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# Contents

# 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.

# Table of Decision Numbers

# List of Claimants, etc.

# Tables of Statutes, etc.

## United States Statutes

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



## United States Code

**See also U.S. Statutes at Large**



## Published Decisions of the Comptrollers General

## Decisions Overruled or Modified



## Decisions of the Court

# March 1991

## B-233742.9, March 1, 1991

## Procurement

**Specifications**
**■ Minimum needs standards**
**■■ Determination**
**■■■ Administrative discretion**

Where protester argues awardee's proposal did not meet several solicitation requirements concerning required database management system, but protester likewise proposed a system that did not comply with several of the requirements, and agency has determined based upon its prior experience with awardee that the awardee's system satisfies its minimum needs, contracting officials have treated both offerors equally and there is no basis to sustain protest against award.

## Procurement

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

Award to higher-priced offeror is unobjectionable where solicitation made technical considerations more important than cost and agency reasonably determined that the clear technical superiority and lesser risk associated with awardee's proven microcomputer workstation system was worth the additional cost.

## Matter of: C3, Inc.

Richard J. Conway, Esq., and William F. Savarino, Esq., Dickstein, Shapiro & Morin, for the protester.

William F. Goodrich, Jr., Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Honeywell Federal Systems, Inc., an interested party.

Carl J. Peckinpaugh, Esq., Department of Air Force, for the agency.

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

C3, Inc. protests the determination by the Department of the Air Force that the continuation of performance by Honeywell Federal Systems, Inc. of contract No.

F19628-89-D-0030, for microcomputer workstations for the World-Wide Military Command and Control System's Information System (WIS), is in the government's best interest. The determination followed the reopening of negotiations and evaluation of revised best and final offers (BAFO), undertaken in response to our decision in *Martin Marietta Corp.*, 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132, *aff'd,* 69 Comp. Gen. 445 (1990), 90-1 CPD ¶ 469. In that decision, we sustained Martin Marietta's protest against the award of a contract to Honeywell, under request for proposals (RFP) No. F19628-88-R-0038, on the basis that Honeywell's offered system failed to satisfy the RFP requirement for a multitasking capability. C3 challenges the agency's evaluation of its own proposal and contends that Honeywell failed to comply with certain mandatory specification requirements.

We deny the protest.

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**Initial Evaluation**

WIS is a worldwide communications network for use by the Department of Defense and other government agencies. The solicitation requested proposals for a 5-year indefinite quantity contract to deliver, install and maintain advanced, reliable microcomputer workstations, and associated software, intended to provide both computer resources for local users and access to WIS. The specification required that the workstations "be capable of executing correctly a multitasking operating system," and defined the required multi-tasking capability as the ability to support the concurrent execution of a minimum of 10 tasks. The specification required that the multi-tasking operating system be capable of mediating the concurrent accesses to shared peripheral devices—*e.g.,* disks, screen display, graphic resources, keyboard and other input devices—generated by a minimum of 10 tasks. In this regard, it also provided that device drivers—*i.e.,* software interfacing between the central processor unit and the shared devices—shall make use of process isolation support features of the WIS workstation processor to provide protection of driver data and instruction spaces—areas in computer memory where driver data and programs are stored—from corruption by application tasks. The specification further required that the proposed system include several broad classes of application software, including user support services applications providing for word processing, spread sheet, and graphics capabilities, and a database management system.

The solicitation provided for award to the offeror whose proposal was "most advantageous" to the government, technical and price factors considered. It required offerors to furnish for a live test demonstration (LTD) the system described in their technical proposal, and provided for the technical proposals to be evaluated on the basis of four technical criteria of equal weight—reliability and maintainability, workstation architecture, capabilities demonstrated at the LTD, and logistics—and one criterion of lesser weight, management. The solicitation described price as less important than the technical factors; it provided for price to be evaluated on the basis of offerors' fixed prices for the Air Force's

projected quarterly workstation ordering—a total of 500 workstations—as well as software, delivery installation, and maintenance.

Four offerors—Martin Marietta, Honeywell, C3, and International Technology Corporation (ITC)—submitted proposals by the December 1, 1988, closing date for receipt of initial proposals. Prior to the closing date, ITC filed a protest with our Office challenging portions of the specification as either inadequate, impossible to meet, or unduly restrictive of competition. When we subsequently denied its protest, *see International Technology Corp.*, B-233742.2, May 24, 1989, 89-1 CPD ¶ 497, ITC withdrew its proposal. Meanwhile, the remaining three offerors underwent the required LTD demonstration in January 1989. Only Honeywell was found to have successfully demonstrated a workstation meeting all specification requirements tested at the LTD; several of the software applications tested by C3 and Martin Marietta exhibited deficiencies. However, since both offerors proposed to remedy these deficiencies and the agency's Source Selection Evaluation Board concluded that the offerors had "shown real solutions that could be produced to meet government delivery requirements," the Source Selection Advisory Council determined that the results of the LTD "were not in and of themselves considered reasons to eliminate offerors from consideration for award." Accordingly, discussions were opened with all offerors and all were subsequently required to submit BAFOs.

Based on the results of the LTD and the evaluation of BAFOs, the Air Force determined Honeywell's proposal to be technically superior to the others. The agency found that the proposal offered significant technical strengths and, under the agency's color-coded evaluation scheme, evaluated the proposal as "blue," or exceptional, under the criteria for reliability/maintainability and workstation architecture. Furthermore, the agency considered Honeywell's proposal to offer the lowest risk to the government, since Honeywell had successfully demonstrated a compliant workstation at the LTD. In contrast, although the Air Force considered both Martin Marietta's and C3's proposals to be "basically compliant with the requirements of the solicitation," and evaluated both as "green," or acceptable, under all criteria, it viewed the proposals as representing a "high risk," since the firms had failed to demonstrate all of the required software capabilities at the LTD, and the agency questioned whether their proposed considerable development efforts would enable them to correct the deficiencies in time for the deliveries (as early as 30 days after award). Since the evaluated price of Honeywell's proposal ($164.4 million) was significantly lower than the evaluated prices of C3's ($232.1 million) and Martin Marietta's ($266.3 million) and, more importantly, Honeywell's proposal was viewed as technically superior, the Air Force determined that award to Honeywell would be most advantageous. Upon learning of the resulting award, Martin Marietta filed a protest with our Office challenging the compliance of Honeywell's proposed workstation with the solicitation requirement for a multi-tasking operating system and with certain of the RFP requirements for the database management system and access to the WIS Honeywell mainframe computers.

In our decision on the protest, we agreed with Martin Marietta that Honeywell's proposed system was noncompliant with the multi-tasking requirement. Honeywell offered an Apple Corporation MacIntosh IIx computer with an A/UX operating system, Apple's implementation of the UNIX operating system. It proposed to meet the RFP requirements in the user support services area for word processing, spreadsheet and graphics capabilities with MacIntosh operating system (MAC/OS) applications running under the A/UX operating system. Although multiple, non-MAC/OS applications could be executed simultaneously on this system, only one MAC/OS software application could be run at a time in the required secure operating mode; multiple MAC/OS applications could not be launched. (Honeywell proposed to supply after award an upgrade which would enable the operating system to launch multiple MAC/OS applications.) We found that Honeywell's proposed system failed to comply with the requirement that the operating system offered for the initial deliveries be capable of initiating and simultaneously executing *any* reasonable combination of up to 10 tasks, including those combinations of tasks running under more than one application. We therefore sustained the protest and recommended that the agency clarify its actual minimum needs with respect to multi-tasking, reopen negotiations with the offerors in the competitive range, and then request a new round of BAFOs.

**Reopened Negotiations**

In response to our decision, the Air Force clarified its minimum needs, advising offerors that notwithstanding the general requirement for the ability to support the concurrent execution of a minimum of 10 tasks, there was no general requirement that the combination of tasks include tasks running under more than one application; rather, according to the agency, the simultaneous operation of multiple software applications was only required where the specification specifically so stated. In addition, the agency amended the specification to relax one of the several database management requirements Martin Marietta had claimed Honeywell failed to meet. The agency advised offerors that their previously submitted proposals were considered to meet all of the requirements of the RFP and that, accordingly, no discussions would be held. It requested the submission of revised BAFOs and cautioned that changes to the previously negotiated proposals might render the proposals unacceptable. Although C3 nevertheless requested several times that discussions be conducted, advising the Air Force that it intended to change its technical solution, the agency refused to hold technical discussions.

Martin Marietta having meanwhile withdrawn from the competition, only Honeywell and C3 remained in the competitive range. In its revised BAFO, Honeywell changed neither its technical proposal nor its unit prices, and instead merely revised its total price downward to an evaluated $117.4 million to reflect the fact that only 4 years remained in the potential contract term. C3, on the other hand, made substantial changes to its technical proposal, including changing its proposed central processor unit, disk drive, approach to the sharing of printers, and user support services software; C3 also substantially reduced its

price, to an evaluated $99.4 million, $18 million (15.3 percent) lower than Honeywell's price.

Notwithstanding C3's lower price, the Air Force determined that Honeywell's proposal remained most advantageous to the government because of its perceived technical superiority. The agency found Honeywell's proposal to be exceptional, and superior to C3's merely acceptable approach, with respect to reliability/maintainability; the agency noted that the 18-month warranty offered by Honeywell exceeded the 12-month warranty offered by C3, and that Honeywell had committed itself to a level of reliability for its workstation over 6.1 times that required by the specification, substantially greater than the 1.3 times the minimum offered by C3. Honeywell also received an exceptional rating for its approach to logistics, which relied upon an established maintenance organization in place and serving WIS sites around the world, as well as long-standing relationships with certain third-party maintenance providers serving some remote sites. In contrast, C3 received a "yellow," or marginal, rating for logistics, having proposed to rely upon third-party maintenance organizations with which it lacked any long-standing relationship.

In addition, Honeywell again received an exceptional rating with respect to workstation architecture, in contrast to the "red," or unacceptable, rating received by C3. The Air Force noted that Honeywell's proposed hardware was in wide commercial use and, with its proposed software, had both undergone a successful LTD and proved itself effective in successful operation as part of the WIS system for the prior 10 months. The agency noted that, in contrast, C3 had proposed much new hardware and software that had neither undergone an LTD nor otherwise been shown to successfully operate together as a system, that the agency's investigation of the commercial versions of C3's software packages had raised concerns as to whether they could function in the required secure operating environment, and that certain other hardware—including the motherboard, a key component of the workstation—and software capabilities were newly developed or under development.

Furthermore, the agency determined C3's proposal to be deficient with respect to its compliance with the requirement that three expansion slots on the workstation remain open after the requirement for the capability to interface with the WIS network through one of two required data communications protocols is met; the agency noted that since C3 bundled the interface card for one of the protocols with its workstation, workstation users relying upon the other protocol would be required to fill one of the three otherwise empty expansion slots with the interface card for that other protocol. In addition, the agency found C3's proposal to be deficient with respect to its approach to the required printer sharing capability, which utilized the WIS network to transmit print messages in violation of the specification and applicable security guidelines as interpreted by the agency. As a result of all these weaknesses and deficiencies, the agency considered C3's proposal to represent a high risk with respect to workstation architecture and, overall, to be less advantageous than Honeywell's.

**Multi-Tasking Operating System**

In its protest of the Air Force's ensuing decision to leave Honeywell's contract in place, C3 maintains that Honeywell's proposal failed to comply with certain requirements concerning the required multi-tasking operating system and database management system. First, with respect to multi-tasking, C3 states its belief, based upon its examination of commercially available versions of Honeywell's proposed A/UX operating system, that Honeywell's system fails to meet the requirements that the system be capable of mediating concurrent access to shared peripheral devices and of making use of process isolation features to preclude any corruption of the device driver or interfaces by application tasks. C3 claims Honeywell's operating system fails to mediate concurrent access to all shared devices, and instead permits application programs direct access to the data space in the device driver controlling the video display hardware; according to C3, these deficiencies can cause the system to "crash" and can result in corruption of displayed data, lost access to critical information, and unauthorized access to data presented on the screen.

The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them and must bear the consequences of any difficulties resulting from a defective evaluation. Therefore, our Office will not engage in an independent evaluation of technical proposals and their relative merits. Rather, we will examine the agency evaluation to ensure it was reasonable and consistent with the evaluation criteria listed in the RFP. *See Group Technologies Corp.,* B-240736, Dec. 19, 1990, 90-2 CPD ¶ 502. Nor will we substitute our technical judgment for the contracting agency's technical judgment unless its conclusions are shown to be arbitrary or otherwise unreasonable. *Suncoast Scientific, Inc.,* B-239614, Sept. 14, 1990, 90-1 CPD ¶ 211. The mere fact that the protester disagrees with the agency evaluation does not render it unreasonable. *Group Technologies Corp.,* B-240736, *supra.*

We find no basis in the record upon which to question the evaluation of Honeywell's multi-tasking. Honeywell maintains, and the Air Force confirms, that as a result of proprietary modifications to commercially available software, modifications of which C3 is unaware, Honeywell's operating system controls and mediates access to the display screen and provides the required process and information isolation. In this regard, we note that Honeywell specifically represented in its proposal that its operating system provides for process isolation, maintaining separation between active processes, by mediating "all accesses to all objects." Furthermore, the agency reports that in more than 3 million hours of use no problems have been encountered in the operating system's mediation of access to the video display screen and maintenance of process isolation.

**Database Management System**

With respect to the required database management system, C3 asserted at the protest conference on this matter that Honeywell's proposed Oracle database

management system fails to furnish seven required capabilities. After the Air Force asserted in response that C3's system also does not fully comply with all requirements, C3 withdrew its protest with respect to three of the capabilities, which it concedes its system fails to provide. C3 continues to argue, however, that Honeywell's proposal should have been rejected for failure to offer the remaining four required database management capabilities.

Specifically, C3 argues that Honeywell failed to satisfy the requirements that the database management system: (1) maintain certain information about a database and its structure, including the number of rows in a table; (2) provide for the required capability to query the system to ascertain the contents of the database, including the capability "of using information retained in the data dictionary (number of rows . . . etc.) to optimize the query strategy and reduce the time required to execute the query"; (3) provide the capability to "delete fields from tables"; and (4) provide the capability to rescind actions that have caused a modification of the database, such as a change in database structure, restoring the database to the state prior to the execution of that action.

According to the Air Force, while Honeywell's proposed system does not continuously and automatically update the count of rows, there is no requirement for continuous updating of the count of rows. Furthermore, Honeywell contends (and C3 does not specifically deny) that C3's system likewise provides for updating the count only upon user command. Likewise, although Honeywell's query optimization process does not automatically consider the number of rows in a table, the agency maintains that the reference in the specification to the "number of rows" was only illustrative of one approach to query optimization, and did not constitute a prerequisite to compliance. According to the agency, Honeywell's approach to query optimization satisfies the agency's functional needs in this regard. As for deleting fields, the agency found that Honeywell's system, which provides for the deletion of a field from a table by recreating the table or defining a new view on top of the table without the field, rather than directly deleting the field from the table, provides the required functionality. With respect to rescinding modifications, the agency points out that the specification expressly provided that there is no requirement for the ability to rescind actions once they have been committed to execution; it reports that in Honeywell's system modifications to the database structure result in the commitment of the changes to execution, thus exempting it from the requirement for the capability to rescind. In any case, the agency maintains that such changes can indeed be "rolled back," apparently through creation of a backup prior to modification.

We agree with C3 that Honeywell's proposed database management system fails to fully comply with all RFP requirements. For example, the specification expressly required that "all information about a database and its structure shall [1] be collected and *maintained* in a data dictionary associated with the database" (italic added); in our view, implicit in the requirement to maintain the data dictionary is the requirement that the count of the number of rows in each table be current, that is, continuously, automatically updated.

Nevertheless, C3's argument that Honeywell's proposal should have been rejected because of its failure to fully comply with the database management requirements is without merit. The Air Force, which has now had over a year of experience with the system, maintains that Honeywell's database management system satisfies its needs. Given that C3 concedes its system also fails to meet at least three of the seven database management requirements it originally referenced, and, further, that C3 likewise failed to satisfy the requirement for the data dictionary to include a continuously updated count of the number of rows in tables, it appears that both offerors were treated equally. Neither offeror satisfied all database management requirements, and neither proposal was rejected on this basis. Under these circumstances, we find no basis for sustaining C3's protest against Honeywell's failure to satisfy all database management requirements. *Integral Sys., Inc.*, 70 Comp. Gen. 105, B-240511, Nov. 23, 1990, 90-2 CPD ¶ 419; *O.V. Campbell & Sons Indus., Inc.*, B-236799 *et al.*, Jan. 4, 1990, 90-1 CPD ¶ 13.

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**Evaluation of C3**

C3 disputes the evaluation of its proposed workstation as failing to meet the specification requirements for three expansion slots to remain open on the workstation (after the requirement for the capability to interface with the WIS network through one of two required data communications protocols is met) and for a printer sharing capability. C3 maintains that the Air Force is imposing requirements not formally incorporated in the specification—*i.e.*, limitations precluding the use of the WIS network for printer sharing—or not reasonably ascertainable from the specification—*i.e.*, the interface requirements that must be satisfied prior to determining the number of expansion slots remaining open. Further, C3 argues that, even if its proposal was deficient, there was no basis for considering the proposal materially deficient. In this regard, it points out that the agency conceded at the protest conference that C3's proposed system could have been modified without technical risk to comply with the agency's interpretation of the specification by: (1) offering workstation users a choice between the two required data communications protocols, rather than bundling the interface card for one of the protocols with the workstation and thereby forcing users relying on the other communications protocol to utilize one of the three otherwise empty expansion slots to accommodate an interface card for that protocol; and (2) reverting to C3's prior, acceptable approach to providing for a printer sharing capability. Conference Transcript (CT) 195-198. According to C3, these changes, and primarily the change in printer sharing approach, would add no more than $3 million to C3's cost, thus leaving the cost of its proposal at least $15 million lower than Honeywell's. CT 199.

We need not consider these arguments. The Air Force maintains that even if C3's proposed workstation conformed to a reasonable interpretation of the RFP requirements, Honeywell's clear technical superiority would justify its selection notwithstanding C3's lower price. Based upon our review of the record, we find the agency's position in this regard to be reasonable.

Specifically, C3 has made no showing that the Air Force unreasonably determined Honeywell's proposal to be superior with respect to reliability/maintainability and logistics, two of the four most important technical evaluation criteria, where Honeywell was evaluated as exceptional while C3 was evaluated as only acceptable—for reliability/maintainability—or marginal—for logistics. We find reasonable the agency's preference in this regard for higher guaranteed reliability, longer warranty coverage and an established, proven maintenance capability. Although C3 questions the evaluation of Honeywell's proposal as exceptional with respect to workstation architecture, arguing that it fails to comply with material requirements and relies upon noncommercial, developmental items, we find no basis to question the agency's determination that Honeywell submitted a superior proposal in this regard. Again, neither offeror's proposal was totally compliant with the specification for the database management system, and we have found no basis for concluding that Honeywell's operating system did not comply with the multi-tasking requirements for process isolation and mediation. While Honeywell relied upon certain proprietary modifications to commercially available software to satisfy the multitasking requirements, its system had been in successful operation for 10 months at the time of the reevaluation and the particular modifications in question were no longer developmental.

In contrast, C3 was proposing a substantially new package of hardware and software that had neither undergone an LTD nor been shown to successfully operate together, and about which the government's investigation had raised concerns with respect to its ability to function in the required secure operating environment. In these circumstances, the agency reasonably evaluated C3's proposal as less advantageous and offering greater risk with respect to workstation architecture than Honeywell's. Furthermore, since price was less important than technical factors under the stated evaluation criteria and Honeywell's proposal was reasonably viewed as clearly and significantly technically superior, we find the record reasonably supports the selection of Honeywell's technically superior, less risky proposal. *See GP Taurio Inc.,* B-238420; B-238420.2, May 24, 1990, 90-1 CPD ¶ 497.

The protest is denied.

## B-240342, March 1, 1991

## Civilian Personnel

**Relocation**

**■ Temporary quarters**

**■■ Interruption**

**■■■ Actual expenses**

**■■■■ Temporary duty**

*Paul G. Thibault,* 69 Comp. Gen. 72 (1989), held that a transferred employee who, while occupying temporary quarters at his new duty station, was required to perform several days temporary duty

away from that station, may be reimbursed the costs of retaining his temporary quarters during his absence in addition to per diem he received for his temporary duty if the agency determines that he acted reasonably in retaining those quarters. *Thibault* applies prospectively only since it represented a substantial departure from prior decisions. Therefore, an employee's claim which was settled prior to *Thibault* may not be overturned on appeal based on the new rules announced in *Thibault.*

## Matter of: Billie Yardman Moxley—Temporary Quarters Subsistence Expense Allowance While Away on Temporary Duty

The principal issue in this case is whether the decision in *Paul G. Thibault,* 69 Comp. Gen. 72 (1989), should be applied retroactively or prospectively only. The issue arises as a result of Ms. Billie Yardman Moxley's reliance on the *Thibault* decision in her appeal of our Claims Group's settlement of her claim, Z-2861086, on February 2, 1988. That settlement disallowed her claim for temporary quarters subsistence expenses for a period she was away from her new duty station and receiving temporary duty allowances. For the following reasons, we sustain the Claims Group's settlement.

## Background

In October 1982, Ms. Moxley, an employee of the Immigration and Naturalization Service, transferred from Atlanta, Georgia to Dallas, Texas, where she rented temporary quarters on a weekly basis. During November 1–3, 1982, Ms. Moxley was sent away on temporary duty, and she was paid per diem expenses while in this travel status. Ms. Moxley then claimed $76.63 for the temporary quarters costs during that same period, since she had already rented the quarters before being notified of the temporary duty travel.

Both the agency and our Claims Group disallowed Ms. Moxley's claim for the temporary quarters costs on the basis that the Federal Travel Regulations (FTR) specifically prohibit allowances which duplicate, in whole or in part, payments received under other laws or regulations covering similar costs,[1] and Ms. Moxley had already been paid subsistence expenses for the same days for which she was claiming temporary quarters expenses. The disallowance of her claim on that basis was in accord with previous decisions of our Office in similar cases.

Ms. Moxley appeals the disallowance of her claim on the basis of our decision in *Paul G. Thibault,* 69 Comp. Gen. 72, *supra,* decided November 9, 1989.

## Opinion

Prior to *Thibault,* we had held that where an employee is reimbursed for per diem while on temporary duty away from the official duty station, the employee may not be similarly reimbursed for temporary quarters expenses at the official

[1] FTR, para. 2-5.2i, *incorp. by ref.* 41 C.F.R. § 101-7.003 (1982).

duty station for those same days. 47 Comp. Gen. 84 (1967); B-175499, Apr. 21, 1972; B-172739, June 14, 1971. However, in *Thibault* we held that if the agency concludes that the employee acted reasonably in retaining temporary quarters at the official duty station while away on temporary duty, these expenses would be reimbursable as temporary quarters expenses since the employee actually incurred separate lodging costs at both locations. We specifically overruled the prior cases holding otherwise.

Although we did not specifically address the issue in the decision, we believe that the holding in *Thibault* should not be applied retroactively. Our decision with respect to the payment of both allowances represented a substantial departure from a long-held position which has been justifiably relied upon by certifying and disbursing officers. Therefore, the holding will be applied prospectively only to cases pending on or arising after the date of the decision, November 9, 1989. *See Prescott A. Berry,* 60 Comp. Gen. 285 (1981); *George W. Lay,* 56 Comp. Gen. 561 (1977).

Accordingly, since Ms. Moxley's claim was settled, and therefore no longer pending at the time *Thibault* was decided, November 9, 1989, it may not be reopened and allowed on the basis of the new rules set forth in *Thibault.*

## B-232666.4, March 5, 1991

## Procurement

**Competitive Negotiation**
**■ Requests for proposals**
**■■ Amendments**
**■■■ Notification**
**■■■■ Contractors**

Protester's nonreceipt of an amendment requesting a new round of best and final offers provides no legal basis to challenge the validity of the award where the record does not indicate that agency deliberately attempted to exclude offeror from the competition or otherwise violated applicable regulations governing the distribution of amendments.

## Procurement

**Competitive Negotiation**
**■ Contract awards**
**■■ Best/final offers**
**■■■ Acceptance time periods**

Award may not be made upon the basis of an offeror's unrevoked 13-month-old best and final offer (BAFO), even though the BAFO had no stated acceptance period, inasmuch as a reasonable time for accepting the offer had passed, the offeror did not respond to a new request for BAFOs, and the offer to accept award under the old BAFO was made after award under the latest BAFO to the offeror who submitted the lowest price on both BAFOs.

## Matter of: Western Roofing Service

Claire E. Duffy for the protester.

Robert C. Mackichan, Jr., Esq., Office of General Counsel, General Services Administration, for the agency.

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

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Western Roofing Service protests the award of a contract to Bryant Organization, Inc. under request for proposals (RFP) No. GS-09P-88-KTC-0225, issued by the General Services Administration (GSA), for roofing repairs.

We deny the protest.

The solicitation initially was issued as a formally advertised procurement on July 15, 1988, to obtain roofing repairs for the Federal Supply Warehouse, South San Francisco, California. The contractor was required to remove, replace, and repair the existing roof, including the removal of asbestos-contaminated roof felts.

At bid opening on August 26, 1988, GSA received five bids. GSA determined that only the high bidder, Bryant, was responsive. Because it was concerned with Bryant's high price, GSA converted the solicitation to a negotiated procurement on September 2 by amendment Nos. 0003 and 0004 and solicited proposals from the four remaining bidders.[1] Award under the RFP was to be made to the low priced technically acceptable offer.

On September 16, GSA received four proposals. Western protested that GSA had improperly included one of the offerors, American Felson Company, in the competition. Western withdrew the protest on being informed that it was in line for the award, since American Felson's proposal was determined unacceptable. On September 27, GSA made award to Western. American Felson then protested the award to Western on October 13. Our Office dismissed that protest as academic when GSA reopened discussions and requested best and final offers (BAFO) to be submitted by December 14.

On December 13, Western protested GSA's decision to reopen negotiations. This protest was denied on April 11, 1989.[2] On June 10, 1989, GSA terminated Western's contract. On August 16, 1989, by amendment No. 0008, GSA requested a third round of BAFOs. On August 23, GSA received BAFOs from Bryant, Western, and American Felson. Bryant submitted the low priced BAFO at $1,816,000, while Western proposed $1,855,485 and American Felson $1,898,323. Before award was made, the October 17 San Francisco area earthquake occurred. Thus, GSA delayed the procurement until seismic and structural studies were con-

[1] One bidder was found unqualified and eliminated from the competition.
[2] *Western Roofing Service*, B-232666.3, Apr. 11, 1989, 89-1 CPD ¶ 368.

ducted on the warehouse to ensure the soundness of the structure for roofing repair.

On August 12, 1990, GSA issued amendment No. 0009. This amendment incorporated a revised Davis-Bacon wage determination and updated clauses, and requested a fourth round of BAFOs. No changes to specifications were made. On August 21, the closing date, only Bryant submitted a BAFO. GSA made award to Bryant on October 5. On October 17, Western learned of the award and filed this protest in our Office on October 25.

Western protests that it was wrongfully excluded from the competition, inasmuch it did not receive Amendment 0009 requesting BAFOs. Western claims that since its August 23, 1989, BAFO had not been revoked, GSA could not exclude it from the competition. GSA responds that it sent Western Amendment 0009, and that Western's proposal cannot be considered since Western did not acknowledge Amendment 0009, which GSA asserts is material.

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 Federal Acquisition Regulations (FAR), for the dissemination of solicitation documents, including amendments and requests for BAFOs, to prospective competitors. *Id.;* FAR §§ 14.203-1; 14.205; 14.208; 15.403; 15.606(b); 15.611(a). Concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents. *Ktech Corp.,* B-240578, Dec. 3, 1990, 90-2 CPD ¶ 447; *Fort Myer Constr. Corp.,* B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200.

As a general rule, the risk of nonreceipt of an amendment rests with the offeror. *Data Express,* B-234468, May 25, 1989, 89-1 CPD ¶ 507. Consequently, a prospective offeror's nonreceipt or late receipt of solicitation amendments, and consequent elimination as a source from the competition, will not justify overturning a contract award, absent a failure to comply with applicable regulations governing the distribution of amendments. *North Santiam Paving Co.,* B-241062, *supra.*

Here, there is no evidence that the agency deliberately attempted to exclude the protester from the competition. Specifically, GSA advises that the amendment was sent to all offerors and has furnished us a copy of an amendment addressed to Western, the original of which GSA states it mailed.[3] Western does not allege

[3] Given the passage of a year since receipt of the August 1989 BAFOs, it would have been prudent for the contracting officer to have telephoned the three offerors remaining in the competition in August 1990 to solicit their continuing interest in this procurement. However, there is no law or regulation that requires this to be done.

that the amendment was not properly sent and has presented no evidence that any offeror other than itself failed to receive the amendment.

While Western advises that it periodically contacted the procuring agency to determine the status of the procurement, Western has not indicated on what dates or with what frequency it did so. In view of the 2-month period from the issuance of Amendment 0009 in August 1990 to when Western became aware of the award in October 1990, it is apparent that Western's efforts to ascertain the status of this procurement and to obtain new amendments was less than diligent. *See Ktech Corp.*, B-240578, *supra.*

Finally, Western brought its failure to receive the amendment 0009 to GSA's attention after award was made, so GSA could not readily remedy the situation. *See Essex Electro Eng'r, Inc.*, B-234089.2, Mar. 6, 1990, 90-1 CPD ¶ 253. Under the circumstances, we ascertain no violation of law or regulation or unreasonable conduct on the part of GSA that resulted in Western's failure to receive the amendment, nor in the contracting officer's decision to accept the one proposal received.[4]

Western argues that notwithstanding its failure to receive the amendment to the RFP, GSA could have evaluated its last offer because neither the RFP nor its offer had a stated acceptance period and Western had not revoked the offer at the time of the award. GSA responds that Amendment 0009 is a material amendment, since it included revised Davis-Bacon Act wage rates and "updated" clauses, and Western's failure to acknowledge this amendment renders its proposal not susceptible to acceptance.[5]

From our review of the RFP, its amendments and the proposals, it appears that there is no express expiration date for Western's August 23, 1989, BAFO.[6] Where an offer does not specify the time within which it may be accepted, it must be accepted within a reasonable time.[7] 26 Comp. Gen. 365, 367 (1946); *National Movers Co. v. United States*, 386 F.2d 999 (Ct. Cl. 1967). Similarly, CICA requires an agency to make award, after receipt of proposals, "with reasonable promptness." 41 U.S.C. § 253b(d)(4). A reasonable time to make award, after an

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[4] While only one proposal was received and Western asserts it would stand by its earlier BAFO price of $1,855,485, there is no evidence that Bryant's $1,981,008 price was unreasonable. Given the 13-month period since previous prices had been submitted, the contracting officer could have concluded that inflation and new market conditions accounted for the higher price. We note that the contracting officer could have contacted the other offerors when the agency received only one proposal at a higher price than earlier proposed to ascertain the reasons the other offerors did not submit offers. *See Weeks Marine, Inc./Bean Dredging Corp., a Joint Venture*, 69 Comp. Gen. 108 (1989), 89-2 CPD ¶ 505. However, the applicable regulations did not require him to do so, since he considered Bryant's price to be reasonable. *Reinhold Industries*, B-236892.2, Jan. 30, 1991, 91-1 CPD ¶ 85.

[5] Western disputes whether Amendment 0009 is a material amendment, since it has a collective bargaining agreement that obligates it to pay at least the Davis-Bacon Act wages and the revised wage determination allegedly has a *de minimis* effect on its proposal price. *See ABC Paving Co.*, 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436. Moreover, GSA has not specified how the contract clauses were updated. However, we need not decide whether this was a material amendment in view of our conclusion below that Western's offer had expired.

[6] Ordinarily, proposals have expiration dates. The RFP omitted the required standard Form 1442, which would have stated an offer acceptance period. *See* FAR § 36.701(b).

[7] Section 2-205 of the Uniform Commercial Code, which we look to as one source of federal common law, *R.H. Pines Corporation*, 54 Comp. Gen. 527, 528 (1974), 74-2 CPD ¶ 385, provides that, if no time is stated, an offer will remain open for a reasonable time.

offer that contains no expiration date is received, is determined by consideration of all the circumstances in the case. *Id.*; B-126073, Dec. 15, 1955.

Under the circumstances here, we think that Western's August 23, 1989, offer could no longer be accepted by the agency. Over 13 months had passed between Western's submission of its proposal for this construction contract and the award. There has been general inflation during this period and economic conditions of the construction industry in the San Francisco area could have significantly changed since the 1989 earthquake. Thus, while it is true that Western never advised GSA that it would not be bound by acceptance of its August 1989 offer over a year later, *see* 26 Comp. Gen. *supra*, the firm did not renew its August 1989 price until after award to Bryant. Given Western's failure to respond to the BAFO request, it was not unreasonable for GSA to conclude that Western was no longer interested in the procurement and to proceed with an award to Bryant, which submitted a timely response to Amendment 0009.

Western argues that even assuming its August 1989 proposal had expired, its proposal can be revived. There are a number of circumstances in which an expired bid or proposal may be revived where the integrity of competitive system will not be compromised. For example, a low bidder, which offered the bid acceptance period required by an invitation for bids, may revive its expired bid. *See Rubbermaid, Inc.*, B-238631, May 2, 1990, 90-1 CPD ¶ 444. Also, where all proposals have expired, an agency may allow the successful offeror to waive the expiration of its proposal acceptance period and make award on the basis of the proposal as submitted, since a waiver under such circumstances is not prejudicial to the competitive system. *See Sublette Elec., Inc.*, B-232586, Nov. 30, 1988, 88-2 CPD ¶ 540. These situations are not applicable here, however, since Bryant, not Western, submitted the low BAFO price both in August 1989 and in August 1990. Bryant and the competitive system would be prejudiced by allowing Western's August 1989 offer to be revived.

The protest is denied.

## B-227534.5, March 7, 1991

## Civilian Personnel

**Relocation**

**■ Household goods**

**■■ Shipment**

**■■■ Restrictions**

**■■■■ Privately-owned vehicles**

An employee is not entitled to reimbursement for shipment of his automobile to his new duty station in Hawaii where shipment at government expense was not authorized at time of transfer and the employee shipped his automobile at personal expense. The employee has not shown that the agency abused its discretion in determining that it would not authorize overseas transportation of employees' automobiles to their duty station as being "in the best interest of the government," pursuant to 5 U.S.C. § 5727(b)(2) and the implementing provisions of the Federal Travel Regulations

and Joint Travel Regulations. *Frayne W. Lehmann,* B-227534.4, Nov. 5, 1990, and B-227534.3, Feb. 21, 1990, affirmed.

## Matter of: Frayne W. Lehmann—Shipment of Privately Owned Vehicle at Government Expense

In this decision we reconsider our prior decision sustaining disallowance of the claim of Mr. Frayne W. Lehmann, a former employee of the Navy, for reimbursement for expenses incurred in shipping his privately owned vehicle (POV) to Pearl Harbor, Hawaii, incident to a permanent change of station. That disallowance was based on the fact that Mr. Lehmann's travel orders specifically stated that no overseas shipment of a POV was authorized, which we held was a valid exercise of the discretionary authority vested in the authorized official by the provisions of 5 U.S.C. § 5727(b)(2) and the applicable regulations. For the reasons set forth below, we affirm our prior decisions, *Frayne W. Lehmann,* B-227534.4, Nov. 5, 1990, and B-227534.3, Feb. 21, 1990.

In his request for reconsideration Mr. Lehmann asserts that because his agency, the Naval Facility Engineering Command, which denied him authorization to ship his vehicle, acknowledged that it has a written policy not to authorize the shipment of civilian employees' vehicles to Hawaii, it has effectively eliminated him from consideration for a potential relocation benefit conferred by 5 U.S.C. § 5727(b) (1988). This statute authorizes transportation abroad of an employee's POV if the head of the agency or his designee determines that it is in the interest of the government for the employee to have the use of a POV at his post of duty outside the continental United States. *See* 2 JTR paras. C11001 and C11002 (Aug. 1, 1985).[1]

Mr. Lehmann points out that decisions of our Office have held that the determination whether to authorize transportation expenses for a POV pursuant to 5 U.S.C. § 5727(b) is a factual matter to be decided on a case-by-case basis. Therefore, Mr. Lehmann maintains that since the Navy applied its blanket policy of denial to his request rather than review his request on a case-by-case basis in light of all relevant facts personal to it, the Navy decision is in violation of the statute and regulations.

As pointed out above, the authority for civilian employees in 5 U.S.C. § 5727(b)(2) provides that a POV may be transported at government expense only when "the head of the agency concerned determines that it is in the interest of the government for the employee to have the use of a motor vehicle at his post of duty." This statutory provision is implemented by regulations placing strict conditions on approval for transporting a POV, including that its use will not be primarily for the convenience of the employee and his immediate family, that local conditions make it desirable from the government's viewpoint for the employee to have its use, and that its use will contribute to the employee's ef-

[1] *See also* FTR, para. 2-10.2c (Supp. 1, Sept. 28, 1981), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1985).

fectiveness in the job.[2] Therefore, the determination to allow transportation abroad of a civilian POV is a matter of agency discretion, and an approving official may not authorize transportation of an employee's POV overseas unless it is determined that it would be in the government's interest to have the vehicle at the duty station.

Considering the criteria provided in the regulations, we do not find the Navy to have abused its discretion by making a determination, without review of the specific facts in Mr. Lehmann's case, that local conditions at Pearl Harbor did not make it desirable from the government's viewpoint to authorize shipment at government expense of civilian employees' POVs.

In the absence of relevant evidence presented in the record that the determination of the authorized official in denying Mr. Lehmann transportation of his POV at government expense amounted to an abuse of the discretionary authority provided by 5 U.S.C. § 5727(b)(2), there is no basis to allow the claim. *Daniel Moy,* B-192445, Nov. 6, 1978.

Accordingly, our prior decisions in Mr. Lehmann's case are affirmed.

## B-239073.2, March 15, 1991

## Civilian Personnel

**Relocation**

■ **Residence transaction expenses**

■■ **Reimbursement**

■■■ **Eligibility**

■■■■ **Lot sales**

## Civilian Personnel

**Relocation**

■ **Residence transaction expenses**

■■ **Reimbursement**

■■■ **Eligibility**

A transferred employee, who jointly owned a residence with his former wife, sold his one-half interest to her based on an agreed to selling price which was below the market price. His claim for expenses which would have been incurred had the residence been sold on the open market is denied. Reimbursement for real estate transaction expenses under the Federal Travel Regulations is limited to those allowable expenses which the transferred employee actually incurs and is legally obligated to pay. B-168074, Oct. 29, 1969, and B-180986, Sept. 18, 1974.

[2] FTR, para. 2-10.2c (Supp. 1, Sept. 28, 1981); and 2 JTR para. C11002-2 (ch. 238, Aug. 1, 1985).

## Civilian Personnel

**Relocation**

■ **Residence transaction expenses**

■■ **Reimbursement**

■■■ **Eligibility**

■■■■ **Property titles**

A transferred employee, who jointly owned a residence with his former wife, sold his one-half interest to her based on an agreed to selling price which was below the market price. His claim for expenses which would have been incurred had the residence been sold on the open market is denied. Reimbursement for real estate transaction expenses under the Federal Travel Regulations is limited to those allowable expenses which the transferred employee actually incurs and is legally obligated to pay. B-168074, Oct. 29, 1969, and B-180986, Sept. 18, 1974.

## Civilian Personnel

**Relocation**

■ **Residence transaction expenses**

■■ **Litigation expenses**

■■■ **Attorney fees**

■■■■ **Reimbursement**

A transferred employee, who jointly owned a residence with his former wife, was required to secure a modification of the court order associated with the divorce decree so that the employee could sell his interest in the residence to his former wife. While the modification itself was not contested, it was a continuation of a litigated matter. Under paragraph 2-6.2c of the Federal Travel Regulations the costs of litigation are not reimbursable. Hence, the legal fee incurred to secure the court order modification may not be reimbursed.

## Civilian Personnel

**Relocation**

■ **Residence transaction expenses**

■■ **Reimbursement**

■■■ **Eligibility**

## Civilian Personnel

**Relocation**

■ **Residence transaction expenses**

■■ **Reimbursement**

■■■ **Eligibility**

■■■■ **Property titles**

A transferred employee, who jointly owned a residence with his former wife, sold his entire interest in the property to his former wife. The rule requiring proration of expenses between the employee and his former wife is not applicable because the residence was not sold by both parties to a third party. Hence, the employee is entitled to full reimbursement of the allowable expenses he incurred in that transaction.

## Matter of: Willie E. Williamson—Real Estate Transaction—Expenses Actually Incurred—Proration

This decision responds to a request from an Authorized Certifying Officer, National Finance Center, Department of Agriculture.[1] It concerns the entitlement of an employee to be reimbursed real estate expenses incident to a permanent change of station in December 1985. We conclude that the employee may be reimbursed only for part of the expenses he claimed, for the following reasons.

## Background

Mr. Willie E. Williamson, an employee of the Rural Electrification Administration (REA), Department of Agriculture, was transferred from Washington, D.C., to Mankato, Minnesota, and reported for duty there on December 8, 1985. When notified of his transfer in October 1985, he resided in Davidsonville, Maryland, and commuted to and from his duty station in Washington, D.C., from that residence.

The Davidsonville, Maryland, residence was jointly owned by Mr. Williamson and his wife. In the spring of 1985, Mr. Williamson had instituted divorce proceedings against her. The divorce was granted in June 1987. The court order in the divorce stipulated that the jointly owned residence in Davidsonville was to be sold and the net proceeds of the sale were to be equally divided between the parties.

The property in question consisted of a three-bedroom house on an 11.2-acre parcel of land. Following several appraisals each by Mr. Williamson and his former spouse, they agreed upon a selling price of $250,000. Thereafter, Mr. Williamson attempted to place the residence on the market, but his former wife would not permit it to be listed because she wanted to purchase the residence and was attempting to secure financing.

Due to the delay in selling the residence, Mr. Williamson secured agency approval on November 17, 1987, to extend the time to sell his residence until December 7, 1988. On November 30, 1988, Mr. Williamson sold his one-half interest in the residence to his former spouse for $105,000. Mr. Williamson filed a voucher claiming $12,500 as expenses incident to that sale. The agency allowed $1,500, and disallowed the remaining $11,000.

Mr. Williamson has appealed that disallowance. He argues, in effect, that had his former spouse not prevented sale of the property on the open market, it would have been sold through a broker at a higher price and his share of the broker's fee and other expenses to be reimbursed by the government would have totaled $12,500.

Based on Mr. Williamson's appeal, the certifying officer asks the following questions, summarized below:

1. Since Mr. Williamson started legal proceedings for his divorce prior to his notification of transfer, would he be entitled to real estate expenses on the sale of the residence to his former spouse?

[1] Mr. W. D. Moorman—Reference FSD-1 WMD.

2. If the answer to question 1 is yes, may the agency reimburse Mr. Williamson based on the 11.2 acres or should the reimbursement be pro-rated based on smaller acreage?

3. If Mr. Williamson may be reimbursed for real estate expenses, should reimbursement be based on the sale price of $105,000 or the appraised price of $250,000?

4. Would any portion of Mr. Williamson's claim be reimbursable since no receipts, other than his letter, have been furnished?

## Opinion

The regulations governing real estate expense reimbursement at the times Mr. Williamson was transferred and sold his residence in Davidsonville, Maryland, are those contained in chapter 2, part 6, of the Federal Travel Regulations (FTR), Sept. 1981, as amended by Supp. 4, Aug. 23, 1982.[2] Paragraph 2-6.1 of the FTR, which sets forth the conditions of entitlement, states that residence sales expenses which are required to be paid may be reimbursed to a transferred employee, provided that: title to the residence is in the employee's name and/or the name or names of one or more members of his immediate family; the employee occupied the residence when he was definitely informed of his transfer; and the settlement or closing on the property occurred after definite notice of transfer, but not later than 2 years (which may be extended up to an additional 1 year) after the employee reports for duty at his new official station.

### Effect of Divorce Proceedings

The fact that Mr. Williamson initiated divorce proceedings before notice of transfer does not preclude reimbursement. We have held that a final decree of divorce between an employee and spouse after issuance of travel orders does not defeat those rights to which the employee is otherwise entitled under the FTR. A divorce decree does, however, limit reimbursement to the extent of the employee's interest in the property at the time of settlement. *Gerald S. Beasley,* B-196208, Feb. 28, 1980. *See also,* B-174612, Jan. 12, 1972; *modified on reconsideration,* B-174612, July 14, 1972.

Mr. Williamson initiated divorce proceedings in the spring of 1985, received notice of transfer in October 1985, and reported for duty at his new station in December 1985. The divorce was granted in June 1987 and the residence was sold in November 1988. Therefore, since Mr. Williamson occupied that residence when he was notified of transfer (October 1985), and jointly held title to the residence with his then wife, but was divorced prior to actual settlement, he is entitled to real estate expenses to the extent of his interest in the property at the time of settlement.

[2] *Incorp. by ref.,* 41 C.F.R. § 101-7.003 (1988).

If the residence had been sold to a third party, his reimbursement normally would be limited under FTR, para. 2-6.1f to one-half of the allowable real estate expenses. *Gerald S. Beasley,* B-196208, *supra. See also Thomas A. Fournier,* B-217825, Aug. 2, 1985. That amount would reflect the extent of his interest as joint owner. As shown above, however, the property was not sold to a third party. Instead, Mr. Williamson sold his entire interest in the residence to the other joint owner, namely his former wife.

The agreed selling price of Mr. Williamson's interest in the residence was $105,000, which was to be paid by Mr. Williamson's former wife to him. The settlement statement reflects the sale of that one-half interest by Mr. Williamson to his former wife. Thus, the transaction was not a sale of the title interests of both joint owners to a third party, but was a sale by one of the owners of his entire interest in the property to the other. Hence, the rule of *Beasley* and *Fournier, supra,* requiring proration of sales expenses is not applicable. Mr. Williamson is, therefore, entitled to full reimbursement of the allowable expenses he incurred in that transaction.

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**Land in Excess of the Residence Site**

Paragraph 2-6.1f of the FTR also provides:

> . . . The employee shall also be limited to pro rata reimbursement when he/she sells or purchases land in excess of that which reasonably relates to the residence site.

The application of this regulation was considered at length in *K. Diane Courtney,* 54 Comp. Gen. 597 (1975). We ruled therein that the agency concerned is responsible for the initial determination as to what portion of the real estate sold reasonably relates to the residence site and the amount of the claimed expenses which are allowable for that portion. However, we advised agencies that doubtful cases should be forwarded to our Office. Examples of matters to be considered in making that determination include prevailing and customary practices in the locality; zoning laws; past, present, and potential future use of the land; and local requirements concerning on-site waste disposal systems.

Information secured by the agency from an official of the Office of Planning and Zoning of the county in question shows that under its zoning code, the minimum lot size in the area is 2 acres per lot. Notwithstanding that, the official suggested that the maximum subdivision potential of Mr. Williamson's property would be four lots, but that three lots would be more realistic. However, he noted that the 11.2 acres has not been subdivided or approved for subdivision to accommodate additional residential dwellings.

Mr. Williamson, in turn, states that his property is part of an old estate which is on the National Register of Historic Places. Further, he maintains that only part of the property is suitable for residential purposes because nearly 3 acres on one end of the parcel lies in a 50-year flood plain zone, other parts in the middle are sufficiently low lying so that all natural water flow from other adjacent properties flows through his, and there are numerous fresh water springs throughout the property. Since much of the land remains wet year around, he

contends that it is unusable for additional residence sites under current county requirements.

County officials seem to agree with Mr. Williamson's argument. They have recognized the existence of the flood plain problem and the need to conduct a current storm drainage study. Further, they have recognized the need for percolation tests as a health requirement because public water and sewer are not available. Their report also states that when the parcel was created in 1970 it conformed to the lot requirements of the time, but would not qualify as a legal lot under current requirements if created now.

In brief, the information of record does not establish that the 11.2 acres is divisible into other residence sites; only that it might be divisible if certain zoning requirements and health standards can be met. In view of those reports, we consider satisfaction of these requirements and standards too problematical to conclude that any part of the parcel would support other residence sites. In the circumstances, we do not believe that any of the property sold should be deemed to be in excess of that which reasonably relates to the site of Mr. Williamson's residence. Therefore, proration for excess land is not required.

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**Qualifying Real Estate Expenses**

Mr. Williamson maintains that he is entitled to reimbursement of constructive costs as if the residence were sold to a third party at its market value of $250,000. He estimates such costs to be $25,000, of which he would have paid $12,500.

Paragraph 2-6.1 of the FTR provides that reimbursement shall be allowed "for expenses required to be paid by him/her in connection with the sale of one residence." Specific reference to the actual expense requirement is made in connection with each of the reimbursable expense items listed in FTR, para. 2-6.2. Thus, only where a transferred employee is legally obligated to pay an otherwise allowable real estate expense item, may he be reimbursed that cost. There is no basis upon which a claim for expenses not incurred may be paid. B-180986, Sept. 18, 1974, and B-168074, Oct. 29, 1969.

As part of the sequence leading to the sale, Mr. Williamson secured an appraisal of the residence at a cost of $250 and he obtained a receipt for that cost. Paragraph 2-6.2b of the FTR permits reimbursement of the customary cost of an appraisal fee. We have held that such fee may be reimbursed if it was incurred after definite notice of transfer was given. *Gerald S. Beasley,* B-196208, *supra.* Mr. Williamson was actually transferred in December 1985 and the property appraisal was not performed until October 1986. Therefore, since an appraisal fee may be reimbursed when selling a residence (B-186009, Oct. 12, 1976), Mr. Williamson may be reimbursed that cost of $250 as an expense of the sale of his interest to his former wife, if the cost of that appraisal was customary.

The only other expense charged Mr. Williamson was $1,500 at settlement. That cost represented the legal fee incurred to modify the original divorce decree so as to permit his one-half interest in the residence to be sold to his former spouse. That modification was apparently deemed necessary by the settlement attorney since the original divorce decree restricted the sale of the residence to a third party.

Under FTR, para. 2-6.2c, legal fees incurred to search title, prepare abstracts, conveyances and other documents required in the chain of conveying property interest from seller to buyer are reimbursable. However, costs of litigation are not reimbursable. The modification of the court order in the divorce proceeding did not involve the adversary relationship normally associated with litigation and was not contested. However, since the original court order was issued as part of a divorce settlement between Mr. Williamson and his former wife, the further action necessary to modify that court order was a continuation of a litigated matter, so as to preclude payment of the legal fees involved. Therefore, no part of the $1,500 legal fee may be reimbursed. *Cf. Charles W. Dodge*, B-160040, July 13, 1976.

## B-240156.2, March 19, 1991

## Procurement

**Contractor Qualification**

**■ Responsibility**

**■■ Financial capacity**

**■■■ Line of credit**

Protest challenging responsiveness of awardee's bid for failure to comply with bid deposit requirement is denied where the awardee's bid documents contained no irregularities or facial defects and bid deposit statement unequivocally bound bidder to furnish 20 percent of its bid price as a bid deposit as required by the solicitation. Fact that bidder pledged credit card account with insufficient line of credit is a matter of responsibility since it pertains solely to the adequacy of assets supporting the bid deposit; accordingly, this error did not render bid nonresponsive and agency properly allowed bidder to correct it prior to award.

## Matter of: N.G. Simonowich

N.G. Simonowich for the protester.

Bruce W. Baird, Esq., Defense Logistics Agency, for the agency.

Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

N.G. Simonowich protests the award of item 146 to G.A. Avril Company under invitation for bids (IFB) No. 31-0133, issued by the Defense Logistics Agency

(DLA) for the sale of various kinds of scrap metal. Simonowich, the second high bidder, contends that Avril's high bid should have been rejected as nonresponsive and thus that it is entitled to the award.

We deny the protest.

This is the second protest Simonowich has filed with our Office under the subject IFB concerning the requirement that each bidder provide a bid deposit in an amount equal to 20 percent of the total bid price; under the terms of the IFB, the bid deposit could be made by cash, cashier's check, certified check, traveler's check, bank draft, money order, or by charge to a VISA or Master Card credit card account. On the cover page of the bid form, each bidder was required to complete a bid deposit statement.

On June 22, 1990, Simonowich filed the first protest and challenged the rejection of its bid as nonresponsive. Briefly stated, DLA rejected Simonowich's bid as nonresponsive because, prior to the award, there was an insufficient credit line in the VISA account Simonowich pledged as its bid deposit. We sustained Simonowich's protest in *N.G. Simonowich,* B-240156, Oct. 16, 1990, 70 Comp. Gen. 28, 90-2 CPD ¶ 298, holding that the deficiency in the credit balance pertained solely to the bidder's responsibility, rather than responsiveness, and could therefore be cured any time prior to award. Based on our finding that DLA improperly rejected Simonowich's bid as nonresponsive due to an insufficiency in the credit line Simonowich pledged as his bid deposit, which was cured by the protester before award, we recommended that Simonowich be awarded the 14 scrap metal items for which he was high bidder.

While Simonowich's protest was pending, Avril, who also had been found nonresponsive after its credit card was declined, advised the contracting officer that it inadvertently had referenced the wrong VISA credit card account on its pledge sheet. Avril also requested that if the credit card problems were waived for the other bidders, that Avril be given the same consideration. Avril's bid deposit statement read as follows:

> The total amount of the Bid(s) is $ —*— and attached is the bid deposit, when required by the Invitation, in the form(s) of *VISA* **$49,619.31,* in the amount of *$10,000.00.* [Italicized portions were originally underlined.]

With its bid, Avril also included a credit card information sheet, which the agency required from any bidder who intended to charge either the bid deposit or final contract price on its credit card. Avril's completed sheet contained all the credit card information required by the agency to access Avril's VISA account.

After reviewing our decision on Simonowich's first protest, the agency allowed Avril, the high bidder on item 146, to substitute its business VISA account number for the original VISA account number cited on the bid, and subsequent-

ly made award of the item to Avril. After initially lodging an agency-level protest, Simonowich's protest to our Office followed.[1]

Simonowich contends that Avril's high bid should have been rejected as nonresponsive because Avril's bid deposit referred to an incorrect VISA account number and the bid deposit did not refer to an approved annual bid bond to otherwise guarantee the bid. The agency disagrees, arguing that the contracting officer's decision to allow Avril to cure its credit card deficiency by substituting the correct VISA card account number on its bid deposit statement is consistent with our decision in *N.G. Simonowich,* B-240156, *supra.* Further, the agency contends that it would have been inappropriate to reject Avril as nonresponsive based on the failure of its bid deposit to reference an approved annual bond because the IFB did not require that a bid deposit in the form of VISA or Master Card credit card be supported by an annual bond. We find that the agency properly awarded Avril the contract for item 146.

Bid deposits and bid bonds are forms of bid guarantees designed to protect the government's interests in the event of a bidder's default. *Marine Power and Equip. Co., Inc.,* 62 Comp. Gen. 75 (1982), 82-2 CPD ¶ 514. If a bidder fails to honor his bid in any respect, the bid bond secures a surety's liability for all excess reprocurement costs. *Surface Preparation and Coating Enters., Inc.,* B-235170, July 20, 1989, 89-2 CPD ¶ 69. A bid deposit similarly obligates a bidder not to withdraw before award and to pay the full purchase price; while a bid deposit may be applied towards the purchase price of goods being sold by the government, in the event the bidder defaults on his contractual obligations, the government may retain the deposit as liquidated damages. *Marine Power and Equip. Co., Inc.,* 62 Comp. Gen. 75, *supra.* Bid deposits offer some advantages over bid bonds—the government has immediate access to the funds without any defenses sureties might raise. On the other hand, bid deposits tie up all bidders' funds for a period of time.

In determining whether a bid is responsive to a bid deposit requirement we look to see whether the bid deposit documents submitted at bid opening are in the form required by the solicitation. *See Forbes Mfg., Inc.,* B-237806, Mar. 12, 1990, 90-1 CPD ¶ 267 (where bidder's personal check rendered his bid nonresponsive since the solicitation provided that the only acceptable form of bid deposit was a guaranteed instrument of payment). Submission of a bid deposit in the exact manner and form called for by the solicitation demonstrates that the bidder has obligated itself to forfeit the bid deposit in the event that it withdraws before award or fails to pay the full purchase price. *See Marine Power and Equip. Co., Inc.,* 62 Comp. Gen. 75, *supra* (replacement of one valid negotiable instrument with another did not render a bid nonresponsive where the bidder had executed all documents necessary to create a binding procurement contract at the time of bid opening).

[1] We consider the second basis of Simonowich's current protest—which objects to award of items 99, 103, and 152 to Simonowich—as academic because the agency has deleted these items from Simonowich's contract; therefore, we will not review this basis.

On the cover page of its bid, Avril clearly stated that its VISA account was to be debited to cover the 20 percent bid deposit charge. The accompanying credit card information sheet submitted by Avril was complete and contained no irregularities or facial defects; thus, Avril's VISA pledge represented a firm commitment by Avril to be liable for the bid deposit. Since its bid documents clearly bound Avril to furnish the bid deposit by means of a credit card charge, an instrument explicitly approved for use as a bid deposit by the solicitation, Avril's bid was responsive. *See Marine Power and Equip. Co.*, 62 Comp. Gen. 75, *supra; Intermountain Paper Stock, Inc.*, B-211269, Apr. 22, 1983, 83-1 CPD ¶ 450.

Whereas bid responsiveness concerns whether the bid itself unequivocally offers to perform in conformity with all material terms and conditions of a solicitation, "responsibility" refers to a bidder's ability to perform all the contract requirements, and is determined not at bid opening, but at any time prior to award based on information received by the agency up to that time. *Ibex, Ltd.*, B-230218, Mar. 11, 1988, 88-1 CPD ¶ 257. The existence and thus the adequacy of Avril's VISA credit line cannot be determined from the bid itself, and thus does not affect the responsiveness of the bid. After correctly interpreting our initial decision in *N.G. Simonowich* as stating this principle, the agency properly allowed Avril to cure the defect concerning its responsibility by substituting a different credit card account prior to award.

Simonowich also argues that Avril's bid was nonresponsive because its bid deposit was not supported by an annual deposit bid bond. Given that there was no requirement in the IFB for a supporting bid bond, Avril's lack of such a bond did not affect the responsiveness of its bid. We recognized in *N.G. Simonowich*, B-240156, *supra*, that unlike cash, cashier's checks and other forms of bid deposits acceptable in this procurement, credit cards are not guaranteed instruments and are subject to such events as insufficient funds and stop payment orders. We noted that Simonowich's annual bid bond—which gives the government access to an amount equal to the bid deposit in the event of default—provides added protection to the government in the event of a credit card deficiency. Our conclusion that Simonowich's bid was responsive did not, however, rest on the fact that the protester also had presented an annual deposit bid bond.

While a bid bond was not required under the IFB at issue here, we recommended in *N.G. Simonowich*, B-240156, *supra*, that the agency consider either requiring that bidders who use credit cards back them up with a bid bond, or immediately processing credit card transactions at bid opening. DLA does not plan to adopt either of these measures, based on its view that they would make surplus sales less attractive to credit card users, lowering both competition and prices. By processing credit card bid deposits after bid evaluation and the agency is prepared to make award (which occurred 8 days after bid opening in *N.G. Simonowich*), DLA receives less protection than with other forms of bid deposits. Applicable regulations appear to permit the delay that DLA believes is beneficial to the government, *see* 32 C.F.R. § 172.5(iv) (1990), and we have no reason to question the agency's judgment in this regard.

The protest is denied.

## B-238877.4, March 20, 1991

## Procurement

**Bid Protests**
**■ GAO procedures**
**■■ GAO decisions**
**■■■ Reconsideration**
**■■■■ Additional information**

Request for reconsideration of decision dismissing protester's supplemental protest as untimely is denied where, by waiting until after its initial protest was dismissed without receiving an agency report and more than 5 weeks after notice of the award to file a Freedom of Information Act request, protester did not diligently pursue information which may have revealed additional ground of protest.

## Matter of: Diemaster Tool, Inc.—Reconsideration

Richard O. Duvall, Esq., and Richard L. Moorhouse, Esq., Dunnells, Duvall & Porter, for the protester.

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

Diemaster Tool, Inc. requests that we reconsider our decision in *Diemaster Tool, Inc.*, B-238877.3, Nov. 7, 1990, 91-1 CPD ¶ 162, in which we dismissed as untimely Diemaster's supplemental protest challenging the award of a contract to Textron Lycoming under invitation for bids (IFB) No. DAAJ09-90-B-0050, an approved source solicitation issued by the Department of the Army for 1,020 turbine shafts, a critical flight safety part for the T-53 helicopter engine.

We deny the request for reconsideration.

The solicitation contemplated the award of a firm, fixed-price supply contract and restricted the competition to approved sources, specifically Diemaster and Textron, the original equipment manufacturer. Clause I-2 of the solicitation, referencing Federal Acquisition Regulation (FAR) § 52.209-1 (FAC 84-39), generally described the government's qualification requirements for testing or other quality assurance demonstration to be completed before award. In its bid, Textron completed clause I-2(c) concerning its previous compliance with the standards specified for qualification by listing itself and KHD as the manufacturers of the turbine shaft which had been supplied under a 1986 contract. Textron was the apparent low bidder and Diemaster was the second low bidder. The contracting officer determined that Textron was a responsible contractor, and on February 27, the agency awarded the contract to Textron.

On March 9, Diemaster filed a protest alleging, among other things, that Textron submitted an unreasonably low-priced bid that would not cover its costs and which represented a "buy-in." Diemaster included with its protest a request that the agency release relevant documents such as Textron's contract as part

of the agency's administrative report. On March 22, the agency filed a request for summary dismissal of Diemaster's protest arguing that the protester essentially was challenging the contracting officer's affirmative determination of Textron's responsibility. On March 29, Diemaster filed its opposition to the agency's request for summary dismissal. Diemaster apparently believed that despite this pending request, the agency would file its report on April 13, at which time Diemaster would receive relevant documents, including a copy of Textron's contract, and that following its submission of comments, our Office would proceed to decide its protest on the merits. However, prior to the submission of the agency report, our Office, on April 5, dismissed Diemaster's protest. *Diemaster Tool, Inc.,* B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375.

In *Diemaster Tool, Inc.,* B-238877, *supra,* we held that Diemaster's allegation that Textron submitted a below-cost or "buy-in" bid did not provide a basis of protest because a bidder, for various reasons, in its business judgment, may decide to submit a below-cost bid, and such a bid is not invalid. *Select Investigative Servs., Inc.—Recon.,* B-235768.3, Aug. 1, 1989, 89-2 CPD ¶ 94. We explained that whether an awardee can perform the contract at the price offered is a matter of responsibility which our Office will not review absent a showing of possible fraud or bad faith or that definitive responsibility criteria have not been met. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1990); *Trak Eng'g, Inc.,* B-231791, Oct. 28, 1988, 88-2 CPD ¶ 402. Diemaster made no such allegation concerning the contracting officer's affirmative determination of responsibility. We further stated in our decision that an unreasonably low-priced bid may not be rejected under FAR § 14.404-2(f) (FAC 84-58) (providing for rejection of a bid where it is unreasonable as to price) solely because of its low price where the bidder is found to be responsible by the contracting officer. *See generally North Am. Laboratories of Ohio, Inc.,* 58 Comp. Gen. 724 (1979), 79-2 CPD ¶ 106.[1]

On April 18, following our dismissal of its initial protest and more than 5 weeks after having been notified of the award to Textron, Diemaster requested from the agency, pursuant to Freedom of Information Act (FOIA) procedures, several documents, including Textron's contract. On June 20, Diemaster received the FOIA documents, including a copy of the contract awarded to Textron. On July 5, based on the FOIA documents released by the agency, Diemaster filed a supplemental protest with our Office alleging that the agency improperly awarded the contract to Textron which was ineligible for award because Textron's designated subcontractor for all of the manufacturing effort, KHD, was unqualified and unapproved under the material qualification requirements of the solicitation.

On November 7, we dismissed Diemaster's supplemental protest as untimely because it waited more than 5 weeks after it was notified of the award to Textron to file its FOIA request. *Diemaster Tool, Inc.,* B-238877.3, *supra.* In this regard,

[1] Diemaster still disagrees with our interpretation that under FAR § 14.404-2(f) an unreasonably low-priced bid may not be rejected solely because of its low price where the bidder is found responsible. Here, as we stated in our prior decision, there is no evidence to suggest that Textron's low-priced bid was below-cost, and, therefore, Diemaster's argument is academic.

we stated that a protester who challenges an award on one ground should diligently pursue information which may reveal additional grounds of protest concerning a competitor's offer and that separate grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements of our Bid Protest Regulations. *See Robinson Indus., Inc.—Recon.,* B-194157.2, Mar. 14, 1980, 80-1 CPD ¶ 197. Where a protest is based on information disclosed pursuant to FOIA, the protest will be considered timely if it is filed within 10 working days after the information is received, provided that the protester diligently pursued the release of the information under FOIA. *Robbins-Gioia, Inc.,* B-229757, Dec. 28, 1987, 87-2 CPD ¶ 632. In this case, we concluded that by waiting over 5 weeks after it received notice of the award to file its FOIA request, Diemaster did not diligently pursue within a reasonable time information upon which its supplemental protest was based. *See Finkelstein Assocs., Inc.,* B-237441, Nov. 22, 1989, 89-2 CPD ¶ 497; *Heroux, Inc.,* B-237432.2, June 8, 1990, 90-1 CPD ¶ 542.

In its request for reconsideration filed on November 28, Diemaster contends that the fact it did not learn of the additional basis of protest until almost four months after the award to Textron was a result of our "unwarranted action" in summarily dismissing its initial protest prior to receiving the agency report. Diemaster, reiterating the chronology of events, argues that it diligently pursued its FOIA request following our dismissal of its initial protest. Diemaster essentially maintains that had our Office not dismissed its initial protest, it would have learned of its supplemental basis of protest at the time it received the agency report without having to initiate a FOIA request for the relevant information.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). Repetition of arguments made during our consideration of the original protest and mere disagreement with our decision do not meet this standard. *R.E. Scherrer, Inc.—Recon.,* B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. Diemaster has failed to make the required showing.

With respect to Diemaster's contention that our decision to dismiss its initial protest without receiving the agency report was unwarranted, our Bid Protest Regulations clearly state that we may summarily dismiss a protest without requiring an agency to submit a report when on its face a protest does not state a valid basis of protest, is untimely, or otherwise not for consideration by our Office. 4 C.F.R. § 21.3(m); *see* 31 U.S.C. § 3554(a)(3) (1988). Further, when the propriety of such a dismissal becomes clear only after information is provided by the agency, we may dismiss the protest at that time without receiving the agency's report. *Id.*

Here, Diemaster's initial protest allegation—that Textron submitted an unreasonably low-priced bid that would not cover its costs and represented a "buy-in"—did not provide a valid basis of protest because below-cost bids are not illegal or improper and the contracting officer made an affirmative determination

that Textron was a responsible bidder which could perform the contract at the price it offered. Despite the fact that our Office initially requested an agency report, we were not precluded from considering the agency's subsequent request for summary dismissal. Diemaster knew that the agency requested dismissal of its protest as evidenced by its filing of an opposition to the request. After considering the respective positions of both Diemaster and the agency, we properly dismissed Diemaster's initial protest in accordance with our Bid Protest Regulations which provide that protests which involve an affirmative determination of an awardee's responsibility may be dismissed without receiving an agency report. 4 C.F.R. § 21.3(m)(5).

Bid protests are serious matters which require effective and equitable procedural standards assuring a fair opportunity to have objections considered consistent with the goal of not unduly disrupting the procurement process. *See Amerind Constr. Inc.—Recon.*, B-236686.2, Dec. 1, 1989, 89-2 CPD ¶ 508. Accordingly, our Bid Protest Regulations, 4 C.F.R. Part 21, contain strict timeliness requirements for filing protests, and to ensure those requirements are met, an affirmative obligation is imposed on the protester to diligently pursue information that forms the basis for its protest. *See Illumination Control Sys., Inc.*, B-237196, Dec. 12, 1989, 89-2 CPD ¶ 546.

Here, the protester, in its initial protest, expected to receive a copy of Textron's contract and other specified information as part of the original protest process. The protester then apparently intended to use this information to file any additional protest grounds. Bid protests were not intended to be employed as an alternative to an FOIA request. Where, as here, the protester does file its protest as a means of obtaining additional information, it does so at its own peril since a protest may be dismissed at any time (including prior to the receipt of the agency report) where it fails to state a valid basis for protest. 4 C.F.R. § 21.3(m). On this record, we remain of the view that by waiting more than five weeks after notice of the award to Textron to file its FOIA request, and only after our Office dismissed its initial protest without receiving an agency report, Diemaster did not diligently pursue information which may have revealed a possible additional ground of protest concerning Textron's bid.

The request for reconsideration is denied.

## B-242134.4, March 20, 1991

## Procurement

**Competitive Negotiation**

**■ Offers**

**■ ■ Preparation costs**

## Procurement

**Socio-Economic Policies**

**■ Disadvantaged business set-asides**

**■ ■ Use**

**■ ■ ■ Administrative discretion**

Where agency erroneously relies on past procurement history and issues solicitation on unrestricted basis which results in a protest and subsequent agency determination, shortly before closing date for receipt of proposals, to set procurement aside for small disadvantaged businesses (SDB), claim for proposal preparation costs is denied since there is no evidence of bad faith on the agency's part; mere negligence or lack of due diligence by the agency, standing alone, does not provide a basis for the recovery of proposal preparation costs.

## Matter of: The Taylor Group, Incorporated

Charles G. Taylor for the protester.

Russ Offutt for Southwestern Associates, Inc., J. Paul Junge for All Star Maintenance, Inc., Stewart Taylor for Stay Incorporated, and Rudy C. Grubb for Contractors International, Inc., interested parties.

Captain Thomas H. Eshman II and Millard F. Pippin, Department of the Air Force, for the agency.

Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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The Taylor Group, Incorporated, a small business, protests agency actions under request for proposals (RFP) No. F41636-90-R-0083, issued by the Air Force for military family housing maintenance. In its protest, Taylor initially challenged the agency's decision, made 24 hours before the closing date for receipt of proposals, to amend the unrestricted solicitation and subsequently to set aside the procurement for exclusive small disadvantaged business (SDB) competition. In its supplemental protest documents and its comments on the agency report, which explained the reasons for the set-aside, the protester concedes that the set-aside determination was proper; however, the protester requests reimbursement of its proposal preparation costs. Taylor argues that the firm is entitled to such costs because the agency negligently issued the solicitation on an unrestricted basis—when it should have known, prior to the issuance, that there was sufficient SDB interest in the procurement and, therefore, in bad faith induced non-SDB offerors to prepare proposals.

We deny the protest and claim for costs.

The RFP was issued on September 17, 1990, on an unrestricted basis. The record indicates that prior to issuing the solicitation the contracting officer consulted the previous solicitation history of the acquisition, conducted in fiscal year 1988, which showed that only one SDB competed for the award, as well as the agency's source list, which did not include any other SDBs. Based on this information, the contracting officer concluded that there was insufficient SDB interest to justify issuing the RFP as a SDB set-aside.

On November 26, 2 days before the closing date for receipt of proposals, the agency received notification that Hernandez Contractors, an SDB concern, had filed a protest with our Office challenging the agency's decision to issue the solicitation on an unrestricted basis. The agency reviewed the protest and concluded that it had based its decision on incorrect data regarding SDB interest and that the current data—the fact that 21 SDBs responded to the *Commerce Business Daily* (CBD) notice by requesting solicitations—showed that there was sufficient SDB interest to set the procurement aside. Consequently, the Air Force postponed the closing date and amended the RFP to set aside the procurement. Hernandez's protest was dismissed as academic; Taylor's protest to our Office followed.

As stated, the protester now concedes that the set-aside is proper but argues that the Air Force should pay its proposal preparation and protest costs, since the allegedly negligent and/or bad faith issuance of the solicitation on an unrestricted basis induced Taylor to invest time and money for proposal preparation. To support its allegation, the protester contends that the agency's decision not to set aside was based on incomplete and outdated information, and that the agency should have known, prior to issuing the solicitation, that there was sufficient SDB interest in the procurement, based on its receipt of requests for solicitations from 21 SDB contractors. Moreover, the protester states that the timing of the decision to set the procurement aside demonstrates that it was made in bad faith.

While we agree with the protester and the Air Force that it would have been preferable to set aside the procurement early in the procurement process, the issue here is whether the agency should be required to pay the protester's proposal preparation costs because it did not make that decision earlier. Even assuming that the agency acted negligently in basing its decision not to set the procurement aside for SDBs on past acquisition history without considering the responses to the CBD notice, recovery of proposal preparation costs is allowed only where there is a showing of bad faith on the agency's part. *Computer Resources Technology Corp.*, B-218292.2, July 2, 1985, 85-2 CPD ¶ 14. To show bad faith, the agency must have had a malicious and specific intent to injure the protester. *See Asbestos Abatement of America, Inc.—Recon.*, B-221891.2; B-221892.2, Aug. 5, 1986, 86-2 CPD ¶ 146. The record here does not show that the Air Force acted in bad faith when it decided not to restrict the procurement. Rather, the record shows that the agency based its decision on the erroneous assumption that there was insufficient SDB interest and that it issued the RFP with the intent to award a contract. The fact that the agency concedes that

it relied on outdated data and failed to react sooner to the SDB responses to the synopsis simply does not rise to the level of bad faith by the agency, *i.e.,* it does not show that the agency's decision to issue the solicitation on an unrestricted basis, even if erroneous, was made with the intent to harm Taylor or any other offeror.

The protester also contends that the manner in which the agency conducted site visits confirms that it was acting in bad faith. In this regard, the protester argues that the first site visit was flawed because the potential offerors were not shown the interior of any housing units and that the second site visit was flawed because the agency only showed a few units which did not constitute a cross section of the units. The Air Force concedes that the first site visit was flawed and argues that even if the second visit was flawed, the government, in good faith, tried to provide an idea as to the breadth of the project by showing vacant quarters and floor map plans.

While Taylor takes issue with the adequacy of the site visits, we fail to see how its contentions demonstrate bad faith by the agency; on the contrary, the agency instituted a second site visit when it discovered that the first visit was flawed. Nor has Taylor explained the nexus between the agency's conduct of the site visits and its initial decision not to set aside the procurement. To the extent the protester is arguing that there was a general air of bad faith on the agency's part, the facts simply do not establish that this is the case. Rather than bad faith, the record at most shows errors by the agency which it has now rectified.

The protest is denied.

## B-241418.2, March 21, 1991

## Procurement

**Competitive Negotiation**
**■ Requests for proposals**
**■■ Cancellation**
**■■■ Resolicitation**
**■■■■ Propriety**

## Procurement

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

An agency had a reasonable basis to cancel and resolicit a request for proposals (RFP), under which award was to be made to the low-priced acceptable offeror, after the receipt of proposals and disclosure of prices, where the major required item was solicited in the RFP on a "brand name" rather than on a "brand name or equal" basis and an acceptable equal item was proposed, because the RFP overstated the agency's requirements, which caused a reasonable possibility of prejudice to the

competitive system since actual and potential offerors did not have the opportunity to compete on the government's actual requirements.

## Matter of: General Projection Systems

Robert J. Kenney, Jr., Esq., Hogan & Hartson, for the protester.

William K. Dix, Esq., for Science Applications International Corporation, an interested party.

William T. Mohn, Esq., Department of the Navy, for the agency.

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

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General Projection Systems (GPS) protests the decision of the Department of the Navy, Naval Regional Contracting Center, Washington, D.C., to request new proposals under request for proposals (RFP) No. N00600-90-R-3391, for an audiovisual system, including installation, for the U.S. Naval Academy, Annapolis, Maryland.

We deny the protest.

The synopsis of the procurement in the July 17, 1990, edition of the *Commerce Business Daily* (CBD) under Federal Supply Class (FSC) Code 67 (photographic equipment), advised potential offerors that the entire audiovisual system, including an Eidophor 5171 projector, was being procured on a "brand name or equal" basis.

The RFP was set-aside for small business concerns and did not designate that the procurement fell under any particular FSC code. The schedule and the specifications of the RFP solicited "brand name or equal" products for all required items except for line item 0007, the high-intensity multisync light-value video projector.[1] For that item, both line item 0007 of the price schedule and the specifications called for the brand name Eidophor 5171 projector.[2] The record indicates that line item 0007 constituted approximately half the cost of the total system. The RFP stated that a single contract would be awarded to the responsible offeror with the lowest-priced, technically acceptable offer.

The solicitation incorporated by reference Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001, "Buy American Act and Balance of Payments Program." The clause implements the Buy American Act, 41 U.S.C. §§ 10a-d (1988), and the Department of Defense (DOD) Balance of Payment Program by providing an evaluation preference for domestic end prod-

[1] The schedule listed 94 separate brand name or equal line items or subline items. A variety of manufacturers' brand names were specified.

[2] Specifically, the Eidophor 5171 with 500mm lens, multisync option, NTSC decoder, 50.32.63 Automatic Changeover Device, spare 4.2kW lamp.

ucts over foreign end products, except for certain classifications of end products of qualifying countries.

Two proposals were received by the September 17 closing date. Science Applications International Corporation's (SAIC) proposal, which offered the Eidophor 5171 projector, was lowest-priced at $1,246,277. GPS' proposal priced at $1,246,860 offered an "equal" product, a General Electric (GE) projector—Talaria model 2MLV-SC—for item 0007. Both proposals were found technically acceptable after a review of the submitted descriptive literature. The contract was awarded to SAIC based on its lowest-priced, technically acceptable proposal.

On October 1, GPS filed a protest with our Office contending that the solicitation was subject to the Buy American Act, and that since SAIC's offered product, the Eidophor 5171, is foreign-made, a 12 percent evaluation factor should have been applied in GPS' favor since its offered GE projector is a domestic product.

The 12 percent evaluation preference, provided for in DFARS § 252.225-7001 and Federal Acquisition Regulation (FAR) § 25.105(a)(2), is generally applicable to DOD procurements for supplies, if the product is not encompassed by the Trade Agreements Act, 19 U.S.C. § 2501 *et seq. See* FAR §§ 25.103; 25.402. Where the lowest domestic offer is from a small business concern, as GPS certifies itself, a 12 percent evaluation preference is applied to lower-priced foreign offers, inclusive of duty, if the foreign product is not an eligible product of a designated country. GPS argued that the Eidophor 5171 projector was not an eligible product of a designated country covered by the Trade Agreements Act and that GPS was therefore entitled to the award as the lowest-priced domestic offer after the evaluation preference was applied.

The Navy agreed with GPS that SAIC had incorrectly certified that the Eidophor 5171 projector was not foreign-made. The Navy found that line item 0007 for Eidophor's brand name product should properly have been classified under FSC Code 58 (communications equipment) rather than under FSC Code 67 (photographic equipment). The Navy stated that FSC Code 67 products fall within the coverage of the Trade Agreements Act, which would negate the Buy American Act evaluation preference, while FSC Code 58 products do not, such that the Buy American Act preference is applicable. The Navy also found that the RFP specifications were overly restrictive, since line item 0007 only called for the brand name product, Eidophor 5171, yet GPS' offered "equal" projector, although not solicited by the RFP, was determined to be technically acceptable.

On November 6, we dismissed GPS' October 1 protest when the Navy advised our Office that the requirement would be resolicited on the basis of a corrected RFP. On November 9, we reopened our file on this protest, when GPS indicated that it was not satisfied by the Navy's corrective action and that it was entitled to award under the RFP.[3]

[3] Although the Navy argues that GPS' protest is untimely under our Bid Protest Regulations because it was filed more than 10 working days after October 22, when the Navy informally apprised GPS of its proposed corrective action, GPS' timely October 1 protest to our Office expressly requested award as the proposed relief. Thus, GPS' protest is timely.

The Navy now asserts that it is not canceling the RFP, but rather is soliciting new proposals from those offerors who requested solicitations. Notwithstanding the Navy's assertion, since the agency is rejecting the two proposals received under the RFP and is proposing to resolicit the requirement, the agency is effectively canceling the RFP. *See* FAR § 15.608(b)(4).

In a negotiated procurement, an agency must have a reasonable basis to cancel an RFP and resolicit after receipt of offers, as opposed to the requirement that an agency have a cogent and compelling reason to cancel an invitation for bids (IFB) and resolicit after receipt of sealed bids. FAR § 14.404-1; *Logics, Inc.*, B-237411, Feb. 1, 1990, 90-1 CPD ¶ 140; *Lucas Place, Ltd.*, B-235423, Aug. 30, 1989, 89-2 CPD ¶ 193. The reason for this is that bids in response to an IFB are publicly exposed, and to reject them and seek new bids would discourage competition. *See GAF Corp.*, 53 Comp. Gen. 586 (1974), 74-1 CPD ¶ 68. The same governmental interest in achieving full and open competition is present, and the same justification for cancellation is applicable, where the cancellation of an RFP occurs after prices have been disclosed, as sometimes occurs during bid protest proceedings. *Carson Optical Instruments, Inc.*, B-228040, Oct. 19, 1987, 87-2 CPD ¶ 373. Under these circumstances, we believe that an agency has a reasonable basis to cancel the RFP and resolicit where the record contains plausible evidence or a reasonable possibility that not to do so would be prejudicial to the government or the integrity of the competitive system itself.[4] *See Meisel Rohrbau GmbH & Co. KG*, 66 Comp. Gen. 383 (1987), 87-1 CPD ¶ 414; *Pacific Coast Utilities Serv., Inc.*, B-220394, Feb. 11, 1986, 86-1 CPD ¶ 150. For example, an agency may cancel a solicitation if it materially overstates the agency's requirements and the agency desires to obtain enhanced competition by relaxing the requirements. *See CooperVision, Inc.*, B-229920.2, Mar. 23, 1988, 88-1 CPD ¶ 301; *Aero Innovations, Ltd.*, B-227677, Oct. 5, 1987, 87-2 CPD ¶ 332.

The Navy states that the requirement here must be resolicited in order to achieve full and open competition since GPS' proposed "equal" product was considered acceptable, even though the RFP only allowed for the brand name product. The Navy asserts that the absence of the words "or equal" in line item 0007 resulted in an overly restrictive specification overstating the Navy's needs, since potential offerors could only supply the brand name product to satisfy the Navy's stated needs. The Navy states that a clear and less restrictive specification that accurately reflects the Navy's minimum needs should result in additional competition and may ultimately result in a lower price. In this regard, the agency states that only 2 of the 15 sources who requested the RFP submitted proposals.

GPS argues that the omission of the words "or equal" for item 0007 is an obvious typographical error and this omission should not have misled any legitimate potential offeror, since the salient characteristics of this product are listed in

[4] In contrast, where the possibility of prejudice is merely speculative or hypothetical, the agency should not resolicit, but should make award under the RFP. *See Pacific Coast Utilities Serv., Inc.*, B-220394, *supra; Tapex Am. Corp.*, B-224206, Jan. 16, 1987, 87-1 CPD ¶ 63 (reversed in *Tapex Am. Corp.—Recon.*, B-224206.2, June 24, 1987, 87-1 CPD ¶ 626, when the agency provided evidence of prejudice).

the RFP specification, and the CBD announcement clearly indicated this item could be a brand name or equal product. We disagree.

The RFP itself can reasonably be interpreted as only allowing the brand name product for item 0007. In this regard, all other line items in the RFP expressly solicited "brand name or equal" products. Moreover, the CBD notice was not incorporated into the RFP. *See Hydraudyne Sys. and Eng'g B.V.,* B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88. The possibility that this was a typographical error on the RFP schedule is belied by the fact that, unlike the other line items, the pertinent specification also only designates the brand name product and does not provide for an equal product. Thus, this case is different from *Environmental Tectonics Corp.,* B-222568, Sept. 5, 1986, 86-2 CPD ¶ 267 and *U.S. Technology Corp.,* 66 Comp. Gen. 16 (1986), 86-2 CPD ¶ 383 (cited by the protester), where the solicitations could reasonably be interpreted as allowing equal products to be supplied, even though they were not expressly solicited.

In view of this clear ambiguity, an award under the RFP would be prejudicial to the competitive system. The two offerors, and presumably other potential offerors, are small business system integrators, who review the specifications and propose the brand name or equal product that they believe would satisfy the government's requirements at the lowest price. Since the RFP can be reasonably read to state that only the brand name product would be acceptable for item 0007, potential sources might not have considered offering a domestic product that would benefit from the application of the Buy American Act as did GPS. In this regard, one offeror, whose proposal was not evaluated because it was submitted late, is a GE dealer, according to GPS; yet, that firm proposed the brand name, rather than the GE projector, for item 0007. Thus, GPS' proposal of an "equal" product on this RFP should not be accepted as a basis for award, even though it apparently satisfies the government's requirements. *See Motorola, Inc.; General Elec. Co.,* B-221391.2 *et al.,* May 20, 1986, 86-1 CPD ¶ 471.

Additionally, SAIC, which was awarded a contract under the RFP, may have reasonably believed that the product it was offering was an eligible product of Belgium, a qualifying country under Trade Agreements Act, such that the Buy American Act evaluation preference was not applicable. As stated above, the CBD announcement erroneously stated that the products to be supplied were covered by FSC Code 67, which describes eligible products under the Trade Agreements Act. Nothing in the RFP indicated otherwise. Since all parties now apparently agree that item 0007 falls under FSC Code 58 and that the Buy American Act preference is applicable, this could well change SAIC's pricing strategy on this RFP. *See Ssangyong Constr. Co., Ltd.,* B-225947.3, Aug. 20, 1987, 87-2 CPD ¶ 183. Indeed, the agency indicates that it will advise offerors how the Buy American Act preference will be applied in the resolicitation. *See Systems-Analytics Group,* B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57.

The protest is denied.

## B-237973, March 22, 1991

## Military Personnel

**Pay**

**■ Reservists**

**■■ Retirement pay**

**■■■ Amount determination**

**■■■■ Computation**

A reservist's civil service retirement income is not "earned income from nonmilitary employment" under the dual compensation restrictions of 37 U.S.C. § 204 which requires a reduction in the pay and allowances a member receives while incapacitated if he receives income from nonmilitary employment since civil service retirement income is unrelated to the member's current employment status. Accordingly, it may not be offset against his pay and allowances.

## Matter of: Chief Master Sergeant Trente R. Adair, USAF Reserve

This action is the result of a claim by Chief Master Sergeant Trente R. Adair, USAFR, for an amount equal to his federal civil service annuity which was deducted from the pay and allowances to which he was entitled under 37 U.S.C. § 204(g) when he became incapacitated. That provision requires that the pay and allowances to which a member of a reserve component is entitled be reduced by earned income received from nonmilitary employment during a period of incapacitation. It is our view that his civil service annuity is not earned income from nonmilitary employment and the claim should be paid.

Sergeant Adair, a member of the Air Force Reserve, was ordered to active duty for 6 days from November 21, to November 26, 1988. During this period of active duty he suffered a disabling illness and was declared medically unfit for duty from November 27, 1988 to January 10, 1989, and became entitled to pay and allowances under 37 U.S.C. § 204(g).

Sergeant Adair is also a retired federal civil service employee who receives a civil service annuity. Throughout the period that he received disability compensation as a reserve member, he also continued to receive his civil service annuity. The Air Force deducted a total of $2076.40 from the allowances to which he was entitled in accordance with 37 U.S.C. § 204(g) which provides as follows:

(g)(1) A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated:

(A) in line of duty while performing active duty;

(B) in line of duty while performing inactive-duty training (other than work or study in connection with a correspondence course of an armed force or attendance in an inactive status at an educational institution under the sponsorship of an armed force or the Public Health Service); or;

(C) while traveling directly to or from such duty or training.

In the case of a member who receives earned income from nonmilitary employment or self-employment performed in any month in which the member is otherwise entitled to pay and allowances under paragraph (1), the total pay and allowances shall be reduced by the amount of such income.

In calculating earned income for the purpose of the preceding sentence, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.

The implementing regulation similarly speaks of civilian earned income as:

. . . the member's normal wages or salary or other earnings . . . that would have been payable for the disability period had the member been fully engaged in civilian employment . . . .

It is clear that Congress intended to reduce the pay and allowances to which a member of a reserve component is entitled when he is able to earn income from civilian employment. However, we think that the "employment" contemplated by the statute and regulation is active employment that, to the extent it can be engaged in, is inconsistent with the receipt of disability payments. Since a civil service annuitant is no longer actively employed in that sense, any income received in the form of a civil service annuity should not be considered as earned income for the purposes of 37 U.S.C. § 204(g), in our view.

Accordingly, the amounts deducted from Sergeant Adair's disability pay and allowances should be refunded to him.

## B-242142, March 22, 1991

## Appropriations/Financial Management

**Appropriation Availability**
**■ Time availability**
**■■ Permanent/indefinite appropriation**
**■■■ Determination criteria**

## Miscellaneous Topics

**Transportation**
**■ Railroads**
**■■ Statutory restrictions**

Prohibition contained in section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 note (1988)), constitutes permanent legislation. Therefore, until amended or repealed, section 402 prohibits the Interstate Commerce Commission from approving railroad branchline abandonments by Burlington Northern Railroad in North Dakota in excess of a total of 350 miles.

## Matter of: Permanency of Limitation on Interstate Commerce Commission's Approval of Railroad Branchline Abandonments Contained in 1982 Appropriation Act

The Interstate Commerce Commission (ICC) requests our opinion on whether section 402 of the Department of Transportation and Related Agencies Appropriation Act for Fiscal Year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 note (1988)), continues to prohibit it from approving railroad branchline abandonments by Burlington Northern Railroad (Burlington) in North Dakota. For the reasons stated below, we conclude that sec-

tion 402 is permanent legislation, and therefore prohibits ICC from using its current appropriation to approve railroad branchline abandonments by Burlington in North Dakota in excess of a total of 350 miles.

## Background

Section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982 provides:

> Notwithstanding any other provision of law or of this Act, none of the funds provided in this or any other Act shall hereafter be used by the Interstate Commerce Commission to approve railroad branchline abandonments in the State of North Dakota by the entity generally known as the Burlington Northern Railroad, or its agents or assignees, in excess of a total of 350 miles . . . .

In February 1990, Burlington invoked a class exemption that would have allowed it to abandon a 36-mile rail line in North Dakota that had been out of service for several years.[1] In a decision dated March 6, 1990, ICC construed section 402 as permanent legislation prohibiting it from authorizing Burlington's proposed abandonment since Burlington had abandoned 346.80 miles of track in North Dakota since 1981.[2] ICC denied Burlington's petition for reconsideration on November 2, 1990, but noted that it would request our opinion and reconsider its decision if we construed section 402 differently. ICC requested our opinion by letter of November 15, 1990. Burlington has since sought judicial review of ICC's decisions. Although we do not ordinarily address matters in litigation, both ICC and Burlington have requested that we respond to ICC's request.

## Discussion

It is well settled that Congress has the power to enact permanent legislation in an appropriation act. *See United States v. Dickerson,* 310 U.S. 554 (1940); *Cella v. United States,* 208 F.2d 783 (7th Cir. 1953); 36 Comp. Gen. 434 (1956). However, there is a presumption that provisions in an annual appropriation act are effective only for the covered fiscal year because appropriation acts are by their nature non-permanent legislation. 31 U.S.C. § 1301(c); 65 Comp. Gen. 588 (1986). Therefore, a provision in an appropriation act may not be construed as permanent legislation unless the language or nature of the provision make it clear that Congress intended it to be permanent. *Id.* at 589; B-230110, April 11, 1988.

[1] Under 49 U.S.C. § 10903, an interstate railroad may not abandon any of its rail lines without the express prior approval of ICC. However, 49 U.S.C. § 10505(a) directs ICC to exempt from the Interstate Commerce Act those transactions for which its regulation is unnecessary. While ICC has exempted from the prior approval requirement of section 10903 the abandonment of any rail lines that have not had any traffic for at least two years, exempt abandonments are subject to other, albeit limited, requirements. *See, e.g.,* 49 C.F.R. § 1152.50 (1990).

[2] ICC maintains that its authority to exempt certain proposed abandonments from the requirements of section 10903 is limited by its authority to approve abandonments under that section. Accordingly, ICC held that section 402 applies to abandonments by class exemption as well as to abandonments by application. Docket No. AB-6 (Sub-No. 318X), *Burlington Northern Railroad Company—Abandonment Exemption—In McKenzie County, ND,* March 6, 1990, *reconsideration denied,* November 2, 1990. We note that both types of abandonments require ICC to spend some portion of its appropriation.

The clearest indication that Congress intended a provision to be permanent is the presence of "words of futurity." 65 Comp. Gen. at 589; B-208705, Sept. 14, 1982. "Notwithstanding any other provision of law" and "in this or any other act" are not "words of futurity" and, standing alone, offer no indication as to the duration of a provision. *Id.;* B-230110 at 3. In contrast, "hereafter" is a "word of futurity" and generally indicates permanence. *Cella v. United States* 208 F.2d at 790; 36 Comp. Gen. at 436. We believe that the presence of the word "hereafter" in section 402 reflects Congress's intent to enact permanent legislation.

Further, an analysis of the evolution of section 402 supports our position. The appropriation bill passed by the House of Representatives, H.R. 4209, did not prohibit railroad branchline abandonments. However, as reported by the Senate Committee on Appropriations and passed by the Senate, the bill prohibited branchline abandonments by Burlington in North Dakota in excess of 350 miles. The Conference Committee substituted a general prohibition against branchline abandonments for the prohibition contained in the Senate version.[3] The Conference Committee explained that its general prohibition in section 311 "broadened" the Senate's language "in response to the numerous requests of Members of Congress." H.R. Rep. No. 331, 97th Cong., 1st Sess. 28 (1981). Considering the Conference Report, both the House of Representatives and the Senate approved a floor amendment that included, as section 402, a prohibition against branchline abandonments like the earlier Senate provision and additional language rendering section 311 inoperative.[4]

The different language of sections 311 and 402 reflect the significantly different results those sections were designed to achieve. Section 311 would have applied to all railroad branchline abandonments in all states; section 402 affects branchline abandonments only by Burlington in North Dakota. Section 311 would have set a percentage limit on branchline abandonments, appropriate since a uniform mile limit may have had a disproportionate impact on some states; section 402 sets a 350-mile limit. Finally, section 311 would have applied by its terms to fiscal year 1982 only; section 402 applies "hereafter." The explicit reference to fiscal year 1982 in section 311 reflected the Conference Committee's intent to prohibit ICC's use of appropriated funds for certain purposes during one fiscal year. The absence of "fiscal year 1982" from and the presence of "hereafter" in

[3] Section 311 of the Conference Committee's bill provided:

None of the funds provided in this Act shall be used by the Interstate Commerce Commission to approve railroad branchline abandonments in fiscal year 1982 in any State in excess of 3 percentum of a State's total mileage of railroad lines operated. . . .

H.R. Rep. No. 331, 97th Cong., 1st Sess. 27 (1981).

[4] Burlington argues that since the Conference Committee could not "broaden" a permanent provision by substituting for it one limited to one fiscal year, the earlier Senate provision, and section 402, were likewise limited to fiscal year 1982. We disagree with the contention upon which Burlington bases its argument. The Conference Committee's provision, although limited in time, was clearly broader than the Senate provision in scope: it applied to all branchline abandonments in all states rather than to branchline abandonments by one railroad in one state. We believe that the better reading of the legislative history is that the conferees recognized the significant difference between the limited scope of the Senate provision and the broad scope of their alternative, and not that the conferees viewed the Senate provision as limited to fiscal year 1982.

section 402 suggests that Congress intended section 402 to apply to a different time period.

In addition, we must assume that Congress knew how courts and this Office have interpreted the word "hereafter" and that it adopted that interpretation when it substituted the word "hereafter" for the phrase "in fiscal year 1982." *See Lorillard v. Pons,* 434 U.S. 575, 580-581 (1978); *Florida National Guard v. Federal Labor Relations Authority,* 699 F.2d 1082, 1087 (11th Cir.), *cert. denied,* 464 U.S. 1007 (1983) (stating that Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning).

Burlington concedes that the word "hereafter" may indicate permanence, but argues that it does not do so with respect to section 402 because it does not precede the entire provision. Burlington claims that, as used in section 402, the word "hereafter" merely specifies the date on which the restriction on ICC's use of appropriated funds was to take effect.

Burlington's argument regarding the placement of the word "hereafter" is not convincing. Burlington provides no rule of statutory construction or any other basis upon which we could ignore prior instances in which we considered statutes with the word "hereafter" in their texts to be permanent. *See* 36 Comp. Gen. at 436; B-100983, Feb. 8, 1951. In addition, Burlington's argument conflicts with accepted principles of statutory construction. Absent an explicit provision to the contrary, an act takes effect upon the date of enactment. 2 N. Singer, *Sutherland's Statutory Construction* § 33.02 (4th ed. 1984); *United States v. York,* 830 F.2d 885, 892 (8th Cir. 1987), *cert. denied,* 484 U.S. 1074 (1988). Since the act making appropriations for fiscal year 1982, including section 402, contained no provision to the contrary, it took effect upon the date of enactment. Further, section 402 would have taken effect on that date even without the word "hereafter." Since constructions that do not give effect to all of the words of a statute must be avoided and Burlington's construction renders the word "hereafter" superfluous, we must reject it. *See* 2A N. Singer, *Sutherland's Statutory Construction* § 46.06 (4th ed. 1984); *United States v. Menasche,* 348 U.S. 528, 538-539 (1955); *Beisler v. Commissioner of Internal Revenue,* 814 F.2d 1304, 1307 (9th Cir. 1987).

Finally, both ICC and Burlington claim that section 402 should not be construed as permanent legislation because such a construction would lead to an absurd or unreasonable result, *i.e.,* that Burlington, its agents and assignees, could not abandon lines that have been out of service for several years.[5] While the application of section 402 may seem inappropriate under certain circumstances, a permanent construction itself does not lead to absurd or unreasonable results. *Compare* 62 Comp. Gen. 54. If ICC or Burlington finds that, as a practical

[5] ICC suggests that we reconsider or limit our prior decisions in light of "the absurd consequences that can result from construing appropriations language as permanent." We see no reason to abandon the principles that courts and this Office have long relied upon to construe language in appropriation acts.

matter, section 402 unreasonably prohibits certain proposed abandonments, either may seek repeal or amendment.

## Conclusion

Section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982 is permanent legislation. Accordingly, until section 402 is amended or repealed, ICC may not use appropriated funds to approve branchline abandonments involving rail lines of the Burlington Northern Railroad Company in North Dakota.

## B-242331, March 22, 1991

## Procurement

**Competitive Negotiation**

**■ Offers**

**■■ Evaluation**

**■■■ Wage rates**

Protest challenging agency's evaluation of awardee's proposal which allegedly proposed the use of tradesmen who would be paid hourly rates less than those required by the solicitation is denied where record shows that awardee's proposal did not take exception to solicitation requirement that it pay specified wage rates and thus the awardee is obligated under the contract to pay the required rates.

## Matter of: Emerald Maintenance, Inc.

John T. Flynn, Esq., Karl Dix, Jr., Esq., and E. Alan Arnold, Esq., Smith, Currie & Hancock, for the protester.

Gregory H. Petkoff, Esq., Department of the Air Force, 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.

Emerald Maintenance, Inc. protests the award of a contract to Global Associates under request for proposals (RFP) No. F64605-90-R-0022, issued by the Air Force for military family housing maintenance at Hickam Air Force Base, Oahu, Hawaii. Emerald alleges principally that the agency's award to Global was improper because Global did not intend to pay certain employees in accordance with wage rates that were contained in the RFP.

We deny the protest.

The RFP, which was issued June 22, 1990, and amended seven times, contemplated the award of a fixed-price requirements contract for one basic contract

period beginning November 1, 1990, and ending September 30, 1991, and for four 1-year option periods. The RFP required the contractor to provide maintenance of approximately 2,455 units, including service calls on a 24-hour basis, change of occupancy maintenance, floor refinishing, painting, and complete cleaning of quarters. The RFP contained more than 100 line items describing the tasks to be completed.

The RFP incorporated applicable Service Contract Act (SCA) and Davis-Bacon Act (DBA) wage rate determinations issued by the Department of Labor (DOL), which specified minimum required wage rates to be paid to employees under the contract. The SCA requires that service contracts with the government in excess of $2,500 contain a provision specifying minimum wages and fringe benefits, as determined by the Secretary of Labor, to be paid to employees in the performance of the contract. 41 U.S.C. § 351(a)(1) (1988). The DBA provides that the advertised specifications for every federal contract in excess of $2,000 for construction, alteration, and/or repair of public buildings or public works of the United States shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages determined by the Secretary of Labor to be prevailing for corresponding classes of laborers and mechanics employed on similar projects in the locality. 40 U.S.C. § 276a(a) (1988). The Act requires further that every contract based upon these specifications contain a stipulation that the contractor shall pay wages not less than those stated in the specifications. *Id.*[1] The RFP required both service and construction work to be performed; the RFP therefore contained both SCA and DBA provisions. These provisions, which become part of the contract, require, among other things, that the contractor pay its employees in accordance with the wage rate determinations incorporated in the RFP.

Certain line items in the RFP stated that the DBA wage rate determination applied to the work described in those line items. The RFP also indicated that where the line items did not state that the DBA wage rate determination was applicable, contract line items would be payable under SCA wage rate determinations.

Included in the specifications were requirements that the contractor maintain plumbing systems and components and that all plumbing work be accomplished by experienced plumbers under the general supervision of a licensed plumber who holds a journeyman's license from any state in the United States. Similarly, the specifications also required that the contractor maintain and repair the electrical systems on individual family housing units and that all work be accomplished by experienced electricians under the general supervision of a licensed electrician who holds a journeyman's license from any state in the United States. These requirements, however, did not correlate with any specific contract line item.

[1] Obligations under the DBA come into being only by virtue of contractual provisions and are not directly imposed on the employer/contractor by the statute. *See* 40 Comp. Gen. 565 (1961).

Amendment No. 2 to the RFP, which was issued on August 3, 1990, incorporated the minutes from a preproposal conference that was held on July 13, and was attended by the offerors and Air Force officials. The minutes reflect that the Air Force officials stated that the licensed supervisory electrician and plumber (one each) whose services were required by the RFP must be paid DBA wage rates. Other electricians and plumbers performing under the contract had to be paid in accordance with the SCA wage rate determinations.

The RFP contained evaluation criteria which were listed in descending order of importance as follows: (1) cost/price; (2) comprehension of requirements; (3) management organization and staffing; (4) contract management; and (5) corporate experience in military family housing maintenance. Proposed prices would be evaluated for completeness, realism and reasonableness. The RFP stated that the total price considered would include the basic period of performance and all options and that award would be made to the offeror whose proposal offered the greatest value to the government.

The Air Force received four proposals. The agency determined that each was within the competitive range and requested best and final offers (BAFO) from each firm. All four firms submitted BAFOs. Global submitted the low-priced BAFO, and on November 30, the agency made award to Global. Emerald filed this protest with our Office on December 11. After filing the protest, Emerald brought an action in the United States District Court for the District of Columbia (Civil Action No. 90-3131 RCL) alleging that the Air Force violated various procurement statutes and regulations in its evaluation of proposals. The District Court has stayed all proceedings in that action pending the issuance of a decision by our Office resolving this protest.

Emerald principally alleges that Global's offer proposed the use of various tradesmen who would be paid at hourly rates far lower than those required by the RFP.[2] Specifically, it asserts that Global proposed hourly wage rates of $11.97 and $13.31 for plumbers and electricians, respectively. The protester states that the required DBA wage rates are $29.02 and $30.05, respectively. Next, based solely on the assertion that Global did not propose to pay wage rates required by the RFP, Emerald contends that the Air Force "could not have" evaluated Global's proposal for "cost realism." Finally, Emerald asserts, again based on Global's alleged failure to propose DBA wage rates, that Global's proposal demonstrated a failure to comprehend the requirements and should therefore have been downgraded by the agency.

We have reviewed Global's technical and cost proposals, and we find that Emerald's protest is based on factually erroneous assumptions. The record shows that the Global wage rates quoted by the protester as evidencing Global's intent to violate the DBA were Global's proposed wage rates for maintenance plumbers and electricians, who were required under the RFP to be paid only at the lower

[2] Emerald states in its protest that it has "obtained a copy of the proposed staffing and hourly rates listed by Global Associates in its technical proposal." Neither the Air Force nor Global has released this proprietary information to Emerald. Emerald has failed to offer any explanation to our Office, the Air Force, or Global regarding how it obtained this information.

SCA wage rate. Page 1-A-4 of Global's technical proposal indicated that journeymen electricians and plumbers were included among the personnel covered by the DBA. Since the RFP contained the DBA contract clauses and Global's proposal did not take exception to the RFP's requirement that it pay its supervisory plumber and electrician DBA wage rates, Global is clearly obligated under the contract to do so. This is true notwithstanding that Global's cost proposal did not contain a separate entry indicating that the supervisory plumber and electrician would be paid at DBA rates.

The protester relies on two recent decisions of our Office, *Unified Indus., Inc.*, B-237868, Apr. 2, 1990, 90-1 CPD ¶ 346; *RGI, Inc.—Recon.*, B-237868.2, Aug. 13, 1990, 90-2 CPD ¶ 120, to support its argument that the agency waived the requirement that Global pay DBA wage rates and that therefore offerors did not compete on an equal basis. We find that those decisions are not controlling here, since in the procurement at issue in those decisions, the awardee's proposal showed that its costs for certain laborers covered under the applicable SCA determination were less than those required to be paid. In other words, the awardee's proposal specifically took exception to paying certain required wage rates. Thus, the facts in those decisions are clearly distinguishable from the facts in the present case.

Accordingly, the protest is denied.

## B-220425.4, March 25, 1991

## Procurement

**Bid Protests**
**■ GAO procedures**
**■ ■ Preparation costs**

Claimant may not recover costs of filing and pursuing General Accounting Office protest which are not sufficiently documented or are unreasonable.

## Matter of: Consolidated Bell, Inc.

Charles Belle for the protester.

Michelle Harrell, Esq., General Services Administration, for the agency.

Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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Consolidated Bell, Inc. requests that our Office determine the amount it is entitled to recover from the General Services Administration (GSA) for proposal preparation costs in connection with the offer it submitted under solicitation No. KECS-85-025, and for the cost of filing and pursuing its protest in *Consoli-*

*dated Bell, Inc.*, B-220425, Mar. 11, 1986, 86-1 CPD ¶ 238. As discussed below, we find that Bell is entitled to recover $490 in protest costs.

In our decision *Consolidated Bell, Inc.*, B-220425, *supra*, we sustained the firm's protest that GSA improperly determined that Bell's proposal was unacceptable. We initially recommended that GSA either terminate the awarded contract and award one to Bell or enter into discussions to include Bell. GSA subsequently informed our Office that while it had terminated the awarded contract, due to a lack of funds it could no longer award a contract under the protested solicitation. As a result, and because no other remedy was available, we amended our decision to permit Bell to recover the costs it incurred in filing and pursuing its protest and its proposal preparation costs. *Consolidated Bell, Inc.*, B-220425.2, Aug. 18, 1986, 86-2 CPD ¶ 192. We directed Bell to submit its claim directly to GSA.

Bell submitted its claim to GSA between August and September 1986. The claim totaled $376,110, consisting of $124,810 for protest and proposal preparation costs; $250,000 in lost profits; and $1,300 for additional attorneys' fees. GSA responded to this claim on October 15, 1986, offering Bell $850, but finding generally that the claim lacked supporting documentation. Bell took no further action toward resolving the dispute or settling the claim until August 8, 1990, when it resubmitted the claim to GSA, now requesting reimbursement in the amount of $124,810. GSA again offered Bell $850, and also informed Bell that overall its claim was excessive and undocumented. On November 8, 1990, Bell submitted its claim to our Office.

## Protest Costs

Bell claims reimbursement for $113,310 in protest costs, comprised of $400 for gasoline and other travel expenses, $150 for copy and mail costs, $300 for a retainer fee paid to an attorney, and $112,460 for various telephone calls, conferences and legal research performed by Bell or its legal researcher.

As a preliminary matter, we disallow $8,330 of the claimed amount, representing costs which Bell incurred before filing its protest with our Office. These costs, which were incurred by Bell in the pursuit of an agency-level protest before GSA, are not recoverable. *See Princeton Gamma-Tech, Inc.—Claim for Costs*, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401. We also disallow $47,410, the amount Bell claims was incurred after our decision sustaining Bell's protest was reached, since these costs were not incurred in pursuit of the protest. *Id.*

Concerning the remaining costs, a protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable, if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the pursuit of the protest. *Data Based Decisions, Inc.—Claim for Costs*, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

Here, Bell initially submitted a list of the time it allegedly spent performing tasks in pursuit of the protest and requested reimbursement for these tasks at a rate of $100 per hour. Bell requested $20,000 for time spent reviewing federal regulations and submitting its protest to our Office; $5,000 for time spent by Bell in reviewing GSA's protest report and various federal regulations; $10,000 for a legal researcher to review the GSA report and federal regulations; $20,000 for time Bell spent at conferences with its legal researcher during which it discussed other conferences it had attended with two attorneys;[1] $1,230 for time spent at conferences with the two attorneys and for one telephone call to one of those attorneys; $300 to pick up and deliver to our Office the comments the attorney prepared in response to the agency report; and $190 for time spent on the telephone with various General Accounting Office (GAO) employees during the pendency of the protest.

In its response to Bell's current claim, GSA challenges the $100 per hour charge to perform each task. GSA also argues in general that the amount of time and money Bell spent pursuing the protest is excessive and the claimed expenses are not adequately documented.

Our Office requested Bell to document the claimed expenses. In response, Bell submitted a statement by an attorney, Cara J. Luther Belle, certifying that she performed legal work as indicated in the claim. Ms. Belle apparently is the person identified as the "legal researcher" in Bell's claim. In addition, Bell submitted 12 pages of copies of canceled checks. The checks totaled $61,218.12, and were for, among other things: $569.24 to Giant (a local grocery store); $7,400 to cash for repayment of a personal loan; $910 to cash; and $658.46 for a deposit on a car. Based on the claim as submitted and this documentation, we dispose of Bell's claim as follows.

Bell may not recover the $20,000 claimed as the company's cost of reviewing federal regulations and submitting its protest to GAO. Bell has not submitted any documentation to show what regulations were reviewed and how this research related to the protest. Nor has Bell submitted documentation to show who performed the review and that this person is compensated at $100 per hour. *Id.* Also, based on the protest submission, which consisted of four pages and referenced only two Federal Acquisition Regulation sections, the amount of time claimed in preparing the protest, 200 hours, is excessive.

Bell may not recover $10,000 for its legal researcher to review GSA's report; $5,000 for a conference with its legal researcher to discuss what happened at an earlier conference with its attorney at which GSA's report was discussed; $5,000 for Bell to review GSA's report and unspecified federal regulations; or $10,000 for a conference with the legal researcher to discuss the attorney's comments on GSA's report and to review federal regulations. Bell has submitted a certification from Cara J. Belle that she performed legal research as indicated in the

[1] The $20,000 claimed for conferences with its legal researcher consists of $5,000 to discuss an earlier conference Bell had with its attorney to discuss GSA's report; $10,000 to discuss the attorney's comments on GSA's report and to review federal regulations; and $5,000 to discuss a conference with a second attorney after the protest record was closed.

claim; however, Bell has not submitted a bill or any other documentation to show that it paid her $10,000 to review GSA's report, or that this amount is reasonable. *Id.* Nor was it reasonable for Bell to spend 50 hours and incur $5,000 in costs to discuss with its legal researcher an earlier conference with its attorney, especially given that the attorney prepared the comments on the report. In addition, Bell has not submitted any documentation to show that any other Bell employee spent 50 hours reviewing GSA's report or that this employee is compensated at a rate of $100 per hour. In any case, we think the cost and amount of time claimed is excessive, given that an attorney prepared Bell's comments on the agency report. Finally, it was not reasonable for Bell to spend 100 hours, at a claimed cost of $10,000, to discuss the attorney's comments on the report with its legal researcher and to further review federal regulations after the comments on the report were filed with GAO.

Bell may not recover $630 claimed for company time spent on various telephone calls and conferences with its attorney. Again, Bell has not submitted documentation demonstrating that the employee involved in these calls and conferences is compensated at $100 per hour. In addition, Bell has not submitted any documentation to show what was discussed during these calls and conferences and how the discussions related to the protest. *Id.*

Bell may not recover $100 for a telephone call with its attorney to discuss our decision after it was reached since this call was not in pursuit of the protest. Similarly, Bell may not recover $5,600 for a telephone call and a conference with a second attorney ($600) and a conference with its legal researcher concerning these communications ($5,000). These calls and conferences allegedly concern a possible new approach to the protest. They took place after the comments on the protest were filed and the protest record was closed. Thus, they were not costs incurred in pursuit of the protest.

Bell may not recover $300 to hand carry its comments to our Office. Bell has not shown that the employee who delivered the comments was compensated at the rate of $100 per hour, nor that it took the employee 3 hours to deliver the comments.

Bell may not recover $150 for copy and mail expenses or $400 for gasoline and other travel expenses since Bell has not provided any documentation to show that these costs were incurred or that they relate to the protest.

Bell may recover $190 for telephone calls it made to GAO during the pendency of the protest. Bell has not provided any documentation to show the employee involved is compensated at $100 per hour, or to show what was discussed during these calls. The GAO attorney involved in the case, however, remembers that the calls took place, and we believe Bell is entitled to recover some amount of money for the time spent pursuing its protest.

Bell may recover the $300 retainer fee it paid to its attorney. While Bell did not submit any documentation for this amount, an attorney was involved in preparing the comments on GSA's report and GSA has agreed to pay this amount.

## Proposal Preparation Costs

Bell requests reimbursement of $11,500 in proposal preparation costs. According to Bell these costs, incurred over a period of 1.5 months, include: rent—$3,000 ($2,000 per month); utilities—$127.50 ($85 per month); office supplies—$300 ($200 per month); and postage—$60 ($10 per week for 6 weeks). In addition, Bell claims $9 in travel expenses billed at $.30 per mile for 30 miles, and $8,000 for 80 hours of employee time charged at a rate of $100 per hour.

Bell has not provided any documentation to support its claim for these costs. Bell has not shown what employees worked on the proposal, the tasks they performed or evidence of the amounts they were paid. Nor has Bell provided a lease or bills for the other alleged costs. Finally, Bell has not shown what amounts of any of these costs were attributable to the preparation of the proposal in issue. Consequently, Bell may not recover any of its proposal preparation costs. *See Patio Pools of Sierra Vista, Inc.—Claim for Costs,* 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374.

## Conclusion

Bell is entitled to recover $490 for filing and pursuing its protest.

## B-241770, March 25, 1991

## Civilian Personnel

**Relocation**

**■ Residence transaction expenses**

**■ ■ Reimbursement**

**■ ■ ■ Eligibility**

**■ ■ ■ ■ Property titles**

A transferred employee sold his residence at the old duty station which he owned in his capacity as trustee of an *inter vivos* trust which he created in which he was sole beneficiary during his lifetime and in which he retained full powers of revocation. Since employee was both sole trustee and sole beneficiary, he retained all legal title and beneficial interest in the property and therefore, retained sufficient title for purposes of real estate expense reimbursement under the Federal Travel Regulations. Thus, he is entitled to receive reimbursement of real estate expenses associated with the sale of the residence.

## Civilian Personnel

**Relocation**

**■ Residence transaction expenses**

**■ ■ Miscellaneous expenses**

**■ ■ ■ Reimbursement**

In connection with the sale or purchase of a residence, a transferred employee is not entitled to reimbursement for a lawn service expense since that is a nonreimbursable routine maintenance cost. Also, where pest and home inspections were not required by law or as conditions of obtaining

financing, they are not reimbursable. Costs of express mail are not reimbursable real estate expenses but may be reimbursed under the miscellaneous expense allowance.

## Matter of: Paul D. Atkinson—Real Estate Expenses—Title Requirements

The issue in this decision is whether an employee may be reimbursed the cost of real estate transaction expenses related to the sale of a residence where the employee held title to the property in his capacity as sole trustee of an *inter vivos* (living) trust of which he was both settlor (creator) and sole beneficiary during his lifetime and in which he reserved to himself full powers of revocation during his lifetime.[1] We conclude that this meets the requirement that title to the property be in the name of the employee so as to entitle him to reimbursement of allowable real estate expenses associated with the sale of the residence at the old duty station.

We are also asked our opinion concerning the agency's determination that four specific items the employee claims as real estate expenses do not qualify for reimbursement. As explained below, we agree generally with the agency, except that one item may be reimbursable as a miscellaneous expense allowance item.

### Background

Mr. Paul D. Atkinson, an employee of the Department of Housing and Urban Development, was transferred from Orlando, Florida, to Jacksonville, Florida, in June 1989. Mr. Atkinson sold his residence at his former duty station. At the time of the transfer, Mr. Atkinson held title to the property in his capacity as trustee of an *inter vivos* trust which he created and in which he named himself sole beneficiary for his lifetime while reserving to himself full powers of revocation for life. Mr. Atkinson states that he transferred title to his revocable living trust which he created in 1986 because he was single at the time and had a potentially disabling illness.

### Title Requirements

The statutory authority for reimbursing an employee for real estate expenses for the sale of his residence incurred incident to a transfer is 5 U.S.C. § 5724a(a)(4) (1988), as implemented by the Federal Travel Regulations (FTR). Specifically, 41 C.F.R. § 302-6.1(c) requires in part that title to the residence sold must be "in the name of the employee alone, or in the joint names of the employee and one or more members of his/her immediate, or solely in the name of one or more members of his/her immediate family."

[1] The matter was presented to us for decision by the Director, Accounting Division, Atlanta Regional Office, Department of Housing and Urban Development.

The agency's doubt in this matter arises from *Carl A. Gidlund,* 60 Comp. Gen. 141 (1980); affirmed, B-197781, Sept. 8, 1982, involving the reimbursement of expenses for the sale and purchase of property held in trust. There, we found that the transferred employee had not met the title requirements of the regulations and had not actually incurred the expenses in question and, therefore, was not entitled to reimbursement. In contrast to the present case, the property involved in the *Gidlund* case was held in the name of a pre-existing testamentary trust which paid the expenses in question. The trust had been established by the last will and testament of the employee's mother-in-law, and most importantly, it was not a living trust with full powers of revocation residing in the employee for life nor was the employee and/or a member of his immediate family the sole trustee and sole beneficiary during his lifetime. In contrast, in the present case Mr. Atkinson held the entire legal interest in the trust property, and as beneficiary had full beneficial equitable interest. Together, these interests constituted a proprietary interest entitling him to convey the trust property. Also, under the living trust created by Mr. Atkinson it is clear that it was his interest that bore the real estate expenses in selling the residence.

Given the differences between the trusts employed in the two cases, the findings and reasoning of the *Gidlund* case are not applicable to the determination of title involving the fully revocable living trust used by Mr. Atkinson. We conclude that Mr. Atkinson did hold title to his former residence as required by the Federal Travel Regulations. Accordingly, Mr. Atkinson is entitled to full reimbursement for otherwise allowable real estate expenses associated with the sale of his residence at the old duty station.

## Disallowance Of Certain Expenses

The certifying officer also requests our reaction to her decision to take exception to Mr. Atkinson's claim for a lawn service expense of $50 incident to the sale of his old residence; express mail expenses of $33 and $26 incident to the sale and purchase respectively; a pest inspection fee of $50 incident to the purchase (no mortgagee involved and not otherwise required in the state of Florida); and a home inspection fee of $250 incident to the new home purchase.

Lawn service is considered a matter of routine maintenance of the property. The cost of routine maintenance is specifically designated as a nonreimbursable item under the regulations. FTR § 302-6.2(d)(2)(iv); *see Irvin W. Wefenstette,* 63 Comp. Gen. 474, at 477 (1984); *Joseph F. Kump,* B-219546, Nov. 29, 1985.

Express mail charges may not be reimbursed under FTR part 302-6 as expenses in connection with the sale or purchase of a residence; however, they may be reimbursed as part of the miscellaneous expense allowance authorized by FTR § 302-3.1. *See Timothy R. Glass,* 67 Comp. Gen. 174 at 177 (1988). Reimbursement as a miscellaneous expense would be subject to the limitations in FTR § 302-3.3.

The cost of a pest inspection is not reimbursable if it is not a requirement for the purchase or sale. FTR § 302-6.2(f); *Robert E. Grant,* B-194887, Aug. 17, 1979. Since no mortgagee was involved who may have required a pest inspection and the agency advises that it was not otherwise required in Florida, this expense was properly disallowed.

Finally, disallowance of the home inspection fee was proper as nothing in the record suggests that the inspection was required for the transfer of ownership interest in the property or the security interest acquired by a mortgage lender but rather the inspection appears to have been solely for the protection of Mr. Atkinson's property interest in the home. FTR § 302-6.2(f); *Ronald M. Pearson,* B-230402, March 23, 1988.

## B-242060, March 25, 1991

## Procurement

**Sealed Bidding**
**■ Invitations for bids**
**■■ Amendments**
**■■■ Acknowledgment**
**■■■■ Responsiveness**

Protest challenging rejection of bid as nonresponsive for failure to acknowledge an amendment to the solicitation is sustained where the amendment merely clarifies an existing requirement in the solicitation and thus is not material.

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Descriptive literature**
**■■■■ Absence**

Rejection of a bid for microcomputers as nonresponsive on basis that protester failed to submit descriptive literature to establish that the offered products conform to the specifications is improper where the solicitation does not require descriptive literature and there is no evidence in the protester's bid to indicate that protester took exception to the requirements.

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Descriptive literature**
**■■■■ Adequacy**

Rejection of bid as nonresponsive on the basis that protester's descriptive literature shows different models of an offered product—one which conforms to solicitation requirement for .31 dot pitch and

one that does not—is improper where a reasonable interpretation of the bid's entire contents does not support conclusion that bidder was offering a nonconforming model.

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Descriptive literature**
**■■■■ Adequacy**

## Procurement

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

Rejection of bid as nonresponsive on the basis that protester submitted descriptive literature, which showed four different configurations of a keyboard to establish conformance to the solicitation's "enhanced keyboard" requirement, is improper where all four configurations depict enhanced keyboards and thus conform to the requirement.

## Procurement

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

Fact that bidder's descriptive literature merely refers to "full 1-year warranty" and does not also repeat solicitation requirement that warranty service be performed on-site does not render bid nonresponsive where there is no clear indication in bid that the bidder does not intend to conform with warranty requirement.

## Matter of: Futura Systems Incorporated

Mamoud Sadre and Patricia A. O'Hearn for the protester.

Donald M. Suica, Esq., and Corlyss Drinkard, Esq., Internal Revenue Service, Department of the Treasury, for the agency.

Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Futura Systems Incorporated protests the rejection of its bid and the subsequent award of a contract to Win Laboratories, Ltd. under invitation for bids (IFB) No. IRS-90-092, issued by the Internal Revenue Service (IRS), Department of the Treasury, for microcomputers. Futura's bid was rejected as nonresponsive be-

cause the firm failed to acknowledge an amendment to the IFB and failed to submit descriptive literature with its bid showing that the product offered conformed to the material specifications set forth in the solicitation.

We sustain the protest.

IRS issued the IFB on July 9, 1990, with bid opening scheduled for August 9. Prior to its original bid opening date, the solicitation was amended three times. Amendment No. 1 extended the bid opening date and added Federal Acquisition Regulation (FAR) § 52.214-21, entitled "Descriptive Literature." The clause defines such literature as information submitted as part of a bid that is required to establish, for the purpose of evaluation and award, the significant details of the product offered as specified in the solicitation. It advises that descriptive literature, "required elsewhere in this solicitation," must be identified to show the items to which it applies, and cautions that failure of the descriptive literature to show that the product offered conforms to the invitation's requirements will result in rejection of the bid.

Although the clause referred to descriptive literature "required elsewhere in this solicitation," the solicitation contained no additional references to the reason for or nature of the requirement for literature, nor did it explain how the literature was to be used in evaluating bids.

Amendment No. 3 extended the bid opening date, deleted the first page of section H of the solicitation, entitled "Special Contract Requirements," and substituted a new page that revised the paragraph describing the warranty period.

Futura submitted the apparent low bid ($26,950) of the 24 bids received by bid opening on August 31. After discovering that Futura failed to acknowledge amendment No. 3, IRS determined that the amendment was material and thus that Futura's failure to acknowledge it rendered the bid nonresponsive. IRS also found Futura's bid nonresponsive on the basis that Futura failed to submit all of the required descriptive literature and that the literature submitted did not show that the product offered conformed to the specifications in the solicitation. As a result, IRS rejected Futura's bid and made award to Win, the second low bidder, on September 28. Futura's protest to our Office followed its October 26 rejection notification.

## Amendment No. 3

Futura contends that IRS improperly rejected its bid as nonresponsive for its alleged failure to acknowledge amendment No. 3 because the firm in fact acknowledged the amendment and returned it with the rest of the bid documents. The protester also asserts that, in any event, the alleged failure should have been waived since the amendment does not affect price and thus is not material. IRS disagrees, arguing that the agency never received an acknowledgment and that the amendment is material because it changed the original terms of the warranty contemplated in the solicitation.

Generally, a bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. *Pittman Mechanical Contractors, Inc.*, B-225486, Feb. 25, 1987, 87-1 CPD ¶ 218. The mere fact that the bidder sent the acknowledgment is not relevant in determining the responsiveness of a bid, since it is the bidder's responsibility to assure that the acknowledgment arrives at the agency. *Call-A-Messenger*, B-212039, Aug. 15, 1983, 83-2 CPD ¶ 211. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery, or the relative standing of the bidders. FAR § 14.405; *Pittman Mechanical Contractors, Inc.*, B-225486, *supra*. An amendment is not material where it does not impose any legal obligations on the bidders different from those imposed by the original solicitation, for example, where it merely clarifies an existing requirement or is a matter of form. In that case, the failure to acknowledge the amendment may be waived and the bid may be accepted. *Star Brite Constr. Co., Inc.*, B-228522, Jan. 11, 1988, 88-1 CPD ¶ 373.

Here, while the agency has asserted that the amended solicitation altered the contractor's obligation to furnish warranty maintenance, this is simply not the case. The original warranty provision stated the following:

> The Contractor shall furnish, at no cost to the Government, all maintenance (labor and parts) as specified in this contract, both during and outside the Principal Period of Maintenance, for a period of one (1) year or the manufacturer's standard warranty, whichever is greater, beginning on the first day of the successful performance period. The warranty shall not apply to maintenance required due to the fault or negligence of the Government. All parts replaced during the warranty period shall become the property of the Contractor.

Making no substantial changes to the requirements, amendment No. 3 only substituted the following:

> The Contractor shall furnish, at no cost to the Government, all maintenance (labor and parts) as specified in this contract, during the Period of Maintenance stated in paragraph C.3.2 for a period of one (1) year or the manufacturer's standard warranty, whichever is greater, beginning on the first day of the successful performance period. The warranty shall not apply to maintenance required due to the fault or negligence of the Government. All parts replaced during the warranty period shall become the property of the Contractor.

The new language in the amendment—"during the Period of Maintenance stated in paragraph C.3.2 . . ."—merely incorporates a reference to a requirement that already was stated in paragraph C.3.2 of the solicitation.[1] By signing its bid and agreeing to be bound by the terms of the original IFB, Futura obligated itself to comply with paragraph C.3.2. *See Collington Assocs.*, B-231788, Oct. 18, 1988, 88-2 CPD ¶ 363. Accordingly, since it merely referred to a requirement that already was contained in the original IFB, the amendment was not material. *See B&T Int'l, Inc.*, B-224284, Dec. 8, 1986, 86-2 CPD ¶ 654.

[1] In relevant part, paragraph C.3.2 states that the contractor is to provide on-site maintenance with a 24-hour response time, 8:00 a.m. to 5:00 p.m. Monday through Friday.

## Descriptive Literature

The agency argues that Futura's descriptive literature was inadequate in five areas. Of the five, the agency states that the protester failed to submit any descriptive literature to show conformance with two requirements: "DOS 3.3 or 4.01 or latest version," and "[s]ystem integration and burn-in (24 hour burn in minimum)." We find that even though Futura failed to submit descriptive literature to show conformance with the two requirements cited above, the agency nevertheless improperly rejected Futura's bid as nonresponsive.

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. *Data Express,* B-234685, July 11, 1989, 89-2 CPD ¶ 28. Where descriptive literature is required to be supplied for use in bid evaluations, a bid may be rejected as nonresponsive if the bid and the data submitted with the bid do not clearly show that the offered product complies with the specifications. *Id.*

The literature in this case was, in a technical sense, "solicited," in that the IFB included the descriptive literature clause; however, the clause's requirement—that solicited descriptive literature must affirmatively establish conformance with the solicitation requirement—effectively was rendered inapplicable by the IFB's failure to alert bidders as to what literature was required and for what purpose. *See Tektronix, Inc.; Hewlett Packard Co.,* 66 Comp. Gen. 704 (1987), 87-2 CPD ¶ 315. Since the IFB effectively failed to require descriptive literature for these two requirements, Futura's failure to submit such literature, standing alone, did not render its bid nonresponsive. While literature that is not needed for bid evaluation generally is considered informational only, so that the failure to furnish it with the bid is immaterial, any submitted literature will cause the bid to be nonresponsive if it establishes that the bidder intended to qualify its bid or if the literature reasonably creates a question as to what a bidder is offering. *Id.* Since there is no indication in its descriptive literature or elsewhere in its bid that Futura took exception to these requirements, there was no basis to find its bid nonresponsive to them.

Further, the "requirement," albeit ineffective, that bidders submit descriptive literature to show conformance with the "[s]ystem integration and burn-in (24 hour burn in minimum)" specification is inappropriate. Descriptive literature for a performance requirement, such as the system integration and burn-in requirement does not, and cannot, aid the contracting officer in evaluating the technical acceptability of an offered product. *See* FAR § 14.201-6(p)(1) (agencies may require descriptive literature if it is necessary to evaluate the technical acceptability of an offered product). In fact, requiring the bidder to merely reassert this performance obligation which already was imposed by the solicitation only increases the chances that a bid will be found nonresponsive without providing any greater assurance that the bidder will satisfy the government's needs. *See Interad, Ltd.,* B-182717, June 16, 1975, 75-1 CPD ¶ 363.

With regard to the remaining alleged deficiencies in the literature that IRS cites, the agency charges that it properly found Futura's bid nonresponsive because Futura's descriptive literature for three requirements was ambiguous and thus failed to show compliance with these specifications. For example, the agency states that while the specifications required a "14 [inch] VGA color monitor (.31 dot pitch)," Futura's descriptive literature shows two different models of the monitor, one which conforms to the solicitation's .31 dot pitch requirement and the other—with a .39 dot pitch—which does not. Similarly, Futura submitted descriptive literature showing four different models of one keyboard to show conformance with the solicitation's requirement for an "enhanced 101-key keyboard" requirement.

While the agency is correct in its assertion that any submitted literature will cause the bid to be nonresponsive if it establishes that the bidder intended to qualify its bid or if the literature reasonably creates a question as to what the bidder is offering, *see Tektronix, Inc.; Hewlett Packard Co.,* 66 Comp. Gen. 704, *supra,* we find that Futura's bid here was responsive.

With regard to the monitor requirement, the descriptive literature submitted by Futura describes two monitors: one which conforms to the dot pitch requirement and one which does not conform to the requirement. The intent of a bid must be construed from a reasonable interpretation of its entire contents; we simply do not think it is reasonable to conclude that Futura's literature legitimately suggests that the firm might have been offering the nonconforming model. For purposes of marketing presentation or economy, the descriptive literature of many if not most vendors describes more than one of the vendor's models. Absent any indication elsewhere in Futura's bid that it intended to qualify its bid in this respect, we find it responsive.

Nor do we find that Futura's descriptive literature showing four different keyboards rendered its bid nonresponsive to the enhanced keyboard requirement. The submission of literature showing four different models does not create an ambiguity since there is no indication on Futura's pre-printed information that any one of the four keyboards does not conform to the requirement. Unlike the descriptive literature submitted for the monitor requirement, showing that one monitor conformed to the requirement and one did not, the literature here establishes that all four models are enhanced keyboards. The models differ in current consumption, operating force, and lifetime; however, these features are not relevant since they do not pertain to any of the requirements in the solicitation.

Finally, the agency asserts that Futura's descriptive literature relating to the warranty rendered its bid nonresponsive. The solicitation required a warranty "period of one (1) year or the manufacturer's standard warranty, whichever is greater, beginning on the first day of the successful performance period." In addition, as noted above, paragraph C.3.2 in part required maintenance on-site from 8:00 a.m. to 5:00 p.m., Monday through Friday. Although Futura's descriptive literature stated that Futura offers a 1-year "full warranty," the agency argues that absent an indication in the literature that Futura offered on-site maintenance, the bid was ambiguous with respect to the warranty requirement.

The descriptive literature submitted by Futura does not specifically address all the warranty requirements in the solicitation. However, as discussed above, the intent of a bid must be construed from a reasonable interpretation of its entire contents; we simply do not think it is reasonable to conclude that the pre-printed statement on Futura's literature legitimately suggests that the firm does not plan to offer on-site maintenance, or otherwise render uncertain Futura's intention, evidenced by signing its bid, to conform with the solicitation's warranty requirements.

In any event, it was inappropriate for the agency to require bidders to submit descriptive literature to address the warranty requirements in the solicitation, since a warranty, like the requirement for system integration and burn-in discussed above, relates to a performance obligation and does not involve the technical acceptability of an offered product. *See* FAR § 14.201-6(p)(1); *Interad, Ltd.*, B-182717, *supra.*

## Conclusion

Based on our finding that Futura's bid was improperly rejected as nonresponsive, we sustain the protest. The record shows that delivery under Win's contract has been completed. Accordingly, we find that Futura is entitled to recover its bid preparation costs and the costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d) (1990); *Comspace Corp.*, B-237794, Feb. 23, 1990, 90-1 CPD ¶ 217. Futura should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

## B-242598, March 26, 1991

## Procurement

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

## Procurement

**Bid Protests**
**■ GAO procedures**
**■■ Protest timeliness**
**■■■ Effective dates**
**■■■■ Facsimile**

Agency-level protest, and subsequent protest to the General Accounting Office, of an alleged solicitation impropriety are untimely where the agency-level protest was transmitted by facsimile machine to the procuring agency on the closing date at the exact time set for the receipt of proposals but was not received until after the time set for receipt of proposals.

## Procurement

**Bid Protests**
**■ GAO procedures**
**■■ Protest timeliness**
**■■■ Significant issue exemptions**
**■■■■ Applicability**

Untimely protest that solicitation terms provide the contractor with unfair and early use of Federal Energy Guidelines in violation of public information dissemination laws and policy is not an issue of widespread interest to the procurement community justifying invocation of the significant issue exception to the General Accounting Office timeliness requirements.

## Matter of: Mead Data Central

Gerald E. Yung for the protester.

Kerry L. Miller, Esq., United States Government Printing Office, for the agency.

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

Mead Data Central protests the provisions of request for proposals (RFP) No. Program 651-S, issued by the United States Government Printing Office (GPO) for automatic electronic publishing of the Federal Energy Guidelines.[1] Mead Data contends that the RFP adversely affects public access to government data by giving the Program 651-S contractor early and unfair use of the data to be published.

We dismiss the protest as untimely.

The RFP contemplated the award of a no-cost or minimal-cost contract for publishing services, including editorial preparation, data capture and file creation, maintenance of a "loose leaf" database management system, photocomposition of text pages, and printing and binding. Offerors were informed that the Program 651-S contractor may sell, in machine-readable or telecommunicated form, the weekly updated material.

The closing date for receipt of proposals was stated to be not later than 2:00 p.m., December 14, 1990. By facsimile (FAX) transmission of December 14, 1990, Mead Data protested to GPO that under the RFP the contractor would have unfair access to the Federal Energy Guidelines data under a no-cost or minimal-cost contract. The "faxed" agency-level protest was marked by Mead Data's FAX machine as transmitted by the protester at 2:00 p.m. from Dayton, Ohio, and was marked by GPO's FAX machine as received at 1:57 p.m. in Washing-

[1] The Federal Energy Guidelines are a system of loose leaf manuals produced by the Federal Energy Regulatory Commission (FERC) that consist of FERC's opinions and orders, statutes, regulations, and other information related to the pricing, production, and transportation of natural gas, oil pipelines, and electric power.

ton, D.C.[2] GPO dismissed as untimely Mead Data's agency-level protest on December 21, and Mead Data protested to our Office on January 11, 1991, within 10 working days of receipt of GPO's decision.

GPO argues that Mead Data's agency-level protest concerns an alleged apparent solicitation impropriety, which was untimely received after the 2:00 p.m. closing date for receipt of proposals, and that, therefore, Mead Data's subsequent protest to our Office is untimely. GPO states that on December 18, 4 days after receipt of the agency-level protest, the agency checked the accuracy of its FAX machine's clock against the U.S. Naval Observatory Master Clock and found that the FAX machine was 4 minutes slow so that Mead Data's protest must have been late.

Mead Data does not dispute that its protest concerns an alleged apparent solicitation impropriety, but argues that GPO's FAX time/date stamp is *prima facie* evidence of the date and time when the agency received the agency-level protest, and its protest is therefore timely.

Our Bid Protest Regulations require that protests, based upon alleged apparent solicitation improprieties, be filed prior to bid opening or the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1991). A protest of an alleged apparent solicitation impropriety that is filed on the bid opening or closing date must be filed prior to the exact time set for bid opening or the receipt of proposals. *Southern Methodist Univ.*, B-187737, Apr. 27, 1977, 77-1 CPD ¶ 289. A protest is considered "filed" under our Bid Protest Regulations when it is received by our Office or the agency (in the case of an agency-level protest). *See Custom Programmers Inc.*, B-235716, Sept. 19, 1989, 89-2 CPD ¶ 245. This requirement is intended to enable the procuring agency to decide an issue while it is most practicable to take effective corrective action where the circumstances warrant. *Ratcliffe Corp.—Recon.*, B-220060.2, Oct. 8, 1985, 85-2 CPD ¶ 395.

Mead Data's agency-level protest was not timely filed prior to the time set for the receipt of proposals. While Mead Data argues that we should not consider the agency's evidence that its FAX machine's clock was slow and that we should accept GPO's FAX time/date stamp as conclusive of the date and time on which its agency-level protest was filed, Mead Data does not dispute that its own FAX machine indicated that the agency-level protest was not transmitted until 2:00 p.m. Since the FAX transmission of Mead Data's protest must necessarily have taken some time, we conclude that Mead Data's protest could not have been filed/received prior to the 2:00 p.m. time set for receipt of proposals. Mead Data commenced transmission of this FAX protest sometime between 2:00 p.m. and 2:01 p.m. It is reasonable to assume that the transmission of Mead Data's two page FAX could take 1 minute. Therefore, we find reasonable GPO's argument, which is supported by affidavit, that Mead Data's agency-level protest was not actually received by its FAX machine until 2:01 p.m., 4 minutes later than the agency's time/date stamp.

[2] Both Dayton and Washington are in the Eastern Standard Time zone.

Accordingly, since Mead Data's agency-level protest was not timely filed by the closing time for receipt of proposals, its subsequent protest of this alleged apparent solicitation impropriety to our Office, after the dismissal of its agency-level protest, is not timely. 4 C.F.R. § 21.2(a)(3). Mead Data argues, however, that we should consider the protest under the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(b).

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Lucas Place, Ltd.—Recon.*, B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180. We may, in a given case, invoke the significant issue exception to our timeliness rules when, in our judgment, the circumstances of the case are such that our consideration of the protest would be in the best interest of the procurement system. *DynCorp*, B-240980.2, Oct. 17, 1990, 70 Comp. Gen. 38, 90-2 CPD ¶ 310. In order to prevent our timeliness requirements from becoming meaningless, we will strictly construe and seldom use the significant issue exception, limiting it to protests that raise issues of widespread interest to the procurement community, *see Golden North Van Lines, Inc.*, 69 Comp. Gen. 610, 90-2 CPD ¶ 44, and which have not been considered on the merits in a previous decision. *Keco Indus., Inc.*, B-238301, May 21, 1990, 90-1 CPD ¶ 490.

We do not find that Mead Data's protest presents a significant issue. The crux of Mead Data's protest is that the RFP will allegedly provide the Program 651-S contractor with an early and unfair use of Federal Energy Guidelines data that the contractor can later sell to the public and that this violates public information dissemination laws and policy. While early access to the information, which will later be made available to the public by the government, may be of concern to firms that are in the business of disseminating agency information, this does not present an issue of widespread interest to the "procurement community."

The protest is dismissed.

## B-241945.2, March 28, 1991

## Procurement

**Bid Protests**

**■ GAO procedures**

**■ ■ Protest timeliness**

**■ ■ ■ 10-day rule**

Protest that apparent low bidder on a construction contract should be disqualified since it is an affiliate of the designer is timely filed under the Bid Protest Regulations, where the protest is filed within 10 days of when the protester first reasonably became aware of low bidder's affiliation.

## Procurement

**Specifications**
**■ Design specifications**
**■■ Competitive restrictions**
**■■■ Waiver**

Agency may only waive the proscription contained in Federal Acquisition Regulation § 36.209 against a design firm or its affiliates contracting to construct a project it designed where there is a reasonable basis for concluding that an overriding governmental interest exists or that no purpose would be served by the application of the restriction in the procurement. Where a particular building design process minimized any potential competitive advantage, the contracting officer could determine a waiver is justified.

## Matter of: Lawlor Corporation—Reconsideration

Paul W. Losordo, Esq., for the protester.

John B. Tieder, Jr., Esq., Watt, Tieder, Killian & Hoffar, for Stateside Builders, Inc., an interested party.

Lester Edelman, Esq., Department of the Army, for the agency.

Robert A. Spiegel, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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Lawlor Corporation protests the proposed award of a contract to Stateside Builders, Inc., under invitation for bids (IFB) No. DACA33-90-B-0084, issued by the U.S. Army Corps of Engineers for the renovation of a building at Fort Devens, Massachusetts, and for the construction of an addition to the building. Lawlor claims that Stateside, the apparent low bidder, is ineligible for award since it is an affiliate of the project designer, Carlson Associates, Inc.

We deny the protest.

Lawlor's initial protest was filed with our Office on November 2, 1990, more than 3 months after the July 17 bid opening. On November 5, 1990, we dismissed the protest as untimely since it appeared to have been filed more than 10 working days after the protester knew, or should have known, the basis for its protest. *See* 4 C.F.R. § 21.2(a)(2) (1990).

On November 15, Lawlor requested reconsideration of the dismissal. In an affidavit accompanying the reconsideration request, Lawlor's president attested that its protest resulted from an anonymous telephone tip "on or about October 29," which Lawlor confirmed on the following day. Since no award has been made, and since there is nothing in the record that indicates Lawlor knew or should have known at any earlier date that Stateside was an affiliate of the designer, we now consider the protest to be timely filed under our Bid Protest Regulations. *See Kimmins Thermal Corp.,* B-238646.3, Sept. 12, 1990, 90-2 CPD ¶ 198; *Price Bros. Co.,* B-235473, June 9, 1989, 89-1 CPD ¶ 549.

This construction project was designed by two architectural and engineering (A-E) firms: Anderson & Nichols & Co., Inc., and Carlson. Anderson reportedly performed approximately 75 percent of the design work; Carlson performed the balance. The Carlson contract specifically stated that: "[t]he A-E or any of his subsidiaries, affiliates and associates shall not participate in the construction of the project designed hereunder."

Sixteen bids were submitted on this IFB by the July 17, 1990, bid opening. Stateside was the low bidder at $12,221,000, while Lawlor's bid was second low at $12,580,400. Both were substantially below the government estimate. The contracting officer became aware that Stateside and Carlson are affiliates because both are subsidiaries of SAE Engineering Construction Co., Inc.

Federal Acquisition Regulation (FAR) § 36.209 provides:

> No contract for the construction of a project shall be awarded to the firm that designed the project or its subsidiaries or affiliates, except with the approval of the head of the agency or authorized representative.

This regulation and its predecessors were promulgated pursuant to general authorities governing federal agency procurements, rather than legislation specifically addressing conflicts of interest. The prohibition is obviously intended to prevent the apparent competitive advantage in seeking a construction contract that would flow to an A-E firm (or its affiliates) that has prepared the specifications. Army Federal Acquisition Regulation Supplement § 36.209 (September 1990) delegates to the Head of the Contracting Activity the authority to approve an award of a construction contract to the designer of the project, with the authority to redelegate to the Principal Assistant Responsible for Contracting (PARC).

On July 27, upon being apprised that it was considered an affiliate of Carlson (and thus fell under the FAR § 36.209 proscription), Stateside requested a waiver pursuant to that regulation. On August 2, the contracting officer recommended that the waiver be granted to Stateside because, among other reasons, he believed that the coordinated use of two independent A-E firms in the design process, and during construction if optional construction oversight portions of the A-E contracts are exercised, eliminated any actual or potential advantage or conflict of interest for Stateside. On August 8, 1990, the PARC granted the requested waiver. Lawlor argues that this determination was an abuse of discretion.

As discussed above, FAR § 36.209 provides procuring agencies the authority to waive the proscription against design firms (or their affiliates) contracting to build projects they have designed. Where a procurement decision such as the waiver in this case is committed by statute or regulation to the discretion of agency officials, our Office will not make an independent determination of the matter. Rather, we will review the agency's explanation to ensure that it is reasonable and consistent with applicable statutes and regulations. *See, e.g., Litton Sys., Inc.*, B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115.

The strict prohibition in FAR § 36.209 was evidently designed to eliminate the advantages that an A-E firm would have in the competition for the construction of a project that it designed. Since the regulation writers envisioned a need for waiving the prohibition, they contemplated the possibility of governmental interests that would override the purpose of FAR § 36.209. In our view, one such interest would be where the government could not obtain necessary construction services at a reasonable price from another responsible and otherwise eligible contractor. Our role is to determine if the procurement record reflects a reasonable basis to conclude that an overriding governmental interest exists or that no purpose would be served by the application of the prohibition in this case.[1]

Among other reasons, the contracting officer asserted that this particular building design process minimized any potential competitive advantage to Stateside, such that no purpose would be served by the application of the prohibition. Carlson did approximately 25 percent of the work—designing the renovation of a building for which another firm designed an addition. The contracting officer's August 2 memorandum recommending a waiver stated:

> Procedures were employed during the design to insure compatibility of the combined renovation and annex for Building 2602. Coordination meetings were held between the New England Division and the two independent A-E firms during the design process to minimize conflicts and ensure compatibility of the architectural, mechanical, and electric components and systems being incorporated into the two designs. To ensure that the quality workmanship would be maintained, identical building components including windows, doors, blinds, lighting, flooring, and fixtures were specified which required continuous interfacing by both A-E's. Carlson Associates was provided with well defined as-builts of Building 2602, which was completed in 1988, to facilitate their renovation design and minimize the probability of uncovering unforeseen building conditions. The New England Division reviewed all design submittals and determined that the final set of advertised documents accurately depicted the work required for the construction contract.

Similarly, the memorandum concludes that if Carlson provides oversight of the renovation construction, the presence of another A-E firm examining the related construction of an addition and governmental review of Carlson's work will provide necessary safeguards.

Reasonable persons could differ regarding the extent to which the advantage Carlson might have gained for its affiliate was reduced by having to closely coordinate with another A-E firm such matters as selection of architectural, mechanical, and electrical systems. Clearly, however, any possible advantage was less than would have been the case if Carlson had been responsible for all or even the majority of the design work. In our view, the judgment of the agency that the possible advantage accruing to Carlson was small enough to warrant a

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[1] The waiver process established in FAR § 36.209 is in addition to the general authority of agency heads and their designees to deviate from the FAR under section 1.403. Properly authorized class deviations that are consistent with the procurement statutes are not subject to objection by our Office. *See Diverco, Inc.*, B-241978, Mar. 12, 1991, 91-1 CPD ¶ 272. The authority at issue here is similar to the authority of agency heads and their designees to waive an organizational conflict of interest provision in FAR subpart 9.5 where "its application in a particular situation would not be in the Government's interest." Those waivers are subject to a test of reasonableness. *ICF, Inc.*, B-241372, Feb. 6, 1991, 91-1 CPD ¶ 124.

waiver under FAR § 36.209 has enough of a reasonable basis that we will not object.

Lawlor also argues that since Carlson's design contract expressly prohibits it (and its affiliates) from participating in the construction of the designed projects, the Corps has legally agreed to "forego such discretion it has to grant *ad hoc* waivers" of this proscription. We disagree. The referenced provision in Carlson's contract merely implements the general FAR proscription against designers bidding on construction projects they designed; it does not preclude the agency from waiving this proscription. Thus, we deny the protest.

## B-238381, March 29, 1991

## Civilian Personnel

**Relocation**

■ **Executive exchange programs**

## Civilian Personnel

**Travel**

■ **Executive exchange programs**

## Civilian Personnel

**Travel**

■ **Temporary duty**

■■ **Determination**

A federal employee who participates in the Executive Exchange Program is entitled either to relocation expenses or to travel expenses since the program is in the interest of the government and the participant remains an employee of his agency during the exchange period. However, the agency retains the discretionary authority to determine whether the employee's placement at the private sector location shall be as a permanent change of station or as a temporary duty assignment. 54 Comp. Gen. 87 (1974), modified.

## Matter of: Executive Exchange Program—Relocation Expenses or Travel Expenses—Agency Discretion

This decision is in response to a request from the Comptroller, Small Business Administration (SBA).[1] The question asked is whether an agency is required to grant an employee, who is selected to participate in the Executive Exchange Program with travel to another location, full permanent duty station relocation benefits or whether the agency may choose to offer the employee temporary duty per diem. For the following reasons we conclude that the agency has the discretionary authority to choose either method of reimbursing the employee.

[1] Mr. Lawrence R. Rosenbaum.

## Background

The Executive Exchange Program was initially established as the Executive Interchange Program under Executive Order No. 11,451, Jan. 19, 1969. That order designated a commission to develop a program under which executives from government and private industry would be exchanged to permit an interchange of ideas and methods, which would enhance the participants' effectiveness in their respective spheres of activity. Currently the interchange period is for approximately 1 year, during which time the participants are assigned positions of significant responsibility in the other's sector and engage in periodic training to further intensify the learning experience. Although that Executive Order was superseded by Executive Order No. 12,136, May 15, 1979, which in turn was amended on May 21, 1985, by Executive Order No. 12,516, neither of these later Executive Orders made any substantive changes and the above program description remains the same.

In a series of decisions beginning in 1974,[2] we held that federal employees who are selected to participate in the program are entitled to receive the same relocation allowances authorized employees transferred in the interest of the government from one duty station to another for permanent duty.[3] In July 1981,[4] we clarified our 1974 decision to permit agencies to pay per diem or commuting expenses in lieu of relocation expenses to accommodate certain employees who did not wish to transfer. Later in 1981,[5] we gave this decision retroactive effect. We also characterized the decision as concluding that agencies may authorize relocation expenses or travel expenses not to exceed relocation expenses ". . . whichever is determined more appropriate by the employing Federal agency."

The SBA views the 1981 decisions as granting federal agencies the discretionary authority to choose the method by which participants will be placed at the exchange location, even if it is contrary to the participants' wishes. However, if those decisions were not meant to recognize such broad discretionary power in the agency, the SBA urges that we do so now. The reason given is that, since the cost of relocation is so great in comparison to temporary duty reimbursements, budget constraints will force the agency to deny employees the opportunity to participate in the program if the agency is required to pay full relocation expenses. The SBA gives us the example of a Washington, D.C., area employee whose full per diem for 1 year in St. Louis would be a maximum of $34,000, but whose relocation benefits would exceed $100,000. The SBA states that it cannot afford to spend over $100,000 for one employee to participate in the program. Its only alternative to such high costs would be to deny employees the opportunity to participate. The SBA, therefore, urges us to allow agencies to choose to offer the employee per diem or to limit relocation expenses to travel, per diem en route, and shipping and storage of household goods.

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[2] *Travel Allowances under Executive Interchange Program,* 54 Comp. Gen. 87 (1974).
[3] That conclusion was based on the Commission's procedures then in effect and our finding that the interchanges were primarily work assignments rather than training assignments under 5 U.S.C. § 4109 (1988).
[4] *Executive Exchange Program Participants,* 60 Comp. Gen. 582 (1981).
[5] *Executive Exchange Program—Travel or Relocation Expenses,* B-201704/B-202015, Nov. 4, 1981.

## Opinion

Whether an employee's assignment to a particular station is temporary or permanent is a question of fact to be determined on the basis of the circumstances of each case. We have long recognized that the nature and duration of the assignment are central to this determination. 33 Comp. Gen. 98 (1953). When we held in 1974 that executive exchange participants are to receive the same relocation allowances as transferred employees we generally considered any assignment of a year or more as requiring transfer. *Peter J. Dispenzirie,* 62 Comp. Gen. 560 (1983).

Since then, we have recognized that the Joint Travel Regulations (JTR) now explicitly make cost a factor to be taken into account for civilian employees of the Department of Defense, 2 JTR para. C4455 and *Edward W. DePiazza,* 68 Comp. Gen. 465 (1989), and we have approved payment of temporary duty allowances for assignments exceeding 1 year in appropriate cases. *Dessauer and Wells,* 68 Comp. Gen. 454 (1989); *Edward W. DePiazza, supra.*

We see no reason to treat participants in the executive exchange program differently. When an employee volunteers and is selected for an exchange assignment, the agency may, in appropriate circumstances, determine that the assignment should be treated as temporary duty and that determination is not dependent on the arrangement being an accommodation to the employee involved.

## B-239057, March 29, 1991

## Civilian Personnel

**Compensation**
**■ Overtime**
**■ ■ Eligibility**
**■ ■ ■ Travel time**

Thirteen employees, nonexempt from the Fair Labor Standards Act (FLSA), were found by the Office of Personnel Management (OPM) in its compliance order to be entitled to FLSA overtime for time spent as hours of work outside their normal duty hours for travel as passengers from their temporary lodgings to their temporary duty worksites outside established official duty stations. The agency disagrees with such determination. The claims for FLSA overtime are allowed since we do not find OPM's determination to be clearly erroneous or contrary to law or regulation.

## Matter of: Reclamation Drill Rig Operators—FLSA Overtime Pay for Travel as Passengers

The issue is whether 13 Bureau of Reclamation employees,[1] who are covered ("nonexempt") by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.,*

[1] Blair O. Burton, Filbert Espinoza, Dan R. Gibson, Gale Hacking, Steve L. Henderson, David Krake, John T. Ledford, Danny Norman, Robert L. Schwab, Darryl Sholly, Robert L. Singson, Bradley Winters, Larry W. Zolman.

are entitled to overtime pay under the Act for travel they performed as passengers from temporary lodgings to temporary duty worksites.[2] For the reasons that follow, the claims may be paid.

## Background

The 13 employees' permanent duty station is Pleasant Grove, Utah. They are part of drilling crews which are often assigned to various temporary duty locations in the Upper Colorado Region, which includes the states of Utah, New Mexico, Colorado, Wyoming, and Arizona. During the period from July 1983 to November 1987,[3] the employees were in a continuous travel status. Each day they assembled and commuted from their temporary duty lodging site, usually a motel, in a government vehicle so that they could arrive at their worksite at 7 a.m. The vehicle was also used to transport tools, spare parts, equipment, and fuel for the drilling equipment. Due to the type of work, the worksites were often in remote areas, requiring travel over unimproved roads in all types of weather conditions.

Only the driver of the government-owned vehicle transporting passengers and equipment to and from the worksite was compensated FLSA overtime for the time spent before 7 a.m. and after 5:30 p.m. The employees contended that the passengers in the vehicle should also be compensated for the travel time, especially since it sometimes took several hours one way to reach the worksite and to return because of the distance involved.

### OPM's Determination

OPM's Dallas Regional Office issued an initial opinion on October 11, 1988, which held *inter alia,*[4] that the employees were entitled to FLSA overtime for the period involved.

The OPM opinion cites Federal Personnel Manual (FPM) Letter 551-11 (Oct. 4, 1977), which states the general rule that employees are not entitled to be compensated for the time spent in normal home to work travel. However, since these employees were working at remote sites away from established official duty stations, OPM considered the lodging site to be the temporary duty station (equivalent to the official duty station). Time spent outside regular working hours as a passenger on a 1-day assignment away from the official duty station is compensable, and OPM concluded that the same principle applied to this situation in which employees assembled each day at their temporary duty station (lodging site) and traveled in a government vehicle to the temporary job site and returned the same day.

[2] The request was submitted by the Chief, Finance Division, U.S. Department of the Interior, Bureau of Reclamation, Denver, Colorado. Reference D-7700.

[3] The claims were received in this Office on March 26, 1990, and are considered to be constructively filed on June 15, 1989, the effective date of our change in procedures for filing claims against the United States. 4 C.F.R. § 31.5 (1990).

[4] There were several other FLSA overtime issues involved which the Bureau has conceded should be paid.

On December 12, 1988, the Bureau of Reclamation requested that OPM's Dallas Region reconsider its ruling on the basis of a decision of this Office, *Charleston Naval Shipyard Employees,* B-227695, Sept. 23, 1987, where we ruled that travel from temporary duty lodging sites to the temporary duty station at Kings Bay Naval Submarine Station was "normal home to work travel" and, therefore, not compensable.

OPM's Dallas Regional Office reaffirmed its original decision on March 1, 1989. OPM distinguished our decision in *Charleston Naval Shipyard Employees* on the basis that it relied on that portion of FPM Letter No. 551-11, para. D.1, pertaining to employees commuting from their temporary lodgings to a job site *within the limits of the official duty station* who are not entitled to FLSA compensation since such travel is considered noncompensable home to work travel. In OPM's view this case involves the time spent traveling to job sites *outside* the limits of a designated temporary duty station which is compensable.

The Director, OPM, affirmed the Regional Office's determination on December 4, 1989. The Bureau of Reclamation then appealed the OPM Director's decision to this Office.

## Opinion

In view of the authority of OPM to administer the FLSA, we accord great weight to the determinations it reaches in carrying out this responsibility. We will not overrule OPM's findings of fact or determinations unless they are clearly erroneous or contrary to law or regulation. *Lee R. McClure,* 63 Comp. Gen. 546 (1984); *John L. Svercek,* 62 Comp. Gen. 58 (1982); *Paul Spurr,* 60 Comp. Gen. 354 (1981).

Essentially, the Bureau of Reclamation has appealed OPM's determination based on two decisions of this Office, namely *Charleston Naval Shipyard Employees,* B-227695, *supra,* and *Naval Undersea Warfare Engineering Station,* 68 Comp. Gen. 535 (1989). The Bureau contends that those decisions are in conflict with the OPM determination.

Here, OPM determined that the employees' lodging site was their official duty station and that their worksites were outside that station. Therefore, their travel from the lodgings to the worksites was hours of work. Our decisions in *Charleston Naval Shipyard Employees, supra,* and *Naval Undersea Warfare Engineering Station, supra,* involved temporary duty within the limits of a temporary duty station and are not applicable here.

Accordingly, since we find that OPM's determination was not clearly erroneous nor contrary to law or its own regulations, we have no basis to overrule its order of compliance. Therefore, the employees' claims for FLSA overtime pay are allowed.

## B-242435, March 29, 1991

## Procurement

**Sealed Bidding**
**■ Invitations for bids**
**■■ Amendments**
**■■■ Materiality**

## Procurement

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

Bidder's argument that amendment adding a requirement to complete a certificate of procurement integrity is not a material change to the solicitation is denied where the certification requirement binds the contractor to detect and report violations of the procurement integrity provisions and thus imposes a substantial legal burden on the bidder.

## Procurement

**Sealed Bidding**
**■ Invitations for bids**
**■■ Amendments**
**■■■ Acknowledgment**
**■■■■ Responsiveness**

Contention that acknowledgment of amendment adding requirement to complete certificate of procurement integrity was sufficient to commit bidder and that completion of certification should be permitted up to time of award is denied where completion of certificate imposes substantial legal burdens on contractor and is properly viewed as matter of responsiveness.

## Procurement

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

Contracting officer reasonably added requirement for certification of procurement integrity to invitation for bids prior to reinstatement of statutory requirement for such certification since bid opening and contract award would occur after the effective date of the statute requiring certification.

## Matter of: Mid-East Contractors, Inc.

Phil B. Abernethy, Esq., Butler, Snow, O'Mara, Stevens & Cannada, for the protester.

David W. Mockbee, Esq., Phelps Dunbar, for Lampkin Construction Company, Inc., and Todd Roberts for Southern Rock, Inc., interested parties.

Lester Edelman, Esq., and Lanny R. Robinson, Esq., Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Mid-East Contractors, Inc. protests the rejection of its bid as nonresponsive for failure to include a completed Certificate of Procurement Integrity as required by invitation for bids (IFB) No. DACW38-91-B-0005, issued by the U.S. Army Corps of Engineers for erosion control projects along the banks of certain creeks and watersheds in Mississippi. Mid-East argues that the certification requirement involves a matter of responsibility, not responsiveness, which can be addressed any time before award, and, alternatively, that it complied with the requirement at bid opening by properly acknowledging receipt of the amendment adding the certification requirement, even though it neglected to complete the certification itself.

We deny the protest.

The IFB, issued November 13, 1990, sought bids for the projects by December 13. On November 26, the Army amended the IFB to: (1) accelerate the performance initiation date; (2) indicate that the quantities shown on the bid schedule are estimates; (3) change the terms of the Drug-Free Workplace Certification; and (4) add a requirement for a Certificate of Procurement Integrity. With respect to the new requirement for a certificate of procurement integrity, the amendment set forth the full text of the clause found at Federal Acquisition Regulation (FAR) § 52.203-8, which includes instructions to bidders and offerors on how to execute a certificate of procurement integrity, as well as the applicable certificate. The text of the clause requires submission of the signed certificate with the bid, and explicitly advises that "[f]ailure of a bidder to submit the signed certificate with its bid shall render the bid nonresponsive."

Seven bids were received by the bid opening date of December 13, with Mid-East the apparent low bidder. Upon review, Mid-East's bid was rejected as nonresponsive for failure to include a signed certificate of procurement integrity, although Mid-East acknowledged receipt of the amendment adding the certification requirement. By letter dated December 17, Mid-East was notified that its bid had been rejected, and this protest followed. Award to any other bidder has been withheld pending the outcome of this protest.

## Discussion

The certificate of procurement integrity clause (FAR § 52.203-8), added by amendment to the IFB, is required by FAR § 3.104-10 to be included in all solicitations where the resulting contract is expected to exceed $100,000. The clause implements 41 U.S.C.A. § 423(e)(1) (West Supp. 1990), a statute that bars agencies from awarding contracts unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the Office of Federal Procurement Policy (OFPP) Act provisions set forth elsewhere in 41 U.S.C. § 423. The OFPP Act provisions requir-

ing this certification became effective, for the second time, on December 1, 1990.[1] The activities prohibited by the OFPP Act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information.

Mid-East protests that its bid should not be rejected as nonresponsive for failure to submit a signed certificate of procurement integrity. Mid-East first argues that the provision of the IFB amendment requiring that bidders certify their compliance with the procurement integrity provisions of the OFPP Act does not add a material requirement to the IFB. Mid-East contends that the requirement to certify is not material because it is not related to the substance of the bid—*i.e.,* has no effect on price, quality, quantity, or delivery—and should therefore be treated as a matter of responsibility to be established at any time prior to award. Mid-East next argues that even if the amendment adding the certification requirement is material, a bidder's acknowledgment of the amendment, even without completing the certificate itself, is sufficient to indicate the bidder's acceptance of the terms of the certificate. According to Mid-East, the act of completing the certification involves no additional commitment by the bidder above the commitment made by acknowledging receipt of the amendment adding the certification requirement.

As explained in our prior cases, a responsive bid unequivocally offers to provide the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor in accordance with all the IFB's material terms and conditions. *Stay, Inc.,* B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586, *aff'd,* 69 Comp. Gen. 296 (1990), 90-1 CPD ¶ 225. Deficiencies or deviations which go to the substance of a bid, by affecting price, quality, quantity, or delivery, are material and require that the bid be rejected. *Seaboard Electronics Co.,* B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115; *see also* FAR § 14.402-2. Deviations or defects in a bid that change or call into question the legal relationship between the parties are also material and justify rejection of the bid as nonresponsive. 50 Comp. Gen. 11 (1970) (bidder's failure to acknowledge receipt of an amendment granting contractual authority to an agency to make price adjustments for defective cost or pricing data changed the legal relationship between the parties and was a material defect in the bid).[2] Responsibility, on the other hand, refers to a bidder's capacity to perform all contract requirements, and is determined not at bid opening, but at any time prior to award based on information received by the agency up to that time. *D.M. Wilson Lumber, Inc.—Recon.,* B-239136.2, May 18, 1990, 90-1 CPD ¶ 489.

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[1] After extending the original effective date of these provisions to July 16, 1989, *see Woodington Corp.,* B-235957, Oct. 11, 1989, 89-2 CPD ¶ 339, *recon. dismissed,* B-235957.2, Nov. 15, 1989, 89-2 CPD ¶ 461, Congress suspended them, including the certification requirement at issue here, for 12 months beginning December 1, 1989. *See* section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1759 (1989).

[2] *See also Mak's Cuisine,* B-227017, June 11, 1987, 87-1 CPD ¶ 586 (failure to acknowledge receipt of an amendment adding new anti-kickback procedures was a material deficiency in the bid because the amendment changed the legal relationship between the parties); *McKenzie Road Serv., Inc.,* B-192327, Oct. 31, 1978, 78-2 CPD ¶ 310 (failure to acknowledge receipt of amendment changing minority employment goals under the Equal Employment Opportunity Program was a material deficiency because the amendment changed the legal relationship between the parties).

As explained above, to determine whether a requirement is material, and hence a matter of responsiveness, we look, in part, to whether that requirement substantially changes the legal relationship between the parties. 50 Comp. Gen. 11, *supra.* When considering certification requirements, our review focuses principally on the effect of certification on the obligation of the bidder if it received the award. A certification requirement is necessary for a bid to be responsive only if the certification provision imposes requirements materially different from those to which the bidder is otherwise bound, either by its offer or by law. *Tennier Indus., Inc.,* 69 Comp. Gen. 588 (1990), 90-2 CPD ¶ 25. Here, we find that the certification provision implements several requirements of the OFPP Act and imposes a substantial legal obligation on the contractor.

The certification requirements obligate a named individual—the officer or employee of the contractor responsible for the bid or offer—to become familiar with the prohibitions of the OFPP Act, and impose on the bidder, and its representative, a requirement to make full disclosure of any possible violations of the OFPP Act, and to certify to the veracity of that disclosure. In addition, the signer of the certificate is required to collect similar certifications from all other individuals involved in the preparation of bids or offers. The certification provisions also prescribe specific contract remedies—including withholding of profits from payments and terminating errant contractors for default—not otherwise available. These provisions are materially different from those to which the bidders otherwise are bound; accordingly, we find that the certification requirement is a material term of the IFB, and is properly treated as a matter of responsiveness. *See Hampton Roads Leasing, Inc.—Recon.,* B-236564.3, Apr. 4, 1990, 90-1 CPD ¶ 357, *aff'd,* B-236564.4, Aug. 6, 1990, 90-2 CPD ¶ 103; *Woodington Corp.,* B-235957, *supra.*[3]

Mid-East next argues that, even if one views the certification requirement found in the IFB amendment as material, Mid-East's acknowledgment of that amendment was sufficient to indicate its intended compliance with the OFPP Act. According to Mid-East, completion of the certification should be permitted up to the time of contract award.

Acknowledgment of an amendment adding a certification requirement establishes a bidder's commitment to comply with the additional requirements when certification is accomplished by the act of signing one's bid. *See Tennier Indus., Inc.,* B-239025, *supra* (citing FAR § 52.203-11, which establishes that signing a bid or offer constitutes certification that no federal appropriated funds have been paid to any person to influence certain federal acts). However, when bidders are required to complete separate certificates, we will look to whether failure to complete the certificate is a material deficiency by examining the obligations found in the certificate itself. If the text of a certificate imposes a substantial legal obligation on a bidder, and without completion of the certificate the bidder's commitment to be obligated remains unclear, completion of such certifi-

[3] In addition, now that the requirement for the certification has been reinstated, the FAR has been amended to specifically direct that a bidder's failure to submit a signed certificate of procurement integrity with its bid shall render the bid nonresponsive. FAR § 14.404-2(m).

cates are material terms of an IFB with which compliance must be established at the time of bid opening. *See, e.g.,* 52 Comp. Gen. 874 (1973); 51 Comp. Gen. 329 (1971). Permitting a bidder to decide after bid opening whether to comply with a material term of an IFB strains the integrity of the competitive bidding system by giving otherwise successful bidders a second opportunity to walk away from a low bid. *See* 38 Comp. Gen. 532 (1959).

Mid-East's contention that its failure to complete the certificate should be treated as a matter of responsibility ignores the framework of the procurement integrity provisions of the OFPP Act, which relies on certification to impose responsibilities and obligations. Certification imposes on one individual representative of the bidder a direct obligation to become familiar with the OFPP Act's prohibitions against certain conduct. Since the OFPP Act imposes this and other duties on the individual who certifies for the bidder, failure to complete the certificate leaves unresolved the identity and commitment of the individual who will be the focus for the OFPP Act's other obligations.

The certifying individual also attests that every officer, employee, agent, representative, or consultant of the contractor involved in preparation of the bid or offer is familiar with the requirements of the OFPP Act and has filed a certification indicating no knowledge of any possible violation. In addition, the certifying individual must represent that all individuals involved in the preparation of the bid or offer will report any information concerning a possible violation of the OFPP Act to the officer or employee signing the certification. For these reasons, we conclude that failure to complete the certificate itself is a material deficiency in a bid requiring that the bid be rejected as nonresponsive. *See* FAR § 14.404-2(m); *Atlas Roofing Co., Inc.,* B-237692, Feb. 23, 1990, 90-1 CPD ¶ 216 (bidder's failure to acknowledge amendment adding requirement for certification of procurement integrity was not a material deficiency, since the requirement was already included in the IFB, yet bidder's failure to complete and submit certificate properly resulted in determination that bid was nonresponsive).

Finally, Mid-East argues that since the OFPP Act was suspended at the time both the solicitation and amendment were issued, the contracting officer could not impose the requirements of the OFPP Act on this solicitation. We disagree. After a 1-year suspension, the certification provisions of the OFPP Act were automatically reinstated on December 1, 1990. After that date, the contracting officer was statutorily barred from awarding any contract valued at more than $100,000 without the accompanying certification of procurement integrity. 41 U.S.C. § 423(e). Thus, the contracting officer acted reasonably in amending the outstanding solicitation well in advance of the December 13 bid opening date to ensure that the bids received would comply with the statute.

## Conclusion

As a result of the substantial legal obligations imposed by the certification, omission from a bid of a signed certificate of procurement integrity—whether

from failing to acknowledge an amendment adding the certification, from acknowledging the amendment but failing to return the signed certification, or from improperly completing the certification in such a way as to call into question the bidder's commitment to the requirements—leaves unresolved a bidder's agreement to comply with a material requirement of the IFB. Accordingly, such bids, like Mid-East's, are nonresponsive and must be rejected.

The protest is denied.

# Appropriations/Financial Management

**Appropriation Availability**

**■ Time availability**

**■■ Permanent/indefinite appropriation**

**■■■ Determination criteria**

Prohibition contained in section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 note (1988)), constitutes permanent legislation. Therefore, until amended or repealed, section 402 prohibits the Interstate Commerce Commission from approving railroad branchline abandonments by Burlington Northern Railroad in North Dakota in excess of a total of 350 miles.

351

# Civilian Personnel

**Compensation**
**■ Overtime**
**■■ Eligibility**
**■■■ Travel time**

Thirteen employees, nonexempt from the Fair Labor Standards Act (FLSA), were found by the Office of Personnel Management (OPM) in its compliance order to be entitled to FLSA overtime for time spent as hours of work outside their normal duty hours for travel as passengers from their temporary lodgings to their temporary duty worksites outside established official duty stations. The agency disagrees with such determination. The claims for FLSA overtime are allowed since we do not find OPM's determination to be clearly erroneous or contrary to law or regulation.

380

**Relocation**
**■ Executive exchange programs**

A federal employee who participates in the Executive Exchange Program is entitled either to relocation expenses or to travel expenses since the program is in the interest of the government and the participant remains an employee of his agency during the exchange period. However, the agency retains the discretionary authority to determine whether the employee's placement at the private sector location shall be as a permanent change of station or as a temporary duty assignment. 54 Comp. Gen. 87 (1974), modified.

378

**■ Household goods**
**■■ Shipment**
**■■■ Restrictions**
**■■■■ Privately-owned vehicles**

An employee is not entitled to reimbursement for shipment of his automobile to his new duty station in Hawaii where shipment at government expense was not authorized at time of transfer and the employee shipped his automobile at personal expense. The employee has not shown that the agency abused its discretion in determining that it would not authorize overseas transportation of employees' automobiles to their duty station as being "in the best interest of the government," pursuant to 5 U.S.C. § 5727(b)(2) and the implementing provisions of the Federal Travel Regulations and Joint Travel Regulations. *Frayne W. Lehmann*, B-227534.4, Nov. 5, 1990, and B-227534.3, Feb. 21, 1990, affirmed.

327

**■ Residence transaction expenses**
**■■ Litigation expenses**
**■■■ Attorney fees**
**■■■■ Reimbursement**

A transferred employee, who jointly owned a residence with his former wife, was required to secure a modification of the court order associated with the divorce decree so that the employee could sell his interest in the residence to his former wife. While the modification itself was not contested, it

was a continuation of a litigated matter. Under paragraph 2-6.2c of the Federal Travel Regulations the costs of litigation are not reimbursable. Hence, the legal fee incurred to secure the court order modification may not be reimbursed.

330

■ **Residence transaction expenses**
■■ **Miscellaneous expenses**
■■■ **Reimbursement**

In connection with the sale or purchase of a residence, a transferred employee is not entitled to reimbursement for a lawn service expense since that is a nonreimbursable routine maintenance cost. Also, where pest and home inspections were not required by law or as conditions of obtaining financing, they are not reimbursable. Costs of express mail are not reimbursable real estate expenses but may be reimbursed under the miscellaneous expense allowance.

362

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

A transferred employee, who jointly owned a residence with his former wife, sold his entire interest in the property to his former wife. The rule requiring proration of expenses between the employee and his former wife is not applicable because the residence was not sold by both parties to a third party. Hence, the employee is entitled to full reimbursement of the allowable expenses he incurred in that transaction.

330

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

A transferred employee, who jointly owned a residence with his former wife, sold his one-half interest to her based on an agreed to selling price which was below the market price. His claim for expenses which would have been incurred had the residence been sold on the open market is denied. Reimbursement for real estate transaction expenses under the Federal Travel Regulations is limited to those allowable expenses which the transferred employee actually incurs and is legally obligated to pay. B-168074, Oct. 29, 1969, and B-180986, Sept. 18, 1974.

330

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Lot sales**

A transferred employee's residence at his old duty station was situated on an undivided 11.2-acre parcel of land in an area which permitted 2-acre residence sites. However, some of his property was in a flood plain and other parts were sufficiently low lying that they remained wet much of the year. Under paragraph 2-6.1f of the Federal Travel Regulations, only that land which reasonably relates to the residence site may be included for real estate expense reimbursement purposes.

Where a parcel of land has not been subdivided and it is questionable that it can be satisfactorily subdivided into additional residential sites under existing zoning requirements and health restrictions, none of that property will be deemed unrelated to the residence site and expense proration is not required.

329

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Property titles**

A transferred employee sold his residence at the old duty station which he owned in his capacity as trustee of an *inter vivos* trust which he created in which he was sole beneficiary during his lifetime and in which he retained full powers of revocation. Since employee was both sole trustee and sole beneficiary, he retained all legal title and beneficial interest in the property and therefore, retained sufficient title for purposes of real estate expense reimbursement under the Federal Travel Regulations. Thus, he is entitled to receive reimbursement of real estate expenses associated with the sale of the residence.

362

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■■ **Reimbursement**
■■■ **Eligibility**
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330

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330

# Military Personnel

**Pay**

**■ Reservists**

**■■ Retirement pay**

**■■■ Amount determination**

**■■■■ Computation**

A reservist's civil service retirement income is not "earned income from nonmilitary employment" under the dual compensation restrictions of 37 U.S.C. § 204 which requires a reduction in the pay and allowances a member receives while incapacitated if he receives income from nonmilitary employment since civil service retirement income is unrelated to the member's current employment status. Accordingly, it may not be offset against his pay and allowances.

350

# Miscellaneous Topics

**Transportation**

■ **Railroads**

■ ■ **Statutory restrictions**

Prohibition contained in section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 note (1988)), constitutes permanent legislation. Therefore, until amended or repealed, section 402 prohibits the Interstate Commerce Commission from approving railroad branchline abandonments by Burlington Northern Railroad in North Dakota in excess of a total of 350 miles.

351

# Procurement

to the procuring agency on the closing date at the exact time set for the receipt of proposals but was not received until after the time set for receipt of proposals.

371

■ GAO procedures
■■ Protest timeliness
■■■ Significant issue exemptions
■■■■ Applicability

Untimely protest that solicitation terms provide the contractor with unfair and early use of Federal Energy Guidelines in violation of public information dissemination laws and policy is not an issue of widespread interest to the procurement community justifying invocation of the significant issue exception to the General Accounting Office timeliness requirements.

372

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

Award to higher-priced offeror is unobjectionable where solicitation made technical considerations more important than cost and agency reasonably determined that the clear technical superiority and lesser risk associated with awardee's proven microcomputer workstation system was worth the additional cost.

313

■ Contract awards
■■ Best/final offers
■■■ Acceptance time periods

Award may not be made upon the basis of an offeror's unrevoked 13-month-old best and final offer (BAFO), even though the BAFO had no stated acceptance period, inasmuch as a reasonable time for accepting the offer had passed, the offeror did not respond to a new request for BAFOs, and the offer to accept award under the old BAFO was made after award under the latest BAFO to the offeror who submitted the lowest price on both BAFOs.

323

■ Offers
■■ Evaluation
■■■ Wage rates

Protest challenging agency's evaluation of awardee's proposal which allegedly proposed the use of tradesmen who would be paid hourly rates less than those required by the solicitation is denied where record shows that awardee's proposal did not take exception to solicitation requirement that

it pay specified wage rates and thus the awardee is obligated under the contract to pay the required rates.

355

■ **Offers**
■■ **Preparation costs**

Where agency erroneously relies on past procurement history and issues solicitation on unrestricted basis which results in a protest and subsequent agency determination, shortly before closing date for receipt of proposals, to set procurement aside for small disadvantaged businesses (SDB), claim for proposal preparation costs is denied since there is no evidence of bad faith on the agency's part; mere negligence or lack of due diligence by the agency, standing alone, does not provide a basis for the recovery of proposal preparation costs.

343

■ **Requests for proposals**
■■ **Amendments**
■■■ **Notification**
■■■■ **Contractors**

Protester's nonreceipt of an amendment requesting a new round of best and final offers provides no legal basis to challenge the validity of the award where the record does not indicate that agency deliberately attempted to exclude offeror from the competition or otherwise violated applicable regulations governing the distribution of amendments.

323

■ **Requests for proposals**
■■ **Cancellation**
■■■ **Resolicitation**
■■■■ **Propriety**

An agency had a reasonable basis to cancel and resolicit a request for proposals (RFP), under which award was to be made to the low-priced acceptable offeror, after the receipt of proposals and disclosure of prices, where the major required item was solicited in the RFP on a "brand name" rather than on a "brand name or equal" basis and an acceptable equal item was proposed, because the RFP overstated the agency's requirements, which caused a reasonable possibility of prejudice to the competitive system since actual and potential offerors did not have the opportunity to compete on the government's actual requirements.

345

**Contractor Qualification**
■ **Responsibility**
■■ **Financial capacity**
■■■ **Line of credit**

Protest challenging responsiveness of awardee's bid for failure to comply with bid deposit requirement is denied where the awardee's bid documents contained no irregularities or facial defects and

bid deposit statement unequivocally bound bidder to furnish 20 percent of its bid price as a bid deposit as required by the solicitation. Fact that bidder pledged credit card account with insufficient line of credit is a matter of responsibility since it pertains solely to the adequacy of assets supporting the bid deposit; accordingly, this error did not render bid nonresponsive and agency properly allowed bidder to correct it prior to award.

335

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Descriptive literature**
**■■■■ Absence**

Rejection of a bid for microcomputers as nonresponsive on basis that protester failed to submit descriptive literature to establish that the offered products conform to the specifications is improper where the solicitation does not require descriptive literature and there is no evidence in the protester's bid to indicate that protester took exception to the requirements.

365

**■ Bids**
**■■ Responsiveness**
**■■■ Descriptive literature**
**■■■■ Adequacy**

Rejection of bid as nonresponsive on the basis that protester submitted descriptive literature, which showed four different configurations of a keyboard to establish conformance to the solicitation's "enhanced keyboard" requirement, is improper where all four configurations depict enhanced keyboards and thus conform to the requirement.

366

**■ Bids**
**■■ Responsiveness**
**■■■ Descriptive literature**
**■■■■ Adequacy**

Rejection of bid as nonresponsive on the basis that protester's descriptive literature shows different models of an offered product—one which conforms to solicitation requirement for .31 dot pitch and one that does not—is improper where a reasonable interpretation of the bid's entire contents does not support conclusion that bidder was offering a nonconforming model.

365