United States General Accounting Office

GAO

Office of General Counsel

August 1991

Decisions of the Comptroller General of the United States

Volume 70

Pages 661-698

PCN 45300710000

For sale by the Superintendent of Documents,
U.S. Government Printing Office, Washington, D.C. 20402

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

United States Code

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Published Decisions of the Comptrollers General

Decisions of the Court

that one of Mr. Peeples' sureties was a government employee. We recommended that the agency make award to Mr. Peeples, if otherwise appropriate, and found that the protester was entitled to the costs of filing and pursuing his protest. Performance of Hunt Construction's contract was not suspended pending our decision in this matter, and the contract was nearly complete by the date of our decision. Accordingly, the Navy did not award a contract to Mr. Peeples.

Shortly after our decision was issued, Mr. Peeples submitted his claim to the Navy for $16,000. This amount represents 160 hours of Mr. Peeples' time at $100 per hour. No further explanation or documentation was submitted to the agency in support of the claim. The Navy requested that Mr. Peeples provide documentation supporting his claim, including wage rate and overhead information.

Mr. Peeples subsequently provided to the Navy a breakdown of the time spent pursuing the protest; this showed that Mr. Peeples had spent 200 hours pursuing the protest (including 32 hours for travel to Washington, D.C., and Columbia, South Carolina) and that Mr. Peeples' claim was based upon a $100 per hour rate, which Mr. Peeples states is the "going rate in this area."

The Navy again requested that Mr. Peeples provide wage rate and overhead information to support his claim. Mr. Peeples provided no further information and requested payment of $20,303.77, which consists of the $16,000 originally claimed with interest.

On May 14, 1991, Mr. Peeples requested that our Office resolve his claim pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1991). Specifically, Mr. Peeples requests reimbursement of $16,000 plus interest of 18 percent per year for his protest costs and $3,938.40 for his bid preparation costs.[1]

A protester seeking to recover the costs of pursuing a protest or preparing a proposal or bid must submit sufficient evidence to support the monetary claim. *Data Based Decisions, Inc.—Claim for Costs,* 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538. Although we recognize that the requirement for documentation may sometimes entail certain practical difficulties, we do not consider it unreasonable to require a protester to document in some detail the amount and purposes of its employees' claimed efforts and to establish that the claimed hourly rates reflect the employees' actual rates of compensation plus reasonable overhead and fringe benefits. *W.S. Spotswood & Sons, Inc.—Claim for Costs,* 69 Comp. Gen. 622 (1990), 90-2 CPD ¶ 50.

The documentation submitted to the Navy and to our Office does not demonstrate that Mr. Peeples' claimed hourly rate reflects actual rates of compensa-

[1] In his response to the agency's statements concerning Mr. Peeples' request that we determine the amount of costs to which the protester is entitled, Mr. Peeples, for the first time, has requested reimbursement of $797.80 for his automobile mileage, lodging, and meals expenses. There is no indication that these costs were ever submitted to the agency for its review, even though his initial claim was filed with the agency in March of 1989, and we decline to review them *de novo,* where, as here, the protester's actions deprived the agency of a meaningful opportunity to review the claimed costs. *See Patio Pools of Sierra Vista, Inc.—Claim for Costs,* 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374.

tion plus reasonable overhead and fringe benefits.[2] Rather, the record indicates that the hourly rate represents a "market rate," which presumably includes profit as an element of the rate.

A protester may not recover profit on its own employees' time in filing and pursuing protests or preparing bids or proposals, and therefore claimed rates must be based upon actual rates of compensation, plus reasonable overhead and fringe benefits, and not market rates. *See W.S. Spotswood & Sons, Inc.—Claim for Costs,* 69 Comp. Gen. 622, *supra.* Although Mr. Peeples has submitted evidence that $100 per hour is his market rate, he has not provided any evidence to demonstrate that his claimed hourly rates are based upon actual rates of compensation plus overhead and fringe benefits and that these rates do not include profit.[3] Thus, Mr. Peeples' claimed protest costs, based upon market rates, are denied. *Id.*

Mr. Peeples also requests reimbursement of $3,938.40 for his costs of bid preparation, which Mr. Peeples calculated by multiplying his $78,768 bid price by a "standard five percent bid preparation" factor. The agency objects to the reimbursement of these costs on the basis that we did not award Mr. Peeples bid preparation costs in our decision and that Mr. Peeples failed to document that this amount reflects Mr. Peeples' actual out-of-pocket expenses.

We agree that Mr. Peeples' claim for bid preparation costs should not be allowed. We did not award the costs of bid preparation to Mr. Peeples in the prior decision, and his claim for these costs more than 2 years after the date of the decision and after the date when Mr. Peeples learned that he would not receive award in accordance with our recommendation is untimely. *Data Based Decisions—Claim for Costs,* 69 Comp. Gen. 122, *supra.* In any event, a protester is only entitled to recover his actual incurred and reasonable costs of bid or proposal preparation. *Hydro Research Science, Inc.—Claim for Costs,* 68 Comp. Gen. 497 (1989), 89-1 CPD ¶ 572. The use of a percentage factor to calculate a protester's bid or proposal preparation costs is not appropriate because the costs claimed do not reflect the actual expenses incurred by the protester in preparing the bid or proposal.

Finally, Mr. Peeples' claim for interest on his claim for protest costs is not reimbursable since payment of interest on such claims is not authorized by any statute. *Ultraviolet Purification Systems, Inc.—Claim for Bid Protest Costs,* B-226941.3, *supra.*

The claim for costs is denied.

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[2] The record also does not demonstrate the reasonableness of the amount of Mr. Peeples' claimed hours in pursuing the protest. We need not address this matter, because Peeples failed to show that his claimed hourly rates reflect actual rates of compensation plus reasonable overhead and fringe benefits, and his claim is denied on this basis.

[3] For example, Mr. Peeples could have submitted a copy of his federal income tax return. *See Ultraviolet Purification Sys., Inc.—Claim for Costs,* B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376.

B-242019, August 5, 1991

Appropriations/Financial Management

Claims Against Government

■ **Unauthorized contracts**

■ ■ **Quantum meruit/valebant doctrine**

Procurement

Payment/Discharge

■ **Unauthorized contracts**

■ ■ **Quantum meruit/valebant doctrine**

Notwithstanding agency failure to comply with procurement regulations in issuing a delivery order for vehicle repairs on a noncompetitive basis, the contractor who performed the repairs may be paid in accordance with the terms of the order.

Appropriations/Financial Management

Claims Against Government

■ **Unauthorized contracts**

■ ■ **Quantum meruit/valebant doctrine**

Procurement

Payment/Discharge

■ **Unauthorized contracts**

■ ■ **Quantum meruit/valebant doctrine**

A claim for repair work ordered by an agency official whose contract warrant had expired may be paid on a *quantum meruit* basis since the government received and accepted the benefit of the work, the claimant acted in good faith, and the amount claimed represents reasonable value of the benefits received.

Appropriations/Financial Management

Claims Against Government

■ **Interest**

Because interest is generally not recoverable against the United States in the absence of express authorization by contract or statute, claimant who recovers from the government under the equitable theory of *quantum meruit* is not entitled to interest.

Matter of: Maintenance Service & Sales Corporation

Maintenance Service & Sales Corporation has filed a claim for $255,944, plus interest, for repair work performed for the Army and Air Force National Guard, Lawrenceville, New Jersey. The claim is based on repairs to government-owned vehicles under three delivery orders issued by a contracting officer who failed to follow required procurement procedures and whose contracting authority had expired prior to issuing two of the orders. We conclude that payment may be made under the first order, which was entered into by an authorized contracting official, in accordance with its terms. Interest may be recovered on the amount payable. Maintenance's claim under the two subsequent orders

may be paid under the equitable principle of *quantum meruit.* Interest is not recoverable under this principle.

The record indicates that the Guard issued delivery orders Nos. DAHA 28-88-C-0028, DAHA 28-88-C-0033, and DAHA 28-89-F-0068 to Maintenance in July, September, and October 1988, respectively. A procurement management review in November 1989, however, revealed several improper aspects to these procurements. First, the awarding official issued delivery order Nos. -0033 and -0068 after his contracting warrant had expired in August 1988. Second, he issued delivery order No. DAHA 0068 under a fictitious General Services Administration (GSA) Federal Supply Schedule number. All three orders were issued to Maintenance without competition. Finally, the three orders were funded with annual appropriations, but the work was not completed until after the expiration date of those appropriations. The Guard suggests that this may be inconsistent with section 37.106 of the Federal Acquisition Regulation (FAR), which states that the terms of service contracts funded by annual appropriations shall not extend beyond the end of the fiscal year.

After discovering these defects, the Guard informed Maintenance that because the contracting officer had acted improperly, further repairs would be unauthorized. The Guard instructed Maintenance to complete all work in process and submit invoices, the payment of which is the subject of the claim here.

The Guard determined that all three delivery orders were unauthorized commitments, which had to be ratified before the contractor could be paid. Although the record indicates that the Guard intended to have the vehicles repaired and that the price for the repairs is fair and reasonable, the Guard declined to ratify the unauthorized commitments under FAR section 1.602-3(c)(3). The Guard concluded that ratification was not permissible because the contracting officer issued the delivery orders in violation of the Competition in Contracting Act.

We conclude that ratification of delivery order No. -0028 is not required because when the order was issued in July 1988, the awarding official still had authority to bind the government. The issue with respect to this order, therefore, is not the authority of the awarding official, but rather the effect of his failure to obtain competition prior to issuing the order.

A contract should not be treated as void, even if improperly awarded, unless the illegality of the award is plain or palpable. *See John Reiner & Co. v. United States,* 325 F.2d 438, 440 (Ct. Cl. 1963), *cert. denied,* 377 U.S. 931 (1964); *Memorex Corp.,* B-213430.2, Oct. 23, 1984, 84-2 CPD ¶ 446. An award is plainly or palpably illegal if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor, or if the contractor was on direct notice that the procedures followed were unlawful. 52 Comp. Gen. 215, 218-219 (1972). Here, there is no indication in the record that the impropriety was due to some action or statement by the contractor or that the contractor was on notice that the contracting officer failed to obtain competition. Under these circumstances, we are unable to conclude that the award of delivery order

No. 0028 was plainly or palpably illegal and therefore void. Consequently, the contractor may recover under the terms of that contract. Interest on the amount due may be recovered as provided for under the Prompt Payment Act, 31 U.S.C. §§ 3901-3906 (1988).

Regarding the two delivery orders issued by the contracting officer after his warrant expired, a different theory in support of payment is required. In general, the government is not bound by the actions of unauthorized officials. Thus, where the agency declines to ratify the unauthorized action, a binding contract does not arise. *McGraw-Hill Information Systems Co.*, B-210808, May 24, 1984. This Office may authorize reimbursement to a firm that performed work for the government without a valid written contract on a *quantum meruit* basis. 64 Comp. Gen. 727, 728 (1985). Under the doctrine of *quantum meruit*, the government pays the reasonable value of services it actually received on an implied, quasi-contractual basis. B-234321, Mar. 20, 1989.

The criteria for payment under this equitable principle normally consist of four elements. First, there must be a threshold determination that the goods or services for which payment is sought would have been a permissible procurement had the proper procedures been followed. Second, the government must have received and accepted a benefit. Third, the firm must have acted in good faith. Fourth, the amount to be paid must not exceed the reasonable value of the benefit received. 64 Comp. Gen. at 728.

We conclude that the criteria for payment under the equitable principle of *quantum meruit* have been satisfied. First, there is no question that services for repair of government-owned vehicles could have been procured had proper procedures been followed. *See* B-234321, *supra.* Second, the Guard affirms that it received the use and benefit of the services. Third, the Guard apparently has concluded that Maintenance acted in good faith, and there is nothing in the record to suggest otherwise. Fourth, the amount charged appears to have been fair and reasonable based on a comparison with the pricing offered by the GSA Federal Supply Schedule contractor that received a delivery order for the remaining work not completed by Maintenance. The prices offered by the schedule vendor were $45 higher per vehicle than the prices quoted in Maintenance's claim.

As all the elements of a *quantum meruit* claim have been satisfied, we find that the National Guard may pay Maintenance the amount claimed under the September and October delivery orders. Interest on this amount, however, may not be paid. Interest is generally not recoverable against the United States in the absence of an express statutory provision. *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947). Although the payment of interest is required under section 12 of the Contract Disputes Act of 1978, this only applies to claims "relating to a contract." 41 U.S.C. §§ 605(a), 611 (1988). Because we do not view the two orders as enforceable contracts, the provisions of the Act do not apply. *See Effective Learning, Inc.*, B-215505, Feb. 19, 1985, 85-1 CPD ¶ 207. Similarly, the duty to pay interest under the Prompt Payment Act, 31 U.S.C. § 3901 *et seq.* (1988), is premised on the existence of a legally binding contract.

See Office of Management and Budget Circular No. A-125 (Revised)—"Prompt Payment," Dec. 21, 1989, which implements the Act. Because no such contract exists here, the interest provisions of the Prompt Payment Act do not apply.

Finally, regarding whether the three orders were funded with annual appropriations in violation of FAR § 37.106, which provides that the terms of service contracts funded by such appropriations shall not extend beyond the end of the fiscal year, we note that the orders in question call for repairs of specified vehicles and not for services continuing over a term. Because these contracts do not specify a term of performance, we find no violation of FAR § 37.106. Generally a fiscal year appropriation may be obligated in one fiscal year with performance and payment to extend into the following fiscal year, so long as the obligation was made to meet a *bona fide* need of the fiscal year to be charged. 35 Comp. Gen. 692 (1956). It appears that the Guard had a *bona fide* need for the repairs in the year for which the appropriations were available and obligated, and thus the annual appropriations may be used to pay the claim.

B-243544, B-243544.2, August 7, 1991

Procurement

Bid Protests
■ GAO authority
■■ Protective orders
■■■ Information disclosure

Procurement

Competitive Negotiation
■ Contracting officer duties
■■ Information disclosure

In determining whether to grant access to documents under protective order, the General Accounting Office considers whether the applicant primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of proposals, as well as the degree of physical and organizational separation from employees of the firm who participate in competitive decision-making and the degree and level of supervision to which the applicant is subject.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Cost evaluation

Where agency determined, based on a survey of similar staff positions under other contracts and the salaries contained in other technically acceptable proposals, that in order to supply district representatives under recruiting contract, protester would have to pay higher salaries than estimated in its proposal or to hire personnel with less qualifications than indicated in the protester's proposal, it was proper for agency to adjust estimated cost, since solicitation did provide for cost realism

adjustments and since technical evaluation was based on assumption that protester would hire personnel with the qualifications proposed.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Cost evaluation

Agency adjustment of protester's estimated cost to reflect cost experience of incumbent in identifying salary required to recruit qualified district representatives was reasonable, where the limited data available indicated that the incumbent's salaries were generally in the middle range of those paid for similar staff positions.

Procurement

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

Award to higher-cost offeror was proper under solicitation that gave greater weight to technical merit compared to cost, where source selection authority determined that superiority of awardee's technical proposal was worth the extra cost, and the awardee received the highest greatest value score, as adjusted.

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

Where protester offered more highly qualified personnel in its best and final offer (BAFO) but lowered its estimated salaries for district representative positions, agency was not obligated to discuss concerns over cost realism that first arose after protester submitted its BAFO.

Matter of: Earle Palmer Brown Companies, Inc.

Harvey G. Sherzer, Esq., William A. Roberts III, Esq., Scott Arnold, Esq., and Mary A. Denise, Esq., Howrey & Simon, and Jeffrey K. Kominers, Esq., for the protester.

Scott T. Kragie, Esq., and John C. Reilly, Esq., Squire, Sanders & Dempsey, for J. Walter Thompson U.S.A., Inc., an interested party.

George N. Brezna, Esq., United States Marine Corps, for the agency.

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.

Earle Palmer Brown Companies, Inc. protests the award of a contract under request for proposals (RFP) No. M00027-90-R-0010, issued by the United States Marine Corps for recruit advertising services. The protester contends that the agency unreasonably adjusted its estimated cost, resulting in an increase in the awardee's combined cost/technical score that wrongly deprived the protester of award in accordance with the solicitation's award criteria.

We deny the protest.

I. Background

On June 25, 1990, the agency issued the solicitation for a cost-plus-fixed-fee contract for the creation and production of advertising to encourage recruitment in the Marine Corps, for placement in the media, such as television, radio, magazines and periodicals, direct mail and billboards for 9 months of fiscal year (FY) 1991, with evaluated options for additional periods. The successful contractor would also develop an advertising plan to assist the agency in achieving its recruitment goals, purchase advertising space and time on behalf of the agency, and provide support of the agency's district recruiting program, as well as producing reports and performing collateral projects.

The solicitation advised offerors that the agency would evaluate offers on the basis of written and oral proposals as well as cost proposals. The agency would evaluate written proposals for the way in which they addressed the technical requirements of creative (the highest valued factor); system, facilities and staffing; offeror dimensions (equal in importance to system, facilities and staffing); media; district support; and research. The solicitation provided for each offeror which remained in the competitive range after evaluation of initial proposals to make an oral presentation, which would be of less importance than the written proposal; technical proposals (technical and oral) would be of more importance than cost proposals.

The agency would evaluate cost on the basis of cost realism, defined as "the offeror's ability to project realistic costs and to show an understanding of the nature and scope of the work to be performed," reserving the right to the contracting officer to adjust prices to a level that he considered realistic. The solicitation requested each offeror to provide an estimated cost and fixed-fee for the base period and each option year. For computing estimated costs, the solicitation contained a form (Exhibit B) upon which each offeror would indicate the salaries and positions proposed and estimated hours in eight areas: account group; research; creative (art); media (television, radio, print); print production; client advertising; district support; and miscellaneous service. The agency would also score each offeror's Small Business and Small Disadvantaged Business (SDB) Subcontracting Plan, which would be of less importance than the other parts of its proposal.

As the basis for award, the solicitation provided for the method referred to as Greatest Value Scoring (GVS) for making its cost/technical tradeoff. The agency

retained the discretion to examine the points assigned to the highest-rated technical proposals to determine whether the point differential was so insignificant as to indicate that proposals were substantially equal in technical merit; in such instances, the agency reserved the right to make award on the basis of the lower-priced proposal. Where the agency did not consider the technical rating substantially equal, the solicitation provided that GVS ranking would be the primary means of rating and ranking offers and determining which offer was the most advantageous to the government but that the extent to which cost advantages might be sacrificed for technical ones would be "governed only by the tests of rationality and consistency with the established evaluation factors."

Four offerors submitted proposals by the closing date of August 24. As a result of review by the agency's technical evaluation panel, the agency eliminated one offeror from the competitive range; on November 1, it requested the remaining three offerors to schedule their oral presentations. The agency also provided a list of discussion questions to the offerors; in several areas, including staffing for the creative functions, the media departments and district representatives (related to the evaluation criterion of district support), the agency advised the protester that its staff lacked experience. The agency suggested that the protester place more stress on advertising experience for district representatives.

The offerors made their presentations during the first week of December, and the evaluation panel provided the results of its evaluation to the contracting officer on January 4, 1991. On January 7, the contracting officer requested responses to its list of discussion questions and instructed each offeror to submit its best and final offer (BAFO) by January 22. On the same date, the agency amended the solicitation to adjust the method of estimating cost; instead of having each offeror provide its own estimated number of hours as was done with initial proposals, the agency modified Exhibit B to provide a set number of hours for cost estimation purposes, leaving the offerors only to determine the precise categories and labor mix within that number of hours. The agency advised offerors that it would use the fixed estimates of labor hours in assigning point values in the area of cost.

The three offerors submitted BAFOs, and the technical panel completed its evaluation of the revised technical proposals on February 5. Based on a list of enhanced qualifications proposed by the protester in its BAFO for recruiting district representatives, the panel adjusted the protester's technical score slightly upward. Not considering the cost proposals, the panel recommended award to Thompson, whose proposal the panel rated superior with a total technical score of 724.49 points out of 800 available. The protester, with the lowest total of 691.22 points, nevertheless received an excellent rating. In addition, the evaluation of cost proposals resulted in a higher GVS score for the protester as follows:

		Protester	Thompson
Written	(550)	470.84	495.61
Oral	(250)	220.38	228.88
Subcontracting			
Plan	(50)	44 [1]	50
Total	(850)	735.22	774.49
Cost	(200)	200	155.17
Total	(1050)	935.22	929.66

[1] The protester has filed a supplemental protest against the scoring of its SDB plan. The agency found that the protester had computed its SDB participation percentages on the basis of total contract price, rather than on the basis of total subcontracting. The protester argues that it was unreasonable for the agency to deduct points, since its proposal obviously met subcontracting goals. The agency, however, while finding the plan acceptable, noted that it reflected a lack of understanding of the protester's obligations in this regard and indicated that the agency would have to expend resources to monitor the protester's performance and bring the protester's percentages in line with reporting requirements. We find the evaluation reasonable and consistent with the evaluation factors in the solicitation.

The agency had noted errors in the protester's cost proposal, and the secretary of the technical panel then prepared a cost realism analysis of the protester's proposal, which he provided to the contracting officer.[1] The secretary found several concerns; specifically, under the evaluation criterion of district support, where none of the offerors other than the incumbent, J. Walter Thompson U.S.A., Inc., had personnel performing as district representatives, the protester proposed extremely low salaries. In its initial proposal, the protester had stated that it intended to recruit Thompson personnel, providing a proposed list of qualifications for recruiting new personnel if the Thompson personnel declined. That proposal offered relatively low salaries for the district representatives; although the protester had proposed enhanced qualifications in its BAFO, which were reflected in its increased technical score, it had further reduced the salaries that it proposed to offer.

Although the contracting officer found it inappropriate to consider most of the concerns raised in the analysis, he agreed with the panel secretary's finding that the protester had underestimated the salaries that it would have to pay district representatives. After adjusting the protester's proposal for cost realism, which resulted in a 12-point increase in Thompson's cost score,[2] the contracting officer found that apart from Thompson's advantage in the scoring of the SDB plans, the two proposals had received essentially equal GVS scores. Unable to find any significant technical advantage in the Thompson proposal, the contracting officer and the contracts division review board recommended award to the protester, based on its lower cost.

The source selection authority (SSA) received briefings from the technical panel as well as the contracting staff, each of which recommended a different award-

[1] The protester had neglected to price 3 months of contract performance. The agency also prepared a cost realism analysis of the other proposals, but one which provided the contracting officer with no basis to question the cost estimates submitted with the proposals.

[2] Protester's cost, $12,859,221/Thompson's cost, $15,390,330 X 200 = 167.11. This resulted in Thompson having the highest GVS score by a small margin.

ee. On March 27, after a review of the technical proposals and the narrative comments of the technical panel, the SSA selected Thompson for award, based on his belief that the awardee's proposal offered considerable technical advantages justifying the additional expense, as evidenced, among other things, by its receipt of the highest GVS score, after adjustment of the protester's proposal for cost realism. This protest followed.

Pursuant to our Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(d)), our Office issued a protective order covering material related to the offerors' proposals and the agency's process for evaluating proposals and selecting an awardee. None of the parties objected to granting attorneys retained by the awardee and by the protester access to these materials. We also reviewed an application from Thompson's General Counsel, an Executive Vice President of the corporation and a member of the board of directors. The application showed that he provides legal counsel to senior management of the firm and reports to Thompson's Chief Executive Officer (CEO). He also reviews advertising materials produced for use under the contract and assists in drafting and reviewing contracts with suppliers.

In determining whether to grant access to protected material, we consider such factors as whether counsel primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of bids and proposals, the degree of physical separation and security with respect to those who participate in competitive decision-making and the degree and level of supervision to which in-house counsel is subject. Based on the General Counsel's direct relationship to Thompson's CEO and his membership on its board, we were unable to conclude that the risk of disclosure, particularly inadvertent disclosure, of protected material was sufficiently small to warrant granting Thompson's General Counsel access to protected material.[3] *See U.S. Steel Corp. v. United States,* 730 F.2d 1465 (Fed. Cir. 1984).

II. Cost Realism Adjustment

The protester argues that the cost realism adjustment was unreasonable, inconsistent with its proposal and failed to take into account the differences between its proposal and that of the awardee, which was also the incumbent contractor. The protester contends that the agency failed to take into account legitimate differences in the salary structures of the two offerors. The protester asserts that, without this improper cost adjustment, it achieved the highest GVS score and was therefore entitled to award.

At a hearing held at our Office in connection with this protest, we explored the issue of whether the cost realism adjustment was inconsistent with the content of the protester's proposal. We find that it was not.

[3] At the hearing held regarding this protest, our Office refused admission to corporate officials of the protester, to whom we had not granted access under the protective order, since it was impracticable to separate the discussion of protected material from the discussion of unprotected material.

Under the category of district support, the agency weighed three criteria, the second of which related to "The technical expertise/experience of its field force representatives. Anticipated representative qualifications if no representatives exist." At the hearing, the panel secretary, who recorded and compiled the panel's scores, testified that the panel only rated the incumbent by the first factor—expertise/experience of their current representatives. To avoid penalizing non-incumbents, which would have no representatives, the panel rated the other offerors according to the second factor—anticipated qualifications.

Some panel members felt that the protester's proposal to offer the district representative positions to Thompson's current personnel reflected an understanding of the quality of personnel needed to serve in these positions. The initial evaluation, nevertheless, raised a concern that if the current incumbent's personnel were unavailable, the protester proposed to hire entry-level personnel lacking field experience to fill the district representative positions. Raising this issue during discussions, the agency suggested that the protester place greater stress on advertising experience in recruiting district representatives. Accordingly, the protester's BAFO added 3-5 years of advertising experience as a qualification for the representatives, resulting in an increase in the protester's technical score. Although the protester proposed to reduce the district representatives' salaries in its BAFO, the protester also added several other employment criteria such as a thorough knowledge of mass media vehicles, experience in multimedia account management, an understanding of the requirements of working on a U.S. government account and more extensive background in other areas. The panel secretary testified that the panel was aware that the plan to hire incumbent personnel was only one alternative, that the cost adjustment was to reflect the wages that the agency believed necessary for the protester to attract personnel with the experience proposed in the BAFO. We find the proposal clear in this regard, and there is no evidence that in calculating the cost realism adjustment, the agency wrongly presumed that the protester's proposal depended upon hiring incumbent personnel.

When an agency contemplates award of a cost reimbursement contract, the offeror's estimated costs of contract performance are not dispositive since they may not provide valid indications of what the government will be required to pay. *Mandex, Inc.*, B-242841, Mar. 6, 1991, 91-1 CPD ¶ 253. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. *General Research Corp.*, B-241569, Feb. 19, 1991, 70 Comp. Gen. 279, 91-1 CPD ¶ 183. The government evaluation is to be aimed at determining the extent to which the estimates represent what the contract should cost and since this process involves the exercise of informed judgment by the agency, our review of it is limited to ensuring that it was done reasonably. *JSA Healthcare Corp.*, B-242313 *et al.*, Apr. 19, 1991, 91-1 CPD ¶ 388. Where labor constitutes a substantial portion of the cost of performance, an agency's cost realism analysis may involve comparative evaluation of the labor mix and cost proposed in two acceptable proposals. *Electronic Warfare Integration Network*, B-235814, Oct. 16, 1989, 89-2 CPD ¶ 356.

Once the agency determined that an adjustment was necessary, that the protester would have difficulty hiring personnel of the quality promised at the rather low salaries that it proposed to pay, the agency had to determine what rate the protester would realistically have to offer to attract such people. In trying to determine a realistic rate, the agency found that the district representative positions were fairly unique; except for Thompson, which was the incumbent, the agency did not find that any of the offerors employed personnel in a similar position with similar responsibilities. Campbell-Mithun-Esty, the third offeror, proposed salaries for district representatives somewhat higher than those proposed by Thompson; Young & Rubicam, the Army's advertising agency, also paid higher salaries for what appeared to be comparable positions. Compared with the protester's low salaries and the higher salaries of other advertising agencies, the agency found that the incumbent's salaries were in the middle range and constituted an appropriate base of comparison for cost realism purposes.

We find the use of the incumbent's salaries reasonable. For the seven district representative positions, the protester's proposed salary, an average of $16.08 per hour for the contract period, was $7 per hour less than the lowest proposed by Thompson, $9 less than that proposed in two districts and nearly $20 less for the three other positions.[4] The protester's assertions to the contrary, we find no appreciable difference in the fringe benefits and bonus packages of the two offerors; there is nothing in the record before our Office to show that the amount of the adjustment was unreasonable.

III. Evaluation And Award

The protester argues that even after the cost realism adjustment, the agency retained discretion to award a contract to the lowest-priced offeror regardless of GVS totals where it found that the proposals were substantially equal in merit. The protester notes that the contracts division review board could find no technical distinction between the offerors and argues that there was in fact no technical advantage to the awardee's proposal meriting the payment of the cost premium here involved. The protester contends that the agency closely circumscribed its own discretion in the award decision, interpreting the award clause as requiring the agency to make award to the offeror with the highest GVS except for the sole situation where the agency found a lower-technical, lower-cost proposal with a lower GVS score to be substantially equal in technical merit.

Consistent with the prior decisions of our Office, the agency expressly stated that ultimately its cost/technical tradeoff would be governed only by the tests of rationality and consistency with the established evaluation criteria. *See Grey*

[4] These figures are based on the awardee's BAFO. In recommending the $900,000 cost realism adjustment, the panel secretary used smaller figures, derived from the salaries proposed in Thompson's initial proposal, disregarding Thompson's BAFO rates because they included overhead expenses, and he was unfamiliar with the calculations necessary to compute straight salaries from such data. Application of the BAFO rates to the protester's proposal would result in an adjustment nearly twice as great—nearly $1.7 million.

Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Furthermore, while the review board could find no technical distinction between the two proposals, the SSA did, based not just upon the scoring but upon his review of the technical panel's narrative comments and scoring justifications.

Our own review, of the evaluation documents, confirms the testimony of the SSA that where the panel consistently found the protester's plans adequate and its proposed personnel qualified, the panel's narratives described the awardee's plans and personnel in terms of superiority and excellence. While the protester argues that a 33-point (4.1 percent) difference in technical scores was insignificant, the significance of a given point spread depends upon all the facts and circumstances surrounding a procurement; the point scores themselves are not controlling, reflecting as they do the disparate subjective judgments of evaluation, but are useful only as guides to intelligent decision-making. *Midwest Research Inst.*, B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364.

The SSA noted that the awardee received a superior rating on 6 of 10 technical categories, including the critical and most important categories of creative and systems, facilities and staffing; the SSA found that the awardee had superior technical capabilities, particularly in its staffing, employee quality, depth, and experience. Evaluators also expressed concern over certain themes suggested by the protester, such as the suggestion that where the Marine Corps trained soldiers *to live* (not die) for their country, other services did not; evaluators felt that such an approach could provoke an internecine and unnecessary recruiting war between the services, which would eventually be counterproductive. There was also a perception that some of the slogans were geared to current events (Operation Desert Shield) and could become quickly obsolete, while some of the visuals lacked brand identification (undifferentiated personnel in uniform).

The awardee had the highest total GVS score; while the protester disputes the amount of the difference in cost attributable to the awardee's higher quality personnel, as the protester nevertheless concedes, a substantial portion of the cost difference was attributable to the greater experience and expertise of the awardee's personnel. The protester ranked third in technical quality. The SSA therefore concluded that there was not technical equivalency between the proposals. Based on our review of the record and the SSA's testimony at the hearing, we find that the technical panel and SSA reasonably concluded that the two proposals were not in fact substantially equal in technical merit.

IV. Discussions

The protester also argues that the agency should not have presumed that its district representatives' salaries were too low without addressing the issue in discussions. Agencies generally must conduct such discussions with all offerors, advising them of deficiencies in their proposals and providing them with the opportunity to satisfy the government's requirements. *tg Bauer Assocs., Inc.*, B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549. In this case, the protester's initial proposal contained total costs in line with those of other offerors; while its salaries

were low, its proposal compensated by proposing a greater number of labor hours. The January 7 amendment of Exhibit B substantially reduced the number of hours for performance of the work from the protester's original proposal. Although the agency had identified district representative qualifications as a weakness in the initial proposal, the protester promised enhanced experience with its BAFO while lowering proposed salaries, without any explanation for the change. An agency is not required to reopen discussions or to allow an offeror further opportunity to revise its proposal when a deficiency first becomes apparent in a BAFO. *See Addsco Indus., Inc.,* B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317.

The protest is denied.

B-243606, August 7, 1991

Procurement

Sealed Bidding
■ Bid guarantees
■■ Amounts
■■■ Indefinite quantities

Procurement

Sealed Bidding
■ Terms
■■ Materiality
■■■ Integrity certification

Completed Certificate of Procurement Integrity is properly required under solicitation contemplating award of an indefinite quantity contract with a minimum quantity of $50,000, where the estimated value of the orders to be placed exceeded $100,000, as reflected by solicitation's evaluation provision which was based on specified maximum quantities which the solicitation estimated would fall within a range of $1,000,000 to $5,000,000.

Procurement

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Certification
■■■■ Omission

Procurement

Sealed Bidding
■ Terms
■■ Materiality
■■■ Integrity certification

Bid was properly rejected as nonresponsive for failure to submit required Certificate of Procurement Integrity because completion of the certificate imposes material legal obligations on the bidder to which it is not otherwise bound.

Matter of: Service Technicians, Inc.

Ivor F. Thomas, Esq., for the protester.

John Koulakis for Koulakis Painting Co., Inc., an interested party.

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

Paula A. Williams, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Service Technicians, Inc. (Serv-Tech) protests the rejection of its bid as nonresponsive for failure to submit an executed Certificate of Procurement Integrity with its bid as required by invitation for bids (IFB) No. N68711-90-B-1206, issued by the Department of the Navy for painting services.

We deny the protest.

The IFB, which was issued on November 1, 1990, contemplated the award of a 1-year indefinite quantity contract to obtain exterior/interior painting of various buildings and the interior painting of various houses located within the Marine Corps Base, Camp Pendleton, California, and the Naval Weapons Station, Fallbrook, California. On November 21, the Navy issued amendment No. 0001 to the IFB which, among other things, incorporated the requirement for a Certificate of Procurement Integrity pursuant to Federal Acquisition Regulation (FAR) §§ 52.203-8 and 52.203-9. The full text of these FAR provisions including the applicable certificates as well as instructions to bidders on how to complete the certificate were included in the amendment. The amendment explicitly advised bidders that *"[T]he certificate contained in 52.203-8 must be submitted with the offeror's bid."* [Italic in original.]

Bid opening was held on February 6, 1991, and of the nine bids received, Serv-Tech's was the second low bid at $1,542,070. By letters dated February 21, the bids submitted by the low bidder and Serv-Tech, respectively, were rejected as nonresponsive. Following the denial of its agency-level protest of the rejection of its bid for failure to submit the required certificate, Serv-Tech filed this protest with our Office.

Under FAR § 52.203-8(c)(1), the interpretation of which is at issue here, a certificate is not required for indefinite delivery contracts[1] "unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed $100,000."

Serv-Tech contends that it was not required to submit a certificate with its bid because the expected value of all orders to be placed under the proposed contract does not exceed the $100,000 threshold. The thrust of Serv-Tech's argument is that since the IFB did not include any specific total estimated value of

[1] Indefinite quantity contracts are one of three types of indefinite delivery contracts. *See* FAR § 16.501(a).

all orders which would be placed under the indefinite quantity contract, the "value" is limited to $50,000, the amount set forth in amendment No. 0001 as the minimum quantity for purposes of payment and performance bond requirements. The protester cites *Sletager, Inc.*, B-237676, Mar. 15, 1990, 90-1 CPD ¶ 298, as support for this interpretation.[2] In *Sletager, Inc.*, our Office stated that for purposes of determining the penal sum of payment and performance bonds for an indefinite quantity contract, the price payable for the specified minimum guarantee shall be considered the contract price. Serv-Tech argues that by analogy, for purposes of the procurement integrity certification requirement, the estimated value of all orders under the proposed contract is the dollar amount for the minimum quantity which, in this case, is $50,000.

In our view, the *Sletager* case is inapposite because that decision was based on the guidance provided by FAR § 28.102-2(c)(2), which provides an explicit formula for determining the penal sum for bonds for indefinite-quantity construction contracts, but has no applicability to the Procurement Integrity Certificate requirement. The most direct guidance regarding submission of Procurement Integrity Certificates is found at FAR § 52.203-8(c)(2), which provides that a certificate is required for contracts which include options where the aggregate value including all options exceeds $100,000. This regulation indicates that the certificate is required where there is a reasonable likelihood that the value of the award will exceed $100,000, irrespective of the minimum amount of the government's actual or minimum obligation under the contract.

Here, the solicitation provided for a contract minimum of $50,000 and an estimated range of between $1,000,000 and $5,000,000 as a maximum. The solicitation also listed the maximum quantities next to each of the 47 line items to be provided, and stated that bids would be evaluated on the basis of unit prices multiplied by the specified maximum quantities. Thus, all bidders were on notice that the agency contemplated an award which was expected to have a value between $1,000,000, and $5,000,000, and, in fact, all bidders including Serv-Tech submitted bids which were significantly in excess of the $100,000 threshold. Under these circumstances, the agency reasonably concluded that the "total estimated value of all orders" under this solicitation exceeded the $100,000 threshold, and the IFB clearly placed all bidders on notice that the certificate was required.

The Certificate of Procurement Integrity imposes additional legal requirements upon the bidder materially different from those to which the bidder is otherwise bound, either by its offer or by law. *LBM, Inc.*, B-243505, Apr. 12, 1991, 91-1 CPD ¶ 372. In particular, the certification implements several provisions of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423 (West Supp. 1990); the OFPP Act prohibits activities involving soliciting or discussing post-

[2] The protester also cites two Armed Services Board of Contract Appeals decisions *Deterline Corp.*, ASBCA No. 33090, 88-3 BCA ¶ 21,132 and *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993 to support its position. These cases are not relevant because they simply set forth the long-standing principle that the government is not obligated to order quantities in excess of the minimum stated in a solicitation. The cases do not provide any guidance concerning the total estimated value of the awards in question.

government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information.

The procurement integrity certification requirements obligate a named individual—the officer or employee of the contractor responsible for the bid or offer—to become familiar with the prohibitions of the OFPP Act, and impose on the bidder, and its representative, a requirement to make full disclosure of any possible violations of the OFPP Act, and to certify to the veracity of that disclosure. In addition, the signer of the certificate is required to collect similar certifications from all other individuals involved in the preparation of bids or offers; in this regard, the certifying individual attests that every individual involved in preparation of the bid or offer is familiar with the requirements of the OFPP Act. The certification provisions also prescribe specific contract remedies—including withholding profits from payments and terminating errant contractors for default—not otherwise available. *See Mid-East Contractors, Inc.*, B-242435, Mar. 29, 1991, 70 Comp. Gen. 383, 91-1 CPD ¶ 342.

As a result of the substantial legal obligations imposed by the certification, omission from a bid of a signed Certificate of Procurement Integrity leaves unresolved a bidder's agreement to comply with a material requirement of the IFB. For these reasons, failure to complete and return the certificate itself by the bid opening date is a material deficiency in a bid requiring that the bid to be rejected as nonresponsive. *See also* FAR § 14.404-2(m).

Here, since the expected value of the contract will exceed $100,000, Serv-Tech was required to furnish with its bid an executed certificate. Not having done so, Serv-Tech submitted a bid which does not represent on its face an unequivocal commitment to comply with the material obligations imposed by the certification, therefore, the Navy properly rejected Serv-Tech's bid as nonresponsive.

The protest is denied.

B-242204.3, August 14, 1991

Procurement

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

Procurement

Socio-Economic Policies
■ Small businesses
■ ■ Responsibility
■ ■ ■ Negative determination
■ ■ ■ ■ Prior contract performance

Although an agency may use traditional responsibility factors, like management and staff capabilities and company experience, as technical evaluation factors where its needs warrant a comparative

evaluation of proposals, an agency's rejection of a small business firm's proposal as technically unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the proposal but instead effectively constituted a finding of nonresponsibility.

Matter of: Clegg Industries, Inc.

Judy Clegg for the protester.

Paul M. Fisher, Esq., and Arthur F. Thibodeau, Esq., Department of the Navy, for the agency.

Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Clegg Industries, Inc. protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. N47408-90-R-2036, issued by the Department of the Navy for diesel generator plants. Clegg argues that its proposal was improperly determined to be technically unacceptable.

We sustain the protest.

The RFP, issued as a total small business set-aside, is for the purchase and installation of a generator plant system, including outdoor diesel engine-generator units with switchgear and other accessories and control equipment. The generator plant equipment is to be housed in a weatherproof enclosure and wired, piped, and connected to other control panels in a separate building.

Separate technical and cost proposals were required and award of the contract was to be made to the technically acceptable, low-priced offeror. Evaluation of proposals was performed in two stages: Phase I comprising the technical evaluation of proposals; and Phase II, the price competition among acceptable offerors. The RFP provided that technical acceptability would be based on the following criteria: (1) company experience; (2) technical capabilities; (3) management and staffing capabilities; (4) facilities and equipment; and (5) quality and timeliness. To be determined technically acceptable, offerors had to demonstrate acceptability in each factor and subfactor, on a "go-no go" basis.

The agency received seven proposals by the November 30, 1990, closing date, two of which were submitted by Clegg. The technical evaluators determined that Clegg's primary proposal was based on hardware that conformed to the solicitation specifications, but that its alternate proposal did not conform. Clegg was notified that its alternate proposal was rejected as unacceptable by a letter of February 21, 1991. Clegg's primary proposal, along with four other offerors' proposals, was rated marginal.

The agency conducted written discussions with the offerors whose proposals were rated marginal by letters dated February 5 and requested responses by February 12. The agency's letter to Clegg listed eight deficiencies, including specific questions concerning Clegg's company and staff experience. Clegg was asked for a description of its involvement in the projects it identified in its pro-

posal as fulfilling the company experience criteria and for additional information about the specific experience of its staff on projects involving comparable complexities and delivery schedules because it appeared that Clegg did not satisfy the minimum experience qualification under the RFP.

After reviewing Clegg's responses, the technical evaluation board determined that Clegg's proposal was technically unacceptable for lack of adequate company experience and personnel and staff experience. Clegg was notified that its primary proposal was eliminated from the competitive range by a letter of March 29 and was provided with additional information regarding its rejection in a letter dated April 3. Three offers were included in the competitive range, and best and final offers were due by April 18.

The technical factors on which Clegg's proposal was judged technically unacceptable—management and staffing capabilities and company experience—traditionally are considered responsibility factors, that is, matters relating to Clegg's ability to perform the contract. *See* Federal Acquisition Regulation §§ 9.104-(c), (e); *Apex Envtl., Inc.,* B-241750, Feb. 25, 1991, 91-1 CPD ¶ 209. While traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement, *see, e.g., Pacific Computer Corp.,* B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292, the factors may be used only if special circumstances warrant a comparative evaluation of those areas. *Flight Int'l Group, Inc.,* 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257; *Sanford and Sons Co.,* 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266. Under the Small Business Act, agencies may not find that a small business is nonresponsible under the guise of an assessment of the responsibility factors and thus avoid referring the matter to the Small Business Administration (SBA), which has the ultimate authority to determine the responsibility of a small business concern. *See* 52 Comp. Gen. 47 (1972); *Antenna Prods. Corp.,* B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297.

Here, the record shows that the Navy did not use the responsibility-type technical evaluation criteria for the purpose of a comparative evaluation of the merits of the proposals received. Rather, proposals were found technically acceptable on a "go-no go" basis, and Clegg's proposal was rejected solely because of the firm's purported lack of experience and management and staffing capabilities. Clegg would have been denied the contract no matter how the rest of its proposal was judged. Under these circumstances, the determination that Clegg was technically unacceptable was, in effect, a determination by the contracting officer that Clegg was not a responsible contractor. Therefore, Clegg's elimination from the competition without a referral to SBA was improper.

We recommend that the agency include Clegg in the competitive range. If Clegg is found to be otherwise in line for award, and if Clegg's responsibility is still questioned, the issue should be referred to the SBA for a final determination under its certificate of competency procedures. 15 U.S.C. § 637(b)(7) (1988); *ECS Metals Ltd.,* B-229804, Feb. 10, 1988, 88-1 CPD ¶ 136. We also find Clegg is entitled to the costs incurred in pursuing this protest. 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6).

The protest is sustained.

B-242942, August 27, 1991

Civilian Personnel

Compensation
■ Civil Service regulations/laws
■■ Service contracts
■■■ Personal services
■■■■ Prohibition

Procurement

Special Procurement Methods/Categories
■ Service contracts
■■ Personal services
■■■ Criteria

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing operators for nuclear facilities does not involve the performance of inherently governmental activities. The Commission's guidelines are so comprehensive and detailed regarding all aspects of the testing procedures that the contract employees exercise minimal discretionary authority and make limited value judgments in preparing recommendations for Commission employees who decide whether to grant these operator licenses.

Civilian Personnel

Compensation
■ Civil Service regulations/laws
■■ Service contracts
■■■ Personal services
■■■■ Prohibition

Procurement

Special Procurement Methods/Categories
■ Service contracts
■■ Personal services
■■■ Criteria

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing nuclear plant operators does not involve the improper use of personal services contracts because the contract employees are not subject to continuous supervision and control by employees of the Commission.

Matter of: Nuclear Regulatory Commission Licensing Examiners

The issue in this decision is whether the Nuclear Regulatory Commission (NRC) may contract out for examiners to perform the testing procedures involved in

licensing nuclear reactor operators.[1] The questions are whether such contracts are impermissible because the contract examiners are performing an inherently governmental function or because the contracts may be considered prohibited personal service contracts. For the reasons set forth below, we conclude that the NRC may continue to contract out for the examiners to conduct the testing procedures.

Background

The Nuclear Regulatory Commission is responsible for licensing reactor operators and senior reactor operators.[2] As provided in 10 C.F.R. Part 55 (1991), the Commission administers examinations to evaluate an individual's understanding of the facility design and familiarity with the controls and operating procedures for the nuclear facility. These examinations consist of both written tests and operating tests.

Most pertinent to our discussion is the operating examination which is designed to test the individual's level of knowledge on the design and operation of the reactor and its associated plant systems, both internal and external to the control room. *See* 10 C.F.R. § 55.45 (1991). The operating examination consists of (1) a test of the operator's ability to control the plant during a simulated operating condition, and (2) a plant walkthrough, where the operator is tested on his or her knowledge of the plant outside of the control room.

For several years, the Commission has relied on its employees and private contractors to perform the tests involved in licensing operators. Thus, at times, a contract examiner will conduct all tests involved in licensing and will then forward a comprehensive examination file and recommendations to the Commission for review and decision by the chief examiner and branch chief. The chief examiner and branch chief are employees of the Commission.

The Commission's Inspector General (IG) reviewed the contracts under which these contract examiners are procured and issued a report questioning whether these contracts were impermissible personal service contracts and whether the contractor personnel were performing inherently governmental functions that should only be performed by government employees.[3]

In regard to the issue concerning the contract examiners performing inherently governmental functions, the IG's major concern was that the contract examiners had to make value judgments about a candidate's performance and ultimately make a recommendation to pass or fail a candidate. The IG noted that during an operating examination, a contract examiner may conduct all aspects

[1] The matter was submitted by Mr. James M. Taylor, Executive Director for Operations, Nuclear Regulatory Commission.

[2] *See* Section 107 of the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 939 (1954), as amended, and Section 201 of the Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1242 (1974).

[3] According to the IG report, the Commission obtained contract examiners from Sonalysts, Inc., as well as two Department of Energy national laboratories, the Idaho National Engineering Laboratory and the Pacific Northwest Laboratory. The contract examiners from these laboratories are not government employees.

of the examination without any employee of the Commission being in attendance to supervise or observe the ongoing examination. The IG suggested that the examiner is the only person who could effectively evaluate a candidate's performance on this segment of the examination and this places the contract examiner in the position of having to make an independent decision as to whether or not the applicant should pass this portion of the examination.

Concerning the matter of whether the contracts were personal service contracts, the IG was concerned whether under the contract the degree of supervision afforded the contract employees was of such a high degree that they would appear to be federal employees.

The Commission's Office of General Counsel (OGC) responded to the IG report and stated that while the licensing of nuclear reactor operators is a governmental function, the contract examiners are only assisting the Commission staff in performing the licensing function. In support of its view, OGC explains that the Commission's contract examiners must comply with extensive and tightly controlled internal guidelines which carefully limit their discretion. These internal guidelines describe the content of the examinations, the procedures to be used by the examiners in testing the operators, and how to grade the examinations.

Moreover, the Commission's OGC argues that the key test is the nature and significance of the discretion exercised by the contractor, not the government's ability to independently verify all acts by the contractor. Therefore, in view of the limited discretion exercised by these contract examiners, the Commission's OGC concludes that the contract examiners are not performing an inherently governmental function.

The Commission's OGC also states these contracts are not impermissible personal services contracts since the Commission is providing technical direction and scheduling for these contract examiners but does not exercise relatively continuous supervision and control over the contract personnel.

Opinion

The first issue is whether the contract examiners may be performing a function deemed to be inherently governmental which should only be performed by government employees as provided for in Office of Management and Budget (OMB) Circular A-76 and the Federal Acquisition Regulations (FAR) Part 37. OMB Circular No. A-76 defines a governmental function in para. 6e as one "so intimately related to the public interest as to mandate performance by Government employees." Included in these functions are those activities which necessitate either the exercise of discretion in applying government authority or the use of value judgment in making decisions for the government.[4]

[4] Further guidance is contained in OMB Circular No. A-120 which provides guidelines for the use of "advisory and assistance" (consulting) services; under para. 7B of this Circular, advisory and assistance services may not be utilized for "work of a policy, decision-making or managerial nature which is the direct responsibility of agency officials."

Consistent with the guidance set out in OMB Circulars No. A-76 and A-120, we have held that certain functions are so related to the agency's mission that it would be inappropriate to contract out these type functions. For example, in B-237356, Dec. 29, 1989, we held that the use of contract hearing officers by the Department of Energy (DOE) to determine eligibility for a DOE security clearance was an inherently governmental function since the hearing officers had to consider and rule on evidence in disputed matters, make specific findings as to the truth of the information provided, and preliminarily determine whether the access should be granted, denied, or revoked. Although an agency official made the final determination to grant or deny an individual's security clearance, we ruled that the process was inherently governmental since these contractors were exercising broad discretionary authority and making individual value judgments for the government in virtually every aspect of the hearing process. B-237356, *supra.*[5]

However, in the present case we conclude that the contract examiners are not performing a government function when they prepare, administer, and grade the operating examination. Our determination is based on the NRC's internal guidelines for preparing, administering, and grading operating tests which provide such extensive detail and guidance that the contract examiners cannot exercise discretion and make value judgments to the extent that the contract examiners can be deemed to be performing the government function of deciding who has passed the examination and will be licensed. For example, in preparing an operating test, the contract examiner must prepare a test that includes questions and simulations in three categories that are further broken down into detailed subcategories. Indeed, the detail within the agency regulations is so extensive that while the contract examiners have some discretion in choosing specific subcategories within the three main categories, the contract examiners essentially must comply with the specific mandates of the regulations once the subcategory or subcategories are selected.

Also, there is a comprehensive grading system that precludes a contract examiner from exercising broad discretion or making extensive value judgments about an applicant's score. For each part of a test, an applicant is given a score of one, two, or three, and the regulations set out in great detail the behavior and reaction on the part of the applicant that will earn him or her the appropriate score. In addition, the Commission has ensured that in administering the test the examiners will follow a precisely defined mode of operation.

Finally as regards the examiner's documentation and grading of the operating test, the Commission's guidance ensures that this is done uniformly. Examiners must recommend whether an applicant should pass or fail the operating test but in so doing may only make recommendations that are documented and consistent with the Commission's criteria. For example, the examiner must indicate

[5] *See* B-198137, June 3, 1982, where we held that certain legally required auditing tasks that involved making discretionary decisions regarding the disposition of disputed monetary claims against the government could not be contracted out but routine matters such as examining vouchers and verifying invoice amounts could be done under a contract. *See also* 64 Comp. Gen. 408 (1985); B-192518, Aug. 9, 1979.

whether an applicant performed in a satisfactory or unsatisfactory manner in certain parts of the operating test, but the Commission's guidance sets out in great detail the criteria for what constitutes satisfactory or unsatisfactory performance thereby limiting the examiner's use of independent judgment and discretion.

Accordingly, since the Commission's guidance enables contract examiners only to exercise discretion and make value judgments within severely prescribed parameters, we do not consider the contract examiners to be engaged in the performance of an inherently governmental function.[6]

The second issue is whether the contract might be an impermissible personal services contract. A personal service contract is a contract that by its express terms or by the way in which it is administered makes it appear that the contractor personnel are federal employees. FAR, § 37.101, codified at 48 C.F.R. § 37.101 (1990). Although a number of factors may indicate whether there is an employee and employer relationship, generally the main indicia of this would be whether the contractor personnel are subject to the relatively continuous supervision and control of a government officer or employee. *See* FAR, § 37.104(c)(1). If such a relationship does exist, then the personal service should not be provided by contract personnel but rather by employees hired under competitive selection or some other method required by the civil service laws. FAR, § 37.104(a).

We do not consider these contracts to be personal service contracts since the facts demonstrate that the contract examiners are not subject to the continuous supervision and control of Commission employees. Indeed, the degree of independence afforded the contract examiners was one of the areas of concern for the IG. As we view it, the contract examiners are providing advisory and assistance services which are appropriate for the Commission to obtain by contract.[7]

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[6] Our discussion in this case has been limited to the operating test aspect of the licencing procedure. Obviously, if the operating test can be conducted by contract examiners, then conducting the written test, for which the Commission has detailed guidance for the preparation, administration, and grading, would provide much less opportunity to exercise discretion and make value judgments.

[7] "Advisory and assistance services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, or *direct assistance*." FAR, § 37.203 [italic added].

B-243043, August 27, 1991

Appropriations/Financial Management

Appropriation Availability
■ Amount availability
■■ Augmentation
■■■ User fees

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Specific purpose restrictions
■■■ Utility services
■■■■ Use taxes

The Forest Service may pay county landfill user fees as a reasonable service charge, analogous to other utility services provided the government, since the charge is based on levels of service provided and appears nondiscriminatory.

Matter of: U.S. Forest Service—Payment of County Landfill Fees

A certifying officer with the U.S. Forest Service, San Francisco, California, requests an advance decision on whether the Service can pay county landfill fees for garbage disposal. For the reasons indicated below, we hold that the Forest Service may pay the fees.

Background

On June 29, 1989, the Board of Supervisors of the County of Nevada, California, adopted a resolution implementing fees for solid waste disposal at a county-owned and operated landfill. The Nevada County Sanitation Department, which supervises the operation of the landfill, determined that the Forest Service owed user fees for waste generated at two separate facilities (in the amounts of $6,552.00 and $1,638.00). The county filed a claim with the Service on September 11, 1990, for a total of $8,190.00 in solid waste disposal user fees that the Tahoe office of the Service has refused to pay.

The certifying officer questions the propriety of paying the bills on the grounds that the landfill fees are imposed in a discriminatory manner because certain users other than government entities are subsidized by property tax revenues. The officer takes the position that the landfill fees represent a direct tax upon the United States rather than a reasonable service charge, and thus may not be paid.

Opinion

It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local govern-

ments. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), *cited in* B-239608, Dec. 14, 1990. However, a charge made by a state or a political subdivision of a state for a service rendered or convenience provided is not a tax. 50 Comp. Gen. 343, 344 (1970). A federal agency may generally pay service charges such as those for municipal water or sewer service, provided the charges are demonstrably representative of the fair and reasonable value received by the United States for the services rendered. 66 Comp. Gen. 385, 386 (1987). *See also* discussion of tax versus service charge in 65 Comp. Gen. 879 (1986) and 29 Comp. Gen. 120 (1929). Here, the county charges public bodies such as the federal government a fee for landfill use based on a flat rate multiplied by the quantity of garbage disposed of. The charges directly relate to the levels of service rendered by the county. Thus, the charges for landfill services, which are analogous to water or sewer charges, are service charges rather than taxes.

Furthermore, we have held that in the context of utility services, where rates are established by a legislature or public service commission which has been delegated this power, such rates are controlling unless the rates are "manifestly unjust, unreasonable, or discriminatory" and "should be paid by federal agency users." 67 Comp. Gen. 220, 222 (1988) (citations omitted). *See also* 50 Comp. Gen. 343 (1970).[1]

In the present situation, the county board of supervisors established the rates for landfill use under the authority of California Government Code section 25823 (Deering 1974). As pointed out by the certifying officer, certain users are subsidized from county property tax revenue.[2] Nonetheless, the federal government is charged on the same basis as other public entities in the county. An attachment to the resolution on the county's share of landfill costs includes calculations of revenues generated from direct billing of all government entities at the same rate the Forest Service is being charged. Additionally, the Forest Service's charge represents only a small portion of the total amount due the county from other government entities. It is also not clear what effect, if any, the property tax subsidy has on the landfill fees paid by the federal government and by other public institutions. There is, however, no attempt by the county to discriminate specifically against the federal government.

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[1] Although public utilities as a rule cannot discriminate unjustly in their rates to consumers similarly situated or of the same class for the same service, it is also true that rate-making authorities may decide that a substantial inequality in economic circumstances justifies a reasonable inequality of rates. "Accordingly, discrimination by a public utility in setting its rates is not unlawful when based upon a classification corresponding to economic differences among its customers or upon differences in the kind or amount of service furnished or other reasonable basis." 67 Comp. Gen. 220, 222 (1988). In that case we held that a lifeline surcharge could be paid representing lost revenues to utility companies who were providing services at reduced rates to eligible low-income elderly customers. The utility company charged their other users, including the federal government, for the costs of supporting lifeline services.

[2] The fees collected in the county's 1989-1990 fiscal year include a large one-time increase in parcel charges to enable the county to bring the local landfill into compliance with various legal requirements regulating the use and operation of landfills. In order to decrease the impact that the increase in parcel charges "will have on those citizens who are living on fixed incomes and who are unable to afford the increase without serious personal impacts" the county allocated property tax revenues to be used to subsidize a portion of the landfill user costs for such people. Some businesses in the county were also subsidized from property tax revenues, but with a much larger dollar amount.

Because the county's landfill charge appears nondiscriminatory and represents a fair approximation of the benefits received by the Forest Service, the county's claim may be certified for payment.

B-238367.5, August 28, 1991

Procurement

Socio-Economic Policies
■ Small business set-asides
■■ Offers
■■■ Evaluation
■■■■ Risks

In procurement set aside for small business concerns, where protester's and awardee's proposals were both rated "blue/exceptional," and protester's evaluated cost was significantly lower than awardee's, agency's rejection of protester's proposal because of "high risk" based on agency's assessment of protester's financial capability, protester's intent or ability to comply with the solicitation's "Limitations on Subcontracting" clause, protester's capacity to form a contract, and protester's contract performance history, was improper in part because the risk assessment resulted in a circumvention of the requirements of the Small Business Act and in part because the risk assessment is unsupported by the record.

Matter of: PHE/Maser, Inc.

Ronald K. Henry, Esq., John B. McDaniel, Esq., Baker & Botts, and Louis L.S. Tao, Esq., for the protester.

D. Brian Costello, Esq., Costello & Hubacher, for Resource Applications, Inc., an interested party.

Gregory H. Petkoff, Esq., and Paul D. Warring, Esq., Department of the Air Force, for the agency.

Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

PHE/Maser, Inc. protests the Department of the Air Force's rejection of its proposal under request for proposals (RFP) No. F49642-89-RA190. PHE/Maser protests that the Air Force's rejection of its proposal on the basis of a "risk assessment" constituted a nonresponsibility determination which must be referred to the Small Business Administration (SBA) for a final determination.

We sustain the protest.

Background

On August 28, 1989, the Air Force issued RFP No. F49642-89-RA190 as a total small business set-aside. This solicitation sought technical and engineering support services involving environmental matters for the Air Force on a task order

basis. The RFP contemplated a base contract period of 1 year and four 1-year options.

PHE/Maser submitted a proposal on or before the October 30, 1989, closing date.[1] On March 7, 1990, the contracting officer amended the RFP, requesting offerors to submit revised cost proposals and stating that offerors should not submit revised technical proposals. By letter dated April 19, 1990, the contracting officer notified the offerors that PHE/Maser was the apparent successful offeror.

On May 1, 1990, a disappointed offeror filed a protest with our Office, challenging PHE/Maser's corporate status, arguing generally that PHE/Maser was too small to perform the contract, and suggesting specifically that PHE/Maser would be unable to comply with the RFP's "Limitations on Subcontracting" clause set forth at Federal Acquisition Regulation (FAR) § 52.219-14.[2] A second protest was also filed, asserting that the Air Force had improperly precluded offerors from revising their technical proposals. Because of his concerns about the protest allegations, the contracting officer decided to reopen negotiations, conduct discussions with all offerors, and request best and final offers (BAFOs).[3]

By letter dated May 16, 1990, the contracting officer advised PHE/Maser that the Air Force was "considering rejecting" its proposal because (1) PHE/Maser was not incorporated at the time it submitted its initial proposal; (2) the Air Force believed the initial proposal was submitted on behalf of a joint venture consisting of Potomac Hudson Engineering, Inc. (PHE) and Maser Sosinski & Associates (Maser)[4]; and (3) the Air Force believed that Maser had abandoned the venture, rendering the proposal "technically unacceptable." The Air Force requested that PHE/Maser respond to these concerns by May 24, and stated that it would "consider your comments and provide you with our decision without delay."

By letter dated May 22, PHE/Maser responded to the Air Force, pointing out that although PHE/Maser was not a *de jure* corporation at the time the proposal was submitted, formal incorporation had occurred in the state of New Jersey on May 8, 1990. PHE/Maser pointed out to the Air Force that its submission of a proposal in its corporate name prior to formal incorporation was permissible and referred to the decision of this Office in *Telex Communications, Inc.; Mil-Tech Sys., Inc.*, B-212385; B-212385.2, Jan. 30, 1984, 84-1 CPD ¶ 127, *aff'd*, B-212385.3, Apr. 18, 1984, 84-1 CPD ¶ 440, in which we stated that a contract may be awarded to a business which submitted its bid as a corporation, but was

[1] At the time the proposal was submitted, PHE/Maser was not formally incorporated; formal incorporation subsequently occurred on May 8, 1990.

[2] This clause provides that at least 50 percent of the personnel costs of contract performance must be for employees of the prime contractor.

[3] In a statement by the contracting officer, dated May 5, 1990, provided to this Office incident to the prior protests, the Air Force explained:

[T]he contracting officer in his lack of faith in the reliability of PHE/Maser decided to open a discussion phase to get the existing GAO protests withdrawn . . . rather than argue the merits of the protests on behalf of a very questionable contractor like PHE/Maser and experience the months of more delay incidental to such an argument.

[4] PHE/Maser's initial proposal was submitted in the name of "PHE/Maser, Inc."

not incorporated until after bid opening. In its May 22 letter, PHE/Maser also responded to the Air Force's other concerns, arguing generally that it was a responsible contractor and should remain eligible for award.

The Air Force did not expressly respond to PHE/Maser's May 22 letter as it had promised. However, by letter addressed to "PHE/Maser, Inc." dated June 4, 1990, the contracting officer requested that PHE/Maser submit a BAFO. Attached to the BAFO request were clarification requests and deficiency reports concerning PHE/Maser's proposal. Neither the BAFO request nor the attachments indicated any Air Force concern that "PHE/Maser, Inc." was not a proper entity to continue competing for this procurement.

On June 19, 1990, PHE/Maser and seven other offerors submitted BAFOs. Those proposals were subsequently evaluated by the Air Force's source selection evaluation team (SSET) using the evaluation factors and rating scheme identified in section M of the RFP.[5]

By memorandum dated August 16, 1990, the SSET chairman advised the source selection authority (SSA) that both PHE/Maser's and RAI's proposals were rated "blue" (the highest possible rating under the evaluation scheme) by the SSET.[6] The cost proposed by PHE/Maser, as evaluated by the SSET, was significantly lower (approximately 25 percent) than RAI's evaluated cost. At the bid protest hearing, the SSET chairman stated that, after BAFOs had been evaluated, it was the consensus of the technical evaluation team that PHE/Maser's proposal was "low to medium risk," Transcript (Tr.) at 56, and "as far as we were concerned on the technical side, the RAI proposal and the PHE/Maser proposal were equal, or nearly so, from a risk standpoint." Tr. at 53.

By letters dated September 19, and December 10, 1990, the Air Force asked PHE/Maser to extend its BAFO. PHE/Maser responded to each request by extending the period during which its offer remained effective. On February 21, 1991, the contracting officer wrote a "Memorandum for the Record" regarding "Contractor Selection under RFP No. F49642-89-RA190." In that memorandum the contracting officer stated:

> On its face, PHE/Maser's Best and Final Offer (BAFO) is our best BAFO since it contains the lowest price among the prices in all the BAFOs with "blue" technical proposals. However, I have serious concerns about the risk involved with doing business with the company and its actual eligibility for the award.

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[5] Section M of the RFP advised offerors that award would be based on the best overall proposal considering, in descending order of importance, technical, management, and cost factors. The RFP identified seven specific performance categories for evaluation under the technical factor and three categories for evaluation under the management factor. It also referenced the color/adjectival and risk assessment scheme contained in Air Force Regulation 70-30. Under this evaluation scheme, proposals are to be rated as blue/exceptional, green/acceptable, yellow/marginal, or red/unacceptable. Proposal risk assessments are also to be made. A proposal's risk is assessed as high, medium, or low depending on the potential for disruption of schedule, increase in cost, or degradation of performance. Any risk assessment rating may be used with any color code.

[6] At the bid protest hearing conducted in our Office, although the SSA stated that he believed RAI's proposal was slightly superior to PHE/Maser's, he agreed with the SSET's determination that both PHE/Maser's and RAI's proposals were "blue" and stated that he did not reevaluate proposals against the RFP criteria.

The memorandum went on to state that the contracting officer's "concerns about risk" were based on: (1) the fact that PHE/Maser did not become incorporated until after the initial proposal was submitted, and (2) doubt as to whether PHE/Maser would comply with the "Limitations on Subcontracting" clause. The SSET chairman subsequently incorporated this memorandum into the proposal analysis report which he prepared to assist the SSA in making the final source selection decision. The record does not indicate that either the SSET chairman or the contracting officer suggested that the matter be referred to the SBA for a determination regarding PHE/Maser's responsibility.

On March 13, 1991, after reviewing the proposal analysis report, the SSA issued his source selection decision document selecting RAI as the successful offeror. Attached to the decision document was an "integrated assessment" of the various proposals which stated with regard to risk:

[PHE/Maser's] BAFO ended up being evaluated as one with high risk. In checking out the quality of the company's past work the technical proposal evaluation team contacted five of the company's references as mentioned in its technical proposal. In all five cases, the points of contact were unable to provide any information on PHE/Maser as a company they were familiar with. In addition, the company's original proposal contained misrepresentations regarding the identity of the entity submitting the proposal and following that the BAFO was submitted by a different entity. Also, the BAFO reflected what appeared to be a scheme for PHE/Maser to circumvent the Limitations On Subcontracting clause (FAR 52.219-14). Under these circumstances, the PHE/Maser BAFO was determined to be one of such high risk that logically it could not be selected over RAI's BAFO even though it was lower in price (third lowest price overall).

At the protest hearing, the SSA stated that in assessing high risk to PHE/Maser's proposal, he also relied on the pre-award survey report of the Defense Contract Administration Services Region (DCASR), Philadelphia, dated October 18, 1990, which recommended "no award" to PHE/Maser on the basis of financial incapability. Tr. at 12-15.

In summary, the SSA's assessment of high risk associated with PHE/Maser's proposal was based on: (1) PHE/Maser's financial capability as reflected in the DCASR pre-award survey report; (2) doubt as to PHE/Maser's intent or capability to comply with the RFP's "Limitations on Subcontracting" clause; (3) questions concerning PHE/Maser's corporate status and legal capacity to contract; and (4) PHE/Maser's past contract performance as described by the references contacted. We sustain the protest because we find that the risk assessment in this case in part resulted in a circumvention of the requirements of the Small Business Act and in part is unsupported by the record.

Analysis

The Small Business Act, 15 U.S.C. § 637(b)(7) (1988), provides that it is the exclusive responsibility of the Small Business Administration to:

certify to [g]overnment procurement officers . . . with respect to *all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity,* of any small business concern . . . to receive and perform a specific [g]overnment contract. A [g]overnment procurement officer . . . may not, for any reason specified in the preceding sentence

preclude any small business concern . . . from being awarded such contract without referring the matter for a final disposition to the [SBA]. [Italic added.]

The Act requires that, when a procuring agency believes a small business concern will be unable to satisfactorily perform a given contract due to questions regarding the qualities or characteristics listed above, the procuring agency *must* refer the matter to the SBA for a final determination in that regard. *See Sanford and Sons Co.,* 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266; *see also* FAR § 19.602-1(a).

On the other hand, under the procurement statutes and regulations, contracting agencies are responsible for awarding contracts on the basis of proposals that are "most advantageous to the United States," 10 U.S.C. § 2305(b)(4)(B) (1988), and to sources "whose performance is expected to best meet stated Government requirements." FAR § 15.603(d). Procuring agencies are responsible for including in solicitations the evaluation factors that will be used for determining which proposals are most advantageous to the government, 10 U.S.C.A. § 2305 (West Supp. 1991), and these evaluation factors often include offeror experience, management, and certain other matters that traditionally have been regarded as bearing on responsibility.[7] *See* 41 U.S.C. § 403(7) (1988); FAR § 9.104-1; *SBD Computer Serv. Corp.,* B-186950, Dec. 21, 1976, 76-2 CPD ¶ 511; *Design Concepts, Inc.,* B-184754, Dec. 24, 1975, 75-2 CPD ¶ 410.

We have recognized that, in furtherance of their responsibility to identify for each procurement the proposal or proposals that are most advantageous to the government, procuring agencies may utilize responsibility-type factors for the technical evaluation of proposals. *See SBD Computer Serv. Corp., supra,* and cases cited therein. However, such traditional responsibility factors may be used as evaluation factors only if the agency's needs warrant a comparative evaluation of those areas. *Sanford and Sons Co., supra.* Further, such factors may not be used in a comparative evaluation unless offerors are expressly or implicitly advised that proposals will be so comparatively evaluated. *Flight Int'l Group, Inc.,* 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257. An agency also may not, in effect, find a small business nonresponsible through the use of proposal evaluation factors and thereby avoid the requirements of the Small Business Act set forth above. *See Sanford and Sons Co., supra;* 52 Comp. Gen. 47 (1972); *Clegg Industries, Inc.,* B-242204.3, Aug. 14, 1991, 70 Comp. Gen. 679, 91-2 CPD ¶ 145.

Bases for Risk Assessment Requiring Referral to the SBA

Here, the Air Force's risk assessment took into account two matters—financial capability and ability to comply with a specification clause—that are traditional responsibility matters. *See* FAR § 9.104-1; *Little Susitna, Inc.,* B-244228, July 1, 1991, 91-2 CPD ¶ 6. The record does not indicate that a comparative assessment of these responsibility factors was performed; rather, the selection official

[7] 10 U.S.C.A. § 2305(a)(3) (West Supp. 1991) provides that "in prescribing evaluation factors . . . an agency shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, and prior experience of the offeror)."

simply decided that the protester's "exceptional," lower-cost proposal was too risky to accept in light of these (and two other) factors. With respect to financial capability, the Air Force's assessment of high risk regarding PHE/Maser's proposal was based on the DCASR pre-award survey report dated October 18, 1990. This report stated:

> Although [PHE/Maser, Inc.'s] technical and production capabilities were found to be satisfactory, their financial capabilities were found unsatisfactory.
>
> Financial: [Phe/Maser, Inc.] does not have sufficient funds and/or other financing available to support the current backlog of business and the working capital requirements of this solicitation.
>
> Based upon the unsatisfactory findings of the offeror's financial capabilities, a no award is recommended.

An offeror's financial capability to perform a contract is a traditional responsibility factor, *see* FAR § 9.104-1, and a pre-award survey is conducted when the contracting officer needs information to determine the responsibility of an offeror. *See* FAR § 9.106-1. Obviously, the information concerning PHE/Maser's financial situation was sought and intended to be used for determining PHE/Maser's responsibility. The SSA, however, concedes that he relied on this information in deciding that the risk of contracting with the protester was too great. In effect, the SSA used this information to decide that the protester could not or would not perform because of its financial situation.

Where the RFP does not advise offerors that traditional responsibility factors such as financial capability will be comparatively evaluated, a procuring agency may not reject a small business concern's proposal on the basis of its negative assessment of that factor without referring the matter to the SBA. *See Flight Int'l Group, Inc., supra; Eagle Technology, Inc.,* B-236255, Nov. 16, 1989, 89-2 CPD ¶ 468.

Here, the RFP did not indicate that offerors' financial capabilities would be comparatively evaluated, and the record contains no indication that such a comparative evaluation was performed. Rather, the record indicates that the Air Force simply accepted the DCASR determination regarding financial capability as a basis for the high risk assessment. In effect, we think the Air Force made a nonresponsibility determination without referring the matter to the SBA.

With regard to the "Limitations on Subcontracting" clause, PHE/Maser's proposal provided that it would meet this requirement. However, the Air Force's risk assessment reflected concern that PHE/Maser would not comply.

A determination regarding an offeror's intent or ability to comply with a material provision of a solicitation relates to that offeror's "capability, competency, capacity, credit, integrity, perseverance, and tenacity" to perform the contract. *See* 15 U.S.C. § 637(b)(7). We have specifically held that the determination of whether an offeror can comply with the "Limitations on Subcontracting" clause "is a matter of responsibility to be [finally] determined by the SBA in connection with its Certificate of Competency (COC) proceedings." *Stemaco Prods., Inc.,* B-243206, Mar. 27, 1991, 91-1 CPD ¶ 333; *see also Little Susitna, Inc.,* B-244228, *supra.*

Here, the Air Force did not conclude that PHE/Maser failed to offer to comply with the "Limitations on Subcontracting" clause. Rather, the Air Force simply decided that PHE/Maser would not comply with the RFP requirements in that regard. Thus, the Air Force determined that PHE/Maser was nonresponsible on this basis. *See Standard Manufacturing Company, Inc.*, B-236814, Jan. 4, 1990, 90-1 CPD ¶ 14 (whether contractor will meet its obligations to perform is a matter of responsibility).

In short, the Air Force improperly based its assessment of "high risk" regarding PHE/Maser's proposal on PHE/Maser's financial capability and the Air Force's concern that PHE/Maser would not comply with the "Limitations on Subcontracting" clause without referring the matter to the SBA. Both of these bases for rejecting the proposal are matters of responsibility which, under the Small Business Act, must be referred to the SBA prior to a procuring agency's rejection of a small business proposal. Our decision in this regard is not affected by the fact that the Air Force did not label as "responsibility" its determinations regarding PHE/Maser's financial capability and compliance with the "Limitations on Subcontracting" clause. *See Clegg Industries, Inc., supra.* An agency may not avoid the requirements of the Small Business Act by labeling as "risk assessments" what are, in effect, responsibility determinations.

Bases for Risk Assessment Not Supported by the Record

In assigning high risk to PHE/Maser's proposal, the Air Force stated in the "integrated assessment" document that "the company's original proposal contained misrepresentations regarding the identity of the entity submitting the proposal and following that the BAFO was submitted by a different entity." The Air Force's position regarding possible misrepresentations and PHE/Maser's questionable capacity to contract is not supported by the record.

As PHE/Maser pointed out to the Air Force in its letter dated May 22, 1990, there is ample legal authority permitting an entity, formed for the purpose of performing a particular government contract, to submit a proposal in the name of the corporation prior to formally incorporating. *See Telex Communications, Inc.; Mil-Tech Sys., Inc.*, B-212385; B-212385.2, *supra; see also Protectors, Inc.*, B-194446, Aug. 17, 1979, 79-2 CPD ¶ 128; *Oscar Holmes & Son, Inc.; Blue Ribbon Refuse Removal Inc.*, B-184099, Oct. 24, 1975, 75-2 CPD ¶ 251. At a minimum, these cases provided PHE/Maser with a good faith basis for submitting its initial proposal under the corporate name. Accordingly, we find no reasonable basis for the Air Force to conclude that PHE/Maser engaged in misrepresentation by submitting its proposal in the name of the corporation that was formally incorporated after proposal submission.

Further, the record indicates that the Air Force was fully aware of PHE/Maser's legal status more than 10 months before the SSA's source selection decision. On May 7, 1990, the contracting officer and the contract specialist met with a PHE/Maser representative. According to a "Memorandum for the Record," signed by both the contracting officer and contracting specialist, this

meeting was held to explain the Air Force's reasons for re-opening negotiations after the initial decision had been made to award the contract to PHE/Maser. The memorandum further stated:

[The contracting officer] explained [to the PHE/Maser representative] that he believed the SBA would be making the final decision as to PHE/Maser's eligibility for contract award. He said under the circumstances he now can see himself clear to request BAFOs to give everyone an opportunity to revise proposals and at the same time dispose of the protests lodged with GAO. He encouraged [the PHE/Maser representative] that he was not out of the picture at this point, and unless we receive an unfavorable report from SBA or our legal officer their BAFO will be treated on the same basis as BAFOs from other participants within the competitive range.

[The PHE/Maser representative] asked if before the BAFO he should fix the name problem. [The contracting officer] said if the SBA gave a favorable report there perhaps would be no need, and *if they desired to change their name this could be done after award under FAR procedures if they got the award.* [Italic added.]

Less than 1 month after this meeting, the contracting officer asked PHE/Maser to submit a BAFO and twice thereafter asked PHE/Maser to extend its offer. In light of the contracting officer's discussions with PHE/Maser regarding the nature of its corporate status, the Air Force's subsequent request that PHE/Maser submit a BAFO, and the Air Force's requests that PHE/Maser extend the validity of its BAFO, we find no reasonable basis for the Air Force to finally reject PHE/Maser's significantly lower-cost, "blue" proposal on the theory that PHE/Maser misrepresented its corporate status in its initial proposal or on the basis that PHE/Maser's initial proposal led the Air Force to question—but not resolve—PHE/Maser's legal capacity to enter into a contract.

Finally, we note that PHE/Maser's initial proposal, its BAFO, and all subsequent extensions of its BAFO were submitted in the name of PHE/Maser, Inc. Under the circumstances presented, we fail to see any basis for questioning PHE/Maser's legal capacity to form a contract. *See Telex Communications, Inc.; Mil-Tech Sys., Inc.,* B-212385; B-212385.2, *supra; see also Protectors, Inc.,* B-194446, *supra; Oscar Holmes & Son, Inc.; Blue Ribbon Refuse Removal Inc.,* B-184099, *supra.*

With respect to references, the RFP did not expressly require offerors to provide a list. In March 1990, the Air Force contacted PHE/Maser and requested that it identify prior government clients whom the Air Force could contact to obtain references regarding past or ongoing work. PHE/Maser responded by providing the names and addresses of three individuals and stated that the references "will recognize us as Potomac Hudson Engineering, or PHE." Notwithstanding this information provided by PHE/Maser, the Air Force subsequently contacted as references individuals other than those identified by PHE/Maser.

The "integrated assessment" document stated that:

the technical proposal evaluation team contacted five of the company's references as mentioned in its technical proposal. In all five cases, the points of contact were unable to provide any information on PHE/Maser as a company they were familiar with.

This document does not explain why the Air Force chose to contact references other than those which PHE/Maser identified. To the extent the above state-

ment suggests that all of the references contacted were unfamiliar with the people associated with the newly formed PHE/Maser, Inc., it is misleading. In fact, two of the individuals contacted had favorable comments regarding Potomac Hudson Engineering.[8] Specifically, the proposal analysis report, submitted to the SSA by the SSET chairman, discussed the references contacted in connection with PHE/Maser's proposal, stating:

[A reference in the procurement office at Warner Robbins Air Force Base] was not familiar with PHE/Maser *but was familiar with Potomac Hudson Engineering and was very satisfied with their work. They . . . always submitted their deliverables ahead of schedule.* [Italic added.]

Regarding another reference contacted in connection with PHE/Maser's proposal, the proposal analysis report stated:

[A reference with the U.S. Coast Guard] was not familiar with PHE/Maser but *he did know Potomac Hudson Engineering. He . . . was satisfied with their work.* [Italic added.]

The statement in the "integrated assessment" of proposals that the references "were unable to provide any information on PHE/Maser" also fails to disclose that, in checking two references for *RAI* (the awardee), the Air Force obtained unsolicited, favorable comments relating to *Potomac Hudson Engineering.* Specifically, in discussing the first of five references supporting *RAI's* proposal, the proposal analysis report stated:

[A reference from the Department of Transportation] said "RAI is doing a good job for them." . . . (He mentioned RAI is using Potomac Hudson Engineering as one of the subcontractors.)

In discussing the second of five references supporting *RAI's* proposal, the proposal analysis report stated:

[A different reference from the Department of Transportation] said, "RAI was easy to work with and the main strength of RAI was with their subcontractors." (RAI is using Potomac Hudson Engineering as one of the subs for the DOT contract.)

Accordingly, the Air Force's statement that "all five of the references contacted could not provide information on PHE/Maser" fails to accurately reflect the information the Air Force actually obtained regarding PHE/Maser's past contract performance, and does not by itself provide a reasonable basis for assigning a high risk to PHE/Maser's proposal.

Conclusion

On the basis of the record presented, we conclude that the Air Force's assessment of high risk with regard to PHE/Maser's proposal in part resulted in the circumvention of the requirements of the Small Business Act and in part is unsupported by the record. Specifically, to the extent the assessment of risk was based on PHE/Maser's financial capability and the Air Force's concern that

[8] PHE/Maser had specifically advised the Air Force that its references "will recognize us as Potomac Hudson Engineering or PHE." Further, in light of the Air Force's earlier arguments that it believed the initial proposal was submitted on behalf of two separate companies—one of which was Potomac Hudson Engineering, the Air Force cannot credibly assert that references for Potomac Hudson Engineering were not relevant to PHE/Maser's proposal.

PHE/Maser would not comply with the "Limitations on Subcontracting" clause, these matters should have been referred to the SBA before the proposal was rejected. To the extent the risk assessment was based on PHE/Maser's purported misrepresentations regarding its corporate status and lack of references, the record does not reasonably support the Air Force's assessment of high risk.

The protest is sustained.

Recommendation

The Air Force awarded this contract to RAI on April 11, 1991. PHE/Maser's protest was filed more than 10 calendar days after that award; accordingly, the Air Force was not required to suspend contract performance pending resolution of this protest. However, the contract is being performed on a task order basis. We therefore recommend that the Air Force reconsider the risk presented by PHE/Maser's proposal without taking into account concerns related to PHE/Maser's corporate status or its references, neither of which is supported by the record. If the resulting risk assessment warrants selection of PHE/Maser, RAI's contract should be terminated and award made to PHE/Maser. In the event the Air Force still considers that the risk presented by PHE/Maser's financial capability and its ability to comply with the "Limitations on Subcontracting" clause is sufficient to preclude award, the matter should be referred to the SBA and, in the event the SBA issues a COC, RAI's contract should be terminated and the award should be made to PHE/Maser. In addition, PHE/Maser is entitled to the costs of pursuing its protest. 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6(d)).

Appropriations/Financial Management

Civilian Personnel

Compensation

■ Civil Service regulations/laws

■■ Service contracts

■■■ Personal services

■■■■ Prohibition

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing nuclear plant operators does not involve the improper use of personal services contracts because the contract employees are not subject to continuous supervision and control by employees of the Commission.

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■ Civil Service regulations/laws

■■ Service contracts

■■■ Personal services

■■■■ Prohibition

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing operators for nuclear facilities does not involve the performance of inherently governmental activities. The Commission's guidelines are so comprehensive and detailed regarding all aspects of the testing procedures that the contract employees exercise minimal discretionary authority and make limited value judgments in preparing recommendations for Commission employees who decide whether to grant these operator licenses.

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Procurement

■ Discussion
■■ Adequacy
■■■ Criteria

Where protester offered more highly qualified personnel in its best and final offer (BAFO) but lowered its estimated salaries for district representative positions, agency was not obligated to discuss concerns over cost realism that first arose after protester submitted its BAFO.

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■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Cost evaluation

Agency adjustment of protester's estimated cost to reflect cost experience of incumbent in identifying salary required to recruit qualified district representatives was reasonable, where the limited data available indicated that the incumbent's salaries were generally in the middle range of those paid for similar staff positions.

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■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Cost evaluation

Where agency determined, based on a survey of similar staff positions under other contracts and the salaries contained in other technically acceptable proposals, that in order to supply district representatives under recruiting contract, protester would have to pay higher salaries than estimated in its proposal or to hire personnel with less qualifications than indicated in the protester's proposal, it was proper for agency to adjust estimated cost, since solicitation did provide for cost realism adjustments and since technical evaluation was based on assumption that protester would hire personnel with the qualifications proposed.

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■ Offers
■■ Evaluation
■■■ Technical acceptability

Although an agency may use traditional responsibility factors, like management and staff capabilities and company experience, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business firm's proposal as technically unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the proposal but instead effectively constituted a finding of nonresponsibility.

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