United States General Accounting Office

GAO

Office of General Counsel

June 1991

Decisions of the Comptroller General of the United States

Volume 70

Pages 541-605

PCN 45300708000

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

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Preface

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

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

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

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

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 69 Comp. Gen. 6 (1989). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-237061, September 29, 1989.

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

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

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Procurement

Competitive Negotiation

■ **Offers**

■■ **Cost realism**

■■■ **Evaluation**

■■■■ **Administrative discretion**

Agency's cost realism analysis is reasonable where agency made probable cost adjustments based upon the government's requirements as embodied in an independent government cost estimate as well as the agency's assessment of the costs associated with each firm's particular technical approach.

Matter of: All Bann Enterprises, Inc.

Lawrence Bann for the protester.

Al Weed for Nomura Enterprises, Inc., an interested party.

Craig E. Hodge, Esq., Department of the Army, for the agency.

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

All Bann Enterprises Inc. protests the award of a contract to Nomura Enterprises, Inc. under request for proposals (RFP) No. DAAA15-90-R-0013, issued by the Department of the Army for the design and manufacture of a quantity of modular decontamination systems (MDS). All Bann contends that the Army's cost realism analysis under the subject RFP was improper and that it would have received the award if a proper analysis had been performed.

We deny the protest.

The RFP called for both the design and manufacture of the MDS, and contemplated the award of a cost-plus-fixed-fee base contract with two firm, fixed-price options. The base cost-type contract is for the design of the MDS, and for the fabrication and testing of prototype units. The two fixed-priced options are for manufacturing stated quantities of the MDS.

The RFP provided that firms would be evaluated in the areas of technical capability, management capability, adequacy of facilities, past performance and cost. To be eligible for award, a proposal had to be found technically acceptable under each non-cost evaluation criterion. In the cost area, the RFP provided that the offerors' proposed costs for the development effort would be evaluated using a probable cost analysis, and that each offeror's evaluated probable cost for the development effort would be added to its fixed prices for the production quantity options to calculate its evaluated costs. Award was to be made to the firm offering a technically acceptable proposal at the lowest evaluated cost.

For the cost area, offerors were required to provide in their proposals a complete breakout of their estimated costs including labor, material, and indirect costs. In the labor cost portion of their proposals offerors were required to provide detailed information concerning the mix of labor proposed as well as their proposed level of effort in the form of a manloading matrix. This matrix provided the agency with each firm's proposed man-hours on a task-specific basis for the development effort. For the fixed-price options, offerors were required to provide more general data in support of their offered per-unit prices.

In response to the RFP, the agency received four offers, all of which were determined to be technically unacceptable but susceptible of being made acceptable through discussions. These initial offers were also evaluated in terms of probable cost for the development portion of the requirement.

The agency engaged in two rounds of discussions, and solicited best and final offers (BAFO) in connection with the second round of discussions. Since the agency found that it no longer needed some options for spare parts, it issued an amendment to delete these requirements. The agency then conducted a third round of discussions, and requested a second BAFO. The initial round of discussions addressed both the technical acceptability of the firms' offers and their proposed manloading. After these technical discussions, all four offerors were determined to be technically acceptable. During each of the subsequent rounds of discussions, each firm was advised of the agency's concerns regarding the sufficiency of their proposed manloading. These discussions identified perceived overstaffing or understaffing in each employee category for each of the various tasks outlined in the RFP's statement of work for the development effort.

The agency, in evaluating the cost realism of the initial proposals and BAFOs, made various adjustments to the offerors' proposed costs based upon a comparison of each firm's cost proposal with its technical proposal. Where a firm's proposed level of effort was determined to be either insufficient or excessive to meet the level of effort determined necessary to comply with its technical proposal, the agency used man-hour estimates in its independent government cost estimate (IGCE) to calculate that firm's evaluated costs.[1]

[1] In evaluating initial offers, where an offeror's proposal did not adequately justify the proposed staffing levels, the agency allowed a 30 percent variation in proposed manloading on a per-labor-category basis in calculating each firm's probable cost. Thus, for example, where a firm proposed a drafting effort, which called for less than 70 percent of the man-hours used in calculating the IGCE, the agency added the cost of bringing the firm's level of

Continued

In addition, during the conduct of discussions, the agency requested and received Defense Contract Audit Agency (DCAA) audits for each firm's various proposed labor rates and non-labor cost elements. The DCAA audits took no exception to any of the offerors' proposed labor rates, and only minor exceptions to certain offerors' non-labor cost elements. These audits are not germane to the protest.

After performing a cost realism analysis of the second round of BAFOs, the agency made award to Nomura, since it was found to be the technically acceptable offeror proposing the lowest overall evaluated price. This protest followed.

All Bann argues that the agency erred in its cost realism analysis and therefore improperly determined that Nomura was the firm offering the lowest evaluated cost. Specifically, All Bann alleges that the Army "normalized" all the firms' proposed manloading estimates by simply increasing all offerors proposed levels of effort to that in the IGCE. According to All Bann, this "normalization" converted the acquisition to a level of effort requirement, which had the effect of directing award to the offeror with the lowest proposed labor rates. All Bann asserts that this analysis did not account for its superior experience and skills, particularly as compared to Nomura's alleged lesser experience and skills. All Bann also alleges that the IGCE must have been erroneous because of the large disparity in terms of labor hours between the IGCE and the offers of Nomura and All Bann. All Bann also argues that the agency erred in its cost realism analysis by failing to reduce the firms' overhead rates to account for the fact that those rates were being applied to a much larger number of labor hours. According to All Bann, had the agency properly calculated its overhead rates, its overall evaluated cost would have been approximately $340,000 less. Finally, All Bann argues, in the alternative, that the agency did not conduct meaningful discussions with it on the subject of manloading.

Where a cost reimbursement contract is being contemplated under an RFP, the offerors' proposed estimated costs of contracting should not be considered controlling, since they may not provide an accurate assessment of the actual costs which the government is, within certain limits, required to pay. *CACI, Inc.—Federal*, 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542; *Pan Am World Servs., et al.*, B-231840 *et al.*, Nov. 7, 1988, 88-2 CPD ¶ 446. In this regard, a cost realism analysis is a government determination as to what the probable cost of acceptance of a particular proposal will be, and must consequently take cognizance of differing technical approaches, which may impact upon, for example, a firm's requirement for labor. *Id.* Our review in such cases is limited to consideration of whether the agency's actions in making adjustments to a firm's proposed costs are reasonable. *Id.*

We have examined the record and conclude that the agency's cost realism analysis was reasonable. First, contrary to All Bann's contention, the record does

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effort to within 70 percent of the IGCE using the firm's proposed rates of compensation. In evaluating BAFOs, the agency expected firms to propose a level of effort within 10 percent of the IGCE and adjusted the firm's level of effort to 100 percent of the IGCE on a per-labor category basis if the firm did not propose to within 10 percent of the man-hours called for under the IGCE or justify its proposed staffing level *vis-a-vis* its technical proposal.

not show that all firms' proposed labor hours were normalized to the level of effort stated in the IGCE. Rather, the record shows that the agency read each firm's cost proposal in connection with its technical proposal, making both upward and downward adjustments to each firm's proposed labor hours for each task outlined in the RFP based upon the technical evaluators' judgments concerning the firm's capability to perform in accordance with its particular technical approach.[2]

For example, the technical evaluators found that in All Bann's proposal, the firm had not demonstrated that it had either the required facilities or necessary man-hours committed to meet the solicitation's requirement for the production of computer assisted drawings. Consequently, in its initial evaluation of All Bann's proposal, the agency noted this as a technical deficiency and added the estimated cost for the labor required to the firm's evaluated cost using, as its basis for the number of labor hours required, the labor hours called for in the IGCE for the related tasks. In its subsequent evaluations, however, the agency determined that All Bann had demonstrated during discussions the necessary capabilities, both in terms of investment in its facilities and commitment of sufficient man-hours, to accomplish the drawing requirement. Accordingly, the agency in the later evaluations did not adjust All Bann's cost proposal in this area, even though its man-hour estimate deviated from the estimate contained in the IGCE.

That labor hours were not normalized is also shown by the fact that there existed a wide variation—more than 13,000 labor hours—in the offerors' adjusted levels of effort. Also, All Bann's evaluated hours were the lowest of the four offerors, which seemingly indicates that the agency recognized whatever technical advantages might be obtained by virtue of All Bann's relative level of skill and innovation.[3] On the other hand, the record indicates that even more hours were added to Nomura's proposal in the cost realism analysis.[4] Under the circumstances, the Army's evaluation of man-hours was reasonable.

All Bann also challenges the reliability of IGCE. It is true that where there exists substantial deviation between an IGCE and offers received, the government may not properly reject deviating offers without discussions where the IGCE is not disclosed to offerors. *See Teledyne Lewisburg, et al.*, B-183704, Oct. 10, 1975, 75-2 CPD ¶ 228. This is so because without discussions, an offeror is not afforded an opportunity to explain the discrepancy, which may be the result of a particular level of skill or innovation on the part of the offeror. *Id.*

Here, the record shows that, both in terms of cost and proposed level of effort, the IGCE fell at about the midpoint of the four offerors' proposals, a fact which tends to indicate the IGCE was relatively accurate. In any event, since the agency engaged in exceptionally detailed discussions with the offerors regarding

[2] The three rounds of discussions gave offerors who disagreed with the agency's assessment an opportunity to explain how they could successfully accomplish the work with less or more staff.
[3] The record does not support All Bann's assertion that it has superior experience and skills *vis-a-vis* Nomura.
[4] The record also belies All Bann's contention that Nomura's lower evaluated cost was solely attributable to lower labor rates. For example, Nomura's other direct costs and fees were also lower than All Bann's.

their respective proposed levels of effort, we cannot say that the offerors were not afforded an adequate opportunity to demonstrate the technical adequacy or potential cost savings of their proposed levels of effort. *See Pan Am World Servs., et al.*, B-231840 *et al., supra.*

We agree with the protester that the record does show that the agency failed to reduce each firm's proposed overhead rates to account for changes in their respective levels of effort. Nevertheless, this failure was clearly not prejudicial to All Bann. Even assuming that All Bann is correct that the agency erroneously calculated its probable cost to be $340,000 higher than it should have been, All Bann's offer would still not be low for award purposes.[5]

Finally, we find no merit to All Bann's argument that meaningful discussions were not conducted with it on the subject of manloading. For discussions to be meaningful, an agency must generally lead an offeror into the areas of its proposal deemed deficient, but need not conduct all-encompassing discussions. *See generally Scientific Mgmt. Assocs.*, B-238913, July 12, 1990, 90-2 CPD ¶ 27. The record here shows that on three separate occasions the agency discussed with remarkable specificity the sufficiency of All Bann's manloading.

The protest is denied.

B-241376.3, June 5, 1991

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Cancellation
■■■ Justification
■■■■ GAO review

Protest that agency does not have a reasonable basis to cancel request for proposals set aside for small businesses is sustained where basis for cancellation is that protester, the only offeror remaining in the competitive range, submitted unreasonably high proposed costs, but agency improperly failed to conduct meaningful discussions with protester relating to its proposed costs.

Matter of: Mikalix & Company

[5] This does not even take into consideration the similar adjustment that must necessarily be made to Nomura's overhead costs if such an adjustment were made to All Bann's probable cost.

David B. Dempsey, Esq., and S. Lawrence Kocot, Esq., Akin, Gump, Strauss, Hauer and Feld, for the protester.

James F. Trickett, Department of Health and Human Services, 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.

Mikalix & Company protests the decision of the Department of Health and Human Services (HHS) to cancel request for proposals (RFP) No. 282-90-0023, and recompete the requirement after the Small Business Administration (SBA) determined that the awardee, Health Systems Research, Inc. (HSR), was ineligible for award under the RFP. Mikalix argues that HHS does not have a reasonable basis for canceling the solicitation and contends that HHS should either award the contract to the firm or reopen negotiations with Mikalix and give the firm an opportunity to submit a revised best and final offer (BAFO).

We sustain the protest.

Background

The RFP was issued on June 26, 1990, as a total small business set-aside to provide technical and administrative support services to the Public Health Service's Forum for Quality and Effectiveness in Health Care (FQEHC).[1] The RFP, which contemplated award of a cost-plus-fixed-fee contract for the support services for a 5-year period, required offerors to submit separate technical and business management (cost) proposals. Paragraph M.4 of the RFP, titled "Negotiation and Selection of Successful Offeror," states in part:

> Negotiations will be conducted with those offerors determined to have submitted technically acceptable proposals together with a realistic cost estimate. *You are advised that paramount consideration shall be given to the evaluation of technical proposals rather than cost or price unless, as a result of technical evaluation, proposals are determined to be essentially equal, in which case cost or price shall then become the determining factor.* [Italic in original.]

A technical evaluation committee (TEC) numerically rated the six initial proposals received by the August 7 closing date on the basis of four main technical criteria and listed subcriteria worth a maximum possible weighted score of 100 points. The TEC report shows that the average scores received by the initial proposals submitted by HSR (88.0 points) and Mikalix (87.7 points) were virtually identical.[2] Of the six initial proposals, the agency found only the proposals

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[1] The FQEHC was established as part of the Agency for Health Care Policy for the purpose of promoting the quality, appropriateness, and effectiveness of health care. The RFP contemplates award of a contract to assist FQEHC in the development, periodic review, and updating of medical guidelines, standards of quality, performance measures, and criteria for reviewing and assessing the provision and quality of health care. *See* 42 U.S.C.S. §§ 299b *et seq.* (Law. Co-op. Supp. 1990).

[2] The average scores of the three other acceptable proposals ranged from 70.3 to 78.0 points, while the sixth proposal earned an average of 46.3 points and was deemed unacceptable.

submitted by HSR and Mikalix technically acceptable and within the competitive range.

HSR's and Mikalix's cost proposals were reviewed by a cost analyst and by the project officer, who evaluated the reasonableness and appropriateness of the proposed costs and fees to the government for the first year of the contract only. Mikalix initially proposed $1.9 million, while HSR proposed $1.6 million in estimated costs for the first year of the contract. Regarding total cost, Mikalix proposed the highest ($10,414,741) and HSR the second highest ($8,842,061) estimated total cost for the 5-year period, exceeding the independent government estimate ($6,650,000) for the 5-year period by nearly 57 and 33 percent, respectively. On September 17, HHS held oral discussions and requested BAFOs from the two firms.

Mikalix slightly reduced its total estimated cost in its BAFO; HSR's proposed total BAFO cost, however, was approximately $2.7 million below Mikalix's. Since the technical proposals were essentially equal, HHS selected HSR as the firm submitting the proposal deemed most advantageous to the government on the basis that it offered the lowest estimated total cost, and awarded the contract to that firm on September 25.

Although HSR had self-certified that it was a small business, in response to a timely challenge by Mikalix to HSR's small business size status, SBA's Philadelphia Regional Office determined on November 26, 1990, that HSR was not a small business concern for purposes of this procurement, and that HSR was therefore ineligible for award under the RFP. On January 8, 1991, SBA's Office of Hearings and Appeals (OHA) affirmed the prior finding that HSR is not a small business.

In a letter to our Office submitted after OHA's ruling, HHS stated that it intended to terminate HSR's contract for the convenience of the government and conduct a new small business set-aside competition.[3] Although the agency acknowledged in its letter that Mikalix was the only other offeror in the competitive range, HHS stated that cancellation of the RFP is proper because Mikalix's proposed costs were unreasonably high, and that sufficient funds are not available to award the contract to Mikalix at the firm's proposed cost. The agency maintains that a new competition would permit Mikalix and other potential offerors to restructure their proposals or find other methods of meeting the government's requirement at more reasonable prices. Mikalix subsequently filed this protest in our Office on January 29, challenging the agency's proposed corrective action.

[3] During an informal conference held at our Office on March 14, the agency revealed that it had not yet terminated HSR's contract pending resolution of Mikalix's protest challenging the agency's proposed corrective action. HHS relies on our decision in *Department of Health and Human Servs.—Recon.*, B-231885.2, June 2, 1989, 89-1 CPD ¶ 521, to justify HSR's continued performance. Contrary to the agency's suggestion, however, our decision did not grant agencies the "right" to continue performance of a contract by an ineligible awardee. We merely recognized that under the very limited facts of that case, it was impracticable to phase out certain detailed tasks that would have unduly delayed completion of HHS' statutorily mandated annual report. Here, HHS has presented no circumstances compelling continued performance by HSR.

Mikalix argues that if HHS considers the proposed costs in its BAFO to be unreasonable, then HHS improperly failed to conduct meaningful discussions with the firm because HHS never indicated that the firm's initial proposed costs were unreasonable. Mikalix requests that, since its proposed costs are reasonable and it is the only offeror remaining in the competitive range, we direct HHS to make award to Mikalix. Alternatively, Mikalix requests that we recommend that HHS, rather than canceling the solicitation and recompeting the requirement, reopen negotiations with the protester and allow the firm to submit a revised BAFO.

Discussion

Cancellation of the RFP and Adequacy of Discussions

The protester contends that HHS cannot properly justify its decision to cancel the RFP on the basis that Mikalix's proposed costs were unreasonably high. Mikalix takes the position that if its reduced BAFO cost is unreasonable, as the agency now alleges, then HHS failed to conduct meaningful discussions with the firm because at no time did HHS inform Mikalix that its initial proposed cost exceeded what the agency considered reasonable. Mikalix asserts that HHS did not voice any concern over its allegedly unreasonable cost during discussions, nor informed the firm that its proposed levels of effort (LOE) exceeded what the agency considered reasonable. Mikalix states that during negotiations, HHS merely pointed out certain LOE that were considered to be slightly high; questioned Mikalix concerning certain overhead costs (*e.g.*, telephone, telefacsimile, postage, reproduction, etc.), which were not previously included in its initial cost proposal; and urged Mikalix to include these costs in its BAFO.

In a negotiated procurement, the contracting officer has broad discretion in determining whether to cancel a solicitation and needs only to have a reasonable basis to do so. *Victorio Inv. Co., Ltd.*, B-236024, Nov. 1, 1989, 89-2 CPD ¶ 406. Here, HHS' proposed decision to cancel the RFP is based on its determination that Mikalix's proposed estimated cost is unreasonable. The propriety of canceling the RFP thus depends on the adequacy of the discussions HHS held with the protester.

Regardless of its rationale for retaining Mikalix in the competitive range,[4] when an agency requires goods or services by means of a negotiated procurement, the Competition in Contracting Act of 1984, 41 U.S.C. § 253b(d)(2) (1988), as reflected in FAR § 15.610(b), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range.

[4] Relying on our decision in *Electrospace Sys., Inc.*, B-234006.2, Feb. 13, 1990, 90-1 CPD ¶ 184 (higher-priced offeror reasonably retained in competitive range where only two offerors remained and acceptability of lower-priced offeror was not assured), HHS states that it included Mikalix in the competitive range because the contracting officer could not determine beforehand how much Mikalix's estimated costs might have decreased as a result of discussions, adding that it is almost always reasonable and proper to include a doubtful competitor in the competitive range. *See* Federal Acquisition Regulation (FAR) § 15.609(a).

Such discussions must be meaningful, and in order for discussions to be meaningful, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result either in disclosure of one offeror's approach to another or in technical leveling. *The Faxon Co.,* 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425.

During discussions, agencies are prohibited from advising an offeror of its cost standing relative to other offerors, FAR § 15.610(e)(2)(ii), and are not required to point out that a proposed cost is too high if the price is still below the government estimate. *University Research Corp.,* B-196246, Jan. 28, 1981, 81-1 CPD ¶ 50. On the other hand, discussions cannot be meaningful if an offeror is not apprised that its cost exceeds what the agency believes to be reasonable. *Price Waterhouse,* 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, *aff'd,* B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. Applying this standard here, based upon the agency's failure to point out to Mikalix that its estimated cost exceeded what the agency considered reasonable, we conclude that HHS failed to conduct meaningful discussions with Mikalix.

The agency states that it retained no contemporaneous records of the discussions with Mikalix. HHS agreed during the informal conference at our Office, however, that an affidavit by the project officer, who led the discussions with Mikalix and whose cost analysis formed the basis for such discussions, would be useful to resolving this protest in its favor.[5] HHS has not filed any affidavits to rebut Mikalix's statements and in its comments on the conference, HHS states that the project officer's recollection of the negotiations with Mikalix is "not clear enough to make a sworn affidavit appropriate."

To corroborate its position, Mikalix has provided us with the affidavits of its managing partner and of the two other individuals who participated in the discussions on behalf of Mikalix, together with a copy of each individual's handwritten contemporaneous notes documenting the discussions. In his affidavit, the managing partner states that Mikalix was informed that its direct labor costs were reasonable, and that its LOE in the clerical areas was "slightly" high, but vehemently denies that HHS ever described Mikalix's proposed cost as unreasonable or its LOE as "excessive." On the contrary, the managing partner states that at the end of the negotiations, he had the uncomfortable feeling that the discussions were leading to a BAFO cost not materially different from Mikalix's original proposed cost. The managing partner further states that he was left with the impression following discussions that Mikalix's cost was within the government's estimate, leaving him to justifiably conclude that no material changes needed to be made to Mikalix's cost proposal. The managing partner's contemporaneous record of the discussions, as well as the other two affidavits and corresponding supporting notes documenting what transpired during the negotiations, are consistent with Mikalix's position.

[5] The project officer did not attend the informal conference. Of the three individuals who participated in the discussions with Mikalix, only the contract specialist attended the informal conference, and she could not specifically recall what transpired during the negotiations.

In support of its position, the agency relies on two documents, which allegedly show that HHS discussed "several cost issues" during the negotiations with Mikalix: the project officer's September 13, 1990, memorandum summarizing his review of Mikalix's cost proposal; and the cost analyst's September 17 detailed analysis of Mikalix's cost proposal. According to HHS, the recollection of the individuals who participated in the discussions on behalf of the agency is that the project officer's and cost analyst's memoranda were relied upon and reflect what Mikalix was told during the negotiations, which included a discussion of Mikalix's "excessive" LOE in all categories.

The project officer's and cost analyst's memoranda, however, do not support the agency's position. While the documents offered by HHS refer to certain issues related to Mikalix's proposed LOE, they do not support a finding that HHS informed Mikalix during negotiations that its total estimated cost was unreasonable or that its LOE was "excessive" in any category. The cost analyst states in his memorandum, for example, that he reviewed the cost proposals, focusing his analysis on the budget Mikalix proposed for the first year of the contract only. Except for recommending that certain fringe benefits be recomputed resulting in a net reduction of $2,025 to Mikalix's proposed costs for the first year of the contract ($1.9 million), the cost analyst does not suggest that any of the estimated costs or LOE proposed by Mikalix are unreasonable or excessive.

While the project officer's memorandum concludes that Mikalix's mix of staffing was reasonable, it states that Mikalix's LOE across all categories is "somewhat high" and "especially high" in the clerical area; nowhere in his brief comments, however, does the project officer state that Mikalix's estimated cost is unreasonable or that its proposed LOE is "excessive" across all categories, as the agency maintains. The project officer's memorandum further indicates that Mikalix's proposed travel, consultant and additional editorial consultant costs are "reasonable," while indicating that daily fees are "somewhat high." The project officer also points out that the bibliographic search charges are "not unreasonable" and questions how certain overhead costs (*e.g.*, telephone, postage, telefacsimile, etc.) not included in Mikalix's cost proposal would be handled. In lieu of an affidavit from the project officer, HHS did provide us with a brief memorandum dated March 22, in which the project officer essentially restates the conclusions of his review of Mikalix's cost proposal.

Even assuming, as HHS contends, that the project officer's and cost analyst's memoranda are a reflection of what Mikalix was told during discussions, this advice did not give Mikalix adequate notice that its cost estimate exceeded what the agency considered reasonable, or that its LOE was so excessive that award to the firm would not be possible because Mikalix's proposed costs were unreasonable.[6] We conclude that the agency's failure to indicate to Mikalix during

[6] Our finding that the documents submitted by HHS do not support the agency's position is consistent with and bolstered by HHS' assertion in its report to our Office that "it was only after the receipt of [BAFOs] that Mikalix was clearly seen to be unreasonably priced." The record simply does not indicate that Mikalix was ever told during the negotiations that its proposed cost was unreasonable; nor does the record support a conclusion that HHS' cost evaluators so regarded Mikalix's initial proposal. We note that there is not even any documentation for

Continued

discussions either that its estimated cost or that its proposed LOE exceeded what the agency considered reasonable, prejudiced Mikalix because the firm was denied the opportunity to submit a more competitive BAFO. Accordingly, we sustain Mikalix's protest on the basis that HHS failed to conduct meaningful discussions with the firm. *Price Waterhouse,* 65 Comp. Gen. 205, *supra.* In view of our finding that the agency did not conduct meaningful discussions with the protester, HHS' conclusion that the protester's costs are unreasonably high is not a reasonable basis to cancel the RFP.

Recommendation

Since the agency states that sufficient funds are not available to award the remaining portion of the contract to Mikalix at its BAFO price, we recommend that HHS promptly terminate HSR's contract for the convenience of the government, reopen negotiations with Mikalix and afford the protester the opportunity to submit a revised estimated cost covering the period remaining under the RFP, and award the contract to Mikalix if otherwise reasonable. In the alternative, if HHS concludes that any of the three remaining offerors which submitted acceptable proposals would have been included in the competitive range had HSR's proposal not been considered initially, then HHS should revise the competitive range, conduct discussions, and request BAFOs covering the period remaining under the RFP.

Mikalix is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991). Mikalix should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

B-242602, June 5, 1991

Procurement

Contractor Qualification
■ Responsibility
■■ Contracting officer findings
■■■ Affirmative determination
■■■■ GAO review

Agency reasonably determined that offerors which had received prior production contracts for items being procured, completed in-house testing and appeared to be making satisfactory progress under the contracts, satisfied solicitation provision restricting procurement to "producers with a proven ability to produce the item(s) under a previous procurement."

the agency's statement that after BAFOs, Mikalix was "clearly seen to be unreasonably priced." On the contrary, in a memorandum to the contracting officer concerning his review of BAFOs, the project officer states that Mikalix's BAFO "was responsive to the issues raised during negotiations and [is] acceptable."

Matter of: Kollmorgen Corporation

Paul Shnitzer, Esq., and Robert P. Davis, Esq., Crowell & Moring, for the protester.

Jeffrey I. Kessler, Esq., and Anthony B. Sconyers, Esq., Department of the Army, for the agency.

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

Kollmorgen Corporation protests the award of contracts to Lenzar Optics Corporation and Opto Mechanik, Inc. for sight assemblies for the M1A1 Abrams Tank, under request for proposals (RFP) No. DAAA09-91-R-0063, issued by the Department of the Army. Kollmorgen contends that neither awardee is a "producer with a proven ability to produce the item(s) under a previous procurement," as required by the solicitation.

We deny the protest.

The RFP solicited offers for two items, the gunner's auxiliary sight (GAS) and the commander's weapon station sight (CWSS). The Army issued the RFP to Kollmorgen, Lenzar, and Opto only, justifying less than full and open competition on the basis of urgency. The justification and approval document stated that only certain identified sources (which had previously been awarded contracts for the items)—Kollmorgen and Opto for the GAS and Kollmorgen and Lenzar for the CWSS—possessed the necessary production capabilities, technical expertise, and overall knowledge required to produce the items within the time frame required to support the tank production schedule. Due to the urgency of the delivery schedule, the justification stated that there was insufficient time for first article testing (FAT), and that delay in the procurement would compromise the operational readiness of the tanks, a primary weapon system. The RFP also was amended to provide that "this request is issued as an urgent requirement and only producers with a proven ability to produce the item(s) under a previous procurement will be considered."[1]

Kollmorgen, Lenzar, and Opto submitted offers in response to the RFP. Their unit prices for the required quantity of 171 each of the 2 types of sights were as follows:

	GAS	CWSS
Kollmorgen	$5,875	$3,165
Lenzar	No offer	1,808
Opto	4,200	No offer

[1] While the RFP did not specifically identify this requirement as a special standard of responsibility, all parties have treated it as a condition that had to be satisfied to be eligible for award; we adopt this view.

Based on the prices offered, the agency made award to the low offerors, Opto for the GAS on January 25, 1991, and Lenzar for the CWSS on January 28.

Kollmorgen argues that the awardees should not have been considered for award because they did not meet the solicitation requirement for a proven ability to produce the items under a previous procurement. Kollmorgen recognizes that both awardees have existing contracts with the Army to produce the subject items, and that those contracts require the firms to pass FAT. Kollmorgen notes, however, that as of the award dates for this solicitation, neither firm had received first article approval or produced the items under a prior procurement; it asserts that FAT approval or production is necessary to meet the proven ability requirement.

We disagree. There was nothing in the RFP that made completed FAT, production, or delivery prerequisites for consideration of an offeror's proposal. The requirement speaks only in terms of a "proven ability to produce the item(s) under a previous procurement;" it contains no detailed criteria defining proven ability. Consequently, compliance with the requirement cannot be determined objectively beyond an offeror having been awarded a prior contract. Thus, as in *Telex Communications, Inc.*, B-236981, Jan. 29, 1990, 90-1 CPD ¶ 120, cited by the agency, the proven ability requirement here was a general requirement, largely a judgmental matter for the agency's determination.

In concluding that this general requirement was met, the agency considered the progress the awardees had shown under their prior GAS and CWSS contracts, as well as favorable information previously obtained during the pre-award surveys conducted prior to award of those contracts. Specifically, with respect to their progress under the prior contracts, the contracting officer took into account the facts that, at the time of award, Lenzar had begun prototype production of the CWSS and was expected to perform FAT during June 1991, while Opto had completed in-house testing of the GAS and was scheduled for FAT in April 1991. Based on these observations, the agency reconfirmed that FAT would not need to be included in the proposed contracts with Opto and Lenzar. In other words, the agency found that the awardees appeared to be making satisfactory progress under their production contracts for the CWSS and the GAS to warrant concluding that the firms met the proven ability requirement. We conclude that the Army's application of the less restrictive interpretation of the requirement was proper, *see Computer Sciences Corp.*, B-213287, Aug. 6, 1984, 84-2 CPD ¶ 151, and find that the agency's determination that the awardees met the proven ability requirement was reasonable.[2]

The protest is denied.

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[2] While Kollmorgen contends that one of the agency's contracting personnel orally advised the firm that first article approval was required by the time of contract award, the agency has submitted an affidavit from the employee denying that the advice alleged was given to Kollmorgen. Furthermore, the contracting officer reports that she specifically advised Kollmorgen that the procurement would be competitive. In any event, it is well established that offerors who rely on oral advice that alters the written terms of the solicitation do so at their own risk. *Air Inc.*, B-236334, Nov. 13, 1989, 89-2 CPD ¶ 455.

B-242782, June 5, 1991

Procurement

Contract Management
■ Contract modification
■■ Cardinal change doctrine
■■■ Criteria
■■■■ Determination

Protest against issuance of delivery order under existing contract is denied where record establishes that the order for engineering services to replace circuit card assemblies and redesign the F-16 Control Air Data Computer was within the scope of an existing contract to provide engineering services for the microelectronics technology support program.

Procurement

Special Procurement Methods/Categories
■ Architect/engineering services
■■ Indefinite quantities

The Federal Acquisition Regulation does not prohibit the use of an indefinite-quantity contract for the acquisition of other than commercial items or prohibit the issuance of a cost-plus-fixed fee indefinite-quantity contract.

Matter of: Astronautics Corporation of America

Daniel R. Wade and Michael Russek for the protester.

Jerome R. Hamilton, Esq., and Millard F. Pippin, Department of the Air Force, for the agency.

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

Astronautics Corporation of America protests the issuance by the Sacramento Air Logistics Center (SM-ALC), McClellan Air Force Base, California, of a delivery order to Honeywell Defense Systems, Inc., to obtain engineering services for reliability, modernization, and upgrade of the Central Air Data Computer (CADC) and computer circuit cards used in F-16 aircraft under Honeywell's existing time and material, indefinite quantity contract No. F04606-90-D-0002. Astronautics contends that the requirements of the delivery order are not within the scope of the Honeywell contract.

We deny the protest.

The requirements of the time and material contract were synopsized in the *Commerce Business Daily* (CBD) in March 1988. The synopsis indicated that the Air Force was seeking "proposals for engineering services for the microelectronics technology support program (MTSP)" to resolve "critical or obsolete microelectronics support problems as well as providing for insertions of advanced semiconductor technologies." The synopsis stated that the requirements includ-

ed, among other things, analysis, evaluation, design, fabrication, prototyping, and insertions of Very High Speed Integrated Circuits (VHSIC), and advanced semiconductor technology integrated circuits (ICS) and systems, "to be applied to discontinued, nonprocurable ICS and the development of form-fit-function emulation replacements and supporting methodologies." Ten offerors responded to the solicitation and Honeywell was awarded the contract on December 19, 1989. Astronautics did not submit an offer.

Under the terms of the contract, Honeywell is required to provide new microelectronics technology for form-fit-function replacements for obsolete microelectronic and semiconductor components in the Department of Defense (DOD) weapons systems inventory. Generally, contract requirements include providing engineering services/items for the analysis, prototype design, fabrication, replacement/insertion and limited production of ICS devices and microelectronic circuit components. Specifically, paragraph 3.4.6 of the contract statement of work (SOW) states that the contractor shall provide "Prototyping Services" and "shall develop and deliver engineering prototypes . . . including VHSIC and non-VHSIC devices, systems and microelectronic circuit replacements and components." Paragraph 3.4.7 calls for "Testing/Screening Services" and paragraph 3.4.8 requires "Advanced Technology Insertions and Application Services," including the design, development, testing and provision of prototype circuit boards, limited production quantities of advanced technology devices for technology insertions and applications, and the insertion/integration of the advanced technology into the system. The contract schedule for required supplies or services lists 30 contract line items (CLINs). CLIN 0024, at issue here, reads, in relevant part, as follows:

Engineering services in support of microelectronics design development and insertion in accordance with statement of work SM-ALC/MME 86-134, dated 89 Oct. 1, excluding paras 3.4.9., 3.4.10, 3.4.11 and 3.4.17.

The Air Force issued delivery order No. 0005, titled "F-16 CADC [Central Air Data Computer] Reliability and Modernization Upgrade," to Honeywell on December 19, 1990. The purpose of this order is to provide a form-fit-function replacement of 13 circuit card assemblies, using advanced technology, such as VHSIC/VHSIC-like technology, to redesign the CADC, utilizing the existing CADC chassis, pressure transducers and power supply and to build 12 "CADCs representative of the production design . . . ." Honeywell will also develop, test, document and deliver all software needed to operate the CADC. The schedule for supplies or services under this delivery order included CLINs 0024 and 0025. CLIN 0024 reads, in relevant part:

Engineering services in support of microelectronics design development and insertion in accordance with statement of work SM-ALC/MME 90-345 F-16 CADC reliability and modernization upgrade.

Astronautics contends that the services requested by delivery order No. 0005 are not within the scope of the basic contract and that the Air Force's actions avoid full and open competition for the F-16 CADC upgrade. The protester argues that nothing in the March 1988 synopsis or the contract references the F-16 aircraft or the delivery requirement of 12 CADCs "representative of pro-

duction design." Astronautics contends that while the synopsis provided details of engineering services that may be required, it did not "provide any details regarding what systems could be applied to the general, indefinite-quantity contract." The protester says that the synopsis refers only to "advanced semiconductor technology integrated circuits and systems" which could "apply to every electronic item utilized by the [DOD]." The contract does not reference the F-16 aircraft or provide "any detail regarding potential programs to be included within its scope" and none of the deliverables listed in the contract supports the delivery of 12 CADCs.

Astronautics argues that the Air Force, by failing to synopsize the order requirements, violated Federal Acquisition Regulation (FAR) § 6.001(e)(1), which provides that orders placed under indefinite-quantity contracts are exempt from the FAR competition requirements only where "all responsible sources were realistically permitted to compete for the requirements contained in the order . . . ." Astronautics argues that even though it was given an opportunity to compete for the indefinite-quantity contract, it is "still entitled to the right to compete for the order . . . ."

Finally, Astronautics contends that delivery order No. 0005, issued on a cost-plus-fixed-fee basis, violates FAR § 16.501(c), which states that indefinite-delivery contracts may provide for firm, fixed prices, fixed prices with economic price adjustments, fixed prices with prospective redetermination or prices based on catalog or market prices, and violates FAR § 16.504(b) which states that "[a]n indefinite-quantity contract should be used only for items and services that are commercial products . . . ." Astronautics contends that engineering service is not a commercial product.

The Air Force contends that delivery order No. 0005 falls under line item 24 of the existing contract and is fully within the scope of the properly awarded contract. The agency says that order No. 0005 "orders services virtually identical to those of line item 24 in the basic contract." The order states that the tasks required are within the scope of the basic contract, paragraphs 3.4.6, 3.4.7, 3.4.8(h), and 3.4.11. The agency asserts that the CBD synopsis which contained "substantial detail regarding the work to be done," provided adequate notice for the work at issue under order No. 0005, and, since all responsible sources were given an opportunity to compete on the contract, no further competition on the order was required. The agency also maintains that the issuance of the delivery order is a matter of contract administration which our Office should not review.

As a general rule, our Bid Protest Regulations provide for dismissal of protests involving contract administration matters. 4 C.F.R. § 21.3(m)(1). We will, however, consider a protest that a delivery order issued under an existing contract is beyond the scope of that contract, changing the nature of the contract originally awarded, because the work covered by the delivery order would be subject to requirements for competition absent a valid sole-source determination. *See Defense Sys. Group; Warren Pumps, Inc.; Dresser Indus., Inc.*, B-240295; B-240295.2; B-240295.3, Nov. 6, 1990.

We do not find that the delivery order materially changed the nature or purpose of the original contract. The record shows that the Air Force requires engineering services for MTSP for "form-fit-function emulation replacements" which broadly means replacement systems for Air Force weapons systems. As the protester correctly notes, no specific components or systems used by the Air Force were identified in either the synopsis or the basic contract. Rather, the agency broadly stated a series of services it required, including the design and prototyping of microelectronic circuits and components, and the insertion of these upgraded parts into any number of existing Air Force equipment. We agree with the agency's position that paragraphs 3.4.6, 3.4.7, and 3.4.8 of the basic contract support the circuit boards and delivery of 12 CADCs required under the delivery order. As noted above, paragraph 3.4.6 requires, among other things, "VHSIC . . . devices, systems and microelectronic circuit replacements and components" and paragraph 3.4.8 calls for "limited production quantities" and "prototype circuit boards." While the protester disagrees, we find that this language reasonably encompasses the delivery requirement of 12 CADCs "representative of production design." Moreover, as the agency notes, CLIN 0024 of the basic contract is nearly identical to CLIN 00024 of the delivery order; the agency merely specified in the delivery order the vehicle, here the F-16, into which the upgraded replacement components would be inserted.

Accordingly, we conclude that the agency reasonably determined to satisfy its needs through the issuance of a delivery order under an existing engineering services contract. Since the delivery order falls within the scope of the existing engineering services contract, there is no basis to require a separately competed procurement as urged by the protester. *See Stanford Telecommunications, Inc.*, B-241449, Dec. 10, 1990, 90-2 CPD ¶ 475.

Here, the basic contract appears to encompass an extremely broad spectrum of items and services, which prompted the protester to hypothesize that DOD could use the contract routinely to obtain a wide range of electronic items without meaningful competition. While on the limited record presented in this case we could not resolve the question, we recognize that where an agency conducts a procurement for a total package or for broadly aggregated needs without a legitimate basis for bundling its requirements rather than breaking them out, competition is inhibited in derogation of the mandate for "full and open competition" under the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (1988). *See LaBarge Products, Inc.*, B-232201, Nov. 23, 1988, 88-2 CPD ¶ 510; *Pacific Sky Supply, Inc.*, B-228049, Nov. 23, 1987, 87-2 CPD ¶ 504; *Systems, Terminals & Communications Corp.*, B-218170, May 21, 1985, 85-1 CPD ¶ 578. However, as the protester also acknowledges, the CBD synopsis indicated the broad range of services which could be acquired. Astronautics did not timely protest the scope of the procurement in 1988. To the extent that Astronautics is now protesting the scope of the requirements under the basic contract, the protest is untimely.

We also note that the protester's allegation that FAR § 16.504(b) prohibits the use of an indefinite-quantity contract with this delivery order is incorrect. That

section provides, in part, that "[a]n indefinite-quantity contract should be used only for items or services that are commercial products or commercial-type products . . . and when a recurring need is anticipated."[1] In our view, the use of the word "should" rather than "shall" in FAR § 16.504(b) indicates that the regulation is permissive in nature. It does not impose a mandatory prohibition against the use of the indefinite-quantity-type contract for other than commercial items or services. *Morrison Constr. Servs., Inc.*, B-240789, Dec. 18, 1990, 70 Comp. Gen. 139, 90-2 CPD ¶ 499. Similarly, the use of the word "may" in FAR § 16.501(c) indicates that the regulation is permissive and does not categorically limit indefinite-quantity contracts to firm, fixed prices, fixed prices with economic price adjustments, or to any of the other listed price forms.

The protest is denied.

B-243785.2, June 10, 1991

Procurement

Bid Protests

■ GAO procedures

■ ■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action within 2 weeks of when the protest was filed.

Matter of: Oklahoma Indian Corporation—Claim for Costs

Lisa Smith Sanders, Esq., Spriggs & Hollingsworth, for the protester.

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

Oklahoma Indian Corporation (OIC) requests that our Office declare the protester entitled to recover reasonable costs of filing and pursuing its protest. OIC had protested the rejection of its proposal under request for proposals (RFP) No. F34650-91-R-0164, issued by the Department of the Air Force. The protester contended that the agency had violated statute and regulation by finding the protester, a small business, nonresponsible without referring the matter to the Small Business Administration (SBA) for a certificate of competency.

OIC filed its protest on April 26, 1991; on May 10, the agency acknowledged the legitimacy of the protester's contentions and agreed to refer the matter of the

[1] While not relevant to this protest, we note that subsequent to the issuance of the delivery order, FAR § 16.504(b) was amended to delete the reference to "commercial products or commercial-type products" and now provides that an indefinite-quantity contract should be used only when a recurring need is anticipated. FAR § 16.504(b) (FAC 90-4).

protester's responsibility to the SBA. We therefore dismissed the protest as academic.

On May 17, the protester filed a claim with our Office under section 21.6(e) of our revised Bid Protest Regulations, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6(e)), for the costs of filing and pursuing the protest. Pursuant to the revised regulations, if the contracting agency decides to take corrective action in response to a protest, we may declare the protester to be entitled to recover reasonable costs of filing and pursuing the protest, including attorneys' fees.

Prior to revision of the regulations, we did not award costs in cases where an agency took corrective action prior to our issuing a decision on the merits of the protest. We became concerned, however, that some agencies were taking longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. We thought that providing for the award of costs in cases where the agencies delayed taking corrective action would encourage agencies "to recognize and respond to meritorious protests early in the protest process." 55 Fed. Reg. 12834, 12836 (1990).

As initially proposed, section 21.6(e) would have permitted us to award costs in cases where the agency notified us of a decision to take corrective action after the due date for submission of the agency report on the protest. 55 Fed. Reg. 12838. As adopted, section 21.6(e) permits the award of costs without regard to the report due date; we stated in the explanatory material accompanying the promulgation of the final regulations that deciding whether to award costs was more appropriately based on the circumstances of each case, including when in the protest process the decision to take corrective action was made and communicated to us and the protester, rather than on the report due date. We noted in this respect that there may be circumstances where the award of costs, even where corrective action was taken after submission of the report, would not be justified, just as there may be circumstances where the award of costs would be appropriate even where corrective action was taken prior to report submission. *See* 56 Fed. Reg. 3,759 *et seq.*

Obviously, it was not our intention in adopting the revised provision to award protest costs in every case in which the agency takes corrective action in response to a protest. Since our concern was that some agencies were not taking corrective action in a reasonably prompt fashion, our intent was to award costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Here, the agency took corrective action within 2 weeks of the filing of the protest. Such action, taken early in the protest process, is precisely the kind of prompt reaction to a protest that our regulation is designed to encourage. It provides no basis for a determination that the payment of protest costs is warranted. Accordingly, the protester's claim for costs is denied.

B-240561, June 12, 1991

Civilian Personnel

Compensation

■ Retroactive compensation

■■ Interest

No interest is due on an arbitrator's award of backpay which became final before December 22, 1987, the effective date of the amendment to the Back Pay Act which provided for interest on final decisions granting backpay, even though the award was clarified after that date. Although several compliance issues were not resolved until later, such issues which arise during the implementation phase of an award do not affect the finality of an award in which liability and remedy had been decided.

Matter of: Interest on Backpay

The question in this case is whether interest may be paid to certain grievants on an arbitrator's award of backpay to them.[1] We conclude that interest is not payable because the arbitrator's award was "final" before December 22, 1987, the date upon which an amendment to the Back Pay Act, 5 U.S.C. § 5596, to award interest on backpay determinations became effective.

Background

In 1984, employees in certain job classifications in several hospital and clinic service units located throughout the Navajo Reservation filed grievances claiming that they were entitled to overtime compensation for hours spent in an "on-call"/"standby" duty status. When negotiations between the agency and the union were unsuccessful, the case went to arbitration, and the arbitrator awarded backpay on July 3, 1987, to grievants in some but not all of the job classifications because he found that they were effectively working overtime on "standby" duty. Since many grievants were involved, and since they were in a "standby" duty status for several years, the parties realized that it would not be feasible to compute the overtime due each individual within the month provided in the award. On July 17, 1987, a supplemental agreement of the parties, approved by the arbitrator, eliminated the time period for compliance with the award, affirmed the finality of the award's liability determination, and postponed the matter of attorney fees until after compliance with the award. The arbitrator retained jurisdiction over the compliance phase of the arbitration to settle any disputes regarding specific backpay calculations.

The union filed two unfair labor practice charges, which were settled in November 1988, in order to move along the process of calculating backpay for the grievants. In June 1989, the agency requested a clarification from the arbitrator of a part of his award. The arbitrator issued a clarification in July 1989, to

[1] The question was presented by a joint request of the Department of Health and Human Services and Navajo Nation Health Care Employees Union, Laborers International Union of North America, Local 1376, under 4 C.F.R. part 22 (1990).

which the union took exception. On April 20, 1990, the union withdrew its exceptions and agreed to backpay calculations based upon the award as clarified by the arbitrator. The settlement agreement also dealt with some issues not included in the award, including liquidated damages and some implementation details, and provided for the parties to submit the question of interest on the award of backpay to the Comptroller General.

Analysis and Conclusion

The Back Pay Act, 5 U.S.C. § 5596, was amended December 22, 1987, to provide interest on backpay when awarded under the act.[2] However, the amendment provided that interest was allowable under the act on backpay resulting only under final decisions rendered on or after December 22, 1987. An arbitrator's award is a decision under the Back Pay Act, so the question in this case is whether the arbitrator's award of July 3, 1987, was a final decision in this case.

The union argues that the July 3 award was not a final decision for two reasons. First, it argues that this award determined only liability and reserved jurisdiction to later determine the remedy, and was therefore interlocutory rather than final. Second, the union claims the July 3 award was subsequently so substantially modified by the July 1989 clarification that the clarification modification constitutes a new final order. We do not agree.

The Award of July 31, 1987, Disposed of the Entire Proceeding

The union relies on the fact that when the arbitrator began the hearings in 1986, a two-stage proceeding was planned—the first stage consisting of determining liability and the second stage consisting of determining remedy. However, that initial plan was not carried out in the arbitrator's award after the hearings were over. The arbitrator determined that the agency was liable to grievants in certain job classifications for overtime compensation, and he awarded backpay for the grievants' time spent in a "standby" duty status as a remedy. The Federal Labor Relations Authority (FLRA) looks at what an arbitrator actually does in his or her award to determine whether the award is final. In a recent case an arbitrator found that an agency violated an agreement to promote certain persons in a career ladder when they became eligible and were recommended for promotions, and he directed as a remedy that the agency process the recommended promotions as soon as possible but not more than 30 days from receipt of his award. Although he retained jurisdiction to address questions concerning interpretation and matters affecting the expeditious implementation of the award, the FLRA ignored the arbitrator's caption of "Interim Award" and concluded that the award was not an interlocutory award but one that disposed of the entire proceeding and was final. *American Federation of*

[2] 5 U.S.C. § 5596(b), as amended by the Continuing Appropriations Act of 1988, Pub. L. No. 100-202, § 101(m), Dec. 22, 1987, 101 Stat. 1329, 1329-428, 429.

Government Employees, Local 1760 v. U.S. Department of Health and Human Services, Social Security Administration, 37 FLRA 1193 (1990).

We believe we have the same situation here. The arbitrator determined liability and the remedy in July of 1987 and retained jurisdiction only in the event of a controversy over the determination of the number of backpay hours for each grievant. The language of both his award of July 3 and the supplemental agreement of July 17 state the need for compliance with and implementation of a remedy that has been determined, not of a need to determine the remedy later. In all the cases that the union cites to demonstrate interlocutory awards that were not final, the arbitrator had expressly reserved his jurisdiction to determine a remedy or an additional element of liability at a later time. In those cases, the arbitrators and parties knew that the awards did not dispose of the entire case and the arbitrators expressly retained jurisdiction to make specific remedy or liability determinations.[3] The fact that the settlement of April 1990 dealt with some implementation details and issues not treated in the award did not affect the award's finality.

A Clarification of an Award That Does Not Modify It Does Not Disturb the Award's Finality

A substantial modification of an award may be considered a new final award. However, this principle does not apply to a clarification that only removes an ambiguity and relates back to the original award without modification. *See Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO,* 15 FLRA 181 (1984), and decisions cited therein.

We believe that is the case here. The arbitrator's original award contained an ambiguous provision concerning how sleep time was to be deducted from 24-hour periods of duty. In July 1989, the arbitrator issued a clarification which explained the provision concerning the deduction of sleep time but which did not modify the original award. Thus, there was no modification of the award to give rise to a new final award.

Accordingly, the arbitrator's award of July 3, 1987, was a final decision for purposes of the 1987 amendments to the Back Pay Act. Thus, the amendment allowing interest on backpay under the act does not apply to this case, and no interest is due the grievants.

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[3] The union also cites cases that concern an interlocutory award where an arbitrator reserves jurisdiction to later issue an award of attorney fees. These cases do not apply here where the arbitrator did not reserve jurisdiction to later rule on attorney fees. The supplemental agreement of July 17 did not reserve jurisdiction, and the settlement merely provided that disputes over reasonable attorney fees would be presented to the arbitrator at a later time. Normally, requests for attorney fees are submitted to an arbitrator after an award is final. *Philadelphia Naval Shipyard v. Philadelphia Metal Trades Council,* 32 FLRA 417 (1988).

B-242900, June 18, 1991

Procurement

Sealed Bidding
■ Invitations for bids
■■ Amendments
■■■ Notification

Procurement

Sealed Bidding
■ Potential contractors
■■ Exclusion
■■■ Propriety

Agency violated provisions of Federal Acquisition Regulation governing the distribution of amendments and caused the improper exclusion of the protester from the competition where (1) unreasonable actions by agency personnel resulted in the agency mailing an amendment setting a new bid opening date to the protester's former address, which in turn caused the protester to receive the amendment 1 hour prior to bid opening; (2) the protester did not fail to avail itself of a reasonable opportunity to obtain the amendment; and (3) only one responsive bid was submitted and four prospective bidders were eliminated from the competition because of the agency's actions.

Matter of: Custom Environmental Service, Inc.

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

William E. Phillips for Custom Lawn Service, an interested party.

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. (CES) protests the proposed award of a contract to Custom Lawn Service (CLS) under invitation for bids (IFB) No. GS-11P-90-MJD-0052,[1] issued by the General Services Administration (GSA), for landscape maintenance services for a 1-year base period and four yearly options. CES contends that GSA did not timely provide it with the amendment announcing the revised bid opening date, which caused CES to be eliminated from the competition.

We sustain the protest.

The IFB was issued on July 17, 1990, with an original bid opening date of August 21. Subsequent amendments extended the bid opening date to September 20. On September 7, CES filed a protest with our Office challenging the

[1] The solicitation was originally issued as IFB No. GS-11P-90-MJC-0052, for a firm, fixed-price contract. On September 27, 1990, amendment No. 5 changed the type of contract to an indefinite quantity contract. Amendment No. 8 modified the IFB number by changing the letter preceding the numbers "0052" from "C" to "D."

IFB's format as amended.[2] We denied CES' protest in *Custom Envtl. Serv., Inc.*, B-241052, Jan. 15, 1991, 70 Comp. Gen. 184, 91-1 CPD ¶ 38.

On January 18, GSA issued amendment No. 8 announcing a new bid opening date of February 5 at 1:30 p.m. GSA posted the new date in its regional office bid room on both the weekly and the monthly bid opening schedules, and mailed a copy of the amendment to each of the 80 potential bidders named on the original bidders list, including CES, on January 22.

On February 5, CES phoned GSA's contract specialist [3] 1 hour before bid opening to say that CES had just received a misaddressed copy of amendment No. 8. CES requested a postponement of the bid opening—which according to the amendment was scheduled within the hour. The contract specialist told CES that she would look into the matter and call CES back. GSA reports that the contract specialist's first action after receiving CES' call was to look for the procurement clerk,[4] because the clerk could access amendment No. 8's mailing list on the computer. Unable to locate the procurement clerk, the contract specialist looked in the solicitation file seeking a copy of the amendment No. 8 mailing list. She only found copies of the mailing lists for the initial solicitation and amendment Nos. 1 through 7. Unable to find the amendment No. 8 mailing list, the contract specialist proceeded to the 1:30 p.m. bid opening, which she conducted as scheduled. She did not get back to CES prior to bid opening. Only two bids were received by bid opening, one of which was nonresponsive for failing to submit the required bid guarantee; only CLS' bid was responsive.

CES contends that GSA violated the Federal Acquisition Regulation (FAR) when it (1) failed to timely provide CES with a solicitation amendment setting the new bid opening date, and (2) refused to postpone bid opening after CES advised GSA of the amendment's late receipt before the scheduled opening.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. *North Santiam Paving Co.*, B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18. In pursuit of these goals, it is a contracting agency's affirmative obligation to use reasonable methods, as required by the FAR, for the dissemination of solicitation documents, including amendments, to prospective competitors. *Id.;* FAR §§ 14.203-1, 14.205, 14.208.

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[2] CES objected to the amended IFB pricing schedule that invited bids on a single percentage factor or net basis rather than soliciting prices for the multiple items of work.

[3] Two contract specialists have been assigned to the instant procurement. The first contract specialist served from the IFB's issuance in July 1990 until January 14, 1991 (the day before our decision resolved CES' protest), at which time the second (and current) contract specialist assumed the position.

[4] The procurement clerk sets up solicitation files and maintains and updates the computerized bidder's mailing list. The procurement clerk works with 22 contract specialists. The contract specialists prepare solicitations and amendments that they then pass on to the procurement clerk for mailing. The procurement clerk mails the documents using labels generated from the computer's mailing list. The procurement clerk retains a copy of each mailing (*i.e.*, copies of the labels affixed to the envelopes) for inclusion in the appropriate contract file.

FAR § 14.208 specifically requires all prospective contractors, who have been furnished IFBs, to be furnished copies of the amendments to the IFB. Concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of reasonable opportunities to obtain solicitation documents. *Fort Myer Constr. Corp.*, B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. Thus, a prospective contractor normally bears the risk of not receiving a solicitation amendment unless there is evidence (other than non-receipt by the protester) establishing that the agency failed to comply with the FAR requirements for notice and distribution of amendments, *Shemya Constructors*, 68 Comp. Gen. 213 (1989), 89-1 CPD ¶ 108, provided that the prospective contractor avails itself of reasonable opportunities to obtain the documents. *EMSA Ltd. Partnership*, B-237846, Mar. 23, 1990, 90-1 CPD ¶ 326; *Western Roofing Serv.*, B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 323, 91-1 CPD ¶ 242; *Fort Myer Constr. Corp.*, B-239611, *supra*.

As discussed below, GSA's dissemination of amendment No. 8 failed to comply with applicable regulations governing the distribution of amendments. In our view, this failure, rather than CES' failure to affirmatively seek a copy of the amendment, caused CES' elimination from the competition.

According to GSA, its problems with the solicitation mailing list began when an attempt was made to change the contract type—from a fixed-price to an indefinite quantity—in its existing computer records,[5] just prior to issuing amendment No. 8, which announced the revised bid opening date. Under GSA's method of identifying documents, this entailed changing the solicitation number. In making this change, the contract specialist canceled the original solicitation number in the computer. This had the effect of deleting the original bidders' mailing list from the computer's data base because of the peculiarities of the GSA computer software.[6]

The contract specialist prepared approximately 100 copies of amendment No. 8 for distribution and gave them to the procurement clerk for mailing late on Friday afternoon, January 18. On Tuesday morning, January 22,[7] the procurement clerk unsuccessfully tried to use the bidders' mailing list on the computer in order to generate mailing labels. This attempt was unsuccessful because the current mailing list had been deleted from the computer data base and no replacement had been entered. Unable to generate the mailing labels with the computer, and apparently in order to make an afternoon mail pick-up, the procurement clerk used the names and addresses on her copy of the amendment No. 1 mailing list [8] to manually type the labels. The procurement clerk appar-

[5] Amendment No. 5 changed the contract type from fixed price to indefinite quantity. However, GSA did not update its computer records when that amendment was issued to reflect this change.

[6] GSA reports that the contract specialist did not know that canceling the original solicitation number would delete the current updated bidders' list associated with the original solicitation number. There is no indication that the contract specialist mentioned her cancellation of the original solicitation number to the procurement clerk. The contract specialist should have made a copy of the current mailing list before she deleted the original solicitation number if she knew that such a change would destroy the current mailing list.

[7] Monday, January 21 was a federal holiday.

[8] The procurement clerk had earlier given the mailing lists for amendment Nos. 2 through 7 to the contract specialist, but had retained a copy of the mailing list for amendment No. 1.

ently did not tell the contract specialist that the current mailing list had disappeared from the computer, nor did she obtain the current amendment No. 7 mailing list from the contract file or specialist. The result was a mailing list that used CES' former address and omitted the names and addresses of three other firms that had expressed interest in the procurement after the solicitation was issued and whose names first appear on the amendment No. 3 mailing list. Therefore, we find that GSA failed to comply with the FAR requirement that prospective bidders be supplied with amendments.

We think CES met its duty to avail itself of reasonable opportunities to obtain this amendment. The record shows that CES repeatedly contacted the first contract specialist prior to our January 15 decision on CES' protest and was told that GSA would issue an amendment establishing a new bid opening date after our Office issued its decision.[9] CES was not told to check the schedules in the GSA bid room, instead it was told that GSA would send it an amendment. Under the circumstances, we do not believe CES was obligated to specifically check with the agency in a 3-week period from issuance of our decision on its protest and the bid opening date.

Finally, we do not agree with GSA's assertion that the competition was sufficiently adequate so that there is no compelling reason to cancel the IFB and resolicit, notwithstanding its failure to properly distribute the amendment. Only one responsive bid was received and at least three other prospective bidders were eliminated from the bidding as a result of GSA's use of an obsolete mailing list. When so few firms participate in a competition, the absence of even one responsible bidder due to the agency's regulatory violation so diminishes the level of competition that a compelling reason to resolicit the requirement is established. *See Trans World Maintenance, Inc.*, 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; *Abel Converting, Inc. v. United States,* 679 F. Supp. 1133 (D.D.C. 1988).

The protest is sustained.

We recommend that GSA cancel the IFB and resolicit. CES is also entitled to the costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

[9] The parties have submitted conflicting affidavits as to whether CES contacted the first contract specialist after January 15 regarding the status of the procurement. There is no evidence that CES was apprised that a new contract specialist was now responsible for the procurement. Also, the parties have submitted inconclusive conflicting affidavits as to whether GSA technical personnel may have apprised CES of amendment No. 8 or the new bid opening date.

B-242962, June 18, 1991

Procurement

Sealed Bidding
■ Invitations for bids
■■ Amendments
■■■ Notification

Procurement

Sealed Bidding
■ Potential contractors
■■ Exclusion
■■■ Propriety

Where agency failed to send the protester two material solicitation amendments in violation of applicable regulatory requirement governing the dissemination of solicitation materials, and the record shows significant deficiencies in the contracting agency's procedures in sending out solicitation amendments which contributed to the protester's exclusion from the competition and resulted in the receipt of only two responsive bids, the protester was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open" competition.

Matter of: Republic Floors, Inc.

Phil B. Hammond, Esq., Hammond & Tellier, for the protester.

R.W. Jones for Jones Floor Covering, Inc., an interested party.

Craig E. Hodge, Esq., and Michael I. Stump, Esq., Department of the Army, for the agency.

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

Republic Floors, Inc. protests the rejection of its bid as nonresponsive and the award of a contract to Jones Floor Covering, Inc. under invitation for bids (IFB) No. DAAG60-91-B-0008, issued by the Department of the Army for replacing sheet vinyl floor covering. The Army rejected Republic's bid because the firm failed to acknowledge and complete two amendments to the IFB. Republic contends that the agency's failure to send Republic the amendments prevented the protester from furnishing the required amendment information.

We sustain the protest.

The Army synopsized the requirement in the *Commerce Business Daily* (CBD) on October 29, 1990, and invited interested parties to submit written requests for the bid documents. The IFB was issued on November 23, with a December 27 bid opening date, and copies were mailed to 31 interested parties who were either on a bidders mailing list (BML) or had submitted a written request for the bid package. On December 6, the Army issued amendment No. 0001 to the

solicitation which included the certificate of procurement integrity that bidders were required to complete and return with their bids. This amendment package was mailed to 29 interested parties, including Jones, who were on the BML as of that date. According to a declaration signed by the Army's contract specialist, although she had received a written request from Republic for the bid documents and had mailed a solicitation package to Republic, she inadvertently failed to enter Republic's name or address on the BML; thus, the amendment was never sent to the protester. Allied Painting and Decorating and Meris Construction Corp., two other firms that responded by the bid opening date, were also not placed on the BML and this amendment was not mailed to these firms.

Amendment No. 0002, issued on December 17, incorporated a liquidated damages clause into the solicitation and was mailed to 33 interested parties who were on the BML as of that date. Although Jones, the awardee, was on the BML as of the date of issuance of the second amendment, it apparently had not received this amendment as of December 21. On that date, Jones telephoned the contracting agency to confirm that only one amendment had been issued, learned of the issuance of amendment No. 0002, and requested and received a copy by facsimile transmission. Republic, Allied, and Meris were still not listed on the BML and again were not furnished copies of the amendment by the Army.[1] Neither amendment changed the scheduled December 27 bid opening date.

Four firms submitted bids by the scheduled bid opening date. Of those four, only two—Jones and Allied—acknowledged receipt of both amendments and returned executed certificates of procurement integrity. Republic was the apparent low bidder at $231,935, but it failed to acknowledge either amendment and did not include a signed certificate of procurement integrity. Since the amendments were material, the Army rejected Republic's bid as nonresponsive and made award to Jones, the second low, responsive, responsible bidder for $245,474.75. Performance of the contract has been suspended pending our decision.

Republic protests that it was improperly excluded from the competition as a result of flaws in the Army's conduct of the procurement, which frustrated the mandate of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), that contracting agencies obtain full and open competition through the use of competitive procedures.

The Army explains that its failure to add Republic's name to the BML and to send the amendments to the protester was an inadvertent mistake and not a deliberate attempt to exclude the firm from the competition. The agency attributes this mistake to the inexperience of the contract specialist who started

[1] During the pendency of this protest and in response to an inquiry from the contracting agency, Allied indicated that it received amendment No. 0001 on December 17 and amendment No. 0002 on December 24, but does not state how it obtained copies of either amendments. In this regard, the Army reports that Allied received neither the bid package nor the amendments from the agency.
Meris acknowledged receiving both amendments prior to December 27 but noted that it had not kept a record of the dates of actual receipt. Meris also did not identify the source through which it received the amendments.

working in the particular procurement office only 22 days prior to the issuance of the CBD announcement. Further, the agency argues that since the protester did not avail itself of every reasonable opportunity to obtain the amendments prior to bid opening, and the agency was not on notice of Republic's nonreceipt of the amendments prior to bid opening, the protester must bear the risk of nonreceipt. Finally, the agency asserts that the contract was properly awarded to Jones since adequate competition was achieved and reasonable prices obtained.

To meet its obligation under CICA to obtain full and open competition, an agency must use reasonable methods to disseminate solicitation materials to prospective competitors. *See North Santiam Paving Co.,* B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18. In particular, the contracting agency is required by regulation to add to the BML all firms that have been furnished IFBs in response to their requests so that they will be furnished copies of any amendments unless it is known that the request was made by an entity which is not a prospective bidder. *Id.;* FAR § 14.205-1(c). Concurrent with the agency's obligations in this regard, prospective contractors have an obligation to avail themselves of reasonable opportunities to obtain solicitation documents, particularly in a sealed bid procurement. *Fort Myer Constr. Corp.,* B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. Thus, a prospective contractor normally bears the risk of not receiving a solicitation amendment unless there is evidence (other than nonreceipt by the protester) establishing that the agency failed to comply with the FAR requirements for notice and distribution of amendments, *Shemya Constructors,* 68 Comp. Gen. 213 (1989), 89-1 CPD ¶ 108, provided that the prospective contractor availed itself of reasonable opportunities to obtain the documents. *EMSA Ltd. Partnership,* B-237846, Mar. 23, 1990, 90-1 CPD ¶ 326; *Western Roofing Serv.,* B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 323, 91-1 CPD ¶ 242; *Fort Myer Constr. Corp.,* B-239611, *supra.*

As noted above, the FAR requires that the names of prospective bidders who are furnished invitations in response to their request be added to the BML so that they will be sent copies of any solicitation amendments. FAR § 14.205-1(c); *Essex Electro Eng'rs, Inc.,* B-234089.2, Mar. 6, 1990, 90-1 CPD ¶ 253. Here, the Army admits that it failed to comply with this regulatory requirement. The agency sent the IFB to all interested firms that had either responded in writing to the CBD announcement or which the agency had on its BML, but there is no evidence that the agency made any attempt to ensure that those firms were included on the BML for either amendment. The record shows that of the 31 firms that were sent the IFB, 8, including the protester, were not on the BML for either amendment. In addition, Jones, whose name appeared on the BML at all relevant times, apparently did not receive a copy of amendment No. 0002 in the normal course of events. The agency's position essentially is that the final responsibility rests with the protester to ensure that it received all solicitation amendments in a timely manner. We disagree.

Republic could have contacted the agency during the period between the issuance of amendment No. 0001 and the bid opening date to confirm that it had

received all documents pertaining to this solicitation. We do not believe, however, that prospective contractors are obligated to telephone agencies whenever there is a 3-week period between the last amendment they receive and bid opening. In this case, we find that the agency's deficiencies in disseminating the bid materials, not a failure by the protester to avail itself of a reasonable opportunity to obtain the materials, resulted in the failure of the protester and other bidders to receive the amendments, and warrant sustaining the protest.

As a result of the agency's actions, of the four bids which were received, only two were responsive. Where so few firms participate in a competition, the absence of even one responsible firm due to the agency's regulatory violation so diminishes the level of competition and undermines the CICA mandate for full and open competition that a compelling reason to resolicit the requirement is established. *See Trans World Maintenance, Inc.,* 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; *Abel Converting, Inc. v. United States,* 679 F. Supp. 1133 (D.D.C. 1988). Accordingly, we believe that the appropriate remedy is for the agency to terminate Jones's contract and resolicit the requirement, giving all responsible sources a fair opportunity to compete on the resolicitation. We also find that Republic is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

The protest is sustained.

B-244157, June 18, 1991

Procurement

Socio-Economic Policies
■ Small businesses
■■ Competency certification
■■■ Applicability

Agency was not required to refer rejection of protester's offer based on grounds of technical unacceptability to Small Business Administration for certificate of competency determination where firm's proposal was determined not to be within competitive range, since in rejecting firm's offer agency did not reach the question of offeror's responsibility.

Matter of: Pais Janitorial Service & Supplies, Inc.

Victor G. Martinez for the protester.

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

Pais Janitorial Service & Supplies, Inc. protests the rejection of its proposal under request for proposals (RFP) No. F41691-90-R0058, issued by the Department of the Air Force for janitorial services. The protester contends that the

agency should not have rejected its proposal without referring the matter to the Small Business Administration (SBA) under certificate of competency (COC) procedures.

We summarily dismiss the protest without obtaining a full agency report since on its face the protest does not state a legally valid basis of protest. *See* 4 C.F.R. § 21.3(m) (1991).

The Air Force determined that Pais's technical proposal failed to meet the solicitation's minimum requirements because it was deficient in four out of five of the technical evaluation criteria and would require major revisions to make it acceptable. Consequently, the firm's proposal was eliminated from the competitive range. In its protest, Pais does not take issue with the Air Force's determination as to the technical unacceptability of the firm's proposal. Instead, Pais simply argues that the Air Force should not have rejected its offer as technically unacceptable without first referring the matter to the SBA because it contends its responsibility is at issue.

This argument is without merit. While no small business may be precluded from award because of nonresponsibility without referral of the matter to the SBA for a final determination, 15 U.S.C. § 637(b)(7)(A) (1988); *Pacific Sky Supply, Inc.*, 64 Comp. Gen. 194 (1985), 85-1 CPD ¶ 53, Pais was not found nonresponsible, that is, incapable of meeting the obligations that it would incur if awarded the contract. Rather, Pais's proposal was determined to be technically unacceptable when evaluated under the criteria specified in the RFP. In this circumstance, even where the evaluation factors are related to responsibility, a proposal from a small business, such as Pais, may be rejected as technically unacceptable even when based in part on responsibility-type considerations without referral of the question to the SBA for possible issuance of a COC. *TM Sys., Inc.*, B-236708, Dec. 21, 1989, 89-2 CPD ¶ 577; *Systec, Inc.*, B-205107, May 28, 1982, 82-1 CPD ¶ 502. Consequently, here, the Air Force's determination of the technical unacceptability of Pais's proposal was not required to be referred to the SBA.

The protest is dismissed.

B-233397.2, June 21, 1991

Civilian Personnel

Relocation

■ **Travel expenses**

■ ■ **Privately-owned vehicles**

■ ■ ■ **Mileage**

On reconsideration, our prior decision, *James R. Stockbridge*, 69 Comp. Gen. 424 (1990), which held that an employee who was permanently transferred to the place where he was on temporary duty, is entitled to round-trip en route per diem and mileage expenses for return to his old duty station by privately owned automobile to retrieve stored household goods, is affirmed. Interest is not payable on the claim in the absence of an express statutory or contractual authorization.

Matter of: James R. Stockbridge—Reconsideration—Relocation Travel-Mileage and Per Diem

Mr. Roy E. Morris, Authorized Certifying Officer, Office of Surface Mining, United States Department of the Interior, requests reconsideration of our decision, *James R. Stockbridge,* B-233397, Apr. 27, 1990, published at 69 Comp. Gen. 424. We held that Mr. Stockbridge, an employee of the agency, who had been permanently transferred from Redding, California, to Washington, D.C., where he was on temporary duty assignment, is entitled to en route per diem and mileage expenses by privately owned automobile for round-trip travel to Redding to retrieve stored household goods. Our conclusion was based on the provisions of paragraph 2-2.3a of the Federal Travel Regulations (FTR),[1] which provide that relocation travel by privately owned vehicle is deemed to be advantageous to the government.

In support of the request for reconsideration, the certifying officer has submitted a supplementary administrative report in which he states that prior to returning to Redding, Mr. Stockbridge requested that the Government Bill of Lading (GBL) include shipment of an inoperative automobile to Washington, D.C. The certifying officer alleges that when Mr. Stockbridge was advised that he could not include transportation of an inoperative automobile in his household goods shipment, he opted to drive to Redding and tow the automobile to Washington, D.C. The certifying officer therefore believes that the only reason Mr. Stockbridge drove from Washington, D.C., to Redding and back was to tow the inoperative automobile. The certifying officer states that by driving to Redding, Mr. Stockbridge was absent from his job for a longer period of time and essentially cost the government more money by his absence.

In his written response to the supplementary administrative report, Mr. Stockbridge states that the purpose of his return trip to Redding was to account for the transfer of his household goods from storage to the moving van and to protect his furnishings from unrecoupable damage by the transfer agent. He says that there were certain items that the transfer agent was unable to transport, i.e., a canoe, several hundred board feet of expensive ($4.50 per board foot) black walnut lumber, several sheets of veneer-grade plywood, cleaning solvents, furniture-finishing liquids, and an antique 1948 Willys Jeep. Mr. Stockbridge states that he was able to load all of these items on his pick-up truck, except the Jeep, which he towed behind his truck, for the trip back to Washington, D.C.

Mr. Stockbridge contends that had he been required to travel by common carrier, he would have had to liquidate or dispose of the items discussed above which, under normal relocation conditions, he would have been able to move. He states that had he been required to dispose of these items, which a prudent man would not do, it would have taken approximately 1 week of additional time in Redding to accomplish this task. He also states that, in using his pickup

[1] (Supp. 1, Sept. 28, 1981), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1988).

truck to move some of his household goods, he drove in excess of 700 miles per day (as opposed to the regulatory standard of 350 miles per day).

Mr. Stockbridge also requests that we address the issue of the payment of interest on the amount of his claim, either from the date of his original claim, the date of our initial decision, or the date of this decision.

As discussed in our decision of April 27, 1990, FTR, para. 2-2.3a, which governs reimbursement for Mr. Stockbridge's use of his privately owned vehicle (POV) for his travel, clearly establishes the use of such a vehicle for permanent change-of-station travel as being advantageous to the government and allows no discretion by agency officials to conclude otherwise. *Dominic D. D'Abate,* 63 Comp. Gen. 2 (1983).

The additional information submitted by the certifying officer as to the reasons why Mr. Stockbridge chose to travel by POV rather than by commercial carrier do not compel us to reverse our prior decision. Mr. Stockbridge's response shows that the reasons for the use of his POV for the trip to and from Redding were to arrange for the transfer of his household goods from storage to the moving company and for the transportation of the remaining household goods by his privately owned vehicle to Washington, D.C. We believe his use of a POV for these purposes was entirely consistent with the established rule that such travel incident to a transfer is treated as advantageous to the government.

Accordingly, we affirm our decision of April 27, 1990. Mr. Stockbridge's reclaim voucher should be processed in conformance with that ruling.

With respect to the payment of interest on the amount of the claim, it is a well-settled rule of law that the payment of interest on claims against the government of the United States may be made only under an express statutory or contractual authorization.[2] Therefore, interest may not be paid on Mr. Stockbridge's claim.

[2] *Seaboard Air Line Railway v. United States,* 261 U.S. 299, 304 (1923); *Smyth v. United States,* 302 U.S. 329, 353 (1937); *Fitzgerald v. Staats,* 578 F.2d 435 (D.C. Cir. 1978); 45 Comp. Gen. 169 (1965); *Leland M. Wilson,* B-205373, Apr. 24, 1984.

B-243000, June 24, 1991

Procurement

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

Procurement

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

In a negotiated, indefinite quantity procurement for construction, maintenance, and repair services, the procuring agency reasonably evaluated the protester's proposal as technically unacceptable and properly eliminated it from the revised competitive range after discussions, where the protester's model project submissions, which were evaluated under a specific evaluation criterion, failed to demonstrate the protester's understanding of the solicitation requirements or the protester's ability to use the required unit price book to price contract services.

Matter of: Beneco Enterprises, Inc.

Patrick S. Hendrickson, Esq., Howell, Fetzer & Hendrickson, for the protester.

Maj. Richard B. Robison and Capt. K. Lisa Guillory, 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.

Beneco Enterprises, Inc. protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. F08651-90-R-0004, issued by the Department of the Air Force, for the simplified acquisition of base engineering requirements (SABER) at Eglin Air Force Base (AFB), Florida.

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

The RFP, issued as a total set-aside for small disadvantaged businesses, contemplated the award of a fixed-price, indefinite quantity contract for minor construction and small and medium-sized maintenance and repair projects at Eglin AFB for a base year and 3 option years. Tasks under the RFP included carpentry, road repair, roofing, excavation, interior electrical services, steam fitting, plumbing, sheet metal, painting, demolition, concrete masonry, and welding. The RFP included detailed task specifications. A minimum of $300,000 was required to be ordered each year and a maximum of $10,000,000 could be ordered for the base year.[1]

[1] Specified larger amounts of work could be ordered in the option years.

The RFP included a unit price book (UPB), containing price information (*i.e.*, a government estimate) for a large variety of work items in specified units of measure.[2] The RFP required offerors to provide percentage factors for standard and non-standard [3] working hours to accomplish the RFP work, and informed offerors that the actual cost of contract work would be determined by multiplying the UPB unit price by the appropriate percentage coefficient.

Offerors were informed that award would be made to the responsible offeror, whose offer was the most advantageous to the government, based upon an integrated assessment of the evaluation criteria. Technical criteria were more important than cost/price. The technical evaluation factors were stated in descending order of importance as follows:

(1) Project Management Ability
(2) Subcontracting Support Capability
(3) Project Execution

Subfactors were provided for each evaluation factor. Each criterion was to be assessed for compliance with the solicitation requirements, soundness of approach, and understanding the problem.

Offerors were instructed in section L of the RFP as to the required format and content of technical proposals relative to each of the evaluation factors and subfactors. For the "project execution" criterion, offerors were informed that attached to the RFP was a sample work order for the construction of a pre-engineered metal building and that offerors were required to submit all necessary drawings, documents, and cost estimates for the execution of this model project. The RFP provided that the model projects would be evaluated for (1) technical approach to meeting the RFP requirements, specifications and statement of work; (2) use of the UPB (*i.e.*, the use of pre-priced listings *vis-a-vis* non-pre-priced listings); and (3) cost effectiveness decisions.

Of the 10 proposals received by the Air Force, 7 proposals, including Beneco's, were found to be in the initial competitive range. Written discussions were conducted with each of the competitive range offerors. Beneco received eight clarification requests (CR) and eight deficiency reports (DR) and was provided with the opportunity to revise its proposal. The Air Force determined, after its evaluation of Beneco's responses to the agency's CRs and DRs, that Beneco had not demonstrated an understanding of the solicitation requirements or a familiarity with the UPB. Accordingly, Beneco's proposal was determined to be technically unacceptable and was eliminated from the revised competitive range. This protest followed. Best and final offers have been received from the six remaining offerors but no award has been made.

[2] The UPB prices include the costs of material, delivery, equipment, and labor. The RFP provided that work items that were not pre-priced in the UPB would be negotiated during the contract. The stated contract goal was that over 90 percent of the work items would be pre-priced listings from the UPB.

[3] The RFP estimated that less than 5 percent of the maximum dollar amount of the contract would be accomplished on a non-standard basis.

Beneco protests that the agency's determination that its proposal was technically unacceptable and its consequent elimination from the revised competitive range was unreasonable. Specifically, the protester contends that the agency's evaluation of Beneco's model project was unreasonable because (1) the evaluation of the model project was not a specific evaluation criterion and was given too much weight in the evaluation in any case; (2) the model project was not an accurate test of SABER understanding and the RFP failed to provide sufficient information for the model project to allow "a prudent, knowledgeable SABER contractor" to provide a complete offer; and (3) the problems identified by the agency regarding Beneco's model project are illusory and undocumented.

First, Beneco is not correct that the RFP did not provide for the evaluation of offerors' model projects under a specific evaluation criterion. The RFP, as noted above, specifically identified "project execution" as a technical evaluation factor, and informed offerors in section L that the agency, under "project execution," would evaluate offerors' model project submissions for technical conformity and approach, completeness of pricing, and cost effectiveness. Thus, we fail to see how Beneco could not know that its model project would be considered by the Air Force in the technical evaluation.

Beneco's contentions that the RFP provided insufficient model project information to allow offerors to submit complete offers and that the model project is not an accurate representation of how SABER procedures actually operate concern apparent solicitation improprieties that Beneco was required to protest prior to the closing date for receipt of proposals.[4] *See* 4 C.F.R. § 21.2(a)(1) (1991). Accordingly, its protest on these grounds, first raised in Beneco's comments on the agency's report, is dismissed as untimely.

In reviewing Beneco's protest of the agency's technical evaluation and decision to eliminate an offeror from the competitive range, we will not evaluate the proposal anew, but instead will examine the agency's evaluation to ensure that it was reasonable and in accord with the evaluation criteria listed in the solicitation. *Abt Assoc., Inc.*, B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223. We will review the documentation supporting the evaluation decision to determine whether the decision was adequately supported and rationally related to the evaluation factors as required by Federal Acquisition Regulation (FAR) § 15.612(d)(2). *Programmatics, Inc.; Telesynetics Corp.*, B-228916.2; B-228916.3, Jan. 14, 1988, 88-1 CPD ¶ 35.

From our review of the record, we find that the agency's evaluation of Beneco's proposal was adequately documented, reasonable, and in accordance with the RFP evaluation criteria. The record consists of the agency's summary evaluation of offerors' proposals, written CRs and DRs identifying proposal deficiencies, Beneco's written responses to the CRs and DRs, the agency's evaluation of Beneco's revised proposal, and the contracting officer's revised competitive range determination. The record indicates all of the deficiencies that resulted in the agency's determination that Beneco's model project was unacceptable were

[4] Beneco never sought clarification of the model project requirements.

fully disclosed to the protester in the written CRs and DRs. This record sufficiently documents the agency's evaluation decision to allow us to determine the rationality of the agency's technical judgments. *See Hydraudyne Sys. and Eng'g B.V.*, B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88.

Beneco's contention that the model project was given too much weight in the evaluation, even though this was the factor that ultimately caused Beneco's otherwise marginal proposal to be rejected, is not supported by the record. That is, Beneco's revised proposal was rated only marginally acceptable under the "project management ability" and "subcontracting support capability" criteria, even after discussions, and since Beneco's model project was evaluated as unacceptable, Beneco was considered technically unacceptable overall with no real chance at award. This weighting of the evaluation criteria was in accord with the RFP.

Beneco also attacks the agency's evaluation of its model project. The Air Force found that Beneco in its model project, despite specific discussions from the agency, failed to demonstrate its understanding of SABER requirements and its ability to use the UPB to find pre-priced items. For example, the model project specified a pre-engineered metal building as a requirement and the UPB provided a pre-priced listing that would satisfy this requirement. Beneco, however, proposed to construct a metal building from component UPB line items. In response to the agency's DR concerning Beneco's approach, the protester stated that it had been unable to locate the pre-engineered building in the UPB. Beneco was similarly unable to find, as it admitted in discussions, numerous other pre-priced items in the UPB.[5]

The Air Force also questioned several other aspects of Beneco's model project, including the firm's inclusion of work items that were not required. While Beneco in discussions informed the agency that these items were offered as "options" or "alternatives," these items were not identified as options or alternatives in its proposal. Also, Beneco's use of waste allowance percentages for rebar and asphalt was questioned, since the RFP restricted waste and excess quantities to specified building materials, not including rebar or asphalt. In response to the DRs on this matter, Beneco deleted the waste factor percentages for rebar and asphalt in its revised proposal with the statement that it had been the firm's practice to use these waste factor percentages under its other SABER contracts.[6]

Under the circumstances, the agency reasonably concluded that Beneco's model project and the firm's responses to the agency's discussion questions indicated a lack of understanding of the solicitation's requirements and familiarity with the

[5] Beneco argues that the agency failed to identify during the protest which items were not pre-priced. The record indicates that all of these items were specifically identified in the written discussions provided to Beneco.

[6] The protester also objects that the RFP list of building materials to which a waste allowance can be applied was not intended to be inclusive. We disagree. The RFP unambiguously states that waste allowance "[f]actors shall be applied for the following building materials" and then lists specific materials. We think the plain meaning of this clause is that a waste or excess quantities allowance would not be permitted for materials not identified in the RFP.

UPB. Beneco's mere deletion of these items in response to the agency's discussion questions, while "correcting" the identified deficiency, does not demonstrate that Beneco understood the scope of work sought by the model project or could find the pre-priced listings in the UPB. In this regard, in assessing an offeror's response to a sample problem, an agency may properly give greater weight to the offeror's initial solution in judging its understanding. *See Syscon Servs., Inc.*, 68 Comp. Gen. 698 (1989), 89-2 CPD ¶ 258; *Hill's Capitol Sec., Inc.*, B-233411, Mar. 15, 1989, 89-1 CPD ¶ 274. Given that Beneco's proposal was otherwise marginal, the Air Force reasonably eliminated Beneco's revised proposal from the competitive range as technically unacceptable based on its unacceptable model project. *See John W. Gracey*, B-228540, Feb. 26, 1988, 88-1 CPD ¶ 199 (an agency may reasonably downgrade an offeror who does not demonstrate the requisite understanding of solicitation requirements in its proposal and exclude that proposal from the competitive range).

Beneco argues that the agency's exclusion of its proposal from the revised competitive range was not made in accordance with the Air Force's Formal Source Selection for Major Acquisition Regulations § 3-11. Specifically, Beneco complains that its proposal should not have been excluded from the competitive range absent a showing that its proposal contained a "substantial technical drawback" that could not be corrected without a major rewrite of its proposal.

This section, which is in appendix AA to Air Force Regulation 70-15, is not applicable to this procurement, since this is not a major acquisition. Moreover, this regulation is an internal instruction to aid agency personnel and does not itself provide outside parties with any legal rights. *See Sabreliner Corp.*, B-242023; B-242023.2, Mar. 25, 1991, 91-1 CPD ¶ 326. Where, as here, a proposal that was initially included in the competitive range is found after discussions to have no reasonable chance for award, the proposal may properly be excluded from the competitive range. FAR § 15.609(b).

Finally, Beneco complains that some of the CRs it received from the agency should have been identified as DRs. However, Beneco does not explain how, even assuming that this is true, the protester was prejudiced thereby. In any event, the identification of a discussion question as a CR rather than a DR does not in itself provide any basis for protest, in the absence of a showing that meaningful discussions were not conducted. *See Advance Sys. Tech., Inc.; Eng'g and Prof. Servs., Inc.*, B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153.

The protest is dismissed in part and denied in part.

B-243061, June 24, 1991

Procurement

Bid Protests

■ GAO procedures

■■ Agency notification

■■■ Deadlines

■■■■ Constructive notification

Requirement under 4 C.F.R. § 21.1(d) (1991) of General Accounting Office's (GAO) Bid Protest Regulations that the contracting officer receive copy of protest within 1 working day after filing with GAO was met by subcontractor which provided copies of the protest to the contractor conducting the procurement "by or for the government" as well as to government officials believed to be involved in the subcontractor selection.

Procurement

Bid Protests

■ Subcontracts

■■ GAO review

General Accounting Office (GAO) will consider protest of subcontract award where the government's involvement in the procurement is so pervasive that the contractor was a mere conduit for the government in selecting the subcontractor. Where government officials identify the need for the services, draft the solicitation evaluation criteria, select government officials to serve on the evaluation committee, and approve the evaluation committee's subcontractor selection, the procurement is "by or for the government" and subject to GAO's bid protest jurisdiction.

Procurement

Bid Protests

■ Agency-level protests

■■ Protest timeliness

■■■ GAO review

Procurement

Bid Protests

■ GAO procedures

■■ Protest timeliness

■■■ 10-day rule

■■■■ Adverse agency actions

Where a protest has been filed initially with contracting agency, subsequent protest to General Accounting Office is timely where filed within 10 days of initial adverse agency action, provided that the initial protest was filed in a timely manner. Where government contractor is conducting the procurement "by or for the government," protest to contractor constitutes agency-level protest.

Procurement

Competitive Negotiation
■ Contract awards
■ ■ Propriety
■ ■ ■ Subcontracts

Protest against award of subcontract is sustained where proposals were not evaluated based solely on evaluation factors stated in the solicitation.

Matter of: St. Mary's Hospital and Medical Center of San Francisco, California

Donn Pickett, Esq., and Holly A. House, Esq., McCutchen, Doyle, Brown & Enersen, for the protester.

Robert M. Halperin, Esq., Crowell and Moring, for Foundation Health Federal Services, Inc., an interested party.

Karl E. Hansen, Esq., Office of Civilian Health and Medical Program of the Uniformed Services, for the agency.

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

St. Mary's Hospital and Medical Center of San Francisco, California, protests the award of a subcontract by Foundation Health Plan (Foundation) to May, Ecker, Iverson, Young, and Ennix Cardiac & Thoracic Surgery Medical Group (May, Ecker) for cardiac surgery services. St. Mary's essentially argues that the award decision was based on undisclosed evaluation criteria.

We sustain the protest.

Background

The Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) is a civilian agency of the Department of Defense which is responsible for providing health care for the civilian dependents of active duty members of the uniformed services and for retirees of the uniformed services and their dependents. On January 19, 1988, Foundation Health Corporation entered into contract No. MDA903-88-C-0056 with OCHAMPUS requiring Foundation Health Corporation to provide for the development, implementation, and operation of a health care delivery system and claims adjudication and processing system which would operate in support of and in coordination with the uniformed services medical treatment facilities located within California and Hawaii.[1] The contract was awarded under a program called "CHAMPUS

[1] By virtue of a novation agreement between Foundation Health Federal Services, Inc. (FHFS) and Foundation Health Corporation, FHFS subsequently assumed responsibility for performance of the contract.

Reform Initiative," which seeks to improve the coordination between the military and civilian components of the military health services system. The contract specifically required that Foundation Health Corporation establish a provider network, by contractual or other arrangements, and to develop and implement a plan for seeking agreements with individual military treatment facilities to use medical personnel, equipment, and/or supplies.

On June 30, 1988, Foundation Health Corporation entered into a subcontract with Foundation which provided, generally, that Foundation would perform the services required under the prime contract to eligible CHAMPUS beneficiaries in northern California.

By letter dated May 14, 1990, the Commander, San Francisco Medical Command, Department of the Navy, sent Foundation a proposal for a cardiac surgery program to be performed initially at Letterman Army Medical Center and to be transferred to Naval Hospital Oakland on July 1, 1991. The proposal identified the requirement for cardiac surgery services as a result of a decision to terminate the cardiac surgery program at Letterman Army Medical Center, the only existing military cardiac surgery program in the San Francisco area. The plan contemplated that these military treatment facilities would enter into a resource sharing agreement with Foundation under the CHAMPUS Reform Initiative. Foundation would then enter into a contract with a cardiac surgery provider which would perform the required cardiac surgery at Letterman Army Medical Center and Naval Hospital Oakland.

By letter dated May 31, 1990, Foundation requested proposals to provide cardiac surgery services to CHAMPUS beneficiaries at Letterman Army Medical Center which would later be moved to the Naval Hospital Oakland. The request for proposals (RFP or solicitation) stated that as part of the CHAMPUS Reform Initiative Resource Sharing Program, the selected offeror would provide cardiac surgery services to CHAMPUS beneficiaries. The solicitation, which indicated that a representative of Foundation was conducting the procurement, required that the prospective contractors furnish all surgical staff other than an anesthesiologist. In addition, the solicitation required that proposals include information regarding the number and outcomes of surgery cases performed over the last 3 years. The RFP also requested that offerors provide curricula vitae for all members of its surgery group.

Foundation received six proposals in response to its solicitation by July 1990. By letter dated October 5, 1990, Foundation requested that May, Ecker and St. Mary's provide Foundation with additional information not requested in the original RFP concerning credentialing action or cases filed against liability coverage. By letter dated November 9, 1990, the Commander, San Francisco Medical Command, at the request of the San Francisco Medical Command Executive Committee, appointed a selection committee to choose the cardiac surgery provider. The Commander designated the chief of the cardiac surgery program at Letterman Army Medical Center as chairman of the committee. The Commander also appointed members of the staffs of the Department of Veterans Affairs Medical Center, David Grant U.S.A.F. Medical Center, San Francisco Medical

Command, and Naval Hospital Oakland, to serve on the selection committee. The Foundation representative specified in the solicitation also served on the committee.

After the offers were received, the chairman of the committee drafted evaluation criteria which were later approved by the committee. The offerors were not provided copies of the evaluation criteria used by the committee. The record shows that the selection committee met on December 7, 1990, to review and rank the proposals. May, Ecker received the high score of 1,800, while St. Mary's received the second highest score of 1,749. By letter dated December 11, Foundation advised the two surgery groups that the selection committee would conduct an interview with each group concerning the following three specific issues: (1) a case-by-case review of the group's mortality experience; (2) 24-hour coverage to Naval Hospital Oakland; and (3) a fixed, per patient rate.[2] The agency has not provided our Office with any documentation describing what was actually discussed at the interviews or what impact the interviews had on the decision-making process. The committee did not request best and final offers or rescore the proposals after the interviews. The committee voted 4 to 2 to recommend May, Ecker for selection.

The record shows that the primary factors leading to the recommendation were that May, Ecker is a large, cohesive group with experience, that all members work and live in close proximity to the Hospital, and that the members of the group hold academic appointments and are currently involved in teaching residents. None of these factors was identified to the offerors as an evaluation factor during the course of the procurement.

The recommendation was approved by the Commander, San Francisco Medical Command, who, in turn, notified Foundation on January 4, 1991. Foundation advised May, Ecker and St. Mary's of the award decision on January 7. On March 1, Foundation entered into a resource sharing agreement with Letterman Army Medical Center and Naval Hospital Oakland requiring Foundation to provide cardiac surgery services to those military treatment facilities. The agreement, which was signed by the Commander, San Francisco Medical Command for Naval Hospital Oakland, provided that Foundation shall bear the costs of providing the services, subject to the compensation arrangements contained in its subcontract.

The protester asserts that, on January 10, it first learned from a Foundation representative in a telephone conversation that the award decision was based on factors which had not been stated in the solicitation. St. Mary's filed a protest with Foundation on January 25, alleging that the award decision was not based on what St. Mary's believed to be the three main evaluation criteria: mortality rate, 24-hour coverage, and price. The protester argued that its mortality statistics were significantly lower than the awardee's, that St. Mary's promised coverage with physicians residing in the geographical area, and that it has a

[2] These issues corresponded to only 3 of the 24 evaluation factors actually used by the committee to evaluate proposals.

much lower price than the awardee. By letter dated February 11, the Commander, San Francisco Medical Command, notified St. Mary's that the award decision would not be changed. St. Mary's filed this protest on February 25.

Threshold Issues

Service of a Copy of Protest on the Procuring Agency

OCHAMPUS preliminarily argues that our Office should dismiss the protest because the protester did not furnish the agency a copy of the protest within 1 day of filing the protest with our Office and that OCHAMPUS has been prejudiced by the protester's failure to do so. St. Mary's provided copies of its protest to the Foundation representative, the Commander, San Francisco Medical Command, several members of the selection committee, and the Deputy Assistant Secretary of Defense, Health Services Financing.

Our Bid Protest Regulations require a protester to furnish a copy of the protest to the individual or location designated by the contracting agency in the solicitation for receipt of protests, or the contracting officer if no individual or location is so designated, within 1 day of the filing of the protest. 4 C.F.R. §§ 21.1(d), (f) (1991). This requirement was drafted with protests of prime contract awards in mind. The reference to individuals designated by the contracting agency and to the contracting officer is not applicable in the context of a subcontract protest, where there is no contracting agency or contracting officer. *University of Mich.; Indus. Training Sys. Corp.*, 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. The protester clearly sought to comply with the purpose of the regulation by providing copies of its protest to the contractor which appeared to be conducting the procurement and to certain government officials, and in the absence of any designated individual in the solicitation, we find this was all that was reasonably required by the regulation.

Jurisdiction

OCHAMPUS also argues that the protest should be dismissed for lack of jurisdiction over subcontract protests. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 *et seq.* (1988), our Office has jurisdiction to decide protests involving procurements by federal agencies. Procurements by government prime contractors generally are not viewed as procurements by federal agencies. *See, e.g., ToxCo, Inc.*, 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170. In some cases, however, the prime contractor is merely acting "by or for the government." In such cases, we will assume jurisdiction. 4 C.F.R. § 21.3(m)(10). One such case is where the government's involvement in the subcontractor selection is so pervasive that the contractor is a mere conduit for the government. *See University of Mich.; Indus. Training Sys. Corp.*, 66 Comp. Gen. 538, *supra; Aviation Data Serv., Inc.—Recon.*, B-238057.2, Apr. 11, 1990, 90-1 CPD ¶ 383. Although Foundation technically is itself a subcontractor here, we take jurisdic-

tion because we find that the government's involvement was so pervasive in this procurement obstensibly conducted by Foundation that Foundation was a mere conduit for the government and that the government "took over" the procurement from Foundation. *See Perkin-Elmer Corp., Metco Div.,* B-237076, Dec. 28, 1989, 89-2 CPD ¶ 604.

Although Foundation issued the solicitation, received proposals, asked offerors for additional information, and notified offerors of interview sessions and of the award decision, every meaningful aspect of the procurement for cardiac surgery services, involving evaluation of proposals and selection of a contractor, was controlled by government officials. The Commander, San Francisco Medical Command, identified the need for services and appointed an evaluation committee. This committee consisted almost exclusively of government employees, members of the medical staffs of government facilities. The evaluation criteria were drafted by a government official who was chairman of the committee. The committee approved the criteria, evaluated the proposals, conducted the interviews with the two offerors, and recommended one of them for selection. The Commander then reviewed and approved the recommendation of the committee and so notified Foundation, which, on the next working day, notified May, Ecker and St. Mary's of the award decision.

While the Foundation representative has provided our Office with an affidavit stating that the final decision was made by Foundation, the record contains no other documentation indicating that Foundation participated in the final decision. On the contrary, the record shows that Foundation performed the procedural aspects of the procurement, but that the substantive aspects were performed by the government such that the selection of the cardiac surgery provider was, in effect, by the Department of Defense. Foundation, by virtue of its contractual status with OCHAMPUS, served only as a conduit or "middleman" between various components of the Department of Defense, *i.e.,* OCHAMPUS, San Francisco Medical Command, Letterman Army Medical Center, and Naval Hospital Oakland, and the awardee.

Timeliness

Foundation and OCHAMPUS argue that the protest is untimely because it was not filed with our Office within 10 days of when St. Mary's learned of the basis of the award decision. St. Mary's, however, initially protested to Foundation. Our Regulations provide that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action on the protest will be considered, provided that the initial protest to the agency was filed in a timely manner. 4 C.F.R. § 21.2(a)(3). St. Mary's filed a timely protest of the award decision with Foundation on January 25, 1990, within 10 working days of when it learned of the basis for its protest.[3] By letter

[3] While the agency argues that the protest to Foundation should not be considered an "agency-level" protest, in the context of a subcontract protest, where, as here, there is no apparent contracting officer other than the contractor's representative, the protest to Foundation constitutes an agency-level protest.

dated February 11, the Commander, San Francisco Medical Command, advised St. Mary's that the award decision would not be changed. The St. Mary's protest to our Office on February 25, filed within 10 days of its receipt of the Commander's letter, is therefore timely.[4]

Discussion

Standard of Review

The statutes and regulations governing direct federal procurements generally do not apply to procurements by prime contractors. However, where, as here, the contractor is only a conduit for providing the government with its required services, we believe it is appropriate to consider the procurement as one by the government and thus subject to federal statutes and regulations and to review the protest in that light. *See University of Mich.; Indus. Training Sys. Corp.*, 66 Comp. Gen. 538, *supra.*

Evaluation of Proposals

The procurement violated a basic statutory requirement applicable to competitive procurements. CICA requires that solicitations include a statement of evaluation factors (including price) and their relative importance and further requires that agencies evaluate proposals solely on those factors. 10 U.S.C. §§ 2305(a)(2), (b)(1) (1988). The record clearly shows that this requirement was not met here.

The solicitation requested general information about the provider's performance history and personnel qualifications. As stated, the actual award decision was made on the basis of weighted evaluation criteria which were disclosed only to the members of the selection committee. These undisclosed factors included the size of the group, the proximity of surgeons to the hospital, and the willingness of the group to become involved in teaching and training. While the agency has failed to provide our Office with a complete breakdown of the scoring of proposals based on the undisclosed factors, the record shows that the principal factors provided by the committee to support its recommendation were that the awardee is a large cohesive group with experience, that all members work and live within a 30-minute commuting distance from Naval Hospital Oakland, and that the group has extensive experience in training residents. Since the government based its award decision on these factors, which were never revealed during the course of the procurement, the award was improper and we sustain the protest.

[4] We also find that St. Mary's had no reason initially to believe that the government would "take over" the procurement or that the solicitation was subject to our bid protest jurisdiction. Based on the correspondence which it initially received from Foundation, St. Mary's could not have reasonably concluded that Foundation was conducting the procurement on behalf of the government. The record shows that St. Mary's first learned of the government's involvement from a letter, signed by the Foundation representative, dated February 15. Since the protester had no jurisdictional basis to protest with our Office before that date, its protest of February 25 to our Office is timely for this reason also.

Conclusion/Recommendation

In fashioning a remedy, our Office considers the particular circumstances surrounding the procurement at issue. Here, several firms submitted proposals which were highly rated under the government's undisclosed evaluation criteria. It is unclear how the outcome of the competition would have been affected had offerors been able to prepare their proposals in response to a solicitation which contained a statement of the evaluation factors and the relative importance of those factors. Consequently, we recommend that Foundation issue a new solicitation and provide offerors with a statement of the evaluation factors and their relative importance. If, upon the evaluation of the proposals based on the stated criteria, a firm other than May, Ecker is the successful offeror, Foundation should terminate the current contract and award the contract as appropriate. Further, we find that St. Mary's is entitled to the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1); *University of Mich.; Indus. Training Sys. Corp.*, 66 Comp. Gen. 538, *supra*.

The protest is sustained.

B-243158, June 24, 1991

Procurement

Socio-Economic Policies
■ Small business set-asides
■■ Cancellation
■■■ Justification

Cancellation of small business-small purchase set-aside under a request for quotations (RFQ) was proper where protester, the only small business submitting a quote, conditioned its compliance with the RFQ's 10-day completion schedule in telephone call to agency after submission of quote; although protester disputes agency's interpretation that it qualified quote, based on record agency's interpretation was reasonable.

Matter of: Southeastern Chiller Services, Inc.

David L. Royer for the protester.

Marilyn Walter Johnson, Esq., and Vicki E. O'Keefe, Esq., Department of the Navy, for the agency.

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

Southeastern Chiller Services, Inc. (SCS) protests the cancellation of Department of the Navy request for quotations (RFQ) No. N62467-91-M-4732, a small business-small purchase set-aside, and the subsequent award of a contract to a large business, McQuay Services, for the repair of a chiller. The chiller cools

computer mainframes, which were used by the Naval Air Station, Jacksonville, Florida for processing requisitions in support of Operation Desert Shield.

We deny the protest.

The repair services for the McQuay chiller were urgently required because the breakdown of the chiller caused the Navy's computer mainframes to be shut down, which resulted in an extensive loss of revenue to the government, and discontinuation of all processing of requisitions for Operation Desert Shield. Thus, on November 15, 1990, the Navy issued this RFQ as a small business-small purchase set-aside in accordance with Federal Acquisition Regulation (FAR) § 13.105. The RFQ advised that all repair work must be completed within 10 calendar days after award.

On the morning of November 15, the Navy called three companies, including the protester, and requested that quotes for the repair services be submitted by 4 p.m. that day. Two companies submitted timely quotes: McQuay, a large business and manufacturer of the chiller, submitted the low quote at $21,500, while SCS, a small business, was second low at $24,277; the government estimate was $17,437.50.

Approximately 10 minutes before the 4 p.m. deadline for receipt of quotes, SCS' president telephoned the cognizant contracting specialist. A portion of the ensuing conversation is in dispute. The agency states that SCS advised that it would be able to comply with the RFQ requirements if notified of the award "by the end of the day" to allow time for ordering parts. SCS asserts that it stated only that it "might" not be able to obtain the only motor available if it was unable to place an order for new motor windings "within a day." The agency advised that notice could not be given that same day due to a need to request additional funding that would delay the award decision until the next day.

On November 16, based on its understanding that SCS had qualified its quote on receiving award notification by the end of the prior day, the agency determined that no acceptable small business quotes had been received, and therefore canceled the small business-small purchase set-aside. *See* FAR § 13.105(d)(3). The agency then issued a purchase order to McQuay based on its low quote. After denial of its agency-level protest, SCS filed this protest in our Office.

SCS argues that the Navy improperly canceled the set-aside and made award to McQuay instead of making award to SCS as the low, acceptable small-business quoter. This argument is based on SCS' account of its conversation with the Navy during which it allegedly stated that it could meet the requirement, but "might" not be able to perform if not advised of the award decision "within a day" after the conversation. SCS did not prepare a contemporaneous record of this conversation. SCS maintains that the Navy should have contacted SCS the next day, before proceeding with the award to McQuay, to determine whether the firm in fact could still meet the agency's requirements.

We find the Navy's actions unobjectionable. While SCS agreed to comply with the terms of the RFQ in its quote, including the 10-day performance require-

ment, its telephone call to the agency introduced into the agency's deliberations a timing consideration not evident from the firm's quote. Specifically, whether or not intended as such by SCS, its statement that it "might" not be able to perform absent award notification by a certain time qualified its quote as to the firm's ability to meet the delivery schedule. The Navy understood SCS' statements as imposing a same day award notification contingency on SCS' ability to meet the schedule and, even if the agency misinterpreted SCS' intended message, we cannot say that its understanding was unwarranted. In this regard, SCS claims it requested notice only "within a day," but does not indicate that it made reference to a specific time or date, or that the Navy acknowledged understanding that SCS needed notice only by the next day, and has furnished no contemporaneous notes documenting the conversation.

Given that SCS initiated the telephone call in question to qualify its quote (even under SCS' version of the conversation), we think it was incumbent on the firm to assure that there was no doubt as to the information it was providing, particularly considering that the qualification concerned the performance schedule for an urgent requirement. On this record, we cannot find that it did so. Under these circumstances, there is no basis for objecting to the cancellation of the set-aside and the award to McQuay.

The protest is denied.

B-243067, June 27, 1991

Procurement

Noncompetitive Negotiation

■ **Use**

■■ **Justification**

■■■ **Urgent needs**

Sole-source award for chaff under 10 U.S.C. § 2304(c)(2) (1988) was unobjectionable where based on urgent wartime requirement and agency's reasonable determination that only one source was available that had proven acceptable chaff, since testing necessary for other potential sources, including protester, would cause unacceptable delay in procurement.

Matter of: Lundy Technical Center, Inc.

Timothy C. Riley, Esq., Pillsbury, Madison & Sutro, for the protester.

T.M. Rodgers, for Tracor Aerospace, an interested party.

Gregory H. Petkoff, Esq., John Merritt, Esq., Frank L. Butler III, Esq., and Jerald D. Stubbs, Esq., Department of the Air Force, for the agency.

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

Lundy Technical Center, Inc. protests the sole-source award of a contract by the Air Force to Tracor Aerospace, Inc., pursuant to emergency purchase request No. FD2060-91-30260, for 9,000 boxes of RR-ZZZ chaff, used by B-52 aircraft to deceive, screen, and confuse enemy radar. Lundy contends that it is fully capable of furnishing the chaff, and that the sole-source award therefore is improper under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2301 *et seq.*, (1988 and Supp. I 1989).

We deny the protest.

This sole-source contract resulted from "Operation Desert Shield" in the Middle East, after the Iraqi military forces invaded Kuwait on August 2, 1990. In response to this action, the United States dispatched military personnel, including Air Force crew, to assist in defending Saudi Arabia against Iraqi incursion. In connection with this effort, the Air Force awarded a sole-source contract to Tracor for RR-ZZZ chaff on August 31; the initial contract requirement for 750 boxes subsequently was modified on November 28 to add another 750 boxes. On January 16, 1991, the United States, along with other allied powers, began a full scale military campaign against Iraq. In support of this campaign, the Air Force determined it was necessary to expeditiously procure 9,000 boxes of RR-ZZZ chaff, the amount needed to support 1,200 sorties (40 B-52 aircraft flying one sortie each for 30 days).

Before the inception of Operation Desert Shield in August, the agency had never procured RR-ZZZ chaff. The Air Force had, however, previously procured from Tracor RR-149A chaff, which reportedly is very similar to RR-ZZZ chaff. Since only Tracor had produced RR-149A chaff that had been tested and procured by the Air Force, the agency determined that only Tracor was capable of expeditiously supplying the RR-ZZZ chaff. The Air Force therefore prepared and approved a Justification and Approval (J&A), dated January 18, for procurement of the chaff on a sole-source basis, citing the authority of 10 U.S.C. § 2304(c)(2) (1988), as implemented by Federal Acquisition Regulation (FAR) § 6.302-2, which allows for limited competition where the agency's need for the property or services is of such an unusual and compelling urgency that the United States otherwise would be seriously injured. The J&A and supporting documentation listed Tracor as the only source capable of providing the RR-ZZZ chaff on an urgent basis, and explained that the urgency of the requirement made it infeasible to seek or solicit additional sources; competing the requirement would cause a delay in delivery, which would result in further risk to B-52 aircraft and crew. The Air Force awarded the sole-source contract to Tracor on February 14 for 9,000 boxes of RR-ZZZ chaff, to be delivered in weekly increments over a period of 18 months, commencing February 22, 1991, and ending in September 1992. Lundy thereupon filed this protest with our Office.[1]

[1] Lundy questions the Air Force's failure to suspend performance under Tracor's contract pending our decision. However, suspension of performance was not required here because notification to the Air Force of the protest,

Continued

Lundy argues that the agency failed to maximize competition as required by CICA by not soliciting for the RR-ZZZ chaff from Lundy, a known source of chaff. Although Lundy does not dispute that there was an urgent need for RR-ZZZ chaff resulting from Operation Desert Shield, it argues that this did not justify the agency's decision to limit the noncompetitive award to Tracor because, according to Lundy, it could have qualified as a source for the RR-ZZZ chaff within 100 to 200 days. Lundy also contends that the Air Force no longer has a foreseeable need for 9,000 boxes of chaff to be delivered over 18 months because a cease-fire has been in effect in the Persian Gulf since March 7; Lundy argues that there is no urgent need for this amount of chaff, and that the agency is not justified in procuring all of the chaff on a sole-source basis.

Where an agency's requirements are of unusual and compelling urgency, the agency may limit a procurement to one firm if it reasonably determines only that firm can properly perform the work in the available time. 10 U.S.C. § 2304(c)(2); *Rex Sys., Inc.*, B-239524, Sept. 5, 1990, 90-2 CPD ¶ 185. A military agency's assertion that there is a critical need for certain supplies, which impacts military operations, carries considerable weight. *Greenbrier Indus., Inc.*, B-241304, Jan. 30, 1991, 91-1 CPD ¶ 92. We will review the agency's determination to limit competition on the basis of such urgent circumstances to ascertain whether it was reasonable. *Gentex Corp.*, B-233119, Feb. 13, 1989, 89-1 CPD ¶ 144.

We find that the Air Force reasonably determined that urgent and compelling circumstances arising out of Operation Desert Shield required the noncompetitive procurement of RR-ZZZ chaff here. The record establishes that at the time the sole-source award was made, the agency anticipated a protracted engagement in the Persian Gulf and therefore needed chaff to meet its current and future operational needs for the war against Iraq. The Air Force thus reasonably concluded that an urgent and compelling need existed for the expeditious procurement of RR-ZZZ chaff to safeguard B-52 aircraft and crew.

Although the deliveries of the chaff were scheduled over an 18-month period, the record indicates that this delivery schedule reflected both the agency's projection that hostilities in the Middle East could continue for that length of time and its determination that competition would not be available for the requirement for that 18-month period. We have no basis for questioning the projected time frame for conclusion of the military operations in the Middle East; this was a matter entirely within the purview of the Air Force.

We also find no basis to object to the Air Force's calculation that it would take 18 months or more for another chaff source to become available.

The Air Force's calculations are based on two 1987 contracts with Tracor for a different version of chaff, under which it initially estimated that Tracor could

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although provided by our Office within 1 working day of the filing of the protest, as specified under CICA, 31 U.S.C. § 3553(b)(1) (1988), was received by the agency beyond 10 calendar days after award; CICA requires suspension of performance only where the agency is notified of a protest to our Office within 10 calendar days after award. 31 U.S.C. § 3553(d)(1).

commence delivery in 175 and 295 days, respectively. Tracor in fact took 302 days to pass first article testing under the first contract and 419 days under the second contract. The agency explains it determined that qualification of Lundy for the RR-ZZZ chaff would take even longer than it took to qualify Tracor, because Tracor's previous contracts did not require flight testing; the Air Force estimates that an additional 180 days could be necessary for flight testing Lundy's chaff, and then only if the required airplanes were available. The Air Force states in this regard that, in fact, prompt flight testing of Lundy's chaff would be "virtually impossible" because a majority of the B-52 force has been deployed for use in the Middle East conflict. The Air Force concluded that, under this scenario, it would take Lundy a total of approximately 18 months to qualify as a source for, and commence production of, RR-ZZZ chaff, and that it thus was appropriate to purchase its entire 9,000-box requirement from Tracor over an 18-month period.

Lundy challenges the Air Force's reliance on the agency's experience under prior contracts with Tracor for different chaff as support for its estimate of the amount of time, apart from flight testing, it would take to qualify Lundy; Lundy argues that there is no valid reason to assume that its own performance under a contract for RR-ZZZ chaff would be similarly deficient. We would agree with Lundy that there is was no valid reason for the agency to assume that delays attributable to Tracor under its prior contracts also would be experienced in a contract with Lundy. However, the record shows that the delays under Tracor's contracts were caused, not by any deficiency in Tracor's performance, but by deficiencies in the specification. The Air Force reports that the RR-ZZZ specification also contains deficiencies that would present the possibility of unforeseen delays in testing Lundy's chaff. We see nothing improper in the agency's taking these potential delays into account in considering when competition would be available, and thus how much chaff should be purchased on a noncompetitive basis.

Lundy also questions the necessity for flight testing as a prerequisite to qualification of a new source for the RR-ZZZ chaff and, thus, the 180 days the agency included in its 18-month calculation for flight testing. Lundy points out that flight testing was not required under Tracor's prior contracts for RR-ZZZ chaff, or under Tracor's 1987 contracts. First, there is no circumstance under which the Air Force would be required to forego flight testing of an item such as chaff, used in wartime to ensure airplane and crew safety, in order to increase competition. *See generally Imperial Schrade Corp.,* 66 Comp. Gen. 307 (1987), 87-1 CPD ¶ 254 (agency is not required to buy an unsafe bayonet system at any price). In any case, we see nothing arbitrary in the agency's position that flight testing would be required. The agency reports that flight testing was waived on the previous RR-ZZZ chaff awards because of problems encountered in scheduling such testing, and because the need for the items in support of Middle East military operations had become critical. In waiving testing in these instances, the agency also considered that the RR-ZZZ chaff resulted from a modification of the specification for the reportedly very similar RR-149A chaff, which Tracor previously had successfully produced. We find nothing unreasonable or unfair in the agen-

cy's determination that, due to the differences in Tracor's and Lundy's circumstances, flight testing would be necessary for Lundy, which has manufactured neither the RR-149A nor the RR-ZZZ chaff, even though it was waived for Tracor.

We conclude that the agency properly determined that the Desert Shield military operations gave rise to an unusual and compelling urgency for RR-ZZZ chaff, and that no competition likely would be available for the requirement for the 18-month period during which delivery was scheduled. Under these circumstances, the award of a sole-source contract to Tracor was unobjectionable.

The protest is denied.

B-238024, June 28, 1991

Appropriations/Financial Management

Appropriation Availability
■ Amount availability
■■ Antideficiency prohibition
■■■ Violation

Appropriations/Financial Management

Budget Process
■ Funds transfer
■■ Authority

The Office of the Assistant Secretary for Administration and Management violated 31 U.S.C. §§ 1301 and 1532 when it used appropriated funds of nine agencies within the Department of Labor (Department) to purchase computer equipment for a communications system in amounts in excess of actual costs of equipment provided eight of the agencies. Although the Economy Act and 31 U.S.C. § 1534 authorize transfers between agencies to fund certain shared activities or needs, the Department's cost allocation methodology exceeded the authority granted by these statutes because it required several agencies to subsidize costs allocable to Departmental Management and the Pension Benefit Guaranty Corporation appropriations.

Matter of: Use of Agencies' Appropriations to Purchase Computer Hardware for Department of Labor's Executive Computer Network

This decision responds to the request of the Department of Labor's (Department) Office of Inspector General and Assistant Secretary for Administration and Management concerning the Department's use of various agency appropriations to purchase computer equipment for a communications system linking Executive Staff throughout the Department. They asked, specifically, whether the Department complied with applicable appropriations laws in using the funds of the various agencies within the Department to purchase the equipment. For the reasons stated below, we conclude that the Office of the Assistant Secretary for Administration and Management violated 31 U.S.C. §§ 1301 and 1532.

Background

By memorandum of July 22, 1987, the Deputy Secretary of Labor announced that the Secretary would "reprogram" $1.6 million before the end of the fiscal year in order to finance the purchase of equipment for an Executive Computer Network (Network). The Network would facilitate communication between the Secretary and the Department's Executive Staff (for example, the Deputy Secretary, Assistant Secretaries, Executive Assistants). The Deputy Secretary stated that the Department would pay for the system by drawing on the unexpended balances remaining in the appropriation accounts of the Department's various agencies.

Subsequently, the Office of the Assistant Secretary for Administration and Management (OASAM), acting as the agent of the Secretary, funded the purchase of the Network by initiating obligations against the appropriation accounts of other agencies.[1] A memorandum from OASAM referred to this process of allocating other agencies' funds to finance the purchase as "centralized management." The first step under centralized management was for OASAM to modify contracts already existing between agencies and contractors, and to negotiate new contracts for the supply of Network components. Then, without consulting the affected agencies, OASAM used agency accounting codes to commit agency funds to the various contracts.

OASAM based the amount that each agency would contribute to the purchase of the Network equipment on the Full-Time Equivalent (FTE) staff ceiling of each agency. OASAM deemed the assessments, based on the FTE ceilings, as the best way to finance the project since the Network provided a benefit to the entire Department. OASAM reasoned that the value received from the Network would be directly proportional to the size of the agency's staff, thus, a fee structure based on FTE ceilings would require the agencies to provide funds in a manner commensurate with how the Department as a whole would receive benefits.

Several agencies objected to this method of allocating costs, arguing that the allocations should have been directly related to the amount of computer equipment assigned to the agency. In a memorandum dated April 8, 1988, the Assistant Inspector General argued that the amount charged against his agency's appropriation did not reflect the goods or services that the Office of Inspector General (OIG) received. For example, part of the OIG appropriation was used to purchase two videodisc players, more than 20 computer modems, and 50 copies of Crosstalk software, even though the items were never delivered to OIG. The Assistant Inspector General also pointed out that OASAM officials requisitioned the equipment using OIG appropriations even though the officials never received OIG authorization to commit the funds.

The OASAM officials made all of the purchases of Network components. In making the procurements, the officials did not limit the use of an agency's

[1] The Office of the Secretary and OASAM both operate under the Departmental Management appropriation.

funds to the purchase of equipment directly benefitting that agency; instead, they used the funds to purchase equipment for all departmental units and needs without regard to the source of the funding. According to OASAM, it conducted the procurements in this manner to get the best price, expedite the acquisition process and reduce paperwork. OASAM considered this an acceptable method of procurement since it did not cause any agency to be charged more than its assessed share.

Subsequent to the installation of the Network, OIG investigated the procurement of the computer equipment and determined that the centrally managed purchases based on FTE ceilings resulted in a substantially disproportionate allocation of Network costs to most of the agencies. For example, the Bureau of Labor Statistics (BLS) paid $220,736 in Network costs even though the total costs for supplying and installing computer equipment in BLS offices was only $58,312. The OIG investigation concluded that the allocations should have been based on the cost of computer equipment received by each agency since those costs represented the actual costs which the agency incurred.

Discussion

We agree with the OIG conclusion. As a result of the Department's method for financing the purchase of the Network equipment, eight of the agencies participating in the Network were overcharged. By using these agencies' accounting codes to tap their appropriations, OASAM effectively transferred the amounts of the overcharges to the benefit of other agencies in violation of 31 U.S.C. §§ 1532 and 1301.

We have previously considered joint financing arrangements similar to this, that is, tapping the respective appropriations of the department or agency components to support projects benefitting a department or agency as a whole. 60 Comp. Gen. 686 (1981); B-195775, Sept. 10, 1979. Those decisions recognize that such "pooling" arrangements, as they were referred to, require statutory authority to overcome the purpose limitations of 31 U.S.C. § 1301, and its corollary, 31 U.S.C. § 1532, the limitation on transfers between appropriation accounts. In the two cases cited, we inferred the necessary authority to "pool" agency appropriations to administer department-wide personnel programs from the overall purpose and department-wide focus of the Civil Service Reform Act (CSRA). *Id.* In those cases, we viewed the consolidation of appropriations under the authority of the CSRA as permissible transfers, and because of the general nature of the transfer authority and the programs involved, we did not have to consider issues of relative allocation of benefits or costs realized or incurred by or for the various appropriations financing the program.

Here, there are ten separate appropriations which fund the agencies participating in the Network. Though the Deputy Secretary in his memorandum to the Executive Staff described the use of the appropriations as "reprogrammings," the use of the appropriated funds constituted, in effect, transfers between the appropriation accounts of the nine agencies and OASAM. (A reprogramming is

the movement of funds between different budget items within a single appropriation that does not typically require statutory authority; a transfer is the movement of funds between separate appropriations that does require statutory authority. *See* B-206668, Mar. 15, 1982.)

In general, unless otherwise authorized by law, transfers of funds between agency appropriation accounts are prohibited by section 1532. Most transfers are made pursuant to specific statutory authority, although some are made under the general transfer authority that the Congress has established to promote economy and efficiency. *See* 31 U.S.C. §§ 1535 and 1534. With regard to the personnel programs discussed above, the CSRA provided the transfer authority. Here, however, the Department does not cite any specific statutory authority for the transfers, and upon review of the Department's fiscal year 1987 appropriations act and the relevant provisions of the U.S. Code, we were not able to find any such authority either.

The Department also fails to offer any general statutory transfer authority in support of the Network acquisition. However, reconstructing events in the light most favorable to the Department, we note that the Economy Act, 31 U.S.C. § 1535, provides that if amounts are available and it is in the best interest of the government, an agency may place an order with another agency for goods or services that the other agency can provide, or can procure by contract, more conveniently or cheaply than through direct commercial acquisition by the ordering agency. 31 U.S.C. § 1535(a). Hence, the Economy Act would appear to authorize payments from the Department's agencies to OASAM.

Section 1535(b) of the Act, however, contemplates that the amounts paid will not exceed the actual cost of the goods or services provided to an ordering agency. The OIG investigation disclosed that under the FTE method of allocation, eight of the agencies, in the aggregate, paid $880,464 more for their computer equipment than they would have paid if the method of allocation had been based on the actual cost of the equipment that each of the eight agencies received.[2] The beneficiaries of this method of cost allocation were the agency components funded under the Departmental Management appropriation which received $1,049,978 worth of computer equipment while only paying $180,056, and the Pension Benefit Guaranty Corporation which received $10,542 worth of equipment while paying nothing. To the extent that the eight agencies made payments in excess of the actual cost of computer equipment received, the transfers were outside of the Economy Act and violated section 1532.

Like the Economy Act, 31 U.S.C. § 1534 confers authority, under certain conditions, to effect payments between agency appropriations. The provision allows an agency to use its appropriation to make purchases for the benefit of another agency, as long as the agency that benefits from the purchase 1) has sufficient funds to pay for the items purchased and 2) reimburses the purchasing agency

[2] The following is a list of the excess amounts that each agency paid: 1) Office of Labor, $2,694; 2) Bureau of Labor Statistics, $162,424; 3) Employment Standards Administration, $277,293; 4) Employment and Training Administration, $90,891; 5) Mine Safety and Health Administration, $197,579; 6) Office of Inspector General, $8,076; 7) Occupational Safety and Health Administration, $140,046; and 8) Veterans' Employment and Training Service, $1,461.

before the end of the fiscal year in which the purchase was made. The provision is "primarily a bookkeeping convenience" and is not intended to "authorize the augmentation of funds to any bureau or agency beyond that contained in its respective appropriation. . . ." S. Rep. No. 1284, 89th Cong., 2d Sess. 4 (1966).

Although section 1534 authorizes an agency to make payments out of its own appropriation account for the benefit of another agency, the statute contemplates that each agency, ultimately, will only pay for its own goods. Here, OASAM committed funds directly from the accounts of other agencies through the use of the agencies' accounting codes. Since the resultant transfers exceeded the actual costs of the computer equipment received by the eight agencies, the charges were more than adjustments to appropriation accounts for the purpose of reconciling expenditures and, in fact, constituted improper augmentations of the Departmental Management and Pension Benefit Guaranty Corporation appropriations. As such, they constituted transfers, outside the scope of section 1534, and, thus, violated section 1532.

The expenditures, made pursuant to the FTE cost allocation method, also violate section 1301. Section 1301 provides that an agency, absent statutory authority, may not expend appropriated funds for purposes and objects other than those for which the appropriations were made. The appropriations for each of the Department's agencies were available for the specific benefit of the agency to which the money was appropriated. *See, e.g.*, the Bureau of Labor Statistics appropriation, which read, "For necessary expenses for the Bureau of Labor Statistics, including advances or reimbursements to State, Federal, and local agencies and their employees for services rendered. . . ." Pub. L. No. 99-591, § 101(i), 100 Stat. 3341, 3341-287 (1986), incorporating by reference H.R. 5233, 99th Cong., 2d Sess. (1986), as modified by the conference report. OASAM, acting as the Secretary's agent, used the eight agencies' appropriations for purposes other than as appropriated when it transferred the funds to contribute to the purchase of computer equipment for the benefit of the Departmental Management and Pension Benefit Guaranty Corporation appropriations.

Accordingly, the Department of Labor should adjust its fiscal year 1987 appropriation accounts consistent with this decision. This would include returning from the appropriations for Departmental Management and the Pension Benefit Guaranty Corporation the amounts that each of the eight agencies contributed to the purchase of the computer equipment over and above the actual costs of equipment received. To the extent unobligated funds for fiscal year 1987 do not remain in such accounts adequate to make the adjustments envisioned by this decision, a violation of the Anti-Deficiency Act has occurred and appropriate reporting pursuant to 31 U.S.C. § 1351 and OMB Circular No. A-34 should be made.

B-239903, June 28, 1991

Appropriations/Financial Management

Appropriation Availability
■ Amount availability
■ ■ Augmentation
■ ■ ■ Commercial carriers
■ ■ ■ ■ Computer equipment/services

The ICC did not improperly augment its appropriations by allowing private carriers to install computer equipment at the ICC's headquarters. The computers are used to give both the public and ICC staff access to tariffs which are electronically filed by the carriers. The ICC has broad statutory authority to prescribe the form and manner in which carriers must file tariffs and make them available to the public. Requiring carriers to provide computer equipment to access electronic tariff information is within the ICC's authority. However, the ICC should adopt the controls necessary to reasonably assure that the equipment is used only to access the tariff information.

Appropriations/Financial Management

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

The ICC has satisfied the requirement in 40 U.S.C. § 303b that it charge carriers for the space used by the carrier's computer equipment placed within the ICC's headquarters. ICC already charges the carriers user fees under 31 U.S.C. § 9701. The record shows that the user fees compensate the ICC for the space used by the computers. GAO will not use section 303b to examine the nature of a fee established within the proper use of ICC's discretion under section 9701.

Matter of: Carrier-Provided Computers For Electronically Filing Tariffs With the Interstate Commerce Commission

The General Counsel of the Interstate Commerce Commission (ICC) requested our opinion on whether the ICC's appropriations have been improperly augmented. The potential augmentation occurred when certain private carriers installed computer equipment at their own expense at the ICC's headquarters. The equipment was installed to give both the public and ICC staff access to the carriers' electronically filed rate tariffs.

For the reasons stated below, we conclude the ICC did not improperly augment its appropriations by accepting the equipment at the ICC's headquarters, and making the equipment available to access electronically filed rate tariffs. However, the ICC should institute the controls necessary to reasonably assure that the equipment is used only to access the electronically filed tariffs, and not for unrelated automatic data processing purposes.

Background

The ICC is an independent establishment of the United States which regulates rail and motor transportation carriers. 49 U.S.C. §§ 10301(a), 10501(a), 10521(a) (1988). Carriers must "publish and file" with the ICC tariffs containing their rates and information on the rules and practices which relate to those rates. 49 U.S.C. §§ 10761(a), 10762(a)(2). Carriers which file tariffs must also "keep them open for public inspection." 49 U.S.C. § 10762(a)(2). In addition, the ICC may "prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection." 49 U.S.C. § 10762(b)(1).

Prior to November 1989, carriers filed all tariffs with the ICC on paper. In both fiscal years 1988 and 1989, these tariffs amounted to millions of pages of material. During 1989, the ICC amended its rules to allow carriers to file tariffs electronically. Electronically filed tariffs are placed by the carriers into computer libraries accessible by the ICC and the public.

One section of the ICC's amended rules provides that

> Tariffs filed other than in paper form shall:
>
> (1) be compatible with existing ICC technology and facilities available for the receipt, storage and use of tariffs; or
>
> (2) carriers or their agents shall provide the necessary implementing equipment, facilities and programs to the ICC for use by its staff and the public at no cost.

49 C.F.R. § 1313.4(c) (1990). Several rail carriers have made arrangements to file their tariffs electronically. In compliance with 49 C.F.R. § 1314.4(c), these carriers have chosen to install several computer terminals and dedicated telephone lines at the ICC's headquarters. The terminals are located in the room that is used to archive paper tariff filings, and have been used both by ICC staff and the general public. The ICC has asked for our opinion on whether this arrangement improperly augments its appropriations.

Discussion

The general theory of "augmentation" is a corollary to the constitutional requirement that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." U.S. Const., Art. I, sec. 9. The theory seeks to assure that the executive branch limits its expenditures to appropriations it receives. The control over executive action inherent in passing limited appropriations would be severely eroded if agencies could "augment" the funds they are appropriated. *See, e.g.* 63 Comp. Gen. 459, 460-461 (1984).

The ICC cites our decisions at 42 Comp. Gen. 650 (1963), *overruled on other grounds,* 51 Comp. Gen. 506 (1972) and 63 Comp. Gen. 459 to support its position that there is not an augmentation in this case. These cases involved offers from private parties to supply services to an agency. In 42 Comp. Gen. 650, a private organization offered to install coin operated audio devices at the National Zoo to provide visitors information about exhibits. In 63 Comp. Gen. 459, a private pro-

moter offered the Federal Communications Commission free display space at a communications industry convention to obtain the "drawing power" that an FCC display would provide. We reached differing results in those cases, and the ICC argues that a comparison of those cases to the issues presented here leads to the conclusion that the ICC may accept the carrier-provided computer equipment.

We feel that the facts in this case and those cited by the ICC are so distinct that comparing them does not properly frame the issues before us. The private parties in those cases were not being regulated by the agencies that they were offering to provide services to. In fact, those parties were not under any statutory obligation to deal with the agencies in any way. Thus, those cases presented augmentation questions isolated from any statutory authority of the agency which might have authorized acceptance of the services offered. In contrast, the issue here is whether the ICC's statutory authority to prescribe the form and manner in which tariffs are filed permits the ICC to require electronic tariff filers to install, at no cost to the ICC, computer equipment necessary to access the tariffs without unlawfully augmenting its appropriation.[1]

Our analysis begins with the clear proposition that carriers are responsible for keeping their tariffs open to the public. 49 U.S.C. § 10762(a)(2). In promulgating the new tariff regulations, the ICC specifically relied upon its authority to prescribe the manner in which carriers will keep filed tariffs "open for public inspection." 5 I.C.C. 2d 279, 281 (1989). The U.S. Supreme Court has referred to tariff public notice requirements as

> a continuing act *enjoined upon the carrier,* while the tariff remains operative, as a means of *affording special facilities to the public* for ascertaining the rates in force thereunder.

United States v. Miller, 223 U.S. 599, 604 (1912) (italic supplied). Thus, providing public access to tariffs is clearly the carriers' responsibility. Since the ICC is not responsible for providing the public with access to tariffs, its appropriation would not be expected to bear the cost of providing that access. In this regard, the ICC points out that the costs of processing tariffs and storing them in the ICC's public reading room are paid by the carriers through fees charged for filing tariffs. Therefore, the ICC's appropriation is not augmented when carriers fulfill their statutory duties by providing computers for public access to electronically filed tariffs.

The ICC argues that the carriers also have a similar responsibility to give the ICC staff access to electronically filed tariffs. The ICC asserts that 49 U.S.C. § 10762(b)(1), requires the carriers to file their tariffs with the ICC in a "decipherable format." Since the computer equipment provided by the carriers is necessary to "decipher" the tariffs, the ICC argues that carriers are required to provide the computers as part of their responsibilities to file tariffs with the

[1] The ICC receives an annual appropriation to finance the necessary expenses of fulfilling its statutory responsibilities. *E.g.* Pub. L. No. 101-516, 104 Stat. 2155 (1990). Those responsibilities include reviewing tariffs filed by carriers. 49 U.S.C. § 10762(e). The augmentation theory might be viewed as requiring the ICC to finance all aspects of its tariff review functions, including gaining access to electronically filed tariffs, from those appropriations.

ICC. The ICC argues that the equipment provided by the carriers to access electronically filed tariffs does not augment ICC's appropriation any more than the paper on which paper tariffs are filed.

We agree that the ICC may require carriers who wish to file their tariffs electronically to provide the ICC staff with the means to access and review the tariffs. We view such a requirement as a reasonable exercise of the ICC's authority to prescribe the form and manner in which carriers must file their tariffs. 49 U.S.C. § 10762(b)(1). Accessing tariff information through carrier-provided equipment is functionally the same as viewing a paper tariff appropriately printed and mailed to the ICC at a carrier's expense. Both methods give the ICC staff access to the tariffs without direct cost to the ICC's appropriations. Accordingly, we will not consider the ICC's appropriation to be augmented by accepting carrier-provided equipment which ICC employees use to access rate tariffs.

However, we are less sanguine about the potential for carrier-provided equipment to be used for purposes other than accessing electronically filed tariffs. The equipment provided to the ICC appears to be relatively standard personal computers with modems and printers. 5 I.C.C. 2d at 284. This is general office equipment which could be used by the ICC for various purposes, such as word processing. If so used, the Commission would gain additional data processing capability through its regulatory powers rather than its appropriations. In order to prevent this type of augmentation, the ICC should institute the controls necessary to reasonably assure that the carrier-provided equipment is used only to access electronically filed tariffs.

Finally, we agree with the ICC's conclusion that it need not charge carriers a specific rental charge for the space occupied by carrier-provided equipment at ICC headquarters. Generally, 40 U.S.C. § 303b requires that property of the United States only be leased for a monetary consideration. We have interpreted that provision to require agencies to assess a charge against parties who are granted a special use of a government facility which is not afforded to the general public, *e.g.,* 42 Comp. Gen. 650, 653 (1963), and to require agencies to limit the charges to strictly monetary consideration, *e.g.,* 41 Comp. Gen. 217 (1962). The ICC argues that the fees currently charged to tariff filers sufficiently meet the requirement of section 303b.

The ICC charges carriers user fees for filing tariffs under 31 U.S.C. § 9701. The record indicates that these fees already reimburse the ICC for the space occupied by the carrier-provided equipment. In B-162986, May 1, 1968, we declined to use section 303b as a means to examine the nature of an agency's fee structure adopted under another authority. We stated that the fee structure used was a matter for agency consideration. *Id.* The ICC is charging the carriers a reasonable monetary consideration for the facilities being used. As in B-162986, we will not extend the application of section 303b to object to the nature of the fee ICC imposes on the carriers.

B-242199, June 28, 1991

Appropriations/Financial Management

Appropriation Availability
■ Amount availability
■■ Augmentation
■■■ Maintenance/operation accounts
■■■■ Cost allocation

Appropriations/Financial Management

Budget Process
■ Funds transfer
■■ Authority

The U.S. Army Civilian Appellate Review Agency (USACARA) does not improperly augment its appropriations by directly charging to another Army activity's funding authority travel and per diem costs incurred to investigate civilian employee grievances. The direct citation of another activity's funding authority is authorized because in most situations the "Operation and Maintenance, Army" appropriation account provides all the funds. However, where more than one Army appropriation account is involved, 31 U.S.C. § 1534 authorizes the allocation of common service type costs among the appropriation accounts.

Appropriations/Financial Management

Appropriation Availability
■ Amount availability
■■ Augmentation
■■■ Maintenance/operation accounts
■■■■ Cost allocation

Appropriations/Financial Management

Budget Process
■ Funds transfer
■■ Authority

USACARA's open ended authority to cite another activity's funds for travel and per diem costs incurred when investigating civilian employee grievances is not improper since amounts involved are relatively small and activities can assure that funds are available by reserving sufficient amounts to cover estimated travel and per diem costs.

Matter of: Payment of U.S. Army Civilian Appellate Review Agency Investigative Travel and Per Diem

Charles Williams, Deputy Chief of Staff, Comptroller of the U.S. Army Medical Research and Development Command (AMRDC), asks whether the U.S. Army Civilian Appellate Review Agency (USACARA) improperly augments its appropriations when it directly charges travel and per diem costs to AMRDC funds when investigating civilian employees' grievances that reach the formal stage of dispute resolution. He also asks whether it is improper to provide USACARA with open ended authority to cite AMRDC funds for travel and per diem costs. For the reasons discussed below, we answer both questions in the negative.

Background

Under the Army grievance resolution procedures for civilian personnel, the Commanders and heads of activities are responsible for reviewing employee complaints, grievances, and appeals and for resolving them locally if possible. However, if they can not be resolved locally, they are referred to the USACARA to investigate and recommend resolution of the complaint, grievance, or appeal. The Commander and heads of activities then are charged with implementing the recommendation unless there is sufficient justification for rejecting the recommendation, *e.g.,* the examiner's recommendation involves an erroneous interpretation of law or a misapplication of established policy. Any rejection must be sent to a higher level for review.[1]

The Administrator, USACARA, through the Chiefs of the U.S. Army Civilian Appellate Review Offices, provides recommendations, advice, and information to commands and activities in the processing of employees' grievances and appeals. The Administrator also is responsible for conducting third party investigations of complaints, grievances, and appeals which may include on-site hearings when necessary. The Administrator makes recommendations based on these investigations and, in certain circumstances, may make a decision binding on the Commander or head of the activity *e.g.,* that a procedural violation has occurred.[2]

When a command or activity requests a USACARA investigation, Commanders or heads of activities are to furnish a fund citation to cover the travel and per diem costs and provide administrative, manpower, and logistical support for the USACARA investigator. The fund citation authority is open ended.[3]

Analysis

The AMRDC asks whether funding USACARA investigations in the manner described above constitutes an unauthorized augmentation of appropriations in violation of the principles set forth in 61 Comp. Gen. 419 (1982). We do not view that decision as applicable here. In 61 Comp. Gen. 419 (1982), we affirmed our decision in 59 Comp. Gen. 415 (1980) that the Merit Systems Protection Board (MSPB) could not accept reimbursements from other agencies or employee unions for travel expenses incurred by MSPB hearing officers conducting hearings in the home areas of the employee appealing to MSPB for a decision. We concluded that absent specific statutory authority, MSPB could not accept funds to cover travel costs of its hearing officers either from other agencies or employees or unions requesting the services of MSPB hearing officers since Congress

[1] Army Regulation 10-57, Organizations and Functions U.S. Army Civilian Appellate Review Agency, September 15, 1979, para. 4b(1)(4); Army Regulation 690-700, Personnel Relations and Services, change 4, April 1, 1986, paras. 3-1, 3-2, 5-1 through 5-4.

[2] AR 10-57, para. 4a; AR 690-700, paras. 1-5d, 3-2, 4-1 through 4-4.

[3] AR 10-57, para. 4b(2)(3); AR 690-700, para. 1-5c(4), (5).

had appropriated funds to MSPB to cover its statutory responsibility to provide appeals hearings.[4]

In the present situation we have one agency, the Department of the Army, that directly receives a number of appropriations to carry out various programs or missions. The Army makes these funds available (through allotments and suballotments) to Army commands and activities to execute the Army's missions and programs. Thus, the situation presented here, as explained in greater detail below, is distinguishable from the situation considered in 61 Comp. Gen. 419 (1982) for several significant reasons. In most instances here, the commands and activities requesting USACARA investigative services derive their civilian personnel funds from the same appropriation account, "Operation and Maintenance, Army" ("OM,A"), as does USACARA. The augmentation principle has no application at the agency allotment level within the same appropriation account. Even where an appropriation account, other than "OM,A", funds the activities of the Army command or activity requesting USACARA investigative services, the funding transaction at issue here does not implicate the financial resources of another federal agency or interested employees or unions external to the government as was the case in 61 Comp. Gen. 419 (1982). Further, unlike 61 Comp. Gen. 419 (1982) where MSPB received appropriated funds to defray the costs of fulfilling a statutory duty, Army appropriations to the extent available to cover personnel costs include the travel, per diem, and related costs of USACARA investigators, unless of course Congress has specifically made only one account available therefor.

Travel and Per Diem Funded Out of "OM,A" Account

USACARA's direct citation of another activity's funding authority that is drawn from the "OM,A" account does not present an augmentation issue. Most Army civilian personnel costs (including those incurred by USACARA) are funded out of the "OM,A" appropriation account. Thus, when a command or activity provides a fund citation to USACARA for travel and per diem, the funds typically cited would be those allotted or suballotted to the activity from the "OM,A" account to carry out its civilian personnel functions. Consequently, where, as here, the same appropriation account is being charged for like purposes by different commands or activities, no augmentation of the "OM,A" appropriation account at the expense of some other appropriation account is involved.

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[4] Compare the cited decisions with B-192875, Jan. 15, 1980, holding that employing agencies were authorized to reimburse the Civil Service Commission for services of complaint examiners assigned to conduct discrimination complaint hearings for employing agency, since it was a necessary expense of the employing agency to provide an impartial agency-level hearing on all formal discrimination complaints. CSC had no statutory duty to provide examiners and did not receive appropriations for the purpose of doing so.

However, AMRDC's personnel system is funded out of the "Research, Development, Test and Evaluation, Army" ("RDTE,A") account and not the "OM,A" account.[5] USACARA's direct citation of an activity's funding authority provided by some account other than the "OM,A" account does not constitute an unauthorized augmentation of the account that otherwise funds USACARA activities. Our conclusion is based on the authority in 31 U.S.C. § 1534.

Clearly, an unauthorized augmentation occurs when an agency directly charges an expense to another agency's account that properly should be charged to its own account. Any other conclusion would render nugatory the prohibition on unauthorized augmentation of appropriations.[6] However, where an agency receives two or more appropriations available to fund the same or similar expenses, 31 U.S.C. § 1534 authorizes an agency to charge the costs of common services initially to one appropriation and then allocate them to other appropriations benefited prior to the close of the fiscal year. *See* S. Rep. No. 1284, 89th Cong., 2d Sess. 1 (1966). H.R. Rep. No. 722, 89th Cong., 1st Sess. 2 (1965). The payment of travel, per diem, and related support costs of USACARA personnel trained to conduct independent investigations and hearings for various activities within the Department of the Army is precisely the kind of situation contemplated by section 1534.[7] Accordingly, since section 1534 authorizes charging the costs associated with investigative travel and per diem to one account with adjustments between the funding account and the accounts benefitted by the end of the fiscal year, funding the common service by directly citing the benefitting activity's funds for costs incurred in providing investigative services is also authorized.

The fact that the Army has elected to fund some costs out of one appropriation by including certain USACARA costs in the budget for the "OM,A" account does not alter our conclusion. Consistent with Army's cost allocation requirement, the USACARA neither requests nor receives funds for investigator travel and per diem costs. USACARA only requests and receives funds for travel and per diem for agency management, training, and the resolution of its own grievances when another agency provides the investigator. In effect, the Army has

[5] *See, e.g.*, Budget of the United States Government, Fiscal Year 1991, pp. A-565 through A-566 and A-587 through A-588, indicating that both the "OM,A" account and "RDTE,A" account contain funds for civilian personnel costs.

[6] USACARA asserted that the holding in 61 Comp. Gen. 419 is inapplicable because no transfer of funds takes place between the activity and the USACARA. The assertion is based on USACARA directly citing the funding authority of the activity. This misses the point. The prohibition is against the unauthorized augmentation of one account at the expense of another and is not concerned with the method by which the augmentation is accomplished.

[7] In this regard, the Department of the Army is required to provide a grievance resolution procedure to civilian employees who are not members of a bargaining unit under a collective bargaining agreement. 5 C.F.R. Part 771, *n.b.* § 771.203. The Army regulations make individual commands and activities responsible for grievance resolution. Army practice is to charge the costs of grievance resolution to the same appropriation supporting the activities' other employment costs such as salaries, safety equipment, etc. Thus, for an activity to charge the cost of the independent investigation for civilian employees not covered by a negotiated grievance system to the account funding an activity's civilian personnel costs is consistent with the manner activities charge costs in resolving grievances under a negotiated grievance procedure.

allocated the fixed costs for providing trained investigators to the "OM,A" account that funds USACARA and has allocated the variable costs for travel and per diem to the account funding the activity receiving investigative services. In our opinion, this is an equitable way to allocate these costs since USACARA has no control over the demands placed upon it for investigative services. *See* 64 Comp. Gen. 724 (1985). To hold that such costs cannot be paid by the activity on the grounds that the payment provides an unauthorized augmentation of the "OM,A" appropriation account, even though USACARA neither requests nor receives funds for this purpose in the "OM,A" account, is not supported by our decisions.

Open Ended Fund Citation Authority

With respect to the open ended fund authority, USACARA has explained that the purpose of such authority is to assure that investigations are promptly completed and the grievance resolved. Otherwise, delays in providing the employee due process might result from investigators having to await authorization of additional amounts once the funding limit has been reached. USACARA has also advised that it views the open ended fund citation authority as being valid only until the end of the fiscal year that the funds being cited are available for obligation. The average travel and per diem costs incurred by USACARA investigators is $27 although some have incurred costs involving several hundreds of dollars.

In view of the relatively small amounts involved and the fact that the command or activity providing the fund cite can take steps to assure that its budget is not overexpended (*e.g.,* committing ample funds to cover the investigator's travel and making timely adjustments to the commitment as travel costs become known), we do not object to using an open ended fund citation in these circumstances.

Appropriations/Financial Management

Appropriation Availability

■ Amount availability

■■ Antideficiency prohibition

■■■ Violation

The Office of the Assistant Secretary for Administration and Management violated 31 U.S.C. §§ 1301 and 1532 when it used appropriated funds of nine agencies within the Department of Labor (Department) to purchase computer equipment for a communications system in amounts in excess of actual costs of equipment provided eight of the agencies. Although the Economy Act and 31 U.S.C. § 1534 authorize transfers between agencies to fund certain shared activities or needs, the Department's cost allocation methodology exceeded the authority granted by these statutes because it required several agencies to subsidize costs allocable to Departmental Management and the Pension Benefit Guaranty Corporation appropriations.

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■ Amount availability

■■ Augmentation

■■■ Commercial carriers

■■■■ Computer equipment/services

The ICC did not improperly augment its appropriations by allowing private carriers to install computer equipment at the ICC's headquarters. The computers are used to give both the public and ICC staff access to tariffs which are electronically filed by the carriers. The ICC has broad statutory authority to prescribe the form and manner in which carriers must file tariffs and make them available to the public. Requiring carriers to provide computer equipment to access electronic tariff information is within the ICC's authority. However, the ICC should adopt the controls necessary to reasonably assure that the equipment is used only to access the tariff information.

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■ Amount availability

■■ Augmentation

■■■ Maintenance/operation accounts

■■■■ Cost allocation

The U.S. Army Civilian Appellate Review Agency (USACARA) does not improperly augment its appropriations by directly charging to another Army activity's funding authority travel and per diem costs incurred to investigate civilian employee grievances. The direct citation of another activity's funding authority is authorized because in most situations the "Operation and Maintenance, Army" appropriation account provides all the funds. However, where more than one Army appropriation account is involved, 31 U.S.C. § 1534 authorizes the allocation of common service type costs among the appropriation accounts.

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■ Funds transfer

■■ Authority

USACARA's open ended authority to cite another activity's funds for travel and per diem costs incurred when investigating civilian employee grievances is not improper since amounts involved are relatively small and activities can assure that funds are available by reserving sufficient amounts to cover estimated travel and per diem costs.

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Civilian Personnel

Procurement

tion committee, and approve the evaluation committee's subcontractor selection, the procurement is "by or for the government" and subject to GAO's bid protest jurisdiction.

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Competitive Negotiation
■ Contract awards
■■ Propriety
■■■ Subcontracts

Protest against award of subcontract is sustained where proposals were not evaluated based solely on evaluation factors stated in the solicitation.

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■ Discussion
■■ Adequacy
■■■ Criteria

Protest that agency does not have a reasonable basis to cancel request for proposals set aside for small businesses is sustained where basis for cancellation is that protester, the only offeror remaining in the competitive range, submitted unreasonably high proposed costs, but agency improperly failed to conduct meaningful discussions with protester relating to its proposed costs.

545

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

In a negotiated, indefinite quantity procurement for construction, maintenance, and repair services, the procuring agency reasonably evaluated the protester's proposal as technically unacceptable and properly eliminated it from the revised competitive range after discussions, where the protester's model project submissions, which were evaluated under a specific evaluation criterion, failed to demonstrate the protester's understanding of the solicitation requirements or the protester's ability to use the required unit price book to price contract services.

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■ Offers
■■ Cost realism
■■■ Evaluation
■■■■ Administrative discretion

Agency's cost realism analysis is reasonable where agency made probable cost adjustments based upon the government's requirements as embodied in an independent government cost estimate as well as the agency's assessment of the costs associated with each firm's particular technical approach.

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the contracts, satisfied solicitation provision restricting procurement to "producers with a proven ability to produce the item(s) under a previous procurement."

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Noncompetitive Negotiation
■ Use
■■ Justification
■■■ Urgent needs

Sole-source award for chaff under 10 U.S.C. § 2304(c)(2) (1988) was unobjectionable where based on urgent wartime requirement and agency's reasonable determination that only one source was available that had proven acceptable chaff, since testing necessary for other potential sources, including protester, would cause unacceptable delay in procurement.

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Sealed Bidding
■ Invitations for bids
■■ Amendments
■■■ Notification

Agency violated provisions of Federal Acquisition Regulation governing the distribution of amendments and caused the improper exclusion of the protester from the competition where (1) unreasonable actions by agency personnel resulted in the agency mailing an amendment setting a new bid opening date to the protester's former address, which in turn caused the protester to receive the amendment 1 hour prior to bid opening; (2) the protester did not fail to avail itself of a reasonable opportunity to obtain the amendment; and (3) only one responsive bid was submitted and four prospective bidders were eliminated from the competition because of the agency's actions.

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■ Invitations for bids
■■ Amendments
■■■ Notification

Where agency failed to send the protester two material solicitation amendments in violation of applicable regulatory requirement governing the dissemination of solicitation materials, and the record shows significant deficiencies in the contracting agency's procedures in sending out solicitation amendments which contributed to the protester's exclusion from the competition and resulted in the receipt of only two responsive bids, the protester was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open" competition.

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■ Potential contractors
■■ Exclusion
■■■ Propriety

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563

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Socio-Economic Policies
■ Small business set-asides
■■ Cancellation
■■■ Justification

Cancellation of small business-small purchase set-aside under a request for quotations (RFQ) was proper where protester, the only small business submitting a quote, conditioned its compliance with the RFQ's 10-day completion schedule in telephone call to agency after submission of quote; although protester disputes agency's interpretation that it qualified quote, based on record agency's interpretation was reasonable.

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■ Small businesses
■■ Competency certification
■■■ Applicability

Agency was not required to refer rejection of protester's offer based on grounds of technical unacceptability to Small Business Administration for certificate of competency determination where firm's proposal was determined not to be within competitive range, since in rejecting firm's offer agency did not reach the question of offeror's responsibility.

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Special Procurement Methods/Categories

■ Architect/engineering services

■■ Indefinite quantities

The Federal Acquisition Regulation does not prohibit the use of an indefinite-quantity contract for the acquisition of other than commercial items or prohibit the issuance of a cost-plus-fixed fee indefinite-quantity contract.

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