January 1991

B-240402.5, January 4, 1991

Procurement

Bid Protests

■ GAO procedures

■ ■ Interested parties

Bidder who protested terms of invitation for bids (IFB) prior to bid opening is an interested party to challenge IFB's payment bond requirement, notwithstanding that protester's bid was nonresponsive because it failed to include a required bid bond, since if the protest were sustained, the remedy would be a resolicitation under which the protester could compete.

Procurement

Sealed Bidding

■ Payment bonds

■ ■ Justification

Protest of payment bond requirement in invitation for bids (IFB) for security guard services is denied since it is within the agency's discretion to require bonding even in an IFB set aside for small businesses; the agency's requirement for uninterrupted performance of the security guard services is a reasonable basis for imposing the bonding requirement, especially where previous contractors had a history of unsatisfactory performance and of not paying wages due employees.

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ 10-day rule

Protester's new and independent grounds of protest are dismissed where the later raised issues do not independently satisfy the timeliness rules of the General Accounting Office Bid Protest Regulations.

Matter of: Remtech, Inc.

Thomas C. Pool for the protester.

Frank G. Hunter for Noble Enterprises, Inc., and W. Stewart Taylor for Stay, Inc., interested parties.

Herbert F. Kelley, Jr., Esq., and Major Jack B. Patrick, Department of the Army, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Remtech, Inc. protests the requirement for a payment bond in invitation for bids (IFB) No. DABT01-90-B-0029, issued by the Department of the Army for security guard services at Fort Rucker, Alabama. Remtech alleges that the payment bond requirement is burdensome on small businesses, unduly restricts competition, and is excessive in amount.

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

Background

The Army issued the IFB on June 22, 1990, as a total small business set-aside, for a 1-year base period with up to two 1-year options. The IFB required bidders to submit a bid bond in an amount equal to 20 percent of the bid price for the base year. The IFB also required the successful bidder to submit a performance bond in an amount equal to 100 percent of the contract price, and a payment bond in an amount equal to 40 percent of the contract price. Of the six bids received by the extended bid opening date of October 2, the contracting officer rejected the low bid as nonresponsive for failure to include the required bid bond. Of the remaining five bids, Stay, Inc. submitted the low bid and Remtech submitted the second low bid.

Remtech protested to our Office on September 28, prior to bid opening, challenging the payment bond requirement as excessive and unduly restrictive of competition. Remtech argues that its ability to obtain the required 100 percent performance bond, which it does not challenge, should be sufficient to indicate that it is fiscally responsible and able to satisfy all debts arising out of the resultant contract.

Interested Party Status

As a preliminary matter, the agency argues that Remtech is not an interested party to maintain the protest. The agency states that after reviewing the documents submitted by Remtech at bid opening, the contracting officer determined that Remtech's bid was nonresponsive because the bid bond was not an original document, but rather a photocopy which did not contain the original signature of the surety.[1] The agency argues that since the contracting officer properly determined Remtech's bid to be nonresponsive, Remtech is not an interested party to challenge the IFB's payment bond requirement, as Remtech would not be in line for award even if its protest were sustained.

[1] The agency correctly cites our decisions in *Pollution Control Indus. of America*, B-236329, Nov. 22, 1989, 89-2 CPD ¶ 489, and *G & A General Contractors*, B-236181, Oct. 4, 1989, 89-2 CPD ¶ 308, as authority for its determination that Remtech's bid was nonresponsive. Remtech does not challenge the rejection of its bid on that basis.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1990), a protest may be filed only by an "interested party," defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of or failure to award a contract. Determining whether a party is sufficiently interested involves consideration of a party's status *vis a vis* the procurement, *Seals Servs., Inc.*, B-235523, June 20, 1989, 89-1 CPD ¶ 581, and the nature of the issues protested. *Free State Reporting, Inc. et al.*, B-225531 *et al.*, Jan. 13, 1987, 87-1 CPD ¶ 54.

Here, if the protest were sustained, the appropriate remedy would be cancellation of the IFB and a resolicitation under which Remtech could recompete. Since Remtech would have the opportunity to rebid and remedy its bid bond defect under a new solicitation, we find that it is an interested party to maintain the protest against the IFB's payment bond requirement. *Big State Enters.*, 64 Comp. Gen. 482 (1985), 85-1 CPD ¶ 459; *H.V. Allen Co., Inc.*, B-225326 *et al.*, Mar. 6, 1987, 87-1 CPD ¶ 260; *Tracor Jitco, Inc.*, B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710.

Timeliness

Three firms—Select Investigative Services, Inc., Gold Key Security Services, Inc., and Char-Von Enterprises, Inc.—protested the performance bond requirement in the IFB to our Office prior to the original bid opening date of July 23. We dismissed the protests because the protesters failed to respond to the agency report within the time required under our Bid Protest Regulations, 4 C.F.R. § 21.3(k). A fourth firm, Southern Corrections Systems, Inc., challenged the payment bond requirement; Southern withdrew its protest on August 28.

The Army argues that we should treat Remtech's protest—filed on October 1, before the amended bid opening date—as an untimely request for reconsideration of the prior protests. We see no basis for doing so. As a preliminary matter, three of the protests involved the performance bond requirement only, not the payment bond requirement that Remtech challenges; moreover, those protests were dismissed without a decision on the merits. Similarly, the fourth protest, which did challenge the payment bond requirement, was withdrawn. We fail to see why Remtech should be deprived of its right to file a timely protest on its own behalf by virtue of the withdrawal of a similar protest or the dismissal on procedural grounds of other protests not raising the same issue.

Payment Bond Requirement

Although Remtech concedes that it was able to obtain all of the required bonds under the IFB, including the payment bond, the protester alleges that the payment bond requirement is burdensome on small businesses and excessive in amount, since no loss under the contract could reach the magnitude contemplated by the payment bond (*i.e.*, 40 percent of the contract price).

The Miller Act, 40 U.S.C. § 270a(a) (1988), establishes the requirement for performance and payment bonds in construction contracts. In implementing the Act, Federal Acquisition Regulation (FAR) § 28.103-2(a) authorizes the contracting officer to require a performance bond "when necessary to protect the government's interest"; under FAR § 28.103-3(a), a payment bond is proper where a performance bond is required and the payment bond "is in the government's interest."

The purpose of a payment bond is to provide suppliers of labor and material the security that they ordinarily enjoy under state mechanic's lien laws, but which, because of the government's constitutional immunity, they do not have on federal property or work. *F.D. Rich Co., Inc. v. United States ex rel. Indus. Lumber Co., Inc.*, 417 U.S. 116 (1974). The imposition of a payment bond, while proper only where a performance bond is required, FAR § 28.103-3(a), is not limited to construction contracts; rather, the FAR recognizes that there are situations in which bonds may be necessary for nonconstruction contracts in order to protect the government's interest. *See* FAR §§ 28.103-1(a), 28.103-2(a); *IBI Sec., Inc.*, B-235857, Sept. 27, 1989, 89-2 CPD ¶ 277 (bid and performance bonds were properly required in IFB for security guard services); *Professional Window and Housecleaning, Inc.*, B-224187, Jan. 23, 1987, 87-1 CPD ¶ 84 (requirement for bid, performance and payment bonds proper in IFB for custodial and general housecleaning services).

While a bond requirement may, in some circumstances, result in a restriction of competition, it nevertheless may be a necessary and proper means of securing to the government fulfillment of the contractor's obligations under a nonconstruction contract in appropriate situations. *Aspen Cleaning Corp.*, B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289. In reviewing a challenge to the imposition of a bonding requirement we look to see if the requirement is reasonable and imposed in good faith. *PBSI Corp.*, B-227897, Oct. 5, 1987, 87-2 CPD ¶ 333. A finding on the part of the agency that continuous operations are absolutely necessary is a sufficient basis for requiring a performance bond, even in a solicitation set aside for small businesses. *Id.; IBI Sec., Inc.*, B-235857, *supra*.

Here, the contracting officer determined that the government must have uninterrupted security guard services, including continuous protection of classified aircraft; regular patrols of airfield ramps; restricted access to the facility; and guarded ammunition supply points. The contracting officer states that any interruption in the security guard services at the facility could cause lapses in security coverage or emergency reprocurement costs.

The record further shows that in determining whether to impose the bonding requirement, the contracting officer considered the history of security guard contractors at the facility over the past 5 years, which is marked by repeated unsatisfactory performance and contractors that failed to pay their employees. Since 1985, two contractors were terminated for default and two other contractors failed to pay their employees over $115,000 in wages and fringe benefits. On at least four occasions within the last 3 years, the Department of Labor requested that the agency withhold money due contractors providing security guard services for unpaid wages due their employees. The Internal Revenue Service filed liens against three out of the past four security guard contractors at Fort Rucker for unpaid federal taxes. Additionally, the past three security guard contractors left the state of Alabama without paying over $285,000 in applicable state unemployment taxes.

Given the history of unsatisfactory performance and nonpayment of contractor employees, the agency properly was concerned about ensuring that guards are compensated for their work, and that the security services are performed without interruption. In light of the government's interest in ensuring continuous guard services for a facility containing classified equipment and requiring a constant high level of security, the contracting officer reasonably found that a payment bond was necessary here.[2]

To the extent that Remtech argues that requiring a payment bond in an amount equal to 40 percent of the contract price is excessive, 40 U.S.C. § 270a(a)(2), establishing the amount of Miller Act payment bonds, states in relevant part:

> Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. *Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract.* Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000. (Italic added.)

Paragraph H.11 of the IFB duplicates FAR § 28.102–2(b), which implements the above provision of the Act with virtually identical language.[3] The agency states that this provision is a standard clause included in all solicitations with bonding requirements. Remtech's mere disagreement with the amount of the required bond, or the fact that previous solicitations for similar requirements have not imposed a payment bond requirement,[4] does not establish that the payment bond amount here, established by reference to the Miller Act and FAR provision, is unreasonable.

Remtech's argument that no loss under the contract could reach the proportion of coverage required by the payment bond, since it expended less than $140,000 on the last contract for security guard services, is without merit. In support of its position, Remtech submitted a list of total purchases (vehicles, uniforms and personal equipment, and weapons), and yearly expenditures (training ammunition, telephones, physicals, and credit checks) totalling $138,020, stating that "this total shows the sum of *all* requirements to run this contract." Remtech's

[2] With regard to Remtech's contention that the bond requirement unduly restricted competition, the agency in fact received six bids from small business concerns. Thus, it does not appear that requiring a payment bond discriminated against small businesses. *See Space Servs. Int'l Corp.*, B-215402.2, Oct. 22, 1984, 84-2 CPD ¶ 430.

[3] Under this clause, Remtech would be required to submit a payment bond in the amount of 40 percent of the total amount payable under the contract, since its evaluated bid price was $2,266,755.

[4] The protester included in its comments on the agency report what appears to be a list of approximately 48 solicitations issued by various federal agencies for security guard services between July 1, 1990, and October 22, 1990, which presumably imposed no payment bond requirement.

calculations, however, ignore the fact that Remtech's own bid of over $2 million is primarily composed of employee wages—the nonpayment of which is precisely what the payment bond is intended to protect against.

Accordingly, we see no basis to object to the contracting officer's decision to impose performance and payment bonds to protect the government's interest, especially in light of the history of unsatisfactory performance, nonpayment of employees, and where continuous security services at the facility are essential.

Procurement Format

For the first time in its comments on the agency report, Remtech challenges the IFB's lack of appropriate "evaluation criteria" and contends that the procurement should be conducted using a negotiated format, rather than under an IFB. Remtech's objections, however, are allegations of improprieties in the solicitation and are therefore untimely under our Bid Protest Regulations.

A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to that date to be timely. *See* 4 C.F.R. § 21.2(a)(1). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the latter raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. *Id.; Tri-States Serv.*, B-232322, Nov. 3, 1988, 88-2 CPD ¶ 436. Thus, a protest challenging the procurement format or alleging the IFB lacked appropriate "evaluation criteria," must have been filed prior to bid opening to be timely. Since Remtech raised these issues for the first time nearly 1 month after bid opening, its protest on these bases is dismissed as untimely.

The protest is denied in part and dismissed in part.

B-240590.2, January 7, 1991

Procurement

Competitive Negotiation

■ Competitive advantage

■ ■ Foreign laws

Protest is dismissed where protester complains of its competitive disadvantage in procurement of Embassy guard services resulting from application of Panamanian law since disadvantage is not the result of preference or unfair action by United States government.

Matter of: DOD Contracts, Inc.

Daniel A. Bellman, Esq., Porter, Wright, Morris & Arthur, for the protester.

Keith Loken, Esq., Department of State, for the agency.

Susan K. McAuliffe, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DOD Contracts, Inc. protests the award of any contract under solicitation No. S-132-FA-151, issued by the Department of State for guard services at the United States Embassy in Panama City, Panama. DOD Contracts contends that it suffers an unfair competitive disadvantage under the solicitation.

We dismiss the protest.

The solicitation was issued on June 15, 1990, and was mailed to 53 prospective contractors including the protester and MIMSA, which is presently providing the required guard services at the United States Embassy in Panama as essentially a substitute under the protester's current contract. The solicitation contemplates the award of a firm, fixed-price contract for 1 year plus 4 option years. The extended closing date for the receipt of proposals under the solicitation was scheduled for September 7. DOD Contracts filed its protest with our Office on September 5.

The solicitation requires bidders to provide their proposed wage rates and requires compliance with any wage standards set by Panamanian law. Bidders were directed to address their questions about any required wage rates to the appropriate Panamanian government authority. Under the solicitation, current Embassy guards are to be offered the right of first refusal for employment under the contract. Article 159 of the Panamanian Labor Code, which all parties agree applies to these services, prohibits any Panamanian licensed employer from reducing the wages of its employees as long as they remain working for that employer, even if the employees agree to any wage reduction. The State Department reports, and the protester agrees, that since MIMSA is the licensed firm currently providing these services, MIMSA, and not DOD Contracts, would be required to pay the current Embassy guards their present wage rates. Other competitors could propose lower wage rates.

DOD Contracts essentially contends that it suffers a competitive disadvantage because it has been unable to acquire a business license from the Panamanian government to perform these services and that it would again have to perform the work through MIMSA as it did under its existing contract. Under such an arrangement, since MIMSA would be legally required to maintain its current employee wages, DOD Contracts contends it would have to bid a higher price than other competitors. DOD Contracts states that the agency previously directed the firm under its existing contract to increase employee wages which it now cannot reduce.

The agency responds that since DOD Contracts is not required to bid in conjunction with MIMSA, the protester's sole complaint is that the Panamanian government has not yet approved the firm's license application.

Generally, certain firms may enjoy a competitive advantage or disadvantage by virtue of their own particular circumstances, and we know of no requirement for equalizing competition by taking into consideration these types of advantages or disadvantages. *See ENSEC Service Corp.*, 55 Comp. Gen. 656 (1976), 76-1 CPD ¶ 34. Rather, the test to be applied is whether the competitive advantage or disadvantage experienced by a particular firm would be the result of preference or unfair action by the government. *See id.* Here, the disadvantage suffered by the protester (if it chooses to use MIMSA) results from Panamanian law and not from preference or unfair action by the government. Further, to the extent the protester's complaint is against its inability to obtain the required Panamanian license for performance without using MIMSA, its protest is a grievance against a third party, the Panamanian government, other than the contracting agency, which is not within the control of the United States government and which also does not form an appropriate basis for a protest to our Office. 4 C.F.R. § 21.3(m) (1990).

Accordingly, we dismiss the protest.

B-240963, B-240963.2, January 7, 1991

Procurement

Bid Protests
■ Forum election
■■ Finality

Procurement

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

Protest, which was initially filed with and then withdrawn from the General Services Administration Board of Contract Appeals (GSBCA), may be considered by the General Accounting Office (GAO), despite the fact that the GSBCA did not issue an order dismissing the protest until 2 days after the protest was filed at the GAO, where the protester sought withdrawal of its GSBCA protest in order to pursue its protest at the GAO, the withdrawal was not opposed by the agency, and the protest was otherwise timely filed at the GAO.

Procurement

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

Procurement

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

Award to a higher-priced offeror is unobjectionable under a request for proposals that stated that technical considerations were more important than cost and the agency reasonably concluded that the protester's price advantage over the awardee was outweighed by its significantly higher evaluated risk.

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

Protest that meaningful discussions were not conducted is untimely filed under the General Accounting Office Bid Protest Regulations, where the protester only identifies in its post-conference comments the specific areas where it contends discussions were not conducted even though it was made aware of the facts on which it bases this contention at a debriefing conducted prior to the filing of the initial protest.

Matter of: Computer Based Systems, Inc.

J. Patrick McMahon, Esq., for the protester.

Michelle R. Cappello, Esq., Network Solutions, an interested party.

Carl J. Peckinpaugh, Esq., and Richard C. Bean, Esq., Department of the Air Force, for the agency.

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

Computer Based Systems, Inc. (CBSI) protests the award of a contract to Network Solutions under request for proposals (RFP) No. F19628-89-R-0113, issued by the Electronic Systems Division, Department of the Air Force, for the acquisition, integration, and installation of specified computer hardware and software. CBSI protests that the Air Force improperly evaluated its low priced offer and failed to conduct meaningful discussions.

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

The RFP, issued as a small disadvantaged business set-aside, contemplated the award of a fixed-price contract for specified hardware and software to support the agency's Sentinel Aspen II training program.[1] Under the Sentinel Aspen II program, general intelligence skills will be taught, using computer aided and managed instruction.[2] The system sought by the RFP consists of computer workstations, equipped with 80386 microprocessors, connected by a multiple Ethernet Local Area Network and using a UNIX operating system. Each workstation provides computer-based training, graphics, wordprocessing, database and communications support.

The RFP identified the specific hardware and software required and provided that the system architecture, hardware and software must replicate, to the maximum extent possible, that employed in the agency's computerized Sentinel Bright II training program, to assure that the two training programs are completely compatible.[3] Offerors were informed that all offered hardware and software must be commercial-off-the-shelf (COTS) or a non-developmental item (NDI) and that any alternatives or deviations from the RFP requirements must be identified, explained, and tested.

The RFP provided that evaluation of proposals would be conducted under the streamlined source selection procedures of Air Force Regulation 70-30, and that award would be made, based on an integrated assessment of information contained in the proposals, to the offeror with the most advantageous proposal, price and other factors considered. The solicitation listed system architecture, technical support, and management as technical evaluation factors and provided that the first two were of equal weight and more important than management. Technical considerations were stated to be more important than cost/price. The RFP also provided that cost/price would be evaluated for realism and reasonableness to include an evaluation of the extent to which the proposed cost/price indicated a clear understanding of and sound approach to satisfying the RFP requirements.

The Air Force received five offers, including those of CBSI and Network Solutions, and determined that all offers were within the initial competitive range. Discussions were conducted with all the offerors through the issuance of deficiency reports (DR) and clarification requests (CR).[4] After evaluation of the offerors' responses, the Air Force determined that only four offerors, including CBSI and Network Solutions, remained in the competitive range. Written points-for-negotiation (PFN) were issued, face-to-face discussions conducted, and

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[1] Travel and material aspects of the contract, which are associated with interim systems support, are cost reimbursable.

[2] These general intelligence skills are currently taught manually.

[3] The Sentinel Bright II program is a computerized training program to provide computer aided and managed instruction, with graphics, audio and interactive video, to provide cryptologic analysis and reporting training.

[4] DRs were issued when an offeror's proposal did not meet minimum RFP requirements; CRs were issued when the evaluation team did not understand a portion of an offeror's proposal.

best and final offers (BAFO) requested from the remaining competitive range offerors.

The final evaluation results were as follows:

	System Architecture	Rating/Risk Technical Support	Management	Price
Offeror A	E/L	E/L	A/L	$11,668,000
Network	A/L	A/L	A/M	$9,481,000
CBSI	A/H	A/H	A/M	$8,104,000
Offeror B	M/H	A/L	A/L	$10,121,000

The letters under the technical rating represent the following: "E" for exceptional; "A" for acceptable; "M" for marginal; and "U" for unacceptable. Under risk assessment, the letters represent the following: "H" for high; "M" for moderate; and "L" for low.

The source selection authority (SSA) determined that Network Solutions had the most advantageous proposal to the government under the evaluation criteria. Specifically, the SSA determined that offeror A's proposal, while evaluated to be exceptional overall, was not worth the $2.2 million price premium over Network Solutions' technically acceptable, low risk proposal. The SSA also concluded that CBSI's $1.4 million price advantage over Network Solutions' offer was outweighed by CBSI's significantly higher evaluated risk. Award was made to Network Solutions on August 7, 1990.

CBSI was debriefed on August 15, and on August 17, protested to the General Services Administration Board of Contract Appeals (GSBCA). In response to the agency's motion to dismiss,[5] the protester sought leave to withdraw its GSBCA protest and filed this protest with our Office on August 29, 10 working days after its debriefing. The Air Force did not oppose CBSI's motion to withdraw, and on August 31, the GSBCA dismissed CBSI's protest without prejudice.

Initially, the Air Force argues that the protest to our Office should be dismissed as untimely. Specifically, the agency contends that pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3552 (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(6) (1990), CBSI could not file its protest with our Office while its GSBCA protest was still pending. The Air Force argues that since CBSI's protest to our Office could only be filed after the GSBCA's dismissal of the protest, which occurred more than 10 working days from the date of CBSI's debriefing, CBSI's protest could not be timely filed with our Office.

While it is true that CBSI protested to our Office prior to the GSBCA's actual dismissal of its board protest, this is not a situation, such as was presented in *TAB, Inc.*, 66 Comp. Gen. 113 (1986), 86-2 CPD ¶ 639, where the protester sought to actively litigate its protest before both forums. Rather, the protester acted to

[5] The Air Force contended that the GSBCA did not have jurisdiction to hear CBSI's protest pursuant to the Warner Amendment to the Brooks Act, *see* 40 U.S.C. §§ 759(a)(3), (f) (1988), because the computer system being procured here involves intelligence and cryptologic activities related to national security and is critical to the direct fulfillment of intelligence missions.

withdraw its GSBCA protest in order to file its protest here; its withdrawal was not opposed by the agency; and the GSBCA promptly issued an order confirming the withdrawal and dismissing the protest. Since CBSI affirmatively acted to withdraw the GSBCA protest before filing this protest, as opposed to maintaining duplicate proceedings in both forums, its protest was in effect no longer before the GSBCA. *See Sector Technology, Inc.*, B-239420, June 7, 1990, 90-1 CPD ¶ 536; *Idaho Norland Corp.*, B-230598, June 6, 1988, 88-1 CPD ¶ 529.

The Air Force attempts to distinguish these cases by noting that in *Sector Technology* the GSBCA had actually dismissed the protest at the time the protest was filed at our Office and that in *Idaho Norland* we had specifically confirmed with the GSBCA that the protest would be dismissed before we accepted jurisdiction. However, in the absence of any evidence that CBSI's request to withdraw its GSBCA protest would not have been routinely granted (as indeed it was), we see no legally significant difference between this case and *Idaho Norland*, where the GSBCA also had not issued an order dismissing the board protest at the time the protest was filed with our Office. Given the fact that CBSI filed its protest here on the tenth working day after the date of its debriefing, we find its protest to be timely filed.

The basic point of CBSI's protest is that the Air Force improperly evaluated its proposal as being of high risk and thus erroneously determined that CBSI's $1.4 million low offer was not the most advantageous to the government. The determination of the relative merits of proposals is primarily a matter of agency discretion, which our Office will not disturb unless it is shown to be unreasonable. *GP Taurio, Inc.*, B-238420; B-238420.2, May 24, 1990, 90-1 CPD ¶ 497. In this regard, we have consistently upheld awards to offerors with higher technical scores and higher costs where it was determined that the cost premium was justified, considering the technical superiority of the awardee's proposal, and the result is consistent with the evaluation criteria. *See Pacific Architects and Eng'rs Inc.*, B-236432, Nov. 22, 1989, 89-2 CPD ¶ 494.

The Air Force identified numerous weaknesses and risks in CBSI's technical proposal,[6] which caused CBSI's proposal to be evaluated as a significantly higher risk than Network Solutions' higher priced, low risk proposal. Indeed, CBSI's proposal was evaluated as a high risk for both of the primary technical evaluation factors, systems architecture and technical support.

Under the technical evaluation factor, "system architecture," the Air Force considered CBSI's proposal to be a high risk, even though it was rated technically acceptable. Specifically, the agency found the following areas of CBSI's system architecture to be of high risk: (1) CBSI's unexplained deletion in its BAFO of the required MT-800 Multiport Transceiver from its system; (2) CBSI's proposed bulk storage device did not meet the RFP durability requirements; (3) CBSI's BAFO was ambiguous regarding the power supply proposed; (4) CBSI's mount-

[6] The Air Force defines "weakness" to be a proposed approach that is unacceptable or is marginally acceptable and was communicated to the offeror during the discussions process. "Risk" is defined to be the "result of a proposed approach that causes disruption of schedule, increase in cost or degradation of performance."

ing of the Elographic E271-140 Controller outside the monitor created additional costs and maintenance; (5) CBSI's use of one student workstation as a server for a laser printer degraded the performance of the workstation; and (6) CBSI's failure to tailor system menus as required by the RFP. While CBSI contests each of these evaluated risks, we find the agency's evaluation of this criterion to be reasonable.

The apparent deletion of the required Cabletron MT-800 Multiport Transceiver in CBSI's BAFO was considered one of the most significant system architecture risks.[7] The Air Force states that the MT-800 is essential to the operation of the system network because the MT-800 is used to join network segments into a single environment, provides signal integrity by regenerating the signal at its optimum level, provides network monitoring and fault isolation, and allows the rapid configuration of the system to compartmentalize sensitive and classified information. From its review of CBSI's BAFO, the Air Force was uncertain whether CBSI actually intended to delete this required item, since CBSI provided no explanation or justification of the deletion of the MT-800 in its BAFO and its BAFO contained ambiguous references to the use of the MT-800. Furthermore, CBSI had offered the MT-800 in its initial proposal and stated no intention of deleting this item during the extensive face-to-face discussions. The Air Force evaluated this apparent deletion to be both a weakness and a significant risk in CBSI's proposal.

CBSI argues that the deletion of the MT-800 should not have been evaluated as a weakness but an enhancement, since the MT-800 was unnecessary in its proposed hardware configuration and the elimination of the MT-800 improved the design of the system architecture by eliminating a point of failure. We disagree and find reasonable the agency's evaluation of CBSI's unexplained deletion of the MT-800 in its BAFO as a significant risk and weakness. The RFP specifically required the use of the MT-800 in the proposed system and required that any deviation from the specified hardware or system architecture be identified and explained. As noted above, CBSI offered no explanation in its BAFO concerning the deletion of this solicitation requirement and the Air Force was unsure whether CBSI actually intended to delete the MT-800 from its offer. The agency now maintains that had it known that CBSI's deletion of this solicitation requirement was intentional it would have rejected CBSI's proposal as technically unacceptable.[8] Therefore, CBSI's approach was reasonably considered a high risk.

CBSI's BAFO also contained conflicting information regarding its proposed power supply. CBSI in its initial proposal offered a 200-watt power supply. In discussions it stated its intention to use a 250-watt power supply. CBSI's BAFO, however, references power supplies of 200, 250, and 300 watts. The agency states

[7] CBSI argues in its comments that the MT-800 is not required by the RFP. We disagree. The MT-800 is specifically identified in Table 3-2 to the RFP specification as hardware that is required for system operation. The protester's contention that this table does not show the quantities required and therefore the quantity required could be none is without merit.

[8] CBSI did not confirm that it intended to delete this item until the protest was filed.

that it was unsure which power supply was offered and notes that the selection of a power supply is important to determining the potential for expandability of the system as well as the fundamental viability of the offerors' design approach and the available safety margin.

CBSI argues that the Air Force should have known from the block diagrams in its BAFO that CBSI intended to offer a 300-watt power supply. We disagree that the block diagrams, which reference a 300-watt power supply, adequately informed the Air Force as to CBSI's intention regarding the power supply when the BAFO also contained descriptive literature, referencing a 200-watt power supply,[9] and the BAFO elsewhere indicated that a 250-watt power supply would be provided. We find that CBSI's proposal was ambiguous in this matter and that the Air Force reasonably considered the possibility that CBSI may not offer an adequate power supply to be a risk.

Under the other important technical evaluation factor, "technical support," for which CBSI was also evaluated to be acceptable but with a high risk, the Air Force also identified numerous risks and weaknesses in CBSI's proposal. Specifically, the Air Force found that: (1) CBSI's preliminary room layouts did not take into account maintenance and student accessibility; (2) CBSI failed to propose sufficient labor hours to accomplish the testing required by the RFP and to perform the enhanced testing, which was not required by the RFP but which CBSI offered; (3) CBSI's offer to preassemble workstations prior to shipping exacerbated the risk of hardware damage; (4) CBSI's proposed placement of computer and floppy disk drives showed incomplete human factors analysis; and (5) CBSI failed to demonstrate a system meeting RFP configuration requirements. Here, too, CBSI contests these identified risks and weaknesses, but our review indicates that the agency again reasonably evaluated CBSI's proposal.

For example, the Air Force evaluated CBSI's preliminary room layouts to be a risk because they did not take into account maintenance accessibility and student viewability of previously installed white boards. CBSI argues that this risk assessment is unreasonable because the RFP only required preliminary drawings and CBSI proposed to prepare final room layouts after contract award. The RFP required offerors to provide block diagrams for each subsystem configuration with a depiction of equipment layout within each room. During discussions CBSI was informed that the block diagrams must take into consideration existing equipment (such as power outlets, fire extinguishers, white boards) in each of the rooms. CBSI's BAFO did not provide diagrams that accounted for this equipment; instead, CBSI promised to conduct an on-site survey and prepare a site preparation and installation plan after award in accordance with the RFP statement of work. Such a promise obviously is not a substitute for the detailed block drawings; under the circumstances, the agency could reasonably find CBSI's response represented a high risk, given the problems with CBSI's preliminary room layouts.

[9] The descriptive literature provided in the BAFO also states that power supplies of 230, 375, and 450 watts are available as options. The 300-watt power supply, which CBSI now contends it would provide, is not listed, much less described, in the descriptive literature CBSI provided with its proposal.

The agency also determined that CBSI had failed to propose sufficient labor hours to perform the testing required by the RFP.[10] CBSI offered to test its system and software in conformance with DOD-STD-2167A, which is a standard used by the Department of Defense to establish uniform requirements for software development. The Air Force questioned how CBSI could perform the RFP-required testing within its proposed price while also testing its system and software at the DOD-STD-2167A enhanced level of testing.[11] The agency evaluated CBSI's proposed testing approach to be both a weakness and a risk.

CBSI contends that DOD-STD-2167A enhanced testing is necessary because two software packages required by the RFP are not NDIs as represented in the RFP.[12] CBSI argues that it did not propose to test all of its system components in conformance with DOD-STD-2167A, only the two software packages in question. However, our review of the protester's initial and revised proposals, as well as its response to the agency's DR concerning this enhanced testing, indicates that CBSI did indeed offer to test all its system components at the higher level testing of DOD-STD-2167A. The protester does not otherwise dispute the agency's statement that CBSI cannot perform both the DOD-STD-2167A level tests on all system components and the RFP-required tests with the number of labor hours proposed. Under the circumstances, we think CBSI's response to this requirement is indicative of a lack of understanding of the agency's requirements, and find that the agency reasonably found CBSI's proposal to be of high risk in this regard. *See Cygna Project Mgmt.*, B-236839, Jan. 5, 1990, 90-1 CPD ¶ 21.

Based on our review of the record, we find that the agency reasonably determined that CBSI's proposal contained numerous weaknesses and risks in the most heavily weighted technical areas, such that it was reasonably considered as being of high risk overall. Also, the agency, in accordance with the RFP, conducted a price realism assessment to evaluate CBSI's performance risks, by assessing the impact of CBSI's evaluated weaknesses and risks on its proposed price. Based on this analysis, the agency concluded that CBSI's low price reflected its high risk technical approach. We find nothing in the record that calls into question the reasonableness of this conclusion. *See Systems & Processes Eng'g Corp.*, B-234142, May 10, 1989, 89-1 CPD ¶ 441. Network Solutions' technical proposal, on the other hand, was evaluated to be acceptable with low risk. The

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[10] The RFP required testing to "assure that the functional capabilities of the [Sentinel Bright II] COTS/NDI system are replicated in the [Sentinel Aspen II] system, assure that [Sentinel Aspen II] meets the functional capabilities specified in [the RFP specification], and assure that any differences between the [Sentinel Bright II] COTS/NDI system and [Sentinel Aspen II] system are qualified at the hardware/software component level."

[11] The agency considered testing pursuant to DOD-STD-2167A to be unnecessary because the solicitation sought only COTS or NDI software/hardware, and software/hardware development was not required.

[12] CBSI, in its post-conference comments, acknowledges that whether these software packages, which were required by the RFP, are actually NDIs "is a specification problem [that] should have been addressed prior to submission of proposals." Despite its acknowledgment, CBSI, after the receipt of the Air Force's comments, filed a second protest that award was improperly made to Network Solutions because the awardee did not comply with the mandatory requirements of the RFP by not offering NDI software. On the other hand, CBSI concedes that Network Solutions' software was that required by, and identified as an NDI in, the RFP. We fail to see how the awardee's proposal can be noncompliant when it offered software that was specifically required by the RFP. In any event, the question of whether the software packages are actually NDIs concerns an apparent solicitation impropriety that CBSI was required to protest prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

record shows that the SSA properly weighed the technical merit and costs of the competing proposals in light of the RFP criteria and reasonably found that CBSI's $1.4 million price advantage was not worth CBSI's significantly higher risk.

CBSI also protests that the Air Force failed to conduct meaningful discussions. The record shows that the agency conducted extensive discussions with the protester through the issuance of 63 CRs, 8 DRs, and 41 PFNs and during 2 days of face-to-face discussions. The protester, in its initial protest letter, made only a general, broad allegation that discussions were not meaningful, and CBSI did not identify any deficiencies or areas of its proposal that it contends were not discussed with it. In its post-conference comments, CBSI, for the first time, identified six evaluated deficiencies in its proposed system, which it admits it was apprised of during its debriefing, but which CBSI alleges were not disclosed during discussions.

CBSI's piecemeal presentation of this issue resulted in an agency report and post-conference comments from the Air Force that did not address CBSI's subsequent specific allegations concerning these six deficiencies. The protester's raising of this issue in its post-conference comments, even though it knew the specific bases for these allegations at the time it filed its protest, is untimely under our Bid Protest Regulations and is dismissed. *Science Sys. and Applications, Inc.*, B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381; 4 C.F.R. § 21.2(a)(2). In any event, the record establishes that CBSI's proposal contained significant weaknesses and risks, apart from the six identified "deficiencies." Thus, CBSI was not prejudiced, even if these particular areas were not mentioned during discussions. *See Data Resources*, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 94.

The protest is denied in part and dismissed in part.

B-240974, January 11, 1991

Procurement

Sealed Bidding

■ Bid guarantees

■ ■ Responsiveness

■ ■ ■ Liability restrictions

Bid bond in the amount of 20 percent of the bid price submitted by the low bidder on an invitation for bids (IFB) for an indefinite quantity construction contract, which did not solicit bid prices, but instead requested bidders to bid multipliers that would be applied to pre-priced items in performing the contract, is insufficient to meet the IFB requirement for a $20,000 bid bond, since the IFB only provided for a $50,000 minimum value and stated no estimate of the government's anticipated needs; thus, the bid bond amount would be $10,000. However, the low bid may be accepted under applicable regulation because the difference between the low bid price and the next higher price is less than the insufficient $10,000 bid bond amount under any reasonable calculation.

Matter of: Haag Electric and Construction Inc.

David A. Lewis, Esq., Doehrman & Lewis, for the protester.

William B. Lich for Delta Electric Company, Inc., an interested party.

Bruce H. Segal, Esq., and James K. White, Esq., Department of Commerce, for the agency.

Amy Mito Shimamura, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Haag Electric and Construction, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 51-WCBC-1-06003RA, issued by the Department of Commerce for construction work at the Bureau of Census, Jeffersonville, Indiana.[1] Haag contends that its bid was improperly rejected for failing to provide an adequate bid bond.

We sustain the protest.

The IFB was issued on June 25, 1990, for an indefinite quantity, multi-trade contract for various undefined construction projects for a base year and 2 option years. The contract work is to be ordered by delivery orders specifying the precise work to be performed. The IFB did not request fixed prices for the contract work, but instead incorporated an exhaustive list of pre-priced work elements, and required bidders to bid a single multiplier.[2] This multiplier will be applied to the pre-set prices for each task covered by a delivery order to determine the fixed price of that delivery order. The IFB provided that the government is required to place orders totalling a minimum of $50,000 and not exceeding $750,000 under the contract.

The IFB included a "NOTICE OF REQUIRED BID GUARANTEE," as follows:

Each bidder must submit a bid guarantee in the amount of $20,000. If a bid bond is submitted, it should be on a Standard Form 24 . . . .

The IFB also incorporated Federal Acquisition Regulation (FAR) § 52.228-1, which advised potential bidders that the "failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

Two bids were submitted in response to the IFB: Haag was the apparent low bidder with a multiplier of .80. Delta Electric Company, Inc., the only other bidder, bid a multiplier of .8275. Haag submitted with its bid a bid bond on a Standard Form 24 in the amount of 20 percent of the bid price. The agency

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[1] No award has been made.

[2] The IFB advised bidders to show the multiplier as a decimal. For example, if a bidder wanted to bid the same price as the schedule unit prices, the multiplier would be shown as 1.00; if a bidder wanted to discount the schedule prices by 20 percent, the multiplier would be shown as .80.

found that this bond was not in the amount of $20,000, as required by the IFB, and rejected Haag's bid as nonresponsive.

A bid guarantee is a material part of a bid and when a bond is required, it must be furnished with the bid package. *Drill Constr. Co., Inc.*, B-239783, June 7, 1990, 90-1 CPD ¶ 538. A bid that contains a bid bond that does not comply with the solicitation requirements in all material respects must be rejected unless it falls under one of certain specified exceptions. *Id.;* FAR §§ 14.404-2(j), 28.101-4 (1990).

Haag contends that its bid was responsive because the Standard Form 24 specifically permits expressing the penal sum of the bid bond as a percentage of the bid price. Haag also argues that the penal sum of its bid bond could substantially exceed $20,000 since the contract value could be as much as $750,000 for the contract work (20 percent of $750,000 is $150,000). Commerce argues that Haag's bid bond is defective since it is expressed in terms of percentage of bid price and there is no bid price in this IFB.

We think Commerce is reading the obligation of Haag's surety on the bid bond too narrowly and without consideration of the terms of the IFB. It is apparent from the execution and submission of the bid bond that the surety intended to bind itself to fulfill the requirements of that bond to the extent of 20 percent of the bid price. *Charles Bainbridge, Inc.*, B-186060, July 23, 1976, 76-2 CPD ¶ 160. While it is true that the calculation of the surety's liability in this case is made more difficult because bidders did not bid total or unit prices, the IFB expressly guaranteed a minimum $50,000 price. Bidders (and their sureties) were cognizant that this amount would be paid under the contract, such that a bid bond expressed as 20 percent of the bid price would be enforceable based on this amount.

This calculation is analogous to that made in *Charles Bainbridge, Inc.*, B-186060, *supra*, and *Free State Builders, Inc.*, B-185999, July 12, 1976, 76-2 CPD ¶ 35, which involved IFBs issued by the General Services Administration (GSA) for requirements contracts for painting. The GSA IFBs also did not request bid prices, but only "percentage factors" to be applied to pre-priced items. In those cases, we considered the issue of the sufficiency of bid bonds, expressed in terms of a percentage of bid price, and found the estimated dollar volume estimates for the requirements contracts that were expressed in each IFB could be used as a mathematical base to determine the amount of the bid bond, even though there was no guarantee that this amount of work would be ordered under the contracts. We reasoned that this figure represented the government's good faith estimate of the contract work and the surety's liability could reasonably be calculated from this figure.

Here, while there is no estimated dollar amount stated in the IFB for the indefinite quantity contract, the IFB does provide for a $50,000 minimum that can be used as a mathematical base to calculate the bid price and the sufficiency of the bid bond. Thus, Haag's 20 percent bid bond is calculated as $10,000, an amount insufficient to satisfy the $20,000 bid bond requirement specified in the IFB.

Haag suggests that the $750,000 maximum order limitation be used to calculate the bid bond amount since the bid bond surety would anticipate that a contractor could be liable for this amount under the contract. However, this amount is not represented in the IFB, or otherwise by Commerce, as a good faith government estimate of the anticipated contract work, but rather is a "realistic" estimate based on "the most current information available" of the maximum possible contract value. *See* FAR § 16.504(a)(1). In the absence of a government estimate in the IFB on which bid prices could be calculated, and since the government has the obligation to order only $50,000 worth of work under the contract, we think Haag's bid bond surety could limit its maximum liability to 20 percent of $50,000, inasmuch as the surety's obligation on the bid bond expires upon execution of the contract and delivery of acceptable performance and payment bonds.[3] *See BKS Constr. Co.*, 66 Comp. Gen. 492 (1987), 87-1 CPD ¶ 558. Thus, Haag's bid bond was insufficient in amount to satisfy the IFB's $20,000 requirement.

As indicated above, there is a list of exceptions to the general rule that an insufficient bid bond requires the rejection of a bid. FAR § 28.101-4(c). One exception set forth in FAR § 28.101-4(c)(2) applies to situations where the amount of the bid guarantee submitted, although less than that required by the IFB, is equal to or greater than the difference between the offered price and the next higher acceptable bid. *See American Roofing and Metal Co., Inc., and Port Enters., Inc., a Joint Venture*, B-239457, Aug. 24, 1990, 90-2 CPD ¶ 153.

Because the bids here are expressed in terms of a multiplier, the calculation of the price difference between Haag's and Delta's bids also presents some difficulties. However, this calculation is possible and any reasonable calculation of this difference indicates it is considerably less than Haag's surety's $10,000 bid bond amount because of the close proximity of the two bids (.80 and .8275).

The question of how the difference between bid prices can be calculated where bid prices are not solicited, but only percentage factors, was also addressed in the *Bainbridge* and *Free State* cases. Those cases found that the difference between the two low bids can be calculated by applying the percentage factor to the government estimates for the requirements contracts, that being the same figure used to calculate the penal amount of the low bidder's bid bond that was expressed in terms of a percentage of bid price.

Similarly, the difference between Haag's and Delta's bids can be calculated using $50,000 as a mathematical base. For example, if the multipliers are directly applied to $50,000, there would be a difference between the bid prices of $1,375 (($50,000 x .8275) minus ($50,000 x .80)). A calculation of the difference in the dollar amounts of contract value, to which each bid multiplier would be applied to equal $50,000, also is considerably less than $10,000; that is, Haag's .80

[3] This case is different from that in *A.R.S. Constr. Co.*, B-228476, Jan. 27, 1988, 88-1 CPD ¶ 82, where the IFB expressly required bonds to be based on a percentage of the estimated quantities stated in the IFB for an indefinite quantities contract, such that a bid bond based on a percentage of the minimum guaranteed amount was considered insufficient.

multiplier times $62,500 equals $50,000, while Delta's .8275 multiplier times $60,423 equals $50,000, a difference of only $2,077.

It could be contended that the minimum order amount is not the best assumption on which to base a comparison between the bid prices to determine the applicability of this exception to the bid bond requirements. However, the apparent reason for this exception is that the surety's liability on a bid bond is generally the difference between the low bid and the next highest acceptable bid. Since Commerce has not made an estimate of the contract work that would represent an accurate representation of the government's anticipated needs, we think the government could not successfully recover more than the difference between the two low bids based on the minimum guaranteed amount. Similarly, we do not think the $750,000 maximum order limitation is a reasonable figure on which to calculate the difference between the bids, since the calculated difference between bids, based on a maximum order limitation, is too speculative on which to base a surety's liability.[4] *See American Roofing and Metal Co., Inc., and Port Enters., Inc., a Joint Venture,* B-239457, *supra* (options cannot be used to calculate bid prices for the purposes of determining whether a bid bond falls under this exception).

Commerce has not determined that it would be detrimental to the government's interest to accept Haag's low bid and we can perceive no reason why it would be detrimental. Under the circumstances, Commerce is required to waive the insufficient bid bond. *See Charles Bainbridge, Inc.,* B-186060, *supra.*

We sustain the protest.

We recommend that award be made to Haag if it is otherwise responsible. The protester is also entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990). Haag should submit its claim for protest costs directly to the agency. 4 C.F.R. § 21.6(e).

B-241052, January 15, 1991

Procurement

Sealed Bidding

■ Invitations for bids

■ ■ Amendments

■ ■ ■ Cost estimates

■ ■ ■ ■ Indefinite quantities

Agency properly amended invitation for bids (IFB) to solicit bids for an indefinite quantity-type contract for landscape maintenance and request a single percentage factor to be applied to agency prepriced work items and agency estimated frequencies to determine the amount paid under the contract; this is a legitimate method to prevent deliberate unbalancing of prices by bidders and assure award to the low bidder under the IFB regardless of quantities ordered.

[4] If the $750,000 figure were used for purpose of calculating the penal amount of the bid bond, Haag's bond would equal $150,000 and would thus be sufficient.

Bid Protests
■ **Allegation substantiation**
■ ■ **Lacking**
■ ■ ■ **GAO review**

Protest challenging agency price and frequency estimates for landscape maintenance services is denied where agency properly prepared estimates on the basis of historic information, and adjusted estimates in light of information provided by the protester and further agency review of the requirements; protester's allegation that uncorrected defects in the estimate remain is unsupported.

Matter of: Custom Environmental Service, Inc.

William J. Valois, Jr., for the protester.

Kenneth R. Pakula, Esq., General Services Administration, for the agency.

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

Custom Environmental Service, Inc. protests invitation for bids (IFB) No. GS-11P-90-MJC-0052, as amended, issued by the General Services Administration (GSA) that solicits an indefinite quantity contract for landscape maintenance services for a 1-year base period and four yearly options. Custom objects to the amended IFB pricing schedule that invites bids on a single percentage factor or net basis rather than soliciting prices for the multiple items of work.

We deny the protest.

The IFB, as initially issued, required the submission of unit prices for each work item for each period (base, first option, etc.). The unit prices would then be multiplied by a GSA-estimated frequency (i.e., how often the work will be required during the period) giving a sub-total. Summing the sub-totals of all work items for all buildings during the period would determine the bidder's total price for each period.

Amendment No. 2 changed the IFB pricing schedule. GSA reports that it amended the schedule to preclude unbalanced bidding, a problem that GSA had experienced with previous landscape maintenance solicitations. Amendment No. 2 provides a GSA-estimated unit price and a GSA-estimated frequency for each work item at each building. The bidders are asked to quote a single percentage, plus or minus, which will be applicable to all work items required during the contract period. The total price bid for each period is determined by applying the applicable percentage factor to the IFB's unit prices, multiplying the result by the applicable frequencies, and summing the results. By amendment No. 5, issued after this protest was filed, GSA revised many of its estimates and designated this contract as an indefinite quantity contract.

We have approved agency use of this net or single percentage factor method of soliciting bids for the purpose of avoiding unbalanced bidding. *See Michael O'Connor, Inc.*, 56 Comp. Gen. 107 (1976), 76-2 CPD ¶ 456.[1] We found this was a legitimate approach to allow the agency to efficiently evaluate bids and assure award to the bidder that will ultimately cost the least, regardless of the quantities ordered during the contract term, and has the virtue of preventing deliberate unbalancing of prices by a bidder where it has reason to believe that the government's estimated quantities are substantially wrong. *Id.* Custom argues that net bidding deprives bidders of the ability to adjust for individual items in their bids, which may result in the government paying too much for these items. However, in such circumstances, where a bidder finds the solicitation's predetermined prices are too low or too high, it can adjust prices by an offered plus or minus percentage factor.[2]

Custom also argues that net bidding imposes an improper risk on the contractor because the amount of work is dependent upon weather conditions (e.g., frequency of plant watering depends upon the amount of rainfall—wet versus a dry summer) and the bidder loses its ability to fine tune its bid to adjust for such variables. A solicitation is not defective merely because it may put some contractors at risk. *Neil Gardis & Assocs., Inc.*, B-238672, June 25, 1990, 90-1 CPD ¶ 590. Risk is inherent in any contract, and bidders must use their expertise and business judgment to assess the risk's magnitude and possible cost in computing their bids. *Id.* Agencies properly may impose reasonable risks on contractors in order to limit the burdens on the government. *See Natural Landscape Contractors, Inc.*, B-209745 *et al.*, June 28, 1983, 83-2 CPD ¶ 32; *KCA Corp.*, B-236260, Nov. 27, 1989, 89-2 CPD ¶ 498. Here, we do not think net bidding imposes an unreasonable risk, since bidders can take into account the factors relevant to the contract work (e.g., weather conditions) in their quoted percentage.

Custom also challenges the accuracy of the IFB's price and frequency estimates. When an agency solicits bids on the basis of estimated amounts (here, prices and frequencies), the estimates must be compiled from the best information available and present a reasonably accurate representation of the agency's anticipated needs; however, there is no requirement that they be absolutely correct. *Aleman Food Serv., Inc.*, B-219415, Aug. 29, 1985, 85-2 CPD ¶ 249.

Custom's protest contested specific aspects of the estimates. GSA developed the estimates from historical information (*e.g.*, the bid sheets for the prior contract). In response to Custom's protest, an on-site review was made by an experienced GSA estimator to review the accuracy of the estimates. Amendment No. 5 corrected many of the estimates and was responsive to Custom's specific complaints that GSA found valid.

[1] That decision also found that where a requirements contract was solicited, the government's estimated quantities were required to be disclosed in the solicitation.

[2] Custom submitted an example of a $7,892 savings for multiple line items that it could provide GSA using its own unit pricing instead of the GSA-estimated unit pricing. Under Custom's example, it can provide for $34,508 the same work for which GSA anticipates paying $42,400. Under the IFB, Custom can offer that savings by bidding a minus percentage between 18 and 19 percent ($42,400 - $34,508 = $7,892; $7,892/$42,400 = 0.1861).

During a bid protest conference at our Office, the agency's estimator discussed with Custom many of Custom's specific objections. At that time, Custom admitted that the estimates were reasonable as applied to most contractors, but opined that they did not reflect the capabilities (and costs) of a capital intensive firm like Custom. When GSA commented in its conference comments on Custom's admission—that GSA's estimates were generally reasonable—Custom objected. Custom states that its admission did not apply to the majority of estimates that were not discussed at the conference.

Nothing in this record supports Custom's allegation that improper estimates remain in the IFB; to the contrary, the record indicates that the estimates are based on the best information available to GSA, including Custom's views, and appear to provide a reasonable basis for competition. *Space Serv. Int'l Corp.*, B-207888.4 *et al.*, Dec. 13, 1982, 82-2 CPD ¶ 525.

The protest is denied.

B-241178, January 16, 1991

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Advertising

Procurement for transient aircraft services was properly synopsized under maintenance and repair category of *Commerce Business Daily,* even though requirement also covers certain work that could be synopsized under housekeeping services, where solicitation clearly includes significant proportion of maintenance and repair work and, although other activities previously have synopsized similar procurements under housekeeping, prior procurement by this activity was synopsized as maintenance and repair work.

Procurement

Bid Protests

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ 10-day rule

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Competition rights

■ ■ ■ Contractors

■ ■ ■ ■ Exclusion

Protest that agency deprived protester of an opportunity to compete because it failed to furnish it a copy of the solicitation is dismissed as untimely where procurement was properly synopsized in the *Commerce Business Daily,* and the protester did not file protest within 10 working days of the closing date specified in the synopsis.

Matter of: Do-Well Service & Supplies, Inc.

Mark L. Gelman, Esq., Gelman & Associates, for the protester.

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

Leonard G. Strickland, Allied Management of Texas, Inc., an interested party.

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

Do-Well Service & Supplies, Inc. protests that it improperly was excluded from competing under request for proposals (RFP) No. F45603-90-R-9025, issued by the Department of the Air Force for transient aircraft services at McChord Air Force Base (AFB). Do-Well maintains that it was excluded from competition due to misclassification of the *Commerce Business Daily* (CBD) synopsis and the agency's failure to provide the firm with a copy of the solicitation.

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

The solicitation, issued as part of a cost comparison pursuant to Office of Management and Budget Circular No. A-76, was synopsized in the CBD under category "J," "maintenance and repair of equipment," on May 3 and June 8, 1990; the synopsis specified a July 31 closing date for receipt of proposals. In addition, prior to issuance of the solicitation on June 15, and until the closing on July 31, notice of the solicitation was posted on the agency's bid board. The agency, however, did not provide Do-Well with a copy of the RFP and the firm, which did not otherwise obtain a copy, did not submit a proposal.

In its protest, Do-Well first contends that the solicitation was improperly synopsized in the CBD under category "J," "maintenance and repair of equipment," rather than under category "S," "housekeeping services"; according to the protester, other contracting activities have synopsized procurements for transient aircraft services under housekeeping services.

The agency, on the other hand, maintains that the procurement was properly classified in the CBD because the majority of the work specified in the performance work statement (PWS) involves maintenance and repair services, not housekeeping services. The Air Force notes that different activities previously have synopsized transient aircraft services procurements under category "S," as well as under other categories, but takes the position that, those other procurements notwithstanding, transient aircraft services procurements properly should all be synopsized under category "J" rather than category "S." In this regard, the Air Force notes that the prior procurement for transient aircraft services at McChord AFB was also synopsized under category "J."

An agency's failure to synopsize pending procurements in the CBD in a manner reasonably expected to provide potential offerors with actual notice of the pending procurement violates the requirement under the Competition in Contracting Act of 1984 to obtain full and open competition. *A&C Bldg. and Industrial Maintenance Corp.,* B-230839, July 21, 1988, 88-2 CPD ¶ 67.

Based on the record, we think the notice in this case was sufficient; the agency reasonably classified the procurement under category "J" rather than under category "S." While the work under the PWS involves some services classified as housekeeping services, such as refueling aircraft, custodial services in government-furnished office space and grounds maintenance for outside work areas, *see* Federal Acquisition Regulation (FAR) § 5.207, the Air Force reports, and Do-Well does not dispute, that the majority of the work is directly related to maintenance and repair services. For example, the solicitation requires that the contractor perform operational checks and minor maintenance on aircraft systems (including air frame systems, landing gear systems, engines and electrical systems) and ground support equipment, check and service engine oil, oxygen, hydraulics, and fuel, identify fluid leaks, check tires and struts, change wheel and tire assemblies, and otherwise maintain aircraft and government-furnished equipment. Further, the PWS specifically requires that the contractor's work force be comprised of qualified maintenance technicians who have completed formal training in aircraft maintenance.

The precise proportion of maintenance and repair work to the total requirement is not readily determinable from the RFP, which merely lists the different work requirements. It is clear, however, that a significant portion of the required work involves skilled maintenance and repair services. We thus see nothing unreasonable in classifying the services here under category "J." While the Air Force is unable to explain why different CBD classifications previously have been used by some other activities, those prior classifications do not change our view that the services here reasonably can be categorized as maintenance and repair; moreover, so categorizing the services here is consistent with the prior synopsis for transient aircraft services at McChord AFB. (Based on the position taken in its report, we presume the Air Force intends to assure that transient aircraft services procurements will be synopsized by all activities more consistently in the future.) *The Gunneson Group Int'l,* B-234141.8, May 16, 1989, 89-1 CPD ¶ 464.

Do-Well, a small business, also contends that, the CBD synopsis aside, the agency improperly failed to provide the firm with a copy of the solicitation, contrary to the provisions of FAR § 19.202-4, which generally requires that copies of solicitations be sent to small businesses on the bidders mailing list, or which have requested copies. Do-Well points out that it had specifically requested in 1988, and the agency had agreed, that the firm would be included on the bidder's mailing list for future solicitations for these services.

Where, as here, a contracting agency has properly synopsized a proposed procurement in the CBD, a potential contractor is on constructive notice of the solicitation and its contents and has a duty to make reasonable efforts to obtain a copy of the solicitation in order to ensure that it is included in the competition. *Laser Alignment Inc.,* B-236906, Oct. 4, 1989, 89-2 CPD ¶ 310; *The Gunneson*

Group Int'l, B-234141.8, *supra*. When Do-Well failed to receive a copy of the solicitation by the July 15 closing date specified in the CBD synopsis, the last day on which it could have successfully submitted an offer for the contract, it was on constructive notice that it had not been solicited, which is the basis for its protest. *Id.* Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1990), a protest concerning other than an apparent impropriety in the solicitation must be filed with the contracting activity or our Office within 10 working days after the protester knows or should have known the basis of its protest. Do-Well's September 17 protest to our Office of its failure to receive a copy of the solicitation, filed 2 months after the closing date, therefore is untimely. *Id.*

Moreover, even if it were timely, Do-Well's protest would not provide a basis for requiring resolicitation. A contractor generally bears the risk of not receiving a solicitation unless the failure to receive it is the result of a deliberate effort to exclude the offeror from competing, or the contracting agency inadvertently fails to furnish the solicitation after the offeror has availed itself of every reasonable opportunity to obtain it. *See EMSA Ltd. Partnership*, B-237846, Mar. 23, 1990, 90-1 CPD ¶ 326. We generally will sustain a protest only where the prospective contractor has acted to place the agency on notice of its interest in an ongoing synopsized procurement. *See, e.g., EMSA Ltd. Partnership*, B-237846, *supra; Essex Electro Engineers, Inc.*, B-234089.2, Mar. 6, 1990, 90-1 CPD ¶ 253.

Do-Well generally claims to have contacted the contracting officer concerning the procurement "in the past year," but it provides no dates or details substantiating any claimed contacts, and the contracting officer specifically denies having discussed the procurement with Do-Well during the past 2 years. Do-Well apparently did request in 1988 that it be included on the bidders list for these services. The agency explains, however, that due to a personnel change at that time, Do-Well inadvertently was not added to the list; the agency reports it now has included Do-Well on the bidders list for future requirements. In these circumstances, in the absence of any evidence that Do-Well ever advised the Air Force of its interest in the synopsized procurement, there would be no basis for sustaining the protest.

The protest is denied in part and dismissed in part.

B-240371, January 18, 1991

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■ ■ Fitness centers

■ ■ ■ Membership fees

Under 5 U.S.C. § 7901 (1988), federal agencies may establish preventive health service programs to promote and maintain the physical and mental fitness of their employees. Moreover, regulations issued by the Office of Personnel Management to implement section 7901 specifically authorize agencies to establish and operate "physical fitness programs and facilities designed to promote and maintain employee health." Federal Personnel Manual (FPM), ch. 792 (Inst. 261, Dec. 31, 1980), as amended by FPM letter 792-15 (April 14, 1986). As such, we conclude 5 U.S.C. § 7901 and its implementing regulations authorize the Department of Defense, Defense Medical Systems Support Center to use appropriated funds to provide its employees access to a private fitness center's exercise facilities.

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■ ■ Specific purpose restrictions

■ ■ ■ Membership fees

The prohibition in 5 U.S.C. § 5946 against the use of appropriated funds to pay the membership dues of a federal employee in a society or association does not prohibit a federal agency from using appropriated funds to purchase access for its employees to a private fitness center's exercise facilities.

Matter of: Defense Medical Systems Support Center—Health and Fitness Program

An official of the Department of Defense, Defense Medical Systems Support Center (Center), asks whether the Center may use appropriated funds to provide access to private health and fitness facilities for its employees as a part of its health service program. For the following reasons, we conclude the Center may use appropriated funds for such a purpose subject to budgetary constraints.

Background

For the past two years, the Center contracted with a private health and fitness facility to provide the Center's civilian and military employees access to exercise facilities. Recently, a contracting officer questioned whether an agency may use appropriated funds for such an expenditure and denied the Center's request to renew the contract. Therefore, the Director of the Center asked for our opinion on the matter.

Discussion

Generally, agencies may not use appropriated funds to pay the costs of medical or health care treatment for civilian government employees since such costs are considered personal to the employees. 64 Comp. Gen. 835 (1985). However, 5 U.S.C. § 7901 (1988) authorizes heads of departments or agencies to establish health service programs by contract or otherwise to promote and maintain the physical and mental fitness of federal employees. B-226569, Nov. 30, 1987. These health service programs include "preventive programs relating to health." 5 U.S.C. § 7901(c)(4).

In a previous decision, we concluded that the Park Service could not pay a private health club to allow Park Service employees access to the club's exercise facilities. 64 Comp. Gen. 835 (1985). However, we based our conclusion on the restrictive nature of the Office of Personnel Management's (OPM) regulations implementing 5 U.S.C. § 7901, not on a lack of statutory authority. We concluded that the statutory language, "preventive programs relating to health," was sufficiently broad to encompass physical exercise programs. 64 Comp. Gen. 835, 838 (1985).

In response to our decision, OPM revised its regulations to include the establishment and operation of "physical fitness programs and facilities designed to promote and maintain employee health" in its list of appropriate preventive health services. *See* Federal Personnel Manual (FPM), ch. 792 (Inst. 261, Dec. 31, 1980), as amended by FPM letter 792–15 (April 14, 1986). OPM supports and encourages physical fitness programs because of the "positive impact of good health on maintaining effective performance and productivity," and "to avoid or minimize the problems associated with absenteeism, early retirement due to unavoidable disability and the decline in individual performance due to health problems." *Id.*

Apart from the above issue concerning the availability of agency appropriations for fitness programs, an issue has arisen concerning the applicability of 5 U.S.C. § 5946 to agency contracts for access to and use of the privately owned fitness facilities. Under 5 U.S.C. § 5946, agencies may not use appropriated funds to pay "membership fees or dues of an employee . . . in a society or association." Based on this prohibition, OPM's General Counsel, in a 1988 opinion issued in response to an OPM Regional Director's request, questioned whether agencies may use appropriated funds to pay for employee "memberships" in fitness centers.

In the past, we have not objected to certain expenditures just because they were labeled as memberships in associations. *See, e.g.,* 19 Comp. Gen. 937 (1940) (payment of "membership assessments" to secure access to a law library "association"); B–21, Jan. 5, 1939 (expenditure for "membership" in an electric cooperative). In these cases, we recognized that, regardless of the form of the expenditure, the government was actually paying a service or use charge in furtherance of authorized agency activities. *See* 19 Comp. Gen. 937, 939 (1940).

Similarly, here, the Center is not using appropriated funds to pay dues or fees for membership in a society or association. It is purchasing access for its employees to a private fitness center's exercise facilities as part of an agency fitness program authorized by 5 U.S.C. § 7901. As such, we do not view the expenditure in question as the type Congress intended to prohibit under 5 U.S.C. § 5946.[1]

Accordingly, we would not object to the Center's use of appropriated funds, under the authority in 5 U.S.C. § 7901 to establish health fitness programs "by

[1] Of course, 5 U.S.C. § 5946 does not prohibit a federal agency from joining a society or association in its own name, where, such as would be the case here by virtue of 5 U.S.C. § 7901, such membership is otherwise authorized. *See* 61 Comp. Gen. 542 (1982).

contract or otherwise," to provide its employees access to private health and fitness exercise facilities as part of a health service program.

In conclusion, we would like to note our agreement with the observations of the General Counsel, OPM, contained in his 1988 opinion that the "purchase of fitness club memberships for the use of employees on a continuing basis should be undertaken only where all other resources have been considered and rejected, and where employee use of the program will be carefully monitored as part of a bona fide preventive program relating to health."

B-241067, January 18, 1991

Procurement

Special Procurement Methods/Categories
■ Service contracts
■ ■ Sewage services
■ ■ ■ Municipalities
■ ■ ■ ■ Mandatory use

Provision of Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (1988), requiring federal agencies to comply with local requirements respecting control and abatement of solid waste, does not require the El Toro Marine Air Station to use Orange County, California's exclusive permittee for refuse collection. Although the air station is within the unincorporated limits of Orange County, it is a major federal facility under the guidelines of the Environmental Protection Agency and should be treated as though it were a separate municipality entitled to contract for its own refuse collection services.

Procurement

Bid Protests
■ Allegation substantiation
■ ■ Lacking
■ ■ ■ GAO review

Protest, contending that proposed agency procurement of waste disposal services is improper because of the existence of protester's exclusive franchise as sole refuse collector within city limits, is denied where city code expressly excludes federal facilities from the scope of the franchise.

Matter of: Waste Management of North America, Inc.

VerLyn N. Jensen, Esq., and Michael B. Schwerdtfeger, Esq., Nossaman, Guthner, Knox & Elliott, for the protester.

Christopher J. Jaekels, Esq., for Laidlaw Waste Systems, Inc., an interested party.

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

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

Waste Management of North America, Inc., protests invitation for bids (IFB) No. N62474-90-D-5666 issued by the Department of the Navy for refuse collection and disposal services for Marine Corps Air Stations at El Toro and Tustin, California. Waste Management contends the solicitation is improper because its two wholly owned subsidiaries, Great Western Reclamation, Inc. and Dewey's Rubbish Service, Inc., are the only firms legally authorized to provide refuse collection services in the jurisdictions in which the air stations are located.

We deny the protest.

Our Office has considered in various cases the issue of whether a protester's possession of an exclusive franchise to provide waste disposal services in various jurisdictions within the state of California precludes government agencies with facilities located in those jurisdictions from issuing solicitations to competitively procure these services from other firms. *See, e.g., Oakland Scavenger Co.*, B-236685, Dec. 19, 1989, 89-2 CPD ¶ 565; *Solano Garbage Co.*, 66 Comp. Gen. 237 (1987), 87-1 CPD ¶ 125; *Monterey City Disposal Serv., Inc.*, 64 Comp. Gen. 813 (1985), 85-2 CPD ¶ 261; *see also Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988). This limitation on government contracting is authorized by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6961 (1988), which generally subjects federal agencies to local requirements respecting solid waste abatement and control.

Regarding the El Toro air station, Waste Management contends that no IFB should be issued because Waste Management, through Dewey and Great Western, has the exclusive solid waste collection permit in the county of Orange, Solid Waste Collection Permit Area 6, in which El Toro is located. Waste Management relies on *Parola v. Weinberger*, 848 F.2d at 956, which held that the RCRA generally requires federal installations to comply with local arrangements for solid waste collection and disposal.

RCRA charged the Environmental Protection Agency (EPA) with developing federal guidelines for the submission of state plans governing, in part, federal facility compliance with local environmental laws and regulations. Under the RCRA framework, the states are responsible for formulating and implementing plans for local regulation of solid waste. The state of California has delegated to local governments (city and county) the responsibility for aspects of solid waste handling that are of local concern. This includes such aspects as frequency and means of collection, level of services, charges and fees, and whether collection services are provided by means of an exclusive or nonexclusive franchise. *See California Plan* (Oct. 1981), 47 Fed. Reg. 6834 (1982); Cal. Gov't Code § 66757 (Deering Supp. 1985).

On June 10, 1986, the Orange County Board of Supervisors directed that "effective July 1, 1991, solid waste hauling services be provided on an exclusive basis for each permit area." Previously, Orange County had issued permits on a nonexclusive basis and other firms could obtain permits for the same area. *See Waste Mgmt. of North Am. v. Weinberger*, 862 F.2d 1393, at 1395 (9th Cir. 1988). Waste Management contends that the Board of Supervisors' grant of exclusive collection rights in Area 6 to Waste Management constitutes a local solid waste requirement, with which RCRA requires El Toro to comply.

Although it was not addressed in *Parola v. Weinberger,* an agency need not employ a firm that holds an exclusive license to provide waste management services for an agency facility that qualifies as a "major federal facility" under the EPA guidelines. *See Solano Garbage Co.,* 66 Comp. Gen. 237, *supra.* While Waste Management attacks the applicability of the EPA guidelines, we treated these matters in *Solano.* In *Solano,* we explained that while RCRA requires federal agencies to comply with local requirements respecting the control and abatement of solid waste, we think it is unreasonable to interpret this requirement as a mandate that any federal facility located within a local government's jurisdiction must use that government's exclusive refuse collector. In this respect, the guidelines of the EPA at 40 C.F.R. part 255 (1990) specify that "major federal facilities" are to be treated as "incorporated municipalities."[1] In *Solano,* we interpreted the EPA guidelines to mean that under the California Plan's delegation of refuse collection responsibilities to local governments, federal facilities falling within the scope of the EPA guidelines should be afforded the same refuse collection status as is enjoyed by a similarly situated California municipality. That is, a federal facility is entitled to contract for its own refuse collection services when by virtue of its size and function it constitutes a major federal facility, since it would then be treated as though it were a separate municipality entitled to contract for its own refuse collection services. Since the term "major federal facility" is undefined, we looked to the facility's size and function to determine whether an agency has reasonably characterized a particular facility as a "major" facility.

In *Solano,* we considered Travis Air Force Base to be a major federal facility because of its size and function—more than 5,200 acres, and more than 10,000 military residents existing as a self-contained military community separate and distinct from the adjoining civilian community of Fairfield, California. We see no basis to distinguish between Travis and El Toro in this regard, since El Toro is a separate military installation occupying 4,800 acres and having more than 10,000 military residents. *See Waste Mgmt. of North Am.,* 862 F.2d at 1395. *Cf. Oakland Scavenger Co.,* B-236685, *supra* (where we rejected the argument that 65-acre federal facility inhabited by 2,000 residents was a "major federal facility"). Under the circumstances, the Navy is not required to honor the Orange County exclusive permit and may issue this IFB for refuse collection services at El Toro air station.

Regarding the Tustin air station, Waste Management contends that it, through Great Western, has an exclusive franchise from the city of Tustin, California, designating it as the sole refuse collector for all refuse collections within the city limits of Tustin, including the area of the Tustin air station. The Navy re-

[1] Specifically, 40 C.F.R. § 255.33 provides:

Major Federal facilities and Native American Reservations should be treated for the purposes of these guidelines as though they are incorporated municipalities, and the facility director or administrator should be considered the same as a locally elected official. [42 U.S.C. § 6961 is cited as authority for this provision.]

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ports that the Tustin City Code specifically excludes federal facilities from its waste disposal exclusive franchise provisions.[2] Waste Management does not dispute the Navy's advice. In absence of an applicable exclusive franchise, this aspect of the protest has no merit. *See Solano Garbage Co.*, B-222931, May 7, 1986, 86-1 CPD ¶ 442.

The protest is denied.

B-210555.44, January 22, 1991

Civilian Personnel

Travel
■ Commuting expenses
■ ■ Prohibition
■ ■ ■ Applicability

Use of a government vehicle for transportation between an employee's home and an airport or other common carrier terminal in conjunction with official travel is not precluded by the statute governing home-to-work transportation or by any provision of the Federal Travel Regulations. Contrary views expressed in B-210555.23, May 18, 1987, will no longer be followed.

Matter of: Home-to-Airport Transportation

This decision is in response to a request from the General Counsel of the General Services Administration (GSA) that we reconsider our prior interpretation that there is no authority for a federal employee to receive home-to-airport transportation in a government car. As will be explained below, we agree with GSA's view that the use of government vehicles for home-to-airport transportation in conjunction with official travel is not prohibited under the applicable laws and regulations.

Background

In a letter to an Assistant Commissioner of the Customs Service, B-210555.23, May 18, 1987, we answered two questions. The first question concerned whether there was authority for an employee to be given home-to-airport transportation in a government vehicle. We held that there was no such authority. We noted that the home-to-work statute, 31 U.S.C. § 1344, could not be viewed as authorizing this practice. We further noted that the provisions in the Federal Travel

[2] Tustin City Code, Solid Waste Collection, part 3, Solid Waste Responsibilities - Collector, sec. 4332, "Removal Limited" reads:

The City shall provide for the collection and disposal of solid waste material from all premises at least once each calendar week. Such provision may be made either by letting a contract for such collection and removal, or otherwise. The City, its duly authorized agents, servants and employees, or any Contractor with whom the City may contract therefor, and the agents, servants and employees of such Contractor, while any such contract shall be in force, shall have the exclusive right to gather, collect, and remove solid waste material from all premises in the City (*excluding State and Federal facilities*). (Italic added.)

Regulations (FTR) addressing such transportation only authorized reimbursement for taxicabs, public transportation, or mileage and parking fees. Therefore, we concluded that an employee could not receive home-to-airport transportation in a government vehicle.

In requesting reconsideration, the General Counsel points out, among other things, that the language of 31 U.S.C. § 1344 and the legislative history of the 1986 amendments to that statute evidence that Congress did not intend the home-to-work statute to apply to an employee in temporary duty travel status. Therefore, it is GSA's position that we should reverse our holding that prohibits the use of government vehicles for home-to-airport transportation since an employee is in temporary duty travel status between his or her home and the airport.

Opinion

We have reconsidered the rationale behind our decision in B-210555.23, May 18, 1987, and conclude that we were incorrect in reaching the conclusion that use of a government car between an employee's home and an airport or other common carrier terminal was not authorized.

When an employee departs from his or her residence and travels to an airport or other common carrier terminal to begin temporary duty travel away from the official station, the employee is in official travel status. Federal Travel Regulations (FTR), 41 C.F.R. § 301-7.4(c) (1990), implementing the statutes governing travel expenses, 5 U.S.C. §§ 5701-5709 (1988). We have held that the prohibitions in 31 U.S.C. § 1344 are not applicable to an employee who is in a travel status, and we have recognized that an employee in a travel status could use a government vehicle for purposes that would not be allowed for an employee at his or her permanent duty station. *See e.g.*, B-210555.3, Feb. 7, 1984; B-210555.5, Dec. 8, 1983.

The 1986 amendments to section 1344 made it even clearer that the statute does not apply to an employee in a travel status but only prohibits federal officials from receiving transportation by a government vehicle between their residence and "place of employment." The House report, in describing the employee's "place of employment" for purposes of this general prohibition, states:

> 'Place of employment' means the primary place where an officer or employee performs his or her business, trade or occupation, and includes, but is not limited to, an official duty station, home base, or headquarters. It includes any place where an employee is assigned to work. This legislation covers transportation to such a site that is not covered by statutes dealing with the provision of travel benefits to officers or employees of the government. H.R. Rep. No. 451, 99th Cong., 1st Sess. 7 (1986).

Thus, the statute, as now written, by its terms does not apply to transportation between home and airport and, as GSA notes, the legislative history makes clear that such transportation in connection with official travel was not intended to be covered.

Our prior interpretation of this question, B-210555.23, *supra,* also relied upon the rationale that the FTR does not authorize use of a government vehicle from home to airport. However, in that same letter that we denied home-to-airport transportation, we also noted that the use of a government vehicle between the airport and the employee's office was not precluded by a statute and was allowable even though the FTR does not specifically authorize this use of a government vehicle. *See also* B-210555.18, B-210555.20, Mar. 10, 1987. Upon reconsideration, we conclude that there is no logical reason to treat travel between home and airport differently than between airport and office for an employee in a travel status.

While a specific provision in the FTR authorizing home-to-airport transportation for an employee is not legally required, we believe that such a regulation would be desirable to provide guidance to agencies.[1] In any event, this type of transportation would be subject to the general rules applicable to authorizing the mode of transportation for an employee in a travel status. As we have stated, "federal agencies are required to select the mode of transportation 'which will result in the greatest advantage to the government,' and to consider 'lost work time' in that selection." B-210555.18, B-210555.20, *supra,* citing FTR § 1-2.2b, FPMR 101-7, June 19, 1973 (now contained in 41 C.F.R. § 301-2.2(b) (1989)). Of course, the actual transportation cost is always a factor to be considered in making this decision. 41 C.F.R. § 301-2.2(b).

Accordingly, we now hold that an employee may be transported in a government vehicle from his or her home to a common carrier terminal in conjunction with official travel, subject to the general FTR provisions governing the mode of travel. Our prior interpretation as expressed in B-210555.23, May 18, 1987, will no longer be followed.

B-240819, January 24, 1991

Civilian Personnel

Relocation

■ Residence transaction expenses

■■ Finance charges

A transferred employee may not be reimbursed the amount of a seller financing concession adjustment that went into the determination of the market valuation of his house which was the basis of the offer made to him by a relocation services contractor and accepted by him in the sale of his house.

Matter of: Irving O. Cox

[1] Presently, the regulations authorize reimbursement of taxicab or airport limousine fares or mileage and parking expenses for the employee's privately owned vehicle for such travel. 41 C.F.R. §§ 301-2.3(c) and 301-4.3(d) (1990).

The issue in this case is whether after selling his house to a relocation services contractor, a transferred employee of the Air Force may be reimbursed for the amount of a seller financing concession adjustment that was part of the basis of the agreed selling price of the house.[1] The adjustment may not be reimbursed.

Mr. Irving O. Cox sold his house at his old duty station through the Air Force Relocation Services Program in which a relocation services contractor bought the house. The manner in which the relocation services contractor arrived at the price it would offer for Mr. Cox's house was to have comparable houses that had recently sold in the area appraised, average these appraisals together, and then offer the average as the selling price for the house. In appraising the comparable houses, the appraisers made an adjustment downward to account for financing costs paid by the seller, which usually occurred when the sales of those houses were underwritten by the Department of Veterans Affairs or Federal Housing Administration. Nonetheless, Mr. Cox accepted the offer by the relocation services contractor as the selling price of his house; now he claims reimbursement for the amount that his selling price was reduced by the average adjustment utilized by the appraisers for seller financing concessions on comparable houses used in the appraisal.

Federal agencies may enter into contracts to provide relocation services to transferring employees including, but not limited to, the making of arrangements for purchase of an employee's residence at his old duty station. 5 U.S.C. § 5724c (1988). However, the implementing regulations prohibit payment for market losses. 41 C.F.R. § 302-12.6 (1990).[2] The adjustment for seller financing concessions on comparable houses was directly factored into the appraisal which determined the selling price of Mr. Cox's house. Although Mr. Cox calls the adjustment a part of the closing costs of his house, he had no such closing costs on his house.[3] To claim a reduction in the appraised value of his house on which the selling price was based under these circumstances is, in effect, seeking reimbursement of a loss due to market conditions. Such a loss is not reimbursable. *Cf., Joseph R. Brimacombe,* B-238372, Aug. 1, 1990.

Accordingly, the adjustment for seller financing concessions that was a component of the appraisal which set the selling price of Mr. Cox's house may not be reimbursed.

[1] This responds to a request for a decision received from the Director, Accounting and Finance, Headquarters Air University, Maxwell Air Force Base, Alabama. It was forwarded through the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 90-06).

[2] This is in accord with 5 U.S.C. § 5724a(a)(4)(A) which specifically prohibits reimbursement for losses on the sale of a residence.

[3] Mr. Cox alleges that he was misled by representations of his Relocation Services Program which promised to him the "sale price" of his house less the outstanding mortgage exclusive of "closing costs." As explained above, there were no seller financing concessions paid on the sale of Mr. Cox's house as "closing costs," so none were subtracted from the "sale price" paid to Mr. Cox. Thus, there was no misrepresentation. Had the comparable houses studied by the appraisers been sold with financing that included no seller financing concessions, the appraisers would have made no adjustment for such concessions.

B-239887, January 25, 1991

Civilian Personnel

Travel
■ Travel expenses
■ ■ Reimbursement
■ ■ ■ Official business
■ ■ ■ ■ Determination

Civilian Personnel

Travel
■ Travel regulations
■ ■ Applicability

Attendance at a funeral is not normally considered official business for which an agency may pay an employee's travel expenses. However, where the head of the agency or his delegatee determines that there are circumstances relating to significant activities of the agency that justify the designation of an employee as an official agency representative to attend a funeral, the employee may be reimbursed travel expenses from agency funds. B-236110, Jan. 26, 1990; B-199526, Feb. 23, 1981; B-166141, Feb. 27, 1969; and B-129612, July 1, 1957, are modified.

Matter of: Danny H. Breuninger—Travel Allowances—Attending Funeral as Agency Representative

Background

A certifying officer for the Bureau of Indian Affairs, Department of the Interior, requests an advance decision whether Mr. Danny H. Breuninger, an employee of the Bureau, may be reimbursed for travel expenses incurred in attending the funeral service of a Bureau police officer who was killed in the line of duty. Mr. Breuninger, Director of the Indian Police Academy, was selected as the representative of the Bureau and he was authorized official travel for this purpose from Tucson, Arizona, to Lame Deer, Montana, and return. His travel authorization was signed by the Acting Deputy to the Assistant Secretary-Indian Affairs (Trust Services). The question arises because of prior decisions of the Comptroller General denying travel expense reimbursement to employees for attending a funeral.

Analysis And Conclusion

Federal agencies may only authorize travel at government expense which is for official business essential to the purposes of the government and for accomplishment of the agency's mission. Federal Travel Regulations, paras. 1-1.3(b), 1-1.4(a) (Supp. 9, Feb. 29, 1984), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1989). We have long held that attending the funeral of a fellow employee is not normally considered official business within the meaning of the travel laws and regulations, and thus, an agency may not reimburse its employees for expenses incurred to attend the funeral. B-236110, Jan. 26, 1990; B-166141, Feb. 27, 1969; and B-129612, July 1, 1957. *See also, Donnie W. Daniels,* B-199526, Feb. 23, 1981, denying travel allowances to attend the funeral of a fellow employee's son.

We think the situation in this case justifies a different conclusion. There are situations where the attendance by an official agency representative at a funeral may be considered important to the mission of the agency and where an appropriate representative would be unable to attend without the travel being authorized at government expense. The agency head or delegatee, in his or her discretion, may consider that an agency representative at a funeral would serve the governmental purposes of sustaining employee morale and reinforcing to the agency's employees and others the significance of the deceased to the agency. We would expect, however, that before an employee is authorized to travel to a funeral as the official agency representative, the matter would be reviewed and the authorization made at an appropriate level of the agency. In such a case we would not object to the agency authorizing and paying for the travel as being for official business.[1]

In B-236110, Jan. 26, 1990, *supra,* our most recent decision holding that reimbursement of travel expenses to a fellow employee's funeral was not authorized, a Drug Enforcement Administration agent was killed in the line of duty and a field division official of the agency authorized travel of 17 employees to the funeral. In addition to the large number of employees involved, the employees were not designated as agency representatives at an appropriate level of the agency and the authorization to travel to the funeral at agency expense was contrary to agency policy and regulation.

Donnie W. Daniels, B-199526, *supra,* involved an employee's travel to the funeral of the son of an agency employee; B-166141, *supra,* involved an employee's travel to the funeral of a former agency employee; and B-129612, July 1, 1957, *supra,* concerned an agency's payment of the expenses of five employees to travel to a funeral. It is not clear whether the circumstances involved in any of these cases were such that payment would be proper had the travel been authorized at an appropriate level in the agency in order to insure appropriate official representation at a funeral. In any event, to the extent that these decisions conflict with today's holding, they are modified.

In the present case the circumstances justify the designation of an agency representative to attend the funeral. Accordingly, since Mr. Breuninger's travel as agency representative appears to have been properly authorized, we have no objection to reimbursement of his authorized travel expenses.

[1] *Compare* 55 Comp. Gen. 1333 (1976), concerning employees' travel to receive non-federally sponsored honor awards.

B-241133, January 25, 1991

Procurement

Bid Protests

■ Allegation substantiation

■ ■ Lacking

■ ■ ■ GAO review

Where protester alleges procuring agency has violated its proprietary rights in a technical drawing which it developed through reverse engineering but does not provide sufficient factual record to determine whether the drawing is protectable, and does not provide adequate information regarding the value of materials that were provided by the government at no charge for the reverse engineering effort, protester has not shown that the drawing is entitled to protection as a trade secret and the government's release of the drawing therefore is not legally objectionable.

Matter of: Kitco, Inc.

Paul J. Seidman, Esq., Seidman & Associates, P.C., for the protester.

Robert L. Mercadante, Esq., Defense Logistics Agency, for the agency.

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

Kitco, Inc. protests the Defense Logistics Agency's (DLA) allegedly unauthorized use of one of Kitco's own drawings in request for proposals (RFP) No. DLA500-90-B-0052, which was issued by the Defense Industrial Supply Center (DISC) for a quantity of plate seals or gaskets. Kitco alleges that the solicitation violated Kitco's proprietary rights because it incorporated the protester's drawing and revealed it to others. We deny the protest.

The plate seal at issue, which is used on the constant speed drive of certain aircraft engines, was originally developed and manufactured by Sunstrand Corporation. DISC initially purchased the seal noncompetitively from Sunstrand, since the firm held proprietary rights to the part. When Sunstrand was suspended from government contracting, DISC lent a used seal to Kitco to enable the firm to reverse engineer the part. The reverse engineering effort was not formalized by any contract between Kitco and the agency. In February 1987, Kitco prepared a technical drawing of the seal, which was a compilation of data derived from reverse engineering. Kitco submitted the drawing to DISC and requested source approval of its plate seal as an alternate for the Sunstrand part. The drawing included a "limited rights legend," asserting Kitco's proprietary rights.

Kitco's plate seal subsequently was tested and approved as an acceptable alternate for the Sunstrand part. The agency issued a solicitation listing Kitco's part number, and Kitco received the award of contract No. DLA500-99-C-0469 in

February 1988. The next solicitation listed both Sunstrand and Kitco part numbers, and Kitco also was awarded that contract in May 1988.

The next acquisition of the part was initiated with the issuance of a request for proposals (RFP) in October 1988 that referenced the Sunstrand and Kitco part numbers; this RFP was canceled and an IFB was issued in July 1989, which referenced a Naval Air Rework Facility (NARF) drawing No. 535231. The drawing itself was not included in the solicitation package, in accordance with newly adopted procedures; instead, potential bidders in need of the drawing were advised to request a copy of the drawing from the agency. Kitco states that it requested a copy of the drawing, but for reasons that remain unclear, did not receive one. Kitco submitted its bid on the basis of its own drawing, and received the award (the third contract it had received since its approval as an alternate source).

The IFB at issue here was issued in December 1989. This solicitation also referenced the NARF drawing but did not include the drawing in the bidding package. Kitco again requested a copy of the drawing and again encountered difficulty in obtaining it. Kitco again submitted a bid based on its own drawing. The protester states that it discovered through conversations with another firm seeking to supply the part as a subcontractor that the agency's drawing was, in fact, a copy of Kitco's own drawing.

Kitco filed a protest with the contracting officer by telefax of February 13 and 14, prior to bid opening on February 15. Bids were opened as scheduled. The agency received four bids, including Kitco's, which was the second highest. Upon investigating the alleged disclosure of Kitco's drawing, DISC determined that the drawing at issue had been created by a NARF engineer. Kitco's agency-level protest was denied, and this protest followed. The matter was reexamined when DLA began preparing its report in response to this protest. During that investigation, it was determined that the drawing labeled "NARF Drawing No. 535231" was, in fact, a mechanical reproduction of Kitco's drawing.

Kitco argues that the agency's use of Kitco's drawing violated the firm's proprietary rights and conferred a competitive advantage on other bidders who had not incurred the expense involved in creating the drawing. Kitco contends that since the use of its drawing is undisputed, it is entitled to relief, whether in the form of a directed award or cancellation of the solicitation.

DLA argues that the drawing is not entitled to trade secret protection in any case, since the information contained in the drawing is readily obtainable through reverse engineering and, in fact, was reverse engineered by Kitco using a government furnished seal.

Generally, to prevail on a claim of violation of proprietary rights, the protester must show that: (1) its material was marked proprietary or confidential or that it was disclosed to the government in confidence; and (2) the material involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. *Litton Applied Technology,* B-227090; B-227156, Sept. 3, 1987, 87-2 CPD ¶ 219; *Zodiac of North Am. Inc.*, B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595.

Here, there is no dispute that the drawing was marked as proprietary to Kitco. We are not persuaded, however, that Kitco's drawing is entitled to protection.

First, the substantive specifications and technical data reflected on the drawing were not initially developed by the protester, but resulted from reverse engineering. It is also undisputed on the record that the data could be readily obtained by others by reverse engineering. While reverse engineering data has been recognized not to warrant protection as a trade secret because it is independently obtainable, *see SI Handling Sys., Inc. v. Haisley*, 753 F.2d 1244 (3rd Cir. 1985), we are not prepared to say that data obtained through reverse engineering may never be a protectable trade secret.

A comprehensive definition of a trade secret is provided by the Committee on Torts of the American Law Institute, set out in Section 757, Comment b, of *Restatement, Torts* (1939). The Restatement provides that no exact definition of a trade secret is possible, but sets forth the following factors to be considered in determining whether a person's data qualifies as a trade secret: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees outside of his business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the person and his competitors; (5) the amount of effort or money expended by the person in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. These factors are generally consistent with our standards stated above, requiring, as relevant here, that preparation of the material involved significant time and expense.

The protester has unique knowledge about how much time or money was expended in the reverse engineering effort. However, Kitco has not submitted any evidence on the question of how much time or expense it actually incurred in preparing its drawing, either in the form of engineers' time logs or affidavits, statements of cost for materials used in the effort, or any other quantitative information. Kitco has not even offered an approximate dollar figure for its costs. Instead, the protester relies on generalized statements such as "hundreds of hours of engineering efforts were required."

In connection with this issue, the agency has submitted estimates from private firms indicating that a technical drawing of the seal could be produced for a few thousand dollars. Although Kitco contends that the types of drawings described in these estimates could not be used for manufacturing purposes because they do not include manufacturing tolerances, the protester has given no indication what further expense this additional information represents. While the protester insists in this general way that the development of data relating to tolerances requires a much more intense effort, we find no specific support for this in the record. Indeed, the source approval request documents that Kitco submitted to the agency in 1987, in which the firm describes its reverse engineering process, reveals only that "tolerances were applied to the basic dimensions as per industry standard for the given feature or manufacturing method. OEM [original equipment manufacturer] drawings of similar parts were also reviewed to aid in comparing tolerances for similar features and determining the appropriate industry standard."

In our view, it was the protester's responsibility to disclose the extent of its efforts and the expense these efforts represented. While Kitco's drawing may very well involve a trade secret, we are unable to find a violation of a protectable proprietary interest without a more extensive factual record.

Second, the agency argues that Kitco was able to reverse engineer the drawing because the government provided Kitco with a government-owned seal at no charge; the government's making the seal available contributed to the development of the drawing. Generally, where there is a mix of private and government contribution to an item, the developed item cannot be said to have been developed at private expense, and the government will get unlimited rights to the data, whether or not a contract is formally in place for the item. *See Chromalloy Division—Oklahoma of Chromalloy American Corp.*, 56 Comp. Gen. 537 (1977), 77-1 CPD ¶ 262; 49 Comp. Gen. 124 (1969). Here, the protester has failed to provide the facts to rebut the agency's contention that by providing the seal it obtained rights in the resulting data. Kitco does not reveal to us whether it could have obtained the seal (or even the constant speed drive itself) commercially or from any source other than the government, nor does the protester provide any other indication of the seal's value in this context. Thus, the record supports DLA's view that it has a right to use the data.

Under these circumstances, we think the protester has not shown that its drawing was entitled to protection; we therefore deny its protest.

B-239590, January 29, 1991

Civilian Personnel

Relocation

■ Residence transaction expenses

■ ■ Reimbursement

■ ■ ■ Eligibility

Employee entered into a contract to sell his old residence after he was selected and accepted a job offer from another agency at a new duty station. He later accepted another job offer from his old agency and declined the first offer. He is entitled to reimbursement of sales expenses incident to his transfer by his agency. Since the residence sales contract was occasioned in contemplation of a transfer in the interest of the government his acceptance of another transfer does not defeat his right to be reimbursed.

Matter of: Paul W. Adamske—Real Estate Expenses—Successive Job Offers

This decision is in response to a request from an Authorized Certifying Officer, Bonneville Power Administration (BPA), Department of Energy, concerning the entitlement of an employee to be reimbursed real estate sales expenses incident to his transfer in August 1989.[1] We conclude that he may be reimbursed for the following reasons.

Background

Mr. Paul W. Adamske, a Department of Energy employee stationed in Loveland, Colorado, applied for a position with the Bureau of Reclamation, Department of the Interior, which would have involved a transfer to another location. On July 11, 1989, he was orally notified of his selection, and he accepted the offer. Written confirmation was sent to him by letter dated July 14, 1989, and a travel authorization was issued on July 26, 1989, with a projected reporting date of August 28, 1989.

On July 12, 1989; after he accepted the Bureau of Reclamation offer, Mr. Adamske placed his Loveland, Colorado, residence on the market. On July 18, 1989, he executed a contract to sell the residence which designated August 25, 1989, as the settlement date.

Subsequently, on July 28, 1989, Mr. Adamske was orally offered a position by the BPA at Madras, Oregon. He informed the BPA hiring authorities that he had accepted a job offer from the Bureau of Reclamation. After receiving assurances that he could still decline that offer without difficulties, he orally accepted the BPA position. On July 31, 1989, he received written confirmation of the BPA offer and on August 5, 1989, he executed a 1-year service agreement with the BPA. On or about August 8, 1989, when he received a written travel authorization from the BPA, he notified the hiring authorities at the Bureau of Reclamation that he declined their position offer. On August 25, 1989, the sale of his residence was completed at settlement as scheduled and he vacated the residence and moved to Oregon. Throughout the entire period up to that time, Mr. Adamske had occupied the Loveland residence as his commuting residence.

Following his transfer, he submitted a travel voucher to the BPA which included his claim for real estate expenses incident to the sale of his residence in Loveland, Colorado. Those expenses, which totaled $6,953, were disallowed by the BPA. The agency's view was that, by executing the sales contract on July 18, 1989, Mr. Adamske became legally obligated for the real estate expenses before the BPA definitely notified him of his transfer. The BPA refers to our decision in *Benjamin M. Johnson*, B-229390, Sept. 14, 1988, as authority for that conclusion.

Mr. Adamske has appealed that disallowance. He contends that, before he declined the Bureau of Reclamation job, he was told by the BPA that there would be no problem with relocation if he accepted the BPA offer. He adds that the BPA travel authorization and other documents left him with no doubt that his

[1] Ms. Joanne C. Henry, Reference DSDT.

residence sales expenses would be reimbursed. Otherwise he says that he would not have declined the job with the Bureau of Reclamation.

Opinion

Under authority of 5 U.S.C. § 5724(a) and § 5724a(a)(4) (1988) and implementing provisions in the Federal Travel Regulations (FTR),[2] an employee who is transferred to a new duty station in the interest of the government may be reimbursed for the expenses of the sale of his residence at his old duty station and purchase of a residence at his new duty station.

Section 302-6.1 of the FTR authorizes reimbursement to an employee for real estate expenses required to be paid in connection with the sale of a residence at the old duty station, provided certain conditions are met. Among those conditions are the requirements that a permanent change of station is authorized and a service agreement executed; title to the residence is in the name of the employee and/or member(s) of his immediate family, and the employee occupied it as his commuting residence when first definitely informed of his transfer to a new permanent duty station; and the settlement of the sale occurs not later than 2 years (which may be extended up to an additional 1 year) after the employee reports for duty at his new official station.

In this case, when Mr. Adamske was authorized to transfer by BPA, he signed a service agreement, and the settlement date occurred thereafter, and was well within the time limitations specified. This leaves only the title requirements of FTR section 302-6.1(c) to be satisfied.

We note at the outset that Mr. Adamske held title to the residence at the times in question. The execution of an agreement to sell a residence with settlement at a future date does not constitute a sale and does not transfer title. We have held that a contract of sale which is no more than an agreement to transact the closing in the future is not a "settlement" within the meaning of Part 302-6 of the FTR. *Glenn A. Kovar,* B-186003, Oct. 4, 1976. *See also Robert J. Jaske,* B-227466, Dec. 4, 1987.

We do not consider *Benjamin M. Johnson,* B-229390, *supra,* as controlling Mr. Adamske's entitlement. In *Johnson,* the employee completed the sale of his residence more than 1 year before he received definite notice of transfer. We concluded the employee therefore was not entitled to be reimbursed residence sales expenses.

Here, Mr. Adamske executed a contract to sell his old residence only after he had been notified of his selection by the Bureau of Reclamation and after his acceptance of that transfer offer. Had he transferred to the Bureau of Reclamation, he would have been reimbursed expenses for the sale of his residence. In these circumstances we do not believe that his later acceptance of an offer from the BPA, another government agency, and his declination of the prior offer de-

[2] 41 C.F.R. Part 302 (effective May 10, 1989).

feats his right to reimbursement. *See James K. Marron*, 63 Comp. Gen. 298 (1984).

Therefore, Mr. Adamske may be reimbursed the allowable expenses of selling his residence.

B-239681.2, January 29, 1991

Procurement

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

Bid Protest Regulations require party requesting reconsideration of prior decision to show that decision may contain either errors of fact or law or to present information not previously considered that warrants reversal or modification of our decision; repetition of arguments made during consideration of the original protest and mere disagreement with decision do not meet this standard.

Procurement

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

Bid offering to furnish compliant item was properly found responsive notwithstanding post-bid opening notice from bidder that manufacturer named in bid does not manufacture compliant item; whether a bid is responsive and therefore eligible for award must be determined from contents of the bid itself at bid opening, without reference to information submitted after bid opening.

Matter of: Adrian Supply Co.—Reconsideration

Bob Stormberg for the protester.

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

Adrian Supply Co. requests reconsideration of our decision, *Adrian Supply Co.*, B-239681, Aug. 28, 1990, 90-2 CPD ¶ 170, in which we denied its protest against the Department of the Air Force's award of a contract to Industrial Electric Supply Company (IES), under invitation for bids No. F40650-90-B-0017, for high voltage circuit breakers.

We deny the request for reconsideration.

Adrian originally protested that a post-bid opening letter in which IES informed the agency that the manufacturer named in the Place of Performance Clause in its bid did not manufacture items conforming to the specification, and that IES therefore would furnish items from a different manufacturer, rendered IES' bid nonresponsive; the bid as submitted was not based on furnishing items meeting the IFB requirements. We denied the protest on the grounds that the bid was responsive based on IES' unqualified agreement to furnish a compliant item in its bid as submitted, and that the changed information as to its intended manufacturer related only to the manner in which IES would perform, which concerns bidder responsibility and can be established after bid opening, not the acceptability of the bid itself. *See Southern Ambulance Builders, Inc.*, B-236615, Oct. 26, 1989, 89-2 CPD ¶ 385; *Oscar Vision Sys., Inc.*, B-232289, Nov. 7, 1988, 88-2 CPD ¶ 450.

In its request for reconsideration, Adrian generally repeats arguments it made previously and expresses disagreement with our decision. Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1990). The repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. *R.E. Scherrer, Inc.—Recon.*, B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

In addition to reiterating its previously-raised arguments, Adrian argues that we exceeded our statutory mandate and modified "the intent of [the procurement] statutes and regulations" by limiting the determination of responsiveness to consideration of the bid as submitted.

Adrian refers to Federal Acquisition Regulation (FAR) § 14.301(a), which requires bids to "comply in all material respects with the invitation for bids" to be considered for award, and notes that there is no stated requirement that bid responsiveness be based on the bid as submitted. Although the FAR does not explicitly recite that requirement, it is a long-established, fundamental procurement principle that whether a bid is responsive and therefore eligible for award must be determined from the contents of the bid itself at bid opening, without reference to extraneous aids or explanations submitted after bid opening. *Colorado Container Corp.*, B-238670, May 31, 1990, 90-1 CPD ¶ 514; *NJCT Corp.*, B-216919, Jan. 11, 1985, 85-1 CPD ¶ 33; *McGraw-Edison Co.*, B-181473, Feb. 13, 1975, 75-1 CPD ¶ 95; 17 Comp. Gen. 554 (1938). This principle, which is uniformly followed not only by this Office, but also by the courts and other forums that have considered bid responsiveness issues, *see, e.g., Rochester v. United States Environmental Protection Agency,* 496 F. Supp. 751 (D. Minn. 1980); *Mack Trucks, Inc. v. United States,* 6 Ct. Cl. 68 (1984); *Southwestern Bell Corp.*, GSBCA No. 10321-P, 90-1 BCA ¶ 22,545, reflects the concern that the opposite approach would adversely affect the integrity of the competitive bidding system by allowing bidders, after all bids had been exposed, to decide whether or not to have their bids rejected. *Veterans Admin. re Welch Constr., Inc.*, B-183173, Mar. 11, 1975, 75-1 CPD ¶ 146; 38 Comp. Gen. 532 (1959).

Adrian further asserts that FAR § 14.404-2, "Rejection of individual bids," separately requires rejection of the IES bid. According to Adrian, to be accepted, a bid has to pass two separate and distinct tests: it must be responsive under FAR § 14.301, and it must not be subject to rejection under FAR § 14.404-2. Adrian believes that under this latter section the IES bid was subject to rejection when IES, after bid opening, informed the Air Force that the manufacturer identified in its bid did not manufacture a conforming item.

There is no merit to Adrian's position. FAR § 14.404-2 sets forth several bases for rejecting a bid. The first four bases involve nonconforming, and therefore nonresponsive, bids. Others include situations where the bidder is not responsible or is suspended or debarred and where the bidder's assets, after bid opening, are transferred to another entity. Contrary to what Adrian asserts, the fact that this section encompasses situations—such as nonresponsibility—where information developed after bid opening is used does not change the fundamental rule that the responsiveness of a bid is determined on the basis of the bid itself at the time of bid opening. In other words, FAR § 14.404-2(a) does not establish a responsiveness requirement independent of that in FAR § 14.301(a); it provides only for the rejection of bids that, at the time of bid opening, were nonconforming to a material requirement. As we held initially, we believe that IES committed itself in its bid to all material requirements, and that the change of manufacturers was a permissible change because it concerned IES' responsibility.

The request for reconsideration is denied.

B-239708, January 31, 1991

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■ ■ Office space

■ ■ ■ Use

■ ■ ■ ■ Child care services

The General Services Administration (GSA) may lease space or construct buildings specifically for child care facilities if there is insufficient space available for such purposes in its existing inventory. The Trible amendment, 40 U.S.C. § 490b, authorizes officials controlling space in federal buildings to provide space for child care facilities if, among other requirements, "such space is available." Because a restrictive reading of the "space available" language (in light of the limited existing inventory of appropriate space in federal buildings) would effectively preclude GSA from providing space for child care; and because the legislative history of the Federal Credit Union Act, upon which the Trible amendment is modeled, indicates that the "space available" language was not intended to limit agency ability to provide facilities for credit unions, we interpret the statute as permitting GSA to acquire space to make it available for child care facilities. To the extent it is inconsistent with this decision, 67 Comp. Gen. 443 (1988) is overruled.

Matter of: GSA Authority to Lease New Space for Child Care Facilities

The General Counsel of the General Services Administration (GSA), Washington, D.C., asks whether GSA has authority to lease additional space or construct facilities for child care centers for federal employees. For the reasons indicated below, we hold that GSA has such authority.

Background

40 U.S.C. § 490b (1988) provides in pertinent part that:

(a) If any individual or entity which provides or proposes to provide child care services for Federal employees applies to the officer or agency of the United States charged with the allotment of space in the Federal buildings in the community or district in which such individual or entity provides or proposes to provide such service, such officer or agency may allot space in such a building to such individual or entity *if—*

(1) *such space is available;*

(2) such officer or agency determines that such space will be used to provide child care services to a group of individuals of whom at least 50 percent are Federal employees; and

(3) such officer or agency determines that such individual or entity will give priority for available child care services in such space to Federal employees.

(b)(1) If an officer or agency allots space to an individual or entity under subsection (a) of this section, such space may be provided to such individual or entity without charge for rent or services (italic added).

This provision is commonly referred to as the Trible amendment, after Senator Trible, who introduced the legislation which was enacted in Pub. L. No. 99-190, § 139, 99 Stat. 1185, 1323 (1985). According to Senator Trible, "[v]ery simply, my amendment would permit child care facilities in Federal buildings to be treated in the same manner as credit unions in Federal buildings. Currently, if space is available, credit unions may be granted space in Federal buildings rent-free . . . if our policy is to provide space for such services rent-free, surely we can extend this same treatment to facilities which would meet the urgent needs of working parents." 131 Cong. Rec. 25,075 (1985).

According to GSA's submission "there is very little vacant available space in the GSA inventory in locations where needs exist for child care centers." GSA officials and others maintain that an interpretation of the Trible amendment's "available space" provision to mean only vacant existing space is unworkable, and as a practical matter, conflicts with the purpose of the Trible amendment. In this regard, we understand that agencies request space for such employee amenities as credit unions, health units, and child care centers in space either to be constructed or leased. Similarly, GSA points out that reassignment, consolidation, or transfer of office space within existing space, or as supplemented by newly leased space, does make space available although not necessarily the most suitable space for child care facilities. Thus, GSA interprets the Trible amendment as allowing it to lease additional space, when needed, to accommodate child care centers. This policy has also been encouraged by the Government Activities Subcommittee, Committee on Government Operations, House of Representatives. *See* H.R. Rep. No. 333, 100th Cong., 1st Sess. 4 (1987).

Discussion

GSA asks whether the provision in 40 U.S.C. § 490b authorizing federal agencies to provide space for child care facilities "if such space is available" allows GSA to lease or construct additional space for child care facilities. The answer to this question hinges on whether Congress intended the phrase "if such space is available" to preclude the use of other than existing space in the government's inventory at the time of the request for space to support child care.

We considered this question in 67 Comp. Gen. 443 as it applied to the Air Force. There we stated that the Air Force's authority to allocate space for civilian child care is limited by 40 U.S.C. § 490b to the allocation of "available" space in federal buildings. We construed "available" to preclude the Air Force from leasing new space specifically for civilian child care facilities, suggesting that "available" space is limited to vacant space existing in an agency's inventory at some fixed point in time. *Id.* at 447.

In light of a more detailed examination of the Trible amendment, particularly the phrase "if such space is available," and the amendment's purpose and legislative history, we are now of the opinion that Congress merely intended the "space available" phrase to empower agency officials to prevent other government functions from being displaced by child care facilities, rather than prohibit an agency obtaining additional space specifically for child care.

The purpose of 40 U.S.C. § 490b is to permit greater availability of child care facilities to working parents employed by the federal government. *See* H.R. Rep. No. 210, 99th Cong., 1st Sess. 69 (1985). If facilities for child care are only to be allotted pre-existing vacant space, then the intent of the legislation is defeated because, according to GSA, little pre-existing space can be utilized for child care without displacing other government activities.

The legislative history of the Trible amendment does not directly and specifically address what Congress meant by the use of the "available space" provision. The amendment's legislative history indicates that the Federal Credit Union Act, Pub. L. No. 75-197, 50 Stat. 487 (1937) (codified at 12 U.S.C. § 1770 (1988)), served as a model for the Trible amendment, *see* H.R. Rep. No. 210, 99th Cong., 1st Sess. 69 (1985); *see also* 131 Cong. Rec. 25,075 (1985) (statements of Senators Trible, Abdnor, and DeConcini, cosponsors of Pub. L. No. 99-190), and accordingly we have referred to the legislative history of that act. In this regard, the Federal Credit Union Act provides that

> upon application by any credit union . . . to the officer or agency of the United States charged with the allotment of space in the Federal buildings . . . such officer or agency may in his or her discretion allot space to such credit union *if space is available* without charge for rent or services. (italic added).

The legislative history behind the Federal Credit Union Act indicates that an earlier version of the proposed legislation (H.R. 6287) imposed a mandatory duty on an agency to assign space, upon application by a credit union, and did not consider the possibility that no space would be available without displacing some other government activity. This version simply provided that "such officer or agency shall allot adequate space in such building to such credit union." H.R. 6287 as introduced by Mr. Cochran, April 9, 1937. In commenting on this proposal, the Treasury Department stated that "there should be administrative discretion to decide whether the space conditions in particular buildings would permit the allotment of space to credit unions without undue interference with Government activities." Accordingly the Treasury Department recommended that the language of the bill be changed to provide that "such officer or agency may, in his or its discretion, allot space to such credit union if space is available." H.R. Rep. No. 932, 75th Cong., 1st Sess. 2 (1937). Likewise, the Office of the Postmaster General recommended the same change in order to "obviate any contention that the proposed legislation would give Federal credit unions a preferred claim upon available space." *Id.* at 3.

Because the primary purpose of the Federal Credit Union Act was to give agencies discretion to allot space to credit unions, Congress included the phrase "if space is available" to preclude the argument that federal credit unions had an entitlement to space superior to other government activities. Congress modified the original language to bestow discretion, not to limit agency support for the activity, and to grant authority to manage that activity and integrate it and its space needs within the agency's total space needs. Indeed, as a result of this Act, we stated that "Federal agencies may allot space to credit unions as they wish." B-177610, July 23, 1982 at 6.

Just as we do not think that Congress intended the phrase "if space is available" to be a limitation on federal agencies obtaining space for credit unions, we also conclude that the identical "space available" phrase in the Trible amendment, 40 U.S.C. § 490b, was not intended to limit an agency's ability to obtain space for child care facilities. In our opinion, the "space available" provision can only be understood in the context of an agency's overall budgetary constraints and management of its space and resources to fulfill its mission. Consequently, we do not view 40 U.S.C. § 490b as a limitation on GSA's authority to lease space or construct buildings specifically for child care facilities for the benefit of federal agencies and their employees. To the extent we held to the contrary in 67 Comp. Gen. 443, that decision is overruled.

B-241252, January 31, 1991

Procurement

Competitive Negotiation

■ Contract awards

■ ■ Multiple/aggregate awards

■ ■ ■ Propriety

Protest that solicitation was deceptive regarding the possibility of multiple contract awards is denied where the solicitation specifically provided for the possibility of multiple awards.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

Protest that contracting agency will waste $50,000 in unnecessary travel costs is denied where travel costs were not an evaluation factor for award.

Procurement

Competitive Negotiation
■ Offers
■■ Subcontracts
■■■ Use
■■■■ Propriety

Award to a firm that proposed to subcontract 39 percent of the work under the service contract to a large business was consistent with solicitation provisions limiting subcontracting on this small business set-aside.

Procurement

Competitive Negotiation
■ Offers
■■ Organizational experience
■■■ Evaluation
■■■■ Subcontractors

Evaluation, which took into account the experience and personnel of the awardee's significant subcontractor, was proper and consistent with the solicitation's stated evaluation criteria.

Procurement

Competitive Negotiation
■ Contract awards
■■ Administrative discretion
■■■ Technical equality
■■■■ Cost savings

Agency reasonably found that protester's proposal, which received a consolidated technical and cost score of 91.5 points on a 100-point scale, was not essentially equal to the awardee's proposal, which received a consolidated point score of 92, where the contracting officer found the point difference justified the award in view of the protester's significantly higher (12 percent) evaluated price and the relatively close technical ratings of the protester and awardee.

Procurement

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

Protest that agency failed to provide adequate proposal preparation and evaluation period is untimely under the General Accounting Office's Bid Protest Regulations where protested after award.

Matter of: M.D. Oppenheim & Company, P.A.

Stanley J. Moskowitz for the protester.

Nancy Sullivan, Department of Agriculture, for the agency.

William R. Tichenor for Tichenor & Eiche, and John M. Kamya for Gardiner, Kamya & Co., interested parties.

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

M.D. Oppenheim & Company, P.A. protests the award of contracts under request for proposals (RFP) No. RFP-OIG-90-R-4, issued by the United States Department of Agriculture (USDA), Office of Inspector General (OIG) Audit Regional Office, for auditing services.

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

USDA issued the RFP as a small business set-aside on July 30, 1990, to obtain audit services for the USDA-OIG, Hyattsville, Maryland. The contractor was to provide, primarily within the region,[1] qualified personnel, materials, and travel to perform audits, surveys, reviews and other tasks needed by the OIG.

According to the RFP, the evaluation of proposals would consist of a technical and cost evaluation, and a consolidation of the technical and cost scores. The offerors' evaluated costs were their fixed hourly rates for four designated labor categories multiplied by the respective estimated hours listed in the RFP for each category for the base year plus 2 option years. The technical score was based on the criteria and point range listed in the RFP: proposed personnel's experience and qualifications, the firm's capability and management structure, understanding of the requirements and participation in external quality control reviews. To consolidate scores, the RFP indicated that the technical score would

[1] The region covered the District of Columbia and the states of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.

be weighted by a factor of 75 percent and the cost score by a factor of 25 percent and the sums added in order to determine the overall score for each proposal.[2]

The RFP also stated that:

If proposals are considered to be essentially equal as a result of the consolidation of scores, award will be made to the responsive, responsible offeror whose proposal received the highest technical score of those with equal overall scores.

Award was to be made to the responsive, responsible offeror whose proposal was determined to be the most advantageous to the government, cost and other factors considered. Additionally, the RFP indicated that while only one contract award was anticipated, the government reserved the right to make multiple awards, if advantageous and practicable.

On August 30, USDA received 16 proposals in response to the RFP. The first ranked offeror, Tichenor and Eiche, with a proposed price of $621,000, received a consolidated score of 92.75, based upon consolidation of a technical score of 84 (weighted as 100 points)[3] and a price score of 66. The second ranked offeror was Gardiner, Kamya & Co., which had proposed a price of $593,650, and received an overall score of 92, based upon a consolidation of a technical score of 82 (weighted as 98 points) and a price score of 74. Oppenheim was the third ranked offeror with a proposal price of $666,915 and an overall score of 91.50, based upon consolidation of a technical score of 84 (weighted as 100 points) and a price score of 66. After evaluating proposals, USDA, on September 20, made awards to the first and second ranked offerors, without discussions, on the basis of initial proposals. This protest to our Office followed on September 21.

Oppenheim has made six separate challenges to the awards. Our review of the allegations provides no basis to challenge the awards.

First, Oppenheim asserts that the RFP was deceptive in indicating that only a single contract award would be made. As noted above, the RFP expressly provided that multiple awards could be made. USDA reports that the number of awards resulted from the funds which became available at the time of award and the determination that two awards would be necessary to complete the audits within the required timeframes. While Oppenheim alleges that USDA's multiple awards had a detrimental effect upon New York area firms and was to the advantage of Washington D.C. area firms—which in fact received two awards—our review of the evaluation, and Oppenheim's speculative comments, does not provide any support for this allegation. The awards were made to Washington, D.C. area firms because they received the highest overall scores.[4]

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[2] The highest technical score and lowest evaluated cost of the acceptable proposals were converted to 100 points and the other technical scores and higher evaluated costs weighted based on their ratio to the top rated proposals. The technical scores were then multiplied by 75 percent and cost scores by 25 percent and the sums added.

[3] 84 was the highest of the technical scores.

[4] To the extent Oppenheim asserts that awards should have been made on a regional basis with one award going to a New York area firm, this protest basis is untimely under our Bid Protest Regulations since it concerns an alleged solicitation impropriety, which was not filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1990).

Next, Oppenheim argues that USDA intends to waste up to $50,000 in unnecessary travel costs because a New York area firm, like Oppenheim, was not selected to do the work in that region. However, travel costs were not a stated evaluation factor.[5] Also, it is apparent that travel costs would be incurred by any firm, including Oppenheim, regardless of location in performing the contract work, which was not broken down by geographical region. Indeed, as indicated above, there was no provision in the RFP for splitting the awards along geographic regions. Finally, Oppenheim's price was higher than that of the awardees. Therefore, this protest basis has no merit.

Oppenheim next argues that award to Gardiner may be subverting the intent of the Small Business Act because Gardiner intends to subcontract up to 50 percent of the work to a big eight accounting firm. Oppenheim contends that such action is inconsistent with the RFP provision limiting competition to small business firms. *See* Federal Acquisition Regulation (FAR) § 52.219–14. In response, USDA reports that Gardiner proposed to perform work constituting 61 percent of the contract dollar volume, and the subcontractor would perform work constituting 39 percent of the contract dollars. USDA further reports that it examined a copy of Gardiner's proposal and executed subcontract agreement, and determined that this constituted a true subcontracting arrangement and that the firm would comply with the solicitation's subcontracting limitations. Our review of the record confirms that USDA reasonably determined that Gardiner's subcontracting arrangement complied with the terms of the RFP for small business concerns. *See Science Sys. and Applications,* B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381.

Oppenheim next contends that the technical evaluation of Gardiner's proposal may have been flawed, assuming Gardiner's subcontracting arrangement was improper, because of points improperly awarded to it for the personnel and experience of its subcontractor. As noted above, the RFP did not preclude the particular subcontracting arrangement proposed by Gardiner. Therefore, USDA could reasonably evaluate the personnel and experience of Gardiner's proposed subcontractor. *Id.*

Oppenheim also argues that the award to Gardiner was not made in accordance with the RFP's award criteria.[6] Specifically, Oppenheim notes the RFP states that where proposals are considered to be essentially equal after the consolidation of technical and cost scores, the offeror, which received the higher technical score, should be selected for award. Oppenheim contends that its proposal, rated at 91.5 points, must be considered "essentially equal" to Gardiner's proposal, which was rated at 92 points, and that it is therefore entitled to the award, since its technical score of 84 points is higher than Gardiner's 82 score.

In making a source selection, closeness of point scores does not necessarily indicate that the proposals are essentially equal. *See Training and Mgmt. Resources,*

[5] To the extent Oppenheim argues travel costs should have been an evaluation factor, this contention concerns an alleged solicitation deficiency and was also untimely filed after award. 4 C.F.R. § 21.2(a)(1).

[6] This argument was based upon USDA's disclosure of the scoring in the report on the protest. Oppenheim then timely protested this matter within 10 working days of receipt of the report.

Inc., B-220965, Mar. 12, 1986, 86-1 CPD ¶ 244; *Moorman's Travel Serv., Inc.—Recon.*, B-219728.2, Dec. 10, 1985, 85-2 CPD ¶ 643 (proposals were not considered equal despite the fact that they only differed by .5 points on a 100-point scale). Point scores should be used as a guideline to intelligent decision-making by source selection officials and award decisions should not be based upon the difference in scores alone; rather, a selection should reflect the procuring agency's considered judgment of the significance of the difference in point scores. *Id.*

In this case, the contracting officer did not find Oppenheim's proposal to be essentially equal to the awardees' proposals, despite the closeness in point scores. Indeed, the contracting officer, in reporting on the source selection, expressly noted Oppenheim's higher evaluated price ($666,915), which is significantly higher (12 percent) than Gardiner's price ($593,650). The contracting officer also notes that Gardiner's and Oppenheim's technical proposals were both rated highly technically acceptable and one firm was not judged more qualified than the other firm, as indicated by the relatively close point scores. The record also indicates that the cost scores were significantly compressed because the low priced acceptable, albeit significantly lower technically rated, offeror had a much lower price ($441,500) than any other proposed. Under the circumstances, the contracting officer found that the awardees' point scores and the Oppenheim score were essentially equal and justified the awards. Therefore, we find the award was in accordance with the RFP award criteria.

Oppenheim finally argues that the USDA, by virtue of their inability to issue the RFP in a timely manner, eliminated the opportunity for best and final offers and the opportunity to receive more favorable offers. Oppenheim advises that previous procurements were issued well in advance of the contract due date, whereas this procurement only provided 2 months for proposal preparation, evaluation, and award. We find this issue to be untimely. As noted above, alleged improprieties in a solicitation, which are apparent before the closing date for receipt of initial proposal, such as the issue protested here, must be filed prior to the closing date, not after the award. *See* 4 C.F.R. § 21.2(a)(1).

The protest is denied in part and dismissed in part.

B-241329, B-241329.2, January 31, 1991

Procurement

Sealed Bidding
■ Ambiguous bids
■ ■ Determination criteria

Procurement

Sealed Bidding
■ Bids
■ ■ Responsiveness
■ ■ ■ Terms
■ ■ ■ ■ Deviation

The procuring agency in a sealed bid procurement reasonably rejected as nonresponsive a bid that first stated that the protester offered a particular model that met all specifications and then included language that could reasonably be interpreted as meaning the particular model would not meet certain material solicitation requirements. A bid that takes exception to material solicitation requirements or is ambiguous with respect to whether the bid represents an offer to comply with all material requirements, must be rejected as nonresponsive.

Procurement

Sealed Bidding
■ Bids
■ ■ Responsiveness
■ ■ ■ Descriptive literature
■ ■ ■ ■ Ambiguous bids

The procuring agency cannot properly disregard unsolicited descriptive literature, where a bid specifically states that the bidder is offering equipment meeting or exceeding specifications contained in the descriptive literature; where the specifications contained in the unsolicited descriptive literature are noncompliant with a material solicitation requirement, the bid must be rejected as nonresponsive.

Matter of: Marco Equipment, Inc.; Scientific Supply Co.

R. Timothy Hanlon, Esq., and John E. Jensen, Esq., Shaw, Pittman, Potts & Trowbridge, for Marco Equipment, Inc., and Jon W. van Horne, Esq., McDermott, Will & Emery, for Scientific Supply Co., the protesters.

Bill Dwyer for Midwest Ophthalmic Instruments, Inc., an interested party.

Herbert F. Kelley, Jr., Esq., and James S. Delsordo, Esq., Department of the Army, for the agency.

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

Marco Equipment, Inc. and Scientific Supply Co. protest the award of a contract to Midwest Ophthalmic Instruments, Inc., under invitation for bids (IFB) No. DAKF15-90-B-0043, issued by the Department of the Army for automatic eye refractors. Scientific Supply protests that the Army improperly rejected its lower priced bid as nonresponsive. Marco protests that Midwest Ophthalmic's bid is nonresponsive and that Marco is entitled to award as the lowest responsive bidder.

We deny Scientific Supply's protest and sustain Marco's protest.

The IFB, issued as a total small business set-aside, sought the delivery and installation of 67 automatic eye refractors in various Army military entrance processing stations. The refractors, which measure a patient's near and distance vision, will be used by the Army to screen the visual acuity of Army recruits.

The IFB in Section C, stated performance and function specifications and provided, in pertinent part, that the refractors, at a minimum, have a sphere (measuring) range of "+20D through -12D (at least 0.25 step),"[1] automatic date and time print-out capability, and be able to measure both distant and near vision acuity.

The Army received the following bids:

Nikon, Inc.	$412,763
Humphrey Instruments	$532,650
Scientific Supply	$566,150
Eye Care Distributors	$580,555
Midwest Ophthalmic	$589,600
Marco	$732,846
Universal Ophthalmic	$736,330

The bids of Nikon and Humphrey were rejected because they were not small businesses as required by the IFB, and the bids of Scientific Supply and Eye Care Distributors were rejected as nonresponsive to the IFB. Award was made to Midwest Ophthalmic as the lowest responsible, responsive bidder, and these protests followed.[2] Performance of the contract has been suspended pending our decision in this matter.

The Scientific Supply Protest

Scientific Supply objects to the Army's rejection of its bid as nonresponsive and states that it offered its model 570, which meets all of the IFB requirements. The record shows that Scientific Supply bid its model 570 as its base bid and, in a cover letter attached to its bid, offered two other models as lower-priced alternates. Scientific Supply also provided unsolicited descriptive literature with its bid[3] and stated in the bid that:

[1] "D" represents "diopter," which is a measure of the refractive power of an optical instrument.
[2] Scientific Supply initially filed an agency-level protest objecting to the rejection of its bid, and timely protested to our Office after the Army's rejection of its agency-level protest.
[3] The IFB did not require the submission of descriptive data.

We offer Model 570 which meets all specifications @ $8450.00/ea see enclosed literature Note: Neither model does not include time/date on printout also does not do *near testing, distance only* see attached letter offering alternate models[4]

The Army interpreted this statement to mean that neither the bidder's model 570 nor its alternate models met the IFB requirements for time/date printouts and near vision testing. The Army rejected Scientific Supply's bid as nonresponsive on the basis that Scientific Supply had taken exception to material IFB requirements for time/date printout capability and near vision testing.

Scientific Supply argues that the Army's interpretation of its bid is unreasonable and that the only reasonable interpretation is that Scientific Supply bid its model 570, which met all the IFB requirements. Scientific Supply contends that its bid notation—that neither model meets the IFB requirements—refers only to its alternate models and not to the model 570 offered in its base bid.

To be responsive, a bid, as submitted, must represent an unequivocal offer to perform without exception, the exact specifications called for in the IFB so that the bidder will be bound to perform in accordance with all the material terms and conditions. *Contech Constr. Co.*, B-241185, Oct. 1, 1990, 90-2 CPD ¶ 264. A bid, which takes exception to a material IFB requirement or is ambiguous with respect to whether the bid represents an offer to comply with a material requirement, may not be changed or clarified after bid opening and must be rejected as nonresponsive. *Eclipse Sys., Inc.*, B-216002, Mar. 4, 1985, 85-1 CPD ¶ 267. This is to ensure that all bidders compete on an equal basis, with no advantage being given to any bidder over another, and thus to ensure the integrity of the competitive bidding system. *Id.*

We find that the Army reasonably concluded that Scientific Supply had qualified its bid. The bid first states that Scientific Supply offers its model 570, which meets all IFB requirements, then proceeds to state that "neither model" meets the requirements for a time/date printout and for near vision testing. In our view, this statement that some models do not meet the IFB requirements could refer to Scientific Supply's model 570, as well as its alternate models.[5] Thus, this statement alone creates a question as to whether Scientific Supply had made an unequivocal offer to perform in accordance with the material IFB terms and conditions.

The Army's interpretation is supported by Scientific Supply's unsolicited descriptive literature.[6] This literature contains a sample printout for the model 570 that does not show time/date or contain near vision testing results. This reasonably indicates that the model 570 does not comply with these requirements. Indeed, Scientific Supply admits that none of its models, including its

[4] This statement, with its underlining (changed to italic for printer) and lack of punctuation symbols, has been reproduced exactly as it appears in Scientific Supply's bid.

[5] According to Webster's Ninth Collegiate Dictionary (1989), neither is defined as "not the one or the other of two or more."

[6] While material that is not needed for bid evaluation generally is considered to be informational only, any literature submitted will cause a bid to be nonresponsive if it establishes that the bidder intended to qualify its bid or if the literature reasonably creates a question as to what the bidder is offering and on what terms. *Vista Scientific Corp.*, B-233114, Jan. 24, 1989, 89-1 CPD ¶ 69.

model 570, has an integrated time/date printout capability; rather, Scientific Supply, in its post-conference comments, states that it intended to supply an external device to provide for the time/date printout requirement.[7]

Based on this record, we find that the Army reasonably concluded that Scientific Supply's equipment would not meet the IFB requirements for time/date printouts and near vision testing. At best, there are two reasonable interpretations of the bid, one of which makes the bid nonresponsive. Under these circumstances, the agency properly rejected Scientific Supply's bid as nonresponsive. *Pierce Mfg., Inc.*, B-224007, Oct. 28, 1986, 86-2 CPD ¶ 483.

Scientific Supply also argues that the Army does not need the time/date printout capability and therefore its failure to comply with this requirement should have been waived as immaterial. We need not consider this argument because Scientific Supply does not likewise contend that the requirement for near vision testing is immaterial and should also be waived.

Scientific Supply's protest is denied.

The Marco Protest

Marco protests that Midwest Ophthalmic's bid is nonresponsive because it contains unsolicited descriptive literature, which indicates that Midwest Ophthalmic's offered equipment, a Topcon RM-A2300 Auto-Refractor, does not comply with the IFB minimum required sphere range. The Army contends that Midwest Ophthalmic's bid is responsive because it unequivocally offered to provide equipment, either the RM-A2300 or a substitute, meeting or exceeding the IFB specifications. The agency states that it disregarded Midwest Ophthalmic's unsolicited descriptive literature because it did not clearly show an intent to qualify the bid.[8]

Midwest Ophthalmic submitted unsolicited descriptive literature and made the following notation in its bid:

> We are bidding on Topcon RMA-2300 'or equal' substitution which meets or exceeds specifications (list attached)

The descriptive literature attached to the awardee's bid consists of a commercial brochure for the Topcon RM-A2300 and a document, which is entitled "Specifications." Both of these documents indicate a measuring (sphere) range of +18D to -20D. However, the IFB required a sphere range of +20D through

[7] Since Scientific Supply's initial protest did not mention this solution but rather argues there was no need for the time/date printout, it is reasonable to infer that it did not intend, in its bid, to comply with this requirement. Since the "Note" in the bid refers to both the time/date printout and near testing, it is reasonable to believe that Scientific Supply's bid product offers neither capability.

[8] The agency also contends that Marco's protest concerns Midwest Ophthalmic's responsibility and whether Midwest Ophthalmic will perform in accordance with the IFB specifications is a matter of contract administration that we should not consider in this case. We disagree. Marco protests that Midwest Ophthalmic did not unequivocally promise to provide equipment in accordance with all of the material IFB terms and conditions, and thus this protest concerns the responsiveness of Midwest Ophthalmic's bid.

-12D. Thus, Midwest Ophthalmic's equipment did not comply with the plus side of the sphere range requirement.[9]

We do not think that the Army could reasonably disregard Midwest Ophthalmic's unsolicited descriptive literature under the circumstances present in this case. The Federal Acquisition Regulation (FAR) provides that unsolicited descriptive literature will not be disregarded where it is clear that the bidder's intention was to qualify the bid. FAR §§ 14.402-4(g), 14.202-5(f). Here, Midwest Ophthalmic specifically incorporated its descriptive literature into its offered product by stating that it would provide equipment meeting or exceeding the specifications attached to its bid. These specifications, as noted above, are not compliant with the plus side of the IFB required sphere range. Therefore, we think that the descriptive literature was intended to qualify the awardee's bid. *See Orbit Advanced Technologies, Ltd.*, B-224603.2, Mar. 11, 1987, 87-1 CPD ¶ 273.

Where, as here, unsolicited descriptive literature submitted with a bid raises questions as to whether the product offered complies with a material requirement of the IFB, the bid must be rejected as nonresponsive. *See Benthos, Inc.; Cygnus Eng'g*, B-237454; B-237454.2, Feb. 20, 1990, 90-1 CPD ¶ 295. In this case, neither the Army nor Midwest Ophthalmic contends that the sphere range requirements are not material or that the Midwest Ophthalmic product's variance from the "plus" side of the required sphere range was *de minimis* or immaterial. Accordingly, we find that Midwest Ophthalmic's bid as submitted was nonresponsive.

The Army and Midwest Ophthalmic argue that during discussions concerning the awardee's responsibility the awardee confirmed that it would provide a Topcon RM-A2300 with "an extended measuring range," which would comply with the IFB requirements. These discussions, which occurred after bid opening, cannot be used to establish the responsiveness of the awardee's bid. The responsiveness of a bid must be ascertained from the bid documents themselves, not from clarifications provided by the bidder after bid opening; to permit explanations after bid opening would be tantamount to granting an opportunity to submit a new bid that could be responsive or nonresponsive at the bidder's option based on information available to the bidder after bid opening. *Orbit Advanced Technologies, Ltd.*, B-224603.2, *supra*.

We sustain Marco's protest and recommend that the Army terminate Midwest Ophthalmic's contract for the convenience of the government. If the agency finds that Marco is responsive and responsible and that its bid price is reasonable, award may then be made to Marco. In addition, Marco is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees.

[9] Midwest Ophthalmic submitted to our Office a document entitled "specifications," which it alleges was attached to its bid, and this document indicates compliance with the IFB sphere range requirements (a sphere range of +22D to -25D). From our review of Midwest Ophthalmic's bid, as contained in the Army's report, the specifications now proffered to us by the awardee are not the specifications that were attached to its bid. As noted above, the specifications attached to Midwest Ophthalmic's bid show a sphere range that is noncompliant with the IFB requirements.

4 C.F.R. § 21.6(d) (1990). Marco should submit its claim for its costs directly to the agency. 4 C.F.R. § 21.6(e).