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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-Digest of the Published Decisions of the Comptroller General of the United States" 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., 69 Comp. Gen. 6 (1989). 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-237061, September 29, 1989.

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

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April 1991

B-238898, April 1, 1991

Appropriations/Financial Management

Accountable Officers
■ Cashiers
■■ Liability
■■■ Physical losses

Appropriations/Financial Management

Accountable Officers
■ Cashiers
■■ Relief
■■■ Physical losses

Relief from liability for an unexplained loss may not be granted pursuant to 31 U.S.C. § 3527(a) (1988) to the Alternate Class B Cashier of the Embassy in The Hague where the request was based solely upon the fact that, under applicable State Department procedures, she was not qualified to hold that post. However, the Class B Cashier for whom she was the Alternate is jointly and severally liable with her for the loss because he was responsible for determining the Alternate's qualifications before he entrusted imprest funds to her.

Matter of: Department of State

This responds to your request that this Office grant relief, pursuant to 31 U.S.C. § 3527(a) (1988), to Ms. Anne van Schuppen, who incurred an unexplained loss in the amount of $1,000 on December 7, 1988, while serving as Alternate Class B Cashier for the Embassy in The Hague. As explained below, we are unable to grant relief in this case.

Your submission indicates that this loss took place while Ms. van Schuppen was performing her official duties, and states that "there is no evidence of fault or negligence by [her] or by her supervisor." It is speculated in the submission that, during one or more of the transactions undertaken that day, Ms. van Schuppen either received $1,000 less or paid $1,000 more than she realized. Your submission places the responsibility for the loss upon management in the Embassy in The Hague, suggesting that the Embassy assigned duties to Ms. van Schuppen for which she was not properly qualified. You base this finding on the fact that Ms. van Schuppen, rated at the grade of "FSN-5" at the time of the loss,[1] was assigned to this task in contravention of State Department procedure

[1] Your letter indicates that the term "FSN" refers to Foreign Service National employee.

A-176, which specifies on pages 63-64 that, in the absence of advance written permission (which was not obtained in this case), only employees rated "FSN-7" or higher may be assigned as Alternate Cashiers.

Under 31 U.S.C. § 3527(a), this Office is authorized to grant relief if it concurs in findings made by the employing agency, based upon competent, affirmative evidence, that the loss occurred while the accountable officer was acting in the discharge of official duties, and that it happened without fault or negligence on the part of the accountable officer. *E.g.,* B-213427, Dec. 13, 1983. We cannot concur in your findings in this case.

The shortage suffered here is of the kind characterized as an "unexplained loss," because there is no certain explanation in the record of how the loss occurred. In B-189084, Jan. 3, 1979, we observed that:

> Government officials charged with the custody and handling of public money are expected to exercise the highest degree of care in the performance of their duty. It has long been recognized that when such funds disappear without explanation or apparent reason, there arises a presumption of negligence on the part of the responsible official. If we are to grant relief under [section 3527(a)], this presumption must be rebutted by specific, complete, and convincing evidence. [Citations omitted.]

The mere administrative determination that there is no evidence of fault or negligence will not adequately rebut the presumption of negligence. The accountable officer must come forward with affirmative evidence that she exercised the requisite degree of care. B-213427, *supra.* The submission here does not include such evidence on Ms. van Schuppen's behalf.

Moreover, previous decisions of this Office have found that relief may not be granted predicated upon inexperience or inadequate training or supervision. *E.g.,* B-189084, *supra.* Apparently, the evidence upon which you rest your request for relief is that Ms. van Schuppen was serving in a position for which she was unqualified, according to agency procedures. While you argue that the fault is the agency's for having made such an assignment, this is really just another way of saying that Ms. van Schuppen's training and experience were inadequate to the task at hand. As we commented in B-191051, July 31, 1978:

> An accountable officer of the Government is an insurer of the public funds in his [or her] custody and is excusable only for losses attributable to acts of God or the public enemy. Although . . . it is easy to understand how mistakes can occur in human terms, this Office is not authorized to grant relief except in circumstances which conform strictly to the provisions of the statute. [Citation omitted.]

Accordingly, your request for relief of Ms. van Schuppen from liability for this loss is denied.

At the same time, however, we agree that Embassy management shares responsibility for the loss for having assigned Ms. van Schuppen to a position, in contravention of Department policy, for which she, apparently, had insufficient experience and training. For this reason, we also find that Mr. Johan H. Sluiter, the Class B Cashier for whom Ms. van Schuppen is Alternate Cashier, is jointly and severally liable for this loss. As noted on page 64 of the State Department A-176 procedure which establishes the qualifications for Class B Alternate

Cashiers, the Class B Cashier is responsible for, among other things, supervising the Alternate, and for "determining . . . whether the [alternate] cashier or subcashier has the qualifications to perform successfully." By advancing his imprest funds to a person not qualified to serve as his Alternate Cashier, Mr. Sluiter acted negligently and must share in liability for the loss. *Cf., e.g.,* B-154627, July 16, 1965; B-144148-O.M., Nov. 1, 1960 at 5.

B-242133, April 2, 1991

Procurement

Socio-Economic Policies

■ Small business set-asides

■■ Use

■■■ Administrative discretion

Protest that agency improperly determined under Federal Acquisition Regulation § 19.502-2 that offers would be received from two or more small businesses offering "the products of different small business concerns," and that total small business set-aside therefore was improper, is denied; although all small business offerors were expected to offer systems with the same major component, agency had reasonable expectation that small business offerors each would offer a different "product" by virtue of their assembly of component parts into an integrated system.

Matter of: The Racal Corporation

Robert G. Bugge, Esq., for the protester.

Alton E. Woods, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.

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

The Racal Corporation protests the determination by the Department of the Interior to set aside for exclusive small business competition the procurement of an integrated hydrographic survey system, under invitation for bids (IFB) No. 0-SI-81-17280.

We deny the protest.

The survey system is for measuring underwater cross sections and mapping river channels and reservoirs. The IFB requires all labor, materials, equipment, transportation, and technical expertise necessary to install the required system aboard a survey vessel. Specifically, the solicitation requires integration into a system of various components, including microwave navigation positioning equipment, uninterruptible power supply, ruggedized computer, color monitor, software, plotter, and printer. The navigation positioning equipment is the system's major component, comprising 50 to 60 percent of the total system cost according to the agency's estimate (70 percent according to the protester).

Under Federal Acquisition Regulation (FAR) § 19.502-2, the interpretation of which is at issue here, the entire amount of an acquisition shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns "offering the products of different small business concerns," and that award will be made at a fair market price.

Racal, a large business manufacturer of the navigation positioning equipment, contends that because only one small business firm (Del Norte Technology) produces the major navigation component of the survey system, the contracting officer could not properly have determined, as required under FAR § 19.502-2, that offers could be expected from two or more small businesses (rather than only Del Norte) offering the products of different small businesses. It is the protester's view that the regulation is not satisfied where the agency anticipates that two small business bidders will offer their products, where those products contain components manufactured by the same small business concern. Racal also maintains that Interior could not reasonably have expected to make award at an acceptable price since, with all small business firms offering the same subcontractor's major system component, there effectively would be no price competition. The protester concludes that the procurement should be conducted on an unrestricted basis.

Interior reports that the determination to set aside this procurement was based on information provided by a potential competitor, which it verified, and consultation with the Small Business Administration (SBA). Initially, notice of the requirement as an unrestricted procurement was placed in the *Commerce Business Daily* (CBD). In response, Innerspace Technology, Inc. requested that the procurement be set aside on the basis that itself, Del Norte, and MECCO, all small businesses, could either manufacture or supply the required system. Interior verified these firms' interest in bidding on the procurement if it was set aside, and also learned that all three firms likely would offer systems including the Del Norte navigation equipment. In assessing the effect of this latter fact on the propriety of a set-aside, Interior sought SBA's view. SBA responded that the "product" here for purposes of the regulation would be the system[1] and that each small business could be considered to be offering a different small business product because each would be offering a different integrated end item system, even though all would contain the same major component. Based on this advice, Interior resynopsized the solicitation in the CBD as a total small business set-aside.[2]

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[1] SBA's conclusion was based on its view that the potential small business offerors could qualify as small business concern manufacturers of the end item survey system under the terms of its own regulations dealing with the Walsh-Healey Act. *See* 13 C.F.R. § 121.906(b)(2). This regulation focuses on the "assembly of parts and components into the end item being acquired" and the "importance of the elements added by the concern to the function of the end item, regardless of their relative value" as a basis for considering a small business firm a manufacturer. Interior's interpretation reflected a similar view of the set-aside regulation.

[2] After the change of the solicitation to a small business set-aside, and receipt of Racal's agency-level protest, the agency again consulted with SBA and received its concurrence that the solicitation should be set aside for small business. Subsequent to Racal's protest to our Office, Interior received written confirmation of the SBA interpretation of the FAR set-aside standard, which the agency submitted as a supplemental statement to its report on the protest.

A determination under FAR § 19.502-2 that competitive offers from two or more small business concerns offering the products of different small business concerns may be expected is basically a business judgment within the discretion of the contracting officer; we will not disturb a contracting officer's set-aside determination absent a showing of an abuse of that discretion. *See Litton Electron Devices*, 66 Comp. Gen. 257 (1987), 87-1 CPD ¶ 164.

We find that Interior's and SBA's interpretation of the set-aside regulation is correct, and that the agency therefore had the requisite expectation of receiving offers from at least two small businesses. While the term "product" is not defined under the FAR set-aside provisions, we agree with the agencies that the most reasonable interpretation is that the term refers to the end product, in this case, the integrated system, even where the end products of different small businesses include the same significant component. We think other regulations are instructive in reaching this conclusion. For example, a related FAR provision concerning small business size determinations refers to the manufacturer of the "end product" and the "end item" being procured, *see* FAR § 19.102(f)(1). Under this provision, "the manufacturer of the end item being acquired is the concern which with its own forces transforms . . . miscellaneous parts or components into [an] end item." *Id.* Similarly, as discussed above, the SBA regulations for qualification of a firm as a small business concern provide that the manufacturer of the "end product" or "end item" being acquired is the concern which performs "the assembly of parts and components into the end item being acquired." 13 C.F.R. § 121.906 (1990).

Consistent with the emphasis in these provisions on assembly of an end product as a basis for considering a firm eligible to compete as a small business, we think the set-aside regulation must be read as allowing agencies to consider firms as potential small business offerors of different small business products where it is determined they will offer their own integrated systems, even though the systems may contain some common components. It follows from this reading of the FAR that, contrary to the protester's contention, a set-aside determination is not precluded by the fact that all small business concerns may be expected to offer systems that contain a major component from the same manufacturer; each offered system still may be considered a different product. We thus find no basis for objecting to Interior's determination of an expectation of receiving offers for different products from at least two small businesses.

The protester cites *Hein-Werner Corp.*, B-195747, May 2, 1980, 80-1 CPD ¶ 317, *aff'd*, B-195747.2, Aug. 19, 1980, 80-2 CPD ¶ 131, as support for its interpretation of the FAR clauses. There, as here, the protester argued that a set-aside was improper because there was only one manufacturer of the required item, and the agency therefore could not reasonably expect offers from two small businesses offering the products of different small business concerns. We denied the original protest on the ground that the agency had complied with the regulation applicable to the solicitation, Defense Acquisition Regulation § 1-706.5(a) (1976 ed.), which required only an expectation of a sufficient number of small business offerors to assure award at a reasonable price; it did not require that

the contracting officer have an expectation that the products of more than one small business would be offered. We noted that the regulation recently had been changed to require an expectation of offers of different small business manufacturers' products (Defense Acquisition Circular 76-19, July 27, 1979), but we neither interpreted the new provision nor applied it to the facts of the case. Similarly, in our August 19, 1980, reconsideration decision, we noted the change in the regulation, but again did not interpret the new regulation; indeed, after reciting the change, we stated that "we did not, as Hein-Werner asserts, base our conclusion on this point . . . ."

Given our conclusion that the agency properly determined that sufficient competition was expected to warrant the small business set-aside, the protester's contention that there would be no price competition to assure an acceptable price is without merit. Whether or not fair market prices ultimately are received, there simply was no reason to consider the competition between the different potential small business offerors insufficient to assure such prices. Consequently, we have no basis for determining that the agency could not expect to make award at a reasonable price. It follows that we have no basis to question the agency's set-aside determination.

The protest is denied.

B-239231.11, April 4, 1991

Procurement

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

Second request for reconsideration of dismissal of protest as academic due to agency's corrective action is denied where protester fails to show that prior decision contained errors of fact or law, and information which protester alleged had not been previously considered was factually incorrect.

Matter of: ICF Technology, Inc.—Reconsideration

Kenneth M. Bruntel, Esq., and Joan H. Moosally, Esq., Crowell & Moring, for the protester.

William R. Medsger, Esq., and Robert W. Poor, Esq., Department of the Army, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

ICF Technology, Inc. requests reconsideration of our decision in *Harding Lawson Assocs; ICF Technology, Inc.—Recon.*, B-239231.7; B-239231.8, Dec. 4, 1990, 90-2 CPD ¶ 450, denying its request for reconsideration of our August 7,

1990, decision to dismiss as academic the protest of Harding Lawson Associates (HLA) (B-231239.5). ICF alleges that our decision on reconsideration was based upon incorrect information.

We deny the request.

The request for proposals at issue, (RFP) No. DAAA15-90-R-0009, solicited proposals to provide various environmental services in support of the expanded environmental missions of the Army Toxic and Hazardous Materials Agency. Forty-two offerors submitted proposals, 24 of which, including ICF's, were found technically acceptable. Under the terms of the RFP, the agency could award up to 15 indefinite quantity/indefinite delivery (task order) contracts on a cost-plus-fixed-fee, completion-form basis. On March 30, 1990, the 15 offerors with the lowest evaluated costs received awards. ICF was not among the original awardees.

A number of protests followed the announcement of awards and debriefings of the unsuccessful offerors. On April 17, 1990, ICF filed a protest (B-239231.2), alleging various flaws in the evaluation process including a failure to properly evaluate and adjust ICF's costs. Throughout April and May, the agency conducted debriefings of those offerors in the competitive range which did not receive awards. As a result of questions raised regarding the cost realism evaluations, additional information was obtained from all 24 offerors in the competitive range to clarify various cost elements. After reevaluations, probable cost standings changed and ICF was determined to be among the 15 low offerors. Since it was in line to receive an award once the protests then pending were resolved, ICF withdrew its protest. As a further result of the change in standings, Environmental Resources Management, Inc. (ERM), one of the original awardees, had its contract terminated for the convenience of the government.

On June 15, the agency furnished our Office a written determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision on the protests then pending. In accordance with the determination, contract performance on 14 of the contracts commenced upon issuance of an initial task order. ICF was not one of the 14 and was so informed.

On June 19 and 21, respectively, HLA and ERM filed protests challenging the evaluation process. From June 29 to July 6, the agency conducted a further review of the proposals. During this review, the contracting officer discovered an error in the adjustment to ICF's costs. Correction of this error placed ICF's costs above the 15 lowest offerors. ICF was not informed of the change in its position.

On August 7, 1990, the agency advised our Office that it intended to take corrective action to resolve the protests, including reopening negotiations with all 24 offerors in the competitive range, amending the RFP to eliminate the limit of 15 awards, and providing an opportunity to submit revised proposals and best and final offers (BAFOs). Pending the outcome of an evaluation of BAFOs, the

agency intended to have the 14 original awardees continue performance. We then dismissed the protests of HLA and ERM as academic.

In its first request for reconsideration of the above dismissals, ICF argued that the agency's corrective action would not cure the agency's failure to perform a cost evaluation required by the solicitation and would not prevent below cost offers. It also complained that some offerors would have a competitive advantage due to pricing information revealed during the protest process and performance of the contracts.

We found the agency's corrective action—amending the RFP to eliminate the particular cost evaluation it had omitted in the original evaluations, planning a comprehensive cost realism analysis to normalize below cost offers, and providing each offeror with a copy of all protests filed, including disclosed information—cured the matters raised by ICF and HLA and rendered the protests academic. *See Maytag Aircraft Corp.—Recon.; Claim for Protest Costs,* 69 Comp. Gen. 83 (1989), 89-2 CPD ¶ 457.

ICF also contended that it should have been allowed to perform pending the outcome of BAFO evaluations since ICF believed it was entitled to one of the 15 awards. However, from our review of the record we found that ICF was not entitled to an award. This aspect of our decision was based upon an exhibit entitled "Summary Cost Reevaluation Sheets for each technically acceptable offeror," which was provided to our Office for *in camera* review. Each sheet was comprised of typed cost figures with handwritten changes to various of those figures. While the typed figures resulted in ICF being the 13th lowest offeror, the handwritten changes resulted in a final figure which made ICF the 16th lowest offeror. In the context of the record, we concluded that the undated, handwritten changes represented a reevaluation conducted later in time.

As ICF was no longer an awardee, we found that ICF had suffered no prejudice from the continued contract performance of the 14 awardees. We also observed that where, as here, an agency had complied with the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (1988), we did not review an agency's determination to continue performance.

In its second request for reconsideration, ICF argues that the cost analysis from the reevaluation on which we relied was not the last such analysis. In support of its argument, ICF relies on a cost analysis furnished to it by the agency in conjunction with the reopening of discussions. This analysis sheet contains the same typed figures as the analysis on which we relied, but different handwritten changes to some of the figures. Because this analysis was identified as its "current" cost analysis, and would appear to place ICF among the low 15 offerors, ICF maintains that it was prejudiced by the agency's failure to allow it to perform contract work pending the outcome of BAFO evaluation. Since we did not consider this evidence before, ICF argues that we should reconsider our last decision.

The agency explains that the cost analysis on which ICF now relies was conducted in May, while the cost analysis on which we relied in our last decision

was conducted between June 29 and July 6. No formal rankings have been prepared since that time. While the agency does not explain why its letter to ICF indicated that the May analysis represented the "current" analysis, we have no basis to conclude that the advice was anything but a mistake. Thus, we decline to accept ICF's contention that we should ignore the agency's explanation.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains either errors of fact or law or that the protester has information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1990). Since the information on which ICF relies is factually incorrect, we will not reconsider our prior decision.

Our conclusion is not changed by ICF's additional arguments that we should not rely on the cost analysis because it allegedly contains errors and because ICF was not advised of its changed status or provided an opportunity to respond to the errors. *See* Federal Acquisition Regulation §§ 15.1001, 1003 (1990). As we stated in our prior decision:

> This continued turnover in positions among offerors evidences the seriousness of the flaws in the cost realism analysis. Given the number of questions raised concerning the original and subsequent evaluations, and the various "debriefings" of and "clarifications" from the offerors, had we sustained HLA's or ERM's protest, we would have recommended relief similar to that proposed by the agency.

Harding Lawson Assocs; ICF Technology, Inc.—Recon., B-239231.7; B-239231.8, *supra*, 90-2 CPD ¶ 450 at p. 4. The possible presence of errors in the analysis, as well as ICF's changing status as an awardee, simply reinforces our conclusion that the agency correctly determined to take corrective action.[1]

In this regard, while ICF's non-awardee status led us to the conclusion that it was not prejudiced by the continued performance of task orders by the 14 awardees, ICF's status as an awardee was irrelevant to our ultimate decision that, under the circumstances of this case, we would not review the agency's determination to commence and continue contract performance due to urgent and compelling circumstances.

The request for reconsideration is denied.

[1] Any error in the agency's failure to promptly advise ICF of its status change, was merely procedural and does not affect the validity of the procurement. *See Pauli & Griffin*, B-234191, May 17, 1989, 89-1 CPD ¶ 473. This is especially true where, as here, the status change resulted from post-award, protest-related reevaluations, and where the agency ultimately decided to take corrective action through the reopening of discussions with all offerors, awardees and non-awardees, like ICF.

B-238681, April 8, 1991

Military Personnel

Pay
■ Retirement pay
■■ Amount determination
■■■ Computation
■■■■ Effective dates

Military Personnel

Pay
■ Retirement pay
■■ Reduction
■■■ Computation

Marine Corps board of inquiry recommended to the Secretary that a major be retired at the rank of captain and that the member had not served satisfactorily as a major. Even though the major first became eligible for voluntary retirement before the board's recommendation was approved by the Secretary, his retired pay should be calculated on the grade of captain, since it is evident that the Secretary would not have made the statutorily required determination of satisfactory service as a major on the eligibility date.

Matter of: Captain William G. Peters, U.S. Marine Corps (Retired)

A disbursing officer at the Marine Corps Finance Center requests an advance decision on the proper pay grade to be used in the computation of retired pay for Captain William G. Peters, U.S. Marine Corps (Retired).[1] Captain Peters' pay grade for retired pay purposes should be that of a captain.

On July 7, 1987, the member, then a major since 1979, was convicted by a general court-martial of conduct unbecoming an officer. The court directed that he be reprimanded and dismissed, but under a pretrial agreement the convening authority commuted the dismissal to a forfeiture of pay. On February 16, 1988, a board of inquiry found that but for his eligibility for retirement on April 1, 1988, then-Major Peters' misconduct warranted separation under other than honorable conditions. The board also found that his record was not otherwise so meritorious as to demonstrate satisfactory service as a major, and it recommended retirement as a captain. The board's determination was approved by the Assistant Secretary of the Navy (Manpower & Reserve Affairs) on April 6, 1988, and as a result, the member retired on February 1, 1989, as a captain.

As provided in 10 U.S.C. § 1401a(f), also known as the Tower Amendment, a member who voluntarily retires on the basis of his longevity of service generally is entitled to the maximum amount of retired pay to which he would have been entitled if he had retired voluntarily at some time before his actual retirement date. *See* 66 Comp. Gen. 425 (1987). We have stated, however, that the Tower Amendment only contemplates situations where a member has met all

[1] This request was approved for submission by the Department of Defense Military Pay and Allowance Committee as control number DO-MC-1499.

the requirements necessary to become entitled to retired pay at an earlier date but chose not to retire and to remain on active duty. *Chief Master Sergeant Gerald E. Ohr, USAF,* 68 Comp. Gen. 649, 651 (1989).

Here, although the member was a major on April 1, when he first became eligible for voluntary retirement, we do not believe he would have been permitted to retire in that grade at that time. According to 10 U.S.C. § 6323, the determination of the retired grade of an officer who retires voluntarily is made pursuant to 10 U.S.C. § 1370, which provides for retirement in the highest grade in which the officer served on active duty satisfactorily, as determined by the Secretary of the military department. In February 1988, the board of inquiry not only had recommended retirement in the grade of captain, but had found that the member's record was not otherwise so meritorious as to demonstrate his satisfactory service as a major; it appears that this finding encompasses the member's entire tenure in that grade. Although the Secretary did not concur in the recommendation and finding until April 6, 5 days after then-Major Peters first was eligible to retire voluntarily, it is evident that a request for retirement on April 1 as a major would not have been approved under 10 U.S.C. § 1370.

Accordingly, at his initial eligibility date then-Major Peters could not have retired as a major. His retired pay grade therefore should be that of a captain.

B-240954, B-240954.2, April 8, 1991

Procurement

Specifications
■ Minimum needs standards
■ ■ Competitive restrictions
■ ■ ■ Design specifications
■ ■ ■ ■ Overstatement

Protest is sustained on basis that solicitation requirement for level 3 drawings, which include detailed data on manufacturing processes, exceeded agency's actual needs, where record shows that agency's need for drawings was to support emergency repair and overhaul of the valves, for which full production data is not needed.

Matter of: Keystone Valve USA, Inc.

Thomas E. Hill, Esq., Doke & Riley, for the protester.

Jonathan H. Kosarin, Esq., Department of the Navy, for the agency.

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

Keystone Valve USA, Inc. protests the requirement for level 3 drawings in request for proposals (RFP) No. N00104-90-R-DA52, issued by the Department of the Navy for butterfly valves. Keystone asserts that the requirement exceeds the agency's minimum needs.

We sustain the protest.

The RFP, which provides for butterfly valves used in various shipboard applications, was issued in March 1990. The solicitation includes a requirement for delivery of level 3 drawings, as defined by two Department of Defense (DOD) standards which the RFP incorporates by reference. The first, DOD-D-1000B (Military Specification for Drawings, Engineering and Associated Lists), categorizes drawings as level 1, 2, or 3 depending on the maturity of the item. Level 1 drawings, for example, represent an experimental product, while level 3 drawings are prepared only after all first article testing has been completed and the product has been proven. Level 3 drawings "reflect technical data possessing the highest level of confidence," and can therefore be used by any competent manufacturer to produce an identical or interchangeable item. Their intended use, according to the specification, is "to provide engineering data for support of quantity production to permit competitive procurement for items substantially identical to original items." *See generally Ingersoll-Rand Co.—Recon.*, B-230101.2, June 16, 1988, 88-1 CPD ¶ 574.

The second specification, Military Specification MIL-V-24624 (Valves, Butterfly, Water and Lug Style, Shipboard Service), paragraph 3.17, calls for engineering drawings with a level of detail "necessary for maintenance and overhaul of the valve. Detail of these parts shall be so complete as to permit emergency manufacture by a Naval ship repair facility without assistance from the original manufacturer."

Based on what Keystone considered an apparent conflict between the two standards referenced in the RFP, the firm requested clarification of the level of drawings required. According to Keystone, while DOD-D-1000B, paragraph 3.3.3, entitled "Level 3, Production," specified the highest level of detail, as appropriate and necessary for full quantity production and competitive acquisition of an item, the specification for butterfly valves merely called for that level of detail necessary to make a small number of items for purposes of emergency overhaul or repair. Further, Keystone specifically referenced DOD-D-1000B, paragraph 3.3.3.1, which provides that "level 3 engineering drawings . . . shall include details of unique *processes, i.e.,* not published or generally available to industry, when essential to design and manufacture; . . . critical *manufacturing assembly sequences;* . . . and quality control data." [Italic added.] In light of this apparent conflict and the cost involved in preparing quantity production drawings, as well as the fact that the RFP required that offerors specifically assert their proprietary data rights in their proposals or risk losing such rights, Keystone asked if the agency actually intended for the contractor "to furnish engineering drawings suitable for quantity production."

In response, the Navy issued an amendment which repeated Keystone's inquiry verbatim and stated in reply that, "In accordance with DOD-D-1000B, Level 3 drawings are required." Keystone then filed an agency-level protest, arguing that the requirement for level 3 drawings unduly restricted competition and imposed an undue cost burden on offerors by requiring more detailed engineering drawings than were necessary to meet the agency's needs. Keystone asserted that since the valve was a qualified product list (QPL) item and there were already sufficient QPL firms to provide adequate competition, there was no need for level 3 information which, according to paragraph 6.4.3 of the specification, was intended for the "support of quantity production to permit competitive procurement."

In denying the protest, the Navy explained that its "needs under this solicitation . . . [were for] technical data . . . sufficient for emergency repair or overhaul." The agency further stated:

> Clearly, *detailed manufacturing or process data,* which would fall within the description of 'level 3' for purposes of DOD-D-1000B, *may be acquired for purposes other than use in competitive acquisition, and the primary contemplated requirement for such data is emergency repair or overhaul.* [Italic added.]

Keystone then protested the proposed procurement to our Office,[1] reiterating earlier arguments that level 3 drawings exceed the Navy's stated needs for drawings sufficient to permit emergency repair and overhaul. Keystone argued, for example, that the level 3 definition would call for detailed specifications for the tooling necessary for quantity production of the subject valves. Such tooling, according to Keystone, is specialized tooling designed to produce many valves in a quantity production environment. In an emergency repair and overhaul environment, in contrast, run-of-the-mill tooling would suffice since only one or two valves typically would be repaired. Likewise, Keystone stated, there are machine set-ups used in quantity production that are not used in an overhaul or repair effort. Such set-ups include, for example, special fixtures designed to hold the components in place while they are being machined (*e.g.,* on a lathe). The purpose of such fixtures is to enhance the efficiency of the manufacturing processes and to decrease dimensional differences between parts. Though expensive, Keystone recognizes that the cost is justified in the case of quantity production; obviously, however, according to Keystone, such fixtures would not be fabricated by one tasked with repairing or overhauling one or two valves, since they would not be cost effective.[2]

Primarily to address the issue of whether level 3 drawings, including these detailed manufacturing processes, were required by the Navy, we held a fact-finding conference in our Office on November 9. At the conference, Navy witnesses

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[1] That protest, filed before the closing date for submission of proposals and designated B-240954, was later incorporated into the protest under consideration here. Although Keystone submitted an offer under the RFP, the agency considered it unrealistically high in price and, based on a determination of urgent and compelling circumstances, made an award notwithstanding the protest to Contromatics, Inc. *See* Competition in Contracting Act, 10 U.S.C. § 2304(c)(2) (1988).

[2] Keystone made these detailed arguments concerning manufacturing process requirements in its comments on the agency's report on the protest, which the protester filed on October 22.

indicated that, contrary to Keystone's interpretation of the requirement, the Navy never intended that full quantity production drawings, including manufacturing process information, be provided. According to the Navy, such drawings are not necessarily required by the level 3 specification and are not needed by the agency for this procurement. *See e.g.*, Transcript (Tr.) at 53-56. The Navy's presentation of its views at the conference led Keystone to amend its protest.[3]

Keystone now argues in its amended protest that, had it known prior to the solicitation closing date that the Navy's interpretation of the level 3 requirement did *not* include proprietary manufacturing process information and other proprietary information needed for full quantity production, it would not have objected to the specification in the first place. Keystone asserts that the Navy never expressed this interpretation prior to the conference, and that the agency's concession at this juncture confirms that the stated requirement for level 3 drawings exceeds its actual needs, and that the RFP therefore was defective.

The Navy argues initially that Keystone's new protest arguments are untimely. According to the agency, if Keystone saw in the specification an apparent requirement for manufacturing process drawings, the firm was required to object to that requirement prior to the closing date for the submission of proposals. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990). According to the agency, however, none of Keystone's submissions or statements prior to its October comments indicated that Keystone's objection to the requirement for level 3 drawings was based on the firm's understanding that process drawings would be required. Consequently, according to the Navy, until Keystone raised the issue in its comments on the Navy's report, the agency had "assumed that Keystone had the same understanding as the Navy's . . . ." In the agency's view, therefore, the fact "that Keystone misread [the specification] language to include quantity manufacturing methods and process information was a problem of its own creation."

We disagree. The Navy's timeliness argument rests on the premise that Keystone knew or reasonably should have known that the RFP reference to level 3 drawings did not include a requirement for full quantity production data. The record, however, as indicated in the excerpts quoted above, clearly shows that at each step of the way the agency led Keystone to believe that it intended to require such data. As noted above, for example, in responding to Keystone's agency-level protest, the Navy explicitly confirmed its view that "detailed manufacturing or process data, which would fall within the description of level 3 for purposes of DOD-D-1000B, may be acquired for purposes other than use in competitive acquisition, and the primary contemplated requirement for such data is emergency repair or overhaul." It was only at the conference that the Navy, for the first time, offered its different interpretation of the requirement, which is what gave rise to Keystone's argument that the RFP therefore overstated the

[3] When Keystone filed its comments on the conference on November 21, we determined that the submission should be designated a new protest, since it raised arguments based on information disclosed for the first time at the conference.

agency's needs. Since the protest was filed within 10 days after the conference, it clearly is timely. 4 C.F.R. § 21.2(a)(2).

Turning to the merits, the Navy states that it specified level 3 drawings because level 2 drawings are not sufficient for its needs. This determination was based in part on the Navy's experience under prior contracts (including a contract with Keystone for butterfly valves) where only level 2 drawings were required. Under those contracts, according to the agency, the drawings it was able to obtain were inadequate for purposes of emergency repair and overhaul. *See e.g.,* Tr. at 8-9, 26-27, 58. Consequently, in effect, the Navy argues that it had to specify level 3, the next higher level of detail.

We find that the record supports Keystone's assertion that the level 3 drawing requirement overstates the agency's actual needs. While the Navy certainly may take steps to obtain additional data where the data obtained under a prior contract were inadequate, it cannot specify its data requirements in an RFP in a manner that would require offerors to furnish more data than is actually needed. This clearly is what the Navy did here. Although the Navy asserts that Keystone "has clearly misinterpreted DOD-D-1000B to require noncritical quantity production information that is not in fact required to be provided by the solicitation being protested," the agency does not explain how it believes Keystone could have determined precisely which process data the Navy considered critical and which it considered noncritical. In this regard, Keystone's interpretation of the specification appears to be entirely consistent with its plain language, as quoted above, and also is consistent with the Navy's explanation, in its response to Keystone's agency-level protest, that the level 3 drawings were specified "in support of quantity production."

Notwithstanding these indications to Keystone and other offerors that quantity production data were required, the agency took the position at the conference that it in fact does not require data to support quantity production. In this regard, we note the following exchange between the hearing officer and the Navy's chief expert witness at the hearing:

> Q. Is it your understanding . . . that the level 3 drawings are necessary but that they may in fact include some additional information that you don't need? A. Yes. Q. In other words, level 2 isn't enough; level 3 may include more than you need. A. Like for production drawings. We don't need data which would relate to producing several hundreds of these valves. Tr. at 20.

In other words, while the Navy's experience had convinced it that something more than level 2 drawings would have to be specified, the agency did not need the detailed process data included within the definition of level 3 drawings. The Navy nevertheless included the level 3 requirement in the RFP without ever indicating that specified noncritical detailed process information was not required. By doing so, the agency overstated its needs. *See Hewlett-Packard Co.,* B-239800, Sept. 28, 1990, 69 Comp. Gen. 750, 90-2 CPD ¶ 258.

Since, pursuant to the Navy's determination of compelling urgency, performance has commenced, appropriate corrective action—namely, amendment of the specifications to reflect the agency's actual needs—is not feasible. *Vitro Servs.*

Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136. We find, however, that Keystone is entitled to the costs of preparing its proposal and of pursuing the protest, including reasonable attorneys' fees, and are so advising the Secretary of the Navy by separate letter. 4 C.F.R. § 21.6.

The protest is sustained.

B-238040, April 9, 1991

Civilian Personnel

Compensation
■ Compensation restrictions
■ ■ Rates
■ ■ ■ Amount determination

Under 17 U.S.C. § 802(a) (1988), the Copyright Royalty Tribunal Commissioners are entitled to be compensated at the highest rate now or hereafter prescribed for grade GS-18. Since 5 U.S.C. § 5308 (1988) limits the highest rate prescribed (payable) for grade GS-18 to the rate of basic pay for level V of the Executive Schedule, the Commissioners may not be paid at a rate in excess of that rate, notwithstanding the fact that chapter 53 of title 5, United States Code, which includes 5 U.S.C. § 5308 (1988), may not otherwise be applicable to Copyright Royalty Tribunal positions. *See U.S. Sentencing Commission*, 66 Comp. Gen. 650 (1987), and *Farm Credit Administration*, 56 Comp. Gen. 375 (1977).

Matter of: Copyright Royalty Tribunal—Compensation of Commissioners

Mr. J. C. Argetsinger, Chairman of the Copyright Royalty Tribunal, has requested our opinion regarding the maximum compensation to which he and the other Commissioners are entitled for fiscal year 1990. For the following reasons, we hold that the Commissioners of the Copyright Royalty Tribunal were entitled to be compensated at the annual rate of $78,200 for the relevant period of fiscal year 1990.

The Copyright Royalty Tribunal is an agency funded from private sources. Its members are appointed by the President. The pertinent statute which governs the compensation of Copyright Royalty Tribunal Commissioners is 17 U.S.C. § 802(a) (1988) which, in relevant part, provides:

> . . . Commissioners shall be compensated at the highest rate now or hereafter prescribe[d] for grade 18 of the General Schedule pay rates (5 U.S.C. 5332) [official footnote omitted].

The pay rate for grade GS-18 is limited by 5 U.S.C. § 5308 (1988) which provides:

> Pay may not be paid, *by reason of any provision of this subchapter*, at a rate in excess of the rate of basic pay for level V of the Executive Schedule. [Italic added.]

The Chairman contends that, since the Commissioners are exempt from the coverage of chapter 53 of title 5, United States Code, they are exempt from the pay

limitation contained therein at 5 U.S.C. § 5308 (1988). Therefore, they should have been compensated at the higher rate indicated for grade GS-18 (then $93,484)[1] rather than the rate of basic pay payable for grade GS-18, then $78,200, which they were paid.[2]

For the purposes of this decision, we will assume that the Chairman is correct in his contention that the Commissioners are exempt from the coverage of chapter 53 of title 5, United States Code, which includes 5 U.S.C. § 5308 (1988). On the basis of our previous decisions, *U.S. Sentencing Commission,* 66 Comp. Gen. 650 (1987), and *Farm Credit Administration,* 56 Comp. Gen. 375 (1977), however, we do not agree with the Chairman's conclusion that the Copyright Royalty Tribunal Commissioners may be paid at a rate in excess of the rate payable for grade GS-18 employees.

In *U.S. Sentencing Commission,* 66 Comp. Gen. 650 (1987), we considered the effect of the statute establishing the Sentencing Commission, which has language almost identical to the language authorizing compensation for the Copyright Royalty Tribunal Commissioners.[3] In that case, we noted that the amounts listed in the General Schedule in excess of level V of the Executive Schedule were denoted by an asterisk. The note accompanying the asterisk stated that the rate of basic pay payable to employees at these rates is limited to the rate payable for level V of the Executive Schedule.[4] Thus, we viewed the "prescribed" rate of pay for grade GS-18 as equal to the rate of level V of the Executive Schedule, then $72,500. We concluded that:

> . . . since 5 U.S.C. § 5308 limits the highest rate prescribed for grade GS-18 to the rate for level V of the Executive Schedule, and since 28 U.S.C. § 995(a)(2) provides that the salary rate of the Staff Director of the Sentencing Commission shall not exceed such rate, the Staff Director may not be paid at a rate in excess of $72,500, notwithstanding the fact that chapter 53 of title 5 may not otherwise be applicable to that position. 66 Comp. Gen. 650, 653 (1987).

Similarly, we considered the effect of the language in 5 U.S.C. § 5308 (1988) on the compensation of employees exempted from subchapters I and III of chapter 53 of title 5 in *Farm Credit Administration,* 56 Comp. Gen. 375 (1977). The Farm Credit Act of 1971,[5] provided in section 5.13, 12 U.S.C. § 2247 (Supp. V 1975), that the salary of the Deputy Governors "shall not exceed the maximum scheduled rate of the general schedule of the Classification Act of 1949, as amended." The FCA had argued that, since the Deputy Governors are excluded from the coverage of chapter 51 and subchapters I and III of chapter 53 of title 5, United States Code, the Deputy Governors were likewise exempt from the pay limita-

[1] Also referred to as the "Asterisk" rate since it is denoted by an asterisk in the pay table.
[2] For the sake of simplicity, we have used the pay rates involved for the majority of fiscal year 1990. *See* Schedules 1-B and 5-B, attached to Executive Order 12698, 54 Fed. Reg. 53473, 53476, 53482 (Dec. 28, 1989). We note that the problem of "indicated rates" as opposed to "payable rates" has been eliminated for the majority of fiscal year 1991 in regard to grade GS-18. *See* Schedule 1, attached to Executive Order 12736, 55 Fed. Reg. 51385, 51387 (Dec. 12, 1990).
[3] In *U.S. Sentencing Commission, supra,* the statute involved used the phrase "at a rate not to exceed the highest rate now or hereafter prescribed for grade 18. . . ." In the present case the statute reads "at the highest rate now or hereafter prescribed for grade 18. . . ."
[4] *See* Executive Order 12578, Dec. 31, 1986.
[5] Public Law 92-181, December 10, 1971; 12 U.S.C. § 2001 *et seq.* (Supp. V 1975).

tion contained in 5 U.S.C. § 5308, which is included in chapter 53 of title 5, United States Code.

In discussing the applicability of 5 U.S.C. § 5308 to the Deputy Governors, we noted that it imposes a limitation or ceiling on the rates themselves. The amounts listed in excess of Executive Level V were thus viewed as nothing more than projections of what the pay rates would be were it not for the limitations. *Farm Credit Administration,* 56 Comp. Gen. 375, 377, *supra.*

In the present case, the amounts listed in the General Schedule for the majority of fiscal year 1990 in excess of Executive Level V are denoted by an asterisk in Schedule 1-B attached to Executive Order 12698, December 28, 1989, which states that "[t]he rate of basic pay payable to employees at these rates is limited to the rate payable for level V of the Executive Schedule. . . ."[6] Thus, the "prescribed" rate of pay for grade GS-18 was equal to Level V of the Executive Schedule, *i.e.* $78,200.[7]

We do not view the present case as distinguishable from our two prior decisions cited above. Since 5 U.S.C. § 5308 (1988) limits the highest rate "prescribed" for grade GS-18 to the rate for level V of the Executive Schedule, and since 17 U.S.C. § 802(a) (1988) provides that the Copyright Royalty Tribunal Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade GS-18, the Commissioners may not be paid at a rate in excess of the prescribed (payable) rate ($78,200 for the relevant period of fiscal year 1990 involved), notwithstanding the fact that chapter 53 of title 5, United States Code, which includes 5 U.S.C. § 5308 (1988), may not otherwise be applicable to Copyright Royalty Tribunal positions.

Accordingly, the Commissioners of the Copyright Royalty Tribunal were properly compensated for their services at the highest rate payable for grade GS-18, namely $78,200.

B-242221, April 12, 1991

Procurement

Sealed Bidding

■ Invitations for bids

■■ Terms

■■■ Risks

Protest that solicitation for military family housing maintenance subjects bidders to unreasonable financial risk because it requires the submission of a lump-sum price for much of the work, rather than breaking out each element of work separately for payment on a unit price basis, is denied where the solicitation limited the amount of work which the contractor could be required to perform under the lump-sum portion of the contract, and contained sufficient information for bidders to compete intelligently and on a relatively equal basis.

[6] Schedule 1-B, 54 Fed. Reg. 53476 (Dec. 28, 1989).
[7] Schedule 5-B (Executive Schedule), 54 Fed. Reg. 53482 (Dec. 8, 1989).

Procurement

Sealed Bidding
■ **Invitations for bids**
■■ **Terms**
■■■ **Defects**

Disparity in bid prices received does not by itself establish the existence of a solicitation defect.

Matter of: Tumpane Services Corporation

Ralph L. Kissick, Esq., Zuckert, Scoutt & Rasenberger, for the protester.

Kevin J. Bovee for Management Technical Services, and Patrick R. Manley for PBM Construction, interested parties.

Paul M. Fisher, Esq., Department of the Navy, for the agency.

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

Tumpane Services Corporation protests the terms of invitation for bids (IFB) No. N62474-90-B-3727, issued by the Department of the Navy, for military family housing maintenance at the Point Mugu Naval Air Station, California. Tumpane maintains that the IFB is defective because it imposes unnecessary risks on the contractor and thus unduly restricts competition.

We deny the protest.

The solicitation is a follow-on to a contract for similar services which the protester is currently performing. It was issued on June 8, 1990, with an amended bid opening date of December 5. The work solicited includes virtually all tasks related to the routine maintenance of the 883 military family housing units at the Naval Air Station, as well as change of occupancy maintenance[1] and work to be performed as the result of service calls for a base period and 4 option years. Major repair work, and construction work where the estimated labor and material costs for a single incident of repair exceeds $2,000, are not within the scope of the solicitation.

The solicitation required a single lump-sum price to cover all of the required services for a single year except those services which were listed in the IFB schedule as indefinite quantity items. For example, for several of the maintenance tasks the IFB stated that the tasks must be provided within the yearly total fixed price unless the work exceeds a specified amount, then the items are to be performed for unit prices included in the accepted bid. To guide bidders in pricing the work in excess of specified amounts, the IFB schedule provided the estimates for that work. An example of one such item is wooden fence replace-

[1] Change of occupancy maintenance refers to the work needed to make a unit ready for occupancy.

ment. Fence replacement of 5 linear feet or less per repair would be within the ambit of the lump-sum portion of the contract with performance required without additional compensation, while the work would be ordered under the indefinite quantity provisions of the solicitation if the repair were in excess of 5 linear feet, and the contractor paid on the basis of its unit price.

Tumpane timely protested the terms of the IFB 2 days before bid opening. The Navy, however, proceeded with opening and received 13 bids including one from the protester. The low total bid was $3,929,370. Tumpane's total bid of $6,389,941 was twelfth low.

The protester argues that 13 of the items of work which are included in the IFB's lump-sum price scheme should be priced on a unit or indefinite quantity basis as they represent work which is unpredictable in scope and frequency and the agency has not made available sufficient historical data to permit the formulation of a meaningful bid. The protested items represent such work as the replacement of wooden fences, parquet floors, carpet and partial painting, as well as galvanized pipe replacement and bathroom heat/exhaust fan maintenance. In addition, the protester argues that the solicitation terms concerning change of occupancy maintenance are unreasonable because they require that the work on the first ten housing units issued to the contractor within a given workweek be completed within 2 days. Finally, Tumpane concludes that the range of bids received, from a low of $3,929,370 to a high of $8,271,625, shows that the defects that it has pointed out in the solicitation are in fact valid and therefore the firms were not bidding on a common basis.

Of the 13 items of work protested here, 11 items, such as the replacement of wood fencing, were to be priced on a lump-sum basis up to a designated limit and at that point became indefinite quantity items. The remaining two items—galvanized pipe replacement and bathroom heat/exhaust fan maintenance—are pure lump-sum entries. We will concern ourselves first with the lump-sum/indefinite quantity items.

Lump-Sum/Indefinite Quantity Items

Tumpane asserts that the solicitation does not contain sufficient data on which to base the lump-sum portion of its bid. The protester points out that the solicitation does not contain historical data pertaining to the scope or frequency of the service calls that have been made in the past for each of the particular tasks represented by these line items. Nor, according to the protester, does it contain estimates of the agency's future expectations for this work. The protester says that the necessary information is available since these particular items of work have been included as "pure" indefinite quantity items under the contract on which it is currently performing. The protester also refers to the fact that these items are currently indefinite quantity items in support of its position that it is reasonable and practicable for the agency to administer these items on a work order indefinite quantity basis. The protester concludes that the agency must either provide specific and accurate historical data for each of

these items of work as well as indicate the quantity of work anticipated during each year of the contract or amend the solicitation so that these items are covered solely by the indefinite quantity portion of the solicitation.

The agency responds that it has reviewed the information and historical data available from its records concerning the lump-sum/indefinite quantity items, and while it has not been able to extract information concerning work orders for particular task items, it has included the information to which it had access. The agency also explains that it structured the solicitation so that the contested items would be covered in part by the lump-sum portion of the contract in order to lessen the agency's administrative burden.

While bidders must be given sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis, there is no requirement that a solicitation be so detailed as to eliminate all performance uncertainties and risks. *Aldo Food Serv.*, B-233697.3, Apr. 25, 1990, 90-1 CPD ¶ 418. Some risk is inherent in most types of contracts, and firms are expected, when computing their bids, to account for such risk. *Id.* In fact, it is within the agency's discretion to construct a solicitation so that the resulting contract imposes the maximum reasonable risk upon the contractor with the minimum administrative burden upon the agency. *Bean Dredging Corp.*, B-239952, Oct. 12, 1990, 90-2 CPD ¶ 286.

Under the circumstances here, we do not believe that the solicitation's failure to provide the specific information requested by the protester prevented the competitors from formulating meaningful bids or placed an undue risk on them. The solicitation included a detailed description of the maintenance and service tasks required, an overall map of the facility, the number and location of the housing units, overall and individual unit floor plans, the approximate age of the units, estimated square footage per unit, and the roof types of the housing facilities. It also provided the number of routine, urgent, and emergency service calls per month for 1986 through 1989, and a lengthy list identifying the total work per year performed for many different items of maintenance and repair. Information concerning major renovations and upgrades of the housing facility which have been completed within the past 5 years and which are planned for the period of contract performance was also included. For example, this section of the solicitation provided that 96 to 98 percent of all wood fencing within two of the housing areas had been completely replaced in 1988.

Further, the risk that the contractor would be exposed to under the items of work at issue here is minimized by the express limitations on the amount of work per item the contractor could be required to perform under the lump-sum portion of the contract and by the fact that the solicitation contains a limitation on the work to be performed pursuant to a service call to 16 hours in labor or $500 in materials.[2]

[2] These limitations distinguish this solicitation from the pricing scheme in *Four Star Maintenance Corp.*, B-240413, Nov. 2, 1990, cited by the protester. In that case, we found that the solicitation's use of lump-sum pricing for similar maintenance services subjected the contractor to undue risk and was thus unduly restrictive because it placed

Continued

We have no legal basis upon which to interfere with the agency's selection of its pricing format or with the amount of information included in the solicitation. While it is true as the protester points out that these same items of work were priced as indefinite quantity items under the prior contract, we think that the agency could reasonably conclude that the administrative burden represented by the need to issue a priced work order for each service call necessitated by that pricing format was not practicable and that the proposed "mixed" format of lump-sum and indefinite quantity pricing is an appropriate compromise which both reduces the agency's burden and limits the risk to the contractor. Similarly, we think that the agency has made a reasonable effort to include large amounts of historical data even though it has not been able to construct from its raw data files detailed information concerning each of the separate line items of work. Further, the record shows that 13 bids, including one from the protester, were received by the Navy after the protest was filed, and no bidder other than the incumbent contractor timely challenged the terms of the solicitation.[3]

Galvanized Pipe Replacement

The protester raises similar arguments with regard to the solicitation provisions concerning the maintenance and repair of the housing facilities' plumbing system, which is included in the IFB's lump-sum price scheme. Specifically, Tumpane states that while a solicitation provision here requires the replacement of damaged or deteriorated galvanized pipe, it fails to provide specific data as to the number of occurrences and quantity of pipe replaced for each year of contract performance. The protester argues that without this information, firms will not be bidding on a common basis and will be exposed to undue risk, and concludes that this item of work must therefore be deleted from the lump-sum portion of the solicitation and priced on an indefinite quantity basis. The agency responds that specific historical data concerning galvanized pipe replacement is unavailable as Tumpane was not required to maintain such data in the performance of its prior contract.

In addition to the general information concerning the base housing discussed previously, the solicitation provided information as to the percentage of galvanized pipe already replaced, as well as information concerning the planned renovation of the housing units which is to include the repair and upgrade of the plumbing systems. Additionally, the risk imposed on the contractor was minimized by: (1) the express limitation on the amount of galvanized pipe the contractor can be required to replace to 25 feet or less; (2) the exclusion of major repair work, specifically, the complete replacement of the hot and cold water or drainage piping of a housing unit, from the scope of the contract; and (3) the

no limit on the amount of work the contractor could be required to perform under the lump-sum portion of a building maintenance contract. Such is not the case here, since the work is priced on an indefinite quantity basis when the scope of the work reaches a specified level.

[3] One bidder, after it learned that its bid was fifth low, did submit a letter to our Office in support of Tumpane's protest.

overall limitation on the work to be performed pursuant to a service call to 16 hours in labor or $500 in materials.

We find again that, considering the information provided in the solicitation and the limits on the amount of work the contractor could be required to perform, the solicitation provided enough information to enable bidders to submit intelligent bids and did not impose a legally objectionable amount of risk on the contractor. *See Jones Refrigeration Serv.,* B-221661.2, May 5, 1986, 86-1 CPD ¶ 431.

Ceramic Tile Replacement

Tumpane argues with regard to ceramic tile replacement, a lump-sum/indefinite quantity item, that the solicitation includes historical data which understates the amount of tile replaced at the Naval Air Station. Tumpane asserts that it has replaced a total of 8,739 square feet of tile at the facility over the past 4 years. On the other hand, the agency says that it has reviewed its records and believes the data supplied, indicating that 4,238 square feet of tile were replaced, is based on the best information available.

Where historical data is provided in a solicitation, there is no requirement that it be absolutely correct; rather, it must be based on the best information available. *DSP, Inc.,* B-220062, Jan. 15, 1986, 86-1 CPD ¶ 43. We will not disturb a solicitation unless we find that the data used is not based on the best information available or is otherwise deficient. *Id.* While the protester disputes the agency's position, based upon the information it has collected during its performance of the prior contract, we are not convinced that the historical data did not result from the best information in the agency's possession. Furthermore, because ceramic tile replacement is a relatively inexpensive item and the disparity between the protester's and agency's figures totals only 1,125 square feet of tile per year, the potential pricing problem raised by the protester here is minimal in relation to the cost of the entire contract. *American Maid Maintenance,* 67 Comp. Gen. 3 (1987), 87-2 CPD ¶ 326.

Bathroom Heater/Exhaust Fans

Tumpane refers to a provision in the IFB which states that "there are approximately 470 bathroom heater/exhaust fans which have been disconnected by the government . . . all other bathroom heater/exhaust fans shall be maintained to be safe and fully operational," and argues that the solicitation is deficient because it fails to identify the location of the disconnected fans. The protester asserts that absent this information, a contractor would have to respond to numerous useless service calls to "repair" fans intentionally disconnected. The agency responds that while it maintains a list of the locations of the disconnected fans and will try during the performance of the contract to screen calls before forwarding service requests to the contractor, firms should provide in their bids for the contingency that unnecessary requests for service may slip through.

It appears to us that the solicitation should have provided a list of the locations of the disconnected fans, or indicated that the agency intends to screen service calls. However, we think that this is a relatively minor matter, and there is no indication that the protester was disadvantaged in any way not shared by the other bidders or that it was unable to prepare a bid. The potential pricing problems raised here again appear to be minimal in relation to the cost of the entire contract. *American Maid Servs.*, 67 Comp. Gen. 3 (1987), *supra.*

Change Of Occupancy Maintenance

Tumpane also argues that the solicitation requirements concerning change of occupancy maintenance are unreasonable. The IFB provides that these services will be scheduled 30 days in advance in the absence of certain specified circumstances, and requires that when these services are required for ten units or less in 1 workweek, all work must be completed within 2 working days after each unit becomes available. The solicitation states that on occasion service for more than ten units may be requested during a workweek, and should that occur, 1 additional day shall be allowed to complete all work for each unit in excess of ten. The IFB includes a table showing the number of units needing these services per month from 1986 to 1989.

The protester speculates that under this provision "10 units could come on line on Friday and another 10 on Monday, requiring the first 10 units to be completed by Tuesday and the other 10 units by Wednesday," and should this occur, the contractor would not have "sufficient time to hire qualified personnel to complete the work." Tumpane argues that the problem of surges in the ordering of these services is not alleviated by the provision that they normally will be scheduled 30 days in advance, because under its current contract the Navy does not routinely provide 30 days advance planning as required.

The determination of the government's minimum needs and the best method of accommodating those needs are primarily the responsibility of contracting agencies. Government procurement officials, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future, are generally in the best position to know the government's actual needs. Consequently, we will not question an agency's determination of its actual needs unless we find that the determination lacks a reasonable basis. *Jones Refrigeration Serv.*, B-221661.2, *supra.*

The record here supports no such finding. While it is true as the protester argues that the services could be ordered in such a way (*i.e.*, ten on Friday and ten on Monday) so as to create a heavy work load, there is no indication other than the protester's argument that such a work load could not be reasonably handled by the contractor. In fact, no other firm has complained about this provision. We thus have no basis upon which to conclude that the provision does not reasonably express the agency's needs. The protester's next contention is essentially that provisions are unreasonable because the agency will not adhere to the scheduling requirements in its administration of the contract. The protest-

er's speculation that the agency will act in a manner inconsistent with its obligations under the contract, even if based upon past experience, does not provide a basis on which to question the terms of the solicitation.

Disparity Of Bids

As to the protester's argument concerning the disparity in bid prices, a wide range of prices is not by itself conclusive evidence that bids were not prepared on an equal basis.[4] *Teltara, Inc.*, B-240888.2, Jan. 15, 1991, 91-1 CPD ¶ 40. Here, we have concluded that the solicitation contained sufficient information on which bidders could base their bids, and we again note that no bidder other than Tumpane protested the terms of the IFB.

The protest is denied.

B-237858, April 15, 1991

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Debt conversion
■■■ Foreign currencies

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Specific purpose restrictions
■■■ Educational programs

Unless otherwise authorized, the United States Information Agency (USIA) may not use appropriated funds to engage in "debt for equity" swaps to fund educational and cultural exchange activities. The authority contained in the Mutual Educational and Cultural Exchange Act, 22 U.S.C. § 2451, to finance educational and cultural exchange activities by "grant, contract, or otherwise" does not include the authority to purchase discounted foreign debt from commercial lenders.

Appropriations/Financial Management

Budget Process
■ Funding
■■ Gifts/donations
■■■ Educational programs

USIA may accept donations of foreign debt for the purpose of funding international educational and cultural activities. Under 22 U.S.C. § 2697, USIA may accept conditional gifts. Congress specifically provided that USIA may hold, invest, reinvest, and use the principal and income from any such conditional gift in accordance with the conditions of the gift to carry out authorized functions.

[4] The total bids received were: $3,929,370, $4,288,013, $4,348,058, $4,809,440, $4,848,148, $4,917,095, $5,071,513, $5,366,784, $5,419,713, $5,562,300, $5,840,195, $6,389,941, and $8,271,625. This results in a relatively close upward progression of bids with each succeeding bid increasing by an average of approximately 6.65 percent.

Matter of: United States Information Agency—Debt Conversion Activities

This responds to a request from the General Counsel, United States Information Agency (USIA), regarding the agency's authority to engage in transactions, commonly referred to as "debt for equity swaps," that are part of a foreign country's program to reduce the amount of its outstanding U.S. dollar denominated debt. The General Counsel asks whether the agency may engage in such transactions to fund educational and cultural exchange programs. For the following reasons, we conclude that USIA may not use appropriated funds to purchase foreign debt and convert it to foreign currency or foreign currency denominated bonds. However, under its statutory authority to accept and invest gifts in accordance with their conditions, USIA may accept donations of foreign debt and use such donations to engage in the proposed activities.

Background

In 1987, the Internal Revenue Service (IRS) set forth the federal income tax consequences for various transactions that are part of a foreign country's program to reduce the amount of its outstanding U.S. dollar denominated debt. Rev. Rul. 87-124, 1987-47 C.B. 205. The IRS ruling makes it financially beneficial, under certain circumstances, for a commercial lender holding U.S. dollar denominated debt of a foreign country to donate or sell the debt at a substantial discount. For the lender to obtain the financial benefits, the principal and income on the debt must be used for charitable purposes in the debtor nation. USIA officials hope to take advantage of this tax incentive to commercial lenders to help fund educational and cultural exchange programs.

We understand USIA's proposal is as follows. USIA would accept a donation of, or purchase at a substantial discount, a portion of a foreign country's outstanding debt from a commercial lender. USIA would then grant the note representing the foreign country's outstanding debt to a United States nonprofit organization located in the foreign country. The nonprofit organization would then take the note to the foreign country's monetary authority and exchange it, at face value, for local currency or local currency denominated bonds.[1] The nonprofit organization would then use the local currency or the income from the bonds to carry out educational and cultural exchange programs. By engaging in the transaction, the commercial lender can improve its loan portfolio and may also be able to receive both a charitable contribution deduction and a loss deduction. The foreign country involved reduces the amount of its outstanding U.S. dollar denominated debt and frees its U.S. dollar reserves for other purposes.

[1] For purposes of this discussion, we assume that the official exchange rate is equal to the market rate and that there is no risk of default by the debtor country. We also assume that USIA and the monetary authority fixed the rate of exchange before USIA obtained the debt.

Discussion

Congress enacted the Mutual Educational and Cultural Exchange Act (1) to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange, (2) to strengthen the ties between nations, and (3) to promote international cooperation for educational and cultural advancement. 22 U.S.C. § 2451 (1988). To that end, USIA is authorized to finance international educational and cultural exchanges and United States participation in international fairs by "grant, contract, or otherwise." 22 U.S.C. § 2452(a). USIA is also authorized to provide for a wide variety of other activities including establishing and operating schools abroad, and promoting and supporting medical, scientific, cultural, and educational research and development. 22 U.S.C. § 2452(b).

Our Office has previously held that the authority to provide financial assistance under the Mutual Educational and Cultural Exchange Act by "grant, contract, or otherwise" does not include the authority to make unrestricted or unconditioned gifts or grants or to establish permanent endowment funds to finance program activities. 42 Comp. Gen. 289 (1962). There, we found nothing in the Act or its legislative history to indicate that Congress intended for the Department of State (USIA did not yet exist) to use appropriated funds for such purposes. Therefore, we recommended that the Department obtain specific statutory authority before engaging in the proposed funding activities. *Id.*

Here, USIA proposes to use program funds to purchase certain notes and transfer those notes to grantees who would then swap the notes for foreign currency denominated bonds and use the income to carry out program activities. However, as USIA officials readily concede in their submission, the agency has "no specific statutory authority clearly authorizing or appropriating monies to be spent for debt purchase, either directly or indirectly . . ." We agree and have found nothing to indicate that Congress has provided, under the Mutual Educational and Cultural Exchange Act, 22 U.S.C. § 2451, as amended, any new authority for USIA that would permit it to use program funds to purchase discounted foreign debt for the benefit of grantees or to provide unrestricted grants to grantees to invest rather than apply to programmatic efforts. *See* B-149441, Feb. 17, 1987.

Moreover, the proposed transaction has important policy implications unrelated to USIA's mission. USIA would be using appropriated funds to participate in the burgeoning third-world debt trading market. By doing so, USIA would in effect be using appropriated funds to provide debt relief to certain countries while enabling U.S. banks to improve their loan portfolios and to take advantage of tax benefits. We do not think that Congress intended for USIA to use funds provided to finance international, educational, and cultural activities by "grant, contract, or otherwise" for such purposes. Thus, we remain of the view expressed in 42 Comp. Gen. 289, at 295, that in light of the fact that this proposal, like the one under consideration there, "constitutes an innovation in the methods generally authorized by the Congress with respect to the financial

transactions of the United States," specific legislative authority should be obtained from Congress before entering into such transactions.

The General Counsel, USIA, also asks whether USIA may use donations to carry out the proposed transaction. Under 22 U.S.C. § 2697, USIA may accept conditional gifts and hold, invest, reinvest, and use the principal and income from any such gift in accordance with its conditions to carry out authorized functions. Therefore, USIA may accept a donation of foreign debt to carry out the proposed debt conversion activities if the principal and income is ultimately used for authorized activities.

We also would not object if USIA, under its broad congressional mandate, were to match commercial lenders willing to donate or sell foreign debt with the appropriate nonprofit organizations responsible for carrying out educational and cultural exchange activities.

B-239249, April 15, 1991

Appropriations/Financial Management

Appropriation Availability
■ Time availability
■■ Fiscal-year appropriation
■■■ Substitute checks

An agency may, in issuing replacement checks for pre-effective date checks canceled under the provisions of Public Law 100-86, charge the original appropriation that supported the obligation to the extent funds remain available.

Appropriations/Financial Management

Appropriation Availability
■ Time availability
■■ Time restrictions
■■■ Fiscal-year appropriation

Availability of funds is subject to the new account closing procedures enacted in the National Defense Authorization Act, Fiscal Year 1991. Pub. L. No. 101-510.

Matter of: Department of the Air Force—Claims on Checks Subject to Limited Payability Provisions of Competitive Equality Banking Act of 1987

This is in response to a request for an advance decision from the Department of the Air Force (Department) on the proper funding for payment of valid claims presented on checks issued prior to October 1, 1989, and thus subject to cancellation under the provisions of Public Law 100-86, § 1003, 101 Stat. 552, 658 (1987).

Background

The Competitive Equality Banking Act of 1987, Public Law 100-86, § 1006, 101 Stat. 659 (1987), amended 31 U.S.C. § 3328 and created a new section 3334 to establish time limits on the payability of government checks. The new section 3334 provides that:

(b) *Checks issued before effective date.*—(1) Not later than 18 months after the effective date of this section, the Secretary shall identify and cancel all Treasury checks issued before such effective date that have not been paid in accordance with section 3328 of this title.

(2) The proceeds from checks canceled pursuant to paragraph (1) shall be applied to eliminate the balances in accounts that represent uncollectible accounts receivable and other costs associated with the payment of checks and check claims by the Department of the Treasury on behalf of all payment certifying agencies. Any remaining proceeds shall be deposited to the miscellaneous receipts of the Treasury.

(c) *No effect on underlying obligation.*—Nothing in this section shall be construed to affect the underlying obligation of the United States, or any agency thereof, for which a Treasury check was issued.

The Department is concerned about how to properly fund claims for payment of the underlying obligation to potential payees of pre-effective date canceled checks. The Department suggests that since the 1987 Act entitles Treasury to the proceeds from cancellation of pre-effective date checks, the underlying obligation to the payee can be legally satisfied by charging the original appropriation.

The Treasury's implementing regulations provide that after October 1, 1990, Treasury will no longer settle claims on unnegotiated checks issued prior to the effective date of the Act.[1] Treasury Financial Manual, Bulletin No. 90-03. The regulation also states that if such claims are presented to the agency responsible for the underlying obligation after October 1, 1990, "[d]ecisions as to the payee's entitlement and the source of funds for settlement are the agency's responsibility." *Id.* Treasury officials have told us, informally, that they have been advising all agencies that their interpretation of the Act requires agencies to seek supplemental appropriations to pay any claims on pre-effective date canceled checks submitted for payment. We conclude that the original appropriation may be charged to the extent funds are available. The availability of funds is subject to the new account closing provisions contained in the National Defense Authorization Act, Fiscal Year 1991, Pub. L. 101-510, §§ 1405, 1406, 104 Stat. 1485, 1675 (1990).

Analysis

Based on our examination of the statute and its history, we conclude that an agency may, in issuing a replacement check for canceled pre-effective date

[1] According to section 1006 of the Act, the amendments made by the Act were to become effective 6 months after the date of enactment or on such later date as the Secretary of the Treasury prescribed by regulation. On February 8, 1988, the Treasury set October 1, 1989, as the effective date. 53 Fed. Reg. 10366.

checks, charge the original appropriation that supported the obligation to the extent funds remain available in that appropriation.

First, the statutory language is unequivocal in stating that the underlying obligation of the United States for which a Treasury check was issued remains unaffected. 31 U.S.C. § 3334(c); *see also* H.R. Rep. No. 261, 100th Cong., 1st Sess. 188 (1987); 132 Cong. Rec. E300-301 (daily ed. Feb. 6, 1986) (statement by Rep. Wylie introducing original limited payability bill). Thus, the obligation of the government to pay and the entitlement of the payees remains unchanged.

Second, although the specific moneys backing the checks are, by law, diverted for another use, only those moneys are shifted. The underlying obligations for which the checks were issued remain valid.[2] Thus, should claims be submitted under those obligations, the original appropriations charged may be used to support the replacement checks.[3] Of course, in the event that the original appropriation contains insufficient funds to cover check claims presented, an agency would have no choice but to seek an appropriation to liquidate the underlying obligation.

The recently passed National Defense Authorization Act for fiscal year 1991 (Authorization Act) provides new procedures for closing expired accounts. Pub. L. No. 101-510, § 1405, 104 Stat. 1485, 1675 (1990). These account closure provisions affect the availability of obligated and unobligated balances to support replacement checks liquidating the old obligations in fixed accounts.[4]

In brief, the Authorization Act contains rules for closing all appropriation accounts (for both defense and civilian agencies) after certain time periods. What follows is a brief discussion summarizing the new rules regarding the availability of fiscal year accounts for payment of all pre-effective date (October 1, 1989) check claims.

For fiscal years 1989 and 1990, obligated and unobligated account balances are carried in expired accounts for 5 fiscal years until September 30, 1994 and 1995, respectively. Payment of old balances that are canceled after the 5-year period may be paid from current appropriations made for the same general purpose subject to a limitation of 1 percent of the annual appropriation for the account prescribed by 31 U.S.C. § 1553(b)(2). Specifically:

—For annual accounts, the limitation is 1 percent of the annual appropriation for the account, not total budgetary resources.

—For multiple year accounts, the limitation of 1 percent applies to all the appropriations that have not yet expired for obligational purposes.

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[2] We note that the provision which states that the underlying obligation of the United States remains unaffected preserves a claim for payment but does not resurrect claims that are otherwise unenforceable.

[3] In your letter you express concern that issuing a replacement check might be considered double payment of an obligation. Since the original check was canceled by operation of law, and the issuance of a replacement check is required (assuming the original obligation is still enforceable), certifying and disbursing officers are not making double payment. To avoid the appearance of double payment, it should be noted in the accounts that the first check was canceled and issuance of the second check was required by Public Law 100-86.

[4] Fixed accounts are appropriation or fund accounts with balances that are available for a definite period of time.

Thus, if a valid check issued in fiscal year 1989 is presented for payment it may be charged to the fiscal year 1989 appropriation expired account up until September 30, 1994, to the extent funds are available in that account. Thereafter, the claim may be paid from a current appropriation available for that same purpose up to the 1 percent limitation.

For checks issued in fiscal year 1988 and earlier, the complicated transition rules for the new account closing procedures apply. In this regard, OMB Circular No. A-34, Part XI as added by OMB Bulletin No. 91-07, January 17, 1991, gives specific guidance on pre-1988 account availability. In summary, however, we note that amounts transferred to "M" accounts before September 30, 1990, remain available for obligation adjustment disbursement until September 30, 1993. Thereafter, all obligated balances in "M" accounts are canceled. Payments on claims that come due after September 30, 1993, may be made from unexpired/current appropriations available for the same purpose so long as no more than 1 percent of the unexpired appropriation or the unexpired balance of the original appropriation, whichever is less, is used to pay canceled balances.

Any balances in the "M" accounts that were more than 5 years old (accounts that expired at the end of fiscal year 1983 and prior) were canceled and withdrawn on March 6, 1991, under the transition provision of the new account closing procedures. Any obligated balances that have been in the "M" account for more than 5 years must be canceled at the end of September 30 of each following year. This applies to accounts that expired at the end of fiscal years 1984 through 1988. For example, for accounts that expired at the end of fiscal years 1984 and 1985, obligated balances must be canceled at the end of September 30, 1991, and September 30, 1992, respectively. Any obligations related to these canceled balances may be paid from unexpired/current appropriations, subject to the limitations stated above.

All unobligated balances in the merged surplus authority were canceled on December 5, 1990. Thus, all unobligated balances that expired at the end of fiscal year 1988 or prior fiscal years no longer exist and cannot be considered as available funds.

Again, OMB Circular No. A-34, Part XI, as added by OMB Bulletin No. 91-07, should be consulted for detailed guidance on account closure. We note that older obligations, related to canceled accounts that cannot be paid with current unexpired appropriations because the above mentioned limitations have been exceeded, would require specific legislative authority (*i.e.*, reappropriations or supplemental appropriations) from the Congress.

B-239483, April 15, 1991

Appropriations/Financial Management

Accountable Officers
■ Illegal/improper payments
■■ Determination

Appropriations/Financial Management

Accountable Officers
■ Relief
■■ Account deficiency

When an accountable officer cashes a check outside the scope of his statutory authority under 31 U.S.C. § 3342, the payment of the check is an erroneous payment. If the check is uncollectible, under 31 U.S.C. § 3527(c), only GAO may grant relief for the deficiency in the accountable officer's account.

Appropriations/Financial Management

Accountable Officers
■ Relief
■■ Illegal/improper payments
■■■ Agency request
■■■■ Submission time periods

An accountable officer's account, including a deficiency from an erroneous payment made when a check was improperly cashed, is settled by operation of law upon the passing of the 3-year statute of limitations in 31 U.S.C. § 3526. The agency did not submit the questioned item to GAO until more than three years after both (1) the officer signed over responsibility for the account and (2) the loss was discovered.

Appropriations/Financial Management

Accountable Officers
■ Liability
■■ Statutes of limitation
■■■ Effective dates
■■■■ Illegal/improper payments

The Air Force did not toll the statute of limitations on an accountable officer's liability for an erroneous payment under 31 U.S.C. § 3526 by attempting to hold an accountable officer liable for a physical loss. Only GAO may toll the statute of limitations by suspending an item within an account under 31 U.S.C. § 3526(g).

Matter of: Department of the Air Force

This responds to your April 23, 1990, request for guidance on how to settle a deficiency in the accounts of Captain (now Major) Philip D. Weinberg. Major Weinberg was formerly the Accounting and Finance Officer at Incirlik Air Base, Turkey. The deficiency resulted when Major Weinberg cashed personal checks for Mrs. Amaneh B. Fortis which were uncollectible. For the reasons stated below, we conclude that Major Weinberg's liability has already been set-

tled by operation of law because the applicable statute of limitations has expired.

Background

In May and June of 1986, the Incirlik Accounting and Finance Center cashed five checks for Mrs. Fortis. The checks, totalling $1,975, were returned unpaid by the drawee. The record indicates that Mrs. Fortis stole blank checks from Mr. Mohammad Farsi of San Antonio, Texas, and forged Mr. Farsi's signature on checks she made payable to herself.

As an accountable officer, Major Weinberg was strictly liable for the deficiency in his account. According to the record, the Air Force concluded that Major Weinberg caused the loss through his negligence, and that he should not be relieved of his strict liability for the deficiency. On January 31, 1987, after an inquiry conducted in accordance with Air Force regulations, the Commander of the 39th Combat Support Squadron "held" Major Weinberg liable for $1,575 of the deficiency.[1] The Commander based his action upon the recommendation of the Squadron's Staff Judge Advocate, who reasoned that Major Weinberg had exceeded his authority in cashing the checks. Specifically, the Staff Judge Advocate concluded that Major Weinberg could only cash checks under limited circumstances that did not include cashing checks for Mrs. Fortis. Major Weinberg has appealed the determination that he should be "held liable" for the $1,575 deficiency.

According to your submission, the Air Force denied Major Weinberg the relief afforded under 31 U.S.C. § 3527(b) (1988). Section 3527(b) directs the Comptroller General to grant relief to a disbursing officer of the armed forces when the Secretary of Defense, or the Secretary of the appropriate military department, determines that the official is entitled to relief. The Secretary's determination is binding upon the Comptroller General. 31 U.S.C. § 3527(b)(2). If the disbursing officer requests relief and the appropriate Secretary decides that the officer should not be relieved, the officer's liability for the physical loss remains in place.

However, you note that we recently have treated deficiencies from cashing uncollectible checks as erroneous payments rather than physical losses. *E.g.* B-233757, Jan. 25, 1989 and B-226872, Oct. 16, 1987. Under 31 U.S.C. § 3527(c), only GAO is authorized to grant relief to a disbursing officer for a deficiency resulting from an erroneous payment. If GAO denies relief, the disbursing officer's liability for the erroneous payment remains in place. If GAO does not receive and act on a request for relief within 3 years of when the officer's accounts are substantially complete, the deficiency is settled by operation of law.

[1] One $400 check was cashed by the Accounting and Finance Office after Major Weinberg's tenure as Accounting and Finance Officer had expired. Therefore Major Weinberg was not liable for the loss from cashing that check. You have not indicated whether the Air Force has taken any action against the Accounting and Finance Officer who was responsible for the $400 loss. Nonetheless, our analysis of Major Weinberg's liability would be equally applicable to his successor's liability for the $400 loss.

31 U.S.C. § 3526(c) and GAO Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 8.7 (TS. No. 3-17, Feb. 12, 1990).

You therefore ask whether the deficiency in Major Weinberg's account is the result of an erroneous payment or a physical loss.[2] In the event that we conclude that the deficiency results from an erroneous payment, you also ask whether the 3-year statute of limitations—which would apply to Major Weinberg's liability—was tolled by the Air Force's denial of relief under its physical loss procedures.

Discussion

We conclude that the deficiency in Major Weinberg's account was the result of an erroneous payment. Regardless of how losses from properly cashed but uncollectible checks should be treated, the record clearly shows that Major Weinberg improperly cashed Mrs. Fortis's checks. Major Weinberg was authorized to cash checks only for: official purposes; personnel of the government; certain veterans; contractors; contractor personnel; or personnel of an authorized agency not a part of the government that operates with an agency of the government. 31 U.S.C. § 3342(b). The Air Force has concluded, and we agree, that Major Weinberg exceeded his authority because cashing checks for Mrs. Fortis was not done for an official purpose, and because Mrs. Fortis is not a member of any of the classes of persons listed in section 3342(b).

The legislative history of section 3527(c) makes clear that an erroneous payment under that subsection "is one which the Comptroller General finds is not in strict technical conformity with the requirements of law." H.R. Rep. No. 996, 84th Cong., 1st Sess. 3 (1955); S. Rep. No. 1185, 84th Cong., 1st Sess. 2 (1955). Our decisions have treated disbursing officers' payments made outside the scope of their authority as erroneous payments. *See* 49 Comp. Gen. 38 (1969). Major Weinberg was not authorized to cash Mrs. Fortis's checks, and thus did not act in strict technical conformity with the requirements of 31 U.S.C. § 3342. We therefore conclude that Major Weinberg made erroneous payments when he cashed those checks.

Under 31 U.S.C. § 3526(c), "[t]he Comptroller General shall settle an account of an accountable official within 3 years after the date the Comptroller General receives the account." Moreover, "[t]he settlement of an account is conclusive on the Comptroller General after 3 years after the account is received by the Comptroller General." *Id.* We consider the Comptroller General to have "received" the account at the time that the agency's accounts are substantially complete. 7 GAO PPM § 8.7. Accounts are substantially complete at the latter of: (1) when an accountable officer certifies a periodic statement of accountability; or (2) when an agency receives the information placing it on notice that a

[2] Your submission also presents questions on how to treat losses from cashing checks generally. You also ask several general questions about accountable officer cases. We need not address these questions to resolve the deficiency in Major Weinberg's account, and therefore will address them separately in B-239483.2.

deficiency exists. *E.g.,* B-234959, *et al.,* May 8, 1989 and 62 Comp. Gen. 91 (1983), modified by B-226393, April 29, 1988.

The record shows that Major Weinberg signed over his account to his successor on June 1, 1986. The unpaid checks were returned to the Incirlik Accounting and Finance Office at about that same time. In any case, it is clear that the 3-year limitation period of 31 U.S.C. § 3526(c) expired prior to April 23, 1990, the date of your submission. Thus, Major Weinberg's accounts already were settled by operation of law, and he is no longer responsible for the deficiency.

Section 3526 also provides that the 3-year settlement period "does not prohibit the Comptroller General from suspending an item in an account to get additional evidence or explanations needed to settle an account." 31 U.S.C. § 3526(g). You ask whether the Air Force's attempt to deny Major Weinberg relief under its physical loss procedures, which occurred within the 3-year settlement period, would "suspend the item" in Major Weinberg's account.

The text of section 3526 is clear. Only the Comptroller General has the statutory authority to suspend an item in order to settle an account outside of the 3-year limitations period. In the absence of a "suspension," the settlement of the accounts at the passage of the 3 years is conclusive upon the Comptroller General. 31 U.S.C. § 3526(c)(2). All settlements by the Comptroller General, including those "made" by the passage of the 3-year settlement period, are conclusive on the executive branch of the government. 31 U.S.C. § 3526(d). Thus, the Air Force cannot suspend the statute of limitations on the settlement of an accountable official's accounts.[3] The only recourse for the Air Force, and other agencies, is to submit questionable items to GAO within 2 years of the date accounts are available for audit. 7 GAO PPM § 8.4.c.

[3] For a general discussion on the independent nature of the Comptroller General's account settlement authority, *see Lambert Lumber Co. v. Jones Engineering and Construction Co.,* 47 F.2d 74, 78-82 (8th Cir. 1931).

B-242240, April 15, 1991

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Amendments
■■■ Submission time periods
■■■■ Adequacy

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Competition rights
■■■ Contractors
■■■■ Exclusion

Protest that offeror had insufficient time to prepare revised proposal because of its late receipt of amendments is denied where the protester had the last-issued amendment 5 working days prior to the closing date; 5 days appears to be a reasonable time period to address the particular changes made by the amendments; adequate competition was achieved through the receipt of eight proposals; and there is no showing that the agency deliberately attempted to exclude protester.

Procurement

Competitive Negotiation
■ Competitive advantage
■■ Incumbent contractors

Procurement

Competitive Negotiation
■ Competitive advantage
■■ Non-prejudicial allegation

Agency's failure to equalize competition to compensate for some potential offerors' legal acquisition of incumbent contractor's contract information is not objectionable where the information's availability was not the result of improper or unfair action and pertinent information possessed by the agency was not necessary for offerors to compete intelligently and on a relatively equal basis.

Procurement

Competitive Negotiation
■ Contingent fees

Procurement

Competitive Negotiation
■ Incumbent contractors
■■ Information disclosure
■■■ Contingent fees
■■■■ Prohibition

Incumbent contractor's offer to sell access to its employees and its contract information to potential offerors who agree to buy inventory and equipment at pre-agreed prices if they win the contract is not a prohibited contingent fee arrangement within the meaning of 10 U.S.C. § 2306(b) (1988) be-

cause the services were not "to solicit or obtain the contract" since they did not involve any dealings with government officials.

Matter of: Holmes & Narver Services, Inc.

William A. Roberts III, Esq., and Lee Curtis, Esq., Howrey & Simon, for the protester.

Paul M. Fisher, Esq., and Vicki O'Keefe, Esq., Department of the Navy, 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.

Holmes & Narver Services, Inc. protests the actions of the Navy Facilities Engineering Command in failing to extend the closing date for receipt of proposals under request for proposals (RFP) No. N62467-90-R-0560 for the base maintenance services at the Marine Corps Recruiting Depot, Parris Island, South Carolina, and in failing to provide information pertaining to the incumbent contract.[1]

We deny the protest.

On October 1, 1990, the RFP was issued with a closing date of December 4. Eight amendments were subsequently issued, but the closing date was not extended. On November 9, 1990, the Navy issued amendment No. 5. On November 13, Holmes & Narver, in an effort to expedite the amendment's receipt, offered to pay for overnight delivery of amendment No. 5, which the contracting officer refused. In the alternative, Holmes & Narver sought local distribution of the amendments out of the Navy's Parris Island administrative contracting office, even though the amendments originated in the Navy's procuring contracting office in Charleston, approximately an hour's drive away from Parris Island. Holmes & Narver received amendment No. 5 on November 19.

On November 20, Holmes & Narver requested a 4-week extension of the closing date, urging that amendment No. 5 necessitated major proposal revisions that could not be accomplished in the limited time remaining before the December 4 closing date. The Navy advised Holmes & Narver that an extension would not be forthcoming. On November 26, Holmes & Narver received the balance of the amendments issued under the solicitation (amendment Nos. 6, 7, and 8). On December 3, Holmes & Narver repeated its request for an extension, which the Navy again denied. On December 4, Holmes & Narver—prior to the 2:00 p.m. closing deadline—protested to our Office the Navy's refusal to accede to Holmes & Narver's request for an extension.

The record indicates that the agency was reluctant to delay the closing date because the incumbent contractor, Earth Property Services, Inc. (EPS), had been

[1] The Navy reports that Holmes & Narver is a major subcontractor to the incumbent, and that its responsibilities include management of the Parris Island power-plant; sewage treatment/wastewater facility; swimming pools; and sewage lift station.

suspended and the Navy was unwilling to extend its contract.[2] Holmes & Narver did not submit a proposal in response to the RFP.

Holmes & Narver contends that the Navy improperly failed to extend the closing date in violation of Federal Acquisition Regulation (FAR) § 15.410(b), which requires the contracting officer to consider whether the time before closing is sufficient to permit prospective offerors to consider the changes effected by the amendment. Holmes & Narver claims that the Navy's refusal to extend the closing date to respond to the amendments was unreasonable in light of Holmes & Narver's November 19 and November 26 receipt of the amendments—10 and 5 working days, respectively, before the December 4 closing date.

The Navy reports that it decided that the offerors had enough time to adequately prepare their proposals after receipt of amendment Nos. 5 through 8 because the amendments were basically clarifications of existing work requirements and administrative changes, which added relatively little work. Consideration was also given to the extensive interest in this solicitation (*e.g.*, more than 40 contractors attended the pre-proposal meeting) and the large number of proposals anticipated, as well as the constraints of the government's procurement schedule due to the Navy's reluctance to extend EPS' contract. The Navy asserts that Holmes & Narver should have picked the amendments up in Charleston if it wanted faster access to them.

There is no *per se* requirement that the closing date in a negotiated procurement be extended following a solicitation amendment. *MISSO Servs. Corp.*, 64 Comp. Gen. 4 (1984), 84-2 CPD ¶ 383. The decision as to the appropriate preparation time for the submission of offers lies within the discretion of the contracting officer. *L&E Serv. Co.*, B-231841.2, Oct. 27, 1988, 88-2 CPD ¶ 397. We limit our review of such determinations to the questions of whether the refusal to extend the closing date adversely impacted competition and whether there was a deliberate attempt to exclude an offeror. *MISSO Servs. Corp.*, 64 Comp. Gen. 4, *supra.*

The Navy issued the last amendment on November 20 and Holmes & Narver admits receiving it on November 26, 5 working days prior to the closing date. Our review of amendment Nos. 5 through 8 reveals no significant additional requirements that 5 working days of diligent effort by a qualified offeror could not address, particularly if it were an experienced on-site contractor such as Holmes & Narver. Moreover, late receipt of an amendment provides no basis for disturbing a procurement where the agency obtains adequate competition and reasonable prices since offerors generally bear the risk of late receipt. *See REL,* B-228155, Jan. 13, 1988, 88-1 CPD ¶ 25. Here, the agency received eight proposals and there is no evidence that the Navy deliberately attempted to exclude Holmes & Narver from the competition.

Holmes & Narver also protests that the offerors were not competing on an equal basis because EPS, the incumbent contractor, was offering access to EPS'

[2] Since EPS was suspended, it was ineligible to compete for this award.

employees and to a variety of competitively useful information to those firms that would agree to purchase EPS' inventory at cost and its equipment at fair market value if successful at winning the contract. Holmes & Narver turned down the offer and then reported the matter to the Navy when it learned that two firms had likely purchased the offered information.[3] The protester contends that, under the circumstances, the Navy had a duty to make the same information, insofar as it is in the agency's possession, available to all offerors.

Generally, an agency must assure that it provides enough information through the solicitation or otherwise to allow offerors to compete intelligently and on relatively equal terms. *See John J. Moss,* B-201753, Mar. 31, 1981, 81-1 CPD ¶ 242. The government, however, is not required to compensate for the competitive advantage inherent in an incumbent contractor (for example, by seeking from the incumbent information not in the government's files) unless the advantage resulted from improper preferential treatment or unfair action. *University Research Corp.,* B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636. On the other hand, if material information may have been unfairly or improperly made available to a particular offeror, the agency is required to equalize the competition by providing other potential offerors access, even if this requires reopening the competition or canceling the procurement and resoliciting. 49 Comp. Gen. 251 (1969); *Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc.,* B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379.

The incumbent's November 14 offer to sell the information disclosed the general categories of information offered. For example, it offered personnel information; certain listing/documentation of material and equipment; incumbent financial records pertaining to total job costs; and copies of unnamed operational and technical plans, procedures, and manuals. The protester requested this information to the extent that it is in the possession of the government.

The record does not indicate, however, what specific information offered by EPS the agency could have distributed to the competitors. While it would have been appropriate for the agency to search its files and make available to potential offerors all nonproprietary information pertaining to this procurement,[4] it appears that much of the offered information that may be in the Navy's possession is proprietary to EPS, covered by the Privacy Act, 5 U.S.C. § 552a (1988), or otherwise not for distribution by the government. In any case, nothing in the record persuades us that the information that Navy may have in its possession but has not made available is necessary to allow offerors to compete intelligently or on relatively equal terms.

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[3] The protester reports that the offer was made to it, and that it later received information in the form of a copy of a November 13 memorandum from the incumbent's project manager to all incumbent contractor supervisors advising that the incumbent's president had "given employees permission (release from confidentiality) to discuss [the incumbent's] present contract operations" with two specifically named firms. The protester understood this to mean two other potential offerors had accepted the same deal that the incumbent offered to the protester.

[4] Many agencies set up reading rooms if they have voluminous information that may be relevant to the agency's requirements.

We think it obvious that the value of information being offered, as well as the protester's and other offerors' desire to possess it, derives solely from it being the incumbent's information and reflective of the properly recognized "incumbent's advantage." As indicated above, the Navy is not required to compensate for this advantage, whether it resides in the incumbent or in any other firm that has been given access by the incumbent to its information, unless those in possession of the information came by it as a result of improper preferential treatment or unfair action.

Holmes & Narver contends that its two competitors' possession and use of the incumbent's information results from improper and unfair action because the information came into the competitors' hands as a result of a contingent fee arrangement prohibited by 10 U.S.C. § 2306(b) (1988), which Holmes & Narver brought to the Navy's attention prior to the closing date. The incumbent's offer, as presented to Holmes & Narver, was to provide nonexclusive access to both the incumbent's employees and contract information in the incumbent's possession, provided "[i]n event of the award of the Parris Island contract to [Holmes & Narver]," Holmes & Narver would compensate the incumbent by purchasing the incumbent's inventory at cost and its equipment at fair market value.[5] Holmes & Narver views this as involving a prohibited contingent fee arrangement and states that it therefore declined the offer.

The statutory prohibition reads:

> Each contract awarded under this chapter after using procedures other than sealed-bid procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency *to solicit or obtain* the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. [Italic added.] 10 U.S.C. § 2306(b).

EPS' offer of access to competitively useful information in exchange for an agreement to purchase EPS' inventory and equipment at pre-set prices upon receiving the contract could be regarded as a contingent fee arrangement.[6] We need not resolve whether the purchase of EPS' inventory and equipment would involve the payment of a contingent fee, since we find that it would not be prohibited in any event because the "fee" (if the proposed purchase of the inventory is a fee) was not to be paid for EPS "to solicit or obtain" the contract.

FAR § 3.405(a) states that "[t]he fact that a fee is for information does not exclude it from the definition of contingent fee."[7] Thus, merely providing a pro-

[5] Holmes & Narver explains that a former contractor's inventory ordinarily is sold below cost. Consequently, an awardee bound to purchase the inventory at cost will probably pay more for the inventory than it is worth—the excess being EPS' contingent fee for providing winning information.

[6] This is not clearly a contingent fee as contemplated by the statute. We have found little useful precedent on this matter. For example, the court, in *Weitzel v. Brown-Neil Corp.*, 251 F.2d 661 (4th Cir. 1958), implies that a legitimate subcontract in exchange for providing sales agent services is not prohibited.

[7] An earlier version of the regulation read:

> Contingent fees paid for 'information' leading to obtaining a Government contract or contracts are included in the prohibition and, accordingly, are in breach of the covenant unless the agent qualifies under the exception as a bona fide employee or a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business. Federal Procurement Regulations § 11.5046.

spective contractor with "information" may fall within the ambit of the meaning of "to solicit or obtain" a contract. However, the regulation does not define what is meant by "information"; there is no evidence that the regulation was intended to cover providing any information from whatever source pertaining to the preparation of a proposal. For example, the regulation would not reasonably encompass a potential vendor providing information regarding its product to an offeror on the condition that it receive a subcontract if the offeror is successful.

Court decisions also provide little guidance. They usually involve selling agents who contact government officials to advance opportunities for a contract award, a situation clearly encompassed by the restriction (unless it falls within the statutory exceptions). *See, e.g., Mitchell v. Flintkote Co.,* 185 F.2d 1008 (2d Cir.), *cert. denied,* 341 U.S. 931 (1951), and *J.D. Streett & Co. v. United States,* 256 F.2d 557 (8th Cir. 1958). One court has addressed the distinction between services rendered "to obtain" a contract and other services. *Browne v. R&R Eng'g Co.,* 264 F.2d 219 (3d Cir. 1959). In *Browne,* the court held that contingent fee services in connection with a proposed contract that did not involve "any dealing . . . with those responsible for any aspect of the letting of public contracts" [8] were not prohibited. In the absence of more specific statutory or regulatory guidance about what "to solicit or obtain" a contract entails, we will follow the distinction in *Browne.*

Here, the incumbent only provided information in its possession that it would have used if it could have competed itself. There is no evidence that EPS offered services that involved any contact or dealing with the government on this procurement. Therefore, under the *Browne* standard we find no violation of the contingent fee prohibition. That being so, we conclude that the potential offerors did not acquire the incumbent's information—and perhaps some of its advantage—as a result of improper preferential treatment or unfair action. Consequently, these offerors' use of the information imposed no duty on the Navy to provide similar information to other potential offerors.

The protest is denied.

B-241915, April 17, 1991

Civilian Personnel

Relocation
■ Mobile homes
■■ Shipment
■■■ Actual expenses
■■■■ Reimbursement

A transferred employee moved her mobile home to her new duty station and claims entitlement to expenses incurred to prepare the mobile home for transport and to set it up at the new duty station. Chapter 2, part 7 of the Federal Travel Regulations (FTR), authorizes reimbursement of costs direct-

[8] In *Browne,* the court found the contingent fee for proposal preparation services was not prohibited.

ly related to actual shipment of a mobile home. Expenses necessarily incurred to relocate it before and after shipment are classified as miscellaneous expenses and reimbursable only through payment of a miscellaneous expense allowance under chapter 2, part 3 of the FTR. *John Schilling,* 66 Comp. Gen. 480 (1987). Since she has been paid the maximum amount allowable under FTR, para. 2-3.3b, her claim is denied.

Matter of: Marie K. Madison—Relocation of a Mobile Home—Expense Reimbursement Limitation

This decision is in response to a request from an Authorized Certifying Officer, National Finance Center (NFC), U.S. Department of Agriculture,[1] concerning the entitlement of an employee to be reimbursed additional expenses associated with the transportation of a mobile home incident to a permanent change of station. We conclude that the employee has received the maximum reimbursement authorized.

Background

Ms. Marie K. Madison, an employee of the Forest Service, was transferred from Grants Pass, Oregon, to Gasquet, California, in March 1987. She was authorized to transport her mobile home in lieu of transportation and temporary storage of household goods. She was also authorized temporary quarters subsistence expense reimbursement, a miscellaneous expense allowance, and reimbursement for personal travel by privately owned vehicle.

Following transfer, Ms. Madison submitted a travel voucher claiming expenses totaling $2,133.50. Payment was approved through the NFC's automated system and since she had already received a $1,715 travel advance, she was paid an additional $418.50. On review by the NFC's Travel Audit Section in April 1987, Ms. Madison's relocation expense entitlement was reduced to $903.03.[2] The remainder ($1,230.47—representing the other expenses incurred which were ancillary to the actual transportation of the mobile home) was disallowed and reinstated to Ms. Madison's travel advance account as a debt due the United States. Ms. Madison has since repaid that amount.

Ms. Madison contends that those additional expenses should be reimbursed because they were incurred to prepare the mobile home for transport and to set it up and reconnect the utilities at her new duty station. Additionally, she contends she was given erroneous information regarding her entitlements. She apparently had the opportunity to sell the mobile home because she claims that she would have sold it rather than move it, had she been properly advised that the extra expenses would not be reimbursed.

The Forest Service confirms that Ms. Madison was apparently given inaccurate information at the time. However, it has suggested that our later decision, *John*

[1] Jeanne DiGange, Reference: FSD-1 WMD.

[2] Temporary quarters subsistence expense—$160.22, mileage—$16.81, miscellaneous expense allowance—$322, and transportation of Ms. Madison's mobile home—$404.

Schilling, 66 Comp. Gen. 480 (1987), which overruled *Katherine I. Tang,* 65 Comp. Gen. 749 (1986), in part, supports payment of the expenses which were disallowed. The NFC, in turn, believes Ms. Madison has received maximum reimbursement. However, the NFC is mindful of the fact that she received inaccurate information and suggests the possibility that this Office might find that her claim warrants consideration as a meritorious claim. In the absence of such a finding, the NFC asks whether Ms. Madison has any other recourse available to her.

Opinion

Subsection 5724(b) of title 5, United States Code, provides that under regulations a transferred employee may transport a mobile home from the old duty station to the new duty station at government expense. In addition, 5 U.S.C. § 5724a(b) authorizes payment of a miscellaneous expense allowance in an amount not to exceed 1 week's basic pay in the case of an employee without immediate family, or 2 weeks' basic pay in the case of an employee with an immediate family, but in no event may the payment exceed the maximum pay rate of a grade GS–13 employee.

The regulations governing these reimbursements during the period in question are contained in parts 3 and 7 of chapter 2, Federal Travel Regulations (FTR).[3] Paragraph 2–7.3a(3) of the FTR states that the reimbursable costs of transporting a mobile home "shall not include the costs of preparing mobile homes for movement, maintenance, repairs . . . nor charges designated in the tariffs as 'special services.'" In this connection, paragraph 2–3.1b of the FTR, includes for miscellaneous expense allowance purposes, the cost of (1) disconnecting and connecting appliances, equipment and utilities and (2) the unblocking and blocking and related expenses in connection with relocating a mobile home.

Thus, all expenses ancillary to the actual movement of a mobile home come wholly under these provisions of the FTR, if they are to be reimbursed. However, FTR, para. 2–3.3b carries forward the statutory limitation that the maximum miscellaneous expense allowance payable in any one case is 1 week's basic pay for an employee without immediate family or 2 weeks' basic pay with immediate family. Therefore, based on those provisions, Ms. Madison was correctly reimbursed $404 for the actual transportation of her mobile home. Although she claimed $1,552.47 as expenses ancillary to that transportation, since at the time of her transfer she was a grade GS–5, step 5, without immediate family, her miscellaneous expense allowance was properly limited to $322.

In that regard, our decision *John Schilling,* 66 Comp. Gen. 480, *supra,* does not support payment of any of the amount disallowed Ms. Madison for those ancillary expenses. The ruling in that case specifically supports the adjusted settlement by the NFC as described above. The issue raised by the Forest Service seems to involve a misunderstanding of the additional question raised and dis-

[3] Supp. 1, Sept. 28, 1981, and Supp. 4, Aug. 23, 1982, *incorp. by ref.,* 41 C.F.R. § 101–7.003 (1987).

cussed in *Schilling.* That discussion concerned the issue of apparent inequitable treatment of transferring civilian employees for reimbursement of expenses of mobile home relocations versus those reimbursements available to military members in the same circumstances, since those authorized to civilian employees were significantly less.

We analyzed the legislative history of 5 U.S.C. § 5724(b) in *Schilling* and found that the purpose for which the law was enacted was sufficiently broad to permit expansion of civilian employee entitlements to approximate those available to military members. We stated therein that the term "transportation" as used in 5 U.S.C. § 5724(b) "may properly be applied to cover the necessary costs of preparing a mobile home for shipment, as well as the costs of installing the home at its new site." *Schilling, supra,* at page 484. Having previously stated in *Schilling* that the FTR provisions which limited this entitlement for civilian employees have the force and effect of law, we concluded that the FTR would have to be amended to permit payment of these additional expenses and recommended to the Administrator of General Services that the regulations be so amended. Notwithstanding that recommendation, neither part 7 of chapter 2 of the FTR (1981 edition), nor part 302-7 of the FTR (1989 edition, May 10, 1989) have been amended to permit payment of those additional expenses.

As to the question of other possible recourses available to Ms. Madison, we note that following full payment to her it was determined that the payment was erroneous and recoupment action taken. In view of the amount recovered from Ms. Madison ($1,230.47), if the Forest Service believes that the erroneous payment qualifies for waiver under 5 U.S.C. § 5584 (1988), it may submit a report here on its findings and recommendations. *See* 4 C.F.R. Part 92 (1991).

B-238800, April 19, 1991

Civilian Personnel

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

Under the Voluntary Leave Transfer Program, donated leave may not be transferred to the recipient or used after the medical emergency terminates and any unused transferred leave must be restored to the leave donors. Therefore, the retroactive substitution of a recipient's unused donated leave for the recipient's leave without pay after the death of the recipient was improper, and the payment of compensation resulting from the retroactive substitution was erroneous. The erroneous payment, however, may be subject to waiver.

Matter of: Mary Dawson—Leave Transfer—Death of Leave Recipient

The question in this case is whether, under the Voluntary Leave Transfer Program, annual leave that was donated by leave donors to a leave recipient, but not yet credited to her account at the time of her death, was properly credited to her account after her death and substituted retroactively for her periods of leave without pay.[1] We conclude that the leave donations were improperly credited to the recipient's account after her death and were required to be returned to the donors.

Background

On May 5, 1989, Ms. Mary Dawson, an Army employee at Fort Sam Houston, Texas, entered into the Voluntary Leave Transfer Program, as authorized by the Federal Employees Leave Sharing Act of 1988, Pub. L. No. 100-566 (1988), codified at 5 U.S.C. §§ 6331-6340 (1988), which generally allows federal employees to transfer their annual leave to another employee who has a medical emergency and has used all of his or her own sick leave and annual leave. Annual leave donated and transferred under the program may then be substituted retroactively for periods of leave without pay or used to liquidate an indebtedness for advanced annual or sick leave. Ms. Dawson's application to receive donations of leave under the program was approved by the Army, and an announcement and solicitation for leave donors for Ms. Dawson was issued.[2]

On June 2, 1989, the civilian pay section of Fort Sam Houston's Finance and Accounting Office received the listing of all personnel who had donated leave, but the ministerial operation of actually crediting Ms. Dawson's account on that day had not occurred when Ms. Dawson died. After the leave donors were contacted to verify their willingness to donate under the changed circumstances, a majority of them agreed to do so and on September 9, 1989, 296 hours of leave donated to Ms. Dawson were retroactively substituted for her leave without pay through the day before she died. A check in the amount of $3,039.42 for unpaid compensation, which represented the lump-sum value of the compensation due the decedent for the periods covered by the retroactively substituted leave, with appropriate deductions withheld, was disbursed to her beneficiaries pursuant to 5 U.S.C. § 5583 (1988).

Analysis And Conclusion

Although this case arises under the Voluntary Leave Transfer Program, we encountered a similar case under the predecessor Temporary Leave Transfer Program in *Harold A. Gibson,* 68 Comp. Gen. 694 (1989), where an approved leave recipient died after leave had been donated to him but before the agency had actually retroactively substituted the donated leave for the recipient's leave

[1] The question arose at Fort Sam Houston, Texas, and was forwarded to us by Colonel Garry D. Foster, Finance Corps, Office of the Assistant Secretary of the Army for Finance and Accounting.

[2] Ms. Dawson had applied on April 20, 1989, under the Temporary Leave Transfer Program, a similar leave transfer program authorized under Pub. L. No. 100-202, 101 Stat. 1329, 1329-430 (1987). That program was superseded by the Voluntary Leave Transfer Program.

without pay. The regulations governing the predecessor program had specifically provided, and the regulations governing the Voluntary Leave Transfer Program specifically provide, that when the personal or medical emergency affecting a leave recipient terminates, no further requests for transfer of annual leave to the leave recipient can be granted, and any unused, transferred, donated leave remaining to the credit of the leave recipient must be restored to the leave donors. 5 C.F.R. § 630.909(c) (1989); 5 C.F.R. § 630.910(c) (1990).

In the *Gibson* case, the annual leave donations had been received in the agency's administrative service center where they would have been credited to the recipient's leave account except that the personal emergency was terminated by the recipient's death before that could be accomplished. We concluded that the purpose of that program was to provide income protection to a current employee during the period of emergency for which the application had been approved and not after the emergency ends. Thus, we held that the emergency ended upon the employee's death, and at that point the agency should have restored the unused leave to the donors, as required by the regulations.

The statutory authority for the current Voluntary Leave Transfer Program states that the medical emergency shall be considered terminated on the date on which the employee is separated from service and requires the employing agency, consistent with Office of Personnel Management (OPM) guidelines, "to ensure that a recipient is not permitted to use or receive any transferred leave" after the emergency terminates. 5 U.S.C. § 6335. The statute also provides for restoring unused transferred leave to the donors when the emergency terminates. 5 U.S.C. § 6336. However, the regulations implementing the Voluntary Leave Transfer Program contain a provision that was not part of the Temporary Leave Transfer Program regulations, which raises some question as to whether the medical emergency can be deemed to continue after the employee dies to allow for retroactive substitution. That provision states:

> An agency may deem a medical emergency to continue for the purpose of providing a leave recipient an adequate period of time within which to receive donations of annual leave. 5 C.F.R. § 630.910(d) (1990).

OPM's explanatory comments on this new regulatory provision indicate that it was intended to allow agencies discretionary authority to cover past medical emergencies where the actual processing of the donated leave from donor to recipient had not caught up with the termination of the emergency. 54 Fed. Reg. 53307 (1989). All the examples used in OPM's explanation concerned employees who had either returned to work or were contemplating returning to work when their emergencies had ended. We conclude that new section 630.910(d) was not intended to be applied to continue a medical emergency after an employee's death, and OPM has recently advised us that this too is their view.

Accordingly, since the retroactive substitution of the 296 hours of leave for Ms. Dawson's leave without pay was improper, the resulting payment of unpaid compensation to her survivors was erroneous. However, the erroneous payment is subject to consideration for waiver under the provisions of 5 U.S.C. § 5584 (1988) and 4 C.F.R. parts 91 and 92 (1990).

B-237914, April 22, 1991

Military Personnel

Relocation
■ **Cost-of-living allowances**
■ ■ **Eligibility**

Military Personnel

Relocation
■ **Overseas allowances**
■ ■ **Variable housing allowances**
■ ■ ■ **Eligibility**

A member of the military services ordered to a designated place outside the continental United States, Alaska, and Hawaii to await final action by a Physical Evaluation Board is entitled to the overseas housing allowance (OHA) and cost of living allowance (COLA) appropriate for the designated place.

Military Personnel

Relocation
■ **Cost-of-living allowances**
■ ■ **Eligibility**

Military Personnel

Relocation
■ **Variable housing allowances**
■ ■ **Eligibility**
■ ■ ■ **Amount determination**

A member of the military services ordered to a designated place in the continental United States, Alaska, or Hawaii to await final action by a Physical Evaluation Board is entitled to the variable housing allowance and cost of living allowance appropriate for the designated place.

Military Personnel

Leaves Of Absence
■ **Involuntary leave**
■ ■ **Eligibility**
■ ■ ■ **Allowances**

A member of the military services on involuntary leave pending appellate review of a court-martial sentence to a dishonorable or bad conduct discharge or dismissal from the Service, to the extent entitled to pay and allowances, is entitled to the allowances appropriate for his duty station.

Matter of: Private J. E. Gines, USMC

Private J. E. Gines, USMC, upon discharge from treatment at the U.S. Naval Hospital, Beaufort, South Carolina, on December 30, 1988, was ordered detached from his station at Parris Island, South Carolina and directed to proceed to his home in Vega Baja, Puerto Rico, to await the results of disability retirement proceedings before a Physical Evaluation Board. The orders stated that his

leave account would be debited. He was discharged on March 7, 1989. His disbursing officer has requested a decision on the issue of whether Private Gines is entitled to an Overseas Housing Allowance (OHA) and a cost of living allowance (COLA) for the period he was in Puerto Rico pursuant to these orders.

The Per Diem, Travel, and Transportation Allowance Committee, in forwarding the request, raises two other questions. First, it asks whether a member in Private Gines' circumstances would be entitled to a variable housing allowance (VHA) or COLA if ordered to a place in the continental United States (CONUS), Alaska, or Hawaii rather than Puerto Rico. Second, it asks whether the result in either situation would be different if the member were on involuntary leave pending completion of appellate review of a court-martial sentence involving a dishonorable or bad conduct discharge or dismissal from the Service rather than awaiting the results of disability retirement proceedings.[1]

Under 37 U.S.C. § 502(a) a member who is directed to be absent from duty to await orders pending disability retirement proceedings and whose absence exceeds the leave authorized by 10 U.S.C. § 701 "is entitled to the pay and allowances to which he would be entitled if he was not so absent." Among those allowances are OHAs, VHAs, and COLAs. However, an OHA is authorized only for a member who is assigned to duty outside of CONUS, Alaska, and Hawaii; a VHA is available only to a member assigned to duty in high cost areas of CONUS, Alaska, and Hawaii; and a COLA is authorized only for those on duty outside CONUS. Thus the entitlement of Private Gines to an OHA and a COLA depends on whether his rights are determined with reference to the recruit depot at Parris Island from which he was detached in December 1988 or Vega Baja, Puerto Rico, where he was ordered to proceed and await the results of the disability retirement proceedings.

The duty station of a member is a question of fact, to be determined on the basis of all the circumstances of each case. In 32 Comp. Gen. 348 (1953) we addressed a situation much like the one at issue here. It concerned the appropriate basic allowance for subsistence and basic allowance for quarters for a member who, like Private Gines, was detached from his station and ordered elsewhere to await the results of disability retirement proceedings. We concluded that the member was absent from duty while awaiting the results of the proceedings under the predecessor to the current section 502(a) and was therefore entitled to the same pay and allowances he would receive if on duty. We went on to say that detachment from a duty station under orders has the effect of terminating the member's duty assignment at that station and that therefore the member's right to the allowances must be determined on the basis of the location to which the member was directed to proceed upon detachment. 32 Comp. Gen. at 350. For the same reason, Private Gines is entitled to the OHA and COLA appropriate for Vega Baja, Puerto Rico, for the period that he was there awaiting disposition of his case by the Physical Evaluation Board. Similar-

[1] This request was submitted by the Disbursing Officer, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, South Carolina, and assigned PDTATAC Control No. 89-13 by the Per Diem, Travel, and Transportation Allowance Committee.

ly, a member in Private Gines' circumstances who is ordered to a location in CONUS, Alaska, or Hawaii is entitled to the VHA and COLA appropriate for the location to which he is ordered.

A member who is awaiting appellate review of a court-martial sentence involving an unsuspended dismissal or an unsuspended dishonorable or bad conduct discharge from the Service is treated differently from one awaiting the decision of a Physical Evaluation Board. Specifically, the member may be placed on involuntary leave. 10 U.S.C. § 876a (1990). Under 10 U.S.C. § 706 a member who is required to take leave under these circumstances may receive pay and allowances to the extent of leave accrued as of the time the involuntary leave begins. If the member elects to be paid the amount of accrual leave, he is placed in an excess leave status and receives no pay and allowances.

To the extent that a member receives pay and allowances during a period of involuntary leave under section 876a, the member's allowances should be those appropriate for his or her duty station during the leave period. As we have already said, a member's station is a question to be answered on the basis of the facts of each case. In general, if no action has been taken to detach or transfer the member at the time he or she is placed on involuntary leave, we see no reason why the member's duty station would not remain the same as it was at the time the member was placed on involuntary leave.

B-241871, April 25, 1991

Civilian Personnel

Travel
■ Temporary duty
■■ Annual leave
■■■ Return travel
■■■■ Constructive expenses

Civilian Personnel

Travel
■ Temporary duty
■■ Travel expenses
■■■ Reimbursement
■■■■ Amount determination

An employee was authorized round-trip air travel by premium class, but he did not return by premium class since he had scheduled annual leave in advance. The employee is not entitled to credit for the premium-class travel for the return trip for purposes of establishing constructive cost since his scheduled annual leave removed the justification for premium-class travel on the return trip.

Matter of: Stephen G. Burns—Constructive Cost of Travel When Annual Leave is Taken

Mr. William C. Parler, General Counsel of the Nuclear Regulatory Commission (NRC), requests our decision on the proper basis for computing the constructive cost of an employee's return travel when annual leave was taken during an overseas trip. For the following reasons, we conclude that the employee is not entitled to credit for the constructive cost of the authorized premium-class travel for the return trip.

Background

In September 1990, Stephen G. Burns, the Executive Assistant to the Chairman, NRC, accompanied the Chairman on official travel to Vienna, Austria, and Budapest, Hungary, to attend the general conference of the International Atomic Energy Agency and to meet with officials of the government of Hungary. However, Mr. Burns did not travel with the Chairman back to Washington, D.C., from Budapest because he took 3 days of scheduled annual leave at the completion of the official business in Budapest. Instead he returned to Vienna prior to traveling back from there to Washington, D.C., by economy class.

The Chairman may authorize the use of premium-class travel by NRC employees, and Mr. Burns was authorized by the Chairman to fly round-trip premium class for security purposes and in order to conduct business en route since he was to accompany the Chairman. However, it was known that he would not take the return trip with the Chairman since he had scheduled annual leave in advance.

Because Mr. Burns returned to the United States from a location other than his final duty station, *i.e.*, from Vienna rather than from Budapest, the actual cost of the Vienna return ticket must be compared to the constructive cost of a return ticket from Budapest that the government would otherwise have incurred. The return portion of Mr. Burns' trip from Vienna to Washington was in economy class. Because he would have been traveling with the Chairman for the entire trip but for the annual leave and would have returned premium class as the Chairman did, the question is raised whether Mr. Burns is entitled to credit for premium-class travel for the entire trip for purposes of establishing the cost comparison.

Mr. Burns' position is that since the round-trip premium-class airfare of $2,669 was authorized by the Chairman and was the amount the NRC would have had to pay if he had returned with the Chairman, and since his actual airfare (premium class to Budapest, and return from Vienna at the economy class, commercial rate) was only $2,371.74, he actually saved the NRC money by taking annual leave. The NRC travel office, however, believes that Mr. Burns is not entitled to credit for return at the premium-class rate since he did not accompany the Chairman on his return flight. The travel office views Mr. Burns' actual expenses of $2,371.74 as being in excess of the constructive rate of $1,973 (premium class to Budapest, return from Budapest at the economy class, government rate) by $398.74 which it seeks to recover from Mr. Burns.

Opinion

The Federal Travel Regulation (FTR), in 41 C.F.R. § 301-2.5(b) (1990), provides in relevant part:

> When a person for his/her own convenience travels by an indirect route, or interrupts travel by direct route, the extra expense shall be borne by him/her. Reimbursement for expenses shall be based only on such charges as would have been incurred by a usually traveled route.

This regulation provides that the individual is responsible for any extra expense he incurs for personal travel. The traveler's reimbursement is to be limited to those expenses he would have incurred but for the interrupted travel or travel by indirect route. *See Marlene Boberick,* B-210374, July 8, 1983. *Alan G. Bolton, Jr.,* B-200027, Aug. 24, 1981.

The FTR in 41 C.F.R. § 301-1.4(b)(3) (1987) also provides:

> (3) Travel-authorizing officials shall authorize or approve only that travel necessary to accomplish the agency mission in the most effective and economical manner. Authorizing officials should be aware of travel plans, including plans to take annual leave in conjunction with travel, and shall ensure appropriate consideration of the . . . means of accomplishing travel.

In the instant case, it was known that Mr. Burns would not take the return trip with the Chairman since he had scheduled annual leave in advance. Under the FTR, 41 C.F.R. § 301-3.3(d)(1), the government's policy is that employees shall use coach-class or equivalent air accommodations and premium-class air accommodations may be used only under specified circumstances listed in 41 C.F.R. § 301-3.3(d)(3). Since Mr. Burns had scheduled annual leave at the end of the trip, it is apparent he did not need to travel with the Chairman. Further, his return travel by economy class is inconsistent with the view that premium class was necessary for his security. Thus there is no justification for his use of premium-class airfare on the return trip. Since he returned home by an indirect route, the constructive cost of return travel by the usually traveled route under FTR, 41 C.F.R. § 301-2.5(b), quoted above, must be based on the economy fare, and Mr. Burns is responsible for any extra expense.

Accordingly, Mr. Burns owes the NRC $398.74, which is the amount by which his actual expenses exceeded the constructive cost of $1,973.

B-241987, April 25, 1991

Civilian Personnel

Travel

■ Travel expenses

■■ Reimbursement

■■■ Amount determination

■■■■ Administrative discretion

Civilian Personnel

Travel

■ Travel expenses

■■ Reimbursement

■■■ Spouses

Two employees were authorized temporary duty travel to receive awards at a Departmental Honor Awards Ceremony and to be accompanied by their spouses. Although the preplanned ceremonies were scheduled to end the morning of June 14, 1990, the official authorizing the travel had discretion to allow return travel on June 15. Accordingly, the employees may be allowed lodging and full per diem for June 14 and meals and incidental expenses for June 15.

Civilian Personnel

Travel

■ Travel expenses

■■ Reimbursement

■■■ Amount determination

■■■■ Administrative discretion

Civilian Personnel

Travel

■ Travel expenses

■■ Reimbursement

■■■ Awards/honoraria

Under the Office of Personnel Management's guidelines in FPM Letter 451-7, July 25, 1990, agency heads have broad discretionary authority to establish allowable per diem amounts, points of travel origin and return, and the number of individuals authorized to travel in connection with award ceremonies under 5 U.S.C. § 4503 (1988).

Matter of: Benjamin F. Ackerman & Fred L. Williams—Spouse's Travel to Attend Awards Ceremony—Period of Travel

This decision is in response to a request from an Authorized Certifying Officer, National Finance Center, Department of Agriculture (USDA).[1] The issue is the entitlement of two employees to be reimbursed additional per diem for themselves and their respective spouses incident to attending an Honor Awards Ceremony in June 1990. We conclude that they are entitled to additional per diem.

[1] Ms. Sandra S. Williams, Reference FSD-1 WDM.

Background

Mr. Benjamin F. Ackerman III, and Mr. Fred L. Williams, employees of the Food Safety and Inspection Service, USDA, in Kansas City, Missouri, and Oklahoma City, Oklahoma, respectively, were selected to receive awards at a Departmental Honor Awards Ceremony in Washington, D.C. The travel orders authorized each of them to travel beginning on June 12, 1990, and ending on June 15, 1990, to be accompanied by their wives at government expense.

Mr. and Mrs. Ackerman began their travel from their home in Lenexa, Kansas, at 5 a.m. on June 12, 1990, and arrived back in Lenexa at 6:50 p.m. on June 15, 1990. Mr. and Mrs. Williams began their travel from Oklahoma City, Oklahoma, at 8 a.m. on June 12, 1990, and arrived back in Oklahoma City at 1:47 p.m. on June 15, 1990.

Following completion of that travel, both Mr. Ackerman and Mr. Williams submitted travel vouchers covering the entire period of their trips. The USDA National Finance Center disallowed lodging costs for the evening of June 14 and the meals and incidental expenses (M&IE) claimed for June 15, on both vouchers. In addition, only three-fourths of the M&IE rate for June 14, 1990, was allowed.

The National Finance Center, citing to section 301-1.4(b)(3) of the Federal Travel Regulation (FTR),[2] contends that both the Ackermans' and Williams' length of stay in Washington should be commensurate with the time and duration of the award ceremony activities. Since the final ceremony was concluded on the morning of June 14, the National Finance Center believes that both parties should have performed return travel that day. However, because our decision *Sharon S. Rutledge,* 69 Comp. Gen. 38 (1989), which authorized payment of travel expenses for spouses of honor award recipients, is not clear on the scope of that entitlement, the certifying officer asks the following questions, summarized below:

1. If the agency head authorizes an additional night's lodging and meals after the early close of the ceremony, is this considered a "direct and essential expense of the award"?

2. Our decision appears to suggest that the spouse is to be reimbursed full per diem as is the employee. Is this an area of consideration to be left to the discretion of the agency head?

3. If the point of origin and return travel for the individual who receives invitational travel is different than the awardee, should reimbursement be limited to the cost equivalent of the travel authorized the awardee?

4. Based on the guidelines issued by the Office of Personnel Management (FPM Letter 451-7, July 25, 1990), would it be proper for the agency head to establish

[2] 41 C.F.R. § 301-1.4(b)(3) (1990). That provision states in part that travel-authorizing officials shall authorize or approve only that travel necessary to accomplish the agency mission in the most effective and economical manner.

by regulation a limitation as to the number of family members authorized to attend such functions?

Opinion

The right of an employee to be reimbursed travel expenses while traveling on official business away from his designated post of duty is contained in 5 U.S.C. § 5702 (1988), and part 301 of the FTR. Spouses of employees, who are not themselves employees performing official travel, but who choose to travel with the employee, generally have no independent right to be reimbursed travel expenses. *James E. Moynihan,* B-229074, Mar. 28, 1988.

Section 4503 of title 5, United States Code (1988), however provides authority for an agency head to pay cash awards to, and "incur necessary expense" for the recognition of employees who meet the criteria for such awards. In decision *Sharon S. Rutledge,* 69 Comp. Gen. 38, *supra,* we considered a spouse's claim for travel expenses to attend an awards ceremony with her husband in circumstances substantially similar to the present situation. An earlier decision by this Office would have required the claim in *Rutledge* to be disallowed.[3] Upon reconsideration of the scope and purpose of 5 U.S.C. § 4503 in the light of several recent decisions, we overruled the earlier decision and concluded that the phrase "incur necessary expense" as used in 5 U.S.C. § 4503 granted agency heads discretionary authority to issue invitational travel orders to and pay the travel expenses of the spouse of an employee award recipient to attend the awards ceremony. We also invited the Office of Personnel Management to consider issuing regulations to cover this matter.[4]

In the two claims under consideration, both Mr. Ackerman and Mr. Williams were authorized to perform return travel on June 15. While it may have been possible for either of them to schedule a return flight immediately following the last event preplanned for the morning of June 14, we do not believe they were required to do so. Although the itinerary for the awards ceremony scheduled only morning events, the footnote to the itinerary states that if other activities are scheduled the participants would be notified. In the circumstances, it would not be unreasonable for the authorizing official to assume that other events might be scheduled later, and we believe that the authorizing official acted properly under FTR § 301-1.4(b)(3).

Therefore, in answer to the certifying officer's first question, since both Mr. Ackerman and Mr. Williams and their spouses remained in Washington until June 15, as authorized, they are entitled to lodging and full per diem on June 14 and M&IE for June 15.

As to the remaining questions asked by the certifying officer, we believe that, if the head of an agency or his designee determines that it would further the purpose of the award program for the spouse of an award recipient to be present,

[3] 54 Comp. Gen. 1054 (1975).
[4] *See* FPM Letter 451-7, July 25, 1990.

the travel-authorizing official has broad discretionary authority, under the Office of Personnel Management's guidelines, to establish the amount of per diem allowable under the Federal Travel Regulation, the point of travel origin and return, and the number of individuals authorized to travel. On the latter issue, FPM Letter 451-7, *supra,* states that travel is "normally limited to one individual of the award winner's choosing," and agency heads should be guided by this standard.

B-242440, April 25, 1991

Procurement

Competitive Negotiation
■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Discussion

Procurement

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

Elimination of a technically acceptable, lower cost proposal from the competitive range without discussions, leaving a competitive range of one, was unreasonable where the record shows that weaknesses in the lower cost proposal were considered minor and could be easily addressed during discussions to make it stronger, and that the awardee's evaluated technical superiority was not such that no other offeror had a reasonable chance for award.

Matter of: National Systems Management Corporation

Joel S. Rubinstein, Esq., Sadur, Pelland & Rubinstein, for the protester.

Stephen H. Mims, Esq., Kinosky & Mims, for Strategic Financial Planning Systems, Inc., an interested party.

Jonathan H. Kosarin, Esq., and Brian Kau, Esq., Department of the Navy, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

National Systems Management Corporation (NSM) protests the award of a contract to Strategic Financial Planning Systems, Inc. (SFPS) under request for proposals (RFP) No. N60921-90-R-A146, issued by the Naval Surface Warfare Center, Dahlgren, Virginia, for analytical and engineering support for cost,

budget, and schedule analyses for the Navy's development and acquisition of weapon systems. The successful contractor will perform such services as life cycle cost studies, computer model application and modification, cost/schedule development and control, and parametric cost estimating. NSM contends that the Navy improperly excluded its lower cost, technically acceptable offer from the competitive range and only conducted discussions with SFPS.

We sustain the protest.

The RFP, issued as a total small business set-aside, contemplated the award of a cost-plus-fixed-fee contract for a 5-year period. The RFP stated that award would be made to the offeror whose proposal offered the "best value" to the government, considering the following evaluation factors:

1. Technical Capability
a. Proposed Approach
b. Personnel
c. Corporate Experience
2. Cost

The RFP stated that the "proposed approach" subfactor was approximately 1.5 times more important than the "personnel" and "corporate experience" subfactors, which were of equal weight. The "technical capability" factor was stated to be approximately 4 times more important than "cost." Cost was to be assessed for cost realism to determine the offeror's probable cost to meet the contract requirements, and the lowest evaluated cost offer was to receive the highest score for cost while other offers would receive a proportion of the best score based upon their position relative to the lowest evaluated cost offer.

The Navy received six offers, including the offers of NSM and SFPS. The initial technical and cost proposals were evaluated as follows:

Offeror	Tech Score (80 pts)	Cost Score (20 pts)	Total Score (100 pts)
SFPS	78.40	13.64	92.04
Offeror A	53.95	19.00	72.95
NSM	54.88	16.77	71.65
Offeror B	48.93	20.00	68.93
Offeror C	35.05	---	--- [1]
Offeror D	28.45	---	---

The Navy did not evaluate the cost proposals of offerors C and D because they were found to be technically unacceptable.

The proposal of SFPS was found to be fully responsive to the RFP requirements with no weaknesses. SFPS' superior technical score primarily reflected its per-

fect scores in the less important subfactors "personnel" and "corporate experience."[1]

NSM's proposal was also found to be technically acceptable but to contain "weaknesses which could affect performance under the contract." Specifically, the Navy expressed concern under the technical approach subfactor that NSM's proposal did not demonstrate the firm's knowledge of specific Navy or Marine Corps cost data bases, software, and computer models, and did not address the total acquisition cycle with respect to cost schedule and budget and tracking analysis. Under the "personnel" subfactor, the Navy expressed concern that the resume of NSM's proposed computer scientist did not show an in-depth knowledge of the majority of software packages identified in the RFP or show experience in Marine Corps systems. NSM's proposal was downgraded under the "corporate experience" subfactor for failing to show specific experience in Marine Corps systems. The Navy's technical evaluator states that "information provided by NSM's proposal indicated that it was technically acceptable but could have been made even stronger if all of the noted weaknesses had been fully and adequately addressed."

The contracting officer determined from the evaluation of initial proposals that only SFPS, the second highest cost offeror, should be included in the competitive range for the conduct of discussions. The offers of C and D were excluded as technically unacceptable. Regarding the offers of NSM and offerors A and B, which were substantially lower cost than SFPS', the contracting officer determined that the offer of "SFPS remains so substantially superior to the other three offerors, as to make it impossible for the other three to significantly close the gap without a major rewrite." Accordingly, since the contracting officer concluded that the offers from NSM and offerors A and B, although technically acceptable, did not have a reasonable chance of being selected for award, they were eliminated from the competitive range.

The Navy conducted a cost realism analysis of SFPS' proposal and conducted cost negotiations with that firm.[2] On December 14, 1990, the Navy awarded a contract to SFPS in the amount of $2,685,768, which was significantly less than SFPS' proposed cost. This protest followed.[3]

NSM contends that the Navy's determination to retain only SFPS' second highest cost offer in the competitive range and to exclude NSM's lower cost, technically acceptable offer was improper, particularly since the weaknesses identified in NSM's technical proposal were minor and could have been easily addressed in discussions. In response, the Navy admits that NSM's technical weaknesses were of a "minor nature" that could have been addressed without a major revi-

[1] Our discussion of the relative merits of the offerors' technical proposals and their proposed costs is necessarily general in light of our protest recommendation to reopen the competition.

[2] The Navy did not conduct detailed cost realism assessments of NSM's and offeror A's and B's proposals but verified the firms' rates with the Defense Contract Audit Agency, "with no significant variations noted." The Navy concluded that a comprehensive cost realism assessment of the firms' proposals "would result in a figure within 5 [percent] of the their proposed cost-plus-fixed-fee."

[3] Contract performance has not been suspended since the agency did not receive notice of the protest within 10 calendar days following contract award. *See* 4 C.F.R. § 21.4(b) (1991).

sion of NSM's technical proposal but argues that correcting these weaknesses alone would not make NSM's offer technically competitive with SFPS' superior technical proposal.

The Competition in Contracting Act of 1984 requires that if an agency conducts discussions, it do so with all responsible offerors in the competitive range. 10 U.S.C. § 2305(b)(4)(B) (1988). The Federal Acquisition Regulation (FAR) provides that the competitive range must include all proposals that have a reasonable chance of being selected for award and that any doubt as to whether a proposal is in the competitive range should be resolved by inclusion. FAR § 15.609(a). While the determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency, we closely scrutinize any evaluation that results in only one offeror being included in the competitive range, in view of the importance of achieving full and open competition in government procurement. *Coopers & Lybrand*, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100; *Besserman Corp.*, 69 Comp. Gen. 252 (1990), 90-1 CPD ¶ 191. If there is a close question of acceptability; if there is an opportunity for significant cost savings; if the inadequacies of the solicitation contributed to the technical deficiency of the proposals; or if the informational deficiency reasonably could be corrected by relatively limited discussions, then inclusion of the proposal in the competitive range and discussions are in order. *Besserman Corp.*, 69 Comp. Gen. 252, *supra*.

Here, the protester's elimination from the competitive range rested solely on the contracting officer's determination that NSM's technically acceptable offer could not become technically competitive without a "major rewrite." This conclusion is inconsistent with the agency's concession that the only weaknesses identified in NSM's proposal were considered minor and easily correctable. In this regard, the protester, during the protest conference, provided written, "quick" responses to the identified weaknesses, and the agency admits in its conference comments that these responses "addressed [the weaknesses] to a large degree." Given this admission and the statement of the agency's technical evaluator that NSM's proposal would have been stronger if the identified weaknesses had been addressed, we do not think that the Navy could reasonably find that NSM would not have had a reasonable chance of receiving award in this best-value procurement, particularly given that NSM's proposed cost was significantly lower than SFPS'.

The Navy argues that the weaknesses identified in NSM's proposal were so minor that addressing these weaknesses would not alone make NSM's offer competitive. The agency contends that SFPS' offer was so superior technically that NSM would have to rewrite its proposal, apart from addressing the evaluated weaknesses, to bring it up to the superior level of SFPS' in order to have a reasonable chance for award.

The record does not support the agency's conclusion, at this stage in the procurement, that NSM did not have a reasonable chance for award. While it is true that the proposal of SFPS, the incumbent contractor, was found to have numerous strengths and no identified weaknesses, NSM's proposal was also

evaluated as containing several strengths and only minor weaknesses that could have been easily addressed in discussions. The Navy's argument is essentially that NSM could not have a reasonable chance for award because its offer could not be improved to the point of being the technical equal of SFPS' proposal. However, there is no requirement that NSM's proposal be the technical equal of SFPS' to have a reasonable chance for award—cost also plays a role.

The purpose of the competitive range is to select those offerors, having a reasonable chance for award, with which the agency will negotiate. FAR § 15.609(a). Here, the record shows that NSM's technically acceptable offer would have been improved through discussions, which would have resulted in a higher technical score.[4] Given NSM's substantially lower cost, we do not believe that the contracting officer could decide, even in light of the RFP evaluation scheme that weighted technical considerations greater than cost, that NSM would have no reasonable chance for award. Under the circumstances of this case, that conclusion appears to be a premature cost/technical tradeoff, to be made at the conclusion of negotiations to determine which offer represents the best value to the government.[5]

Accordingly, we find that the record does not substantiate that SFPS' technical superiority was such that no other firm would have had a reasonable chance for award after meaningful discussions were held. In this regard, the Navy's report on the protest does not articulate any reasons why SFPS' technical advantage was so overwhelming that technically acceptable, lower cost offers had no reasonable chance of being selected for award if included in the competitive range.[6] Therefore, the Navy could not reasonably exclude NSM (or the similarly situated offerors A and B) from the competition for "relatively minor" weaknesses.[7] *See Besserman Corp.,* 69 Comp. Gen. 252, *supra.*

The protest is sustained.

We recommend that the Navy reopen negotiations with NSM and all other offerors who should have been included in the competitive range, conduct meaningful discussions, and request a new round of BAFOs. If a firm other than SFPS is selected as a result of the agency's evaluation of BAFOs, then the Navy

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[4] NSM's technical proposal was downgraded approximately 25 percent under technical approach, 50 percent under personnel, and 30 percent under corporate experience.

[5] A cost/technical tradeoff made before discussions is improper because the technical rankings and offered prices could be significantly altered after the conduct of discussions. *See Pan Am Support Servs., Inc.—Recon.,* 66 Comp. Gen. 457 (1987), 87-1 CPD ¶ 512. The Navy argues, however, that the revisions necessary to make NSM's offer competitive with SFPS' would probably increase NSM's cost offer. NSM denies that it would be required to increase its cost in this regard. We need not address the parties' speculation regarding this matter since we think it more appropriate that offerors, under these circumstances, be given an opportunity to address the agency's concerns and submit revised price offers. In this regard, we have recognized that it is not uncommon for offerors to lower their prices in the later stages of negotiation. *See Federal Servs., Inc.,* B-231372.2, Sept. 6, 1988, 88-2 CPD ¶ 215.

[6] Our review of the evaluation documentation also does not indicate that SFPS had such an overwhelming technical superiority that no other offeror could receive award no matter how much it reasonably improved its technical proposal or how much it lowered its cost.

[7] As indicated above, any doubt regarding whether a proposal should be included in the competitive range should be resolved in favor of inclusion. FAR § 15.609(a).

should terminate SFPS' contract for the convenience of the government and make award to that firm.

Under the circumstances, the protester is entitled to its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). NSM should submit its claim for such costs directly to the Navy. 4 C.F.R. § 21.6(e).

B-232234.5, April 29, 1991

Procurement

Bid Protests
■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Where protester knew basis of protest, but protester reasonably understood from competition advocate that agency would not act contrary to the protester's interests while the competition advocate investigated the matter, protester reasonably delayed filing protest until it received notice to the contrary.

Procurement

Special Procurement Methods/Categories
■ Requirements contracts
■■ Additional work/quantities
■■■ Interagency agreements

Under the Economy Act, 31 U.S.C. § 1535 (1988), where the ordering agency reasonably determines that amounts are available, that the receiving activity is able to provide or get by contract the ordered goods or services, that ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise, and that placement of the order is in the best interest of the government, an agency may purchase its requirements under another agency's contract.

Procurement

Contract Management
■ Contract modification
■■ Cardinal change doctrine
■■■ GAO review

Where contract provided for purchase of nonredundant uninterruptible power systems and for expansion of those systems to redundant configuration, agency's purchase of redundant systems made from nonredundant systems and ancillary items available under the contract is within scope of contract.

Procurement

Contract Management

■ Contract modification

■■ Cardinal change doctrine

■■■ Effects

Proposed issuance of delivery orders for quantity of uninterruptible power systems in excess of stated maximum quantity under the contract would be outside the scope of that contract, would result in a contract materially different from that for which the competition was held, and absent a valid sole-source determination, would be subject to Competition in Contracting Act requirements for competition.

Matter of: Liebert Corporation

R. Timothy Hanlon, Esq., Alex D. Tomaszczuk, Esq., and John E. Jensen, Esq., Shaw, Pittman, Potts & Trowbridge, for the protester.

Roger A. Klein, Esq., and Scott Arnold, Esq., Howrey & Simon, for EPE Technologies, Inc., Marc F. Efron, Esq., and Glenn D. Grant, Esq., Crowell & Moring, for Exide Electronics Corporation, interested parties.

John R. McCaw, Esq., Federal Aviation Administration, Carl J. Peckinpaugh, Esq., and Donald E. Weight, Esq., Department of the Air Force, for the agencies.

C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Liebert Corporation protests the actions of the Air Force and the Federal Aviation Administration (FAA) in attempting to procure uninterruptible power systems (UPS) for the FAA through the issuance of delivery orders under the Air Force's requirements contract (No. F04606-88-D-0067) with Exide Electronics Corporation. The protester contends that the FAA is improperly procuring its requirements under an interagency agreement with the Air Force under the Economy Act, 31 U.S.C. § 1535 (1988). The protester also argues that the Air Force will violate the Competition in Contracting Act (CICA) of 1984, 10 U.S.C. § 2301 *et seq.* (1988), by issuing orders beyond the scope of the Exide contract.

We sustain the protest because implementation of the interagency agreement will result in issuance of delivery orders for quantities far in excess of the maximum quantities specified in Exide's contract, in contravention of the competition requirements of CICA, 10 U.S.C. § 2304(a)(1) and 41 U.S.C. § 253(a)(1) (1988).

I. Background

A. Contract Award

On May 5, 1987, the Air Force issued request for proposals (RFP) No. F04606-87-R-0313 for a firm, fixed-price requirements contract for supply of UPS, including certain reimbursable services and materials, used to protect electronic equipment from power anomalies both by controlling the flow of current from commercial utilities and by providing power in the event that service is interrupted. The RFP, as amended, provided for award of a multiyear requirements contract to the low, technically acceptable offeror for 74 different contract line item numbers (CLINs) covering UPS of various configurations and ranging from 1 kilovolt-ampere (KVA) through 750 KVA, as well as an additional 17 CLINs of optional equipment, services, spares, and data associated with installation and maintenance of the UPS.

Each of the 74 UPS CLINs contained 6 sub-CLINs, one for each of 5 program year quantities and one for the total multiyear ("All Program Years") quantity. Each sub-CLIN contained a best estimated quantity (BEQ) for evaluation purposes and a maximum quantity; for example, CLIN 0046, for 750 KVA UPS, contained 5 sub-CLINs (CLINs 0046AA-0046AE), with a BEQ of 0, 0, 0, 1 and 0 and with maximum quantities ("MAX:") of 1, 1, 2, 4 and 8, for a 5-year BEQ of one UPS and a total "multiyear contract maximum quantity" of 16 (CLIN 0046AF). The five individual sub-CLINs for each program year also specifically contained a "quantity variation [of] 0 % OVER [and] 0 % UNDER." In addition to the total maximum quantities for each CLIN, the solicitation also contained the clause at Federal Acquisition Regulation (FAR) § 52.216-19, Delivery-Order Limitations, specifying the maximum and minimum quantities for each individual delivery order under the contract, stating as follows:

(b) *Maximum order.* The Contractor is not obligated to honor—

(1) Any order for a single item in excess of 415;

(2) Any order for a combination of items in excess of 500; or

(3) A series of orders from the same ordering office within 30 days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.

* * * * *

(d) Notwithstanding [paragraph] (b). . . the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within 30 days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. . . .

The agency found that Exide's best and final offer for a 5-year contract at an evaluated price of $26,734,671, including data and reimbursables, as well as certain optional hardware contained in CLIN 0075, was substantially below the evaluated price of $65,161,404 submitted by Emerson Electric Company, Liebert's parent corporation. Accordingly, the agency awarded a contract to Exide on May 6, 1988, at a value of $621,831,472 (since reduced to $610,567,865), based on the maximum quantity for the 74 UPS CLINs: $448,244,172 in hardware

(CLINs 0001-0075); $173,231,700 for reimbursable material, labor and travel (CLINs 0076-0087 and 0091-0092); and $355,600 in data (CLINs 0088-0090).

B. Interagency Agreement

Subsequently, the FAA received a handbook from Exide, which described the contractor's requirements contract and provided guidance to agencies interested in using the Air Force contract to satisfy their own requirements. The FAA at that time had developed a critical need for electrical power equipment for Air Route Traffic Control Centers (ARTCCs); its examination of the Air Force contract, in consultation with that agency's program office, satisfied the FAA that equipment available under the Air Force contract with Exide would meet the FAA's needs.

On November 29, 1989, the FAA entered into a reimbursable interagency agreement pursuant to the Economy Act, by which the Air Force would supply the equipment. Under the terms of the agreement, the Air Force essentially was to provide contract management services to the FAA and use its existing requirements contract with Exide to acquire the equipment, with the FAA providing funds in an estimated amount of $82 million for the period from December 1989 through fiscal year 1993.

The agreement stated that the agencies would order a site survey to develop generic drawings and specifications and to determine the precise configuration needed to meet the FAA's needs. The contractor was then to prepare a test system, which would also serve as the final system for delivery, with the Air Force providing supply support as needed to the FAA and with equipment deliveries starting in approximately April 1991.

In July 1990, the agencies modified the interagency agreement to assign the Air Force responsibility to modify existing ARTCC equipment to assure compatibility with the new equipment being furnished. In September, the agencies again modified the agreement, to assign the Air Force the responsibility for modifying 86 existing Cooper Industries 550 kw engine generators to make them compatible with the new systems. The two modifications increased the estimated amount of the interagency agreement to $95 million.

On January 26, 1990, in furtherance of the interagency agreement, the Air Force issued delivery order No. 135 under CLIN 0076 of the Exide contract, in the amount of $75,000 for a site installation survey. On April 25, the agency modified this delivery order to increase its value to $750,000 and to include material and travel and the following work to be performed under the site survey:

> Engineering support in defining interface for the [FAA] Boston site UPS, switching, load-banks, and back-up power. . . . This effort will result in definition of a 'generic' site/SUPS interface for all 23 sites. The government recognizes some site-specific adjustments will be required . . . however, this effort is intended to cover all engineering necessary to establish a standardized site layout. . . . This

contract does not authorize procurement of any equipment. The equipment must be ordered on a site-by-site basis.[1]

By letter of April 24, 1990, having learned that the FAA and the Air Force had entered into an interagency agreement, the protester requested a copy of that agreement and other information under the Freedom of Information Act (FOIA). On April 30, after meeting with the contracting officer, the protester submitted a written request for an explanation of how the Air Force planned to use the Exide contract to meet the FAA's requirements, expressing the protester's belief that the specific system configuration required by the FAA (3000 KVA parallel redundant system) was not available under that contract. The Air Force responded by letter of May 29, declining to provide any information, but stating that "all applicable procurement laws and regulations have been followed."

On June 18, 1990, the protester received a copy of the interagency agreement pursuant to FOIA; the agency advised the protester that it would be providing additional information. On July 18, the protester learned from the contracting officer that Liebert would not in fact be receiving any additional information. The protester subsequently met with the Air Force Competition Advocate, and on August 8 the Competition Advocate directed Headquarters, Air Force Logistics Command, to investigate the propriety of using the Exide contract to meet the FAA's requirements. During this time, the protester continued its efforts to obtain additional information.

On October 4, pursuant to another FOIA request, the agency supplied the protester with a complete copy of delivery order No. 135, as modified, which the protester recognized to be in implementation of the interagency agreement. On October 19, as Liebert states it was about to file a protest with our Office, the Competition Advocate notified the protester that based on information from Liebert, the agency had changed its plans and would not in fact purchase any of the FAA's requirements under the Exide contract.[2] After further discussing the matter with the ordering activity, however, the Competition Advocate notified Liebert on November 21 that the agency had changed its plans again and would in fact order the FAA's requirements from Exide. Liebert filed this protest on December 6. At a bid protest conference held on January 29 in connection with its initial protest, Liebert learned that the FAA intended to meet its requirements by ordering 750 KVA UPS under CLIN 0046 of Exide's contract. Liebert filed a supplemental protest 2 days later.

[1] This delivery order, as modified, indicated for the first time that the site survey was being ordered to meet FAA requirements. The original delivery order was for a site survey without reference to FAA or any particular site.
[2] The record shows that Headquarters, Air Force Logistics Command, on behalf of the Competition Advocate, directed the purchasing office to discontinue the placement of orders for FAA requirements under the Exide contract.

II. Timeliness

The agencies and the awardee argue that the protest is untimely because the protester waited more than 10 days after learning its basis of protest, which in their view was, at the latest, ascertainable from a copy of the interagency agreement that the protester received in June or from the additional information received in October, 2 months before Liebert filed its protest in December. We disagree.

From the time in April when the protester first learned of the agency's plans to order FAA requirements under the Exide contract, the protester made a good faith effort to secure additional information about the interagency agreement and its implementation, two issues that we find to be interrelated. While the protester knew its basis of protest on October 4, upon its receipt of delivery order No. 135, we do not find it unreasonable for Liebert not to have filed a protest within 10 days of that date in view of the Competition Advocate's assurances on October 19 (the 10th working day after October 4) that the agency would not order the FAA items under the Exide contract. It is clear that as late as November 21 the protester reasonably believed that the Air Force was addressing Liebert's concerns. Liebert had no reason to file a protest until the agency announced its intention to order its needs under Exide's contract, notwithstanding Liebert's objections. Liebert did so within 10 days of receiving this notice.[3]

III. FAA's Use Of The Economy Act

The Economy Act provides as follows:

> The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if—
>
> (1) amounts are available;
>
> (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
>
> (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and
>
> (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise. 31 U.S.C. § 1535(a).

CICA generally requires that in conducting a procurement for property or services, the head of an agency obtain full and open competition through the use of competitive procedures, but exempts procurement procedures otherwise expressly authorized by statute. 41 U.S.C. § 253(a). The Economy Act provides for such

[3] The use of the Economy Act in relation to the requirements of CICA is an issue of first impression for our Office. Accordingly, we would consider that issue, regardless of its timeliness, under the significant issue exception to our timeliness rules at 4 C.F.R. § 21.2(b) (1991).

a procedure. *National Gateway Telecom, Inc. v. Aldridge,* 701 F. Supp. 1104, 1113 (D.N.J. 1988) (interpreting the identical provision in 10 U.S.C. § 2304(a)(1)).[4]

The protester argues that under the Economy Act, the FAA could not reasonably determine that its requirements could not "be provided by contract as conveniently or cheaply by a commercial enterprise." In support of this contention, the protester has submitted copies of recent Federal Supply Schedule contracts to demonstrate that prices for UPS are far more competitive than at the time of the original Air Force competition.[5] At the time of the original competition, 18 months prior to the execution of the interagency agreement, Exide's prices were less than half of the prices submitted by its competitors, including Liebert's parent corporation, Emerson Electric Company. In making its determination, the FAA considered the results of this competition and relied upon engineering estimates provided by its technical personnel. While prices may now be more competitive, nothing in this record establishes that the agency was unreasonable in concluding that the Exide contract was likely to be cheaper and more convenient than a separate agreement.

The protester also contends that the FAA cannot properly have its needs satisfied under the Exide contract because that contract may only be used for Air Force requirements. We disagree. The FAA and the Air Force are both agencies of the United States government, and the Congress has provided for agencies to support each other when appropriate under the Economy Act, 31 U.S.C. § 1535(a)(3), which specifically allows the agency that fills another agency's order to "get by contract the ordered goods or services." The Economy Act therefore allows an agency to use its own contracts to satisfy another agency's needs. Competitors for a requirements contract, such as the one here, are on constructive notice of the Economy Act and its implementing regulations, FAR Subpart 17.5, since these regulations are published in the *Federal Register* and the *Code of Federal Regulations. See East Dayton Meat & Sausage Co.—Recon.,* B-240949.2, Dec. 4, 1990, 90-2 CPD ¶ 457. Competitors therefore knew or should have known of the possibility that the Air Force might serve as an agent for some other agency in issuing delivery orders under the contract. The protester's argument would undermine this provision of the Economy Act by precluding an agency from ordering under any other agency's requirements contract—we find no merit to the protester's position.

[4] CICA, 41 U.S.C. § 253(f)(5)(B), precludes an agency from procuring property or services from another agency under the Economy Act, however, unless that agency complies fully with CICA in its procurement of such property or services.

[5] The protester also argues that the FAA expressed a concern with avoiding "the risks associated with a separate procurement," which the protester considers to be an improper basis for entering into an interagency agreement. So long as the agency makes the appropriate determination supported by reasonable findings of fact, there is nothing wrong with the agency's consideration of administrative convenience or procurement risks. *See generally National Gateway Telecom, Inc. v. Aldridge,* 701 F. Supp. at 1111.

IV. The Exide Contract And FAA Requirements

A. Differences Between Contract CLINs and FAA's Requirements

The protester argues that the Air Force cannot properly accomplish the tasks assigned to it under the interagency agreement by issuing orders against the Exide contract because those tasks exceed the scope of the Exide contract.[6] The protester asserts that the FAA's requirement for redundant UPS differs significantly from the nonredundant UPS under contract, not only in the bypass mechanism but also in the logic boards, front display panels and circuit breaker configuration. In addition, having reviewed drawings of the FAA's projected UPS system, the protester contends that much of the necessary ancillary equipment—a battery monitor, diesel control switchgear, UPS input switchgear, UPS output switchgear, noncritical switchgear, switchgear and UPS monitoring and display and power/control filters—are nowhere among the items available under the Exide contract, although they represent a substantial portion of the $155 million project cost, of which the UPS and the equipment modifications represent a smaller portion. The protester also argues that the portion of delivery order No. 135 ordering a "generic site survey," including the services of a customer support engineer, is beyond the scope of the contract, specifically CLIN 0076 for site installation support.

In determining whether a modification is beyond the scope of the contract, we look to whether the contract as modified is materially different from the contract for which the competition was held. *Clean Giant, Inc.*, B-229885, Mar. 17, 1988, 88-1 CPD ¶ 281. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes during the course of the contract that in fact occurred. *CAD Language Sys., Inc.*, B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342.

While the precise requirements of the FAA were not known at the time of award, the contract provided for a variety of configurations on the understanding that the individual delivery orders would spell out the precise configuration and assemblage of equipment needed for each order. For the reasons stated below, we do not find that plans to assemble redundant systems from nonredundant ones are beyond the scope of the Exide contract.

Regarding the use of nonredundant modules to create a parallel redundant UPS, Attachment 10 to the contract lists four different configurations for UPS, two nonredundant configurations (single- and three-phase nonredundant, CLINs 0002-0046), a cold standby redundant configuration (CLINs 0047-0058) and a parallel redundant configuration (CLINs 0059-0074). In the UPS, current passes through a battery, which serves to remove the chance of spikes and surges and insures uninterrupted power in the event of utility failure. In nonredundant

[6] The protester objected to agency plans to modify ARTCC equipment and Cooper Industries generators through the Exide contract. The FAA now advises our Office that it will withdraw these items from the interagency agreement and procure them separately. Under such circumstances, the issue of whether the Exide contract could have been modified to accomplish such work is academic.

systems, a single module provides power, with a bypass switch to transfer the load back to the local utility source in the event of failure of the UPS. In cold, stand-by redundant systems, one module provides power with a second module installed to pick up the load if the first fails. In parallel redundant systems, such as the FAA requires, four 750-KVA modules are combined into a 3,000 KVA system, with a fifth module installed to pick up the load if one of the other four fails or requires service; the individual modules contain no bypass switch but depend upon a stand-alone bypass control cabinet to insure against UPS failure.

We find nothing in the contract to preclude the agency from purchasing nonredundant 750 KVA systems under CLIN 0046 as modules for combination with other ancillary equipment under contract to satisfy the FAA's requirement for 3,000 KVA parallel redundant systems. The contract specifically provides for delivery of single module, nonredundant systems with "all the provisions for interface connections to accessory items to insure easy and economical expansion . . . to a fully redundant UPS," as well as for expansion of the UPS. The Air Force maintains that the contract was designed to allow flexibility in the configurations and designs to be procured, and we agree that inasmuch as the agency may buy a nonredundant module and later add modules to convert that system into a redundant one, it is reasonable to interpret the contract to allow the agency to assemble from the start a redundant system of nonredundant components available under the contract. The chief difference identified by the protester between redundant and nonredundant configurations is in the bypass mechanism and the need for a bypass control cabinet with the latter. In this respect, the record shows that when constructing redundant configurations in the past, the Air Force has not purchased bypass control cabinets under the Exide contract but has purchased the cabinets under separate contract, and we have no basis for assuming that it will take a different approach in the instant case.

With regard to the ancillary equipment—battery monitor, diesel control switchgear, UPS input switchgear, UPS output switchgear, noncritical switchgear, switchgear and UPS monitoring and display and power/control filters—the agencies point out that CLIN 0077 provides for "reimbursable contractor furnished material that may be required in the contractor's performance of each task (under CLIN 0076) in direct support of Item 0001-0074." The agencies argue that CLIN 0077 was designed to insure that the delivered systems would meet the requirements of individual orders, at a minimum of administrative inconvenience but with maximum flexibility in creating configurations responsive to user needs.

In our view, CLIN 0077 clearly permits the furnishing of incidental material to support UPS being provided under the specific CLINS. The record shows that the ancillary equipment being ordered is necessary for the functioning of the systems being delivered and we have no basis to object to the agencies' plans to buy needed ancillary items to incorporate into each system. With regard to the generic site survey, the record shows that the agency modified the contract in

May 1989 to add the services of senior customer support engineers to conduct surveys under CLIN 0076. We see nothing improper, in view of the FAA's requirements, in tasking Exide to run one generic site survey for 23 sites in lieu of 23 separate surveys.

B. Maximum Quantities

The protester argues that FAA's requirements cannot be satisfied under the Exide contract because of the maximum quantity provisions in the contract. The protester points out that the FAA's requirements for 92–115 750-KVA UPS (four to five nonredundant modules at each of 23 sites) far exceeds the maximum quantity of 16 allowed.

The FAA argues that "[t]here is no limit to the quantity the government may order [for] any single CLIN," provided the orders are timely placed and the aggregate dollar value does not exceed $621 million. The FAA contends that FAR § 52.216–19, Delivery-Order Limitations, allows the agency to order quantities in excess of the maximum order limitations, specifically making the contractor responsible for meeting such orders unless he takes positive action to reject the order within a certain number of days (30 under the Exide contract). The FAA argues that the Exide contract is structured to allow ordering "a nearly infinite range of UPS equipment types and configurations" and that the additional value of UPS ordered under CLIN 0046, roughly $12 million, is *de minimis* in relation to the total contract value.

The FAA's argument overlooks the fact that this contract contains two different kinds of maximum quantity provisions. The Delivery-Order Limitations clause allows the government to place and the contractor to decline delivery orders exceeding the specified maximums and permits the government to explore the possibilities of securing lower prices for larger quantities exceeding the limitations. 49 Comp. Gen. 437 (1970). It imposed maximum order limitations per delivery order of 415 for a single item and 500 for a combination of items issued within 30 days. Wholly separate from this provision are individual maximum quantities set forth for each CLIN. These maximums clearly pertain to each line item over the life of the contract, and have nothing to do with what may be ordered under an individual delivery order. We note that the Air Force requirements were initially competed on the basis of stated maximum quantities for each CLIN, and the award price reflects these maximums. We therefore view the FAA's assertion that it can order an almost infinite quantity of any one line item so long as the total maximum dollar value of the contract is not exceeded as patently unreasonable.

An order in excess of the maximum quantity stated in the contract would be outside the scope of the contract. Such an order would result in a contract materially different from that for which the original competition was held and, absent a valid sole-source determination, would be subject to CICA requirements for competition. *See Neal R. Gross & Co., Inc.,* 69 Comp. Gen. 292 (1990), 90-1 CPD ¶ 212; *Clean Giant, Inc.,* B-229885, *supra.* We therefore sustain the

protest to the extent that the quantities to be ordered are in excess of the stated maximum quantities in the Exide contract.

V. Remedy

The FAA states that it is now 16 months into its interagency agreement with the Air Force, and that UPS systems are urgently needed for expanded Air Route Traffic Control Centers and for Terminal Radar Approach Control facilities. The FAA also states that restarting any acquisition at this late date would cause enormous schedule and cost impacts throughout the National Airspace System modernization program for various reasons, including an estimated 3 years to complete drafting an RFP for UPS systems, proposal evaluation, and source selection. The record supports the agency's position that the requirements are urgent and critical for the agency and for the public safety. The record shows, however, that the specifications for a UPS are complete and available and that the items are essentially off-the-shelf equipment. We therefore think that procuring the items competitively should not require an extensive period of time.

We therefore recommend that FAA comply with CICA requirements for full and open competition in obtaining the UPS by issuing a competitive RFP for equipment beyond the scope of Exide's contract. From our review of the record, it appears that the Air Force has already obtained 12 of the 16 750-KVA UPS available under the contract. One site is currently under preparation, but construction on the next site will not begin until the fall. While the balance of the requirements are being competitively procured, the FAA has an immediate requirement for five UPS at the site currently under construction, one more than the Exide contract makes available. Because of the criticality of the FAA's requirements, we see no objection to the use of Exide's contract to obtain this additional quantity necessary to avoid serious disruption to the National Airspace System, provided that the agency appropriately justifies such action. We also find the protester to be entitled to its cost of pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d).

The protest is sustained.

Appropriations/Financial Management

■ Relief
■■ Account deficiency

When an accountable officer cashes a check outside the scope of his statutory authority under 31 U.S.C. § 3342, the payment of the check is an erroneous payment. If the check is uncollectible, under 31 U.S.C. § 3527(c), only GAO may grant relief for the deficiency in the accountable officer's account.

420

■ Relief
■■ Illegal/improper payments
■■■ Agency request
■■■■ Submission time periods

An accountable officer's account, including a deficiency from an erroneous payment made when a check was improperly cashed, is settled by operation of law upon the passing of the 3-year statute of limitations in 31 U.S.C. § 3526. The agency did not submit the questioned item to GAO until more than three years after both (1) the officer signed over responsibility for the account and (2) the loss was discovered.

420

Appropriation Availability
■ Purpose availability
■■ Debt conversion
■■■ Foreign currencies

Unless otherwise authorized, the United States Information Agency (USIA) may not use appropriated funds to engage in "debt for equity" swaps to fund educational and cultural exchange activities. The authority contained in the Mutual Educational and Cultural Exchange Act, 22 U.S.C. § 2451, to finance educational and cultural exchange activities by "grant, contract, or otherwise" does not include the authority to purchase discounted foreign debt from commercial lenders.

413

■ Purpose availability
■■ Specific purpose restrictions
■■■ Educational programs

Unless otherwise authorized, the United States Information Agency (USIA) may not use appropriated funds to engage in "debt for equity" swaps to fund educational and cultural exchange activities. The authority contained in the Mutual Educational and Cultural Exchange Act, 22 U.S.C. § 2451, to finance educational and cultural exchange activities by "grant, contract, or otherwise" does not include the authority to purchase discounted foreign debt from commercial lenders.

413

■ Time availability
■■ Fiscal-year appropriation
■■■ Substitute checks

An agency may, in issuing replacement checks for pre-effective date checks canceled under the provisions of Public Law 100-86, charge the original appropriation that supported the obligation to the extent funds remain available.

416

■ Time availability
■■ Time restrictions
■■■ Fiscal-year appropriation

Availability of funds is subject to the new account closing procedures enacted in the National Defense Authorization Act, Fiscal Year 1991. Pub. L. No. 101-510.

416

Budget Process
■ Funding
■■ Gifts/donations
■■■ Educational programs

USIA may accept donations of foreign debt for the purpose of funding international educational and cultural activities. Under 22 U.S.C. § 2697, USIA may accept conditional gifts. Congress specifically provided that USIA may hold, invest, reinvest, and use the principal and income from any such conditional gift in accordance with the conditions of the gift to carry out authorized functions.

413

Civilian Personnel

Compensation
■ Compensation restrictions
■■ Rates
■■■ Amount determination

Under 17 U.S.C. § 802(a) (1988), the Copyright Royalty Tribunal Commissioners are entitled to be compensated at the highest rate now or hereafter prescribed for grade GS-18. Since 5 U.S.C. § 5308 (1988) limits the highest rate prescribed (payable) for grade GS-18 to the rate of basic pay for level V of the Executive Schedule, the Commissioners may not be paid at a rate in excess of that rate, notwithstanding the fact that chapter 53 of title 5, United States Code, which includes 5 U.S.C. § 5308 (1988), may not otherwise be applicable to Copyright Royalty Tribunal positions. *See U.S. Sentencing Commission*, 66 Comp. Gen. 650 (1987), and *Farm Credit Administration*, 56 Comp. Gen. 375 (1977).

404

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

Under the Voluntary Leave Transfer Program, donated leave may not be transferred to the recipient or used after the medical emergency terminates and any unused transferred leave must be restored to the leave donors. Therefore, the retroactive substitution of a recipient's unused donated leave for the recipient's leave without pay after the death of the recipient was improper, and the payment of compensation resulting from the retroactive substitution was erroneous. The erroneous payment, however, may be subject to waiver.

432

Relocation
■ Mobile homes
■■ Shipment
■■■ Actual expenses
■■■■ Reimbursement

A transferred employee moved her mobile home to her new duty station and claims entitlement to expenses incurred to prepare the mobile home for transport and to set it up at the new duty station. Chapter 2, part 7 of the Federal Travel Regulations (FTR), authorizes reimbursement of costs directly related to actual shipment of a mobile home. Expenses necessarily incurred to relocate it before and after shipment are classified as miscellaneous expenses and reimbursable only through payment of a miscellaneous expense allowance under chapter 2, part 3 of the FTR. *John Schilling*, 66 Comp. Gen. 480 (1987). Since she has been paid the maximum amount allowable under FTR, para. 2-3.3b, her claim is denied.

429

■ Travel expenses
■■ Reimbursement
■■■ Awards/honoraria

Under the Office of Personnel Management's guidelines in FPM Letter 451-7, July 25, 1990, agency heads have broad discretionary authority to establish allowable per diem amounts, points of travel origin and return, and the number of individuals authorized to travel in connection with award ceremonies under 5 U.S.C. § 4503 (1988).

440

■ Travel expenses
■■ Reimbursement
■■■ Spouses

Two employees were authorized temporary duty travel to receive awards at a Departmental Honor Awards Ceremony and to be accompanied by their spouses. Although the preplanned ceremonies were scheduled to end the morning of June 14, 1990, the official authorizing the travel had discretion to allow return travel on June 15. Accordingly, the employees may be allowed lodging and full per diem for June 14 and meals and incidental expenses for June 15.

440

Military Personnel

Leaves Of Absence
■ Involuntary leave
■■ Eligibility
■■■ Allowances

A member of the military services on involuntary leave pending appellate review of a court-martial sentence to a dishonorable or bad conduct discharge or dismissal from the Service, to the extent entitled to pay and allowances, is entitled to the allowances appropriate for his duty station.

435

Pay
■ Retirement pay
■■ Amount determination
■■■ Computation
■■■■ Effective dates

Marine Corps board of inquiry recommended to the Secretary that a major be retired at the rank of captain and that the member had not served satisfactorily as a major. Even though the major first became eligible for voluntary retirement before the board's recommendation was approved by the Secretary, his retired pay should be calculated on the grade of captain, since it is evident that the Secretary would not have made the statutorily required determination of satisfactory service as a major on the eligibility date.

398

■ Retirement pay
■■ Reduction
■■■ Computation

Marine Corps board of inquiry recommended to the Secretary that a major be retired at the rank of captain and that the member had not served satisfactorily as a major. Even though the major first became eligible for voluntary retirement before the board's recommendation was approved by the Secretary, his retired pay should be calculated on the grade of captain, since it is evident that the Secretary would not have made the statutorily required determination of satisfactory service as a major on the eligibility date.

398

Relocation
■ Cost-of-living allowances
■■ Eligibility

A member of the military services ordered to a designated place outside the continental United States, Alaska, and Hawaii to await final action by a Physical Evaluation Board is entitled to the overseas housing allowance (OHA) and cost of living allowance (COLA) appropriate for the designated place.

435

Procurement

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

Second request for reconsideration of dismissal of protest as academic due to agency's corrective action is denied where protester fails to show that prior decision contained errors of fact or law, and information which protester alleged had not been previously considered was factually incorrect.

394

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

Where protester knew basis of protest, but protester reasonably understood from competition advocate that agency would not act contrary to the protester's interests while the competition advocate investigated the matter, protester reasonably delayed filing protest until it received notice to the contrary.

448

Competitive Negotiation
■ Competitive advantage
■■ Incumbent contractors

Agency's failure to equalize competition to compensate for some potential offerors' legal acquisition of incumbent contractor's contract information is not objectionable where the information's availability was not the result of improper or unfair action and pertinent information possessed by the agency was not necessary for offerors to compete intelligently and on a relatively equal basis.

424

■ Competitive advantage
■■ Non-prejudicial allegation

Agency's failure to equalize competition to compensate for some potential offerors' legal acquisition of incumbent contractor's contract information is not objectionable where the information's availability was not the result of improper or unfair action and pertinent information possessed by the agency was not necessary for offerors to compete intelligently and on a relatively equal basis.

424

■ Contingent fees

Incumbent contractor's offer to sell access to its employees and its contract information to potential offerors who agree to buy inventory and equipment at pre-agreed prices if they win the contract is not a prohibited contingent fee arrangement within the meaning of 10 U.S.C. § 2306(b) (1988) because the services were not "to solicit or obtain the contract" since they did not involve any dealings with government officials.

424

■ Requests for proposals
■■ Competition rights
■■■ Contractors
■■■■ Exclusion

Protest that offeror had insufficient time to prepare revised proposal because of its late receipt of amendments is denied where the protester had the last-issued amendment 5 working days prior to the closing date; 5 days appears to be a reasonable time period to address the particular changes made by the amendments; adequate competition was achieved through the receipt of eight proposals; and there is no showing that the agency deliberately attempted to exclude protester.

424

Contract Management
■ Contract modification
■■ Cardinal change doctrine
■■■ Effects

Proposed issuance of delivery orders for quantity of uninterruptible power systems in excess of stated maximum quantity under the contract would be outside the scope of that contract, would result in a contract materially different from that for which the competition was held, and absent a valid sole-source determination, would be subject to Competition in Contracting Act requirements for competition.

449

■ Contract modification
■■ Cardinal change doctrine
■■■ GAO review

Where contract provided for purchase of nonredundant uninterruptible power systems and for expansion of those systems to redundant configuration, agency's purchase of redundant systems made from nonredundant systems and ancillary items available under the contract is within scope of contract.

448

Sealed Bidding
■ Invitations for bids
■■ Terms
■■■ Defects

Disparity in bid prices received does not by itself establish the existence of a solicitation defect.

407

■ Invitations for bids

■■ Terms

■■■ Risks

Protest that solicitation for military family housing maintenance subjects bidders to unrea financial risk because it requires the submission of a lump-sum price for much of the work, than breaking out each element of work separately for payment on a unit price basis, is where the solicitation limited the amount of work which the contractor could be required form under the lump-sum portion of the contract, and contained sufficient information for to compete intelligently and on a relatively equal basis.

Socio-Economic Policies

■ Small business set-asides

■■ Use

■■■ Administrative discretion

Protest that agency improperly determined under Federal Acquisition Regulation § 19.502 offers would be received from two or more small businesses offering "the products of differen business concerns," and that total small business set-aside therefore was improper, is den though all small business offerors were expected to offer systems with the same major com agency had reasonable expectation that small business offerors each would offer a different uct" by virtue of their assembly of component parts into an integrated system.

Special Procurement Methods/Categories

■ Requirements contracts

■■ Additional work/quantities

■■■ Interagency agreements

Under the Economy Act, 31 U.S.C. § 1535 (1988), where the ordering agency reasonably dete that amounts are available, that the receiving activity is able to provide or get by contract dered goods or services, that ordered goods or services cannot be provided by contract as conv ly or cheaply by a commercial enterprise, and that placement of the order is in the best inte the government, an agency may purchase its requirements under another agency's contract.

Specifications
■ Minimum needs standards
■■ Competitive restrictions
■■■ Design specifications
■■■■ Overstatement

Protest is sustained on basis that solicitation requirement for level 3 drawings, which include detailed data on manufacturing processes, exceeded agency's actual needs, where record shows that agency's need for drawings was to support emergency repair and overhaul of the valves, for which full production data is not needed.

399