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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 (formally 31 U.S.C. §§74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. §3702 (formally 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" 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 (1987). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-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 research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

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B-237122.3, B-237122.4, December 3, 1990

Procurement

Competitive Negotiation
■ Discussion reopening
■■ Auction prohibition

Protest that agency, in taking corrective action to remedy previously improper procurement, is engaged in improper auction technique is denied. Fact that agency did not ultimately make various changes in its requirements, as agency represented it would do, does not affect the need for appropriate corrective action in cases where explicit statutory violations have occurred, and this need takes primacy over possible risk of auction.

Procurement

Competitive Negotiation
■ Technical transfusion/leveling
■■ Allegation substantiation
■■■ Evidence sufficiency

Agency did not engage in improper technical transfusion by permitting competitor of protester to conduct a site visit to a government-owned facility at which protester was incumbent.

Procurement

Competitive Negotiation
■ Offers
■■ Late submission
■■■ Acceptance criteria

Protester's revised offer was properly rejected as late where revised offer was not a modification of an otherwise successful offer which proposed terms more favorable than those contained in original offer.

Matter of: Contact International Corporation

William E. Franczek, Esq., Vandeventer, Black, Meredith & Martin, for the protester.

David M. Eppsteiner, Esq., McKenna & Cuneo, for Servrite International, Ltd., an interested party.

Lieutenant Colonel William J. Holland, Department of the Air Force, for the agency.

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

Contact International Corporation protests the amended terms of request for proposal (RFP) No. F62562-89-R-0130, issued by the Department of the Air Force for services in connection with the operation of a dairy plant and the production of various milk products at Yokota Air Force Base in Japan. Contact argues that the revised RFP causes an impermissible auction situation and that the Air Force engaged in an improper technical transfusion. Contact also protests that the Air Force improperly rejected as late the firm's revised offer submitted in response to the amended RFP.

We deny the protests.

The RFP was originally issued in June 1989, and called for the submission of offers to operate a dairy plant in Yokota, Japan. In response to the original RFP, Servrite International, Ltd. and Contact submitted offers and, after evaluation and discussions with Servrite, the Air Force made award to Contact as the firm submitting the lowest overall cost offer. Subsequent to the agency's award of a contract to Contact, Servrite protested to our Office that the award was improper. In response to that protest, the agency ultimately concluded that it had engaged in improper discussions with Servrite and submitted a request to our Office to dismiss the protest. In that request, the Air Force proposed to take corrective action in the form of amending the RFP to allow discussions with both firms and the submission of best and final offers (BAFO). On the basis of the Air Force's request, we denied Servrite's protest on the ground that either the original award to Contact was proper (if, in fact, the Air Force's communications with Servrite were not discussions and award had therefore been made on the basis of initial proposals to the lowest priced firm) or the agency had engaged in improper discussions with only one offeror (and its proposed corrective action was appropriate). *See Servrite Int'l, Ltd.*, 69 Comp. Gen. 143 (1990), 90-1 CPD ¶ 15.

In response to that decision, Contact filed a request for reconsideration with our Office. Specifically, Contact argued that the agency's communications with Servrite were clarifications rather than discussions and also that the agency's proposed corrective action would result in an impermissible auction since both firms' prices had been revealed during the initial protest. We denied Contact's protest, concluding that the agency had engaged in improper discussions with only one firm and also concluding that the risk of an auction was secondary to maintaining the integrity of the competitive procurement system through appropriate corrective action. *Contact Int'l Corp.*, B-237122.2, May 17, 1990, 90-1 CPD ¶ 481. With respect to the question of an auction, we also stated in the decision that the agency had represented to our Office that it had a variety of changes in its requirements. We indicated that the agency's changed requirements, along with the passage of time, would lessen the potential for an auction.

After our second decision, the Air Force issued amendment No. 3 to the RFP. The amendment called for the submission of revised offers no later than 3:00 p.m. on August 1. Subsequent to the issuance of the amendment, Servrite re-

quested a site visit which was conducted on July 18, apparently without prior notice to the incumbent contractor, Contact. On July 30, Contact filed a protest with our Office alleging an improper auction on the part of the agency and also alleging that the agency had engaged in improper technical transfusion by allowing Servrite to conduct a site visit without Contact being first informed of the time and date upon which it would occur. On August 2, after the time and date set for the submission of revised offers, the agency received a parcel at its facility which apparently was Contact's offer. By facsimile transmission dated August 2, the agency informed Contact that it would not consider the firm's late revised offer. On August 3, Contact filed a protest with the agency arguing that its offer should be considered. On September 13, the agency denied Contact's agency-level protest and, on September 21, the firm protested the rejection of its revised offer to our Office.

Contact first argues that the terms of the Air Force's amendment to the RFP will result in an impermissible auction. Specifically, Contact argues that, despite its representations to the contrary, the agency has made no changes in the amended RFP which will have a significant cost impact on the prices which will now be offered and that, since both firms' prices were previously revealed during the earlier protest, an auction situation exists. In support of its argument, Contact states that the agency has changed the oil ingredient requirement under the RFP from coconut oil to rapeseed oil and has furnished our Office with a modification of another contract which shows that this same change had been effected under that contract without any adjustment to cost. In addition, Contact argues that the agency's minor additions and deletions of certain line items[1] will only result in a net total adjustment to the firm's offer of some $6,500, which is less than one-half of 1 percent of the total contract price. Finally, Contact states that the Air Force has decided not to have the contractor furnish non-fat dry milk despite the agency's contrary representations to our Office.

The Air Force responds that its primary purpose for amending the RFP and seeking BAFOs from competing firms was to remedy an earlier impropriety in its acquisition process, namely, the improper conduct of discussions with only one firm. In addition, the Air Force states that it had previously represented in good faith its intention to require contractors to furnish non-fat dry milk based upon information which led it to question the reliability of its source for this milk, but that, subsequent to the resolution of the earlier protest, it was able to secure a reliable source for the milk. In support of this assertion, the Air Force has supplied our Office with a series of correspondence discussing the initial concern over a reliable source for the milk and directing contracting agencies to develop alternate sources. The correspondence also discusses the subsequent resolution of the problem. Finally, the Air Force also argues that the other minor changes made by the amendment, as well as the passage of time, ameliorate the potential for an auction.

[1] Nine line items were deleted and one added.

In our earlier decision, *Contact Int'l Corp.*, B-237122.2, *supra*, we stated our agreement with the Air Force's proposed corrective action, concluding that the agency had improperly conducted discussions with only Servrite. In that decision, we specifically indicated, with respect to the potential risk of an auction, that such a risk was secondary to the need to preserve the integrity of the competitive procurement process through appropriate corrective action. While we did take note of certain changed requirements which appeared at the time to be factors which would mitigate the potential for an auction situation, those factors were not central to our decision in that case. In this respect, we emphasize that, especially in circumstances where an agency's actions have resulted in the violation of an explicit statutory requirement, the need to preserve the integrity of the competitive procurement process, even at the possible risk of an auction situation, is paramount. *See RGI, Inc.—Recon.*, B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120; *Cubic Corp.—Recon.*, B-228026.2, Feb. 22, 1988, 88-1 CPD ¶ 174.

Here, the Air Force's actions in conducting discussions only with Servrite amounted to an explicit violation of 10 U.S.C. § 2305(b)(4)(B) (1988) which requires an agency to engage in discussions with all responsible offerors within the competitive range. In addition, we are satisfied by the present record that the Air Force represented in good faith its initial intention to require contractors to furnish non-fat dry milk under the revised RFP. Finally, we are persuaded that the minor changes made by the Air Force in its requirements, coupled with the passage of time, lessen the potential risk for an auction. We therefore see no basis to sustain Contact's protest on this ground.

Contact next argues that the agency engaged in improper technical transfusion by permitting Servrite an opportunity to tour the subject facility without prior notice to Contact. Specifically, Contact alleges that the agency conducted an unannounced site visit with Servrite. According to Contact, the agency's improper conduct of a site visit without first providing notice to Contact resulted in there being a technical transfusion between the two firms since Servrite was able to observe Contact's operations at the facility. Contact alleges that Servrite was able to learn who Contact's suppliers are and what maintenance work had been performed on the various pieces of equipment at the facility. Contact alleges that this information provided Servrite with a competitive advantage.

The agency responds that it was not required to provide Contact with notice of Servrite's site visit. In addition, the agency argues that Servrite was not provided any material during the site visit (for example, Contact's laboratory records) which might have provided the firm with an improper competitive advantage.

As an initial matter, we point out that the concept of technical transfusion refers to an improper disclosure by agency officials of information contained in one firm's proposal which results in the improvement of a competing proposal. *See* FAR § 15.610(d)(2) (FAC 84-16). Given the fact that the alleged disclosure in this case occurred during a site visit to a government-owned facility, and was therefore presumably the result of one firm being afforded an opportunity to view a competitor engaged in the performance of work previously contracted for, we think that the concept of technical transfusion is inapplicable to these

circumstances. In any event, we find that nothing improper has occurred in this case. First, we agree with the agency that there is no legal requirement that it provide notice to an incumbent operating a government-owned facility prior to conducting a site visit with another firm interested in competing for the requirement. Second, Contact has provided our Office with no evidence which would tend to suggest that the Air Force, either directly or indirectly, provided Servrite with information which was contained in Contact's proposal or which was otherwise proprietary. We point out that the site visit was conducted at a government-owned facility in which virtually all of the equipment was owned by the government. We also point out that Contact has failed to demonstrate how viewing its operation of the facility would in any way have provided Servrite information relating to the particular contents of its subsequent proposal or would have provided Servrite with information which legally could not have been disclosed. Under these circumstances, we deny this basis of Contact's protest.

Finally, Contact argues that the agency has improperly rejected as late its revised offer in response to the amended solicitation. In this respect, Contact argues that the agency is required to accept the firm's revised offer pursuant to FAR § 52.215-36(e) (FAC 84-58), which provides that a late modification of an otherwise successful proposal which makes the terms of the offer more favorable to the government may be accepted at any time. According to Contact, it had previously submitted the "otherwise successful" offer under the original solicitation (and had been awarded a contract as a result), and its revised offer is simply a modification thereof. Contact also argues that the agency is required to consider its revised offer because only two firms submitted offers under the revised RFP. In this regard, Contact directs our attention to a prior decision of this Office, *Consolidated Devices, Inc.,* B-232651, Dec. 20, 1988, 88-2 CPD ¶ 606, in which we found that a firm submitting a late offer where only one other firm was competing was an interested party to maintain a protest.

First, despite Contact's assertion to the contrary, the firm did not submit an "otherwise successful proposal" as contemplated by FAR § 52.215-36(e). Although Contact was in fact awarded a contract pursuant to its original offer, our Office concluded that the award was improper because the Air Force had engaged in improper discussions prior to the award. Consequently, there is no basis to conclude that Contact was, either at the time of the initial award or at any subsequent time, the "otherwise successful offeror." Moreover, Contact has not even alleged, much less demonstrated, that its revised offer was an offer of terms more favorable than the terms of its original offer. *See* FAR § 52.215-36(e). Second, we think that Contact's reliance upon *Consolidated Devices, Inc.,* B-232651, *supra,* is misplaced. In that case, we concluded that one of only two firms submitting an offer was an interested party for purposes of protesting the propriety of an agency's award decision even though the protester's offer was late. That case does not, however, stand for the proposition suggested by Contact that an agency is required to accept a late offer where only two firms compete for the acquisition. Under these circumstances, we see no basis to

conclude that Contact's late revised offer should have been accepted by the Air Force.[2]

The protests are denied.

B-240150.2, December 3, 1990

Procurement

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

The apparent low bid on a contract for a 3-month base period and three 1-year options properly was determined to be materially unbalanced where there is an unexplained price decrease for the final option period, the bid would not become low until the fifth month of the final option period, and there is reasonable doubt that acceptance of the bid would result in the lowest overall cost to the government because the government determined that it was likely that the final option period may not be exercised due to funding uncertainty.

Matter of: American Housekeepers

J.L. Martin, Jr., for the protester.

Capt. P. Alan Luthy, and Lt. Col. Gerald M. Lawler, Department of the Air Force, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

American Housekeepers protests the rejection of its bid as materially unbalanced under invitation for bids (IFB) No. F41622-90-B0020, a total small business set-aside, issued by the Department of the Air Force, Brooks Air Force Base, Texas, for custodial services.

We deny the protest.

The IFB provided for the award of a 3-month base period from July 1, 1990, to September 30, 1990, with three 1-year option periods. The IFB advised bidders that the government would make award to the lowest priced responsible bidder for the base requirement and all options, but that the government may reject a

[2] Contact also alleges for the first time in its comments filed in response to the agency report on November 13, that Servrite's revised offer should have been rejected as "nonresponsive" because it was a below-cost offer. We decline to consider this argument on the merits since it was not timely filed. In this regard we point out that the subject award was made on September 10, and that all parties to the protest were aware of this fact. Since Contact did not diligently pursue the information necessary to formulate its basis of protest, namely, the dollar value of the award, and since it did not file in our Office within 10 days of learning of the award, we view the allegation as untimely. 4 C.F.R. § 21.2(a)(2) (1990); *see Douglas Glass Co.*, B-237752, Feb. 9, 1990, 90-1 CPD ¶ 175.

bid as nonresponsive if materially unbalanced as to prices for the basic requirement and the option quantities.

At bid opening on June 20, 1990, the Air Force received 36 bids. The four lowest bids were submitted by American, Alpha Maintenance, Inc. (AMI), Western Work Pool, Inc. (WWP), and BPA Building Services (BPA) whose bid prices were:[1]

	Base Period	OP YR 1	OP YR 2	OP YR 3	TOTAL
American	$134,119	486,845	441,560	339,655	1,402,179
AMI	$122,300	456,578	435,662	435,662	1,450,202
WWP	$129,995	479,569	479,569	479,569	1,568,703
BPA	$130,977	486,994	498,092	513,304	1,629,368

On July 3, 1990, the Air Force received an agency-level protest from WWP against any award to American on the ground that American's bid was materially unbalanced. Following review of WWP's protest and American's bid, the Air Force, on July 9, 1990, requested American to provide it with the rationale for its pricing strategy regarding the base period and option years. On that same date, American advised that its pricing strategy was based upon expending large sums of money for equipment, supplies, vehicles, and insurance in advance of start-up contract services. American further advised that since there were no guarantees that the government would exercise any contract options, it believed that its up-front investment of funds was a calculated gamble on receiving option awards and that it was attempting to recoup its investment as early as possible. However, American refused to provide additional cost information in support of its pricing strategy despite being requested to do so by the Air Force.

On July 18, the Air Force determined American's bid to be nonresponsive because it was materially unbalanced. In this regard, the Air Force found that American's bid did not become lower than that of the next lowest bidder until the final option period, and there was a possibility that the government may not exercise all the options. This protest to our Office followed on July 24.

The contracting officer's decision to reject the bid of American as materially unbalanced was proper if: (1) the bid was in fact mathematically unbalanced, and (2) the contracting officer had a reasonable doubt whether the award to American would result in the lowest overall cost to the government. *Professional Waste Sys., Inc.; Tri-State Servs. of TX,* 67 Comp. Gen. 68 (1987), 87-2 CPD ¶ 477; *Howell Constr., Inc.,* 66 Comp. Gen. 413 (1987), 87-1 CPD ¶ 455. A bid is materially unbalanced if the bid is structured on the basis of nominal prices for some work and inflated prices for other work such that each element of the bid does not carry its appropriate share of the total cost of the work plus profit. *Id.* With regard to service contracts that involve the evaluation of a base period and option periods, as is the case here, we have found that a bid may be deemed

[1] Figures are rounded.

mathematically unbalanced if, in terms of the pricing structure evident among the base and option periods, it is neither internally consistent nor comparable to the other bids received. *See Howell Constr., Inc.*, 66 Comp. Gen., *supra.* Thus, a large pricing differential existing between the base and option periods, or between one option period and the others, is itself *prima facie* evidence that the bid is mathematically unbalanced. *Id.*

Here, the record reveals that American's pro rata monthly price for the final option period was 23 percent lower than the pro rata monthly price for the preceding option period and was 58 percent lower than the pro rata monthly price for the initial base period. Further, the record indicates that the other bidders' prices and the government estimate for the base year and each option year remained basically the same or increased somewhat for the later year options.

While American did offer what it considered to be a reasonable explanation for its pricing strategy, the Air Force reports that it was not persuaded that the protester had adequately justified its pricing merely on the basis of start-up costs. For example, the Air Force reports that this rationale may have been viewed more favorably if the prices dropped off after the base period or the first option period and then leveled off. Instead, American's bid price substantially decreased for just the last option year. The Air Force reports that a service contract, such as this, generally does not require the initial expenditure of large sums of money and American, when requested, refused to provide any additional information in support of its pricing.[2]

American argues that the Air Force has not demonstrated by irrefutable evidence that its prices were either nominal or enhanced, which is necessary to show that a bid is mathematically unbalanced. In this regard, American states that developing costs in a custodial contract is very subjective without any set formula, thus making it difficult for anyone to determine with any certainty whether its prices are mathematically or materially unbalanced.

However, as indicated above, American's bidding pattern of offering relatively consistent pricing, except for the last option year is *prima facie* evidence that its bid is mathematically unbalanced. Thus, the agency need not produce further evidence to show mathematical unbalancing, particularly since American refused to provide the more specific details of its pricing strategy when requested by the Air Force to do so.[3] Indeed, we give little weight to a firm's stated business reasons for pricing a final option year much lower than the preceding option period where the firm has failed to explain why its bid should be viewed as mathematically balanced in face of the radically different option year pricing patterns evident in the other bids. *See Howell Constr., Inc.*, 66 Comp. Gen.,

[2] In this regard, the Air Force reports that the majority of costs under the contract are labor costs, which are fixed by the Service Contract Act and that American has proposed to employ the incumbent's employees, thereby reducing most transition costs. Moreover, the Air Force indicates that it is unlikely that the items to be supplied by the contractor would justify inordinate start-up costs because supplies can be used throughout the contract from period to period, and vehicle and insurance expenses should accrue relatively evenly over the contract term. Such costs should generally increase slightly as time passes due to inflation.

[3] American has still declined to provide this information.

supra; G.L. Cornell Co., B-236930, Jan. 19, 1990, 90-1 CPD ¶ 74. Therefore, we find that American's bid is mathematically unbalanced, since it was both internally inconsistent and not comparable to the other bids received, and since American has provided no persuasive explanation to the contrary.

The remaining question is whether American's mathematically unbalanced bid is also materially unbalanced such that an award to American might not result in the lowest overall cost to the government. In this connection, we focus our analysis on various factors, including whether the government reasonably expects to exercise the options; circumstances suggesting that some or all of the options will not be exercised gives rise to a reasonable doubt that an unbalanced bid will result in the lowest cost to the government. *G.L. Cornell Co.*, B-236930, *supra.*

Here, American's bid would not become the lowest compared to the next lower bid until the fifth month of its final option period. Moreover, the Air Force reports that although the custodial services were based upon requirements that were current at the time it drafted the IFB, there is now a substantial likelihood that the contract may be cut short or descoped in some way. The Air Force indicates that because of the end of the cold war, funding for the Air Force is quite uncertain and large cut backs and consolidations are anticipated, which casts considerable doubt on whether the projected savings contained in American's bid will be realized by the government. Because of the Air Force's legitimate concern about funding and because American's bid would not become low until the final option period, we find that the agency reasonably concluded that American's bid may not result in the lowest cost to the government. *See G.L. Cornell Co.*, B-236930, *supra; Professional Waste Sys., Inc.; Tri-State Servs. of TX*, 67 Comp. Gen., *supra.* Therefore, we find that the Air Force properly determined American's bid to be materially unbalanced and thus nonresponsive.

American states that the agency's actions circumvent the IFB's announcement that option prices would be evaluated. However, we find nothing unusual or improper in the agency's initial decision to evaluate options and its subsequent position that the options may not be exercised. *See G.L. Cornell Co.*, B-236930, *supra.* Moreover, the IFB advised that materially unbalanced bids would be rejected.

The protest is denied.

B-235638, December 4, 1990

Civilian Personnel

Compensation

■ Retroactive compensation

■ ■ Deductions

■ ■ ■ Outside employment

An employee who was retroactively restored to duty and awarded backpay disputes the employing agency's determination to deduct the full amount the employee earned through outside employment during the period of the corrected action from the gross amount of the backpay award. In accordance with 5 U.S.C. § 5596(b)(1)(A)(i) (1988) and implementing regulations, the full amount earned by the employee through other employment during the period of improper separation must be deducted from the gross amount of the backpay award. The repayment obligation for lump-sum leave payment is subject to waiver consideration under 5 U.S.C. § 5584. Refunded retirement contributions may be considered for waiver by the Office of Personnel Management under 5 U.S.C. § 8346(b).

Matter of: Chung Yang Kido—Backpay Award—Deduction of Outside Earnings

The issue in this case is whether the Internal Revenue Service (IRS), Department of the Treasury, may compute the backpay awarded pursuant to an Equal Employment Opportunity Commission (EEOC) decision so as to deduct interim outside earnings from net backpay rather than from gross backpay due an employee, Ms. Chung Yang Kido.

This proposal is contrary to the computation method set forth in the applicable regulations and would have the effect of allowing the employee to retain a portion of her outside earnings and eliminate an indebtedness to the government which would otherwise result. Therefore, we hold that this proposed method may not be approved, and all interim outside earnings must be deducted in full from gross backpay. To the extent that the resulting net backpay is insufficient to satisfy the collection of erroneous payments made to Ms. Kido along with other required deductions, Ms. Kido is in debt.

Background

In Ms. Kido's case, in which she claimed she had been forced to resign based on discrimination, a final order was issued by the EEOC Office of Review and Appeals. The final order directed IRS to comply with the Complaints Examiner's recommended decision, which included reinstatement and the payment of backpay under federal anti-discrimination statutes, specifically under Title VII of the Civil Rights Act of 1964.[1] Corrective action ordered by the EEOC Office of Review and Appeals is mandatory and binding on the agency. 29 C.F.R. §§ 1613.234, 1613.237 (1988).

[1] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (1988).

In an attempt to comply with the action ordered by the EEOC, IRS computed Ms. Kido's backpay in accordance with applicable guidance found in 5 C.F.R. § 550.805(e), and the Federal Personnel Manual Supplement 990-2, Book 550, S8 (Backpay). Based upon this guidance, Ms. Kido's gross backpay was reduced by the amount of her interim outside earnings leaving net backpay from which erroneous payments received for accrued annual leave were collected. Then the refunded retirement contributions she had received were deducted, and other authorized deductions were made such as retirement contributions computed on gross basic pay for the period of separation, federal and state taxes computed on net backpay, Medicare, and health benefits premiums. This computation left her in debt to the government.

Ms. Kido has disputed this method of computation. To settle the dispute, Ms. Kido and the IRS have agreed to enter into a settlement, if approved by our Office, whereby the order of the backpay computations would be changed so as to make deductions for all erroneous payments and other authorized deductions from gross backpay before gross backpay is reduced by outside earnings.[2] The agreement would then allow the interim net outside earnings to be deducted from the net adjusted backpay as a final adjustment. The IRS notes that by computing Ms. Kido's backpay in this manner, her outside earnings would exceed what she would have earned had she remained with the agency, thereby disposing of the backpay issue. In addition, the parties have agreed that, by the adoption of this methodology, their financial obligations to each other would be deemed satisfied in full, *i.e.*, Ms. Kido would avoid a net indebtedness to the government.

Opinion

The EEOC has provided in its regulations on remedial actions that when discrimination is found, an award of backpay under Title VII is to be computed in the manner required under regulations implementing the Back Pay Act, 5 U.S.C. § 5596 (1988). *See* 29 C.F.R. § 1613.271 (1989).

Generally, the maximum amount that would be recoverable under Title VII when, as here, a finding of discrimination is made is the gross amount of backpay the employee lost minus any interim earnings and other deductions listed in 5 C.F.R. § 550.805(e), and Federal Personnel Manual (FPM) Supplement 990-2, Book 550, subchapter 8 (Backpay) (April 1984). *See Equal Employment Opportunity Commission*, 62 Comp. Gen. 239 (1983). Section 550.805(e) of Title 5, Code of Federal Regulations, implementing the Back Pay Act, provides that in computing the amount of backpay an agency shall deduct any amounts earned by an employee from other employment during the period covered by the cor-

[2] While we do not have the authority to review the merits of allegations of discrimination in employment in other agencies of the government, we have held that we may determine the legality of awards agreed to by agencies in informal settlements of discrimination complaints, based upon our authority to determine the legality of expenditures of appropriated funds. *Albert D. Parker*, 64 Comp. Gen. 349, 351 (1985).

rective action "to take the place of" the employment from which he or she had been separated.

The Office of Personnel Management (OPM) has issued instructions pertaining to deduction of interim earnings and other deductions from backpay, which are set forth in subparagraph S8-7(c) of the revised FPM Supplement 990-2, Book 550, subchapter 8-7 (April 20, 1984; revised in part Aug. 18, 1988). In applying the test prescribed in 5 C.F.R. § 550.805(e), the current instructions provide that the computation of net backpay is a three-step process. First, the agency must deduct any outside earnings received by the employee during the period of the unjustified or unwarranted personnel action. Second, the agency must deduct erroneous payments the employee received as a result of the improper personnel action. If the net amount of backpay is insufficient to cover all deductions for erroneous payments, these payments must be deducted in the following order: (1) retirement annuity payments; (2) refunds of retirement contributions; (3) payments of severance pay; and (4) lump-sum payments for annual leave. Finally, the agency must deduct from backpay "other authorized deductions," such as unpaid retirement contributions for the period of the separation, federal and state taxes computed on net backpay, and health benefits premiums, if any.

We have consistently held that the order of precedence for deductions from backpay contained in the regulations and instructions must be followed in computing the backpay award. *See Angel F. Rivera,* 64 Comp. Gen. 86 (1984); *Victor Crichton,* 66 Comp. Gen. 570 (1987). Specifically regarding outside earnings, we held in 55 Comp. Gen. 48 (1975) that total interim earnings from private enterprise are for offset against total federal backpay otherwise due, even though this results in no backpay payment and a net indebtedness. *See also* 48 Comp. Gen. 572 (1969).

In this case, then, the IRS is without authority to alter the order in which deductions must be taken from the backpay award. Accordingly, Ms. Kido's backpay award must first be reduced by interim outside earnings to arrive at net backpay. Next, refunds of retirement contributions and lump-sum payments for annual leave must be deducted. In Ms. Kido's case this results in a net indebtedness for those contributions and payments.

Under the Back Pay Act, an employee who is restored to duty following an erroneous separation is deemed for all purposes to have performed government service during the period of the separation, and such service is creditable for retirement purposes. *See* 5 U.S.C. § 5596(b)(1)(B); and FPM Supplement 831-1, paragraph S3-4j (September 21, 1981). Therefore, all federal pay that would have been earned during the period of the separation is subject to deductions for retirement fund contributions. Even if no amount of backpay is due the employee because of excessive deductions, the employee must remit the appropriate amount of retirement contributions to the agency in order to receive full credit for the period of the separation. *See* 5 U.S.C. § 8334(c) (1988).

Accordingly, Ms. Kido must pay retirement contributions in order to receive credit for service during the period of her separation. Collection of that amount

may not be waived under 5 U.S.C. § 5584, since no erroneous payment of pay has been made. *Angel Rivera,* 64 Comp. Gen. at 93; 55 Comp. Gen. at 52. However, the provisions of 5 U.S.C. § 8346(b), as implemented by 5 C.F.R. Part 831, authorize OPM to waive erroneous payments from the Civil Service Retirement and Disability Fund. *See Angel Rivera,* 64 Comp. Gen. at 91. Ms. Kido may request that OPM waive her net indebtedness for the refunded retirement contributions under that authority.

Further, Ms. Kido's indebtedness for the lump-sum leave payment is appropriate for waiver consideration, not to exceed the extent necessary to relieve her net indebtedness, since the payments constitute "erroneous payments" within the meaning of the waiver statute, 5 U.S.C. § 5584. *See Vincent T. Oliver,* 59 Comp. Gen. 395, at 397 (1980).

Settlement of Ms. Kido's backpay award should be effectuated in accordance with the above.

B-240579, December 4, 1990

Procurement

Sealed Bidding

■ Use

■■ Criteria

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (1988), for the use of sealed bidding procedures are present, agencies are required *to* use those procedures and do not have discretion to employ negotiated procedures.

Matter of: Racal Corporation

Richard L. Moorhouse, Esq., Dunnells, Duvall & Porter, and Robert G. Bugge, Esq., for the protester.

J. Eric Andre, Esq., Crowell & Moring, for Mine Safety Appliance Co., an interested party.

Jeffrey I. Kessler, Esq., and David DeFrieze, Esq., Department of the Army, for the agency.

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

Racal Corporation protests the Department of the Army's use of competitive negotiation in the procurement of a quantity of C2 gas mask canisters under request for proposals (RFP) No. DAAA09-90-R-0886. Racal contends that the Army is required to procure the canisters using sealed bidding procedures.

We sustain the protest.

The RFP, issued on July 20, 1990, requested offerors to furnish fixed prices for the canisters, national stock number (NSN) 4240-01-119-2315, both with and without first article testing, and for delivery on an f.o.b. origin and f.o.b. destination basis. Award was to be made on the basis of price and other price related factors.[1] The RFP did not require the submission of technical proposals.

Racal contends that the solicitation violates the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(2)(A) (1988), which provides that an agency *shall* solicit sealed bids if:

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid.

According to Racal, all of the conditions are met in the procurement here and, consequently, the Army is required to use sealed bidding procedures.

The Army does not dispute that three of the conditions have been met, but states that it expects discussions will be necessary such that the use of negotiated procedures is appropriate. Specifically, the Army maintains that discussions are necessary to ensure that offerors fully understand the government's requirements. The Army also maintains that funding uncertainties (which may change the quantity required), the likelihood of changes in delivery schedules and the possibility of changes to the "technical data package" (TDP) may all require discussions.[2]

CICA, 10 U.S.C. § 2304(a), eliminated the previous specific statutory preference for sealed bid procurements. The Act provides that agencies should use the competitive procedure or combination of procedures that is best suited for the circumstances of the procurement. Nevertheless, because of the mandatory language contained in section 2304(a)(2)(A), the use of sealed bidding procedures is required where the four conditions specified are present. *Northeast Constr. Co.*, 68 Comp. Gen. 406 (1989), 89-1 CPD ¶ 402. Negotiated procedures are only authorized if sealed bids are not appropriate under 10 U.S.C. § 2304(a)(2)(A). *See* 10 U.S.C. § 2304(a)(2)(B). While the decision whether to employ negotiated procedures involves the exercise of a business judgment, such decisions must still be reasonable. *See Defense Logistics Agency—Recon.*, 67 Comp. Gen. 66 (1987), 87-2 CPD ¶ 365; *Essex Electro Eng'rs*, 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92.

One of the common reasons utilized by agencies to justify negotiated procedures is the need for discussions, which we have found reasonable where the agency persuasively determined discussions were required or appropriate. For example, we have not objected to this justification in situations where (1) technical proposals or manning charts were requested to assess the understanding of the of-

[1] The "other" price related factors were a determination of whether to accept deliveries f.o.b. origin or destination, whether to impose a first article testing requirement, and what the appropriate government furnished equipment price factor would be.

[2] These issues were the subject of a conference on the record held by the General Accounting Office in which the agency's procurement director and the protester's project manager testified.

ferors because of historical performance problems or where the actual contractual terms might be developed through the negotiation process, *see Military Base Management Inc.*, 66 Comp. Gen. 179 (1986), 86-2 CPD ¶ 720 and *Essex Electro Eng'rs*, 65 Comp. Gen., *supra;* or (2) where no technical proposals were requested but the procurement was for a large quantity of various types of automobiles involving considerable differences in products, such as the availability of various options, that might justify exceptions to the solicitation specifications such that the actual contractual terms might be developed through the negotiation process, *see Carter Chevrolet Agency, Inc.*, B-228151, Dec. 14, 1987, 87-2 CPD ¶ 584 and *Carter Chevrolet Agency, Inc.*, B-229679, Feb. 3, 1988, 88-1 CPD ¶ 107. On the other hand, we have sustained protests where agencies have asserted that discussions were required on a routine construction contract to assess understanding but no technical proposal was requested, *see Northeast Constr. Co.*, 68 Comp. Gen., *supra;* or where the agency asserted that discussions were necessary to guarantee that award will be made at a fair and reasonable price. *See ARO Corp.*, B-227055, Aug. 17, 1987, 87-2 CPD ¶ 165.

In this case, the Army has advanced two basic reasons why discussions are necessary and appropriate. First the Army asserts that discussions are necessary to ensure that all firms have a complete understanding of the specifications. Second, the Army essentially argues that it would be administratively convenient to have the flexibility of a RFP to allow for changes. As outlined below, neither reason justifies the conduct of discussions, given CICA's statutory conditions for employing negotiated procedures.

The Army asserts that discussions are necessary to ensure that all firms have a complete understanding of the specifications. The agency has failed to demonstrate, however, how it intended to utilize discussions to evaluate the understanding of responding offerors. In this regard, an offeror's understanding is typically reflected in its technical proposal, which the agency did not require in this case. *See Northeast Constr. Co.*, 68 Comp. Gen., *supra.* The agency has not explained how it would otherwise evaluate an offeror's understanding in this procurement.

Instead, the record reflects that the Army is in reality concerned that offerors may not have the capability to produce the canisters. *See* Transcript of Conference (Tr.) at 41, 59-60. In this regard, the agency notes that one prior producer went bankrupt and unproven producers have submitted low priced proposals on previous RFPs. On the other hand, except for the bankrupt contractor, only experienced producers, that is, Racal and Mine Safety Appliance Co., have received awards for this item. While the agency's concern that prospective contractors have the capability to perform is legitimate, we think that where no technical proposal is required, an investigation of the offeror's responsibility, using such tools as a preaward survey, is generally the proper mechanism to ameliorate the agency's concerns. *Northeast Constr. Co.*, 68 Comp. Gen., *supra;* Federal Acquisition Regulation (FAR) § 9.105 (FAC 84-39). Moreover, sealed bid procedures have a specific mechanism, pre-bid conferences, for the explicit purpose of briefing prospective bidders and explaining complicated specifications.

FAR § 14.207 (FAC 84-58). Under the circumstances, we find the agency's concerns here, that offerors be capable and understand the requirements, do not support a conclusion that discussions are therefore required.

Nor do we think the agency's other basic reason that negotiated procedures would better allow for possible changes in quantity, delivery schedules, opening dates, etc., serves as a rationale for discussions. Such changes are properly accomplished by an amendment, regardless of the procurement type. FAR §§ 14.208, 15.410 (FAC 84-53).

The agency nevertheless contends that sealed bidding would require it to cancel the solicitation if it realized after bid opening that changes to the quantity, delivery schedule, or TDP were necessary. It states that it needs to have the freedom provided by negotiated procedures to simply incorporate changes, whenever they occur, into the procurement. With respect to quantity or delivery changes, this risk is always present in any type of solicitation and to use it as a rationale to evade this statutory requirement would result in no procurements being conducted using sealed bid procedures. In this case, the record does not indicate that procurements for the C2 canisters have any history of last minute quantity or delivery schedule changes.[3] Tr. at 24.

Moreover, the agency is not using the discussion process for specification development purposes as was the case in the *Carter Chevrolet* cases. The C2 canister has a NSN,[4] and the RFP requires that the canister be manufactured in accordance with a detailed TDP. The record also shows that the C2 canister specifications are relatively mature. *See* Tr. at 73. The agency admits that it is aware of potential changes to the TDP for the C2 canister well in advance of their actual incorporation into the solicitation. Tr. at 29, 30.

Under the circumstances, we do not think the likelihood of unexpected changes occurring in the relatively short period after bid opening and before award is an adequate justification for discussions.[5] Therefore, the agency's desire to maintain the administrative convenience to allow for potential changes or request best and final offers to update prices if awards are delayed and changes are made is not a sufficient reason to justify discussions. Since the Army has not asserted that any of the other three CICA conditions is applicable, we find that the agency was required by section 2304(a)(2) to employ sealed bidding procedures.

While the agency argues that Racal was not prejudiced by this defect, Racal testified that it would submit different initial prices in a sealed bid procurement than it would in a negotiated procurement where subsequent discussions may be conducted.[6] *See* Tr. 86, 92-93, 100-101. Thus, this case is different from

[3] The Army has informed us that during the pendency of this protest an amendment to the RFP increased the procured quantity from 770,780 to 1,248,784 canisters. However, the record shows that in previous procurements no major quantity changes occurred after the closing date for receipt of proposals. *See* Tr. at 24.

[4] The agency, in its report, in fact stated that this RFP was functionally equivalent to an invitation for bids (IFB).

[5] FAR § 14.101(e) requires that award be made after bid opening "with reasonable promptness."

[6] We note that section 802 of the National Defense Authorization Act for fiscal year 1991, Pub. L. No. 101-510, Nov. 5, 1990, has amended CICA, 10 U.S.C. § 2305, to require agencies using competitive negotiation procedures to

Continued

Milbar Corp., B-232158, Nov. 23, 1988, 88-2 CPD ¶ 509, *aff'd, Toolmate Inc.—Recon.*, B-232158.2, Mar. 13, 1989, 89-1 CPD ¶ 266, where none of the offerors had indicated that they would have bid differently had the solicitation been issued as a sealed bid procurement. Here, we conclude that Racal was prejudiced by the agency's failure to utilize sealed bid procedures.

We sustain the protest.

We recommend that the procurement be recompeted using sealed bid procedures. Under the circumstances, we find that Racal is entitled to the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d) (1990).

B-240624, December 4, 1990

Procurement

Sealed Bidding

■ Amendments

■■ Acknowledgment

■■■ Government mishandling

Procuring agency properly considered misplaced acknowledgment of solicitation amendment where record establishes that the acknowledgment was deposited at the government installation 2 days prior to bid opening and was misplaced by the agency, but was in the agency's possession until it was found, and it was discovered prior to award.

Matter of: Kuhnel Company, Inc.

Clarence Kuhnel, Jr., for the protester.

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

Katherine I. Riback, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Kuhnel Company, Inc. protests the award of a contract to Glasson Construction, Inc. under invitation for bids (IFB) No. 62472-89-B-0428, issued by the Naval Facilities Engineering Command for the provision of life safety equipment at the Naval Station, Philadelphia, Pennsylvania. Kuhnel contends that Glasson, the low bidder, failed to timely acknowledge a material amendment to the IFB.

We deny the protest.

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include in solicitations a statement of whether or not discussions will be conducted. H.R. Rep. No. 665, 101st Cong., 2d Sess. 301, in explaining one purpose of this statutory change, states that "competing contractors will be encouraged to make their best offer the *first* time—so the government doesn't waste its time reviewing a proposal that is likely to change anyway, and contractors don't have to waste their time preparing a 'going in proposal' and a 'best and final offer.' "

The IFB was issued May 24, 1990, with a June 26 bid opening date. This bid opening date was extended to July 5 by amendment No. 2, which also contained certain wage rate modifications. At the July 5 bid opening it appeared that although Glasson had submitted the low bid, it had failed to acknowledge amendment No. 2. On August 7, the contract specialist contacted Mr. Glasson, who stated that he had hand-delivered his original bid on June 26 and the amendment acknowledgment on July 3. The contract specialist was unable to verify Glasson's visit to the installation on June 26 because Glasson had not signed the visitor's log for that date.[1] The original bid envelope, which would establish the time and date of receipt, had been discarded by the contract specialist after bid opening. Glasson's visit on July 3 was substantiated by the visitor's log, which lists the purpose of his visit as "bid." The amendment acknowledgment was not located by the agency until August 14, when the contract specialist noticed Glasson's envelope in the bid box attached to several sealed government estimate envelopes. Glasson's envelope, which was marked "Rec'd 7/2/90 3:02," contained a modification reducing the bid price by $5,000 along with acknowledgment of amendment No. 2. The agency has submitted an affidavit by the bid room procurement clerk stating that she now recognizes that she inadvertently marked the acknowledgment envelope as received July 2 rather than July 3.[2] She states that the acknowledgment was definitely received prior to the July 5 bid opening date.

The contracting officer determined that the evidence established that Glasson timely delivered the acknowledgment and that it would have been opened at bid opening but for its misplacement by the agency. The agency determined that consideration of the acknowledgment was proper because it was timely delivered and remained in control of the agency up to the time that it was discovered. The agency therefore awarded the contract to Glasson as the low, responsive bidder and this protest followed.

Initially, Kuhnel protested that Glasson failed to acknowledge amendment No. 2. After receiving the agency report, Kuhnel hypothesized that the absence of the original bid envelope with a time/date notation coupled with the absence of any record of Glasson's visit in the log book, suggests that Glasson did not deliver his bid on June 26, and Kuhnel now contends that Glasson delivered his original bid on July 3 and then delivered his amendment acknowledgment some time after bid opening.

Since the amendment is part of the bid, a misplaced amendment acknowledgment is governed by the procedures concerning misplaced bids. *See Cassidy Cleaning, Inc.*, B-212196, Nov. 22, 1983, 83-2 CPD ¶ 608. We have stated that a misplaced bid may be considered for award if: (1) the bid was received at the installation prior to bid opening, (2) it remained under the agency's control until discovered, and (3) it was discovered prior to award. *T & A Painting, Inc.*,

[1] The agency states that the installation did not have a full-time receptionist during this period and it was possible that not all visitors signed the log book when entering the installation.
[2] The agency also has explained that the time/date notation was handwritten rather than stamped because the mechanical time/date stamp was inoperable on the date in question.

B-233500.2, Apr. 11, 1989, 89-1 CPD ¶ 369. In making the determination of whether such a bid may be considered, the time of receipt at the installation must be established. *Id.*

Here, the time/date notation on the envelope of the acknowledgment, as clarified by the bid room clerk's affidavit, along with the signature of Mr. Glasson in the visitor's log book, establish that the acknowledgment was delivered at 3:02 on July 3. The agency correctly concedes that its own mishandling was solely responsible for the acknowledgment being misplaced until after bid opening, and the record establishes that the Glasson acknowledgment was timely received by the agency and remained under the agency's sole control until its discovery. There is no evidence in the record which supports Kuhnel's hypothesis that the acknowledgment was received after bid opening. Accordingly, the agency properly considered Glasson's bid.

The protest is denied.

B-240728, December 10, 1990

Procurement

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

Where agency investigation revealed misstatements and discrepancies in individual sureties' net worth information furnished in Affidavits of Individual Surety in support of bid guarantee, agency reasonably determined that there was inadequate evidence of value and ownership of claimed assets as well as doubt as to the integrity of the sureties and the credibility of their representations; contracting officer therefore properly rejected bidder as nonresponsible.

Matter of: Santurce Construction Corp.

Frank Rotger for the protester.

Lester M. Hunkele III, Esq., Department of Veterans Affairs, for the agency.

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

Santurce Construction Corp. protests its rejection as nonresponsible under invitation for bids (IFB) No. 620-074, issued by the Department of Veterans Affairs (VA), for the renovation of Building 15, VA Medical Center, Montrose, New York. Santurce argues it improperly was found nonresponsible based on a determination that the individual sureties on its bid guarantee failed to submit suffi-

cient proof of ownership and value of assets claimed in support of net worth, and thus were unacceptable.

We deny the protest.

The IFB, included under the Small Business Administration's (SBA) 8(a) program, solicited bids from 8(a) firms.[1] The IFB required bidders to submit a bid bond or guaranty in the amount of $2,500,000 if the amount of the contract exceeded $5,000,001, which was the case here. In addition, the IFB incorporated Federal Acquisition Regulation (FAR) § 52.228-11, which provides that offerors shall obtain from individual sureties a pledge of assets, including evidence of an escrow account for personal property and a recorded lien on real property, supported by a certificate of title.

Only Santurce submitted a bid, in the amount of $9,047,390. Santurce's bid guarantee, in the proper amount, named two individual sureties, Mr. Pease and Mr. Barrus, and was accompanied by Affidavits of Individual Surety, Standard Form (SF) 28, setting forth each surety's net worth, and also included a certificate of sufficiency for each surety. Mr. Pease's SF 28 indicated a net worth of $21,857,000, including real property in Utah with a stated fair market value of $19,550,000, subject to a $2,675,000 mortgage. Mr. Barrus listed his net worth as $24,330,000, including a claimed $16,030,000 in equity in real property in Utah, with a fair market value of $18,875,000 and subject to a $2,845,000 mortgage. Each surety's certificate of sufficiency was signed by a Mr. Marier, with the title of Vice President of Pyxis Financial Corporation.

A preaward investigation by VA revealed that Mr. Pease owned much less real property in Utah, with a vastly lower fair market value, than claimed in his affidavit. Meanwhile, the agency was unable to confirm ownership by Mr. Barrus of any real property in Utah, contrary to the statements in his SF 28. Neither surety provided the required pledge of assets, such as evidence of an escrow account for personal property, or a recorded lien in favor of the government, supported by title, for the real property listed in their SF 28s. The VA also noted that neither surety used the newest revised version of the SF 28, which provides additional protection to the government against fraud by requiring a sworn statement that is subject to the provisions of 18 U.S.C. §§ 1001 and 494 (1988) (providing monetary and criminal penalties for fraud in government contracts).

As part of its investigation, the VA also contacted the Office of the State of Utah Financial Institutions and learned that "Pyxis Financial Corporation" was not licensed to conduct bank or trust company business in Utah, and that its certificate of incorporation had been suspended on February 1, 1990, for failure to file required annual reports. The agency was further advised that charges of possible criminal conduct had been referred to the local county attorney's office for prosecution on February 26, based on the misrepresentation of Pyxis as a

[1] Section 8(a) of the Small Business Act provides for contracts to be awarded to the SBA and for the SBA to subcontract for their performance with socially and economically disadvantaged small business concerns. *See* 15 U.S.C. § 537(a).

bank or other depository institution, and that the Utah Attorney General's Office had been requested to commence a civil proceeding enjoining Pyxis and Messrs. Marier and Barrus from making further unlawful representations. The investigation also revealed that Mr. Barrus was the registered agent as well as an officer and director of Pyxis; as such, the agency concluded, Mr. Barrus's certificate of sufficiency was tantamount to him certifying his own net worth, and thus was unacceptable.

On July 24, the VA telefaxed a letter to Santurce advising that its bid was rejected as nonresponsive,[2] because its bid guarantee was unacceptable (and because its bid was 21 percent over the government estimate, which issue we need not resolve), and stating it would resolicit on an unrestricted basis if Santurce did not provide an acceptable guarantee within 5 working days of July 24. In response, by letter of July 25, Santurce requested additional information as to the reasons for rejection of its guarantee. By telefax of August 1, the VA responded that it rejected Santurce's guarantee because, among other reasons, it was not supported by acceptable security. Santurce, in a telefaxed response, requested that the original guarantee submitted on June 21, with all supporting documentation, be returned to Santurce prior to its submittal of a new guarantee. On August 7, the 5-working-day deadline having expired, the VA advised Santurce it no longer would accept any additional bid guarantees from Santurce and that it would readvertise the project on an unrestricted basis.

Santurce argues that the VA's nonresponsibility determination was arbitrary and capricious because the agency failed to give Santurce specific reasons why the assets pledged were unacceptable and an adequate opportunity to correct any deficiencies. Santurce asserts that the agency was required under FAR part 28 to afford it 10 days after rejection to provide an acceptable guarantee by, for example, substituting acceptable sureties for the unacceptable sureties.

The contracting officer is vested with a wide degree of discretion and business judgment in determining the acceptability of an individual surety, and we will not question such a determination so long as it is reasonable. *Carson & Smith Constructors, Inc.,* B-232537, Dec. 5, 1988, 88-2 CPD ¶ 560. Further, because the purpose of the bonding requirement is to provide the government with a financial guarantee, information which calls into question a surety's integrity and credibility of their representations in connection with the procurement diminishes the likelihood that this guarantee will be enforceable, and may be considered by the agency in determining the sureties' acceptability. *Farinha Enters., Inc.,* 68 Comp. Gen. 666 (1989), 90-1 CPD ¶ 262.

We find that the VA had a reasonable basis for rejecting both sureties, since the deficiencies and discrepancies discovered in the net worth information furnished cast legitimate doubt on the adequacy of the sureties' assets, as well as on their

[2] While the financial acceptability of an individual surety is a matter of responsibility and not responsiveness, the contracting officer's incorrect use of the word "nonresponsive" rather than "nonresponsible" in rejecting Santurce's bid is of no legal consequence. *See Aceves Constr. and Maintenance, Inc.,* B-233027, Jan. 4, 1989, 89-1 CPD ¶ 57. It is plain from the record that the contracting officer, in effect, made a nonresponsibility determination when rejecting Franklin's bid.

integrity and the credibility of their representations. The VA attempted to, but could not, verify Mr. Barrus's alleged ownership of any real property in Utah. Further, the VA was advised by the Utah Bureau of Land Management and several local appraisers that the estimated value of Mr. Pease's land was only between $25 to $300 per acre, nowhere near the $1,300 per acre claimed. This information alone, we believe, was sufficient to support the agency's conclusions as to the sureties' adequacy, but there were significant other supporting considerations as well: the absence of the required recorded liens supported by titles, making it difficult or impossible to verify ownership of the property; the inadequacy of the certificates of sufficiency, which are to be executed by the officer of a bank or other depository institution, since Pyxis is not such an institution and, moreover, is subject to civil and criminal prosecution for misrepresenting itself as such an institution; and the fact that Mr. Barrus, as an agent and officer of Pyxis, essentially certified the sufficiency of his own assets. Santurce does not challenge the VA's position regarding any of these omissions, misstatements, or discrepancies. We conclude that the agency reasonably determined that both sureties were unacceptable.

The protester's assertion that, under the FAR, it should have been afforded 10 days after rejection of its guarantee to provide an acceptable guarantee is without merit. The FAR contains no such requirement. Indeed, to the extent that Santurce wished to submit acceptable sureties for Messrs. Pease and Barrus, we point out that such a substitution was impermissible; substituting sureties on a bid guarantee would alter the sureties' joint and several liability under the guarantee, the principal factor in determining the bid's responsiveness to the bid guarantee requirement. *See Clear Thru Maintenance, Inc.*, 61 Comp. Gen. 456 (1982), 82-1 CPD ¶ 581.[3] Further, we believe the 5 days given to Santurce to augment surety information already requested in the solicitation was reasonable; a contracting officer need not request any additional information where information of record casts legitimate doubts on the integrity and credibility of the individual sureties. *Seaworks, Inc.*, B-226631.2, Dec. 27, 1989, 89-2 CPD ¶ 581.

Finally, Santurce argues that the agency was required to waive the bid guarantee requirement here, since it was the only bidder. However, while the FAR does provide that a contracting officer *may* waive a bid guarantee requirement where, as here, only one bid has been received and it does not comply with the bid guarantee requirement, it does not require that he do so. *See* FAR § 28.101-4(c). The VA determined that waiver of the bid guarantee here would not be in the government's interest, since the discrepancies and misstatements in the SF 28s raised serious doubts as to the likelihood that the sureties' financial guarantees would be enforceable. This was a reasonable determination. *See Farinha Enters., Inc.*, 68 Comp. Gen. 666, *supra*.

[3] FAR § 28.203(d) does provide that a contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted a reasonable time, as determined by the contracting officer, to present an acceptable substitute surety. However, substitution is permitted in that situation because performance and payment bonds are executed only by the contractor, *i.e.*, after award, and thus, unlike a bid bond or guarantee, have no effect on the responsiveness of a bid. This provision therefore does not apply here.

The protest is denied.

B-241129, December 10, 1990

Procurement

Competitive Negotiation
■ Discussion reopening
■■ Propriety
■■■ Best/final offers
■■■■ Non-prejudicial allegation

Protest that agency improperly reopened negotiations and requested best and final offers after announcing that protester was apparent successful offeror is denied where prices were not disclosed, and other offerors did not gain advantage from knowing identity of apparent successful offeror.

Matter of: General Projection Systems

Drake W. Wayson for the protester.

Millard F. Pippin, Department of the Air Force, for the agency.

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

General Projection Systems (GPS), the apparent successful offeror under request for proposals (RFP) No. F04699-90-R-0055, issued by the Department of the Air Force for installation of projection systems in conference rooms at McClellan Air Force Base, California, protests the agency's decision to reopen negotiations and request new best and final offers (BAFO).

We deny the protest.

The RFP, which was 100 percent set aside for small business, contemplated award of a firm, fixed-price contract to the responsible offeror submitting the lowest-priced, technically acceptable proposal. The Air Force received six proposals by the amended May 31, 1990, due date, and GPS was subsequently selected for award. As required by the Federal Acquisition Regulation (FAR), the contracting officer notified the unsuccessful offerors on July 12 of GPS' selection in order to afford them the opportunity to protest GPS' small business size status. Upon learning that GPS was the apparent successful offeror, another offeror, Carrigan Enterprises, filed an agency-level protest alleging that GPS would not be able to meet certain RFP requirements since it was not present at an April 10 site visit, and that Carrigan had not been permitted to submit questions after April 19—the deadline announced at the April 10 site visit—the answers to which might have enabled Carrigan to lower its price.

Upon review of Carrigan's protest, the Air Force learned that Carrigan had not been informed of a second site visit, held on April 26, at which offerors were informed that they could submit further questions in writing. The Air Force determined that Carrigan had been denied the opportunity to have any further questions addressed, and concluded that it was required to reopen the competition to assure fairness. On September 14, the Air Force issued an amendment to the solicitation requesting BAFOs from all offerors, whereupon GPS filed this protest in our Office.

GPS contends that reopening negotiations and requesting BAFOs prejudiced GPS' competitive position in the procurement because it gave the other offerors the opportunity to lower their prices with the knowledge that GPS was the low offeror. Indeed, GPS notes, since filing its protest, the Air Force has evaluated the BAFOs and has determined that Carrigan is now the apparent successful offeror. GPS argues that Carrigan's agency-level protest was without merit and did not warrant the corrective action taken by the Air Force. The Air Force responds that because all offerors had not been treated equally, it was required to reopen the competition to preserve the integrity of the procurement system. The Air Force also argues that reopening did not cause GPS any competitive harm, since its price was not exposed.

In general, there is nothing improper in an agency's requesting BAFOs in a negotiated procurement; in fact, the usual sequence of events in a negotiated procurement includes at least one request for revised offers. *Braswell Shipyards, Inc.,* B-233287; B-233288, Jan. 3, 1989, 89-1 CPD ¶ 3. Award based on initial proposals is less frequent and, by law, is proper only in limited circumstances. *See* 10 U.S.C. § 2305(b)(4) (1988). Even where, as here, there is information available, at the time the competition is reopened, that a certain firm was in line for award based on initial proposals, the request for BAFOs does not give rise to an improper auction absent a price leak or some other disclosure. *Braswell Shipyards, Inc.,* B-233287; B-233288, *supra.* The record contains no evidence of any disclosure of GPS' price, and none has been alleged. To the extent that other offerors arguably had some advantage from knowing that GPS was the low offeror, GPS had a similar arguable advantage from knowing that it was the low offeror going into the BAFO stage. Under these circumstances, the BAFO request resulted in no competitive prejudice to any offeror, and we think the Air Force's decision to reopen the competition to avoid the possibility that Carrigan was prejudiced by being excluded from the second site visit therefore was unobjectionable.

The protest is denied.

B-240789, December 18, 1990

Procurement

Socio-Economic Policies

■ Small business 8(a) subcontracting

■■ Contract awards

■■■ Administrative discretion

General Accounting Office will review procurements conducted competitively under section 8(a) of the Small Business Act since award decisions are no longer purely discretionary and are subject to Federal Acquisition Regulation.

Procurement

Special Procurement Methods/Categories

■ Service contracts

■■ Commercial products/services

■■■ Use

■■■■ Indefinite quantities

Federal Acquisition Regulation (FAR) does not prohibit the use of an indefinite quantity contract for the acquisition of other than commercial items. Maintenance services, sold to the general public in the course of normal business operations based on market prices, constitute a commercial product as defined in FAR.

Matter of: Morrison Construction Services, Inc.

John H. Chapman for the protester.

Ralph Sletager for Sletager, Inc., an interested party.

Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.

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

Morrison Construction Services, Inc. protests the Department of the Army's solicitation No. DAHC76-90-R-0018, a competitive procurement for maintenance services being conducted under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988). The 8(a) program provides for awards of government contracts to socially and economically disadvantaged small business concerns. We deny the protest.

The solicitation contemplates the award of a fixed-price, indefinite quantity type contract for maintenance of family housing units, including painting, cleaning, floor refinishing, and carpet installation services. Morrison contends that Federal Acquisition Regulation (FAR) § 16.504 does not permit the use of an indefinite quantity contract for this procurement.

Initially, the Army argues that Morrison's protest should be dismissed. The Army argues that since contracts are let under section 8(a) of the Small Business Act to the Small Business Administration (SBA) at the contracting officer's discretion on such terms as are agreed upon by the procuring agency and the SBA, the decision to place or not to place a procurement under the 8(a) program and the award of an 8(a) subcontract are not subject to our review absent a showing of possible fraud or bad faith on the part of government officials or that regulations may have been violated. *See* 4 C.F.R. § 21.3(m)(4) (1990). The Army contends that the protester has not met this standard.

Generally, 15 U.S.C. § 637(a)(1) authorizes the contracting officer "in his discretion" to let a contract to the SBA upon terms and conditions agreed to by the agency and SBA. Traditionally, we have limited our review of 8(a) awards to showings of possible fraud or bad faith or violation of regulations in light of the agency's broad discretion to determine if it will contract through the program or with a particular 8(a) vendor and because the procedure leading to an 8(a) award is not encompassed by the competitive procurement statutes. *See Lee Assocs.*, B-232411, Dec. 22, 1988, 88-2 CPD ¶ 618.

There is, however, a new competition requirement under section 8(a). Where the anticipated award price of an 8(a) contract assigned a manufacturing Standard Industrial Classification code is $5 million, or $3 million in all other cases, and there is a reasonable expectation that at least two eligible program participants will submit offers and award can be made at a fair market price, the contract is to be awarded on the basis of competition among 8(a) firms. 15 U.S.C. § 637(a)(1)(D)(i) (1988), as amended by Pub. L. No. 100-656, § 303, 102 Stat. 3853, 3868-9 (1988); *see* 13 C.F.R. § 124.311 (1990). In sum, the Small Business Act now requires selection of an 8(a) firm on a competitive basis if the contract amount thresholds and other statutory conditions are met.

Our prior decisions limiting review of 8(a) awards were predicated on the agency's broad discretion to let a contract through the 8(a) program or to a particular 8(a) vendor and the lack of competitive selection procedures. While agencies continue to have the discretion to decide whether to award through the 8(a) program, the discretion to make award to a particular 8(a) firm is now limited by the new competition requirement. Moreover, SBA's regulations implementing the 8(a) program require that the competition be conducted in accordance with the FAR. *See* 13 C.F.R. § 124.311(f) (1990). Since our underlying rationale for restricting review of 8(a) awards no longer applies, and since the provisions of the FAR now apply to 8(a) competitions, we will review these 8(a) competitive selections just as we review other competitive award selections.

Morrison's contention is that FAR § 16.504(b) does not permit the use of an indefinite quantity contract for this procurement. That regulation provides, in part, that "An indefinite quantity contract should be used only for items or services that are commercial products or commercial-type products . . . and when a recurring need is anticipated." Morrison asserts that the services being procured here are neither commercial nor commercial-type. The protester argues that construction services, for example, are unique with every sale and

prices are normally established on a competitive bid basis for a specific job, and that there simply is not an established commercial catalog or market price for services such as construction and painting.

In our view, the use of the word "should," rather than "shall," in FAR § 16.504(b) indicates that the regulation is permissive in nature. It does not impose a mandatory prohibition against the use of the indefinite quantity type contract for other than commercial items or services. Moreover, we find the services being procured to be within the FAR definition of commercial products. The regulation defines "commercial product" as one sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices. FAR § 11.001.[1] Painting, cleaning carpets, and other similar maintenance services, even in large quantities, are not services that are unique or provided only to the government. Although the protester asserts that various aspects of this proposed contract such as payment on a square footage basis and possible large variations in the amount of services required are priced in the private sector on an individual basis, the FAR definition focuses on the commercial availability of the items or services being procured, not on the manner in which they are provided. Further, we do not think the commercial product definition should be read so narrowly as to require that the exact services be provided in the exact manner in a commercial setting. *See Sletager, Inc.*, B-237676, Mar. 15, 1990, 90-1 CPD ¶ 298.

The protester also argues that the use of the indefinite quantity type contract imposes a disproportionate cost risk on the contractor, and that this is particularly inappropriate in the context of an 8(a) procurement. Morrison contends that the use of this type of contract creates a condition that can put a small business contractor out of business, thwarting the purpose of the 8(a) program. However, the fact that a solicitation may impose risks on a contractor does not render it improper. *Richard M. Walsh Assocs., Inc.*, B-216730, May 31, 1985, 85-1 CPD ¶ 621. It is within an agency's discretion to offer to the competition a proposed contract imposing risks upon the contractor and minimum administrative burdens on the government. *Sentinel Elecs., Inc.*, B-221914.2 *et al.*, Aug. 7, 1986, 86-2 CPD ¶ 166. The SBA requested use of an indefinite quantity type contract because 8(a) firms would need only obtain bonding for the specified minimum amounts, thus minimizing costs of submitting an offer and maximizing competition among 8(a) firms. The record also shows that at least four firms at the site visit believed the contract type would assist them in obtaining bonding.

Finally, Morrison complains that many line items in the solicitation's price schedule do not include a minimum quantity which the government would be obligated to purchase. In response to this protest, the agency has proposed to amend the solicitation to include the required minimum quantities. The agen-

[1] There does not appear to be any separate definition for commercial services, but we do not think the underlying principles governing services and products differ.

cy's actions render this portion of the protest academic, and we need not consider it further.[2]

The protest is denied.

B-241010, B-241010.2, December 19, 1990

Procurement

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

Protest challenging sole-source award of two interim contracts for automated data processing services based on unusual and compelling urgency is denied where, as a result of protests filed against long-term contract, contracting agency makes a series of short-term awards to incumbent whom agency reasonably believes to be only firm capable of timely fulfilling agency's requirements.

Matter of: Unified Industries, Inc.

Thomas Trimboli, Esq., for the protester.

Edward J. Tolchin, Esq., Ginsburg, Feldman and Bress, for RGI, Inc., an interested party.

Maryann L. Grodin, Department of the Navy, for the agency.

Scott H. Riback, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Unified Industries, Inc. protests the issuance of modification Nos. 14 and 15 to contract N00600-85-D-0477. The modifications were issued to RGI, Inc. by the Department of the Navy for continued performance of RGI's 1985 contract for automated data processing (ADP) services for the Naval Military Personnel Command (NMPC). Unified argues that the modifications were improperly issued on a sole-source basis and that the Navy erred in not soliciting an offer from Unified.

We deny the protests.

On February 27, 1989, the Navy issued request for proposals (RFP) No. N00600-89-R-1017 for the acquisition of ADP support services for the NMPC. The RFP called for an indefinite quantity, indefinite delivery, time and materials contract and called for performance to begin on October 1, 1989, for a 90-day

[2] The protester initially objected to other provisions in the RFP as unnecessary or ambiguous. The agency subsequently took corrective action in response to the protest. Morrison did not take issue with the agency action taken in its comments on the agency report. We deem it abandoned. *Cajar Defense Support Co.*, B-239217, July 24, 1990, 90-2 CPD ¶ 74.

base period with four 1-year options. The procurement required the contractor to continue to develop and maintain the source data system (SDS), a worldwide automated pay and personnel management system. Five proposals were received. Both RGI and Unified were found technically acceptable, but with some weaknesses. Award on initial offers was made to RGI as the technically superior, low evaluated cost offeror. Unified subsequently protested the award to RGI. Unified argued that the Navy improperly evaluated offers. On April 2, 1990, we sustained Unified's protest because the record did not demonstrate that the award on initial offers had been made to the low-cost offeror. We recommended solicitation of best and final offers. *Unified Indus. Inc.*, B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346. On April 9, RGI filed a request for reconsideration. On August 13, 1990, we affirmed our decision.[1] *RGI, Inc.—Recon.*, B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120. While the reconsideration was pending, on July 16, Unified filed a second protest in which it asserted that the technical evaluation which resulted in a finding that RGI was technically superior was the result of bias and a conflict of interest. The Navy subsequently advised us that it was investigating this matter and intended to conduct a new evaluation with a new evaluation panel. Based on this proposed corrective action, we dismissed the protest as academic on August 23, 1990. Since award on the follow-on contract was not made by October 1, 1989, and performance under the last option under the original contract expired on September 30, 1989, the Navy issued modification No. 11 on December 11, extending RGI's 1985 contract through December 31, 1989. Modification Nos. 12 and 13 extended the contract to March 31, 1990, and June 30, 1990, respectively. Modifications Nos. 14 and 15, which Unified protests here, extended the contract to September 30, 1990, and December 31, 1990, respectively. Modification No. 15 contains three 1-month options, extending contract coverage through March 1991.

The modifications are supported by justifications and approval (J&A) for the contract extensions. The J&A cites 10 U.S.C. § 2304(c)(2) (1988), providing for noncompetitive awards on the basis of unusual and compelling urgency. With regard to modification No. 14, the J&A, signed July 17, 1990, stated that if the contract was not extended, the support of SDS programs would not be provided and this would adversely impact support to Navy pay and personnel offices in the continental United States. It states that providing the services in-house is not feasible due to manpower shortages and that use of an alternative source is also not feasible due to high transition costs and the critical need to maintain continuity of services. The J&A further states that after the protest is resolved, the new contract will be competitively awarded. The J&A also states that the services possibly could be performed in-house. The J&A for modification 15, signed September 27, 1990, and also based on urgent circumstances, states that the support to Navy pay and personnel offices will be adversely affected and will prevent SDS from supporting ongoing mission critical requirements for operation "Desert Shield." It further states that any interruption of services

[1] RGI filed a second request for reconsideration (B-237868.4) which we denied on November 13, 1990.

cannot be tolerated at this time. The J&A also advises that the Navy expects to award the new contract by January 1991.

The protester argues that the two modifications in question are improper sole-source awards to RGI. Specifically, the protester argues that the Navy improperly failed to solicit a proposal from it since, in conducting a procurement using other than full and open competitive procedures pursuant to 10 U.S.C. § 2304(c)(2), agencies are required to solicit proposals from as many potential sources as is practicable under the circumstances. Unified points out that the Navy had previously found it technically acceptable under the RFP issued for the follow-on contract to perform identical services. In addition, Unified states that the base period called for under that RFP was 90 days which is the same as the period of performance under each of the modifications being protested. The firm also states that it had developed a detailed transition plan during the pendency of its earlier protest which would enable it to assume responsibility for the work in question within 1 week without disruption of any of the required services. In support of this latter assertion, Unified has submitted an affidavit executed by its vice president which describes in detail the extent and nature of the firm's transition plan and a copy of the plan. Finally, Unified argues that the agency, given the prior and current status of the follow-on acquisition process, was and continues to be aware of its ongoing requirement for the services in question and, consequently, had sufficient time in which to plan and conduct a limited competition for the work called for under the modifications. In this respect, Unified states that the Navy was well aware of the firm's continuing interest in competing for the work.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use other than fully competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2). However, this authority does not automatically justify a sole-source award. Rather, the authority is limited by 10 U.S.C. § 2304(e), which requires agencies to request offers from as many potential sources as practicable under the circumstances. Consequently, sole-source awards are proper only where the agency reasonably believes that only one firm promptly and properly can perform the required work, due to the urgent circumstances. *Data Based Decisions, Inc.*, B-232663; B-232663.2, Jan. 26, 1989, 89-1 CPD ¶ 87.

The Navy argues that it reasonably made award of the two modifications to RGI on a sole-source basis. Specifically, the agency asserts that only RGI as the incumbent was in position to properly perform the work and that Unified could not meet the agency's requirements without a lengthy transition and could not provide the agency with the required services necessary to timely and adequately render contract performance. The Navy asserts that the possibility that Unified might not successfully complete its transition in the 1 week in which the firm states it can accomplish it, posed an unacceptable risk to the SDS program and mission critical requirements. In this regard, the Navy also states that it

was unaware of Unified's 1-week transition plan prior to the time when Unified filed its current protest. Finally, the agency alleges that the delays occasioned by the various protests filed by Unified in connection with the follow-on procurement rather than lack of advanced planning resulted in the agency being unable to solicit a proposal from Unified.

While we are concerned about the fact that the Navy has made noncompetitive awards to RGI for more than a year, we decline, for the reasons stated below, to find that the agency has acted unreasonably here. Under CICA, agencies are required in certain specified circumstances to either stay the award of a contract or suspend performance of a contract which has been awarded during the pendency of a protest to our Office. 31 U.S.C. § 3553 (1988). The fact that a protest has been filed in our Office, however, does not necessarily affect an agency's continuing need for the goods or services to be acquired, and frequently a protested procurement action is timed to provide for the award of a contract at or near the time when a prior contract is due to expire. Under these circumstances, agencies have typically satisfied their continuing need for the goods or services in question by executing short-term modifications to the predecessor contract. In our view, such action on the part of a contracting agency is consistent with the overall purpose of CICA, since it preserves for the protester an opportunity to obtain meaningful relief in the event that we sustain the protest.

Given the nature of the protest process, agencies are faced with uncertainty regarding the amount of time necessary to reach an ultimate resolution of the matter; a protest filed in our Office can take up to 90 working days to be resolved and, if sustained, an indeterminate amount of additional time may be necessary to effectively implement any corrective action recommended by our Office. During this time, agencies must have some method by which they can reliably meet ongoing requirements and at the same time preserve the opportunity for meaningful relief for the protester.

We conclude that the particular circumstances of this acquisition provided the agency with a reasonable basis to make award of the subject modifications on a sole-source basis to RGI. We view the agency's initial three extensions of the subject contract (modification Nos. 11, 12 and 13, which are not at issue in this case) as reasonably necessary in order for the agency to continue to receive the required services during the pendency of Unified's initial protest. In this regard we point out that all three of those modifications were executed prior to our initial decision on April 2, 1990, and that, until receipt of our first decision, the agency had no basis to question the validity of its initial determination to make award of the follow-on contract to RGI. As to modifications Nos. 14 and 15, both were executed after the agency's receipt of our first decision sustaining Unified's initial protest, and during the time when the Navy was determining what course to take in response to our recommendation for corrective action. In addition, in response to Unified's second protest, the Navy agreed to take corrective action. However, this further delayed the follow-on acquisition because the corrective action involved a review of the agency evaluators' apparent conflict of

interest, a matter necessitating investigation by the Navy Inspector General and requiring that the evaluation panel be replaced.

We also do not think that the agency acted unreasonably in making award of the modifications to RGI without first soliciting a proposal from Unified. In this regard, we think the agency, based upon the requirements of the follow-on RFP as well as the proposals submitted in response to that RFP, reasonably concluded that a transition period of approximately 3 months would be necessary in order for another contractor to achieve full performance of the requirement. We note as well that the Navy was unaware of Unified's 1-week transition plan at the time it executed the protested modifications. Given the time frame of the initial Unified protests as well as our recommendation for corrective action, we think the agency's action with respect to the modifications reflected a good faith effort to limit the award of noncompetitive contracts to the period of time directly related to the original protest and the time required for the agency to implement our recommendation. In taking such action, we think that the Navy acted in a fashion which permitted it to acquire necessary services while at the same time preserving for the protester an opportunity to receive meaningful relief in the event that the protest was sustained.

In these circumstances, the demands of 10 U.S.C. § 2304(e) to obtain competition "to the maximum extent practicable" did not require that an agency conduct what would amount to a limited competitive acquisition for requirements that were reasonably expected to be both short-term and uncertain as to duration. Thus, we think that the Navy acted reasonably in extending RGI's contract. We therefore deny the protests.

B-240639.2, *et al.*, December 21, 1990

Procurement

Socio-Economic Policies
■ Preferred products/services
■ ■ Domestic products
■ ■ ■ Applicability

Clause requiring domestic forgings was properly included in a Department of Defense solicitation for items that are considered "final drive gears" on combat support vehicles, where the agency does not find the quantity being acquired is greater than that required to maintain the domestic mobilization base for these items.

Procurement

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

Protest that awardee's offers were technically unacceptable under solicitations for components of final drive gears for combat support vehicles, which required domestically manufactured metal forg-

ings, is sustained, where the awardee's proposals indicated that the forging would be done in a foreign country.

Procurement

Competitive Negotiation
■ **Contract awards**
■■ **Propriety**
■■■ **Offers**
■■■■ **Minor deviations**

Procurement

Socio-Economic Policies
■ **Preferred products/services**
■■ **Domestic products**
■■■ **Compliance**

Contract awards to offeror, whose offer indicated it did not intend to comply with the Department of Defense Federal Acquisition Regulation Supplement § 208.7801 *et seq.* requirements for domestic forging, are not void *ab initio*, where agency and awardee were confused as to the applicability of the requirements and appeared to be acting in good faith.

Procurement

Bid Protests
■ **Moot allegation**
■■ **GAO review**

Protest that contracting agency improperly deleted clause from request for proposals (RFP), which required domestically manufactured forgings, is rendered academic where the agency reinstates the clause.

Procurement

Bid Protests
■ **Moot allegation**
■■ **GAO review**

Awardee's protests against the contracting agency's requesting new proposals are rendered academic where the awardee's contracts are ultimately not disturbed.

Matter of: Diverco, Inc., Metalcastello s.r.l.

Charles A. Raley, Esq., Israel and Raley, for Diverco, Inc., and Richard P. Diehl, Esq., for Metalcastello s.r.l., the protesters.

Susan K. Rosen, for A&H Automotive Industries, an interested party.

Thomas M. Hillin, Esq., Defense Logistics Agency, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Diverco, Inc. protests the awards of contracts by the Defense Logistics Agency, Defense Construction Supply Center (DCSC), to Metalcastello s.r.l. under requests for proposals (RFP) No. DLA700-90-R-0437 (-0437) for 2,452 gearshaft spurs (National Stock Number (NSN) 3040-00-734-7714) and No. DLA700-90-R-0211 (-0211) for 1,685 helical gears (NSN 3020-00-953-9909), because Metalcastello's proposals did not comply with clause I-81 of the RFP, "Required Sources for Forging and Welded Shipboard Anchor Chain Items Used for Military Application for Combat and Direct Combat Support Items" (Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.208-7005 (1988 ed.)). Diverco also protests the deletion of clause I-81 from RFP No. DLA700-90-R-1470 (-1470) for 1,842 helical gearshafts (NSN 3040-00-885-3123). Metalcastello protests DCSC's reopening of discussions and requests for best and final offers (BAFO) on RFPs -0437 and -0211.

We sustain Diverco's protests of RFPs -0437 and -0211 and dismiss Diverco's protest of RFP -1470 and Metalcastello's protests of RFPs -0437 and -0211.

Each of the RFPs, as issued, contained clause I-81, which generally requires all end items and components to contain domestic forging manufactured in the United States or Canada. The applicability of this clause is governed by the DFARS, section 208.7802 of which states in relevant part:

> It has been determined that defense requirements for the forging items listed [below] . . . must be acquired from domestic sources (United States and Canada) to the maximum extent practicable. Accordingly, all acquisitions of these forging items and all acquisitions of items containing these forging . . . items shall include, except as provided in [section] 208.7803 . . . a requirement that such items and forging items incorporated in end items delivered under the contract be of domestic manufacture[1] only. This restriction does not include forgings used for commercial vehicles (such as commercial cars and trucks) or . . . noncombat support military vehicles.

Included on the list of forging items that must be acquired from domestic sources are certain tank and automotive forgings, including "final drive gears."[2] DFARS § 208.7802-1. DFARS § 208.7803 states:

> [Clause I-81] shall be inserted in all contracts except—
>
> (1) when the contracting officer knows that the item being acquired does not contain [the listed forging items];
>
> (2) when purchases are made overseas for overseas use;
>
> (3) if the quantity being acquired is determined to be greater than that required to maintain the U.S. defense mobilization base (provided the quantity above mobilization base needs constitutes an economical buy quantity), such greater quantities will not be subject to the U.S., Canadian restriction and shall be awarded competitively to the maximum practical extent. . . .

DCSC received nine offers on RFP -0437 by January 8, 1990. Metalcastello, the lowest offeror with a unit price of $91.51, indicated in its proposal that except for packaging, the contract would be performed in its plant at Poreta Terme, Italy. Diverco, the fourth lowest offeror with a unit price of $114.15, had the

[1] DFARS § 208.7801 provides that "domestic manufacture" means forging items manufactured in the United States and Canada.

[2] Other listed tank and automotive forgings include: turret rings, road arms, shafts, track shoes, axle shafts, flywheels, connecting rods, crankshafts, roadwheels, spindles, and torsion bars.

lowest offer that clearly agreed to furnish gearshaft spurs with forging manufactured in the United States.[3] On February 23, DCSC awarded Metalcastello the contract without discussions on this matter because it was the low priced offeror.

On January 8, DCSC received seven offers under RFP -0211. Metalcastello, whose offer indicated that all manufacturing (except for packaging) would occur in Italy, was the lowest offeror with a unit price of $52.40. Diverco, which specifically proposed domestic forging, was the next lowest offeror with a unit price of $64. On March 2, DCSC awarded Metalcastello the contract without discussions on this matter because it was the low priced offeror.

On March 6, DCSC issued RFP -1470 for helical gearshafts and received several offers, including offers from Metalcastello and Diverco. To date, no award has been made under the RFP.

With regard to RFPs -0437 and -0211, Diverco filed agency-level protests respectively on March 5 and 13 alleging that the awards to Metalcastello were improper because Metalcastello did not comply with clause I-81. In response to DCSC inquiries on RFP -0437, Metalcastello asserted that clause I-81 was not applicable because these parts were not one of the listed forging items that must be acquired from domestic sources and because the vehicles for which the parts are intended are noncombat support military vehicles.

DCSC initiated a technical review to determine the applicability of the clause to these procurements. The Technical Division at DCSC and the U.S. Army Tank-Automotive Command (TACOM) advised that clause I-81 governs these procurements because the gearshaft spurs and helical gears in question are components of the final drive gears of 2-1/2-ton and 5-ton trucks, which are combat support military vehicles. Accordingly, DCSC, between April and June, repeatedly requested Metalcastello to confirm that domestic forgings would be furnished. Metalcastello continued to dispute DCSC's determination that the items would be used on combat support vehicles or that they were "final drive gears." DCSC issued to Metalcastello a stop work order under RFP -0437 on May 25.[4] No similar action was taken on RFP -0211.

In July 1990, DCSC changed its position. Notwithstanding the advice of the DCSC Technical Division and TACOM, DCSC concluded that clause I-81 should not have been included in RFPs -0437 and -0211. DCSC determined under DFARS § 208.7803 that the quantity of these items being acquired would exceed the quantity necessary for maintaining the defense mobilization base because DCSC's Industrial Preparedness Planning Branch did not list gearshaft spurs or helical gears as defense mobilization base requirements on its Industrial Preparedness Planning List (IPPL).[5] DCSC also believed that, in any event, its re-

[3] The second and third low offerors' proposals indicated other than domestic manufacture of this item. In response to the protest, the third low offeror stated that it could furnish domestically manufactured forging. That offeror's proposal, however, does not indicate that it intended to do so.

[4] On June 11, DCSC advised Metalcastello that unless the condition was cured within 10 days it might terminate the contract for default.

[5] The record shows that the DCSC's belief that the helical gears were not a listed item on the IPPL was erroneous.

quirements were sufficiently urgent that it would not terminate Metalcastello's contract under RFP -0437, particularly since Metalcastello did not agree it was contractually required to supply domestic forged items. On July 17, DCSC denied Diverco's protest with regard to RFP -0437, and on July 19 it authorized Metalcastello to continue performing under this contract.

On August 1, Diverco filed a protest of RFP -0437 with our Office, arguing in effect that the Metalcastello proposal was technically unacceptable. On that same date, Diverco filed an action in the United States District Court for the District of Columbia. In the court action, Diverco sought temporary and preliminary injunctive relief pending our decision on its protest.[6] In opposing this action, DCSC advised the court that it had an urgent need to fulfill its gearshaft spur requirements and that it intended to take certain corrective actions, including providing offerors another opportunity to revise their offers.[7] The court denied Diverco's motion for a preliminary injunction on the basis that Diverco would not suffer irreparable harm, since it could submit another offer and it could reprotest the resulting contract to our Office. The court also believed that DCSC might suffer substantial injury awaiting a decision from our Office because of the urgent need for the part.

On August 3, DCSC issued an amendment to RFP -1470 that deleted clause I-81 and requested BAFOs. On August 7, DCSC issued a stop work order on RFP -0211, which remains in force. On August 9, DCSC amended RFPs -0437 and -0211 to solicit revised prices in accordance with the corrective action it represented to the court. *See* footnote 7, *infra.* On August 10, DCSC denied Diverco's protest of RFP -0211 because of the corrective action being taken.

On August 17, Metalcastello protested to our Office that the agency's actions on RFPs -0437 and -0211 were improper because they constituted an illegal auction and because they may have the effect of overturning proper awards after Metalcastello had incurred substantial expenses on the contracts. On August 17, Diverco protested to this Office DCSC's deletion of clause I-81 from RFP -1470 and the proposed corrective action under RFP -0211. On August 23, Diverco protested the corrective action undertaken by DCSC with respect to RFP -0437.[8] Diverco asserts that clause I-81 was required to be in the RFPs. With regard to RFPs -0437 and -0211, Diverco urges that it should receive the awards as the low acceptable offeror, that is, the only offeror proposing domestic forgings, and asserts that requesting new prices constituted an illegal auction.

In response to the protests, DCSC filed a consolidated report in our Office on September 21, a copy of which it also furnished to Diverco and Metalcastello. In

[6] Diverco argued that the contract with Metalcastello was illegal and that it was entitled to the award, and that Metalcastello's continued performance under the contract would jeopardize whatever remedy might be fashioned in this Office.

[7] DCSC advised the court that it would: (1) issue a stop work order to Metalcastello; (2) delete clause I-81 by amending the RFP; (3) conduct a second round of BAFOs in order to provide offerors an equal opportunity to offer domestic or foreign forging; and (4) make an award to the lowest offeror, which, if it were Metalcastello, would permit continued performance under the original contract.

[8] Diverco's initial protest of RFP -0437 was dismissed as academic because of DCSC's corrective action.

that report, DCSC advised that it had modified its position again and now believed that clause I-81 was applicable to RFPs -0437 and -0211, and that it was reexamining whether this clause applied to RFP -1470. As discussed above, DCSC based its determination not to apply the I-81 restriction on a belief that to do so was unnecessary for maintaining the defense mobilization base. The agency asserts that this view could not reasonably be based upon whether the item was listed on the IPPL or the Planned Producers List (PPL). Since DCSC could not support its determination that the domestic mobilization base requirements for this item were satisfied, it found that clause I-81 was required to be included in the RFPs. *See* DFARS § 208.7803.

The central issue of these protests is whether clause I-81 is applicable to these RFPs. DCSC's cognizant technical personnel have uniformly maintained that the gearshaft spurs and helical gears are components of the "final drive gears" of 2-1/2-ton and 5-ton trucks, and we have no basis upon which to challenge that conclusion.[9] We also agree with the finding of DCSC and TACOM that the trucks—which are "tactical" vehicles, are often used to carry ammunition and are capable of accessing rough terrain—are combat support vehicles. DCSC and Metalcastello state that the applicability of this clause is in doubt because the RFPs did not announce that the 2-1/2- and 5-ton trucks were combat support vehicles. The legal requirement for domestic forgings is not dependent on such an announcement, and we conclude that clause I-81 was applicable to the procurements in question.

As discussed above, DCSC now believes that its decision to delete clause I-81 from the RFPs was in error since there is insufficient evidence that the mobilization base requirements for these parts have been satisfied. DCSC reports that the presence or absence of an item from the IPPL or the PPL is not conclusive evidence of the mobilization requirements for the item. The agency contends that until it establishes a procedure for identifying the mobilization base requirements for these items, the restriction in clause I-81 applies. We agree. Indeed, the fact that the items (final drive gears for combat support vehicles) are listed in DFARS § 208.7802-1 reasonably establishes that there is a mobilization requirement for these items, whether or not the items are specifically listed on an IPPL or PPL. DFARS § 208.7803 clearly is intended to protect domestic sources until there is a sufficient quantity to maintain defense mobilization needs for the items. Since there is no evidence that the amounts of the parts required under these procurements exceeds those necessary to maintain the mobilization base, clause I-81 was properly incorporated in the RFPs and was applicable to all offers submitted.[10] *Cf. NFA, Inc.*, B-236455.2, Dec. 11, 1989, 89-2 CPD ¶ 536 (inclusion of a preference for domestic commodities clause in a solicitation indicates the clause will apply to offers, such that award was

[9] While Metalcastello asserted to the agency these parts cannot be final drive gears because only tanks have final drive gears, it has not supported this position in its protests and comments to our Office. Based on our review, we cannot say DCSC's position on this matter is erroneous.

[10] DCSC has recently informed our Office that on December 7, 1990, the Office of the Assistant Secretary of Defense (Production and Logistics) granted DCSC a class deviation from the requirements of DFARS § 208.7801 *et seq.* for automotive forgings.

properly made to a higher priced offeror that offered a domestic, instead of a foreign, commodity).

Metalcastello's offers on RFPs -0437 and -0211 indicated that it would not comply with clause I-81, even though that clause was specifically checked as applicable. While Metalcastello and DCSC assert that Metalcastello's offers did not preclude it from submitting domestic forging items and did not take specific exception to this requirement, Metalcastello's proposals clearly evidenced an intent to supply foreign forgings. Not only did Metalcastello's proposal indicate that all manufacturing (except packaging) would be done in Italy, but the post-award discussions with that firm confirmed that this was Metalcastello's intent. Under the circumstances, DCSC should not have made award on the basis of Metalcastello's noncompliant offer. *See Federal Data Corp.*, 69 Comp. Gen. 196 (1990), 90-1 CPD ¶ 104; *A&H Automotive Indus., Inc.*, B-225775, May 28, 1987, 87-1 CPD ¶ 546.

We sustain the protests of Diverco on RFPs -0437 and -0211.

Diverco contends that the contract awards should be canceled as void *ab initio* since they are in violation of DFARS § 208.7801 *et seq.* We have adopted the view that an awarded contract should not be treated as void, even if improperly awarded, unless the illegality of the award is plain or palpable. *Peter N.G. Schwartz Co. Judiciary Square Ltd. Partnership*, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353; *John Reiner & Co. v. United States*, 324 F.2d 38 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964). In this case, the record indicates that DCSC and Metalcastello were both confused as to the applicability of the questioned requirement, as evidenced by DCSC's changes in position on this matter. Under the circumstances, since it appears that both DCSC and Metalcastello were acting in good faith, we cannot say the awards are void *ab initio*.

DCSC has notified our Office that the stop work order was lifted under the contract awarded under RFP -0437 due to an urgent need for the item because of a critical supply shortage, which may jeopardize its ability to meet mission essential requirements (specifically, Desert Shield). DCSC also reports that although the need for helical gears is not yet critical, it could become so if Metalcastello's contract is terminated due to the long lead time necessary for this item. Metalcastello has advised that the contracts under RFPs -0437 and 0211 have been substantially performed with significant cost expenditures (70 percent), and DCSC, while not adopting Metalcastello's figures, persuasively states that these contracts are likely substantially performed. Therefore, DCSC asserts that it would not be in the best interests of the government to terminate Metalcastello's contracts.

Diverco contends that the government's interests would be better served if the contracts were terminated and the awards made to Diverco since it contends it could meet the urgent requirements. However, we do not believe that Diverco is necessarily entitled to the award under the RFPs, inasmuch as the failure of Metalcastello to indicate compliance with clause I-81 could have been the subject of competitive range discussions, particularly since it offered the lowest

prices. *See A&H Automotive Indus., Inc.*, B-225775, *supra; Sechan Elecs., Inc.*, B-233943, Mar. 31, 1989, 89-1 CPD ¶ 337. Indeed, Metalcastello persuasively states that if required to do so it would have supplied domestic forgings. Moreover, given the DFARS waiver that has been granted to the application of the domestic forging requirements, see footnote 10, *infra*, it is not clear that clause I-81 would be included in any resolicitation of this requirement.

Under the circumstances, we do not recommend that DCSC terminate the contracts under RFP -0437 and -0211. We do find, however, that Diverco is entitled to recover its proposal preparation costs and the cost of filing and pursuing the protests on these RFPs, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

With regard to RFP -1470, DCSC determined, on November 28, that clause I-81 was applicable and has reincorporated it into the RFP. Therefore, Diverco's protest against DCSC's deletion of this requirement from the RFP is academic. This protest is dismissed.[11]

Metalcastello's protests are also dismissed as academic. Although Metalcastello continues to argue that illegal auction techniques were employed, no useful purpose would be served in considering these issues, since Metalcastello's contract awards are not affected. *See Gartrell Constr., Inc.; U.S. Floor, Inc.*, B-237032; B-237032.2, Jan. 11, 1990, 90-1 CPD ¶ 46.

Accordingly, Diverco's protests of RFPs -0437 and -0211 are sustained, and Diverco's protest of RFP -1470 and Metalcastello's two protests are dismissed.

B-239511, December 31, 1990

Civilian Personnel

Travel
■ Rental vehicles
■■ Fines
■■■ Liability

Absent a clear and unambiguous law to the contrary, United States and its activities are free from state regulation including payment of fines. Therefore, parking tickets are personal liability of employee responsible for their being issued. See court cases cited.

Civilian Personnel

Travel
■ Rental vehicles
■■ Fines
■■■ Liability

A Selective Service System (SSS) employee paid a $50 parking ticket written on a vehicle leased by SSS to prevent the ticket from doubling. SSS determined that the paying employee was not the

[11] Diverco has protested DCSC's right to request a second round of BAFOs in connection with this action, which may be the subject of a separate decision (B-240836.2).

party responsible for receipt of the ticket and did not identify another employee as responsible for receipt of ticket. Whether SSS may reimburse paying employee depends upon whether employee paid a valid obligation of the United States arising by virtue of the language in motor vehicle lease agreement whereby SSS as lessee agreed to not permit leased "vehicle to be used in violation of" District of Columbia law and regulations and that SSS would "indemnify and hold lessor harmless from any and all . . . penalties resulting from violation of such laws."

Civilian Personnel

Travel
■ Rental vehicles
■■ Fines
■■■ Liability

Although the operator of vehicle is liable for payment of parking ticket, District of Columbia law makes owner of vehicle ultimately liable for payment of parking ticket. District law also provides that lessor of vehicle may eliminate liability for parking tickets incurred by lessee. Therefore, whether employee who paid $50 ticket on assumption that agency was liable for such as damages to lessor under a hold-harmless clause in lease agreement paid an obligation of the government for which employee may be reimbursed, depends upon whether lessor would have had to pay the ticket. Request is returned to agency with instruction to make determination regarding lessor's liability since submission lacks requisite finding.

Matter of: Reimbursement of Selective Service Employee for Payment of Fine

This responds to a request from G. Huntington Banister, Comptroller, Selective Service System, (SSS) for a decision on whether SSS may reimburse an employee for paying to the District of Columbia government a parking ticket written on a vehicle leased by SSS. For the reasons stated below, we are returning the request to SSS with instruction to make requisite determination regarding lessor's liability for paying ticket and to take appropriate action based upon such determination.

Background

SSS entered into an agreement on October 15, 1987, with a commercial vendor doing business in the District of Columbia to lease a new automobile for use by the Director, SSS. The automobile received a $50 ticket for failure to have a current safety inspection sticker while parked in the "Government Vehicles Only" space on the public street in front of SSS headquarters building. None of the several drivers who had access to the automobile were present at the time.

SSS states that the failure to obtain a safety inspection resulted from administrative oversight on the part of SSS and not from any negligent or intentional act by a particular employee. It notes that prior to the citation, agency employees believed that the lessor of the automobile was responsible for obtaining the safety inspection.[1] However, subsequent to the receipt of the citation, SSS offi-

[1] This was apparently the first time the automobile had to be inspected while under the lessee's control since the original inspection sticker had been issued for a 2-year period. *See* D.C. Code § 40-201 (1981).

cials reviewed the lease and determined that SSS was responsible for obtaining the safety inspection and for any fines imposed on the lessor as a result of SSS' failure to obtain such inspection.

Within SSS, the Division of Support Services is responsible for maintaining the vehicle and providing drivers as needed. Within the Division, the Support Services Supervisor was responsible for ensuring that the vehicle was properly inspected. However, the Supervisor was on extended leave and subsequently detailed from the Division around the time that the automobile should have been inspected. SSS claims that it is unable to determine who else, if anyone, was responsible for ensuring that the automobile receive a safety inspection. Regardless, the Division Manager paid the ticket to prevent the fine from doubling[2] and has requested reimbursement from SSS.

Voluntary Creditor Rule

Consideration of the Manager's claim for reimbursement begins with what has become known as the "voluntary creditor" rule. This rule holds that using personal funds to pay what a payer perceives to be an obligation of the government generally does not create a valid claim against the government that may be reimbursed. See 62 Comp. Gen. 419 (1983) for an extensive discussion of the voluntary creditor rule. We have permitted reimbursements as an exception to the voluntary creditor rule when the payment is made to meet a public necessity; that is, when there is a real need to act without delay to protect a legitimate government interest. 62 Comp. Gen. at 422-424.[3]

If the employee's claim is for payment of goods or services, the amount allowed as reimbursement may be determined by application of the doctrine of ratification or *quantum meruit.* 62 Comp. Gen. at 424-425. In other situations, reimbursement may be determined in accordance with agency regulations. 61 Comp. Gen. 575 (1982). However, reimbursement may not be authorized to a voluntary creditor when the underlying expenditure itself is improper. Thus, *if the agency would not be authorized to make a given expenditure directly,* then the intervention of an employee as a voluntary creditor can have no effect. 60 Comp. Gen. 379 (1981).

Payment of Fines

It is a fundamental principle of constitutional law that the government of the United States and its activities are free from state regulation in the absence of a clear and unambiguous congressional mandate subjecting the government to state regulation. *Hancock v. Train,* 426 U.S. 167, 178-181 (1976). The freedom from state regulation includes immunity from state taxes, *McCulloch v. Maryland,* 4 Wheat 316 (1819); immunity from state permit requirements, *Train,* 426

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[2] Fines for tickets double if not contested or paid within 15 calendar days. D.C. Code §§ 40-625(d), 40-605(a)(2).
[3] *But see,* 63 Comp. Gen. 296, 298 (1983) (authorizing reimbursement absent exigencies demanding immediate action).

U.S. 198 and *Environmental Protection Agency v. California, ex rel. State Water Resources Control Board,* 426 U.S. 200 (1976); immunity from state inspection fees, *Mayo v. United States,* 319 U.S. 441 (1943); immunity from state licensing of government motor vehicle operators, *Johnson v. State of Maryland,* 254 U.S. 51 (1920); and immunity from state or local fines and penalties for failure to comply with laws or ordinance, *Missouri Pacific Railroad Company v. Ault,* 256 U.S. 554, 563-564 (1921); *People of State of California, Etc. v. Department of Navy,* 431 F. Supp. 1271, 1293-1294 (N.D. Cal. 1977), *aff'd People of State of California v. Department of the Navy,* 624 F.2d 885 (9th Cir. 1980); 65 Comp. Gen. 62 (1985).

However, the government's immunity does not necessarily extend to government employees or shield them from civil fines imposed by state or local government for violations of statute, regulations, or ordinances relating to the safe operation of motor vehicles since such violations are not ordinarily considered within the scope of their official duties.[4] Thus, a fine imposed by a court upon an employee for a parking or moving violation committed while using a government vehicle is a personal responsibility of the employee and there is no authority for an agency to use appropriated funds to pay the fine or to reimburse the employee for payment of the fine. 57 Comp. Gen. 270 (1978); 31 Comp. Gen. 246 (1952). Furthermore, the agency's inability to identify the employee responsible for a vehicle receiving a parking citation does not serve to authorize the agency's payment of the fine. B-147420, July 27, 1977; B-173753.188, Mar. 24, 1976. However, when a fine is imposed against an employee personally for actions by the government over which the employee has no control (rather than because of the employee's intentional or negligent action), reimbursement to the employee for payment of the fine is authorized. 57 Comp. Gen. 476 (1978).

Applying these rules, had SSS identified some employee (other than the Division Manager) as being personally responsible for the receipt of the ticket (i.e., having failed to obtain the required safety inspection), it would have been that person's responsibility to pay the fine, not the government's. Thus, the Division Manager's claim would be denied since he would not have paid an obligation of the government. Further, assuming that the Division Manager paid a parking fine that was levied directly on the government, the claim for reimbursement also would be denied since the government is immune from state or local fines, unless such immunity is waived.

Finally, although SSS argues that the receipt of the ticket was the result of administrative oversight on the part of SSS and not the result of any individual's negligence or intentional act, the fine was not levied directly on the Division Manager. He was not compelled personally by a court to pay a fine resulting from actions beyond his control and the result of the actions taken by the gov-

[4] *Commonwealth of Virginia v. Stiff,* 144 F. Supp. 169 (W.D. Va. 1956); *State of Oklahoma v. Willingham,* 143 F. Supp. 445 (E.D. Okla. 1956). *Compare State of Florida v. Huston,* 283 F. 687 (S.D. Fla. 1922) (holding violations of motor vehicle safety laws by employees to be outside the course of performance of official duties) with *City of Norfolk v. McFarland,* 145 F. Supp. 258 (E.D. Va. 1956) and *Lilly v. State of West Virginia,* 29 F.2d 61 (4th Cir. 1928) (holding violations of speed limits by employees engaged in law enforcement activities where speed is a necessity to be within the performance of official duties).

ernment. Consequently, the rationale in 57 Comp. Gen. 476 (1978) does not provide a basis for reimbursing the Division Manager under the facts of this case.

However, SSS argues that the Division Manager did not pay a fine that was levied directly on the government. Instead, SSS points out that under the paragraph of the lease agreement entitled "Use of Vehicles," SSS agreed that it would not permit the "vehicle to be used in violation of any federal, state or municipal statutes, laws, ordinances, rule or regulations" and that SSS would "indemnify and hold lessor harmless from any and all forfeitures, damages or penalties resulting from violation of such laws, ordinances, rules or regulations." SSS determined that based on this language in the lease, it was responsible for obtaining the motor vehicle safety inspection. Thus, the fine levied on the vehicle because of SSS' failure to obtain the safety inspection on the vehicle and for which the owner (lessor) was ultimately pecuniarily responsible was, by virtue of the lease agreement, a contractual liability of SSS. Therefore, since the fine would have doubled if not paid when it was, the prompt action by the Division Manager served to protect a legitimate government interest by preventing the government's financial liability under the lease from increasing.

There is legal merit to SSS' assertion that the government's immunity from state or municipal fines is inapplicable when the legal incidence of the fine is not imposed directly on the government but, instead, is imposed on the lessor, and the fine is merely a measure of damages for the government's failure to comply with the terms of its agreement and against which the government has agreed to indemnify the lessor.[5] However, for the reasons discussed below, we cannot authorize reimbursement based on the present record and instead return the matter to SSS to make certain determinations affecting SSS contractual liability to the lessor and by extension its authority to reimburse the Division Manager.

When a vehicle is cited for a non-moving violation, the ticket is written against the license plate number, not the operator of the vehicle. While the operator of the vehicle (should he be identified) is primarily liable for the fine, the owner of the vehicle is also liable. D.C. Code § 40-624(a). Regardless of who receives the ticket, the fine ultimately is the responsibility of the vehicle's owner since under District of Columbia law, an owner may not register a vehicle (vehicles must be registered annually) against which there are any outstanding unpaid fines. D.C. Code § 40-102(c)(2). However, pursuant to D.C. Code § 40-624, a lessor of a vehicle is not liable for fines or penalties imposed for non-moving infractions incurred by a leased vehicle if the lessor meets certain conditions.[6] Assum-

[5] *Compare* 49 Comp. Gen. 205 (1969) (government liable as lessee of car for payment of tax imposed on lessor which lessor passed on as separate charge to lessee). *See also* 61 Comp. Gen. 257 (1982). Also, *compare* 51 Comp. Gen. 251 (1971) (legal principle that government is immune from payment of interest on claims unless authorized by statute may be waived by contract authorizing interest payment).

[6] D.C. Code § 40-624, regarding civil liability, provides:

b) The lessor of a vehicle shall not be liable for fines or penalties imposed for an infraction pursuant to this subchapter if:

(1) Prior to the infraction, the lessor has filed with the Bureau the license plate number and state of registration of the vehicle to which the notice of infraction was issued; and

Continued

ing that these conditions are met by the lessor, the lessor is relieved of liability for payment of the fine regardless of whether the District ultimately collects the fine from the lessee. Thus, it is unclear to us that the lessor would have been required to pay the fine incurred as a result of SSS' failure to have the leased vehicle timely inspected. In the absence of required payment by the lessor, there would not have been any financial liability to the government under the hold harmless language of the lease.

The record before us does not indicate whether SSS determined that the lessor had eliminated its liability for the fine. Accordingly, we are unable to resolve whether the Division Manager paid a valid government obligation under the lease, and can neither authorize or deny reimbursing the Division Manager for payment of the fine.

In view of the foregoing, we are returning the request to SSS so that it might make the requisite determination. If SSS determines that the lessor availed itself of the procedure to avoid liability for the fine, then SSS may not reimburse the Division Manager. On the other hand, if SSS determines that the lessor remained liable for the fine, then SSS may reimburse the Division Manager.

B-240885, December 31, 1990

Procurement

Competitive Negotiation
■ Alternate offers
■■ Acceptance
■■■ Propriety

Procurement

Competitive Negotiation
■ Competitive advantage
■■ Non-prejudicial allegation

Protest that agency acted improperly in determining that proposed alternate product satisfied solicitation requirement for interchangeability with referenced brand name voltage standard is denied where, although alternate model was not subject to same shock and vibration standards as the referenced model, the relaxation of this requirement did not result in competitive prejudice to the protester, and thus was unobjectionable.

(2) Within 30 days after receiving notice from the Bureau of the date and time of an infraction, as well as other information contained in the original notice of infraction, the lessor submits to the Bureau the correct name and address of the person to whom the vehicle identified in the notice of infraction was rented or leased at the time of the infraction and the lessor notifies such person by mail of the notice of infraction.

Procurement

Bid Protests
■ GAO procedures
■■ Information submission
■■■ Timeliness

Procurement

Competitive Negotiation
■ Alternate offers
■■ Acceptance
■■■ Propriety

Where protest as initially filed asserted only generally that the awardee's voltage standard, offered as an alternate product, should not have been accepted for award because it is of a lesser quality than the specified product manufactured by the protester, and a detailed argument that specific characteristics of the alternate product differ materially from those of the specified product was raised for the first time in the protester's comments on the agency report, the detailed argument is untimely and will not be considered; the detailed argument was based on information that the protester had in its possession when it filed its protest, and thus had to be raised at that time.

Matter of: Julie Research Laboratories, Inc.

Loebe Julie for the protester.

Jacquelin Pardum, Esq., and Charles J. Roedersheimer, Esq., Defense Logistics Agency, for the agency.

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

Julie Research Laboratories, Inc. (JRL) protests the award of a contract to IET Labs, Inc. under request for proposals (RFP) No. DLA900-89-R-1535, issued by the Defense Electronics Supply Center (DESC), Defense Logistics Agency (DLA), for voltage standards. The RFP specified an acceptable model of voltage standard manufactured by JRL and permitted offers of alternate products interchangeable with the referenced model. JRL maintains that the contracting officer unreasonably accepted IET's proposed alternate product on the basis of data which did not show that the alternate product was interchangeable with JRL's product.

We deny the protest.

Voltage standards produce precision output voltages for use as a reference in maintaining the accuracy of electronic equipment. The RFP described the voltage standard here as National Stock Number (NSN) 6625-01-224-7919 and referenced JRL part number ZVR-518 as the exact product to be offered. The RFP included the "Products Offered" clause, however, which permitted offers of alternate products "either identical to or physically, mechanically, electrically, and functionally interchangeable" with the JRL product. The clause cautioned

that the government may lack detailed specifications or sufficient data to determine the acceptability of other products, and required offerors of alternate products to furnish "all drawings, specifications, or other data necessary to clearly describe the characteristics and features of the product" offered, including its "design, material, performance, function, interchangeability, inspection and/or testing criteria and other characteristics." Award was to be made to the offeror of an acceptable product whose price was most advantageous to the government.

Two firms submitted offers by the closing date. JRL offered its specified model ZVR-518, while IET, the low bidder, offered an alternate product, designated as model HSVR-18.9. As part of its offer, IET submitted commercial literature on its voltage standard that listed some, but not all, of the characteristics listed in the JRL product commercial literature. Nevertheless, based upon a comparison of the firms' literature, DESC found that IET's part was interchangeable with JRL's part in all material respects. Since this would be a first-time buy of this item from IET, however, DESC specified that a government source inspection would be required. Best and final offers (BAFO) were requested on February 13, and IET again submitted the low offer, $449, which was $80.80 less than JRL's unit price of $529.80. As a result, DESC made award to IET on March 16 as the low responsible offeror.

Following award, the agency modified IET's contract to require testing for shock and vibration, pursuant to military specifications, even though this testing was not explicitly required by the RFP. IET's unit price, increased to $503 to cover the cost of testing, was still low.

On April 6, JRL filed an agency-level protest generally asserting that IET's alternate product did not offer performance equivalent to JRL's product, and specifically questioning the reliability of IET's item. After the contracting officer, by letter dated August 6, denied JRL's protest, JRL filed this protest with our Office on August 22.[1]

JRL generally argues in its original protest submission that IET's alternate product is an unqualified, untested voltage standard of lesser quality than JRL's model ZVR-518 and thus should not have been approved as an acceptable alternate. JRL maintains that by accepting IET's product, DESC essentially relaxed the RFP requirements for IET without first issuing an amendment or holding discussions with all potential offerors to notify them of this change. JRL states it would have offered a less expensive alternate product equal in capability to IET's had it received notification from DESC of its less stringent requirements.

IET's commercial literature did not describe certain characteristics of its voltage standard which were addressed in JRL's commercial literature, including mounting configuration, shock and vibration standards, non-operating tempera-

[1] Preliminarily, the agency argues that we should dismiss JRL's protest as untimely because, after filing its agency-level protest, it waited more than 4 months for the agency's response before filing this protest with our Office. The record shows, however, that JRL checked on the status of its protest at least twice (based on a telephone bill) during this period. We find this sufficient here to indicate reasonable diligence by JRL in pursuing the matter.

ture range, humidity operating range and weight. JRL argues that the mere submission of IET's commercial literature summarizing the characteristics of its part was not sufficient to show that the part was interchangeable with JRL's part; by not requiring IET to provide more detailed information, JRL maintains that the agency waived the requirement in the Products Offered clause for "all drawings, specifications, or other data necessary to clearly describe the characteristics and features of the product" offered, including its "design, materials, performance, function, interchangeability, inspection, and/or testing criteria."

DESC concedes that there were minor differences between IET's and JRL's items, but maintains these differences are insignificant because the respective voltage standards are interchangeable in all material respects and that it had sufficient information upon which to base a determination of acceptability. DESC notes that IET specifically referenced in its proposal JRL's data sheet for the specified JRL voltage standard; IET stated that its model was "functionally equal" to the JRL model and met "all the required specifications" as set forth in the JRL literature. In addition, DESC reports that the mounting configuration specified for JRL's model was the industry standard to which IET could be expected to conform (and to which it did conform). DESC points out that IET's model only weighs approximately one ounce, the weight specified for the JRL voltage standard, and that this characteristic was not considered material since no possible configuration of IET's model, which was described in its literature as measuring only one cubic inch, could have varied the weight to any significant extent so as to affect interchangeability. Likewise, DESC reports that the operating range of the IET model with respect to relative humidity was considered immaterial since it would be encapsulated. Further, according to the agency, only the operating temperature range, and not the non-operating range, of the voltage standard was material since the item was not readily affected by temperature changes and, in any case, would not be subjected to extreme temperatures.

Evaluating offers of alternate products pursuant to the Products Offered clause essentially involves a determination of the technical acceptability of the proposal (that is, compliance with the technical requirement to describe clearly the characteristics of the product and to establish its interchangeability with the brand-name product), and not an evaluation of the alternate item itself. *See Sony Corp. of Am.*, 66 Comp. Gen. 286 (1987), 87-1 CPD ¶ 212. Although JRL believes that the Products Offered clause requires in all cases the submission of extensive and detailed data on the alternate product offered, it has been our position that whether an offeror presents sufficient information, aside from test results or other proven performance data, to demonstrate the technical acceptability of its offer of an alternate is essentially a technical judgment committed to the agency's discretion. The sufficiency of the information depends on the circumstances of the particular procurements, taking the nature and function of the equipment into account, *i.e.*, whether there is adequate assurance that the equipment in which the part will be used will perform properly. To be consistent with the statutory requirement for specifications permitting full and open competition, 10 U.S.C. § 2305(a)(1) (1988), the Products Offered clause must be

construed as giving the agency broad discretion to accept offered equivalent products. Indeed, the acceptance of lower-priced alternates is the preferred result since it promotes competition and the possible development of detailed specifications for future procurements. *See Valcor Eng'g Corp.*, 66 Comp. Gen. 613 (1987), 87-2 CPD ¶ 143; *Blackmer Pump*, B-231474, Sept. 9, 1988, 88-2 CPD ¶ 225.

Here, we find that DESC reasonably determined primarily to rely upon IET's commercial literature to demonstrate the essential material characteristics of IET's proposed voltage standard. Again, the technical data listed in the Products Offered clause—"all drawings, specifications and other data" "design, material, performance, functions, interchangeability, inspection and/or testing criteria"—are merely examples of the types of data that can be submitted and not all types are required to be furnished in all instances. JRL has made no showing that additional data beyond that provided in standard commercial literature is necessary to establish the performance characteristics of commercially available equipment of this complexity. In this regard, we have specifically rejected the argument advanced here by JRL that test data proving proposed capabilities is always required; as we have indicated, there is no absolute requirement that an alternate offeror have previously tested the item unless the RFP expressly requires, which it did not here, proven performance of the alternate as a precondition of award. *See Everpure, Inc.*, B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235.

Nor do we believe that DESC acted unreasonably in concluding that the failure of IET's commercial literature to address the characteristics of its proposed voltage standard with respect to mounting configuration, weight, non-operating temperature range, and humidity range did not preclude a finding of interchangeability. Although we have previously held that an alternate product is required not merely to be the functional equivalent of the referenced one, but also to possess the same physical characteristics, *see East West Research, Inc.*, B-237844, Feb. 28, 1990, 90-1 CPD ¶ 248; *Hobart Brothers Co.*, B-222579, July 28, 1986, 87-2 CPD ¶ 120, this in no way requires that *every* physical characteristic be *precisely* the same. The Products Offered clause expressly differentiates between a product "identical" to the referenced product and an interchangeable product. We believe that the concept of interchangeability as properly interpreted requires only that no material differences exist between the alternate product and the referenced product with respect to those characteristics essential to the proper performance of the item. Thus, for example, where the size or color of an item is immaterial to its proper functioning, we do not believe that a mere difference in size or color should preclude a determination of interchangeability. Here, DESC has explained why it reasonably expected to receive a conforming product—*e.g.*, based upon likely conformance to the industry standard for mounting configuration—and why any conceivable differences with respect to certain characteristics of the IET voltage standard—weight, non-operating temperature, and humidity range—were immaterial to the interchangeability of the item in its projected use. JRL has not shown the agency position in this regard to be unreasonable.

It was improper for DESC to approve IET's voltage standard as an alternate in the absence of information showing that the standard would satisfy the applicable military specifications concerning shock and vibration testing. JRL, but not IET, in its commercial literature stated that its model met the military requirements with respect to shock and vibration. DESC had no reasonable basis for otherwise concluding that IET's model met those requirements. In this case, IET's blanket statement of compliance with the interchangeability requirement—*i.e.*, its claim of functional equivalence—did not satisfy the solicitation requirement for "all drawings, specifications, or other data necessary to clearly describe the characteristics of the product" offered, including its "interchangeability, inspection and/or testing criteria." *Cf. United Satellite Sys.*, B-237517, Feb. 22, 1990, 90-1 CPD ¶ 201 (blanket statement of compliance does not meet requirement to affirmatively establish compliance with salient characteristics in brand name or equal procurement).

JRL asserts that DESC relaxed the "specifications" when it approved IET's nonconforming voltage standard as an alternate. JRL states in its comments on the bid protest conference held on this case that had it known DESC would relax the specifications, it could have offered "less expensive lower grade parts which are merely the normal fallout of JRL's premium [model] production."

The record establishes that DESC has not waived the specifications. It erroneously relied first upon IET's blanket statement of compliance to assure compliance in areas not addressed by IET's literature and then upon the post-award modification of IET's contract. Instead of relying on that blanket statement of compliance, the agency should have discussed with IET, prior to requesting BAFOs, the absence from IET's offer of any specific reference to the military requirements concerning shock and vibration. *See A.T. Kearney, Inc.*, B-237366; B-237366.2, Feb. 14, 1990, 90-1 CPD ¶ 278. Nevertheless, IET represents that its product complies with the military standards for resistance to shock and vibration and IET's contract as modified requires testing to confirm this. Thus, had the matter been raised during discussions, it would have been a simple matter for IET to provide the necessary information.

The agency's failure to discuss the matter with IET prior to award, however, and its modification of IET's contract after award, were not prejudicial to the protester. JRL's choice of which model to offer was based upon the same requirement for conformance to the military specifications with respect to shock and vibration that was applicable to IET's model. Moreover, JRL has not alleged that it would have lowered its price for its offered model had it been given the opportunity to submit a revised BAFO. Although generally we will find prejudice where the government's stated needs are relaxed for one offeror, *see, e.g., Logitek, Inc.—Recon.*, B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401, or where the protester reasonably establishes that it would have offered a different price had it had the opportunity, *see Racal Filter Technologies, Inc.*, 70 Comp. Gen. 127, B-240579, Dec. 4, 1990, 90-2 CPD ¶ 453, here neither circumstance is present. Thus, we conclude on this record that JRL was not prejudiced

by DESC's actions. *See International Transcription Servs., Inc.,* B-240488, Nov. 28, 1990, 90-2 CPD ¶ 437.

In its comments on DESC's report, JRL for the first time argues that IET's product as described in IET's commercial literature materially deviates from the specified JRL model with respect to 10 specific characteristics. JRL concludes that in view of the lesser capabilities of IET's product, it should not have been accepted as a "physically, mechanically, electrically and functionally interchangeable" alternate, as required by the RFP.

Under our Bid Protest Regulations, a protest must set forth a detailed statement of the legal and factual grounds of the protest. 4 C.F.R. § 21.1(b)(4) (1990). Where a protester, in its initial protest submission, argues in general terms that a procurement was deficient, and then, in its comments on the agency's report, for the first time makes out a detailed argument specifying precisely the alleged procurement deficiencies, the detailed arguments will not be considered unless they independently satisfy the timeliness requirements under our Regulations. *See Dayton T. Brown, Inc.,* B-223774.3, Dec. 4, 1986, 86-2 CPD ¶ 642; *see generally Astro-Med, Inc.,* B-232147.2, Nov. 1, 1988, 88-2 CPD ¶ 422.

Here, JRL's detailed position underlying its original protest against acceptance of IET's item as an alternate product was nowhere stated in its initial protest submission, even though, as it indicated at the bid protest conference it had in its possession prior to submitting its initial protest to our Office IET's commercial literature listing the characteristics of IET's item. JRL did not furnish its detailed analysis of the differing characteristics of IET's voltage standard until it submitted its comments on the agency report. Accordingly, we consider JRL's arguments with respect to those characteristics of IET's voltage standard described in IET's literature to be untimely. *Id.*

The protest is denied.

Civilian Personnel

Compensation
■ Retroactive compensation
■■ Deductions
■■■ Outside employment

An employee who was retroactively restored to duty and awarded backpay disputes the employing agency's determination to deduct the full amount the employee earned through outside employment during the period of the corrected action from the gross amount of the backpay award. In accordance with 5 U.S.C. § 5596(b)(1)(A)(i) (1988) and implementing regulations, the full amount earned by the employee through other employment during the period of improper separation must be deducted from the gross amount of the backpay award. The repayment obligation for lump-sum leave payment is subject to waiver consideration under 5 U.S.C. § 5584. Refunded retirement contributions may be considered for waiver by the Office of Personnel Management under 5 U.S.C. § 8346(b).

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Travel
■ Rental vehicles
■■ Fines
■■■ Liability

A Selective Service System (SSS) employee paid a $50 parking ticket written on a vehicle leased by SSS to prevent the ticket from doubling. SSS determined that the paying employee was not the party responsible for receipt of the ticket and did not identify another employee as responsible for receipt of ticket. Whether SSS may reimburse paying employee depends upon whether employee paid a valid obligation of the United States arising by virtue of the language in motor vehicle lease agreement whereby SSS as lessee agreed to not permit leased "vehicle to be used in violation of" District of Columbia law and regulations and that SSS would "indemnify and hold lessor harmless from any and all . . . penalties resulting from violation of such laws."

153

■ Rental vehicles
■■ Fines
■■■ Liability

Absent a clear and unambiguous law to the contrary, United States and its activities are free from state regulation including payment of fines. Therefore, parking tickets are personal liability of employee responsible for their being issued. See court cases cited.

153

■ Rental vehicles
■■ Fines
■■■ Liability

Although the operator of vehicle is liable for payment of parking ticket, District of Columbia law makes owner of vehicle ultimately liable for payment of parking ticket. District law also provides that lessor of vehicle may eliminate liability for parking tickets incurred by lessee. Therefore, whether employee who paid $50 ticket on assumption that agency was liable for such as damages to

lessor under a hold-harmless clause in lease agreement paid an obligation of the government for which employee may be reimbursed, depends upon whether lessor would have had to pay the ticket. Request is returned to agency with instruction to make determination regarding lessor's liability since submission lacks requisite finding.

154

Procurement

characteristics of the alternate product differ materially from those of the specified product was raised for the first time in the protester's comments on the agency report, the detailed argument is untimely and will not be considered; the detailed argument was based on information that the protester had in its possession when it filed its protest, and thus had to be raised at that time.

159

■ **Competitive advantage**
■■ **Non-prejudicial allegation**

Protest that agency acted improperly in determining that proposed alternate product satisfied solicitation requirement for interchangeability with referenced brand name voltage standard is denied where, although alternate model was not subject to same shock and vibration standards as the referenced model, the relaxation of this requirement did not result in competitive prejudice to the protester, and thus was unobjectionable.

158

■ **Contract awards**
■■ **Propriety**
■■■ **Offers**
■■■■ **Minor deviations**

Contract awards to offeror, whose offer indicated it did not intend to comply with the Department of Defense Federal Acquisition Regulation Supplement § 208.7801 *et seq.* requirements for domestic forging, are not void *ab initio,* where agency and awardee were confused as to the applicability of the requirements and appeared to be acting in good faith.

147

■ **Discussion reopening**
■■ **Auction prohibition**

Protest that agency, in taking corrective action to remedy previously improper procurement, is engaged in improper auction technique is denied. Fact that agency did not ultimately make various changes in its requirements, as agency represented it would do, does not affect the need for appropriate corrective action in cases where explicit statutory violations have occurred, and this need takes primacy over possible risk of auction.

115

■ **Discussion reopening**
■■ **Propriety**
■■■ **Best/final offers**
■■■■ **Non-prejudicial allegation**

Protest that agency improperly reopened negotiations and requested best and final offers after announcing that protester was apparent successful offeror is denied where prices were not disclosed, and other offerors did not gain advantage from knowing identity of apparent successful offeror.

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prior to bid opening and was misplaced by the agency, but was in the agency's possession until it was found, and it was discovered prior to award.

131

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**
■■■■ **Information submission**

Where agency investigation revealed misstatements and discrepancies in individual sureties' net worth information furnished in Affidavits of Individual Surety in support of bid guarantee, agency reasonably determined that there was inadequate evidence of value and ownership of claimed assets as well as doubt as to the integrity of the sureties and the credibility of their representations; contracting officer therefore properly rejected bidder as nonresponsible.

133

■ **Unbalanced bids**
■■ **Materiality**
■■■ **Responsiveness**

The apparent low bid on a contract for a 3-month base period and three 1-year options properly was determined to be materially unbalanced where there is an unexplained price decrease for the final option period, the bid would not become low until the fifth month of the final option period, and there is reasonable doubt that acceptance of the bid would result in the lowest overall cost to the government because the government determined that it was likely that the final option period may not be exercised due to funding uncertainty.

120

■ **Use**
■■ **Criteria**

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (1988), for the use of sealed bidding procedures are present, agencies are required to use those procedures and do not have discretion to employ negotiated procedures.

127

Socio-Economic Policies
■ **Preferred products/services**
■■ **Domestic products**
■■■ **Applicability**

Clause requiring domestic forgings was properly included in a Department of Defense solicitation for items that are considered "final drive gears" on combat support vehicles, where the agency does not find the quantity being acquired is greater than that required to maintain the domestic mobilization base for these items.

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