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Preface

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

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

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

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

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

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

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

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Procurement

Competitive Negotiation
■ **Discussion**
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Procurement

Noncompetitive Negotiation
■ **Offers**
■■ **Sole sources**
■■■ **Clarification**
■■■■ **Propriety**

Protest is sustained where agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis.

Matter of: EMS Development Corporation

S. Steven Karalekas, Esq., Karalekas & McCahill, for the protester.

Joseph J. Kelley, Esq., for Raytheon Company, an interested party.

John B. Bennett, Esq., and Robert J. Boardman, Department of the Navy, for the agency.

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

EMS Development Corporation protests the award of a contract to Raytheon Company under request for proposals (RFP) No. N00024-90-R-2141, issued by the Naval Sea Systems Command for the manufacture and installation of equipment for the magnetic silencing facility at Kings Bay, Georgia. EMS principally alleges that the technical evaluation was biased in favor of Raytheon, that the price evaluation was improperly conducted, and that, in view of the allegedly flawed evaluations, award to Raytheon at a price higher than EMS' price was improper.

We sustain the protest.

The purpose of the magnetic silencing facility (MSF) is to measure the magnetic signatures of TRIDENT nuclear submarines and adjust their magnetic profiles in order to reduce the likelihood of their detection. The Navy currently operates such a facility in Bangor, Washington, which was outfitted by Raytheon under a contract awarded in 1978. Based on its experience with the Bangor contract, for which Raytheon was the only offeror under a competitive solicitation, the Navy initially concluded that only Raytheon was capable of meeting the Kings Bay requirement, and announced an intended sole-source award to that firm in the *Commerce Business Daily* on March 6, 1990. The Navy sent Raytheon a copy of the RFP on March 30. Between April 6 and 24, Raytheon forwarded to the Navy four sets of questions regarding the RFP and the technical specification. The Navy provided its answers to the questions in a six-page response on May 10.

Meanwhile, EMS had requested a copy of the solicitation, and on April 26 protested the sole-source procurement to our Office, alleging that it was capable of performing the work. In response to the protest, the Navy issued a competitive solicitation on June 29. Both Raytheon and EMS responded to the solicitation with questions, which were answered in an amendment to the RFP. Both firms submitted proposals by the amended August 28 due date; based on the initial technical evaluation, the Navy determined that both proposals were in the competitive range. Following written discussions and submission of best and final offers, the Navy determined that award to Raytheon was in the best interest of the government, and awarded the contract on December 21. Upon learning of the award, EMS filed this protest on December 28.

Competitive Advantage

EMS alleges that, by virtue of discussions the Navy held with Raytheon when it was proceeding with this acquisition on a sole-source basis, Raytheon had an unfair competitive advantage over EMS after the procurement was opened to competition. We agree.

It is a fundamental principle of competitive negotiation that offerors must be treated equally by a procuring activity. *Union Carbide Corp.,* 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134. An essential element of that treatment involves providing offerors with identical statements of the agency's requirements so as to provide a common basis for the submission of proposals. *Id.* Thus, under the Federal Acquisition Regulation (FAR), any information that is given to a prospective offeror under a negotiated procurement must be promptly furnished to all other prospective offerors as a solicitation amendment if the information is necessary in submitting proposals, or if the lack of such information would be prejudicial. FAR § 15.410(c); *University Research Corp.,* 64 Comp. Gen. 273 (1985), 85-1 CPD ¶ 210. The information given to Raytheon in answer to its questions about the specifications was provided in the context of a sole-source procurement, so there was no need at that time to issue an amendment incorporating the information. Nonetheless, once the planned sole-source acquisition was converted to a competitive one, EMS was at a disadvantage relative to Raytheon because the infor-

mation already furnished Raytheon, as discussed below, was material for purposes of preparing a technical proposal, but never was incorporated in the RFP or otherwise furnished to EMS.

The FAR does not specifically address the agency's responsibility for disseminating information originally provided to one firm in connection with a planned sole-source award, where the agency subsequently decides to compete the requirement, and we have not previously addressed similar facts. We think the principle underlying FAR § 15.410(c)—that offerors must be provided with equal information to assure competition on an equal basis—renders it improper for an agency to conduct a competitive procurement after initially giving the intended sole-source contractor material information for use in preparing its technical proposal, as the Navy did here, without providing that information to the other competing firms. *See Union Carbide Corp.*, 55 Comp. Gen. 802, *supra; University Research Corp.*, 64 Comp. Gen. 273, *supra.*

The Navy argues that the issues raised by Raytheon in its questions were "mooted" by the Navy's decision to issue a competitive solicitation. This would only be the case, however, if the questions raised related only to the sole-source solicitation; in fact, the questions related largely to the technical requirements, and remained relevant under the competitive RFP. Of the 67 questions Raytheon submitted regarding the sole-source RFP, 64 concerned statement of work requirements, the technical specification, or technical proposal preparation; the Navy answered all of these. The questions and answers offered a number of clarifications to the statement of work and technical specification which, we think, the Navy reasonably could have expected would be helpful to Raytheon in preparing its proposal, including five questions to which the Navy responded by stating that the specification could not be changed. Although a few of Raytheon's questions were raised again during the competitive procurement and were answered in amendments to the RFP, the vast majority were not. For example, Raytheon inquired about the required low frequency signal dynamic range for the alternating magnetic field measurement system; the Navy responded with the required dynamic range. This information was not given to EMS with the competitive RFP. In its response to another question, the Navy agreed to a requested change in the specified characteristics of the anti-aliasing filter; however, this change was not reflected in the competitive RFP.

EMS' lack of equal information clearly had an impact that was reflected in EMS' evaluation. For example, Raytheon asked whether the government-owned software in use at the Bangor MSF would be supplied to the contractor. The Navy replied that it would not provide the software, but that it would eventually provide a magnetic media copy of the Bangor source code. Thus, Raytheon knew that the Bangor software would not be made available to it as government-furnished property. EMS, on the other hand, assumed in preparing its proposal that the Bangor software would be made available to it since the software is government property; EMS' proposal was downgraded for failing to adequately discuss its software approach. The Navy also clarified for Raytheon certain

sensor design requirements, but did not do so for EMS; the Navy later listed EMS' failure to describe its sensor designs as a deficiency in its proposal.

We conclude that the Navy should have provided EMS with the same information provided Raytheon, and that its failure to do so left EMS at a competitive disadvantage that had a negative effect on the evaluation of its technical proposal.

Price Evaluation

EMS also alleges that the Navy improperly adjusted its proposed price upward by $2.4 million. While we need not address this issue because we sustain the protest on other grounds, we note that the RFP calls for a fixed-price incentive contract; accordingly, the RFP provided for a ceiling price of 130 percent of the offeror's proposed target price, and a sharing arrangement under which the contractor is responsible for 35 percent of any actual costs exceeding the target cost up to the 130 percent price ceiling, at which point the contractor becomes responsible for all additional costs. Based on our review of the record, it appears that the Navy's cost evaluation, which appears to have measured what the Navy believed to be the likely cost to the government, may have been based on the amount by which EMS' costs were expected to exceed its proposed target cost without regard to the fact that the government would only be responsible for 65 percent of those excess costs up to the ceiling price.

In addition, the adjustments the Navy made to EMS' proposed costs are not supported by the record. For example, the Navy adjusted EMS' proposed overhead costs upward by $1.2 million by applying an overhead rate significantly higher than the rate proposed by EMS. Although EMS had explained in its cost proposal the basis for its proposed rate, the Navy rejected EMS' proposed rate in favor of the Defense Contract Audit Agency's estimate, even though DCAA admitted it was unable to calculate projected overhead rates without cost and pricing data, which were not required under the RFP. While the RFP stated that proposed prices would be compared to DCAA estimates, nothing in the agency report on the protest or in the price evaluation itself explains why the Navy rejected EMS' justifications for its proposed lower overhead rate in favor of DCAA's estimate, which admittedly did not encompass the considerations set forth in EMS' price proposal. In addition, we note that it appears that the Navy rejected EMS' proposed materials costs, including those of subcontractors, in favor of its own estimates, based solely on its experience with Raytheon's 1978 contract, rather than on any cost or pricing data from Raytheon, EMS or their subcontractors.

Conclusion

Although EMS' technical proposal received a considerably lower score than Raytheon's, the record shows that most of the difference between the offerors' scores is attributable to EMS' lower score under the heavily weighted technical

understanding/approach factor. It thus is possible that the offerors' relative positions would be different if EMS and Raytheon had been afforded an equal basis for preparation of their proposals. We conclude that these actions had a potentially significant effect on EMS' competitive position in the procurement.[1]

Based on the foregoing, we sustain the protest. By letter of today to the Secretary of the Navy, we are recommending that the agency issue an amendment to the RFP incorporating the substance of Raytheon's questions and the Navy's answers; request revised proposals from both offerors; and perform new technical and price evaluations, taking into consideration our finding regarding the price evaluation. If EMS is the successful offeror under the new evaluation, the Navy should terminate Raytheon's contract for the convenience of the government and make award to EMS, if otherwise appropriate. We also find that the protester is entitled to recover its costs of filing and pursuing the protest; EMS should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(d) (1991).

The protest is sustained.

B-217114.7, May 6, 1991

Appropriations/Financial Management

Accountable Officers

■ Liability

■■ Debt collection

■■■ Amount determination

Accountable officers should have their liability for improperly paying fraudulent travel subsistence expense claims determined on the basis of the actual fraudulent overpayments made. Accountable officers are strictly liable for losses of government funds under their control. Under the False Claims Act and the Program Fraud Civil Remedies Act, the government's loss for paying fraudulent subsistence claims is the amount overpaid due to the fraud. Accountable officers' liabilities also should be limited to those overpayments. Prior cases which included in the officer's liability nonfraudulent expenses claimed for the same day as fraudulent expenses are modified. 41 Comp. Gen. 285 (1961) and 57 Comp. Gen. 664 (1978) are modified in part. 65 Comp. Gen. 858 (1986); B-217114.3, Feb. 10, 1987; B-217114, Mar. 26, 1987; B-217114, Feb. 29, 1988; B-217114, Aug. 12, 1988; B-217114.5, June 8, 1990; B-217114.6, July 24, 1990, are modified.

[1] EMS also alleges that the Navy was biased in favor of Raytheon. While we find that the Navy afforded Raytheon an improper competitive advantage by failing to provide EMS with the same information it provided Raytheon, we find no proof of bias. *See Institute of Modern Procedures, Inc.*, B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93.

Appropriations/Financial Management

Accountable Officers

■ **Certifying officers**

■■ **Relief**

■■■ **Illegal/improper payments**

■■■■ **Overpayments**

Appropriations/Financial Management

Accountable Officers

■ **Liability**

■■ **Debt collection**

■■■ **Amount determination**

The False Claims Act and the Program Fraud Civil Remedies Act specify the government's rights to collect damages and penalties from employees who submit fraudulent travel expense claims. Agency actions to recoup fraudulent overpayments of subsistence expense claims from fraudulent payees should be taken in light of those Acts and other applicable statutes and regulations. Prior decisions advising agencies to recoup from fraudulent payees both the fraudulent overpayments and non-fraudulent subsistence expenses claimed for any day tainted by the fraudulent claim are overruled. 41 Comp. Gen. 285 (1961) and 57 Comp. Gen. 664 (1978) are overruled in part.

Matter of: Determining The Amount of Accountable Officer Liability For Improperly Paying Fraudulent Travel Subsistence Expense Claims

Mr. Paul F. Kane, an accountable officer within the U.S. Army Corps of Engineers, has asked for our opinion whether his liability for paying a fraudulent travel expense voucher should include the non-fraudulent claims on the vouchers. Under our current "tainted day" rule, an accountable officer who pays a fraudulent claim for a per diem subsistence expense (i.e. lodging or meals) for a specific day is also liable for paying non-fraudulent per diem expenses claimed for that day.

Specifically, Mr. Kane has asked us to exclude the amounts covered under the "tainted day" rule from his liability for paying fraudulent travel expense vouchers which was fixed by our denial of relief in 65 Comp. Gen. 858 (1986). Mr. Kane also asked us to certify the amount of his liability to the Attorney General under the provisions of 5 U.S.C. § 5512. Section 5512(b) provides that "the Attorney General, within sixty days, shall order suit to be commenced" against Mr. Kane, affording him the opportunity for a judicial hearing on the issue of his liability.

For the reasons stated below, we conclude that accountable officers should not be held responsible for the non-fraudulent amounts covered under the "tainted day" rule. The officer's liability will be limited to the actual overpayments which occur when the government pays a fraudulent travel voucher.

Background

As discussed in more detail in 65 Comp. Gen. 858, Mr. Kane was initially held liable for a number of erroneous payments made as a result of a long-running scheme of travel reimbursement fraud. The scheme was perpetrated by a number of employees at the Buffalo, New York District Office of the North Central Division, U.S. Army Corps of Engineers. Our decision addressed Mr. Kane's liability for $22,848.22 in payments made between October 19, 1981, and August 1982.[1] We granted Mr. Kane relief for $7,515.72 in payments made before January 1, 1982, and denied him relief for $15,332.50 in payments made after that date. On June 8, 1990, we denied Mr. Kane's request for reconsideration of our decision.

Mr. Kane first questioned whether his liability should include amounts covered under the "tainted day" rule in a June 15, 1987, letter to this Office. In response to that letter, we stated that it would be premature to consider the question for two reasons. First, Mr. Kane had not yet submitted a request for reconsideration of our decision partially denying relief. Second, efforts were still being made to collect damages from the employees who received the erroneous payments. B-217114, Feb. 29, 1988. In light of our denial of Mr. Kane's request for reconsideration, B-217114.5, June 8, 1990, and his request that we certify the amount of his liability to the Attorney General, this issue is now ripe for consideration.

Discussion

The "tainted day" rule states that a fraudulent claim for reimbursement for any part of a single day's subsistence expenses taints with fraud the entire day's claim for reimbursement of subsistence expenses. 59 Comp. Gen. 99 (1979). We first articulated the rule in response to questions about the effect of 28 U.S.C. § 2514 on government employee travel claims. Section 2514 provides:

> A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment or allowance thereof.

In 41 Comp. Gen. 285 (1961), we were asked to interpret how this section would apply to a voucher which included all of a military enlisted person's pay and allowances for a specific period, including some allowances (i.e. travel expense reimbursements) which were fraudulent. The Assistant Secretary of Defense (Comptroller) pointed out that if the "claim" in section 2514 were equated with the entire voucher, the enlisted member would lose his entitlement to any pay or allowance for the covered period. 41 Comp. Gen. at 287.

[1] Mr. Kane's liability for improper payments made before October 19, 1981, was settled by operation of law upon the running of the applicable statute of limitations. 31 U.S.C. § 3526(c) (1988). Payments made after that date were not subject to the statute of limitations because our Notice of Exception suspended the statute as of that date. 65 Comp. Gen. at 861.

In our response, we agreed that "each separate item of pay and allowances is to be viewed as a separate claim . . . ." *Id.* at 288. If fraud was suspected, these "items" were to be withheld and the claimant "should be left to his remedy in the Court of Claims [now the Claims Court]." *Id.* This remedy then would include the analysis of whether the "item" withheld was forfeited under 28 U.S.C. § 2514. Our subsequent cases further defined the "item" in the context of per diem expenses which we concluded should be withheld from payment. We concluded that the "items" which are fraudulently claimed are the per diem expenses applicable to a full day. 59 Comp. Gen. 99 (1979); 57 Comp. Gen. 664 (1978). These are the amounts which are covered under our "tainted day" rule.

Although we acknowledged that section 2514 is not applicable to *paid* claims, we stated that an amount which has been paid, but which would have come under our "tainted day" rule, "is purely and simply an erroneous payment for recoupment as such." 41 Comp. Gen. at 287. We reached this view in order to fully serve the salutary purpose of section 2514. We stated that an erroneously paid "item" (as we have defined that term) should be recouped, and the claimants should thereafter be limited to their recovery in the Claims Court. *Id.* at 288. Subsequently, we clarified this point by stating that "[t]he recoupment of the improperly paid item should be made to the same extent and amount as the denial of an unpaid claim based on fraud." 57 Comp. Gen. at 668 (1978).

We also applied these holdings to determine the liability of the accountable officer who made the erroneous payment. *E.g.,* B-229274, Jan. 15, 1988; B-224832, July 2, 1987. Thus, we held accountable officers liable for amounts covered under the "tainted day" rule because we equated the amounts erroneously paid to fraudulent *payees* with the amounts which our cases state should be withheld from fraudulent *claimants.*

We now conclude, however, that we should not equate these amounts. As we acknowledged in 41 Comp. Gen. 285, the statutory basis for the "tainted day" rule, 28 U.S.C. § 2514, does not apply to paid claims. The federal government's rights against fraudulent payees are generally governed by the False Claims Act, 31 U.S.C. §§ 3729-3733, and the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812.[2] Analyzing these statutes shows that the amount of a claim which is forfeited under 28 U.S.C. § 2514 by committing a fraud is not the same as the amount which can be recovered from a fraudulent payee.

The False Claims Act generally provides that a person who knowingly presents a false or fraudulent claim for payment "is liable to the United States Government for . . . an amount equal to 2 times the amount of damages the Government sustains . . . ." 31 U.S.C. § 3729. The United States recovers these amounts in suits brought by either the Justice Department or private parties suing on behalf of the United States. 31 U.S.C. § 3730.

[2] Both of these Acts have provisions regarding the federal government's rights against fraudulent claimants who are not paid. However, those provisions are not relevant to our analysis of accountable officer's liabilities for amounts erroneously paid.

Our research has not revealed a case which has determined the extent of damages the United States suffers when it pays a fraudulent travel reimbursement claim. In *United States v. Clay,* 420 F. Supp. 853 (D.D.C. 1976), the court held that the False Claims Act applies to fraudulent travel reimbursement claims made by a congressman, but did not reach the issue of determining the amount of damages caused by paying fraudulently inflated claims.

However, False Claims Act cases involving other types of fraudulent overpayments make clear that the damages from paying fraudulent travel expense claims is the amount overpaid, not the total amount claimed. "Ordinarily the measure of the government's damages would be the amount it paid out by reason of the false statements *over and above what it would have paid if the claims had been truthful.*" *United States v. Woodbury,* 359 F.2d 370, 379 (9th Cir. 1966) (italic supplied). *See also United States v. Country View Care Center, Inc.,* 797 F.2d 888 (10th Cir. 1986) (Damages were equal to overcharges paid on fraudulent Medicaid claims); *United States v. Ehrlich,* 643 F.2d 634 (9th Cir. 1981) (Damages were equal to inflated amount of HUD interest subsidies paid to claimant); and Annotation, *Measure and Elements of Damages Under False Claims Act,* 35 A.L.R. Fed. 805 (1977).

The difference between the forfeiture of an unpaid fraudulent claim under 28 U.S.C. § 2514 and the more limited damages for a paid fraudulent claim under the False Claims Act is illustrated by two cases involving the same government program. In the case involving an unpaid fraudulent claim, *Little v. United States,* 152 F. Supp. 84 (Ct. Cl. 1957), a contractor sued to recover tuition and other payments under a Veterans Administration contract. The claimant had provided education and training to World War II veterans under a federal program. The United States filed a counterclaim under 28 U.S.C. § 2514 asserting that the contractor had committed a fraud against the United States by submitting false and fraudulent vouchers for payment. However, the fraud did not involve the expenses which the contractor had sued to collect. The court held that the contractor's claim was forfeited, even though the fraud did not involve the claimed amounts. The court stated,

> . . . where, as in the present case, fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it.

152 F. Supp. at 87-88. Thus the court held that the fraud had tainted *all* claims made under the contract, regardless of whether those claims involved fraud themselves. The court did not specifically address the measure of damages caused by the fraud, other than to characterize those damages as "the amount overpaid the plaintiff." 152 F. Supp. 88.

In the case involving a paid fraudulent claim, *First National Bank of Birmingham v. United States,* 117 F. Supp. 486 (N.D. Ala. 1953), the court did reach the question of damages for the same sort of fraud. In that case, an assignee of a Veterans Administration contractor sued for payment on a contract similar to that in *Little v. United States.* The government filed a counterclaim alleging that the contractor had already been overpaid because of fraudulently inflated

vouchers, and sought double damages and forfeitures under the False Claims Act. The court determined that the damages suffered from the fraud were the amounts overpaid to the contractor. 117 F. Supp. at 488.

These two cases show that courts do not treat fraudulent claimants and fraudulent payees the same. A fraudulent claimant who is not paid and who sues for collection in the Claims Court will, under 28 U.S.C. § 2514, be denied recovery of amounts which would have been payable absent the fraud. This result is consistent with our "tainted day" rule as it has been applied to fraudulent unpaid subsistence expense claims. However, a fraudulent payee who is pursued under the False Claims Act will have to pay damages based upon the actual overpayment. The payees are not held responsible for any amounts which might have been forfeited under 28 U.S.C. § 2514. This result is not consistent with our "tainted day" rule as it has been applied to recouping fraudulent payments and determining accountable officer liability.

The conclusion that the treatment of unpaid fraudulent claims is different from the treatment of paid fraudulent claims is reinforced by the provisions of the Program Fraud Civil Remedies Act. That Act gives federal agencies the authority to administratively pursue remedies for false claims made against the government. The Act generally provides that a person who knowingly presents a false claim is liable for "an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim . . . ." 31 U.S.C. § 3802(a)(1). This assessment only applies to paid claims. 31 U.S.C. § 3802(a)(3). The legislative history of the Act makes clear that the claim which is doubled by or pursuant to section 3802 is the amount which is fraudulently claimed and not any other amount which is also paid. S. Rep. No. 212, 99th Cong., 1st Sess. 18-19 (1985).[3]

In our opinion, an accountable officer who is jointly liable for fraudulent travel subsistence expense payments should similarly have his liability determined on the basis of the fraudulent overpayment, rather than amounts which could have been withheld under the "tainted day" rule. Accountable officers are strictly liable for losses of government funds under their control. *E.g., Prescott v. United States,* 44 U.S. (3 How.) 578 (1845), *Serrano v. United States,* 612 F.2d 525, 528 (Ct. Cl. 1979). In the context of paid fraudulent travel claims for subsistence expenses, the amounts that the government has lost are the amounts which have been overpaid due to the fraud. We therefore conclude that an accountable officer's liability also should be limited to those overpayments. Thus, we will no longer determine an accountable officer's liability for amounts erroneously paid under our "tainted day" rule. In the future, such rule shall only apply when deciding how much of a partially fraudulent travel voucher should be paid.

To the extent that 41 Comp. Gen. 285, 57 Comp. Gen. 664, and other cases equate the amounts erroneously paid to fraudulent payees with the amounts

[3] This Senate Report discusses S. 1134, a predecessor bill to the Act. The Act was passed as part of Pub. L. No. 99-509, 100 Stat. 1874 (1986). The legislative history of Pub. L. No. 99-509 states that the Act was based upon S. 1134 as that bill was reported out by S. Rep. No. 212. H.R. Rep. No. 1012, 99th Cong., 2d Sess. 257-260 (1986).

that should be withheld from fraudulent claimants, they are modified accordingly. Furthermore, our instructions in those cases that agencies apply the "tainted day" rule in recouping fraudulent travel reimbursements are overruled. Agency actions against fraudulent payees should be taken in light of the provisions of the False Claims Act, the Program Fraud Civil Remedies Act, the Debt Collection Act, and the Federal Claims Collection Standards, as well as any other statutes and regulations applicable to recovering the fraudulent payment involved.

In 65 Comp. Gen. 858, we denied Mr. Kane relief for $15,332.50 of payments he made on travel vouchers tainted by fraud. The record shows that $7,809.36 of that amount were actual payments of fraudulent claims. The $7,523.14 balance consisted of amounts included under the "tainted day" rule. Accordingly, we modify our decisions in this case to state that Mr. Kane is denied relief for the fraudulent payments in the amount of $7,809.36.

Furthermore, the record in this matter reflects that the amount of Mr. Kane's liability has been reduced by $1,325.12 by collections from the employees who received the fraudulent payments, and by collections of $3,126 from Mr. Kane. Therefore, Mr. Kane's current outstanding liability is $3,358.24. In accordance with his request, we are certifying Mr. Kane's liability for this amount to the Attorney General.

B-238110, May 7, 1991

Appropriations/Financial Management

Appropriation Availability
■ Time availability
■ ■ Time restrictions
■ ■ ■ Fiscal-year appropriation
■ ■ ■ ■ Training

Travel and transportation expenses of temporary duty travel spanning more than one fiscal year should be charged against the appropriations current in the fiscal years in which the expenses are incurred rather than in the fiscal year in which the travel is ordered.

Matter of: Proper Appropriation to Charge for Expenses of Travel Spanning More than One Fiscal Year

In 64 Comp. Gen. 45 (1984), we concluded that the reimbursable expenses of relocation should be charged against the appropriation current when the employee was ordered to transfer. Prior decisions to the contrary were expressly overruled. *Id.* We have since applied the holding of 64 Comp. Gen. 45 to the 60-day extension of temporary quarters subsistence expenses (TQSE) and to the dislocation allowance in connection with an employee's relocation. 64 Comp. Gen. 901 (1985); 67 Comp. Gen. 474 (1988).

An official of the Department of Veterans Affairs (VA) now asks us to extend our holding in 64 Comp. Gen. 45 to cover expenses of employees whose temporary duty travel spans more than one fiscal year. For the reasons discussed below, we conclude that the expenses of temporary duty travel should continue to be charged against the appropriations current in the fiscal years in which the expenses are incurred, not when the travel is authorized.

Background

An employee of the government is entitled to an allowance or reimbursement for travel expenses when on official business away from his designated post of duty under 5 U.S.C. §§ 5701-5707 (1988). Specifically, under 5 U.S.C. § 5702, the employee is entitled to a per diem allowance, reimbursement for the actual and necessary expenses of travel, or a combination of the two. An employee is also entitled to the actual expenses of transportation, or a mileage allowance when advantageous to the government, under 5 U.S.C. § 5704. In addition, under 5 U.S.C. § 4109(a), the head of an agency is required to reimburse an employee for the cost of travel associated with training in the manner prescribed in 5 U.S.C. §§ 5701-5707. 67 Comp. Gen. 540 (1988). The Department of Veterans Affairs (VA) requests that we extend the holding of 64 Comp. Gen. 45 and our subsequent cases to temporary duty travel, including travel for purposes of training, spanning more than one fiscal year.[1]

Discussion

A fiscal year appropriation may be obligated only to meet a *bona fide* or legitimate need arising in the fiscal year for which the appropriation was made. *See* 31 U.S.C. § 1502(a). What constitutes a *bona fide* need of a particular fiscal year depends largely on the facts and circumstances of a particular case and there is no general rule applicable to all situations. 44 Comp. Gen. 399, 401 (1965). Logic dictates that an employee's official travel is a *bona fide* need of the year in which the employee actually travels. If a *bona fide* need for the employee to travel existed in any other year, the employee would travel in such other year. As expenses must be charged against the appropriation current in the fiscal year in which a *bona fide* need for them exists, expenses of temporary duty travel should be charged to the fiscal year in which they are incurred.

Our decision at 64 Comp. Gen. 45 did not "negate the obligational concept of 31 U.S.C. § 1502(a) relative to permanent change of duty," as VA asserts. To the contrary, we concluded in 64 Comp. Gen. 45 that the expenses of relocation are properly charged to the fiscal year in which relocation is ordered precisely because the relocation of an employee is a *bona fide* need of that fiscal year. 64

[1] We do not address here the appropriation to be charged for the expenses of training unrelated to travel for which 5 U.S.C. § 4109 authorizes payment or reimbursement. We have held, however, that the cost of developing and providing a training course that spans more than one fiscal year is properly chargeable to the fiscal year appropriation when the need for the training was determined, the contract for the training was entered into, and contract performance was begun. B-233243, Aug. 3, 1989.

Comp. Gen. at 47. The fact that the applicable statutes and regulations impose an obligation on the government to reimburse whatever allowable expenses the employee might incur at the time of the transfer supported our conclusion. We subsequently applied 64 Comp. Gen. 45 to expenses of a more discretionary nature, again relying upon the *bona fide* need rule. We held that an extension of temporary quarters subsistence expenses (TQSE) that an agency provides to a transferred employee at its discretion relates back to the original issuance of transfer orders and is, thus, a *bona fide* need of the year in which the orders were issued. 64 Comp. Gen. at 902. We did not, however, apply 64 Comp. Gen. 45 to the expense of contracting with a private firm to arrange for the purchase of a transferred employee's residence. 66 Comp. Gen. 554 (1987). We found that, in contrast to the extension of TQSE, the expense of employing a relocation firm is "totally discretionary" and relates back to no initial expenditure. *Id.* at 556.

Factual distinctions between the expenses of relocation and the expenses of temporary duty travel support our decision not to extend the rule and analysis of 64 Comp. Gen. 45 to this case. Factors beyond the agency's and the employee's control may prevent the employee from incurring certain expenses of relocation at the time the relocation is ordered. 64 Comp. Gen. at 47. Since the government's obligation to reimburse the employee for the expenses of relocation is mandatory, but for such factors, the government would have to reimburse the employee at the time the relocation is ordered. The statute and the regulations appear to impose a similar mandatory obligation on the government with respect to the expenses of temporary duty travel.[2] However, unlike relocation expenses, external factors are not likely to affect when the employee will incur the expenses of temporary duty travel; an employee can only incur the reimbursable expenses of temporary duty travel when he actually travels.

Moreover, we based our decision in 64 Comp. Gen. 45 in part on our desire to alleviate practical difficulties arising from the uncertainty as to when employees would incur the reimbursable expenses of relocation. We noted that, because transferred employees have several years to incur certain reimbursable expenses, agencies were forced to reserve sufficient funds for a fiscal year to reimburse its employees for the maximum expenses of relocating and to deobligate funds tentatively recorded as obligations in excess of the amount of reimbursable expenses actually incurred.

The practical difficulties that we described in 64 Comp. Gen. 45 are far less likely to arise in connection with the reimbursable expenses of temporary duty travel. Generally, agencies know when an employee will actually incur those expenses. The employee will incur the expenses daily during the period of sched-

[2] Under 5 U.S.C. § 5702(a), an employee "is entitled to" a per diem allowance, reimbursement for the actual and necessary expenses of travel, or a combination of the two when traveling on official business away from his designated post of duty. The Federal Travel Regulation provisions implementing section 5702(a) employ mandatory language, stating "[p]er diem allowances shall be paid as prescribed . . . for official travel away from the official station . . . , except when actual subsistence expense reimbursement is authorized or approved . . . ." Federal Travel Regulations, para. 1-7.1(a) (Supp. 20, July 1, 1986), 41 C.F.R. § 301-7.1 (1990).

uled travel.[3] Since the policy supporting our decision regarding relocation expenses does not apply equally to temporary duty travel expenses, we decline to extend our previous decision on policy grounds. In addition, our decision here prevents agencies from issuing travel orders toward the end of a fiscal year merely to obligate the funds available for temporary duty travel before they expire.

Arguably, since certain expenses of relocation, *i.e.,* per diem and transportation expenses of an employee and his immediate family, cannot be incurred until the travel actually occurs, such expenses should be treated like the expenses of temporary duty travel. We recognize that our decisions require agencies to treat expenses for per diem or subsistence and transportation differently based upon the context in which they arise. However, we believe that, as a practical matter, the order transferring an employee carries a greater degree of certainty that the employee will actually incur the expenses of travel than the order for temporary duty travel. In addition, the expenses of travel and transportation for relocation do not stand alone, but rather are only two of the myriad of allowances the government provides for transferred employees under 5 U.S.C. §§ 5724 and 5724a .

Since we do not extend the holding of 64 Comp. Gen. 45 to the expenses of temporary duty travel, agencies should continue to apply the principles we have previously articulated regarding travel spanning more than one fiscal year. In general, the expenses of travel and transportation should be charged to whatever fiscal year's appropriation is current at the time the expenses are incurred. 42 Comp. Gen. 699 (1963). However, tickets for round trip transportation may be charged against the appropriation current at the time the employee embarks on temporary duty travel, even though the employee will not use the second portion of the ticket until the following fiscal year. 26 Comp. Gen. 961 (1947).

Conclusion

Temporary duty travel is a *bona fide* need of the year in which the travel actually occurs. Therefore, agencies must charge the expenses of temporary duty travel to the appropriation current in that fiscal year. Where travel spans two fiscal years, agencies must charge the expenses to the appropriations current in the fiscal years in which the particular travel expenses are incurred.

[3] Since expenses of official travel accrue on a daily basis during the time of travel, payment of per diem or subsistence expenses is similar to payment for services that are severable and, thus, chargeable only to the appropriation current at the time the services are rendered. *See, e.g.,* 64 Comp. Gen. 359 (1985).

B-242052.2, May 7, 1991

Procurement

Socio-Economic Policies

■ **Preferred products/services**

■ ■ **Domestic products**

■ ■ ■ **Compliance**

Procurement

Socio-Economic Policies

■ **Preferred products/services**

■ ■ **Foreign/domestic product distinctions**

Agency improperly evaluated proposed digital facsimile system as a domestic end product for Buy American Act purposes, and protest on that ground is sustained, where the imported facsimile machine underwent some manufacturing operations in the United States but the essential nature of the machine was not altered, so that it remained a foreign component.

Matter of: General Kinetics, Inc., Cryptek Division

David S. Cohen, Esq., Cohen & White, for the protester.

Joseph A. Petrillo, Esq., Petrillo & Hordell, and George Rehm, Esq., Weadon, Rehm, Thomsen & Scott, for Ricoh Corporation, the interested party.

Clifton M. Hasegawa, Esq., Defense Communications Agency, for the agency.

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

General Kinetics, Inc., Cryptek Division, protests the Defense Communications Agency's (DCA) award of a contract to Ricoh Corporation under request for proposals (RFP) No. DCA200-90-R-0038, for secure digital facsimile (fax) machines. Cryptek contends that Ricoh offered a foreign end product for purposes of the Buy American Act, 41 U.S.C. § 10a *et seq.* (1988), and that its proposed fax machines failed to meet mandatory solicitation requirements.

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

Background

The solicitation requested proposals for base and option quantities of two versions of secure digital fax machines—that is, digital fax machines that will be used with government-furnished cryptographic equipment—including schedule items for a version complying with the TEMPEST standard on limiting compromising emanations, and other schedule items for a second, non-TEMPEST version. In addition, the solicitation required offerors to propose TEMPEST and non-TEMPEST interconnecting cables, fax paper and supplies, installation,

training, and maintenance. Award was to be made to the firm submitting a technically acceptable offer with the lowest overall evaluated cost. The solicitation provided that the government could accept any item or group of items of an offer, unless the offer was otherwise qualified, and that offers would be evaluated on the basis of the advantages and disadvantages of making more than one award.[1]

Five offers were received in response to the solicitation, one of which was rejected as technically unacceptable. Following discussions, DCA found another two offers to be technically unacceptable as well, and then requested best and final offers (BAFO) from the remaining two offerors, Ricoh and Cryptek. DCA evaluated Ricoh's BAFO as offering a lower overall life-cycle cost, discounted to $5,557,100 current year dollars ($6,223,645 proposed), than Cryptek's BAFO, whose life-cycle cost as discounted totaled $6,822,200 ($7,613,651 proposed). When DCA thereupon made award to Ricoh, Cryptek filed this protest contending that DCA improperly evaluated Ricoh as offering a domestic end product.

Timeliness

As an initial matter, DCA and Ricoh argue that Cryptek's protest of the evaluation of Ricoh's non-TEMPEST fax system is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1991), which require that protests based on other than alleged solicitation improprieties be filed within 10 working days after the protester knew or should have known the basis for protest, and under our decisions, which require that additional grounds of protest raised after the filing of the initial protest independently satisfy the timeliness requirements. *See, e.g., Little Susitna Co.*, 65 Comp. Gen. 652 (1986), 86-1 CPD ¶ 560. DCA and Ricoh point out that in its initial protest, filed on November 14, 1990, Cryptek alleged only that Ricoh's model No. R-2112T, the model which Cryptek "on information and belief" surmised had been offered and the model which in fact was offered to satisfy the TEMPEST requirement, was not a domestic end product. They note that the protest of the evaluation of Ricoh's model No. R-2110, proposed to satisfy the non-TEMPEST requirement, was not filed until December 28, approximately 6 weeks after Cryptek had filed its initial protest.

We find Cryptek's protest of the evaluation of Ricoh's non-TEMPEST fax machine timely. Cryptek's initial protest submission to our Office was filed 4 working days after the award to Ricoh. Cryptek indicated at the bid protest conference conducted by our Office, Conference Transcript (CT) at 25, and in a subsequently submitted affidavit, that it was unaware of which fax machine Ricoh had offered to satisfy the non-TEMPEST requirement until it received the agency report; it then supplemented its protest in this regard on the next working day. According to Cryptek, it was able to surmise which model Ricoh was offering to satisfy the TEMPEST requirement because only one Ricoh model

[1] The acquisition plan adopted by DCA stated that "multiple awards will be allowable and are possible [since] some contractors may be able to provide only the TEMPEST secure facsimile and others may only be able to provide the Non-TEMPEST secure facsimile."

met the solicitation requirement that the machine be on the National Security Agency's (NSA) Preferred Products List (PPL) or on its Endorsed Tempest Products List (ETPL) of approved TEMPEST products "at time of response to the RFP." Cryptek explains that it was unable similarly to surmise which fax machine Ricoh had proposed to meet the non-TEMPEST requirement since only limited changes were required to conform a commercial fax machine to the non-TEMPEST requirement, and Ricoh therefore could have offered any number of fax machines for this requirement. In these circumstances, we find that Cryptek was not on notice of the basis for its protest with respect to Ricoh's non-TEMPEST fax machine prior to receipt of the agency report, and that its protest on this ground therefore was timely filed. *See Arrow Gear Co.*, 69 Comp. Gen. 596 (1990), 90-2 CPD ¶ 28 (General Accounting Office will resolve doubts over when a protester first becomes aware of its basis for protest in the protester's favor).

NSA Listing Requirement

Cryptek first contends that Ricoh's proposed TEMPEST digital fax system failed to comply with the solicitation requirement that "the DF [digital fax] device" be listed on either NSA's PPL or ETPL lists as of the time of proposal submittal. Ricoh, unlike Cryptek, offered a separate, external protocol converter to satisfy the solicitation requirement that the proposed TEMPEST digital fax machine comply with Military Standard MIL-STD-188-161B, governing interoperability among digital fax machines. Ricoh's TEMPEST protocol converter was not listed on either NSA list of approved TEMPEST products until after award.

We need not resolve this issue. Even if we agreed with Cryptek, acceptance of a proposal that deviates from RFP specifications warrants sustaining a protest only if there is resulting prejudice to the protester, *e.g.*, if the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to relaxed requirements. *See Astro-Med, Inc.—Recon.*, B-232131.2, Dec. 1, 1988, 88-2 CPD ¶ 545; *see generally Federal Computer Corp.*, B-239432, Aug. 29, 1990, 90-2 CPD ¶ 175. Here, we have no basis for finding a reasonable possibility of prejudice. Cryptek does not assert, and the record does not indicate, that it would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the relaxed requirement. In this regard, there would be no apparent reason for Cryptek to alter its proposal since the listing requirement concerned the status of the offered item and Cryptek's item had that status, whether or not listing was required. DCA's waiver of the requirement therefore would not provide a basis for sustaining the protest. *See CryoMed*, B-241605, Feb. 22, 1991, 91-1 CPD ¶ 202.

Cryptek also challenges DCA's acceptance of Ricoh's certification that, as required by the specifications, its proposed fax systems comply with MIL-STD-188-161B, governing interoperability among digital fax machines. Although it is unclear from the record whether DCA had any basis upon which to question Ricoh's certification, again, there is no assertion or indication that Cryptek was prejudiced by any relaxation of the specifications in this regard.

Buy American Act

We find that DCA did not properly evaluate Ricoh's proposal for purposes of the Buy American Act. The solicitation included the clause set forth at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001, which implements the Buy American Act and provides for the addition of an evaluation differential to offers proposing to furnish foreign end products when they are in competition with offers of domestic end products. The differential to be applied ranges from 6 percent of the offered price inclusive of duty, to 50 percent of the offered price exclusive of duty, whichever results in the greater evaluated price. DFARS § 252.225-7001(d). A domestic end product is defined as an "end product manufactured in the United States if the costs of its . . . components which are mined, produced or manufactured in the United States exceeds fifty percent (50%) of the cost of all its components." DFARS § 252.225-7001(a)(6)(ii). Components are defined by the DFARS as "those articles, materials, and supplies directly incorporated into end products." DFARS § 252.225-7001(a)(1).[2]

The RFP required offerors to certify whether the end products that would be furnished were domestic. While Cryptek certified its proposed fax machines as domestic end products, Ricoh certified in its initial proposal that both its TEMPEST (Model No. R-2112T) and non-TEMPEST (Model No. R-2110) fax machines were non-domestic end products of Japanese origin. However, when asked during discussions to furnish an import duty unit price for each machine, Ricoh responded by revising its proposal to claim that its fax machines were domestic end products. When the contracting officer then warned that a 50 percent evaluation factor could be added to its evaluated price should it later be determined that the fax machines were not domestic, Ricoh furnished a detailed analysis in support of its assertion of domestic end product status.

Specifically, Ricoh explained that it was offering a TEMPEST fax system comprised of only three components, all of domestic origin, including: (1) a "Mitek [Systems, Inc.] Tempestized Fax" machine; (2) a shielded "pedestal" enclosure containing certain electronic subassemblies which had been removed from the fax machine, insulated and then installed in the pedestal; and (3) a protocol converter, which permits the fax machine to satisfy the solicitation requirement for compliance with the applicable Military Standard—MIL-STD-188-161B—governing interoperability among digital fax machines. Ricoh further explained that the manufacturing process for the TEMPEST fax machine includes: (1) import into the United States from Japan of a Ricoh commercial fax machine;

[2] The Trade Agreements Act generally provides that the President may waive, with respect to eligible products of designated countries, the application of any law, regulation, procedure or practice that would result in treatment less favorable than that accorded to United States products and supplies of such products. 19 U.S.C. § 2511 (1988). The regulations implementing the Act provide that when the value of a proposed acquisition of an eligible product is estimated to be at or over a specified dollar threshold, agencies shall evaluate offers for an eligible product without regard to the restrictions of the Buy American Act. Federal Acquisition Regulation § 25.402(a)(1). With respect to the Department of Defense, however, the implementing regulations provide that items within Federal Supply Classification group 58, the classification under which this procurement was synopsized, are not subject to the Trade Agreements Act. DFARS § 225.403. Accordingly, this procurement was subject to the Buy American Act.

(2) disassembly of the unit; (3) removal of certain printed circuit boards; (4) replacement of programmable read only memory chips on the boards; (5) reassembly of the fax machines and shipment to Mitek, an independent subcontractor; (6) disassembly; (7) the addition of insulation to electronic subassemblies to conform with the TEMPEST standards governing the control of compromising emanations; (8) incorporation of insulated electronic subassemblies into the pedestal; and (9) integration of the fax machine and pedestal.

As for the non-TEMPEST fax, Ricoh explained to DCA that its proposed system is comprised of only two components, both of domestic origin, including: (1) a commercial fax machine; and (2) a protocol converter. With respect to the fax machine, Ricoh further explained that "although this machine is based upon equipment initially manufactured by Ricoh Japan, it is substantially transformed by Ricoh in San Jose, California, in the process of meeting the specifications." Ricoh furnished a production process flow chart indicating that it imports into the United States from Japan the same commercial fax machine used for the TEMPEST version, disassembles the unit, removes a printed circuit board and replaces programmable read only memory chips, and then reassembles the unit.

Ricoh maintains that the manufacturing operations performed in the United States on the Japanese commercial fax machine and pedestal in the case of the TEMPEST system, and on the Japanese commercial fax machine in the case of the non-TEMPEST system, constitute a "manufacture" of the components, rendering them of domestic origin for purposes of the Buy American Act. Since the protocol converters also are manufactured in the United States, Ricoh maintains, all components of both systems—the fax machine, pedestal, and protocol converter of the TEMPEST system and the fax machine and protocol converter of the non-TEMPEST system—are of domestic origin, and the systems therefore are domestic end products. Based on Ricoh's explanation, DCA accepted its revised certification of the fax systems as domestic end products and therefore did not add an evaluation differential to Ricoh's proposed price. Without the differential, Ricoh's price was low, and it was awarded the contract on this basis.

Cryptek questions DCA's acceptance of Ricoh's rationale for domestic end product status for the TEMPEST and non-TEMPEST units; it argues that the end product being procured is the fax machine itself, with the protocol converter and pedestal serving merely as accessories. According to Cryptek, the term "components" as defined in DFARS § 252.225-7001(a)(i)—"articles, materials, and supplies directly incorporated into end products"—for purposes of calculating whether the cost of the components manufactured in United States exceeds 50 percent of the cost of all components, encompasses the components of the fax machine itself, that is, its subassemblies. Cryptek also argues that if the system itself is the end product, *i.e.,* including a domestic protocol converter and pedestal, DCA should have measured the foreign-manufactured subcomponents of the fax machine against the total cost of the system. This percentage, Cryptek asserts, is 56.1 percent of the cost of the TEMPEST version and 74.6 percent of the non-TEMPEST version. In addition, Cryptek questions whether Ricoh's proposed

fax machines satisfy the other prerequisite for domestic status, namely, manufacture in the United States; Cryptek argues that the Japanese commercial fax machines do not undergo any substantial change after import into the United States and that they therefore can not be considered to have been of domestic manufacture.

As a general matter, a contracting agency should go beyond a firm's self-certification for Buy American Act purposes, and not automatically rely on the validity of that certification, where the agency has reason to believe, prior to award, that a foreign end product will be furnished. *See Cryptek, Inc.,* B-241354, Feb. 4, 1991, 91-1 CPD ¶ 111; *American Instrument Corp.,* B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287. Where an agency is required to investigate further, we will review the evaluation and resulting determination of country of origin to ensure that they were reasonable. *See Autospin, Inc.,* B-233778, Feb. 23, 1989, 89-1 CPD ¶ 197. Here, we find that DCA, based on the additional information available to it, reasonably concluded that Ricoh's proposed TEMPEST fax system qualified as a domestic end product. However, we find unreasonable the agency conclusion that Ricoh's proposed non-TEMPEST fax system qualified as a domestic end product.

TEMPEST Fax System

As indicated above, to qualify as domestic, an end product must meet two requirements: (1) it must be manufactured in the United States; (2) and the cost of its components which are mined, produced or manufactured in the United States must exceed 50 percent of the cost of all its components. The term "manufacture" means completion of the article in the form required for use by the government, *see Marbex, Inc.,* B-225799, May 4, 1987, 87-1 CPD ¶ 468, and assembly of components necessary to transform an imported machine into a machine which meets the specifications can constitute manufacture, at least where a significant number of assembly operations are performed in the United States. *See Rolm Corp.,* B-200995, Aug. 7, 1981, 81-2 CPD ¶ 106. It is not necessary for the process performed in the United States to result in a substantial or fundamental change to the physical character of an imported machine in order for it to constitute manufacture. *Saginaw Mach. Sys., Inc.,* B-238590, June 13, 1990, 90-1 CPD ¶ 554.

We find that Ricoh's proposed TEMPEST fax system as described in its proposal will undergo sufficient transformation to be considered manufactured in the United States. The Japanese commercial fax machine will only conform to the specifications after the replacement of programmable read only memory chips, addition of TEMPEST-required insulation to certain electronic subassemblies, removal of insulated electronic subassemblies to the newly added pedestal, and the addition and integration of a protocol converter. These steps seem to us significant and clearly are necessary to make the system conform to the TEMPEST specifications. While Cryptek appears to question whether the domestic protocol converter and pedestal should be considered in this analysis, they clear-

ly are components of the ultimate end-item, a fax system, that is to be furnished to the government.

We find that the TEMPEST fax system also satisfies the 50-percent-plus domestic component requirement. Our finding in this regard is based on an analysis similar to that used above to determine whether the TEMPEST fax system satisfied the domestic manufacture requirement. The cost of the fax machine component is over 50 percent of the cost of the end product, and most of the significant manufacturing operations—replacement of programmable read only computer chips, addition of insulation, and removal of certain electronic subassemblies—were performed on the fax machine component. The significance and necessity of those operations in making the fax machine conform to the specifications renders the fax machine a domestic component.

The agency also concluded that the costs of the fax machine component are largely domestic. This analysis reflects, to a great extent, the contribution of Mitek, an independent subcontractor, which insulated the electronic subassemblies to conform with the TEMPEST standards. Cryptek believes these costs are overstated and therefore distort the total domestic cost content. However, the agency determined that Mitek's costs reflected an "arms-length negotiated 'off the shelf' price," and in the absence of any evidence of fraud, we think it was proper for the agency to weigh these costs in its analysis. Thus, we find no basis in the record for questioning the agency's overall determination that the cost of the domestic components of Ricoh's proposed TEMPEST fax system will amount to more than 50 percent of the cost of all components.

Non-TEMPEST Fax System

We find that Ricoh's non-TEMPEST fax system fails to satisfy the second prong of the Buy American Act test, that is, the 50-percent-plus domestic component requirement. Notwithstanding the domestic manufacturing operations performed on it—disassembly, removal of a circuit board and replacement of memory chips, and reassembly—the Japanese commercial fax machine, the most significant, costly component of the end product (*i.e.*, the non-TEMPEST fax system), remains a foreign-manufactured component of the overall system which, because its cost exceeds 50 percent of the cost of all the components of the system, renders the system a foreign end item.

Although assembly of components can constitute manufacture, limited domestic assembly or manufacturing operations which do not alter the essential nature of a component which is the core or essence of the end product being procured may not be used to circumvent the plain requirement of the Buy American Act that the end product be manufactured "substantially all" from domestic articles, material or supplies. 41 U.S.C. § 10a; 48 Comp. Gen. 727 (1969); *Ampex Corp.*, B-203021, Feb. 24, 1982, 82-1 CPD ¶ 163. For example, in 48 Comp. Gen. 727, boring, plating and machining operations were performed on an unfinished foreign-made cylinder lining forging in order to make it into the finished liner required by the specifications. We found that although such machining oper-

ations might reasonably be regarded as adequate to establish that the end product was an article manufactured in the United States, they did not transform the liner into a domestic component for Buy American Act evaluation purposes. Likewise, in *Ampex Corp.*, B-203021, *supra,* a foreign-made video recorder base unit was disassembled into five basic subassemblies and then was reassembled after the addition of three subassemblies and the deletion of one. We found that the disassembly, substitution of parts, and reassembly of the base unit did not change the fact that the base unit was a foreign-made component of the overall video recorder system being procured by the agency.

We reach a similar conclusion here. The essential nature of the Japanese commercial fax machine is unchanged by the relatively limited domestic manufacturing operations performed on it; although necessary to make the machine conform to the specifications, the disassembly, removal of a circuit board and replacement of memory chips, and reassembly in the United States do not change its essential function as a basic fax machine, nor do they appear significant with respect to the level of effort and materials required. Thus, we think the fax machine, the core component of the end product being procured, remains a foreign-manufactured component. The Japanese commercial fax machine would render Ricoh's non-TEMPEST fax system other than a domestic end product because the cost of the domestic components would total less than 50 percent of the cost of all the components. *See generally Autospin, Inc.,* B-233778, *supra.* That being the case, DCA was required to add an evaluation differential amounting to 50 percent of Ricoh's offered item price (exclusive of duty) for the non-TEMPEST fax system to Ricoh's proposed price.

The addition of the evaluation differential to Ricoh's price for non-TEMPEST fax machines renders Cryptek the low offeror for those items on the schedule. DCA believes that the 50 percent evaluation differential should be calculated without considering the cost of the domestically manufactured protocol converter. We disagree. Ricoh offered a single unit price for its complete non-TEMPEST fax system and did not break out from that price any allowance for a protocol converter. The regulations provide that "each nonqualifying country offer of defense equipment shall be adjusted for the purpose of evaluation by . . . adding 50% of the *offer,* exclusive of duty" (italic added) as an evaluation differential. DFARS § 252.225-7001(d). The agency therefore is obliged to calculate the evaluation differential based on Ricoh's unit price for its complete non-TEMPEST fax system.

Recommendation

Cryptek's offer when properly evaluated was low with respect to the non-TEMPEST schedule items, while Ricoh's offer was low with respect to the TEMPEST items. Since the solicitation provided for the possibility of multiple awards, the low overall cost to the government will result from awarding Cryptek the non-TEMPEST requirement, while continuing Ricoh's contract for the TEMPEST requirement. Therefore, by letter of today to the Director of DCA, we are recom-

mending that Ricoh's contract be terminated for the convenience of the government with respect to the schedule items for non-TEMPEST fax machines, and that a contract for those items be awarded to Cryptek, if otherwise appropriate. Further, we find Cryptek to be entitled to reimbursement of the costs of pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1); *see Falcon Carriers, Inc.*, 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

The protest is denied in part and sustained in part.

B-240238, May 8, 1991

Appropriations/Financial Management

Obligation
■ Recording
■■ Advances
■■■ Imprest funds

The Department of Veterans Affairs was not required to record Imprest Fund advances made in 1985 as obligations against its appropriations. Advances to cashiers made to finance unspecified future cash payments do not meet the statutory requirements for recording obligations. The obligations occur only as cashiers use the funds and obtain reimbursements from available appropriations.

Appropriations/Financial Management

Obligation
■ Recording
■■ Advances
■■■ Imprest funds

Imprest Fund advances to cashiers represent potential obligations which agencies may be compelled to record against their appropriations. To prevent over-obligation of the appropriations, agencies should administratively record commitments or reservations of funds against their current appropriations which will have to be obligated to reimburse the Imprest Fund expenditures.

Matter of: Appropriations Accounting for Imprest Fund Advances Issued to Cashiers

The Office of the Inspector General (IG) of the Department of Veterans Affairs (VA) asked for our opinion on two questions dealing with VA's accounting for advances made to VA cashiers. First, the IG asked whether VA incurred obligations in fiscal year 1985 when it first advanced funds to establish cashiers' balances for VA's Imprest Funds. The IG asserts that VA failed to record the required obligations, and that recording the obligations for 1985 will show that VA over-obligated its 1985 Medical Care appropriation in violation of the Anti-Deficiency Act.

Second, the IG asks whether VA complied with applicable statutory requirements when it restored expired budget authority from a merged surplus account

to an M account in 1989. The authority was restored so that VA could permanently record its cashier advances as charges against its Medical Care appropriation M account.

For the reasons stated below, we conclude that the advances to VA cashiers should be recorded as commitments or reservations, but not obligations, against a current appropriation. The obligations occur as cashiers use the funds and obtain reimbursements from available appropriations. Thus, VA was not required to record the Imprest Fund advances made in 1985 as obligations. With respect to the restoration action in 1989, we conclude that VA should not have recorded its cashier advances as a "charge" against the M account in 1989. Accordingly, we do not address whether VA followed the proper procedures in charging the amounts to its M account. Rather, we recommend that VA return to its prior practice of charging advances to current appropriations.

Background

In order to facilitate making certain forms of cash payments, federal agency cashiers are given cash advances to establish Imprest Funds. Treas. Financial Manual, vol. 1, § 4-3020 (T.L. No. 496) (hereafter cited as 1 T.F.M.). Imprest Funds are used by cashiers to pay for authorized small purchases, to pay reimbursements for federal employee travel expenses, and to make cash advances for federal employee travel costs. "Manual of Procedures and Instructions For Cashiers Operating Under 31 U.S.C. 3321" at 23 (Supplement to 1 T.F.M. Chap. 4-3000). Cashiers may make these cash payments only when the payments are properly authorized, and when applicable documentation requirements are met. *Id.* at 23-27 and 1 T.F.M. § 4-4030.

Once payments have been made out of Imprest Funds, cashiers submit vouchers for replenishment of the Fund. Cashiers detail the payments they have made, and note which of their agency's appropriations should be used to reimburse the Fund for the payments. *Id.* at 29-30. The cashiers are then issued checks to replenish the amount of the Fund. *Id.*

Prior to fiscal year 1985, advances to create or increase Imprest Funds were made directly from Treasury or other Disbursing Officers to the cashiers without charging the amounts against any specific appropriation or fund account. Treas. Fiscal Requirements Manual Bulletin No. 84-11, March 29, 1984. The advances were "accounted for" on the Disbursing Officer's statement of personal accountability. Beginning with fiscal year 1985, Treasury issued new instructions to agencies on how to account for advances to cashiers.

Under the new procedures, advances were to be recorded within each agency's appropriations accounting rather than on Disbursing Officer statements of personal accountability. Treas. Fiscal Requirements Manual Bulletin No. 84-21, Sept. 10, 1984 (hereafter cited as TFRM Bull. No. 84-21). Advances already issued to cashiers were removed from the Disbursing Officers reports by "no-check" vouchers. *Id.*

On September 26, 1984, VA completed the voucher required under the new Treasury procedures. On October 1, 1984, the accountability for about $9.2 million in Imprest Fund advances made to VA cashiers was transferred from a Treasury Disbursing Officer to the cashiers within VA. VA recorded the $9.2 million as a charge against its 1985 Medical Care appropriation, but did not record an obligation against the appropriation.

In October of each year from 1985 to 1988, VA "rolled over" the charges for the outstanding Imprest Funds by removing the charges from the past year's appropriation and recording new charges against the current year's appropriation. In August 1989, VA reversed the charge to its 1989 appropriation and recorded the outstanding Imprest Funds as a charge to the M account for VA's Medical Care appropriation.

Legal Analysis

The IG's first question asks whether VA officials violated 31 U.S.C. § 1341, which prohibits "making or authorizing an expenditure or obligation exceeding an amount available" in an appropriation. The IG asserts that the Imprest Funds should have been recorded as obligations against VA's Medical Care appropriation when the accountability change was made in 1985. The IG further believes that VA's records show that recording the additional obligations in 1985 would have over-obligated VA's 1985 Medical Care appropriation.

Recording Imprest Fund advances to cashiers as obligations does not meet the statutory requirements for recording obligations contained in 31 U.S.C. § 1501. Paragraphs (a)(1) through (a)(9) of section 1501 list the sort of liabilities and commitments which agencies may use to properly support obligations of appropriations. Advances which allow cashiers to finance indefinite future cash payments are not encompassed by section 1501, since they do not reflect existing liabilities or commitments of the government. In contrast, when cashiers make properly authorized and documented cash payments, the cashiers are using advance funds to pay liabilities of the government. B-135798, Apr. 30, 1958; B-196109, Oct. 23, 1979. The requirements of section 1501 are satisfied when the cashiers pay these liabilities, not when the cashiers receive advances. Therefore, it would be premature to record obligations at the time that Imprest Funds are advanced to cashiers.

The guidance issued by Treasury when agencies were required to record accountability for Imprest Fund advances reinforces the conclusion that the advances should not be recorded as obligations. The instructions Treasury issued included answers to a number of questions raised by agencies. One of those questions was "When we charge our appropriation [for the amount of an advance], will this result in an obligation?" The answer to this question clearly reflected that advancing funds to cashiers would not result in an obligation of an agency's appropriation. An example given by Treasury showed that appropriations would not be obligated until the advance was expended and the cashier sought reimbursement from the applicable appropriation. TFRM Bull. No.

84-21 at 4. In our view, this example is consistent with the statutory provisions which govern recording obligations.

Moreover, the Treasury guidance went on to state that, if turnover of cashier advances is very rapid, agencies have the discretion to record obligations at the time that advances are made. Giving agencies discretion to record obligations when advances are made is inconsistent with the IG's view that obligations must be recorded when funds are advanced.

The IG refers to a letter from GAO to Treasury[1] as support for his position that the advances should have be recorded as obligations. The letter stated,

[o]ur Office of General Counsel has reviewed your proposed changes [to the accounting for advances] and has no legal objection to the changes as you have explained them to us. They concluded that cash advances to agency disbursing officials may be charged against an agency's appropriation at the time they are made, with adjustments being made at fiscal year-end to ensure allocation of expenditures to the proper appropriation account.

The IG asserts that the "charge" made to an agency's appropriation must be an obligation. The IG has misapprehended the language in the GAO letter. The charge referred to in the letter is not a legally required obligation. Rather, the charge is an administrative accounting entry made to ensure that Imprest Funds advanced to cashiers will not cause federal agencies to over-obligate their appropriations.

The ability of Imprest Fund cashiers to make certain cash payments, and later request reimbursement from agency appropriations, creates a potential for over-obligation. Agencies must take steps to prevent over-obligations from occurring. For example, an agency with a $1,000 appropriation and a $100 Imprest Fund advanced to a cashier might fully obligate its $1,000 appropriation while the Fund is still outstanding. If the cashier subsequently makes $50 of authorized cash payments and seeks reimbursement, an additional $50 obligation would have to be recorded. The total obligations of $1,050 would then exceed the amount of the $1,000 appropriation, and the agency would have violated the Anti-Deficiency Act.

To prevent this type of over-obligation, the agency should charge or reserve the $100 Imprest Fund advance against its appropriation, so that the agency's records will show only $900 of its $1,000 appropriation available for obligation. Then, if the agency fully obligates its available appropriation (now limited to $900), and the cashier seeks reimbursement for $50 of Imprest Fund expenditures, the total obligations would then be only $950, less than the $1,000 appropriated.[2]

However, as stated above, the advances do not meet the statutory requirements for recording obligations. Therefore, the charges made to prevent over-obligat-

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[1] Letter from John J. Cronin, Jr., Senior Group Director, Accounting and Financial Management Division, U.S. General Accounting Office to Michael T. Smokovich, Director, Division of Government Accounts and Records, Bureau of Government Financial Operations, U.S. Department of the Treasury, June 13, 1984.

[2] If agencies want the Imprest Funds to stay at the levels advanced, the charges for advances should remain at the full amounts advanced throughout the fiscal year. Obligations for Imprest Fund reimbursements would then be recorded against available appropriation balances, as reduced by the charges for advances.

ing the appropriations cannot be obligations. Rather, agencies should record some other form of charge (such as a "commitment" or "reservation") against the appropriation. The charges needed are similar to commitments made to ensure that appropriations are available to obligate when an upcoming contract is awarded. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 3.4.E (TS No. 7-42, Feb. 12, 1990). Examples of how to record these types of commitments in an agency's appropriation accounts are contained in GAO's *Accounting Guide: Basic Topics Relating to Appropriations and Reimbursements* (GAO/AFMD-PPM-2.1, Sept. 1990).

The IG's second question asks whether VA's charge of its cashier advances to an M account in 1989 satisfied certain legal requirements. The record reflects that VA's charge of its advances to its M account included recording the amount of then outstanding advances as an obligation. As discussed above, Imprest Fund advances do not satisfy the statutory requirements for recording obligations. In this regard, we view VA's action as improper. Accordingly, we need not address the question raised by the IG as to whether VA followed proper statutory procedures when it charged the cashier advances to an M account.

However, VA's actions raise a fundamental question about whether VA has the necessary assurance that Imprest Fund expenditures will not cause VA to over-obligate its appropriations. Under 31 U.S.C. § 1502, Imprest Fund expenditures must be reimbursed from an appropriation available for obligation or expenditure at the same time that the cashier paid the expenditure from the advance.[3] Such appropriations are not protected from over-obligation if the administrative charge for the Imprest Fund is made against some other appropriation account. Thus, VA's charge of its Imprest Fund cashier advances to its Medical Care M account provides no assurance that its current Medical Care appropriation will not be over-obligated.[4]

Therefore, we recommend that VA reverse the charge against its M account to reflect the Imprest Funds advanced to cashiers. VA should resume its past practice of recording reservations against its current appropriations for advances made to cashiers each year.

[3] The record before us does not indicate that VA used its M account to reimburse Imprest Fund cashiers for expenses incurred since 1989. Using the M account to reimburse current expenses would, of course, violate 31 U.S.C. § 1502.

[4] Also, under Pub. L. No. 101-510, § 1405(b), 104 Stat. 1679 (1990), and OMB Circular No. A-34, ¶ 111.8, the balances of VA's M account which are applicable to its 1985 appropriations will be canceled on September 30, 1992.

B-241710, May 13, 1991

Civilian Personnel

Relocation

■ Miscellaneous expenses

■■ Reimbursement

■■■ Eligibility

■■■■ Litigation expenses

A transferred employee attempted to cancel a residence purchase contract entered into prior to notice of transfer and retrieve his earnest money deposit. As a result of court action initiated by the seller, the court concluded that the earnest money deposit had been forfeited to the seller for breach of contract, and awarded the seller judgment for an additional amount as liquidated damages to cover expenses and lost rental income. The forfeited deposit as well as the liquidated damages and court costs may be included as miscellaneous expenses under section 302-3.1(c) of the Federal Travel Regulation, because the transfer to the new duty station was the proximate cause of those expenses. *Cf. Steven W. Hoffman,* B-184280, May 8, 1979.

Civilian Personnel

Relocation

■ Miscellaneous expenses

■■ Reimbursement

■■■ Eligibility

■■■■ Licenses

A transferred employee claimed the cost of new driver's licenses for himself and his wife as a miscellaneous expense under section 302-3.1(b) of the Federal Travel Regulation. The agency permitted the inclusion of only one license. The cost of both are to be included as allowable expenses. *George M. Lightner,* B-184908, May 26, 1976.

Civilian Personnel

Relocation

■ Miscellaneous expenses

■■ Reimbursement

■■■ Eligibility

■■■■ Post-office box

A transferred employee rented a post office box at his new duty station for a short period until he established a residence at that location and claimed the cost as a miscellaneous expense under section 302-3.1(b) of the Federal Travel Regulation. Since the purpose for the allowance is to help defray the extra expenses incurred during the transitional period when a residence is discontinued at the old station and a residence is established at the new station, the short-term post office box rental qualifies as an allowable miscellaneous expense. B-163107, May 18, 1973, and *George M. Lightner,* B-184908, May 26, 1976, are overruled in part.

Relocation
■ Miscellaneous expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Telephone calls

A transferred employee's claim for telephone calls as allowable miscellaneous expenses under section 302-3.1(b) of the Federal Travel Regulation (FTR) was disallowed by the agency in its entirety. Such expenses may be allowed or disallowed depending on the purpose for the calls. Where telephone calls concern a matter which would itself be allowable elsewhere in the FTR, *e.g.*, real estate transactions, telephone calls regarding it are includable as a miscellaneous expense. *Timothy R. Glass*, 67 Comp. Gen. 174, 177 (1988).

Matter of: Andrew Fischer—Relocation Expenses—Miscellaneous Expense Allowance Items

This decision is in response to a request from Mr. Gary R. Heitmann, Acting Area Director, Aberdeen Area Office, Bureau of Indian Affairs (BIA), U.S. Department of the Interior.[1] The question is whether an employee's miscellaneous expense allowance for a permanent change of station in September-October 1989 was correctly calculated. We conclude that several adjustments are required to be made regarding the expense items to be included and such adjustments may result in an increased allowance.

Background

Mr. Andrew Fischer, an employee of the BIA, was transferred from Bemidji, Minnesota, to Aberdeen, South Dakota. Prior to notice of that transfer, Mr. Fischer executed a contract to purchase a residence at his old station and paid $500 to the realtor as an earnest money deposit. Following notice of transfer, he attempted to cancel the contract and retrieve his deposit. The seller refused to permit it to be returned. Further, since the seller had already incurred expenses to prepare the residence for sale to Mr. Fischer and suffered a loss of rental income from part of the property pending sale, the seller sued Mr. Fischer for damages in Small Claims Court. By court order dated December 27, 1989, the court concluded that the earnest money deposit had been forfeited by the breach of contract and also awarded the seller judgment for an additional $241.73 to cover reasonable expenses and lost rental income. This included $21 as a court filing fee.

Mr. Fischer filed a travel voucher claiming $1,224.64 as miscellaneous expenses. On audit, the agency disallowed $581.34 of the claimed expenses, including the $241.73 damages award. Since the remaining allowable amount ($643.30) was

[1] Reference: Aberdeen Area Branch of Finance, MC: 203.

below the minimum amount payable to him as a miscellaneous expense allowance ($700), he was reimbursed $700.

On reclaim, Mr. Fischer contends that the $241.73 paid under the court order should be included in his entitlement, citing to our decision *Steven W. Hoffman,* B-193280, May 8, 1979, as controlling. The BIA requests our review of the disallowed amounts.

Opinion

An employee, who is transferred in the interest of the government and who has discontinued and reestablished a residence in connection with that transfer, is entitled to a miscellaneous expense allowance under the provisions of 5 U.S.C. § 5724a(b), as implemented by part 302-3 of the Federal Travel Regulation (FTR).[2] Section 302-3.3(a)(2) of the FTR provides that an employee with an immediate family is entitled to receive as a miscellaneous expense allowance the lesser of $700, or the equivalent of 2 weeks' basic pay, without requiring documentation of expenses. Where documentation of expenses is supplied, section 302-3.3(b) provides, that, if the allowable miscellaneous expenses of an employee with immediate family exceed $700, those additional expenses may be paid, but the higher payment may not exceed the lesser of the employee's basic pay for 2 weeks or the maximum basic pay rate of grade GS-13 for that period.

We agree that the following expenses allowed by the agency are properly included for miscellaneous expense allowance purposes:

Earnest money deposit forfeited	$500.00
Telephone installation	37.80
Cable TV installation	36.75
Piano tuning—new duty station	40.00
Vehicle registration	22.75

Other expenses incurred are subject to the following analysis.

Breach of Contract Judgment

In decision *Steve W. Hoffman,* B-193280, *supra,* citing to several earlier decisions of this Office, we ruled that where a transferred employee forfeited a loan commitment fee and incurred the expenses of hiring an attorney to negotiate a release from a residence construction contract, those expenses are properly included as miscellaneous expenses. However, *Hoffman* did not involve the court-awarded damages in question here.

Section 302-3.1(c) of the FTR states, in part:

[2] 41 C.F.R. part 302-3 (1990).

(c) Types of costs not covered. This allowance shall not be used to reimburse the employee for . . . judgments, court costs, and similar expenses growing out of civil actions; or any other expenses brought about by circumstances, factors, or actions in which the move to the new duty station was not the proximate cause. . . .

Ordinarily the fact that an employee has been transferred is not the proximate cause of a dispute that arises in the course of moving and requires legal action for its resolution. Therefore, costs arising out of that legal action are not covered by the miscellaneous expenses allowance. For example, the allowance does not cover liability imposed by a court as a result of an automobile accident that occurs while traveling to a new duty station.

On the other hand, occasionally there are circumstances like those involved here in which the transfer is the proximate cause of the legal action and the resulting liability. Had Mr. Fischer not been transferred, we presume that he would have fulfilled his contract obligation to purchase the residence at his old duty station, gone to settlement and moved in. However, because of his transfer, not only was he no longer able to fulfill his agreement to purchase, but a dispute arose between him and the seller regarding disposition of his earnest money deposit and responsibility for various costs incurred by the seller pursuant to the purchase contract. The matter was resolved by the court by rendering judgment in favor of the seller. In our view § 302-3.1(c) does not exclude the costs associated with that judgment from those allowable as miscellaneous expenses.

Driver's Licenses

Mr. Fischer claimed $12 for driver's licenses for himself and his wife. The agency permitted inclusion of only the employee's license as a miscellaneous expense item. The $12 cost for both driver's licenses are to be included. *George M. Lightner,* B-184908, May 26, 1976.

Post Office Box Rental

The agency excluded the $14 cost incurred by Mr. Fischer for a short-term rental of a post office box in the vicinity of his new duty station in Aberdeen, South Dakota. In decision *George M. Lightner,* B-184908, *supra,* citing to decision B-163107, May 18, 1973, we ruled that such a rental charge was not reimbursable. Although the basis for that disallowance was doubt that such expense was one of the types of expenses covered by the regulations, on further consideration we believe that conclusion was unduly restrictive.

The rental of a post office box is not an expense item specifically excluded under 41 C.F.R. § 302-3.1(c). Since the purpose for the miscellaneous expense allowance is to help defray the extra expense incurred during the transitional period associated with discontinuing a residence at the old station and establishing a residence at the new station, we see no reason not to permit the short-term rental of a post office box during that transition period to be included as an allowable item under section 302-3.1(b) of the FTR. Therefore, Mr. Fischer's

cost for that rental is to be included as a miscellaneous expense. To the extent that our decisions in B-163107, *supra*, and *George M. Lightner*, B-184908, *supra*, disallowed short-term post office box rentals as miscellaneous expenses, they are overruled.

Telephone Calls

Mr. Fischer's claim for telephone calls ($91.46) during the period prior to moving into permanent quarters at his new duty station was disallowed in its entirety. In *Timothy R. Glass*, 67 Comp. Gen. 174 (1988), citing to *Richard B. Dawson*, B-189140, Nov. 23, 1977, and *Walter Alt*, B-185160, Jan. 2, 1976, we ruled that where a telephone call concerned a matter which would itself be allowable under other parts of the FTR, *e.g.* real estate transactions, the expense of the call is allowable as a miscellaneous expense. Therefore, if Mr. Fischer can demonstrate that certain telephone call costs related specifically to allowable expenses elsewhere in the FTR, those costs may be included as a miscellaneous expense.

To the extent that the additional expenses allowed by the decision increase Mr. Fischer's total allowable expenses over $700, he may be reimbursed the additional amount.

B-242568, May 13, 1991

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Terms
■■■ Compliance

Procurement

Contract Management
■ Contract administration
■■ Contract terms
■■■ Compliance
■■■■ GAO review

Agency improperly awarded contract on basis of proposal which indicated that the offeror would not comply with a jewel-bearing clause contained in the solicitation, which was a material contract requirement.

Matter of: Stocker & Yale, Inc.

Jay P. Urwitz, Esq., Hale & Dorr, for the protester.

D. Joe Smith, Esq., Jenner & Block, for Marathon Watch Company, Ltd. and Canadian Commercial Corporation, interested parties.

Philip F. Eckert, Jr., Esq., Defense Logistics Agency, for the agency.

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

Stocker & Yale, Inc. protests the award of a contract to Marathon Watch Company, Ltd.,[1] under request for proposals (RFP) No. DLA400-90-R-2009, issued by the Defense General Supply Center (DGSC) of the Defense Logistics Agency (DLA). The RFP sought proposals to provide 61,000 wristwatches. We find that Marathon's proposal did not include an offer to comply with a jewel-bearing clause, which was a mandatory requirement under this RFP; rather Marathon, in effect, certified that it would not comply with the requirement.

We sustain the protest.

The RFP was issued by DLA on February 12, 1990, seeking offers for 61,000 analog, encapsulated tritium, general purpose wristwatches and required that any watch offered must be listed on the Qualified Products List (QPL) for this procurement. The RFP included Federal Acquisition Regulation clause 52.208-2, which requires offerors to certify whether any jewel bearings are required for the product offered and, if so, that the jewel bearings will be purchased from the William Langer Plant in Rolla, North Dakota. Further, the RFP required that this certificate include an attachment estimating the quantity, type, and size of the jewel bearings required.

Initial proposals were submitted on or before March 14, 1990. Following an amendment to the solicitation, Marathon submitted its best and final offer on December 11, 1990, proposing to provide a watch designated as model 348A. This watch contains 17 jewel bearings and was the only Marathon watch listed on the QPL for this procurement. With its offer, Marathon submitted a partially completed certificate regarding its compliance with the jewel-bearing clause.[2] Marathon also attached to its certification a quotation from the William Langer Plant indicating its intent to order seven jewel bearings per watch from that facility.

On December 24, 1990, DLA awarded a contact to Marathon. On February 5, 1991, DLA granted Marathon a "one-time deviation" from the requirements of the jewel-bearing clause, and justified this deviation by stating:

> The deviation is required because Marathon . . . has ordered only 7 of the required jewel bearings for each watch under the contract (a total of 61,000 watches) from the William Langer Plant. FAR § 52.208-1, incorporated in this contract, requires [the contractor] to order all required jewel bearings (17 per watch) from the William Langer Plant. . . . *DGSC has requested that the deviation apply . . . because Marathon pointed out to DGSC on 5 February 1991 that the contracting officer had con-*

[1] Marathon is a Canadian corporation and pursuant to applicable regulations and procedures, the Canadian Commercial Corporation (CCC) is the actual awardee; after award, CCC subcontracts 100 percent of the contract to Marathon. For purposes of simplicity, we refer to Marathon as the awardee.

[2] Marathon left blank the space next to "date of execution," and failed to strike through either of two alternative provisions designed to advise the agency whether or not the product offered contained jewel bearings.

structive notice of Marathon's intention to order only 7 jewel bearings per watch when it [Marathon] submitted its bid. (Italic added.)

DLA first argues that Stocker should not be considered an interested party to file this protest because, according to DLA, Stocker does not hold certain distribution licenses, which the RFP required the awardee to obtain prior to contract award. DLA also asserts that Stocker also intended to purchase only seven jewel bearings from the William Langer Plant for the watch it proposed and, therefore, is in the same position as Marathon. Stocker disputes both of DLA's assertions. Stocker maintains that, in fact, it holds licenses that meet the RFP's requirements. With regard to compliance with the jewel-bearing clause, Stocker asserts that DLA is confused by the fact that Stocker had two different watches listed on the QPL for this procurement, and maintains that its proposal fully complied with the jewel-bearing clause for the watch that it proposed to provide.

In general, under our Bid Protest Regulations, an offeror that is not eligible for award is not an interested party to object to the award to another offeror. 4 C.F.R. § 21.0(a) (1991). However, we will not conduct an investigation regarding the acceptability of the protester's proposal where the record has not clearly resolved this matter previously. *See Radiation Safety Serv., Inc.,* B-239995.2, Nov. 27, 1990, 90-2 CPD ¶ 427. Further, when an award is improperly made to an offeror who fails to meet a solicitation's mandatory requirements, we will consider a protest challenging that award because the contract requirements may have to be resolicited. *See Stocker & Yale, Inc.,* B-238251, May 16, 1990, 90-1 CPD ¶ 475. We note that DLA did not make a negative responsibility determination on the basis of Stocker's licenses prior to contract award and did not challenge the acceptability of Stocker's proposal on any other basis prior to the time Stocker filed this protest. In our view, the current record does not provide sufficient evidence to conclude that Stocker would not have qualified for award of the contract.[3] We have no basis to dismiss Stocker's protest on the grounds that it is not an interested party.

DLA next argues that Marathon's compliance with the jewel-bearing clause is a matter of contract administration and should not be considered. We agree that in instances where an offeror has properly certified that it will comply with a particular solicitation requirement, whether the contractor does, in fact, meet its obligations in that regard is a matter of contract administration not for consideration by this Office. *See, e.g., American Instrument Corp.,* B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287. However, where a proposal fails to indicate that the offeror is contractually bound to meet a particular solicitation requirement, the acceptability of the proposal is at issue. Such an issue is within the purview of our Office. *See, e.g., Mid-East Contractors, Inc.,* B-242435, Mar. 29, 1991, 70 Comp. Gen. 383, 91-1 CPD ¶ 342; 52 Comp. Gen. 874 (1973).

[3] We note that we have previously determined that Stocker does comply with the solicitation licensing requirement at issue. *Stocker & Yale, Inc.,* B-238251.2, Dec. 6, 1990, 90-2 CPD ¶ 461.

Based on the record, it is clear that Marathon did not, in fact, offer to be bound by the requirements of the jewel-bearing clause. On the contrary, Marathon submitted with its certification a document indicating it did *not* intend to purchase all the jewel bearings in the watch it offered from the William Langer Plant. As noted above, in persuading DLA to grant a contract deviation, Marathon itself properly argued that its proposal put DLA on notice that Marathon did not offer to comply with the jewel-bearing clause.

In negotiated procurements, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations. *See, e.g., Eklund Infrared,* B-238021, Mar. 23, 1990, 90-1 CPD ¶ 328; *Biegert Aviation, Inc.,* B-222645, Oct. 10, 1986, 86-2 CPD ¶ 419. Under this solicitation, offerors were required to certify as part of their proposal that they would purchase from the William Langer Plant "all jewel bearings . . . required for the supplies to be furnished under this contract." Since Marathon's proposal failed to comply with this material solicitation requirement, and in essence specifically indicated its intended noncompliance, award based on that proposal was improper.

Suspension of Marathon's contract performance was not required under the Competition in Contracting Act because Stocker's protest was filed in our Office more than 10 days after the award was made. We understand the contract has now been substantially performed; accordingly, termination and recompetition is not a feasible remedy. However, since the agency improperly awarded the contract to an offeror that failed to comply with the mandatory requirements of the solicitation, the protester is entitled to recover its proposal preparation costs and the costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d); *Video Ventures, Inc.,* B-240016, Oct. 19, 1990, 90-2 CPD ¶ 317.

The protest is sustained.

B-242664, May 17, 1991

Procurement

Sealed Bidding
■ Invitations for bids
■■ Terms
■■■ Risks

Protest alleging that firm, fixed-price solicitation for maintenance services subjects contractor to unreasonable risk of work load fluctuations is denied where the record shows that bidders can reasonably estimate the project cost given their expertise and the historical work load data provided in solicitation.

Procurement

Sealed Bidding
■ Invitations for bids
■■ Terms
■■■ Risks

Protest alleging that agency's omission from solicitation of Variation in Quantity clause, which limits circumstances under which government will accept variation in quantity, subjects contractor to unreasonable risk of work load fluctuations is denied; since clause is not intended to protect the contractor in the event of work load fluctuations, omission of clause does not impose additional risk on contractor.

Procurement

Contract Management
■ Contract administration
■■ Options
■■■ Use
■■■■ Notification

Procurement

Sealed Bidding
■ Invitations for bids
■■ Terms
■■■ Options

Protest of solicitation's renewal clause, which does not require agency to give contractor preliminary notice of its intent to exercise contract option by a specified time before contract expiration, is denied where applicable regulations do not require such a specific time period and the provision is otherwise reasonable.

Matter of: LBM Inc.

Frank Moody for the protester.

Lucie J. McDonald, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.

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

LBM Inc. protests the terms of invitation for bids (IFB) No. N62472-90-B-4726, issued by the Naval Facilities Engineering Command (NAVFAC) for maintenance and repair of family housing heating, ventilating, and air conditioning at the Philadelphia Naval Complex. LBM alleges several IFB deficiencies.

We deny the protest.

The IFB contemplates the award of a firm-fixed-price contract for an 8-month base period and 4 option years. For each period of the contract, the IFB instructs bidders to submit a lump-sum price for all of the required work; to this

end, the IFB provides historical work load data over a 2-year period for each of the required tasks.

LBM first contends that the IFB improperly allocates the risk of work load fluctuations to the contractor. LBM particularly objects to an IFB amendment informing bidders that there will be no adjustment to the contract price if the number of service calls actually required exceeds the historical quantities listed in the IFB.

We find the IFB unobjectionable in this regard. An agency is not prohibited from offering to competition a proposed contract imposing substantial risks upon the contractor and minimum administrative burdens upon the agency. *Bean Dredging Corp.*, B-239952, Oct. 12, 1990, 90-2 CPD ¶ 286. There is some amount of risk present in any procurement, and offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their offers. *S.P.I.R.I.T. Specialist Unlimited, Inc.*, B-237114.2, Mar. 8, 1990, 90-1 CPD ¶ 257. Here, the agency included historical work load data for the previous 2 calendar years in the IFB so that bidders could assess the risk of work load fluctuations and account for it in their bids. While LBM objects to the agency's strategy, it has offered no evidence to establish that it cannot prepare a reasonable bid given its expertise and the extensive historical data provided.

Second, LBM alleges that the agency improperly failed to include in the solicitation Federal Acquisition Regulation (FAR) clause § 52.212-9, Variation in Quantity. LBM asserts that the clause is required in firm-fixed-price solicitations for services that involve the furnishing of supplies, and argues that the absence of this clause subjects the contractor to unreasonable risk in the event of severe work load fluctuations. The Variation in Quantity clause provides that the government will not accept a variation in the quantity of an item required under the contract except under certain circumstances; in other words, the clause is for the government's protection, not the contractor's. The clause does not, as LBM appears to argue, provide for an adjustment in the contract price in the event that the work performed under the contract substantially exceeds the historical work load figures stated in the IFB. Thus, the absence of the clause from the IFB in fact does not expose LBM to additional risk, and we deny the protest on this ground.

Finally, LBM objects to a clause in the IFB concerning the agency's right to exercise the options under the contract. Section H.15 of the solicitation, entitled "Option to Extend the Term of the Contract-Services," provides in pertinent part:

> a. The government may extend the term of this contract for a term of one to twelve months by written notice to the contractor within the performance period specified in the schedule; provided, that the government shall give the contractor a preliminary written notice of its intent to extend before the contract expires.

LBM contends that the clause is ambiguous because it does not require that the government provide notice of its intent to extend the contract at any particular

time. In this regard, the clause varies the language of FAR clause § 52.217-9, Option to Extend the Term of the Contract, which provides that the government shall give the contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. LBM argues that the absence of the 60-day provision allows the agency to wait until the last minute before exercising its unilateral right to extend the contract, thus placing unreasonable risk upon the contractor.

The determination of the government's minimum needs and the best method of accommodating them is primarily the responsibility of the contracting agency; accordingly, our Office will not question an agency's determination in these matters unless it has no reasonable basis. *Bean Dredging Corp.*, B-239952, *supra.*

We conclude from our review of the record that the agency's decision to delete the 60-day limitation from the preliminary notice provision was reasonably based. NAVFAC notes that FAR § 17.208(g), which prescribes inclusion of the Option to Extend clause, provides that the agency "shall insert a clause substantially the same as" the standard clause. NAVFAC explains that it previously had used the standard FAR clause in its solicitations. However, due to unavailability of funds or other unforeseen problems, the agency often was unable to notify the contractor of its intent to exercise an option 60 days before expiration of the contract, and consequently lost the unilateral right to exercise the option. Accordingly, the agency revised the clause, deleting the reference to a specific time limit. In a letter implementing the new clause, NAVFAC instructed its contracting officers to exercise their discretion in determining how much preliminary notice to give contractors. NAVFAC points out that FAR § 1.602-2(b) requires contracting officers to treat contractors fairly and equitably, and explains that the contracting officer's decision of how much preliminary notice is necessary in a particular case therefore would take into account such factors as the type of contract, the items being procured, the mobilization or demobilization effort required, and the availability of funds.

There are several clauses included in the regulations available for use when agencies need an option to extend contract performance. The clause set forth at FAR § 52.217-8 provides that the government may extend contract services for up to 6 months without any specified preliminary notice to the contractor.[1] FAR § 52.217-9 contains an option clause to extend contract services with three additional provisions: preliminary notice must be given of an intent to extend the contract by 60 days before contract expiration, the option clause will be included in the extended contract, and the total duration of the contract as extended is to be specified. FAR § 17.208(g) states that agencies should use a clause "substantially the same as" this latter clause (FAR § 52.217-9):

> when the inclusion of an option is appropriate . . . and it is necessary to include in the contract a requirement that the Government shall give the contractor a preliminary written notice of its

[1] Other clauses, those for increased quantities set forth in FAR §§ 52.217-6 and 52.217-7, have blanks for agencies to insert the period of time in which the option may be exercised and no provisions for preliminary notice.

intent to extend the contract, a stipulation that an extension of the contract includes an extension of the option, and/or a specified limitation on the total duration of the contract.

The NAVFAC clause at issue contains each of the provisions in the FAR § 52.217-9 clause except the preliminary notice provision. Since the clause is provided for agency use when it is "necessary" to include a preliminary notice requirement and/or other specified additions to the basic option clause to extend contract services (in FAR § 52.217-8), we believe that an agency need only use those portions of the clause that it reasonably determines necessary, or at least provisions "substantially the same as" the necessary portions. Also, we are aware of no other reason a contract may not provide a preliminary notice period to be determined at the discretion of the contracting officer. *Cf. Moore's Cafeteria Servs., Inc.,* Armed Services Board of Contract Appeals No. 28,441, June 17, 1985, *reprinted in* 85-3 B.C.A. ¶ 18,187 (CCH 1985) (parties may agree upon time period within which to exercise option).

The NAVFAC provision, as discussed above, does require the contracting officer to give the contractor preliminary notice of the agency's intent to extend the contract, subject to the FAR requirement for fair and equitable treatment of contractors. To the extent that the NAVFAC provision imposes some risk on the contractor by not stating a specific time for providing a preliminary notice, we do not believe that the risk is so high that it cannot be alleviated by building such considerations into bid prices. *Neil Gardis & Assocs., Inc.,* B-238672, June 25, 1990, 90-1 CPD ¶ 590. Thus, we do not find the NAVFAC provision to be an unreasonable approach to satisfying the agency's need for flexibility with respect to possible extension of contemplated contract.

The protest is denied.

B-242650, *et al.*, May 20, 1991

Procurement

Noncompetitive Negotiation
■ **Contract awards**
■■ **Sole sources**
■■■ **Justification**
■■■■ **Procedural defects**

Protest is sustained where agency's justification for proposed sole-source award under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not based on evidence that establishes the reasonableness of its determination that only one known source can meet the government's needs.

Matter of: Gulf Gas Utilities Co.; Krystal Gas Marketing Company; Commercial Energies, Inc.

Laurie Heasley for the protester, Gulf Gas Utilities Co., J. Abel Godines for the protester, Krystal Gas Marketing Company, Gregory Kellam Scott for the protester, Commercial Energies, Inc.

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

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

Gulf Gas Utilities Co. (GGU), Krystal Gas Marketing Company, and Commercial Energies, Inc. protest the issuance on October 31, 1990, of request for proposals (RFP) No. F41689-91-R-0005, by Randolph Air Force Base, Texas, for the sole-source award of an indefinite-term, fixed-price (with an economic price adjustment) requirements contract for public utility service to Valero Transmission Company, L.P. (Valero).[1] The contract is to cover the transportation and delivery of natural gas to six Texas Air Force bases and one Naval Air Station; the installation (where necessary), operation, and maintenance of meters for measuring the amounts of delivered gas and of the gas distribution system; and backup and administrative services. The protesters contend that sufficient competition exists to permit the procurement to be competed among small and small-disadvantaged businesses (SDBs) and that the agency is attempting to circumvent the requirement for full and open competition.

We sustain the protests.

Initially, the agency decided to compete the procurement. In November 1989, the contracting officer requested a draft statement of work for a competitive spot market natural gas acquisition to replace its natural gas contract with Valero Industrial Gas, L.P., an affiliate of Valero. Under that contract, Valero's affiliate provided spot market gas for 70 percent of the agency's needs and Valero, in addition to transportation, provided regulated gas for the remaining 30 percent of the agency's needs.

After determining that City Public Service (CPS), the San Antonio public utility owning the San Antonio pipelines needed for the delivery of gas to the three bases located in that city, which represented 75 percent of the total needs, "would consider another transportation agreement with other suppliers so long as it did not adversely impact on other ratepayers," the contracting officer determined to proceed with the competitive acquisition. The contracting officer also determined that the procurement would not be restricted to small businesses or SDBs because no reasonable expectation existed that at least two such businesses would submit reasonably priced offers. The proposed procurement was synopsized in the *Commerce Business Daily* (CBD) on March 20, 1990. The synopsis required an offeror to provide with its proposal "firm transportation agreements signed with Valero and CPS." (In addition to owning a pipeline which connected to the CPS San Antonio pipelines, Valero owns the pipelines which deliver the natural gas to the four non-San Antonio military bases also

[1] The Federal Property and Administrative Services Act, 40 U.S.C. § 481(a) (1988), grants the General Services Administration (GSA) the authority to manage, procure, and supply public utility services to the government. The Act also provides that the Department of Defense (DOD) may procure its own utility services where it is in the best interest of national security. Pursuant to this authority, GSA and DOD agreed that DOD would procure its own utility services.

covered by the proposed procurement.) Copies of the solicitation were requested by 22 firms.

On April 5, the Air Force utilities advisor requested that the proposed competitive solicitation be canceled and that the procurement be awarded to Valero on a sole-source basis. It was his view that the agency requirements for uninterrupted gas flow could only be met by a natural gas utility such as Valero. He also requested that a market survey and economic analysis for the procurement be conducted by a private firm. On June 14, a meeting between the utility advisor, the private firm hired to conduct the survey and analysis, and agency procurement personnel was held to discuss the reasoning behind a sole-source award for public utility service rather than a competitive procurement of spot market natural gas with transportation agreements to ensure pipeline delivery. A "formal market survey" was conducted on June 21, by the private firm to determine what companies could provide the agency's needs. Only Valero and agency personnel were contacted during this survey. The survey firm concluded based on these discussions that Valero was the "only responsible source for natural gas utility service" which could guarantee an uninterrupted "secure, long-term access to spot market natural gas supplies" which would meet the agency's needs. The survey was based on the assumption that no means existed for the delivery of alternative supplier gas.

On August 6, a Justification and Approval (J&A) was issued in accordance with Federal Acquisition Regulation (FAR) § 6.303-2 to provide the justification for purchasing, pursuant to 10 U.S.C. § 2304(c)(1) (1988), public utility service for the seven bases from Valero as the only existing responsible source that could provide uninterrupted gas supplies and energy security/reliability. The J&A met all procedural requirements. The award was to be for an indefinite term since no change in the competitive situation was anticipated in the foreseeable future.

The J&A stated that it was necessary to award to a contractor providing public utility service since a public utility service contractor provides service, regardless of changes in the customer's usage requirements or the general nature of the natural gas market, until the service responsibility is formally abandoned. The J&A also stated that Valero—as a public utility—was the only company that could provide the necessary supplies and services because Valero's contract with CPS limited to Valero or its affiliates the use of the leased CPS pipeline to the three bases located in San Antonio. Although the J&A acknowledged that CPS had stated that it would consider a transportation agreement with an alternate supplier, no such agreement or the rates it would incorporate existed. The record also shows that the Air Force utility advisor did not want to lose the very low rates that CPS was charging Valero for transportation over its pipelines.

Regarding the remaining 25 percent of the agency's gas needs (the other four bases), the J&A stated that award of a sole-source contract to Valero was necessary to ensure reliable gas flow. The options of purchasing all or part of the agency's gas needs from an alternate supplier were determined unacceptable.

First, the agency would not have Valero's utility service obligation in the case of nonperformance by the alternate supplier. Second, alternate suppliers realistically could not compete with Valero or its affiliate because they would have to transport their gas over Valero pipelines and the terms and conditions that Valero would require would make competition impossible. Third, the agency did not have the metering equipment and personnel necessary to support alternate suppliers using Valero's pipelines.

The J&A also stated that a market survey had been conducted and also that knowledgeable experts had concluded that Valero represented the only "responsible" source for natural gas utility service and for secure, long-term access to spot market gas supplies. Further, an analysis of natural gas prices based, in part, on prices for Valero's gas under previous contracts projected significant savings from this new contract. Finally, the J&A reported that no sources expressed an interest in supplying total service as required in the proposed sole-source acquisition from Valero.

The three protesters question the validity of the agency's sole-source decision. They note that a sufficient number of firms expressed an interest in the March 20 synopsis. GGU claims that it is one of three small business natural gas utility service companies that could perform this contract.[2] The protesters state that they and others could contract with a utility company, other than Valero, such as CPS, to lease pipeline usage, contract to have a parallel pipeline constructed to the bases, or the Air Force could obtain the necessary transportation agreements itself—the latter approach apparently is used by the Defense Logistics Agency. GGU notes that a recent state agency agreement with Valero to transport gas does not contain the onerous requirements Valero allegedly seeks to impose here on alternate suppliers. Further, the protesters argue that the survey of Valero, but none of its competitors, biased the facts in favor of a sole-source award to Valero. Additionally, in the protesters' view, the J&A creates a misleading impression in stating that no sources expressed an interest in supplying the total service involved in the proposed sole-source award since none of Valero's competitors were ever surveyed regarding these needs.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does permit noncompetitive acquisitions in specified circumstances such as when the supplies needed are available from only one responsible source. 10 U.S.C. § 2304(c)(1). *Elbit Computers, Ltd.*, B-239038, July 11, 1990, 90-2 CPD ¶ 26. Where the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), we will not object to a sole-source award based on a determination that only one known source can meet the government's needs unless it is shown that there is no reasonable basis for the award. *Astron,*

[2] GGU has submitted a letter from the Railroad Commission of Texas stating that GGU "has been classified as a gas utility." The agency argues that GGU has possibly "mischaracterized" its status and that it is a gas production utility rather than a transmission utility as is Valero. GGU states that it currently is providing public utility services to the Federal Bureau of Prisons.

B-236922.2, May 2, 1990, 90-1 CPD ¶ 441; *Turbo Mechanical, Inc.*, B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299. To justify a sole-source award, an agency must reasonably establish that there is only one possible contractor that can do the work. *See Daniel H. Wagner, Assoc., Inc.*, 65 Comp. Gen. 305 (1986), 86-1 CPD ¶ 166.

In order to justify a sole-source in this case, the agency was required to ascertain whether other qualified sources capable of satisfying the government's requirements exist. This is commonly accomplished by a market survey. FAR §§ 6.303-1, 6.303-2(a)(8); *See, e.g., Union Natural Gas Co.*, 66 Comp. Gen. 116 (1986), 86-2 CPD ¶ 648. We find that support for the decision to issue a sole-source contract is lacking. The record fails to establish that only Valero and its affiliates can meet the agency's needs.

First, the survey by the private contractor relied on in the J&A was incomplete because it was based only on discussions with the sole-source contractor and the Air Force. The contractor did not independently determine if a sole-source was justified, but adopted the results of meetings with the Air Force and Valero. The contractor concluded that "due to the lack of transportation access for [non-Valero] suppliers and the unacceptable energy security risk . . . of terminating [Valero's] utility service contract, the Air Force decided to pursue the sole-source contract option." The report then stated the contractor's purpose was to prepare a price analysis of procurement options. The survey thus did not address the capabilities of the firms which responded to the original synopsis or CPS' willingness to enter into transportation agreements with natural gas suppliers.

Second, the Air Force determination is not reasonably based because it omitted a major consideration—CPS' willingness to enter into transportation agreements with other natural gas suppliers to supply the three San Antonio bases. No mention is made in the survey or the J&A as to why a company could not transport its gas through the CPS system. The record shows that CPS already has a contract with GSA to furnish gas to federal facilities in the San Antonio area and submitted a transportation agreement to permit gas suppliers to use its pipelines in a proposal it submitted to the agency in 1988. The record also contains correspondence showing CPS' continued willingness to enter transportation agreements and to consider proposals received from suppliers to the Air Force which apparently led to the initial decision to compete the requirement. The agency responds that CPS' statement that it would be willing to transport gas for an alternate supplier is meaningless since no agreement exists. In our view, the fact that no alternate supplier has provided the agency with a transportation agreement with CPS does not make the possibility of such an agreement "meaningless." We see no reason why an alternate supplier should be required to enter into such an agreement in the absence of a competitive procurement requiring one. Also, while the agency states that it could not provide the gas metering needed to regulate alternate suppliers, the record shows that for 75 percent of the agency's needs the metering is already being provided by CPS, not Valero.

As regards the four non-CPS area military installations, the record does not show that consideration was given to the possibility that an alternate supplier could construct pipelines and the necessary metering for these installations or lease facilities from Valero if Valero's sole-source is withdrawn. In sum, the record before us fails to show that other sources beside Valero could not perform the necessary services. We think a more comprehensive survey of alternate sources would have established whether GGU or other sources could possibly meet the agency needs. The price analysis conducted by the survey firm, which allegedly shows significant savings resulting from a sole-source award to Valero, does not, standing alone, serve as a reasonable basis for limiting competition. *Lea Chemicals, Inc.*, 67 Comp. Gen. 149 (1987), 87-2 CPD ¶ 622.

Accordingly, we recommend that, unless the agency is able to reasonably justify a sole-source procurement based on a market survey that shows only Valero can meet its needs, the Air Force should conduct a competitive acquisition.[3] We also find that each of the protesters is entitled to the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protests are sustained.

B-242686, May 20, 1991

Procurement

Sealed Bidding
■ Invitations for bids
■■ Defects
■■■ Signature lines
■■■■ Omission

Protest is sustained where solicitation's Certificate of Procurement Integrity failed to provide a signature line, which reasonably misled bidders to believe a separate signature on the certificate was not required.

Matter of: Shifa Services, Inc.

Arthur Kalpin for the protester.

Harry Finkel for Crescent Cleaning Company, an interested party.

Steven A. Bartholow, Esq., Railroad Retirement Board, for the agency.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

[3] The agency has authorized award to Valero based on urgent and compelling circumstances.

Shifa Services, Inc. protests the rejection of its bid as nonresponsive for failure to submit a signed Certificate of Procurement Integrity as required by invitation for bids (IFB) No. 91-A-5, issued by the Railroad Retirement Board for janitorial services. Shifa claims that since the solicitation's Certificate of Procurement Integrity failed to provide a space for the certifier's signature, and the certificate was incorporated into the solicitation and Shifa's bid, the firm's authorized signature on its bid adequately demonstrates the intent to be bound by, and thus satisfies, the requirement for a "signed certificate."

We sustain the protest.

The IFB, issued December 3, 1990, incorporated the Certificate of Procurement Integrity clause, Federal Acquisition Regulation (FAR) § 52.203-8, as required by FAR § 3.104-10. This 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.A. § 423. The OFPP Act's provisions requiring 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. Under FAR § 52.203-8, bidders are to complete the certificate and list, on the blank lines provided, all existing violations or possible violations of the OFPP Act (or enter "none" if none exists). The Certificate of Procurement Integrity form that was included in the IFB, which is essentially a photocopy of the certification clause provided at FAR § 52.203-8, did not contain a signature line or signature block for the offeror to complete. The form provided, in pertinent part, as follows:

K18. REQUIREMENT FOR CERTIFICATE OF PROCUREMENT INTEGRITY (SEP 1990)

* * * * *

(b) Certifications. As required in paragraph(c) of this provision, the officer or employee responsible for this offer shall execute the following certification:

CERTIFICATE OF PROCUREMENT INTEGRITY

(1) I, [Name of certifier], am the officer or employee responsible for the preparation of this offer and hereby certify that, to the best of my knowledge and belief, with the exception of any information described in this certificate, I have no information concerning a violation or possible violation of . . . the Office of Federal Procurement Policy Act, as amended (41 U.S.C. § 423), . . .

(2) . . . I further certify that, to the best of my knowledge and belief, each officer, employee, agent, representative, and consultant of [Name of Offeror] who has participated personally and substantially in the preparation or submission of this offer has certified that he or she is familiar with, and will comply with, the requirements of . . . the Act . . . pertaining to this procurement.

[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 requirements 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).

(3) Violations or possible violations: (Continue on plain bond paper if necessary and label Certificate of Procurement Integrity (Continuation Sheet), ENTER NONE IF NONE EXIST)

(4) I agree that, if awarded a contract under this solicitation, the certifications required by subsection 27(e)(1)(B) of the Act shall be maintained in accordance with paragraph(f) of this provision.

[Signature of the officer or employee responsible for the offer and date]

[Typed name of the officer or employee responsible for the offer]

Nine bids were received by the January 10, 1991 closing date. Four bidders submitted signed Certificates of Procurement Integrity with their bids. Shifa and three other bidders inserted "none" under section 3, but did not sign the certificate itself; one other firm left the certification completely blank. These five bids, including Shifa's, were rejected as nonresponsive for failure to include a signed Certificate of Procurement Integrity. The four responsive bidders altered the IFB's certificate, either by retyping the full certificate or by erasing the bracketed print, to create a signature line for the certifier's signature. On January 16, Shifa filed a protest with our Office challenging the rejection of its bid. No award has been made.

FAR § 3.104-9(b)(3) provides that for procurements using sealed bidding procedures, as here, a signed procurement integrity certification "shall be submitted by each bidder with the bid submission . . . ." FAR § 14.404-2(m) provides that "[a] bid shall be rendered nonresponsive and rejected if the bidder fails to submit the signed certificate . . . with its bid." Accordingly, a separate signed certificate is required to be submitted by each bidder by bid opening and this requirement affects the bid's responsiveness.

In a recent decision, *Mid-East Contractors, Inc.*, B-242435, Mar. 29, 1991, 70 Comp. Gen. 383, 91-1 CPD ¶ 342, we found that a bid was properly rejected as nonresponsive for the bidder's failure to submit a signed and completed Certificate of Procurement Integrity with its bid, even though the bidder signed its bid and acknowledged the amendment that added the certification requirement to the solicitation. In that decision, we recognized that since the certification provision, which implements several requirements of the OFPP Act, imposes additional and substantial legal obligations on the contractor, omission from a signed bid of a separately signed, completed Certificate of Procurement Integrity is a material deficiency. We upheld the contracting agency's nonresponsiveness determination in that case because the incomplete certificate called into question the bidder's commitment to the certificate's stated requirements.

In this case, however, the record shows that the majority of bidders were evidently misled by the certificate's omission of a signature line. We find this resulted from a latent solicitation defect. While the clause contained a parenthetical request for the "signature of the officer or employee responsible" for the cer-

tification, there was no indication where the signature should be placed. There was no signature line or space provided in the clause to reasonably indicate that a signature in addition to the one on the face of the bid was required. Four of nine bidders submitted signed certificates by altering the form contained in the IFB, four other firms, including Shifa, signed the bid after completing the provision in the certificate which solicited a response concerning any procurement integrity violations. We find it unreasonable to hold bidders responsible for creatively altering a solicitation provision, as here to include their own signature line, in order to be found responsive. In our view, due to the omission of the signature line, Shifa and the other bidders that filled out their bids in the same manner reasonably were misled regarding the certification's signature requirement.

This solicitation was ambiguous as to the precise manner by which bidders were to certify compliance with requirements concerning procurement integrity. In these circumstances, we think that it would be in the best interest of the government to cancel the IFB and resolicit the requirement to include a distinct signature line on the required Certificate of Procurement Integrity, making it clear to bidders that a separate signature is required on the certificate itself. *See American Cyanamid Co.*, B-232200.2, June 23, 1989, 89-1 CPD ¶ 593. We also find that Shifa is entitled to the costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1991). By letter of today, we are advising the Chairman of the Railroad Retirement Board of our decision.

The protest is sustained.

B-240181.2, B-240181.3, May 21, 1991

Procurement

Competitive Negotiation

■ Discussion

■■ Adequacy

■■■ Criteria

An agency may not reject protesters' low fixed-price proposals for proposing unrealistically low professional compensation packages, where the agency did not discuss the matter with those firms, the technical evaluation criteria specifically encompassed the adequacy of professional compensation packages, and the agency advised the protesters that their offers were technically acceptable.

Matter of: National Medical Staffing, Inc.; RP/Health Care Professionals

Gloria M. Bertacchi for National Medical Staffing, Inc., and Marie Minichino for RP/Health Care Professionals, the protesters.

Joel R. Feidelman, Esq., Fried, Frank, Harris, Shriver & Jacobson, for PHP Health Care Corporation, and Moses O. Nwaigwe, R.Ph., for American Healthcare Staff Management, interested parties.

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

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

National Medical Staffing, Inc. (NMS) and RP/Health Care Professionals (RPHCP) protest the award of two contracts under request for proposals (RFP) No. DADA10-90-R-0025, issued by the Department of the Army to acquire pharmacist services at a number of Army medical installations. Both protesters argue that the agency improperly awarded the contracts to other than the low-priced offerors in contravention of the RFP's terms.

We sustain the protests.

The RFP contemplated the award of one or more firm, fixed-price contracts for the provision of pharmacists at several Army medical installations[1] for a base period and four 1-year options. The RFP listed three evaluation factors, with subfactors, as follows:

Factor 1 - Personnel Qualifications
a. Management Experience/Qualifications
b. Employee/Subcontractor Qualifications

Factor 2 - Business Management/Understanding of Requirement/Commitment
a. Recruitment
b. Backup
c. Retention

Factor 3 - Price will be evaluated using price analysis. The price will not be numerically scored, but will be evaluated to determine the extent to which it is reasonable and realistic and also for consistency with the technical proposal.

The solicitation provided that the three evaluation criteria were of equal weight and each of the subfactors within the first two evaluation criteria was of equal weight.

Under the "Evaluation Factors for Award" section in the RFP, award was to be made for each line item "for a given site/location . . . to the responsible offeror who provides the technically acceptable, lowest reasonable, realistic priced offer." Elsewhere the RFP reserved to the agency the right to make award to other than the low-priced offeror.

The solicitation also contained the clauses appearing in Federal Acquisition Regulation (FAR) §§ 52.222-45 and 52.222-46, which provide for the evaluation of compensation of professional employees to assess the offerors' management approach and understanding as those factors relate to the retention of profes-

[1] As originally issued, the RFP called for services at six different installations: Brook Army Medical Center; U.S. Army Medical Activity, Fort Carson; Letterman Army Medical Center; Madigan Army Medical Center; U.S. Army Medical Activity, Fort Ord; and Walter Reed Army Medical Center. Before award, the agency eliminated the requirements at Madigan and Fort Carson.

sional employees. This evaluation includes an assessment of the offerors' ability to provide uninterrupted high quality work through adequate professional compensation, the impact on recruiting and retention of professionals, the consistency of the offerors' technical proposal with a total compensation plan, and price realism. "Unrealistically low" professional compensation may be viewed as evidence of failure to comprehend the complexity of the contract requirements.

In response to the solicitation, 12 offers were received by the closing date for the submission of offers; 10 were determined to be susceptible of being made technically acceptable and two were rejected as unacceptable. The agency then conducted two rounds of discussions after which eight proposals were determined technically acceptable. (The proposals were not point scored.) The agency then solicited and received best and final offers (BAFO) from seven firms.[2]

Next, the agency conducted a "cost realism" analysis of the offers, which only analyzed the adequacy of the proposed professional compensation rates. This analysis adjusted, for evaluation purposes, the proposed professional labor rates to account for differences in offered vacation time and annual leave as compared to an independent government estimate.

As a result of the Army's post-BAFO analyses, the decision was made not to make awards to various low-priced offerors because their evaluated professional compensation rates were considered unrealistically low as compared to the government estimate. In this regard, RPHCP's and NMS' proposals for Letterman, Fort Ord, and Walter Reed were rejected. American Healthcare Staff Management, which submitted the third low offer for both Letterman and Fort Ord, received the awards for those facilities, while PHP Healthcare Corp., the fourth low offeror, received the award for Walter Reed. RPHCP received the award for Brook, an award which has not been protested.

Based on our review of the record, we find that the Army did not conduct meaningful discussions with the protesters on the subject of professional compensation. Discussions with the competitive range offerors are required to be meaningful; to satisfy that standard, agencies generally must advise offerors of deficiencies in their proposals and provide them with an opportunity to revise their proposals to fully satisfy the government's requirements. *Secure Servs. Tech., Inc.*, B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421. The agency did not provide that opportunity here.

The agency conducted two rounds of discussions during which it identified discrepancies and deficiencies in the offerors' proposals and requested clarifications and additional information. In the first round of discussions, complete cost breakouts of the firms' compensation packages were requested from the protesters and other offerors, and in the second round some additional details on the compensation packages were requested of, and supplied by, RPHCP (although apparently no such questions were asked of NMS). The record shows that the

[2] One firm withdrew from the competition.

agency discussed with the protesters only the sufficiency of the cost breakdown documentation and the level of overhead and profit, and did not discuss the level of, or the sufficiency of, their compensation packages.

At the close of discussions when BAFOs were requested, the agency determined the seven remaining proposals were technically acceptable. This determination necessarily took cognizance of the adequacy of the offerors' proposed professional compensation packages, since one of the technical evaluation subfactors, "retention," expressly encompassed professional employee compensation.[3] The record, including the technical evaluation worksheets, discloses no evidence that the agency was concerned over the levels of professional compensation proposed by the seven "acceptable" offerors. Indeed, in the request for BAFOs, the offerors, including the protesters, were expressly advised they were "technically acceptable" with no reservations.[4] Thus, the protesters could reasonably presume at that point that their compensation packages, including the levels of professional compensation, were acceptable.

Subsequent to the receipt of BAFOs, the agency apparently decided to conduct a "cost realism" analysis, which was limited to assessing the realism of the level of professional compensation proposed by the offerors. (No such in-depth analysis of the compensation packages had previously been done, nor were any concerns expressed on this subject.) The agency then rejected as "unrealistic" and "unreasonable" offers reflecting professional compensation levels that it considered to be too low.[5]

The agency did not satisfy its obligation to conduct meaningful discussions under these circumstances. When it rejected the protesters for the sole reason that they proposed too low a level of professional compensation, it did so without first informing the protesters of its concern with the compensation rates and giving them an opportunity to explain or revise their proposals in this regard. In fact, during the course of discussions, the protesters were expressly advised that their proposals were acceptable. Therefore, once the agency determined that the protesters' professional compensation rates were unrealistically low, the agency, having conducted discussions, should have reopened discussions and pointed out this deficiency to the protesters, before rejecting their proposals on this basis. Its failure to do so was inconsistent with the statutory and regulatory requirements governing competitive range discussions. *See* 10 U.S.C. § 2305(b)(4) (1988); FAR § 15.610.

As an additional matter, we find that the record does not clearly support the determinations that the protesters' professional compensation rates were unrealistically low; the rates of the protesters are not, in our view, significantly

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[3] In the technical proposal instructions of the RFP, the subfactor "Retention" is defined as:

Describe the procedures and techniques to be used to retain qualified personnel performing services under the contract. The objective should be to ensure that substitution of personnel is kept to an absolute minimum during the period of the contract in recognition of the professional necessity for continuity of personnel. Describe any incentives used to retain personnel, such as fringe benefits, bonuses or any other incentives. If applicable, offerors should submit examples of employment/subcontract agreements proposed to be used for this requirement.

[4] NMS also claims, without rebuttal, that it was expressly advised its compensation package was acceptable.

[5] The agency did not conclude that the protesters' overall prices were unrealistic or unreasonable.

lower than those proposed by the awardees for the three installations in question.[6] Also, from our review, we are not convinced of the propriety of the agency's "cost realism" adjustments to the offerors' professional compensation rates to account for the differences in proposed annual leave. In at least one case, the agency made adjustments to a low offeror's rates because it found that the offeror did not propose annual leave or vacation time. Yet, our review of that offeror's proposal indicates that it did propose such leave.

Finally, we think that the basis for award under the RFP is not entirely clear. While on one hand the evaluation criteria are weighted and the government reserved the right to make award to other than the low priced offeror, the specific award selection statement in the RFP (quoted above) only allows award to the low priced, technically acceptable offeror. *See Technology Applications, Inc.*, B-238259, May 4, 1990, 90-1 CPD ¶ 451. Moreover, the role and weight of the evaluation of proposed professional compensation rates is not clearly stated in the RFP.

The protests are sustained.

We recommend that the agency proceed with one of two alternative corrective actions. If the Army now determines the professional compensation rates proposed by the rejected offerors are in fact realistic, it should terminate the contract awards for the Letterman, Fort Ord, and Walter Reed facilities and make awards to the low-priced offerors for those line items.[7] Alternatively, if the Army continues to question the proposed compensation rates, it should reopen discussions, point out deficiencies with respect to proposed professional compensation plans, amend the solicitation to clearly state the basis for award, request new BAFOs, and make award selections in accordance with the stated evaluation criteria; if firms other than the current awardees are selected, the current contracts should be terminated and the appropriate awards made. In addition, both NMS and RPHCP are entitled to the costs of pursuing their protests. 4 C.F.R. § 21.6(d) (1991).

[6] We do not disclose these rates because of their proprietary nature. The protesters' proposals contain information supporting the reasonableness and the comparability of the rates to local professional rates.

[7] We do not disclose the low offeror for these line items because the agency may elect to follow the alternative recommendation that the solicitation be amended and discussions reopened. The RPHCP award at Brook Army Hospital was not protested and our recommendation therefore does not encompass this award.

B-241569.2, B-241569.3, May 21, 1991

Procurement

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

Procurement

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

The General Accounting Office will not reconsider prior decision sustaining a protest where the agency and interested party request reconsideration on the basis that the contracting officer's cost realism adjustments were based upon audit advice of the Defense Contract Audit Agency (DCAA) and that the contracting officer had no reason to know, at the time of the award, that DCAA's advice was erroneous, where these new arguments and information are inconsistent with the arguments and information provided during the initial consideration of the protest, and could have and should have been raised at that time. In any event, a contracting officer's cost realism determination may not reasonably be based upon erroneous DCAA audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.

Procurement

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

Procurement

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

The General Accounting Office will not reconsider the conclusion in a prior decision sustaining a protest on the basis that the offers of the interested party and protester were technically equal such that award should be made to the protester as the offeror with the lower evaluated cost, where the agency and interested party now argue that the two firms' proposals are not equal yet fail to identify a single technical difference.

Matter of: American Management Systems, Inc.; Department of the Army-Reconsideration

Raymond S.E. Pushkar, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for General Research Corporation, the protester.

Carleton S. Jones, Esq., and John E. Jensen, Esq., Shaw, Pittman, Potts & Trowbridge, for American Management Systems, Inc., the requester.

Gregory E. Smith, Esq., and Wendy E. Ojeda, Esq., Department of the Army, for the agency.

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

American Management Systems, Inc. (AMS) and the Defense Supply Service-Washington (DSS-W), Department of the Army, request reconsideration of our decision in *General Research Corp.*, B-241569, Feb. 19, 1991, 70 Comp. Gen. 279, 91-1 CPD ¶ 183, in which we sustained the protest of General Research Corporation (GRC) against the award of a cost reimbursement contract to AMS under request for proposals (RFP) No. MDA903-90-R-0094, issued by DSS-W for automated data processing (ADP) support services for the Army's Management Information System.

We deny the requests for reconsideration.

GRC protested that DSS-W's cost realism analysis was unreasonable, primarily because the agency arbitrarily "normalized" GRC's proposed labor costs, which were based upon the use of uncompensated overtime[1] over a 45-hour workweek, to labor costs that were based upon a 40-hour workweek. This resulted in a substantial increase in GRC's proposed costs in the cost evaluation and in the resultant agency determination that AMS' evaluated costs were lower than GRC's. GRC stated that the bidding of uncompensated overtime was not prohibited by law, regulation, or the RFP, and that the firm's offer of uncompensated overtime was consistent with its standard accounting practices, as disclosed in its Cost Accounting Standards (CAS) disclosure statement.

DSS-W argued that its contracting officer determined, in part relying upon the advice of the Defense Contract Audit Agency (DCAA), that GRC's offer of uncompensated overtime was inconsistent with GRC's CAS disclosure statement and accounting practices,[2] and that GRC's offer of uncompensated overtime was ambiguous because GRC failed to show how it would use its overtime hours to perform the contract.

We found that the contracting officer's reliance upon DCAA's advice was unreasonable. In this regard, the contracting officer stated in the report on the protest that he reviewed GRC's disclosure statement and was familiar with "GRC's past and present practices derived from a number of contracts that I awarded as contracting officer or reviewed as Chief of the ADP Division . . . ." However,

[1] "Uncompensated overtime" refers to the overtime hours (hours in excess of 8 hours per day/40 hours per week) incurred by salaried employees who are exempt from coverage of the Fair Labor Standards Act, 29 U.S.C. § 202 (1988). Under the Act, exempt employees need not be paid for hours in excess of 8 hours per day or 40 hours per week.

[2] DSS-W throughout its report argued that DCAA had "determined" that GRC's offer of uncompensated overtime was inconsistent with its disclosure statement and accounting practices. While it is true that DCAA so advised DSS-W prior to award, DSS-W neglected to inform us that DCAA had informed the agency after award that DCAA's earlier advice was erroneous and that in fact GRC's accounting system and practices, as shown in its disclosure statement, provided for uncompensated overtime.

GRC's disclosure statement specifically provided for "full time accounting,"[3] which properly accounted for the uncompensated overtime hours performed by exempt employees. Moreover, the record indicated that GRC had bid uncompensated overtime on a number of solicitations and received two awards on this basis, and that GRC, as an incumbent contractor for these services, had billed uncompensated overtime hours to the prior contract under its full time accounting system. Thus, the agency could not reasonably rely upon DCAA's advice—that GRC lacked an accounting system that properly accounted for uncompensated overtime—as a basis not to consider GRC's offer of labor rates based upon uncompensated overtime.

We concluded from the record that the agency unreasonably adjusted GRC's proposed cost upward to reflect rates based on a 40-hour workweek, rather than the 45-hour workweek GRC proposed, since nothing precluded GRC from proposing uncompensated overtime. Accordingly, we determined that DSS-W should have found GRC to be the lower evaluated cost offeror and that, since the record demonstrated that GRC's and AMS' proposals were technically equal, GRC was entitled to award as the technically equal offeror with the lower evaluated cost.

The crux of DSS-W's and AMS' reconsideration requests is that we improperly considered DCAA's post-award statements to DSS-W concerning GRC's accounting practices since this information was not available to the contracting officer at the time of his selection decision and because the contracting officer was entitled to rely upon DCAA's expert advice when he made the award selection. DSS-W and AMS now contend that the contracting officer had no reason to question the validity of DCAA's pre-award advice—that is, that GRC's disclosed accounting system did not provide for uncompensated overtime—since the contracting officer had not reviewed GRC's CAS disclosure statement prior to award and was not familiar with GRC's bidding and billing practices, and that our conclusions to the contrary are in error.

DSS-W and AMS are incorrect in their assertion that our decision, finding unreasonable the agency's cost realism adjustment of GRC's proposed labor rates, was primarily based upon DCAA's post-award advice. Rather, as explained in detail in the prior decision, we found that the contracting officer could not reasonably accept DCAA's erroneous pre-award advice concerning GRC's disclosure statement and accounting practices where this advice was clearly inconsistent with GRC's disclosure statement, GRC's standard bidding and billing practices (with which the record indicated the contracting officer was familiar), and the agency's evaluation and acceptance of several of GRC's proposals containing uncompensated overtime rates.

It is true that DCAA's post-award advice to DSS-W confirmed that its earlier advice was in error, as noted in our prior decision. We discussed this change in

[3] "Full time accounting" refers to an accounting practice in which all hours worked in a pay period are accounted for and divided into an employee's salary to determine that employee's labor rate for that period. *See* DCAA Contract Audit Manual ¶ 6-410.4 (July 1990).

DCAA's position in our prior decision, in part to correct DSS-W's misrepresentation of DCAA's position on this matter throughout the protest process (including the informal conference on the protest). DSS-W maintained that DCAA had "determined" that GRC's accounting system did not account for uncompensated overtime and presented DCAA's handwritten notes to substantiate this position. However, at the time DSS-W presented these arguments, DCAA had actually determined that GRC's accounting system used full time accounting, which accounted for uncompensated overtime, and had so informed the agency orally and in writing. DSS-W never informed us as to what DCAA actually had determined regarding GRC's disclosure statement and accounting system and practices, nor provided us with DCAA's letter to the agency, detailing DCAA's error concerning GRC's accounting system.[4]

DSS-W now argues that it did not inform us of DCAA's reversal of its earlier advice to the agency, concerning GRC's accounting system, because this post-award advice was not relevant to the contracting officer's award decision. However, since DSS-W argued throughout the protest that GRC's offer of uncompensated overtime rates was a deviation from its standard billing practices and was not consistent with its disclosed accounting system, we do not think that the agency could reasonably fail to disclose DCAA's actual position regarding GRC's disclosed accounting system.

In any event, DSS-W and AMS argue that the contracting officer reasonably accepted DCAA's pre-award advice concerning GRC's accounting system and practice because the contracting officer had not reviewed GRC's disclosure statement before award and was unfamiliar with GRC's bidding and billing practices. The contracting officer now states in this regard that he "relied on the advice of experts at DCAA . . . with no [other] information in hand to contradict that expert opinion . . . ."

These contentions are inconsistent with the agency's representations during the protest that its contracting officer had determined that GRC's disclosure statement did not provide for uncompensated overtime. For example, the contracting officer stated in his report to us that:

> Although the protest states that uncompensated overtime is referred to explicitly in the disclosure statements, I found no use of the term 'uncompensated overtime' in the CAS disclosure statements. DCAA was also unable to find any explicit mention of uncompensated overtime in the CAS disclosure statements that they had on file.[5]

Similarly, DSS-W's contention, that the contracting officer had little knowledge of GRC's bidding and billing practices, is also inconsistent with the agency's representations during the protest. For example, the contracting officer stated in his report that:

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[4] We obtained directly from DCAA the audit agency's October 24 letter that informed DSS-W that GRC's CAS disclosure statement and full-time accounting system provided for uncompensated overtime.

[5] The agency now states that the contracting officer's review of GRC's disclosure statement occurred after award. We recognized in our prior decision that other documentation in the record suggested that DSS-W did not obtain GRC's disclosure statement until after award, notwithstanding the contracting officer's statement.

My knowledge of GRC's past and present practices derived from a number of contracts that I awarded as contracting officer or reviewed as Chief of the ADP Division, as well as my consultation with staff and DCAA on six occasions about three different issues (initial compliance, escalation and uncompensated overtime, and CAS disclosures), led me to determine that [GRC's] proposal was unrealistic as stated.

The agency also represented that the contracting officer "consulted with the [DCAA], reviewed historical data of previous offers and analyses from other GRC contracts, considered his staff's professional analysis and relied upon his own experience with GRC." Furthermore, DSS-W admitted during the protest that GRC had offered uncompensated overtime on other DSS-W solicitations and that the agency had awarded two contracts to GRC, before the award here, which were based on offers of uncompensated overtime.[6]

To obtain reversal or modification of a decision, the requesting party must convincingly show that our prior decision contains either errors of fact or law or information not previously considered that warrants its reversal or modification. 4 C.F.R. § 21.12(a) (1991); *Gracon—Recon.*, B-236603.2, May 24, 1990, 90-1 CPD ¶ 496. We will not reconsider a prior decision based upon arguments that could have and should have been raised at that time since the goal of our bid protest forum—to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record—otherwise would be undermined. *Department of the Navy—Recon.*, B-228931.2, Apr. 7, 1988, 88-1 CPD ¶ 347; *Newport News Shipbuilding and Dry Dock Co.—Recon.*, B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428. Thus, parties that withhold or fail to submit all relevant evidence, information or analyses for our initial consideration do so at their own peril. *Department of the Army—Recon.*, B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

DSS-W's argument on reconsideration—that the contracting officer had no reason to know at the time of award that DCAA's pre-award advice was incorrect—varies from its position during the protest that DCAA and the contracting officer had "determined" that GRC's disclosed accounting system and practices did not provide for uncompensated overtime. DSS-W's revised contention concerning what its contracting officer knew or reviewed could have and should have been raised at the time of our initial consideration of the protest. *Department of the Navy—Recon.*, B-228931.2, *supra; Newport News Shipbuilding and Dry Dock Co.—Recon.*, B-221888.2, *supra.* Thus, we will not reconsider our decision based upon these new arguments and evidence that are inconsistent with the arguments and information provided to us by the agency during our initial consideration of the protest.

In any event, we disagree with the apparent belief of DSS-W and AMS that a contracting officer's cost realism determination will be deemed reasonable, although based upon incorrect information, where the incorrect information was provided to the contracting officer by experts outside the procuring agency—

[6] DSS-W's argument—that it had no basis to question DCAA's advice that GRC could not account for uncompensated overtime—is incongruous with the agency's evaluation of GRC proposals offering uncompensated overtime apparently without question and with the award of contracts on the basis of such proposals.

e.g., DCAA—and the contracting officer had no reason to know that the advice was erroneous. A contracting officer's cost realism determination may not reasonably be based upon erroneous audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.[7] While a contracting officer may ordinarily rely upon DCAA in performing a cost realism analysis rather than perform all aspects himself, *NKF Eng'g, Inc.; Stanley Assocs.*, B-232143; B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497, this does not mean that a contracting officer is thereby insulated from responsibility for error.[8] *PAI, Inc.*, 67 Comp. Gen. 516 (1988), 88-2 CPD ¶ 36. A contracting officer's judgment concerning the realism of an offeror's proposed costs must be reasonably based and not arbitrary. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Where this judgment is founded upon incorrect information, it will not be deemed reasonable.[9] *See Vinnell Corp.*, B-180557, Oct. 8, 1974, 74-2 CPD ¶ 190.

DSS-W also contends that GRC did not provide sufficient cost and pricing data to support its offer of uncompensated overtime. This contention was not mentioned by the agency during our initial consideration of the protest, nor is there any indication in the agency's contemporaneous evaluation documents that GRC's offer was not supported by sufficient cost or pricing data. Even at this stage the agency does not identify what cost or pricing data GRC failed to provide or what other data the agency required for its cost realism evaluation. Since this argument could have and should have been raised during our initial consideration of the protest, we will not reconsider our decision based upon this new argument. *See Department of the Navy—Recon.*, B-228931.2, *supra.*

DSS-W next argues that we erroneously concluded in the prior decision that "GRC, in its revised technical and cost proposals, detailed on a manning chart how its proposed personnel would provide the requested 8 man-years of effort with the salaried personnel working 45 hours per week." The agency contends that the manning chart to which we referred provides 8 man-years of effort but in increments of 40 hours per week.[10] As explained in the prior decision, GRC,

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[7] We note that this same rule applies to other judgments of contracting officers. *See e.g. Fiber-Lam, Inc.*, B-237716.2, Apr. 3, 1990, 69 Comp. Gen. 364, 90-1 CPD ¶ 351 (contracting officer may not automatically rely upon information provided by transportation rate specialists that results in improper or unreasonable evaluations of offered prices). In this regard, the courts and board of contract appeals have imputed audit information to contracting officers. *See e.g. United States v. Hanna Nickel Smelting Co.*, 253 F. Supp. 784 (D. Ore. 1966) (knowledge of contractor's accounting practices imputed to agency), *aff'd on other grounds*, 400 F.2d 944 (9th Cir. 1968); *E-Systems, Inc.*, ASBCA No. 18877, Feb. 23, 1976, 76-1 BCA ¶ 11,797 (knowledge of contractor's pooling and allocation of material costs, known to DCAA, was imputed to the contracting officer). Similarly, a contracting officer is not insulated from responsibility for erroneous advice provided by experts within the procuring agency, *i.e.*, a price analyst or a technical evaluator.

[8] FAR § 15.805-1 (FAC 90-3) provides that:

The contracting officer, *exercising sole responsibility for the final pricing decision*, shall, as appropriate, coordinate a team of experts and request and evaluate the advice of specialists in such fields as contracting, finance, law, contract audit, packaging, quality control, engineering traffic management, and contract pricing. [Italic added.]

[9] The General Services Administration Board of Contract Appeals follows a similar rule. *See Compuware Corp.*, GSBCA No. 9356-P, Mar. 21, 1988, 88-2 BCA ¶ 20,663.

[10] The agency does not state why this alleged error of fact warrants reversal of the prior decision.

in response to the agency's technical discussions, provided the requested 8 man-years of effort in its revised technical proposal. It was not until GRC's best and final offer (BAFO), after the revised technical proposal, that GRC offered uncompensated overtime to provide the offered 8 man-years of effort. Thus, GRC's manning chart in the revised technical proposal and its BAFO, read together, unambiguously offer uncompensated overtime to provide the requested level of effort. In this regard, the RFP sought offers of man-years of effort to perform, and not specific persons, as DSS-W's argument implies.

DSS-W and AMS finally argue that we erred in concluding that GRC's and AMS' offers were technically equal and in recommending award to GRC as the technically equal offeror with the lower evaluated cost.[11] The agency states, without explanation, that the conclusion of its technical evaluation panel that the two proposals were "substantially the same" is not the same as " 'technical equivalence' in the legal sense." DSS-W contends that since the source selection authority (SSA) is not bound by the ratings or recommendations of the technical evaluation panel, *see TRW, Inc.*, B-234558.2, Dec. 18, 1989, 89-2 CPD ¶ 560, we erred in not allowing the SSA the opportunity to judge the difference in technical merit between GRC's and AMS' offers and to perform a cost/technical tradeoff.[12] In this regard, the agency argues that the offerors proposed different approaches to performing the contract work and has submitted the affidavit of its technical evaluation panel chairman who now states that he is "of the opinion that there were differences in the merits of the two proposals."

While DSS-W argues on reconsideration that there are technical differences between the offers that should be considered by the SSA, the agency has failed to point to a single technical difference. The unsupported statement of the technical evaluation panel chairman and the fact that the two offerors may have proposed differing approaches to accomplishing the contract work do not show that our determination, based upon the protest record, that the proposals were technically equal was incorrect. As described in the prior decision, none of the contemporaneous evaluation documentation in the record, which includes the evaluators' notes and scoring sheets, and the agency's business clearance memorandum, indicate that AMS' proposal was considered technically superior to GRC's proposal. In the absence of any evidence from the SSA or another agency official specifying differences in technical merit between the two proposals, we have no basis upon which to further delay the resolution of this protest by referring the procurement back to the agency for additional evaluation.

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[11] AMS also contends that the issue of whether the two proposals were technically equal was not raised by GRC until its post-conference comments and therefore this issue was untimely and should not have been considered. The question of whether the two proposals were technically equivalent arose in the context of our recommendation for relief and not in deciding the arguments of the parties. Since, as described in the prior decision, the record established no discernible technical differences between the two offers, we recommended award to GRC.

[12] DSS-W contends that "[t]he cost/technical tradeoff conducted by GAO [General Accounting Office] in this opinion was insufficient to establish the technical equality of the two proposals." Technical equivalence, however, is not decided on the basis of a cost/technical tradeoff; rather, cost/technical tradeoffs are performed to assess the relative value of proposals in light of the technical merit and cost/price offered.

Accordingly, since DSS-W and AMS have failed to demonstrate errors of fact or law that warrant modification of our award recommendation, we will not reconsider our decision in this regard.

The requests for reconsideration are denied.

B-238004, B-242685, May 24, 1991

Appropriations/Financial Management

Claims By Government
■ Interest

Procurement

Contract Disputes
■ Appeals
■ ■ Interest

The Forest Service is not required to discontinue the assessment of interest, late payment penalties, or administrative costs pursuant to the Federal Claims Collection Act, as amended, 31 U.S.C. § 3717, during the pendency of an appeal under the Contract Disputes Act.

Procurement

Contract Disputes
■ Sureties
■ ■ Liability
■ ■ ■ Amount determination

Corporate sureties are liable, up to the penal sum of their bond, for the interest, late payment penalties, and administrative costs assessed against the contractor on whose behalf the surety provides its bond, plus any such assessments made against the surety for its own failure to pay in a timely fashion, even if the latter assessments exceed the penal sum of the bond.

Appropriations/Financial Management

Claims By Government
■ Litigation expenses
■ ■ General/administrative costs

The Forest Service may not include the costs of defending the agency's position in any appeals brought by a contractor or surety pursuant to the Contract Disputes Act as part of the administrative costs assessed under 31 U.S.C. § 3717 against contractors and sureties.

Matter of: Interest Under the Federal Claims Collection Act, as Amended, on Debts Appealed Under the Contract Disputes Act of 1978

This responds to separate requests from officials of the Department of Agriculture's Forest Service and its Office of Inspector General concerning the assessment of interest and other charges under the Federal Claims Collection Act of 1966 (FCCA), as amended by the Debt Collection Act of 1982, 31 U.S.C. § 3717

(1988), on delinquent debts arising from national forest timber sales contracts. The questions posed in those requests concern (i) whether the Forest Service may assess interest, penalties, and administrative costs under the FCCA on such debts during the pendency of appeals taken pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. ch. 9 (1988); (ii) the extent to which the corporate sureties who provide performance bonds for those timber sale contracts are subject to the assessment of those same charges in addition to the penal sums owed under their bonds; and (iii) whether the Forest Service may include its costs of defending appeals taken under the CDA in the administrative costs it assesses against either the contractors or their sureties under the FCCA.

As discussed below in greater detail, we find that: (i) the Forest Service, under the FCCA, should assess interest, late-payment penalties, and administrative costs on delinquent contract debts during the pendency of their appeal under the CDA; (ii) to the extent that it becomes necessary or appropriate to invoke the surety's bond, the surety is liable both for any charges assessed under section 3717 against the contractor, as well as any such charges assessed against the surety itself, after its obligation under the bond is invoked; and, (iii) in neither situation, however, may the Forest Service include its costs of defending or prosecuting an appeal pursuant to the CDA in the administrative costs assessable against the contractor or surety based solely upon the authority of section 3717. Only if such costs are awarded in the course of or by virtue of the CDA procedures or some other applicable statutory or contractual provision (*i.e.*, independent of the FCCA), may they be collected from either the contractor or the surety.

Background

As explained in the submissions, the Forest Service sells national forest timber to private purchasers through a program of competitive bidding which is subject to the CDA. In order to protect the government's interests, the Forest Service requires successful bidders (*i.e.*, the contractors) to provide performance bonds, which they often obtain from corporate sureties. If the contractor defaults (*e.g.*, by failing to remove the purchased timber in a timely fashion, or by damaging other government property or resources), the Forest Service assesses damages under the contract, and the Forest Service's Contracting Officer (CO) bills the contractor in accordance with the FCCA and the Federal Claims Collection Standards (FCCS), 4 C.F.R. ch. II (1991). The CO's bill explains the reasons for his determination, the contractor's appeal rights under the CDA, and the government's policies with respect to the assessment of interest, late-payment penalties, and administrative costs under the FCCA and FCCS.[1] At that time, the CO also notifies the surety of the default and damages.

[1] The FCCA and FCCS generally require agencies to assess (a) interest at the "Treasury tax and loan accounts" rate (also known as the "current value of funds" rate), accruing from the date of the initial notice of delinquency, plus (b) a late-payment penalty of 6 percent per annum on those portions of the debt which are more than 90 days past due, plus (c) a charge to cover the additional administrative costs incurred by the agency in consequence of the debt's delinquency. 31 U.S.C. § 3717; 4 C.F.R. § 102.13. *See* B-222845, Dec. 9, 1987.

If the contractor does not pay the amount billed by the due date, the Forest Service bills the surety for the amount of the damages up to the amount of the penal sum of the bond.[2] If the surety does not pay by the due date, the Forest Service assesses interest against the surety on the amount billed to it, accruing from the date of the billing notice sent to the surety. If the contractor or the surety appeal (either to the Board of Contract Appeals or the Claims Court), the Forest Service continues to accrue interest on the debt during the pendency of the appeal. The submissions indicate that many contractors and sureties have taken the position that the Forest Service cannot legally hold them liable for such charges before completion of the appellate process, and that, in any event, a surety's liability can never exceed the penal sum of its bond. According to the Forest Service, neither its contracts nor the sureties' performance bonds address these issues. The submissions also indicate that, while these issues do occasionally arise in connection with contracts entered into before amendment of the FCCA in 1982 to require interest and other charges, the Forest Service is primarily concerned about those claims which arise under contracts entered into after the amendments.

Discussion

Debts Pending Appeal

The FCCA and the FCCS impose a general requirement on agencies to assess interest, penalties, and administrative costs on delinquent claims owed to the United States. 31 U.S.C. § 3717(a)(1), (e) ("shall" assess these charges); 4 C.F.R. § 102.13(a) ("shall assess"). Section 104.2(c) of the FCCS provides for the suspension of collection activities where the debtor properly requests waiver or reconsideration of the debt. Whether the agency may or must suspend collection activities under the FCCS depends upon whether the statute under which waiver or reconsideration is sought is "mandatory" or "permissive." 4 C.F.R. § 104.2(c). A statute is said to be "mandatory" where it imposes a "duty to decide" before collection may proceed; it is "permissive" if it does not prohibit collection action pending consideration of the request, and thus allows the agency to decide whether to proceed without awaiting the outcome of the waiver or reconsideration request. *E.g.*, 63 Comp. Gen. 10, 12 n.3 (1983), *quoting Califano v. Yamasaki*, 442 U.S. 682, 693 n.9 (1979). Under a "mandatory" statute, the agency must suspend collection, including the assessment of interest, until either the agency has decided the issue subject to waiver or reconsideration, or the time within which such a request could be made has passed without one having been made. 4 C.F.R. § 104.2(c)(1). *See also* 4 C.F.R. § 102.13(h). As we have observed previously:

> While interest serves to compensate a creditor for loss of the use of money, in the specific context of the [FCCA as amended by the CDA,] it serves perhaps a more important purpose—to encourage the

[2] The Forest Service states that frequently, when claims arise against a timber contractor, the contractor lacks sufficient resources to cover the damages and that those damages usually exceed the penal sum of the bond.

prompt payment of debts owed to the United States. The authority to charge interest is essentially another weapon in the Government's debt collection arsenal . . . . [W]here a mandatory waiver [or reconsideration] statute applies, there is no debt upon which collection action may be pursued—stated differently, the overpayment does not 'ripen' into a debt—until the [mandatory] waiver [or reconsideration] process has run its course.

63 Comp. Gen. at 12.

Thus, whether the Forest Service must discontinue the accrual of interest and related charges pending completion of the CDA appellate process depends upon whether the CDA is "mandatory" or "permissive," as those terms are used in the FCCS regulations that implement the FCCA.[3]

Our review of the CDA convinces us that it is "permissive" in nature. Nothing in the CDA requires suspending collection action pending appeal. Indeed, the act seems to contemplate otherwise. The CDA provides that: "Nothing in this Act shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with the performance of the contract in accordance with the contracting officer's decisions." 41 U.S.C. § 605(b). The legislative history of this provision notes that it was inserted in order to address

the concerns of the Defense Department that by not including such a statement in the statute, [agencies] might be precluded from inserting and enforcing sections in [their] contracts requiring that contractors continue performance on their contracts pending final determination of their claims. . . . This will give the executive agencies the flexibility they currently have to include such clauses in their contracts.

124 Cong. Rec. 36267 (Remarks of Sen. Byrd).

The fact that Congress specifically intended agencies to have the discretion to require contractors to perform despite the pendency of claims under the CDA suggests that Congress also intended that agencies may require contractors to comply with other aspects of their contractual obligations—including the obligation to pay money. The investment in the agency of this discretion under the CDA, in combination with the mandatory interest provisions of the FCCA and FCCS, leads us to conclude that Forest Service generally should continue these assessments during the pendency of CDA appeals unless, in the exercise of sound discretion, it finds, on a case-by-case basis, that the suspension is consistent with the criteria in 4 C.F.R. § 104.2(c)(2).[4] Of course, this is not to say that agencies are free to ignore the jurisdiction and authority of the Boards of Contract Appeals or the Claims Court when taking collection action on claims which have been submitted to those bodies, but rather, that the dual status of interest assessments as both compensation for late payment and inducement to

[3] Contract debts within the scope of the CDA are subject to the assessment of interest and other charges under the FCCA. *See* 31 U.S.C. § 3701(b), 4 C.F.R. § 101.2(a) (the definition of "claims"). *Cf.* 31 U.S.C. §§ 3701(c) & (d); 4 C.F.R. §§ 102.3(b)(4), 102.13(i), 102.19 (identifying kinds of debts and debtors exempt from the CDA). *See also, e.g., IBM Corp.*, ASBCA Nos. 28821, 29106, 84-3 BCA ¶ 17,689; *Pat's Janitorial Service, Inc.*, ASBCA No. 29129, 84-3 BCA ¶ 17,549 (application of the FCCA to contract debts subject to the CDA).

[4] This result seems equitable given the government's obligation, under 41 U.S.C. § 611, to pay interest to contractors in similar situations.

prompt payment makes it appropriate to continue to accrue interest and related charges even after an appeal has been filed. The continued accrual of interest and related charges does not interfere with the appellate tribunal's authority. *Accord, Summit Contractors v. United States,* 21 Cl. Ct. 767, 781 (1990) (prejudgment interest assessment not tolled by virtue of surety's appeal of administrative decision against contractor).

Surety's Liability

A surety's liability with respect to assessments made against the contractor for the contractor's delay in making payment is limited to the penal sum of its performance bond. This follows from the fact that the surety has contractually pledged to make all payments owed by the contractor to the government, subject to the limits of the penal sum of its bond. However, once the surety's obligation under the bond has been properly invoked, its contractual duty is to make timely payment to the government, in place of the contractor. From that point on, any failure to make timely payment would represent not a derivative liability of the contractor's breach, but, rather, the direct liability of the surety for its own breach, with respect to which the penal sum of the bond is irrelevant. *See,* for example, *United States v. United States Fidelity & Guaranty Co.,* 236 U.S. 512, 530-31 (1915) (quoting *United States v. Hills,* 4 Cliff. 618, 26 Fed. Cas. 332 (C.C.D. Mass. 1878) (Fed. Cas. No. 15,369), holding that:

> Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as accrued from their own default in unjustly withholding payment after being notified of the default of the principal.

See also, e.g., Royal Indemnity Co. v. United States, 313 U.S. 289, 295 (1941); *Summit Contractors v. United States,* 21 Cl. Ct. at 781.

Costs of Defending Appeals

According to the FCCS, agencies are required to "assess . . . charges to cover administrative costs incurred as a result of a delinquent debt, that is, the additional costs incurred in processing and handling the debt because it became delinquent." 4 C.F.R. § 102.13(d). In explaining this provision, the Supplementary Information statement which accompanied the most recent revision of the FCCS stated that an exhaustive and detailed list of the charges included under this rubric would not be "feasible." Instead, the following test was offered: "[W]hether the particular cost was incurred by virtue of the delinquency or whether it would have been incurred in any event." 49 Fed. Reg. 8889, 8893 (1984).

We do not believe that the costs of defending the government's position in CDA hearings qualify under this test. Indeed, the Supplementary Information statement suggested that "administrative costs" do not include the cost of administrative hearings and appeals. *See* 65 Comp. Gen. 893, 898 n.13 (1986), *interpreting* 49 Fed. Reg. at 8895. To allow the government to routinely and unilaterally charge contractors with the costs of the government's defense of appeals would

effectively punish, discourage, and defeat pursuit of the procedural rights granted by the CDA. It would also be inconsistent with the authority of the Boards of Contract Appeals and the Claims Court to award costs and attorney fees based upon their assessments of the relative merits and burdens of the parties in each case and their positions. *Cf., e.g.,* 41 U.S.C. § 607(d) (agency boards have authority to "grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court").

In discussing the government's right to assess interest on these debts, the submissions of the Forest Service and the Inspector General stressed that contractors and sureties often (if not usually) delay filing their appeals under the CDA until the last day of the statutory periods established for such actions. Certainly, given the lengthy periods involved (as much as a year, for example, *see* 41 U.S.C. § 609(a)(3) (appeals to Claims Court)), the practice of delaying the filing of an appeal until the last day possible will often mean that the debt is delinquent at the time that the government incurs the costs of defending the appeal. However, this does not mean that the cost of defending the appeal was incurred by virtue of the delinquency. As the submissions suggest, appeals filed before the onset of delinquency would still have to be defended at a cost to the agency. Thus, there is more of "coincidence" than "cause" to this relationship.

B-242503, May 28, 1991

Civilian Personnel

Travel

■ Overseas travel

■■ Tour renewal travel

■■■ Dependents

Under 41 C.F.R. § 302-1.4(e) (1990), an employee's daughter is a member of his household where he and his former spouse have joint legal and physical custody of their daughter and she resides with him more than 50 percent of the time. Therefore, the employee may be reimbursed for his daughter's travel costs incurred in connection with his overseas tour renewal agreement travel.

Matter of: Alan M. Grundy—Overseas Tour Renewal Agreement Travel—Joint Legal and Physical Custody of Minor Child

The issue presented in this decision is whether an employee who has joint legal and physical custody of his daughter may be reimbursed for her travel costs in connection with his overseas tour renewal agreement travel.[1] For the following reasons, we hold that the employee may be reimbursed for his daughter's travel costs.

[1] The request for decision was submitted by Mr. Richard H. Thomson, Authorized Certifying Officer, Forest Service, USDA.

Background

Mr. Alan M. Grundy, an employee of the Forest Service stationed in Ketchikan, Alaska, was initially appointed to a position in Alaska in April 1982. Upon completion of his initial and subsequent 2-year tours of duty, he performed renewal travel in 1984, 1986, and 1988. In each of these years, Mr. Grundy was accompanied by his wife and by his daughter, Miss Leigh M. Grundy.

Mr. Grundy and his wife were divorced in August 1989. Under the provisions of the decree of divorce, he and his former wife were granted joint legal and physical custody of Leigh and each parent was granted alternating weeks of physical custody. Mr. Grundy now seeks reimbursement for Leigh's airfare costs incurred when she accompanied him on his tour renewal travel from June 15 through July 1, 1990.

Mr. Grundy maintains that his daughter, who was 8 years of age in 1990, is part of his household and that, in practice, she spends more than 50 percent of the time with him because of extensive travel performed by his former wife. He reports that he has not been able to obtain a letter from his former wife to verify that Leigh lives in his household in excess of 50 percent of the time since she is concerned that such statement could be used against her in future custody proceedings. He also states that the Internal Revenue Service and the state of Alaska consider Leigh a member of his household. He reports that he has claimed and will continue to claim her as a dependent on his income tax returns for alternate years, i.e., 1988, 1990, 1992, when he performs tour renewal travel. Mr. Grundy says that Leigh was living with him at the time he performed his tour renewal travel in 1990.

Opinion

Tour renewal agreement travel for an employee and his or her immediate family is authorized under 5 U.S.C. § 5728 (1988). The definition of "immediate family" in the implementing regulations contains a listing, including "children," of named members of the employee's household at the time he or she reports for duty at the new permanent duty station or performs authorized or approved overseas tour renewal agreement travel.[2]

The term "children" is sufficiently broad to include a child whose custody has been jointly placed in an employee and a former spouse.[3] In order to be considered a member of the employee's "immediate family," and consequently entitled to the travel and transportation allowance being claimed, the child must be a member of the employee's household at the time the renewal travel is performed.[4]

[2] 41 C.F.R. § 302-1.4(e).
[3] 52 Comp. Gen. 878 (1973).
[4] *John C. Raynor*, B-187241, July 5, 1977.

We have held that in order for a divorced employee's child to be considered a member of his household, it must be established that the child is in his legal custody and resides with the employee at his permanent duty station and is not merely engaged in the exercise of visitation rights.[5] Where a child is in the employee's joint or divided custody, the length of time the child actually lives with him at the overseas post of duty, and the intent of the parties to make the child a member of the employee's household are the factors which must be considered in determining the employee's entitlement to travel and transportation expenses for her.[6] Where a child in an employee's joint custody resides with him for only a brief period (1 month) each year, that child does not qualify as a member of the employee's immediate family.[7]

In the case before us, Mr. Grundy has joint legal and physical custody of his daughter and physical custody every other week. Further, he states that, due to the extensive travel performed by his former wife, Leigh actually lives with him more than 6 months each year. In addition, he says that Leigh is recognized as a member of his household by the Internal Revenue Service and the state of Alaska. He claims her on his income tax returns in alternate years, coinciding with his tour renewal agreement travel.

We believe that, where as here the evidence shows that a child of divorced parents resides with the employee parent more than 50 percent of the time, the child may be considered a member of the employee's household for purposes of FTR § 302-1.4(e).

In these circumstances, we conclude that Leigh is a member of Mr. Grundy's household for purposes of the requirements contained in 41 C.F.R. § 302-1.4(e) and, therefore, he is entitled to reimbursement of her travel costs incurred in connection with his overseas tour renewal travel from June 15 through July 1, 1990. The voucher may be certified for payment if otherwise proper.

B-242616, B-242616.2, May 28, 1991

Procurement

Bid Protests

■ GAO procedures

■■ Protest timeliness

■■■ 10-day rule

Lower priced offeror timely filed protest of agency's cost evaluation and technical/cost tradeoff within 10 days of its receipt of information under a Freedom of Information Act request pertaining to the awardee's prices; however, protest is untimely to the extent that it touches on the protester's objections to the agency's technical evaluation and technical ranking of its proposal because it was

[5] *See* B-208874, Nov. 16, 1982, where the employee's child only visited him during the 2-month summer visitation period.
[6] *Ernest P. Gianotti*, 59 Comp. Gen. 450 (1980); B-129962, Nov. 17, 1976.
[7] *Raynor, supra.*

not filed within 10 days of an agency debriefing disclosing the specific deficiencies in the protester's technical proposal.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Prices
■■■■ Additional work/quantities

Agency price evaluation that only considered the total cost of a sample task, rather than the total contract cost, on a solicitation for an indefinite quantity of services under a delivery order contract was proper, where the sample task provided a common basis for cost evaluation under a solicitation that did not specify labor classifications or labor hours because of the uncertainty of the tasks that may be ordered during the contract and the agency's desire to use offerors' existing organizational structure and approaches, and where the task is typical of work under the contract.

Procurement

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

Agency properly exercised its discretion in determining awardee's technical superiority to be worth its higher cost under an evaluation scheme that accorded equal weight to costs and to technical factors.

Matter of: High-Point Schaer

Martin Healy, Esq., Thompson & Waldron, for the protester.

Robert B. Wallace, Esq., and Steven Levine, Esq., Wilson, Elser, Moskowitz, Edelman & Dicker for O'Brien-Kreitzberg & Associates, Inc., an interested party.

Tracy Gruis, Esq., Department of the Army, for the agency.

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

High-Point Schaer (HPS) protests the award of a fixed-price, indefinite-quantity, delivery order contract to O'Brien-Kreitzberg & Associates, Inc. (OKA), issued by the Department of the Army, Corps of Engineers under request for proposals (RFP) No. DACA51-90-B-0003 for construction claims management services at Fort Drum, New York, for a base year and 4 option years. HPS' contends that the Corps improperly evaluated offerors' costs and made an improper technical/cost tradeoff in the award selection.

We deny the protests.

The RFP's statement of work calls for the contractor to assist the Corps in researching and evaluating claims received from construction contractors working at Fort Drum.[1] Under this fixed-price, indefinite-quantity contract, the minimum dollar amount for the base year work was $100,000 and the maximum was $2,000,000.

The RFP sought proposals based on offerors' existing organizational structures and approaches. Instead of listing required labor classifications and giving an estimated number of labor hours for each classification, the RFP required offerors to (1) name the disciplines (*i.e.*, labor classifications such as engineers, technicians, and clerical help) they would use to perform the work; (2) state each discipline's minimum qualifications (*e.g.*, level of education and years of experience); and (3) provide a fixed, price-per-hour for each discipline.[2] Offerors submitted the required information in their technical proposals, price proposals,[3] and their proposed approaches to the resolution of a hypothetical construction contractor's claim against the Corps.[4] The RFP advised offerors that their responses to the hypothetical claim would be used for the "purposes of the Government's price and technical evaluation of proposals."[5]

The RFP listed two evaluation areas—technical and cost. The technical area listed two sub-areas, in descending order of importance, technical ability/approach and past performance/experience. Within the technical ability/approach sub-area, the following items were given equal importance: (1) ability to analyze claims using network analysis scheduling techniques; (2) proposed management and staffing for project; (3) qualifications of proposed person-

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[1] The claims may involve such diverse matters as allegations of government-caused construction delays, differing site conditions, and deficient designs. The contractor reviews government and claimant (*i.e.*, construction contractor) documents (the contract, contract modifications, submittals, and planned and progress schedules) showing both how the parties initially planned to carry out the construction ("as planned" documents) and how the construction actually was performed ("as built" documents). From this information, the contractor develops as-built schedules and achievable schedules to show who, or what, was responsible for deviations from the "as planned" documents, and estimates the extent of the government's liability, if any, for any amounts claimed. The contractor reports its conclusions concerning the merits of particular claims to the agency, and may be called on to provide expert testimony in support of the agency's position should the matter go to trial.

[2] The RFP calls for agency and contractor negotiation of delivery orders specifying the disciplines that the contractor will use to assist on particular claims. The contractor is compensated for the designated disciplines at the contract's fixed labor rates.

[3] The price proposals did not have a bottom line cost because the RFP did not provide total estimated hours for each labor classification against which to evaluate the offerors' proposed discipline rates, nor did it specify what particular disciplines should be proposed or priced.

[4] The RFP included a hypothetical construction delay claim that offerors were to address in their technical proposals by providing:

a. the general approach and methodology to be used in analyzing the claim and determining the issues,
b. each of the offeror's proposed disciplines required to analyze the claim and the role of each,
c. the estimated number of hours, broken down by discipline, required to analyze the claim,
d. the estimated number of days to complete the analysis and prepare a recommendation. . . .

[5] At the preproposal conference, offerors asked how the hypothetical claim would figure into the evaluation:

Q: Section M-Evaluation Factors. Under which evaluation criteria will the hypothetical be evaluated? How will the estimate provided in the hypothetical claim be evaluated? What is the relative importance of the hypothetical claim vs. the criteria in Section M.1a Technical Ability/Approach?

The Army answered:

A: . . . the hypothetical will be evaluated as part of the technical and price evaluations. The estimate will be considered as part of the price evaluation, proposed management and staffing, and ability to provide a timely response. The hypothetical will be one factor considered in the M.1a evaluation and will be evaluated as an element of each of the above items.

nel; and (4) ability to provide a timely response to government requirements, including the ability to respond to multiple, concurrent delivery orders. The Corps evaluated technical proposals using both a weighted scoring system (for initial proposal evaluation) and adjectival scoring systems (for best and final offers (BAFO)).

The Corps evaluated cost/price separately. The RFP provided that:

> For hourly pay rate price evaluation, the Government will consider the duties and responsibilities of each proposed discipline, including the qualifications, professional background, education, and experience the offeror states is included in its proposed disciplines.

The RFP stated that award would be "made to an acceptable technical proposal, the cost or price of which is not the lowest, but which is sufficiently more advantageous as to justify the additional cost or price."

The Corps received 14 proposals in response to the RFP, included 6 proposals in the competitive range, and conducted discussions with those offerors. BAFOs were submitted on June 21, 1990. The Corps reevaluated the BAFOs before determining to select OKA for award because its technical superiority was worth its additional cost. On October 22, the Corps awarded the contract to OKA. The Army debriefed HPS on November 13, 1990. HPS filed this protest with our Office on January 17, 1991, after requesting and receiving certain information pertaining to OKA's price pursuant to a Freedom of Information Act (FOIA) request.

The protest focuses on the Corps' cost evaluation and technical/cost tradeoff. HPS argues that it was unreasonable to award the contract to OKA when OKA's technical proposal was only marginally better than that of HPS,[6] but HPS' proposed hourly rates were substantially below OKA's rates. In HPS' view, the award is inconsistent with the equal importance accorded technical and cost considerations by the RFP. HPS also claims that the cost analysis of OKA's response to the hypothetical claim was unreasonable and not documented, and that the Corps improperly limited its cost evaluation to only the disciplines proposed in the offerors' responses to the hypothetical claim. Finally, HPS questions the propriety of the evaluation of its proposal and argues that meaningful discussions were not conducted with it.

The Corps argues that HPS' protest is untimely because HPS filed the protest more than 2 months after the debriefing in which the Corps told HPS why the Corps considered HPS' proposal "less attractive" than OKA's proposal. The Corps reports that it told HPS of its concern "with HPS' emphasis on a [1 to 2 month] initiation visit to Fort Drum as well as the fact that the New Jersey office which would be responsible for the contract only has 15 people on staff, since both provisions could impact the timeliness of performance."

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[6] HPS views its proposal deficiencies as *de minimis* in nature since at the debriefing the agency apparently characterized HPS' proposal as "less desirable."

HPS states, and the Corps does not deny, that at the debriefing the Corps limited the debriefing to a discussion of the Corps' evaluation of HPS' proposal and refused to disclose any information concerning other offerors.

We find HPS' protest timely insofar as it challenges the propriety of the cost evaluation and technical/cost tradeoff as it is based on HPS' comparison/evaluation of OKA's and its own prices. HPS made its FOIA requests on November 9 and 20, promptly after the award and debriefing. On January 3, 1991, HPS received some of the requested information including OKA's labor rates and evaluated price. The Corps does not allege that it provided HPS with any information concerning OKA's prices or the cost/price evaluation before January 3, despite HPS' consistent attempts to obtain it. Thus, HPS' January 17 protest is timely since it was filed within 10 working days of HPS learning of OKA's labor rates and cost evaluation. 4 C.F.R. § 21.2(a)(2) (1991); *see Canadian Gen. Elec. Co., Ltd.*, B-223934.2, July 10, 1987, 87-2 CPD ¶ 29.

On the other hand, we agree with the Corps that the protester's arguments touching on either the evaluation (scoring/ranking) of HPS' technical proposal or the adequacy of the Corps' discussions are untimely filed, since HPS was expressly advised in the November 13 debriefing of the evaluated deficiencies in its proposal and its proposal's relative technical evaluation *vis-a-vis* OKA's. *See Sach Sinha and Assocs., Inc.*, B-241056.3, Jan. 7, 1991, 91-1 CPD ¶ 15. Consequently, we will review the reasonableness of the technical/cost tradeoff in light of the stated cost evaluation criteria and the firms' technical ratings, and we will not consider HPS' challenge of the Corps' technical evaluation.

The procuring agency has broad discretion in determining the manner and extent to which it will make use of the technical and cost evaluation results, and the agency's technical/cost tradeoffs are subject only to the tests of rationality and consistency with stated evaluation factors. *Babcock & Wilcox Co.*, B-235502, Sept. 18, 1989, 89-2 CPD ¶ 237. In other words, we will consider whether the Corps could reasonably find OKA's technically superior proposal worth its additional cost consistent with the evaluation criteria.[7]

In this case, the Corps' evaluation of total cost was limited to those disciplines and hours that offerors proposed to use to resolve the hypothetical claim. HPS questions the propriety of this evaluation, particularly the Corps' failure to consider any of the offerors' proposed disciplines other than the ones used in the hypothetical claim. Given the RFP's unusual labor provisions, we think the Corps may have used the only reasonable method it could to evaluate relative total cost. Agencies normally evaluate and compare each competing proposal's labor rates by requiring rates for RFP specified/defined labor classifications and multiplying the rates times the RFP estimated number of labor hours. In this

[7] In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determining factor. *Sach Sinha and Assocs., Inc.*, B-241056.3, *supra*. Here, the RFP stated that cost would be evaluated but did not indicate its specific weight relative to technical factors, aside from stating that award may not be made to the lowest priced offeror. Therefore, we presume that cost and technical factors have approximately equal importance. *Associates in Rural Development, Inc.*, B-238402, May 23, 1990, 90-1 CPD ¶ 495; *Babcock & Wilcox Co.*, B-235502, *supra*.

case, the Corps had to evaluate proposals on the basis of unique, offeror-defined labor classifications and a hypothetical claim, without the benefit of estimated labor hours.

The Corps reports that it did not provide total estimated labor hours for the total contract work because of the uncertain nature of the amount and kind of construction claims that may arise during the contract. Indeed, the RFP stressed that the number of delivery orders and contract value were unknown. The Corps wanted to assure that offerors could perform this work within their existing organizational structures and approaches. Consequently, the RFP also did not specify or define what disciplines an offeror was required to offer; this left the matter of labor classifications to the discretion of the individual offerors. While the successful offeror could largely retain its particular management and technical approach, the Corps would retain control of the contract work by individually negotiating delivery orders as the need for specific services arose.

The record shows that the Corps looked at all the disciplines proposed by each offeror, and found no common basis for comparison mainly because of the offerors' unique discipline definitions. The hypothetical claim provided a common basis for proposal comparison since it required the offerors to designate disciplines able to accomplish a common specific task.[8] In other words, all offerors had to select and price a group of personnel that together possessed the skills required to resolve the hypothetical claim. While significant variations in offeror responses to the hypothetical claim could be expected, given the considerable latitude left to the offerors in preparing their proposals, we agree with the Corps that this was a reasonable basis on which to evaluate cost. Furthermore, the RFP, as clarified at the pre-proposal conference, apprised offerors that the evaluation of the hypothetical claim would be a significant part of the cost evaluation.

In support of its position, HPS provides several quantitative comparisons/analyses that HPS thinks show that OKA's productivity or quality would have to be double that of HPS to justify the cost difference in their respective solutions to the hypothetical claim. HPS argues that "[t]he price of OKA was significantly greater than that of HPS based on both a comparison of the rates, and the total price of the sample claim, and especially comparing the price for the amount of effort on the sample claim."

We are not persuaded that HPS' comparisons/analyses of the labor rates and its conclusion that OKA is substantially higher priced are valid. The RFP allowed, and the two offerors proposed, different disciplines (in term of skills and capabilities), hours, and approaches to accomplishing the hypothetical claim. The protester did not have access to OKA's proposal, which we examined *in camera*. Contrary to HPS' contentions, the Corps did consider the reasonableness of the costs of OKA's response to the hypothetical claim. OKA's proposed approach involved using personnel with higher labor rates for fewer hours than HPS' pro-

[8] The Corps reports, and the protester does not rebut, that the work envisioned by the hypothetical claim (*i.e.*, a delay of construction claim) is typical of the work that the agency would order from the contractor.

posed approach. The Corps attributed OKA's faster completion of the claim to the greater efficiency of OKA's more experienced and higher paid personnel, and we do not find this conclusion to be unreasonable.[9]

On the other hand, although HPS appeared to offer a lower price for resolving the hypothetical claim, the Corps doubted the reliability of HPS' pricing. The Corps' doubts stem from HPS' suggestion in its proposal that the Corps consider placing a delivery order for an initiation visit—to familiarize HPS personnel with the situation at Fort Drum—at the beginning of the contract. The Corps perceived the initiation visit as an unnecessary cost. During discussions the Corps questioned HPS regarding the need for the initiation visit. HPS' BAFO did not convince the Corps that HPS personnel could operate just as efficiently with or without the initiation visit. Consequently, the Corps was unsure of how much faith it could place on HPS' hypothetical claim pricing (rates and hours) if the initiation visit was not ordered.

We find the Corps' cost evaluation reasonable. While its method did not consider all possible disciplines, since some disciplines are not needed for the hypothetical task, the agency did review the reasonableness of OKA's proposed discipline rates and hours given the personnel proposed. Agencies may award to higher rated offerors with higher proposed prices or costs where the agency reasonably determines that the cost premium involved is justified considering the technical superiority of the selected offeror's proposal, even where cost is equal in weight to the technical factors. *Babcock & Wilcox Co.*, B-235502, *supra.* Given the Corps' conclusion about the technical superiority of OKA's technical proposal over HPS' proposal, which was not timely protested by HPS, we do not believe that the tradeoff made by the Corps was unreasonable.

The protests are denied.

B-242718, May 28, 1991

Procurement

Sealed Bidding

■ **Bid guarantees**

■■ **Responsiveness**

■■■ **Checks**

■■■■ **Adequacy**

Bid guarantee in the form of a cashier's check to the order of "Farmers Home Bureau, U.S. Government" on a construction services solicitation issued by the Farmers Home Administration is an acceptable firm commitment to the government since there is no doubt that the check can be negotiated by the agency in the event of a default by the bidder.

[9] The Army had prepared an estimate of the labor hours required to resolve the hypothetical claim based on how long it would take junior-level Army personnel to resolve the problem. The Army estimate substantially exceeded OKA's proposed solution to the hypothetical claim. The Army did not question the discrepancy because the Army concluded that had its estimate been based on Army personnel with experience similar to OKA's personnel, the Army labor hour estimate would have been substantially lower.

Matter of: Castle Floor Covering

Robert E. Gibson for the protester.

Betty C. McMurtry, Farmers Home Administration, Department of Agriculture, 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.

Castle Floor Covering protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 09-00-1-009P, issued by the Department of Agriculture, Farmers Home Administration (FmHA), Gainesville, Florida, for the repair of five government-owned, single-family houses. Castle alleges that FmHA erroneously found its bid guarantee unacceptable.

We sustain the protest.

The IFB required bidders to furnish a bid guarantee in the amount of 20 percent of the bid price. The IFB also included the clause at Federal Acquisition Regulation (FAR) § 52.228-1, which requires that bidders "shall furnish a bid guarantee in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit, or . . . certain bonds or notes of the United States." That clause further advised that "failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid."

Three bids were received by the January 3, 1991, bid opening. The low bidder was found nonresponsive because it did not submit a bid guarantee with its bid. Castle submitted the second low bid in the amount of $35,725 with a bid guarantee in the form of a cashier's check from First Union National Bank of Florida in the amount of $7,150. The cashier's check stated that it was to be paid to the order of "Farmers Home Bureau U.S. Government." There was no reference to the solicitation number or project on the face of the check. The agency contends that the check cannot be negotiated by FmHA since it was not made out to that agency, and the bank may not honor the check. Since FmHA found that Castle's bid guarantee did not represent a firm commitment to the government, it rejected Castle's bid as nonresponsive. The agency found the third bid on the IFB unreasonably high in price and canceled the IFB for the five houses.

Proposals were then orally requested for the three houses most urgently in need of repair, and award made to another offeror; Castle submitted the second low quote on that solicitation. For the remaining two houses, FmHA has issued a request for quotations (RFQ) and received quotes on January 16, 1991. Castle did not submit a response to the RFQ, although it protested this solicitation to the agency. No award has been made under the RFQ pending our decision on Castle's protest of the rejection of its bid.

Castle timely protested the rejection of its bid under the IFB to our Office contending that the cashier's check submitted as its bid guarantee was negotiable by FmHA and represented the required firm commitment. We agree.

The submission of a binding bid guarantee is a material condition of responsiveness with which a bid must comply at the time of bid opening. *Blakelee Inc.*, B-239794, July 23, 1990, 90-2 CPD ¶ 65. The determinative question in judging the sufficiency of any bid guarantee is whether it clearly could be enforced if the bidder subsequently defaults by failing to execute the required contract documents and providing acceptable performance and payment bonds. *Daniel R. Hinkle*, B-220163, Dec. 9, 1985, 85-2 CPD ¶ 639.

The IFB expressly authorized cashier's checks as acceptable bid guarantees. In determining the enforceability of checks, including cashier's checks, by the government, we think that the Uniform Commercial Code (UCC) should be controlling to the maximum extent practicable where not inconsistent with federal interest, law, or court decisions. *See* 62 Comp. Gen. 121, 122 (1983); 51 Comp. Gen. 668, 670 (1970); *cf. The GR Group, Inc.*, B-242570, Apr. 29, 1991, 91-1 CPD ¶ 418 (countervailing federal law governing the pledging of a U.S. Treasury Bill as a bid guarantee so that UCC provisions governing the pledging of assets were not applicable).

A cashier's check is a check drawn by a bank upon itself. Under the UCC, a cashier's check is considered accepted by the bank upon issuance, and is thus not subject to stop payment. *See* UCC § 3-410(1); *Dziurak v. Chase Manhattan Bank, N.A.*, 396 N.Y.S.2d 414 (1977), *aff'd*, 406 N.Y.S.2d 30, 377 N.E.2d 474 (1978); *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14 (Mo. 1976). That is why cashier's checks are considered a sufficient firm commitment to be an acceptable bid guarantee.[1]

The agency primarily argues that the Castle cashier's check is defective because it is made out to the Farmers Home Bureau and thus is not negotiable by FmHA. UCC § 3-203 recognizes that commercial instruments can be negotiable even where made payable to a person under a misspelled name. Minor errors in the name of a payee of a check will not affect the negotiability of the instrument so long as the payee is identified with reasonable certainty. *Hartford Acc. & Indem. Co. v. American Express Co.*, 544 N.Y.S.2d 573, 542 N.E.2d 1090 (1989); *Quantum Supplies Inc. v. Bank of the South*, 544 So. 2d 1 (La. 1989), *writ denied*, 550 So. 2d 653 (La. 1989). "To require a bank to return or refuse to accept all documents not tendered at time of presentment exactly as shown on the face [of the check] would create chaos." *Quantum Supplies, Inc. v. Bank of the South*, 544 So. 2d, at 4.

In this case, the check made payable to the order of the "Farmers Home Bureau U.S. Government" only could be a reference to the FmHA; no other federal agency has a similar name. If the check had been made payable to the

[1] This form of bid security offers many advantages over bid bonds, which are the most commonly submitted form of bid guarantee. This is so because the government has immediate access to the funds without any defenses sureties might raise. *See N.G. Simonowich*, 70 Comp. Gen. 28, B-240156, Oct. 16, 1990, 90-2 CPD ¶ 298.

United States or U.S. government alone, there is no question but that the check would have been negotiable by FmHA. In the absence of any possibility that the check could be negotiated by another entity, we perceive no reasonable circumstances where the bank would not be required to honor this cashier's check.[2] Thus, Castle's bid guarantee should have been accepted.

The agency also argues that the cashier's check was defective because it did not reference the solicitation number. We disagree. FmHA cites FAR § 28.101-4(c)(9), which provides that a defect in a bid bond not listing the United States as the obligee can be accepted so long as it correctly identifies the bidder, the solicitation number and the name and location of the project involved. By its terms, the provision only applies to bid bonds, not cashier's checks, *see* FAR § 28.001 (which defines a bond), and only applies where the bid guarantee is deficient, which is not the case here. Also, a cashier's check submitted as a bid guarantee is not required to reference the IFB number or project to be enforceable.[3] UCC § 3-112(1)(a) provides that the negotiability of an instrument is not affected by the omission of a statement of any consideration (in this case the IFB or project). *See Northwestern National Bank of Minneapolis v. Shuster,* 307 N.W.2d 767 (Mn. 1981).

The protest is sustained.

Since the repair work on three of the houses covered by this IFB has been or will soon be completed, we cannot recommend any remedial action for that portion of the IFB requirement. With regard to the remaining two houses, FmHA should make award to Castle as the low responsive bidder, if otherwise appropriate, and cancel the RFQ. Under the circumstances, Castle is entitled to its bid preparation costs on the IFB and its costs of pursuing the protest. 4 C.F.R. § 21.6(d) (1991). The protester should submit its claim for these costs directly to the agency.

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[2] The bank has confirmed that the check can be negotiated by FmHA.

[3] As discussed above, there is a fundamental difference between a cashier's check and a bid bond in that third party instruments are strictly construed in favor of the surety. *A.D. Roe, Inc.,* 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. If a bid bond did not specifically identify the project or solicitation, those instruments would be considered unacceptable since they would not clearly bind the surety or issuer to the government in the event of a default by the bidder. *See Grafton McClintock, Inc.,* B-241581.2, Apr. 17, 1991, 91-1 CPD ¶ 381.

B-244149, May 29, 1991

Procurement

Bid Protests

■ Premature allegation

■ ■ GAO review

■ ■ ■ Alternate sources

Procurement

Noncompetitive Negotiation

■ Sole sources

■ ■ Alternate sources

■ ■ ■ Qualification

Where *Commerce Business Daily* (CBD) notice announcing agency's plans to make sole-source award contains footnote 22—giving other potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements—a potential source must first timely respond to the CBD notice and receive a negative agency response before it can protest the agency's sole-source decision at the General Accounting Office (GAO). GAO will dismiss protest as premature where protest does not indicate that the protester submitted an expression of interest to the agency before filing the protest at GAO.

Matter of: DCC Computers, Inc.

Roy T. Bondurant for the protester.

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

DCC Computers, Inc. protests the Department of the Air Force's announced intent to procure XMENU software on a sole-source basis from VM Systems Group, Inc. DCC contends that the agency should compete its software requirements instead of awarding a sole-source contract.

We dismiss the protest as premature.

The agency announced the proposed sole source to VM in the April 19, 1991, *Commerce Business Daily* (CBD). The CBD synopsis referenced footnote 22 that gave potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements.

We require a protester to submit a timely expression of interest responding to a CBD notice and to receive a negative agency response as prerequisites to filing a protest challenging an agency's sole-source decision. *Keco Indus., Inc.*, B-238301, May 21, 1990, 90-1 CPD ¶ 490; *see also Mine Safety Appliances Co.*, B-233052, Feb. 8, 1989, 89-1 CPD ¶ 127. This procedure gives the agency an opportunity to reconsider its sole-source decision in light of a serious offeror's preliminary proposal, while limiting challenges to the agency's sole-source decision to diligent

potential offerors. *Fraser-Volpe Corp.*, B-240499 *et al.*, Nov. 14, 1990, 90-2 CPD ¶ 397.

DCC's May 21, 1991, protest does not indicate that it submitted an expression of interest to the agency before protesting to our Office. Consequently, DCC's protest to our Office is premature.[1]

The protest is dismissed.

B-242242.2, B-242243.2, May 31, 1991

Procurement

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

Protest of agency nonresponsibility determination filed more than 10 working days after the Small Business Administration (SBA) Regional Office finds protester ineligible for consideration under certificate of competency program because the protester is not a small business will be considered timely under the General Accounting Office (GAO) Bid Protest Regulations when filed with GAO within 10 working days of the denial of protester's timely (within 5 working days) appeal by the SBA Office of Hearings and Appeals.

Procurement

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

Agency reasonably determined protester was nonresponsible where the protester's recent contract performance on similar work was inadequate, and protester does not specifically dispute agency position.

Matter of: Pittman Mechanical Contractors, Inc.—Reconsideration

David A. Hearne, Esq., Outland, Gray, O'Keefe & Hubbard, for the protester.

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

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

[1] By our calculations, DCC has until June 3, 1991, to submit an expression of interest to the Air Force detailing its ability to provide the required software. Should the Air Force reject DCC's expression of interest and proceed with the sole-source procurement of the software, DCC may protest that determination to our Office if it still believes it has grounds for protest.

Pittman Mechanical Contractors, Inc. requests reconsideration of our decision in *Pittman Mechanical Contractors, Inc.*, B-242242; B-242243, Dec. 11, 1990, 90-2 CPD ¶ 479, in which we summarily dismissed Pittman's protests of determinations by the Department of the Navy under invitation for bids (IFB) Nos. N62470-85-B-7757 (replacement of air handling units) and N62470-87-B-8716 (installation of heater units), respectively,[1] that Pittman was not a responsible bidder.

We reverse our decisions dismissing the protests and deny the protests on the merits.

Procedural Matter

In the initial protests, Pittman stated that the Small Business Administration (SBA) had denied Pittman's requests for certificates of competency (COC) in response to its appeals of the Navy's nonresponsibility determinations on these IFBs, and that the protests were filed within 10 working days of SBA's "final decision" on these matters. We dismissed the protests because the Small Business Act, 15 U.S.C. § 637(b)(7) (1988), gives SBA conclusive authority to decide whether to issue COCs and the protester alleged none of the circumstances where our Office will review SBA's decision to deny a COC, those being SBA's fraud, bad faith, or failure to consider vital information bearing on the protester's responsibility.

On reconsideration, Pittman states that SBA declined to issue COCs because Pittman was determined to be other than a small business and, therefore, Pittman was ineligible for consideration under the COC program, notwithstanding its self-certification that it was a small business concern.[2] The SBA Philadelphia Regional Office determined that Pittman was not a small business on October 10, 1990.[3] On October 18, Pittman appealed that determination to SBA's Office of Hearings and Appeals (OHA). The appeal was denied on November 20, 1990, and Pittman thereafter filed its protests with our Office on December 4. Pittman contends that since SBA will not review the agency's nonresponsibility determinations, it is entitled to a decision by our Office.

We will review protests of agency nonresponsibility determinations, where, as here, SBA declines to issue a COC because an applicant is not a small business. *Allied Sales and Eng'g, Inc.*, B-224345, June 26, 1986, 86-2 CPD ¶ 13. The Navy asserts that Pittman's protests are untimely under the Bid Protest Regulations,

[1] Neither IFB was set aside for small businesses.

[2] In its initial protest, Pittman did not disclose the reason for SBA's refusal to issue a COC or the fact that it appealed this decision.

[3] Both IFBs contained Standard Industrial Classification (SIC) code 1711 (Plumbing, Heating and Air Conditioning) and size standard. SBA found that Pittman's average annual receipts exceeded the $7 million size standard. In considering a COC referral, SBA can review a firm's eligibility, including its size status, and need not limit its consideration to questions of the firm's responsibility raised by the agency. *Astrodyne, Inc.—Recon.*, B-231509.2, July 7, 1988, 88-2 CPD ¶ 24. Under 15 U.S.C. § 637(b)(6), SBA has conclusive authority to determine matters of small business size status for federal procurement purposes.

since they were filed more than 10 working days after the SBA Regional Office's adverse size determination. 4 C.F.R. § 21.2(a)(2) (1991).

Our Bid Protest Regulations provide that after a protester learns of the specific facts on which it bases its protest, it must file the protest within 10 days. 4 C.F.R. § 21.2(a)(2); *see Atlantic Marine, Inc.*, B-239119.2, Apr. 25, 1990, 90-1 CPD ¶ 427. In this case, Pittman elected to appeal the Regional Office's decision to OHA as was its right under applicable SBA procedures. *See* 13 C.F.R. § 121.1705(a)(1) (1991). Under SBA's regulations, appeals of size determinations apply to pending procurements when they are filed within the 5 working days of receipt of the determination. 13 C.F.R. § 121.1705(a)(2). Appeals filed within 30 calendar days, but after the 5th working day of receipt of the size determination, apply only to future procurements. *Id.*

Even though an SBA regional office size determination is effective until reversed, *Propper Int'l, Inc.; Soc'y Brand, Inc.; Bancroft Cap Co., Inc.*, 55 Comp. Gen. 1188 (1976), 76-1 CPD ¶ 400; 13 C.F.R. § 121.3-6 (1991); 53 Comp. Gen. 434 (1973), *aff'd, Dyneteria, Inc.*, B-178701, Feb. 22, 1974, 74-1 CPD ¶ 89, we do not believe that Pittman was required to protest to the General Accounting Office (GAO) while pursuing its appeal to OHA. Requiring an offeror to simultaneously conduct both appeals, with the attendant possibility of inconsistent results,[4] would unnecessarily burden the offeror as well as the government agencies involved. In our view, a prospective contractor, found to be nonresponsible by the procuring agency and not to be a small business by an SBA regional office, who elects to file a timely appeal with the SBA (within 5 working days), may protest to GAO its rejection as nonresponsible after receiving an adverse decision by OHA. Thus, any GAO protest filed by a firm also electing to file an SBA appeal within 5 working days is premature. *Eagle Design and Mgmt., Inc.*, B-239833 *et al.*, Sept. 28, 1990, 90-2 CPD ¶ 259. As discussed above, if the firm does not appeal its SBA regional office size determination to OHA within 5 working days, the resolution of that appeal will not affect the pending procurement. In that case, the regional office's determination is conclusive for the pending procurement and must be protested to GAO within 10 working days to be timely.

In this case, Pittman filed its OHA appeal within 5 working days of receipt of the regional office determination. Pittman then filed its GAO protests within 10 working days of its receipt of SBA's OHA decision denying its appeal. Under the circumstances, we consider Pittman's protests to be timely filed. 4 C.F.R. § 21.2(a)(2).

[4] Pittman's filing of a timely 5-working-day appeal with SBA opened the door to the possibility of both a reversal of the Regional Office's adverse size determination and the granting of COCs applicable to the pending procurements. If Pittman had also protested the nonresponsibility determinations to our Office at the same time it filed an SBA appeal, our Office could have denied Pittman's protest, finding that the agency reasonably found Pittman not responsible, only to have SBA subsequently issue COCs, which would have the effect of determining Pittman responsible and requiring awards to it.

Merits

Pittman contends that the Navy's negative determinations of responsibility are based improperly on interim unsatisfactory performance evaluations that Pittman received from the Department of the Army on a single recent contract. Pittman argues that its experience on that $1,093,000 Army contract is inapposite to its ability to perform the current work for which it was found nonresponsible, since the Army contract required extensive subcontracting, subcontract administration and scheduling on Pittman's part. Pittman contends that the current work is of significantly lesser value—$146,100 (replacement of air handling units) and $31,000 (installation of heater units). Pittman claims the work under these IFBs will not require subcontracting and will be relatively simple to administer.

The Federal Acquisition Regulation (FAR) provides that contracts shall be awarded only to responsible contractors. FAR § 9.103(a). In order to be found responsible, a prospective contractor must have a satisfactory performance record. FAR § 9.104-1(c). In particular, a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. FAR § 9.104-3(c). A nonresponsibility determination may be based upon the procuring agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default or the contractor disputes the agency's interpretation of the facts or has appealed an agency's adverse determination. *See Becker and Schwindenhammer, GmbH*, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235; *Firm Reis GmbH*, B-224544 *et al.*, Jan. 20, 1987, 87-1 CPD ¶ 72. In our review of nonresponsibility determinations, we consider only whether the negative determination was reasonably based on the information available to the contracting officer at the time it was made. *Becker and Schwindenhammer, GmbH*, B-225396, *supra*.

The Navy reports that its negative determinations of Pittman's responsibility are not based simply on Pittman's prior performance on one contract. Rather, the Navy based its determinations on a review of Pittman's performance history on four government contracts (two Navy contracts and two Army contracts), which disclosed untimely performance,[5] ineffective management,[6] and a failure to comply with labor standards.[7] The Navy also considered the Army's recent

[5] On contract No. N62470-88-C-2618, the Navy accepted Pittman's work as "useably complete" on December 2, 1989, but more than a year later Pittman had not completed the punchlist items. On contract No. N62470-89C-5481, Pittman began work 4 days before the completion date and completed the work 35 days late.
[6] On contract No. N62470-88-C2618, Pittman was late in tendering critical submittals, tendered foreign made materials when domestic materials were required, failed to keep its site superintendent on site, and improperly incorporated used materials into the work. On contract No. N62470-89C-5481, Pittman again encountered in the areas of submittals, performance of the site superintendent, and untimely completion of punchlist items.
[7] On both contract Nos. N62470-88-C-2618 and N62470-89C-5481, the Navy found Pittman classifying and paying its employees as if they were laborers when the employees were actually performing the work of higher paid mechanics. Pittman also failed to pay its employees the proper overtime rates. The Navy is withholding approximately $300,000 in payments due Pittman on account of its labor violations.

ermination for default of Pittman under Army contract No. DACA65-88-C-0115 for failure to timely complete the work. In its comments on the Navy's report, Pittman does not dispute the seriousness of the reported deficiencies in its performance. Based on our review of the record, the Navy's nonresponsibility determinations were documented and reasonable.

Pittman's comments on the report focus entirely on a letter contained in the agency report that, in Pittman's view, shows the Navy is engaged in a *de facto* suspension or debarment of Pittman. A Navy employee, an Assistant Resident Officer in Charge of Construction, wrote the letter to SBA in response to SBA's request for information on Pittman's responsibility. The letter describes Pittman's recent unsatisfactory performance, and includes the lines:

> I would strongly discourage award of any contracts to Pittman based on my personal experience. Is there something that can be done if they are proposed subcontractors?

Pittman argues that the letter and the Navy's several negative determinations of Pittman's responsibility show that the Navy has *de facto* debarred or suspended Pittman without affording Pittman the procedural due process rights of FAR subpart 9.4. However, we recently considered and rejected this argument in our decision, *Pittman Mechanical Contractors, Inc.*, B-242499, May 6, 1991, 91-1 CPD ¶ 439, which found that Pittman was not *de facto* debarred.[8] We see no reason to again consider this matter.

The dismissal is reversed and the protest is denied.

[8] We rejected the argument because the Navy found Pittman nonresponsible on four similar construction services contracts in the past year (including the two solicitations under consideration here) after a comprehensive review of current information on Pittman's responsibility. We noted that the Navy was currently considering the initiation of debarment proceedings against Pittman under FAR subpart 9.4, and found the Navy employee's statement to SBA nothing more than a properly reported personal observation based on the employee's actual experience with the contractor.

Appropriations/Financial Management

Civilian Personnel

Relocation
■ Miscellaneous expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Licenses

A transferred employee claimed the cost of new driver's licenses for himself and his wife as a miscellaneous expense under section 302-3.1(b) of the Federal Travel Regulation. The agency permitted the inclusion of only one license. The cost of both are to be included as allowable expenses. *George M. Lightner,* B-184908, May 26, 1976.

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■ Miscellaneous expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Litigation expenses

A transferred employee attempted to cancel a residence purchase contract entered into prior to notice of transfer and retrieve his earnest money deposit. As a result of court action initiated by the seller, the court concluded that the earnest money deposit had been forfeited to the seller for breach of contract, and awarded the seller judgment for an additional amount as liquidated damages to cover expenses and lost rental income. The forfeited deposit as well as the liquidated damages and court costs may be included as miscellaneous expenses under section 302-3.1(c) of the Federal Travel Regulation because the transfer to the new duty station was the proximate cause of those expenses. *Cf. Steven W. Hoffman,* B-184280, May 8, 1979.

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■ Miscellaneous expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Post-office box

A transferred employee rented a post office box at his new duty station for a short period until he established a residence at that location and claimed the cost as a miscellaneous expense under section 302-3.1(b) of the Federal Travel Regulation. Since the purpose for the allowance is to help defray the extra expenses incurred during the transitional period when a residence is discontinued at the old station and a residence is established at the new station, the short-term post office box rental qualifies as an allowable miscellaneous expense. B-163107, May 18, 1973, and *George M. Lightner,* B-184908, May 26, 1976, are overruled in part.

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■ Miscellaneous expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Telephone calls

A transferred employee's claim for telephone calls as allowable miscellaneous expenses under section 302-3.1(b) of the Federal Travel Regulation (FTR) was disallowed by the agency in its entirety. Such expenses may be allowed or disallowed depending on the purpose for the calls. Where telephone calls concern a matter which would itself be allowable elsewhere in the FTR, *e.g.*, real estate transactions, telephone calls regarding it are includable as a miscellaneous expense. *Timothy R. Glass*, 67 Comp. Gen. 174, 177 (1988).

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Travel
■ Overseas travel
■■ Tour renewal travel
■■■ Dependents

Under 41 C.F.R. § 302-1.4(e) (1990), an employee's daughter is a member of his household where he and his former spouse have joint legal and physical custody of their daughter and she resides with him more than 50 percent of the time. Therefore, the employee may be reimbursed for his daughter's travel costs incurred in connection with his overseas tour renewal agreement travel.

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Procurement

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

The General Accounting Office will not reconsider the conclusion in a prior decision sustaining a protest on the basis that the offers of the interested party and protester were technically equal such that award should be made to the protester as the offeror with the lower evaluated cost, where the agency and interested party now argue that the two firms' proposals are not equal yet fail to identify a single technical difference.

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■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

The General Accounting Office will not reconsider the conclusion in a prior decision sustaining a protest on the basis that the offers of the interested party and protester were technically equal such that award should be made to the protester as the offeror with the lower evaluated cost, where the agency and interested party now argue that the two firms' proposals are not equal yet fail to identify a single technical difference.

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■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

The General Accounting Office will not reconsider prior decision sustaining a protest where the agency and interested party request reconsideration on the basis that the contracting officer's cost realism adjustments were based upon audit advice of the Defense Contract Audit Agency (DCAA) and that the contracting officer had no reason to know, at the time of the award, that DCAA's advice was erroneous, where these new arguments and information are inconsistent with the arguments and information provided during the initial consideration of the protest, and could have and should have been raised at that time. In any event, a contracting officer's cost realism determination may not reasonably be based upon erroneous DCAA audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.

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

Lower priced offeror timely filed protest of agency's cost evaluation and technical/cost tradeoff within 10 days of its receipt of information under a Freedom of Information Act request pertaining to the awardee's prices; however, protest is untimely to the extent that it touches on the protester's objections to the agency's technical evaluation and technical ranking of its proposal because it was

not filed within 10 days of an agency debriefing disclosing the specific deficiencies in the protester's technical proposal.

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■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Protest of agency nonresponsibility determination filed more than 10 working days after the Small Business Administration (SBA) Regional Office finds protester ineligible for consideration under certificate of competency program because the protester is not a small business will be considered timely under the General Accounting Office (GAO) Bid Protest Regulations when filed with GAO within 10 working days of the denial of protester's timely (within 5 working days) appeal by the SBA Office of Hearings and Appeals.

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■ **Premature allegation**
■■ **GAO review**
■■■ **Alternate sources**

Where *Commerce Business Daily* (CBD) notice announcing agency's plans to make sole-source award contains footnote 22—giving other potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements—a potential source must first timely respond to the CBD notice and receive a negative agency response before it can protest the agency's sole-source decision at the General Accounting Office (GAO). GAO will dismiss protest as premature where protest does not indicate that the protester submitted an expression of interest to the agency before filing the protest at GAO.

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

Agency properly exercised its discretion in determining awardee's technical superiority to be worth its higher cost under an evaluation scheme that accorded equal weight to costs and to technical factors.

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■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

An agency may not reject protesters' low fixed-price proposals for proposing unrealistically low professional compensation packages, where the agency did not discuss the matter with those firms, the

technical evaluation criteria specifically encompassed the adequacy of professional compensation packages, and the agency advised the protesters that their offers were technically acceptable.

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■ **Discussion**
■■ **Offers**
■■■ **Clarification**
■■■■ **Propriety**

Protest is sustained where agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis.

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■ **Offers**
■■ **Cost realism**
■■■ **Evaluation errors**
■■■■ **Allegation substantiation**

The General Accounting Office will not reconsider prior decision sustaining a protest where the agency and interested party request reconsideration on the basis that the contracting officer's cost realism adjustments were based upon audit advice of the Defense Contract Audit Agency (DCAA) and that the contracting officer had no reason to know, at the time of the award, that DCAA's advice was erroneous, where these new arguments and information are inconsistent with the arguments and information provided during the initial consideration of the protest, and could have and should have been raised at that time. In any event, a contracting officer's cost realism determination may not reasonably be based upon erroneous DCAA audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.

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■ **Offers**
■■ **Evaluation**
■■■ **Prices**
■■■■ **Additional work/quantities**

Agency price evaluation that only considered the total cost of a sample task, rather than the total contract cost, on a solicitation for an indefinite quantity of services under a delivery order contract was proper, where the sample task provided a common basis for cost evaluation under a solicitation that did not specify labor classifications or labor hours because of the uncertainty of the tasks that may be ordered during the contract and the agency's desire to use offerors' existing organizational structure and approaches, and where the task is typical of work under the contract.

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lenied where applicable regulations do not require such a specific time period and the provision is itherwise reasonable.

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

Agency reasonably determined protester was nonresponsible where the protester's recent contract performance on similar work was inadequate, and protester does not specifically dispute agency position.

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Noncompetitive Negotiation
■ Contract awards
■■ Sole sources
■■■ Justification
■■■■ Procedural defects

Protest is sustained where agency's justification for proposed sole-source award under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not based on evidence that establishes the reasonableness of its determination that only one known source can meet the government's needs.

497

■ Offers
■■ Sole sources
■■■ Clarification
■■■■ Propriety

Protest is sustained where agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis.

459

■ Sole sources
■■ Alternate sources
■■■ Qualification

Where *Commerce Business Daily* (CBD) notice announcing agency's plans to make sole-source award contains footnote 22—giving other potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements—a potential source must first timely respond to the CBD notice and receive a negative agency response before it can protest the agency's sole-source decision at the General Accounting Office (GAO). GAO will dismiss protest as premature

where protest does not indicate that the protester submitted an expression of interest to the agency before filing the protest at GAO.

534

Sealed Bidding
■ Bid guarantees
■■ Responsiveness
■■■ Checks
■■■■ Adequacy

Bid guarantee in the form of a cashier's check to the order of "Farmers Home Bureau, U.S. Government" on a construction services solicitation issued by the Farmers Home Administration is an acceptable firm commitment to the government since there is no doubt that the check can be negotiated by the agency in the event of a default by the bidder.

530

■ Invitations for bids
■■ Defects
■■■ Signature lines
■■■■ Omission

Protest is sustained where solicitation's Certificate of Procurement Integrity failed to provide a signature line, which reasonably misled bidders to believe a separate signature on the certificate was not required.

502

■ Invitations for bids
■■ Terms
■■■ Options

Protest of solicitation's renewal clause, which does not require agency to give contractor preliminary notice of its intent to exercise contract option by a specified time before contract expiration, is denied where applicable regulations do not require such a specific time period and the provision is otherwise reasonable.

494

■ Invitations for bids
■■ Terms
■■■ Risks

Protest alleging that agency's omission from solicitation of Variation in Quantity clause, which limits circumstances under which government will accept variation in quantity, subjects contractor to unreasonable risk of work load fluctuations is denied; since clause is not intended to protect the contractor in the event of work load fluctuations, omission of clause does not impose additional risk on contractor.

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