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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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B-239141.2, November 5, 1990

Procurement

Specifications

■ Minimum needs standards

■ ■ Total package procurement

■ ■ ■ Propriety

An agency's decision to procure its immediate minimum need for modification kits and associated engineering services to upgrade jet engines on a total package basis rather than break out components for separate competitive procurements will not be disturbed where the agency reasonably determined that due to the magnitude and complexity of the upgrade program the purchase of the kits and engineering services on a total package basis is essential to maintain standardization and configuration control of the parts.

Procurement

Noncompetitive Negotiation

■ Use

■ ■ Approval

■ ■ ■ Justification

Protest that noncompetitive procurement is improper because it resulted from lack of advance planning is denied where record shows that agency's decision to procure on a sole-source basis was reasonable.

Matter of: Electro-Methods, Inc.

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

Kent R. Morrison, Esq., Crowell and Moring, for United Technologies Corp., Pratt & Whitney, Government Engine Business, Robert F. Kearns for B.H. Aircraft Company, Inc., and Randall Finley for Kitco, Inc., interested parties.

Paul S. Davison, Esq., and Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.

Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Electro-Methods, Inc. (EMI) protests the proposed award of a sole-source contract to United Technologies Corporation, Pratt & Whitney, Government Engine Business (Pratt & Whitney), under request for proposals (RFP) No.

F41608-90-R-72838, issued by the Department of the Air Force for modification kits to upgrade various configurations of the F100-PW-100 and F100-PW-200 jet engines which are used on F-15 and F-16 jet fighters. The protester asserts that the individual components of the kit should be procured competitively, and that the solicitation is defective for failing to include complete technical drawings and specifications for each of the approximately 900 parts which make up the various kits. EMI also questions the propriety of the Air Force's sole-source procurement of the kits primarily because it believes the sole-source was the result of the lack of advance planning.

We deny the protest.

The RFP was issued on March 2, 1990 and is for a fixed-price requirements contract for a 3-year base period with two 1-year options. In addition to the kits, the requirement is for support equipment, logistics engineering services, and program management data. Pratt & Whitney was the only named source in the RFP. Pratt & Whitney was the only offeror to submit a proposal in response to the RFP. On July 12, after the Air Force issued the Justification and Approval (J&A) for a noncompetitive sole-source award to Pratt & Whitney, EMI filed this protest.

EMI essentially challenges the Air Force's use of a total package approach and argues that the bundling of the kits, support equipment and engineering services in a solicitation requiring an all-or-none offer is unduly restrictive of competition. EMI contends that the Air Force lacks a reasonable basis for restricting competition and instead should make separate line item awards for individual parts or kits, since the parts in question are not manufactured by Pratt & Whitney. EMI maintains that there are numerous other vendors, including EMI, which have provided some or all of the parts listed in the modification kits in the solicitation. EMI maintains that the Air Force can consolidate components after they are acquired into kits or separately contract to have this done. In the alternative, EMI contends that even if the kits rather than the individual parts are purchased, the kits can be purchased from sources other than Pratt & Whitney. EMI also argues that there is no reason for the Air Force to combine a contract for engineering services with the purchase of kits that can otherwise be competed. In EMI's view, there is no need for the Air Force to purchase any engineering services relating to this installation effort and subsequent engine performance since the kits are not a developmental item.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2301(a) (1988), generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. Where, as here, the protester contends that acquiring certain items as part of a total package rather than breaking them out unduly restricts competition, we will object only where the agency's choice of a total package approach as necessary to meet its minimum needs lacks a reasonable basis. *See Eastman Kodak Co.*, 68 Comp. Gen. 57 (1988), 88-2 CPD ¶ 455.

The agency explains that the original F-100 and F-200 engines were manufactured by Pratt & Whitney. There are currently at least 16 configurations of the F-100 engine and eight configurations of the F-200 engine. The upgrade program calls for the remanufacture of the various configurations of the Pratt & Whitney engine into a single configuration. The new engine configuration is considered to be more reliable, maintainable, and durable which will reduce unscheduled engine removal rates and maintenance man-hours. The upgraded engine also will provide an improved margin of flight safety, increase operational capabilities and offer unrestricted throttle movement for both the F-15 and F-16 aircraft. This upgrade program is the result of an engineering change proposal submitted by Pratt & Whitney.[1] Under the program, the Air Force expects to purchase some 33 different kits consisting of 900 different parts and 3500 individual components.

The upgrade program has been divided into two phases. This solicitation represents Phase I. Phase I is to be a sole-source contract with Pratt & Whitney to upgrade a maximum of 439 engines, 234 part modules, support equipment, ratable pool parts, logistics engineering services and program management data (about 14 percent of the total program requirement).[2] Installation of the kits will be accomplished by Air Force personnel.

Phase II represents the purchase of the kits to upgrade the remaining 2232 engines. The Air Force, at this time, proposes to accomplish Phase II with three separate contracts. Sole-source contracts will be awarded to the actual manufacturers of the high value components and a competitive contract will be awarded for the remaining items. The Air Force states that if it is in a position to award Phase II ahead of schedule and can obtain deliveries from the actual manufacturers so as not to delay the modification kit installations, then the Air Force may elect to order fewer than the designated maximum quantities under Phase I from Pratt & Whitney and move toward an early breakout strategy.

The Air Force reports that the upgrade program will significantly enhance the user's operational capability and that, in order to maximize savings and safety benefits associated with the upgrade, an accelerated schedule for kit installation is necessary to meet the user's requirement for a more reliable and maintainable engine. The Air Force maintains that if it fails to meet the delivery schedule it runs the risk of having idle engines waiting for upgrade which equates to planes in the field without engines. The Air Force believes that due to the complexity of the engine modification and the large volume of parts (over 900 line items and 3500 individual parts) it would be impossible to buy these parts on an individual part basis and not experience delinquent deliveries and disruption of the repair line. It is undisputed that certain key items, for example, controls, have long lead times and that only Pratt & Whitney which currently produces

[1] In 1985, the Air Force, as a part of a test program, modified 41 F-100 engines and because of the success of that program decided to upgrade the entire fleet of F-100 and F-200 engines.

[2] On July 12, 1990, the Air Force issued a Justification and Approval (J&A) authorizing negotiations with Pratt & Whitney for the requirements on a noncompetitive basis pursuant to 10 U.S.C. § 2304(c)(1) (1988). The J&A further provided that Foreign Military Sales requirements will be procured pursuant to 10 U.S.C. § 2304(c)(4).

the engine has contracts in place with the manufacturers of the controls which will ensure timely delivery. Most importantly, the Air Force states that the purchase of kits improves the Air Force's ability to ensure that each engine is modified to a standard configuration. Each kit will be identified in the Air Force's warehouse system with a single part number to facilitate standardized installation. According to the Air Force, if the kit components were only identified as individual items, the task of integrating them into the upgrade process, particularly at the outset, would be nearly impossible. The Air Force also reports that every kit contains parts to which the government does not currently have data rights. The Air Force estimates that it has unlimited rights on 42 percent of all the parts that are in the kit and while some additional data which the Air Force has rights to is still being delivered, it cannot be made available within the necessary timeframe for Phase I.[3]

The Air Force also maintains that the purchase of logistic engineering services related to the kit installation is necessary in the early stages of the program because the installation of the kits into the older engines may require design changes. Specifically, old engine parts must be inspected, reoperated, and integrated with other ongoing engineering changes. As a result, kit configuration and upgrade procedures may change.

Essentially, EMI argues that given time and an opportunity to compete, EMI can supply all of the kits solicited by the Air Force. EMI maintains, however, that the Air Force unreasonably required offerors to supply every item of material—all kits, parts, and engineering services.

Use of a total package approach is consistent with the CICA requirement that specifications of an agency's needs achieve full and open competition, where the agency reasonably shows that one integrated contract is necessary to meet its needs. *LaBarge Prods., Inc.,* B-232201, Nov. 23, 1988, 88-2 CPD ¶ 510. Here, while the protester disagrees with the Air Force's position, the record does not show that the agency's decision to use the total package approach was unreasonable.

In view of the fact that this procurement is for the upgrade of the engines and not for the acquisition of spare parts, we find persuasive the Air Force's argument that a total package approach is necessary to ensure that each engine will be modified to a standard configuration. *See Batch-Air, Inc.,* B-204574, Dec. 29, 1981, 81-2 CPD ¶ 509. We find nothing in the record to indicate that this decision was made purely for the administrative convenience of the government. Rather, it appears that procurement by a total package approach for the initial quantity was viewed as the most logical and efficient method of procuring the various kits and services to accomplish the engine upgrade effort in the most expeditious manner. Given the critical schedule demands, the complexity of the upgrade program and the volume of parts involved, we find reasonable the Air Force's determination that buying, storing, and issuing the parts on an individ-

[3] The Air Force states that the scheduling of deliveries is necessary to achieve the cost-saving and safety objectives of the program.

ual basis would require an excessive effort and would jeopardize the installation schedule and flow of engines through the depot facility. The protester presents no evidence to show otherwise.

We also find the Air Force's reason for including logistic engineering services in the requirement valid. As previously stated, the purpose of this procurement is to upgrade the engines into one standard configuration. In the initial stages of the program the kits will be installed in older configuration engines and design changes are anticipated. We agree that the offeror supplying the kits is in the best position to satisfy the Air Force's need for a single contractor to monitor and evaluate problems arising in the installation effort and subsequent engine performance.

Finally, the record indicates that under this procurement the Air Force is purchasing 14 percent of its total requirements to meet only its immediate needs. In fact, the Air Force states that if it is in a position to award Phase II (in which kit components will be obtained competitively, except for those which remain proprietary and must be procured on a sole-source basis) ahead of schedule and obtain deliveries so as not to delay the kit installations, then the Air Force may elect to order fewer than the designated maximum quantities from Pratt & Whitney and move toward an early breakout strategy.

In presenting its arguments on the total package issue, EMI also questions the propriety of the Air Force's decision to procure this initial quantity on a total package, sole-source basis. EMI specifically argues that the requirement for a total package, noncompetitive approach resulted from a lack of advance planning by the agency.

The record shows that the agency did furnish Pratt & Whitney a draft RFP in October 1989 and discussed aspects of the requirements with Pratt & Whitney during that time. The agency knew at that time that: (1) Pratt & Whitney had successfully modified the engines previously; (2) Pratt & Whitney had access to all necessary drawings, technical data packages and had ongoing subcontracts with key suppliers; and (3) Pratt & Whitney, as the original equipment manufacturer, was the most likely firm to perform the engineering services support for the limited Phase I requirements on a timely basis with the least risk. While, in hindsight, it could be argued that the agency should have more quickly sought to develop other sources for the requirements, we think the agency's belief that Pratt & Whitney was the only contractor who could perform the work within the time constraints was reasonable because Pratt & Whitney had contracts in place with suppliers even before the agency contacted the firm concerning its requirements. We therefore find no violation of statute or regulation concerning advance planning.

The protest is denied.

B-240351, B-240351.2, November 7, 1990

Procurement

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

Protest challenging determination not to evaluate subcontractor experience under corporate experience criterion is denied where request for proposals (RFP) did not provide for inclusion of subcontractor's experience under corporate experience and it was necessary for the contractor to possess relevant corporate experience in order to assure satisfactory performance of the contract.

Procurement

Competitive Negotiation
■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Competitive range of one is unobjectionable where agency reasonably determined that due to initial substantial scoring and price differential the excluded firms lacked a reasonable chance for award.

Matter of: Technology and Management Services, Inc.

Jacob B. Pompan, Esq., Pompan, Ruffner & Bass, for the protester.

Thomas S. Bustard, for Energetics, Incorporated, an interested party.

Patricia D. Graham, Esq., Department of Energy, for the agency.

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

Technology and Management Services, Inc. (TMS) protests the rejection of its offer and the subsequent award to Energetics, Incorporated, under request for proposals (RFP) No. DE-AC01-89EH89030, issued by the Department of Energy (DOE) for technical and analytical support services. TMS challenges its exclusion from the competitive range, arguing that the agency improperly failed to consider subcontractor experience when evaluating corporate experience.

We deny the protest.

The RFP provided for award of a cost-plus-fixed-fee, level-of-effort contract to the responsible offeror submitting the proposal most advantageous to the government. The solicitation advised that technical factors would be of greater importance than cost and listed three technical evaluation criteria: technical approach, personnel/management resources, and corporate experience. According

to the solicitation, the first criterion was 10 percent more important than the second and third, which were of equal importance.

Six firms submitted offers in response to the RFP. Energetics received the highest technical score, 800 of 1,000 available points, and proposed the third lowest cost, $3,932,089, while TMS received the third highest technical score, 460 total points, and proposed the highest cost $4,736,264. The three proposals rated technically acceptable were as follows:

	Technical Approach	Personnel/ Management	Corporate Experience	Total
Total Possible	400	300	300	1,000
Energetics	280	260	260	800
S. Cohen & Associates	160	180	180	520
TMS	160	210	90	460

Although DOE determined these three proposals to be technically acceptable, it established a competitive range of only Energetics on the basis of Energetics' significant advantage with respect to technical rating—Energetics' score was approximately 54 percent higher than S. Cohen's and 73 percent higher than TMS'—and the fact that its cost was $95,223 lower than S. Cohen's and $804,175 lower than TMS'. DOE concluded that even if S. Cohen and TMS were given an opportunity to respond to discussions, they would not likely be able to increase their technical ratings and reduce their proposed costs to the point where they would be in line for award; in other words, the agency determined that S. Cohen and TMS lacked a reasonable chance for award.

After establishing a competitive range of Energetics, the agency conducted discussions with the firm and requested a best and final offer (BAFO). Based upon evaluation of the BAFO, which offered a further $258,745 reduction in cost, the contracting officer determined that the technical superiority of Energetics' proposal and its evaluated cost provided assurance that the firm would successfully provide high quality work in a cost efficient manner. The agency thus made award to Energetics.

TMS primarily argues that DOE improperly excluded subcontractor experience from its scoring of TMS under the corporate experience criterion. The RFP advised under the criterion for corporate experience that:

> The offeror will be evaluated on its experience in service contracting with the Federal Government and others; related experience to the generic work areas described in the Statement of Work; experience within the past 5 years in planning and support effort to Headquarters type organizations; experience in nuclear and nonnuclear technologies; and familiarity with . . . environmental and health regulatory issues as shown in the Statement of Work.

TMS notes that the RFP's instructions for the preparation of proposals required offerors to describe in the section of their proposals in which corporate experience was to be discussed, "the specific roles of subcontractors, if any." According to the protester, in the absence any provision limiting the relevant experience to that of the offeror itself, the only reasonable interpretation of the expe-

rience criterion is that subcontractor experience would be considered. The protester points out that during the evaluation of initial proposals certain evaluators initially interpreted the RFP as did TMS, and included subcontractor experience in their scoring of TMS for corporate experience; these evaluators subsequently rescored TMS' proposal to eliminate consideration of subcontractor experience. In view of the evaluators' initial scoring, TMS maintains, the agency should have clarified the RFP to notify all offerors of the basis for evaluation.

We find that the corporate experience evaluation was consistent with the plain meaning of the RFP.

Preliminarily, the record shows DOE had a need for a contractor with relevant corporate experience, and thus had a basis for evaluating corporate experience apart from subcontractor experience. The statement of work calls for extensive technical and analytical support services, some to be provided on a quick response basis, concerning the environmental issues raised by programs dealing with such technical and complex areas as nuclear and nonnuclear energy research and development, and hazardous and nuclear wastes. The agency determined that, in light of these complexities, it is necessary for the contractor itself to possess relevant corporate experience; a lack of experience would necessarily impair its ability to oversee and manage tasks and perform them if a subcontractor is unavailable. Thus, while in some cases we have allowed agencies to give credit for other experience to satisfy corporate experience requirements, *see, e.g., AeroVironment, Inc.*, B-233112, Apr. 3, 1989, 89-1 CPD ¶ 343, the agency here had legitimate reasons for concluding that the offeror itself must possess relevant corporate experience in order to assure successful performance of the contract. *Jim Welch, Inc.*, B-233925.2, July 12, 1989, 89-2 CPD ¶ 34.

We think the RFP provided, with sufficient clarity, for evaluation only of an offeror's own experience under the corporate experience criterion. The RFP advised that the "offeror will be evaluated on *its* experience" (italic added), and included no mention of subcontractors or their experience under the corporate experience criterion in the statement of evaluation factors. The reference in the RFP's proposal preparation instructions to "the specific roles of subcontractors, if any," was made only in connection with the requirement for submission of an organizational chart and was not sufficient to change the plain meaning of the other clear references to an offeror's own experience. In this regard, the proposal preparation instructions specifically relating to corporate experience required that "the offeror" provide a discussion of recent experience, without mention of subcontractor experience.

In order for an interpretation of a solicitation provision to be reasonable, it must be consistent with the solicitation when read as a whole and in a reasonable manner. *Aerojet Ordnance Co.*, B-235178, July 19, 1989, 89-2 CPD ¶ 62. Applying this standard, TMS' interpretation of the corporate experience criterion as providing for consideration of subcontractor experience was not reasonable.

We think the RFP sufficiently indicated that the offeror's own experience was the focus of the corporate experience evaluation.[1]

Our view of the RFP language notwithstanding, moreover, it is not apparent how putting TMS on more specific notice that subcontractor experience would not be considered would have had any effect on the outcome here. Advising offerors that subcontractor experience would not be considered would leave DOE to consider only TMS' own corporate experience, which is just what DOE did. As corporate experience is a characteristic that an offeror generally cannot change for purposes of an evaluation, we fail to see how TMS could have improved its evaluation score with the notice it requests.

Although we think DOE properly evaluated TMS' proposal for corporate experience, it does not appear that increasing TMS' score under this criterion would change the outcome of the procurement in any case. Even if TMS received the maximum possible score for corporate experience (300 points), the only aspect of the evaluation at issue, the firm would have had an overall technical score of only 670, still 130 points below Energetics' score of 800. While TMS generally contends it was deprived of an opportunity to improve its technical proposal and reduce its proposed cost through discussions, it does not allege any specific areas under the remaining two evaluation criteria where either the evaluation was deficient or TMS could have improved its score sufficiently to overtake the awardee. Nor does the protester allege any specific areas where it would have decreased its proposed cost, which was $1,073,417 higher than the proposed cost upon which the award was based. Absent some indication that TMS' competitive position would change, DOE's scoring of TMS' corporate experience would not provide a basis for disturbing the award. *See Empire State Medical, Scientific and Educ. Found., Inc.,* B-238012, Mar. 29, 1990, 90-1 CPD ¶ 340.

TMS further complains that the competitive range determination was improper because it failed to include all responsible offerors whose proposals were technically acceptable. However, even a proposal which is technically acceptable or susceptible of being made acceptable may be excluded from the competitive range if, relative to all proposals received, it does not stand a real chance of receiving the award. *Hittman Assoc., Inc.* 60 Comp. Gen. 120 (1980), 80-2 CPD ¶ 437; *McMahon & Sons,* B-224226, Feb. 5, 1987, 87-1 CPD ¶ 119. Such was the case here. Further, while we carefully scrutinize decisions which result in a competitive range of one, such decisions are unobjectionable where, as is the case here, the agency reasonably determined that the excluded firms lacked a reasonable chance of being selected for award. *See Inst. for Int'l Research,* B-232032, Mar. 15, 1989, 89-1 CPD ¶ 273.

The protest is denied.

[1] It is not clear why certain evaluators initially looked at TMS' subcontractor experience; it appears they may have simply mistakenly extended their consideration of subcontractors under other portions of the evaluation where subcontractor information was to be reviewed. In any case, DOE subsequently realized that this was inappropriate based on the plain language of the corporate experience criterion, and the scoring was corrected accordingly (while proposals were rescored to correct other discrepancies).

B-240357, November 8, 1990

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Point ratings

Under solicitation for design and construction of a commissary, evaluation and assignment of points for innovative design features is proper, notwithstanding solicitation's general description of desired commissary as one operated and designed under standards similar to those found in commercial food stores, where solicitation provided that offerors would receive quality points for innovative or creative proposals and there is no language in the evaluation criteria requiring that design features meet only commercial food store standards.

Procurement

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

Where solicitation provided that the lowest priced offeror would not necessarily receive award, and that the award would be based on the combination of technical merit and price which is most advantageous to the government, agency properly awarded to higher priced offeror since agency reasonably determined that the technical advantage associated with higher-rated proposal warranted the price premium.

Matter of: Shirley Construction Corporation

Daniel R. Weckstein, Esq., Vandeventer, Black, Meredith & Martin, for the protester.

Craig R. Schmauder, Esq., and Linda J. Selinger, Esq., Department of the Army, for the agency.

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

Shirley Construction Corporation protests the award of a contract to Donohoe Construction Company under request for proposals (RFP) No. DACA65-90-R-0001, issued by the Army Corps of Engineers, Department of the Army, Norfolk District, for the design and construction of a commissary at Fort Eustis, Virginia. Shirley alleges that the agency failed to follow the RFP evaluation criteria in evaluating proposals, and that Shirley should have received the award as the lowest priced, technically acceptable offeror.

The RFP, issued on November 17, 1989, contemplated the award of a firm, fixed-price contract and sought prices and technical proposals for the design and construction of a commissary. Prior to the closing date for receipt of proposals, the agency issued six amendments to the solicitation.

Parts I and II of the RFP, as amended, described how the proposals would be evaluated in order to determine the successful offeror. Specifically, amendment No. 1 indicated that the government would award a contract to the most advantageous proposal considering price, technical, and other factors. With regard to price, the RFP advised offerors that the government may award the contract to an offeror who is not the low offeror if the higher priced proposal is sufficiently more advantageous than the lower priced offer.

Amendment No. 1 also described the factors that the agency would use in the technical evaluation. The following four technical evaluation criteria were listed in descending order of importance: (1) fundamental and aesthetic design; (2) building and site engineering; (3) offeror qualifications; and (4) total time of performance. Each of these criteria contained subcriteria, which were also identified in descending order of importance.

The solicitation established few minimum requirements, and advised offerors that innovative, creative, or cost-saving proposals that met or exceeded the requirements were encouraged. It also stated that offerors who submitted such proposals would receive quality points.

The agency received six proposals by the January 17, 1990, closing date. After it evaluated the proposals, the technical evaluation team decided that four of the six offerors, including Donohoe and Shirley, were in the competitive range. Discussions were held with these four offerors and a request for best and final offers (BAFO) was issued with a March 29 due date. Based on the findings and recommendations of the technical evaluation team, the Source Selection Board recommended that the award be made to Donohoe, the technically superior, third-low offeror, because it would be most advantageous to the government. The agency awarded the contract to Donohoe on June 22. Shirley filed a protest in our Office on July 9 and was formally debriefed by the agency on July 12.

Commercial Food Store Standards

Shirley challenges the agency's evaluation of Donohoe's proposal, arguing that the agency improperly considered and then arbitrarily assigned Donohoe additional points for features that normally are not found in commercial food stores. Shirley alleges that such an evaluation is inconsistent with the solicitation's general description of the project, which states that "[t]he primary purpose of the commissary is to provide grocery items . . . in a facility designed and operated under standards similar to those found in commercial food stores." In essence, the protester contends that it prepared its offer based on the view that—by calling for the design to be based on commercial store standards—the agency was not interested in an upgraded design with features exceeding those found in commercial stores.

The protester's position gives greater significance to the reference to commercial store standards in the RFP's general project description than is warranted when the RFP is viewed as a whole. The RFP clearly did not require that the

designs proposed be limited to those found in commercial stores. The agency specifically drafted the RFP to encourage offerors to meet or exceed the RFP's minimum requirements and to investigate alternate approaches that may yield a high level of technical quality while maintaining reasonable construction, operating, and maintenance costs. Even the general project description on which the protester relies states only that the agency desires a facility "designed and operated under standards *similar to* those found in commercial food stores." (Italic added.) By setting out minimum requirements only, and advising offerors that additional points would be given for innovative proposals, the RFP clearly encouraged offerors not to be bound by any particular design approach.

With regard to the specific areas of the awardee's proposal which the protester challenges, the record shows that the agency's evaluation was reasonable. While Shirley challenges the agency's decision to assign additional points for retention of trees in Donohoe's proposed parking lot construction plan, the solicitation advised offerors that "[i]t would be desirable for the proposed landscaping plan to incorporate existing oak trees." Similarly, the solicitation specifically listed ceramic tile as acceptable for floor and wall applications; accordingly, the evaluation was not objectionable on this basis.[1]

We also disagree with the protester's assertion that the agency improperly assigned additional points to Donohoe for its proposed warehouse and pallet space because Donohoe's space exceeded that requested by the solicitation. The solicitation specifically provides that "square footages, room requirements . . . are to be determined by the design/build contractor unless specified. . . ." Since the solicitation did not specify any maximum square footage for the warehouse area or for the pallet space, we see no reason to object to the agency's evaluation of Donohoe's proposed space in this regard. Nor do we find unreasonable the agency's conclusion that Donohoe's design was superior to Shirley's design in this area, based on Donohoe's proposed larger warehouse and pallet space, since a larger space would accommodate more items should the commissary's inventory increase.

Finally, Shirley contends that the agency improperly rewarded Donohoe for its plan to provide crawl space access to refrigeration piping for food storage coolers. The RFP required that refrigeration piping run in an accessible utility trench and that all refrigerant piping be located to facilitate service and replacement. While the agency concedes that Donohoe's feature exceeds the RFP's minimum requirements, it states that Donohoe's proposed crawl space access was found to be most advantageous to the government because it maximizes accessibility, flexibility, and maintainability. Since the RFP stated that innovative, creative, or cost-saving proposals which meet or exceed the minimum requirements are encouraged and will receive quality points accordingly, we find that the agency reasonably determined that Donohoe's proposed crawl space

[1] Moreover, to the extent that Shirley objects to the RFP's inclusion of ceramic tile as an acceptable finishing option and argues that ceramic is unacceptable because it has potential serious health and sanitation drawbacks, these allegations are untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990), because the protester should have raised these arguments prior to the closing date for receipt of proposals.

access would be more advantageous in terms of facilitating service and replacement, as called for by the RFP, and properly scored Donohoe's proposal accordingly.

Evaluation Of Price

Where, as here, a solicitation indicates that price will be considered but does not indicate the relative importance of price and technical factors, they are considered approximately equal in weight. *Bachy/Bauer/Green Joint Venture,* B-235950, Sept. 18, 1989, 89-2 CPD ¶ 240. Shirley contends that since the agency report on the protest incorrectly stated that "price is subordinate to technical factors (except where competing proposals are determined to be substantially equal technically)," the agency must not have followed the proper evaluation procedure, with price and technical scoring being equal. The protester also asserts that price was never considered during the evaluation and that the contracting officer merely selected the offeror with the highest technical score, regardless of the price differential.

The agency agrees with the protester that the statement in the agency report is both incorrect and inconsistent with the language in the RFP; however, the agency contends that the erroneous statement does not reflect the actual manner in which the proposals were evaluated. In this regard, the agency states that while the technical evaluation team did not know the proposed price for each proposal, the Source Selection Board considered price, and thus adhered to the RFP's award criteria before selecting Donohoe. Moreover, the agency reports that given the technical inequality of the two offerors as shown by their technical scoring difference, the agency correctly concluded that price was not the controlling factor in determining the successful awardee.

Our examination of the record, including our *in camera* review of confidential source selection materials which were not disclosed to the protester, reveals that while the agency considered price equal to the technical factors, the agency correctly concluded that price was not the controlling factor in selecting the awardee. In this regard, the project manager met with the Source Selection Board on April 11 to review and discuss the evaluation process and the RFP's language concerning the agency's basis of award. After the discussion, the project manager presented an overview of the technical evaluation findings, including BAFO scores, and the proposed price for each proposal. Following the overview, the project manager specifically discussed the perceived weaknesses and strengths of each proposal. Based on the findings and recommendations of the technical evaluation team, the Source Selection Board concluded that award to Donohoe would be most advantageous to the government. With regard to Donohoe's price, the agency determined it fair and reasonable based on the technical analyses of the proposed design, and comparison to the other proposals in the competitive range and the government estimate.

Based on our review of the record, notwithstanding the incorrect statement in the agency report, we find no evidence that supports the protester's position

that the agency incorrectly assumed that price was subordinate to technical factors. Rather, we find that the agency correctly concluded that in light of the technical inequality of the proposals, price was not the controlling factor in determining which proposal was most advantageous to the government.

Technical/Price Tradeoff

The protester argues that even assuming that the agency followed the evaluation procedure required by the solicitation, the agency failed to make a reasonable technical/price tradeoff. The protester contends that since its price was 35 percent lower than the awardee's and its technical score was only 17 percent lower than the awardee's, the government could not reasonably determine that the award to Donohoe, the higher priced offeror, was most advantageous to the government.

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 determinative factor. *University of Dayton Research Inst.*, B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. Since the RFP did not provide for award on the basis of the lowest priced technically acceptable proposal, but instead stated that the award would be made to the offeror whose offer is most advantageous to the government, considering price and other factors, the contracting officer had the discretion to determine whether the technical advantage associated with Donohoe's proposal was worth its higher price. This discretion exists notwithstanding the fact that price and technical factors were of equal weight. *McShade Gov't Contracting Servs.*, B-232977, Feb. 6, 1989, 89-1 CPD ¶ 118. Agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Thus, technical/price tradeoffs may be made subject only to the test of rationality and consistency with the established evaluation factors. *Id.*

Shirley's BAFO was low priced at $6,645,202, compared to Donohoe's third-low BAFO of $8,984,000. While the technical evaluation team determined that Shirley's proposal met the minimum requirements, it received the lowest technical score. Specifically, the technical evaluation team found that Shirley's proposed design had several drawbacks in each technical evaluation area. For example, Shirley received the lowest technical score in the functional and aesthetic design area, the most important technical area, because the technical evaluation team found Shirley's proposed warehouse area to be small. Moreover, the team found that the design exhibited a poor flow of perishables from the receiving dock through the warehouse to the coolers, which are located in the center of the facility. With regard to the building and site engineering area, the team found that Shirley's site design merely met the solicitation's minimum criteria. Shirley's proposed design included exterior face brick with sheathing, metal stud and gypsum wallboard finish on the interior, which resulted in the evaluation team's finding that the overall quality of the proposal in terms of material quality and maintainability was of a minimum acceptable quality.

On the other hand, Donohoe's proposal was rated as the best technical proposal of the four which were received. This rating was superior to the rating that Shirley's proposal received in every area except the total time of performance, the least important factor. In view of the fact that Donohoe's proposal was significantly higher rated than Shirley's across the board, and particularly in the functional and aesthetic design area, which was listed as the most important technical factor, we find that the agency reasonably determined, consistent with the evaluation criteria, that Donohoe's proposal was significantly superior to Shirley's and, as compared to the other higher rated proposal, that it was most advantageous to the government.

Shirley contends that the agency has failed to maintain the integrity of the competitive bidding system because the evaluation of offers under the RFP at issue was inconsistent with the evaluations under other solicitations with similar evaluation criteria. The protester cites two other commissary procurements where its design subcontractor was selected for award based on the same basic design as proposed in the current procurement and a third procurement where another, lower priced offeror was selected despite the technical advantage offered by the protester's subcontractor. The protester in essence argues that it reasonably assumed that the evaluation in this case would result in an award to the low priced, technically acceptable offeror, and prepared its offer accordingly.

Each procurement action is a separate transaction; thus, the evaluation conducted under one is not relevant to the propriety of the evaluation under another for purposes of a bid protest, especially when there are different evaluation team members, different offerors, and varying proposals. *See Ferrite Eng'g Labs*, B-222972, July 28, 1986, 86-2 CPD ¶ 122. Rather, the issue is whether the evaluation is consistent with the evaluation criteria in the RFP. Given our finding that the evaluation was proper, we see no basis to challenge the selection of Donohoe.

The protest and the claim for proposal preparation and protest costs, including attorneys' fees, are denied.

B-230360, November 9, 1990

Military Personnel

Pay

■ Reenlistment bonuses

■■ Computation

Under an Air Force early separation program a group of first-term enlisted members were released up to 5 months before their enlistments expired. Since these members were entirely free to separate from the service, their previously obligated service may be regarded as having been terminated. Therefore, when such a member reenlists immediately rather than separates from the service, the full period of the member's reenlistment may be counted as additional obligated service under 37 U.S.C. § 308(a)(1) for the purpose of computing the member's selective reenlistment bonus.

Matter of: Selective Reenlistment Bonus—Early Separation and Immediate Reenlistment

This decision concerns an Air Force program to release a specified group of airmen early from their enlistments to reduce the number of personnel on active duty. Certain of the airmen were allowed to immediately reenlist thereafter, and the Air Force asks whether the unserved periods of their initial enlistments may be counted as additional obligated service in computing their selective reenlistment bonuses.[1] For the reasons discussed below, we find that the full period of these airmen's reenlistment may be counted as additional obligated service.

Under the Air Force early separation program involved here, a specified group of first-term enlisted members was involuntarily released from active duty up to 5 months prior to the expiration of their enlistments to alleviate shortages of Air Force personnel funds.[2] Certain of these members were eligible to immediately reenlist and were allowed to do so, whereupon they became eligible for a selective reenlistment bonus authorized under 37 U.S.C. § 308 (1982). The bonus is not to exceed 6 months of the member's basic pay to which he was entitled at discharge, multiplied by the number of years, or monthly fractions thereof, of "additional obligated service," but cannot be more than $30,000.

As stated, the question is whether the remaining unserved portions of these members' prior enlistments must be excluded from the computation of their bonuses upon reenlistment. The Air Force recognizes that two of our prior decisions indicate that previously obligated, but unserved, service is not to be included in the computation of a selective reenlistment bonus. It notes that the members involved in the prior decisions had the option of serving out their enlistments but elected to be discharged early. In the present case, the Air Force indicates, the members have no option to serve out their enlistments; they are discharged early at the direction of the service. Once they are so discharged, the Air Force argues, their legally obligated enlistment periods are ended and the previously obligated additional service should not be excluded from their reenlistment bonus computations.

We agree with the Air Force. As is indicated above, the statute limits the service to be used in the computation to "additional obligated service." The implementing regulations define such "additional" service as any active service commitment beyond an existing contractual service agreement, including enlistments. Department of Defense Military Pay and Allowances Entitlements Manual, para. 10912a(1). *See also* DOD Instruction 1304.22, para. D2c, Apr. 20, 1983.

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[1] The request for decision was made by the Acting Assistant Secretary of the Air Force (Manpower and Reserve Affairs) and was approved by the Department of Defense Military Pay and Allowance Committee and assigned submission number SS-AF-1480.

[2] This program operated in 1987, and we understand it was also used in 1988 and 1989. In 1989 it involved the early release of approximately 5,400 airmen.

The first of the two decisions to which the Air Force refers concerned the situation where a member is discharged within 3 months of the expiration of his enlistment for the purpose *of* reenlisting. We noted that, in general, when a person is discharged, his service obligation under his then current enlistment is terminated for all purposes. We stated further, however, that when a member's discharge is approved specifically for the purpose of reenlistment, we do not consider the former obligation terminated, and the balance of the prior term could not be counted as additional obligated service in computing the selective reenlistment bonus. 55 Comp. Gen. 37 (1975). The second case to which the Air Force refers involved a member who was discharged for immediate reenlistment after serving 3 years of a 4-year enlistment. Relying on 55 Comp. Gen. 37, *supra*, it reached the same result—the unserved term of the prior enlistment could not be counted in computing the bonus. *George Zwolinski,* B-200974, Mar. 9, 1981.

Thus, when a member is discharged early for the specific purpose of his immediate reenlistment, the balance of the member's then-current enlistment does not qualify as "additional obligated service" under 37 U.S.C. § 308(a). In such a situation the remaining obligated service is deducted from the member's reenlistment period in computing the member's bonus entitlement unless the member comes within one of two exceptions provided by the statute, neither of which is applicable here.

As the Air Force points out, this case differs from the decisions discussed above in a fundamental respect. In this case the airmen were involuntarily released from their service obligation in accordance with an early separation program. Their early releases were not tied to any reenlistment commitments. Each of the early discharged airmen was entirely free to separate from the military service. Some of them, however, were given the opportunity to reenlist immediately after their release from service.

In our view, the early discharge of these airmen terminated their remaining obligated service under their initial enlistments. The fact that some of them were offered the opportunity to reenlist and chose to do so does not alter the situation. Their discharge from service was for a reason unrelated to their reenlistment. Under these circumstances, the full reenlistment period may be counted as additional obligated service for the purpose of computing their selective reenlistment bonuses.

B-240322, November 9, 1990

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Rates
■■■■ Mileage

Where solicitation provides that offerors' rates will be adjusted based on mileage determined by the Installation Transportation Officer (ITO) to reflect cost of roadmarch of a large convoy transporting tanks, trucks, and other heavy military equipment between Army base and offeror's railroad terminal, the ITO reasonably determined the protester's mileage on the basis of a four-lane interstate highway route which the ITO selected based on safety considerations. The agency was not required to calculate the mileage based on a shorter state highway route which the ITO considered less safe.

Matter of: Georgetown Railroad Inc., Union Pacific Railroad, and Southern Pacific Transportation Company

Martin D. Schneiderman, Esq., Steptoe & Johnson, for the protesters.

Daniel L. Rothlisberger, Esq., and William J. Dowell, Esq., Office of the Judge Advocate General, Military Traffic Management Command, and Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.

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

Georgetown Railroad Inc., Union Pacific Railroad, and the Southern Pacific Transportation Company (Georgetown) protest an award by the Military Traffic Management Command (MTMC), Department of the Army, for freight transportation services to the Atchison, Topeka and Santa Fe Railway Company (Atchison). The services in question were solicited by MTMC by a letter solicitation of June 4, 1990, as subsequently amended, which requested tenders for the movement of military vehicles and impedimenta between Fort Hood, Texas and the National Training Center, Fort Irwin, California. Georgetown protests that its proposed price should have been evaluated as low, but was miscalculated because MTMC applied an improper disability cost factor to reflect the mileage between Fort Hood and Georgetown's railroad terminal.

We deny the protest.

The solicitation requested tenders for transportation services for four round-trip movements for the next four scheduled training rotations (military exercises). The solicitation indicated that the government was interested in awarding all such shipments of unit equipment to one carrier, covering training rotations scheduled through the end of 1992, and that if any of the anticipated four rotations were canceled, the next subsequent rotation would be included in the award. The solicitation required that the offeror's terminal be situated within a

75-mile radius of Fort Hood. The items being shipped included M-1 tanks, trucks, and other military impedimenta sufficient to equip a brigade, which MTMC estimated would require 353 railcars to transport.

The solicitation provided that "[t]he government's actual requirements for transportation services under this solicitation will be allocated for the period involved to the responsive carrier whose offer conforms to this solicitation and is most advantageous to the government, cost and other factors considered." The solicitation further provided that "disability" costs would be added to offers which provided for a rail terminal at a site other than Fort Hood. Since only Atchison had a rail terminal at Fort Hood, the option to propose an adequate off-base terminal to which disability costs would be added was intended to encourage competition while taking into account the additional costs which would be incurred by the government in moving equipment to an off-base terminal.

As a threshold matter, MTMC asserts that the matter is outside of our bid protest jurisdiction, citing our decision, *Moody Bros. of Jacksonville, Inc.; Troika Int'l Ltd.*, 69 Comp. Gen. 524, B-238844, June 12, 1990, 90-1 CPD ¶ 550. MTMC argues that *Moody* controls because the shipments in question are each denominated as a "spot movement," and are for transportation services which are accomplished by government bill of lading (GBL), under regulations promulgated by MTMC. We determined the question of the extent of our jurisdiction in this area in *Federal Transport, Inc.—Recon.*, 68 Comp. Gen. 451 (1989), 89-1 CPD ¶ 542. In that decision, we reversed previous cases and asserted jurisdiction over protests concerning requests for tenders issued under MTMC's guaranteed traffic program. We did so because we found that all the indicia of procurements were present in the program. In particular, we found that while MTMC does not follow the procurement procedures outlined in the Federal Acquisition Regulation (FAR) and the DOD FAR Supplement, the solicitations contain provisions similar to those in the FAR and the program involves formal solicitations and a formal source selection. Further, the program gives rise to what is, in effect, a requirements contract for transportation services, which is distinguishable from the majority of the government transportation business, where MTMC merely selects a tender and issues a GBL for one-time routings without any type of formal solicitation or source selection. Accordingly, we concluded that protests against a guaranteed traffic program solicitation fell within our jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3552 (1988).

We have jurisdiction here for the same reasons; the transportation services in question are within the guaranteed traffic program, are being obtained under a formal solicitation, including a source selection formula and language substantially similar to that contained in the FAR, and the award gives rise to what is in effect a requirements contract for at least eight repetitive movements over a 2-year period. The holding in *Moody* does not control since it simply exempted from our expanded jurisdiction under *Federal Transport* a spot movement involving only a one-time shipment of a commodity under one GBL which did not

involve issuance of a formal solicitation or the conduct of a source selection. Accordingly, we will consider the merits of the protest.

The solicitation provides that total cost will be determined on the basis of a formula which includes calculating the rates quoted for 353 railcars plus listed services and multiplying these rates by four round trips, adding disability costs for four round trips where applicable to reflect mileage traveled to an alternate, off-base terminal. The solicitation contained an appendix which listed disability costs in one-mile intervals for distances ranging from 30 to 80 miles. Only two offers were received, one from Atchison whose terminal is at the base, and one from Georgetown for its terminal at an alternate site. MTMC calculated the disability costs for Georgetown's offer on the basis of the 57-mile distance supplied by the ITO for the anticipated actual roadmarch route from Fort Hood to Georgetown's terminal over Interstate Highway 35 and U.S. Highway 190. As a result of the application of the disability costs for 57 miles, Atchison's offer was low. Had a slightly lower disability mileage been applied, Georgetown's offer would have been low. Georgetown contends that the proper disability mileage is 46, based on use of State Highway 195, which Georgetown contends should have been used by MTMC for cost calculations since it represents the most direct route between the base and Georgetown's terminal. Georgetown contends that it is entitled to the award because use of the 46-mile disability factor would result in its offer being evaluated as low.

Evaluation and award are required to be made in accordance with the terms of the solicitation. *Environmental Technologies Group, Inc.*, B-235632, Aug. 31, 1989, 89-2 CPD ¶ 202. CICA provides that the head of any agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation. 10 U.S.C. § 2305(b)(1) (1988). In reviewing protests like the one here, against an allegedly improper evaluation, our Office will examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria listed in the solicitation. *Space Applications Corp.*, B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255. A protester's disagreement with the agency's judgment is not sufficient to establish that the agency acted arbitrarily. *United HealthServ Inc.*, B-232640 *et al.*, Jan. 18, 1989, 89-1 CPD ¶ 43.

Here, the solicitation provides that for determining disability costs for rail sites other than Fort Hood, "mileage will be determined by ITO, Fort Hood, prior to the evaluation of offerors."[1] The record reflects that the ITO, who is responsible under MTMC regulations for a broad range of transportation matters, including maintaining familiarity with laws and regulations pertaining to vehicle size and weight limitations and the movement of cargoes which subject public highways to unusual hazards, had before him information pertaining to the two alternate routes to the Georgetown terminal site at the time he made his recommenda-

[1] Georgetown initially had protested that the MTMC was required to use the shortest route mileage listed in the Household Goods Carriers Bureau Mileage Guide, rather than the mileage supplied by the ITO. It is clear that the guide is inapplicable by the express terms of the solicitation, and this allegation is untimely under our Bid Protest Regulations because it concerns an alleged apparent solicitation impropriety which was not protested until after the award was made. *See* 4 C.F.R. § 21.2(a)(1) (1990).

tion. In particular, he was aware that the 57-mile route via U.S. Highway 190 and Interstate Highway 135 was a four-lane highway over the entire route and was a proven, safe route which had been successfully used by the Army in 1987 for the deployment of a convoy of over 1800 military vehicles to the ports of Beaumont and Galveston. By contrast, the shorter route over Highway 195 is a two-lane road, including stretches which are heavily traversed by civilian traffic, and includes numerous hills and curves and sections which lack improved shoulders. Because the convoy at issue would consist of hundreds of military vehicles, including heavily laden trucks and other large vehicles, and safety was a primary concern, the ITO determined that the 57-mile route was the preferred alternative and provided it for calculation of the disability factor.

Georgetown argues that the record shows that other procurement officials within the agency believed that the 46-mile route was feasible and was the route preferred by the Texas state highway department. However, since the route determination is properly within the ITO's responsibilities and the solicitation clearly provides for this determination to be made by the ITO, these opinions do not provide any basis to require the substitution of a different disability mileage. In addition, Georgetown speculates that the ITO simply made a mistake in recommending the 57-mile route, basing the recommendation solely on the fact that the 1987 convoy movement was made over that route, without realizing that the alternate 46-mile route had been substantially improved in the intervening time. Georgetown argues that the ITO simply failed to consider contemporaneously the alternate 46-mile route, which Georgetown contends is now equally safe, and is preferred by the state. In this regard, Georgetown points out that the agency initially requested our Office to dismiss the protest on jurisdictional grounds and did not include any reference to the ITO's consideration of safety factors which the subsequent full agency report indicated formed the basis for the ITO's determination. Georgetown argues that this evidences that the ITO's safety rationale was a pretext which was not supplied until after the protest was filed.

We find that none of the Georgetown's allegations establish that the ITO's determination was unreasonable or otherwise improper. The summary dismissal request was merely intended by the agency to support its position, discussed above, that our Office does not have jurisdiction to consider the merits of the protest. The fact that this request did not reference the ITO's safety rationale does not call into question the explanation for the ITO's determination which was provided in the full report since the two reports are not inconsistent—the second merely provides amplification on the merits. The specific objections raised by Georgetown amount to nothing more than an attempt to substitute the protester's assessment of the agency's minimum safety needs for the determination made by the ITO, and do not provide a basis to overturn the agency's determination. *Xerox Corp.*, B-236072.2 *et al.*, Nov. 29, 1989, 89-2 CPD ¶ 502. Moreover, where a solicitation requirement relates to human safety or national defense, an agency has the discretion to set its minimum needs so as to achieve not just reasonable results, but the most reliable and effective results. *Marine Transport Lines, Inc.*, B-224480.5, July 27, 1987, 87-2 CPD ¶ 91. Under this solic-

itation, the route safety considerations were properly within the ITO's discretion, and Georgetown's disagreement with the significance or implications of the safety factors which were considered by the ITO does not establish that the ITO's determination was unreasonable. On the contrary, we find that under the circumstances, the factors considered by the ITO reasonably established that the four-lane route was warranted for safety reasons, and MTMC's application of this 57-mile disability factor constituted a proper application of the evaluation criteria under the solicitation.

We also note that while Georgetown has suggested that the safety rationale is a pretext and that the 57-mile route is not that which the Army would actually use, the Army points out that it is presently routing military equipment convoys for the Desert Shield deployment over this four-lane 57-mile route as part of its movement of troops to the Mideast via Texas Gulf ports. The Army states that this use of the 57-mile route was based on a determination that it was a proven route and the safest route.

The protest is denied.

B-240333, November 9, 1990

Procurement

Competitive Negotiation
■ Contract awards
■■ Initial-offer awards
■■■ Propriety

Contracting agency conducting an urgent procurement under the authority of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(2) (1988), may make award on the basis of initial proposals whether or not such award represents the lowest overall cost to the government.

Matter of: Raytheon Company

James J. McCullough, Esq., and Richard L. Larach, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.

James J. Regan, Esq., Robert M. Halperin, Esq., and Stephanie B. N. Renzi, Esq., Crowell & Moring, for CAE-Link Tactical Simulation Division, an interested party.

Margaret A. Olsen, Esq., Department of the Navy, for the agency.

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

Raytheon Company, Submarine Signal Division, protests the award of a contract to CAE-Link Tactical Simulation Division under request for proposals (RFP) No. N00019-89-R-0123, issued by the Department of the Navy for the

design, fabrication, test and installation of an Update IV operator and maintenance trainer for the P-3C aircraft. The protester contends that the agency improperly made award on the basis of initial proposals.

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

On July 10, 1987, the agency awarded to Boeing Corporation a prime contract for the Update IV avionics system; as part of its prime contract, Boeing was to award a subcontract for a trainer. Boeing twice requested proposals for the trainer, but in both instances the offers received exceeded the agency's available funding, and the agency decided to procure the trainer by a separate prime contract.

The agency prepared a justification and approval (J&A) dated October 17, 1989, for the use of other than full and open competition as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (1988). The J&A authorized the acquisition of P-3C Update IV operator and maintenance trainers, with associated products and services, citing the authority of 10 U.S.C. § 2304(c)(2), which allows the head of a military agency to use other than competitive procedures when the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.

The J&A stated that the agency estimated that the development period for the trainers would encompass 48 months and that the trainers had to be available by August 1992, to allow training of the crews in time for deployment in January 1993. The J&A evidenced the agency's intention to limit competition to the two potential offerors that Boeing had identified as technically acceptable, based on its subcontracting attempts. The J&A advised the approval authority that, in the opinion of the contracting officer, the limited competition between the two producers identified by Boeing would insure a fair and reasonable cost, but that the agency would evaluate all costs prior to award.

On March 1, 1990, the agency issued the RFP for a fixed-price incentive contract, including numerous option items exercisable in subsequent years, with competition limited to the protester and to CAE-Link Tactical Simulation Division, the two firms that Boeing had recommended. The RFP contained the standard clause, Federal Acquisition Regulation (FAR) § 52.215-16 (FAC 84-40), providing for award to the responsible offeror whose offer was most advantageous to the government, cost or price and other factors considered, and reserving for the government the right to make award on the basis of initial offers, without discussions. The solicitation set forth the evaluation and award factors as follows: technical and price, equal in value but more important than the combined value of the other two factors, which were management/schedule and integrated logistics support.

The agency received initial proposals on March 16, 1990. As a result of our decision, *Ferranti Int'l Defense Sys., Inc.*, B-237760, Mar. 22, 1990, 90-1 CPD ¶ 317, the agency allowed a third offeror an additional period, until April 10, to submit

a proposal. On May 4, the agency's procurement review board recommended award to CAE-Link, the low technically acceptable offeror, as most advantageous to the government, even though the protester's proposal offered a slight technical superiority. On May 31, the agency awarded a contract to CAE-Link. The agency provided a debriefing for the protester on June 26, at which agency personnel stated that although Raytheon's proposal was technically acceptable, the agency could not have accepted it without discussions even if the proposal had been low, since, as Raytheon was aware, it had not offered a firm price for option items.[1] This protest followed.

The protester argues that the agency was precluded from awarding a contract on the basis of initial proposals unless full and open competition or prior cost experience demonstrated that acceptance of the initial proposal would result in the lowest overall cost to the government. The protester asserts that there was not adequate competition for purposes of making an award on the basis of initial proposals since CAE-Link's proposal was the only fully compliant proposal received. Consequently, the protester argues that the agency did not reasonably determine that award to CAE-Link on the basis of its initial proposal would result in the lowest overall cost to the government, especially since the agency should have known that the protester would have reduced its price following discussions. In short, the premise of this protest ground is that the agency, in making an award based on initial proposals, was required to award to the lowest overall cost offeror. We disagree.

The protester is correct that generally an agency may only award a contract on the basis of initial proposals where it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussions would result in the lowest overall cost to the government. *See* FAR § 15.610(a)(3) (FAC 84-16); *Economic Consulting Servs., Inc.*, B-229895, Apr. 8, 1988, 88-1 CPD ¶ 351. This requirement is derived from CICA, 10 U.S.C. § 2305(b)(4)(A), which provides that where an agency has solicited and received competitive proposals:

> The head of an agency shall evaluate competitive proposals and may award a contract—(i) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or
>
> (ii) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States.

We think this provision by its terms only applies to the evaluation of "competitive proposals" under competitive procedures. Under CICA, "competitive procedures" are those by which the head of an agency enters into a contract pursuant to full and open competition, which in turn means that all responsible

[1] Raytheon had reserved for itself in its initial proposal the right to adjust its prices if the agency exercised the options for anything less than the full stated quantities; after submission of initial offers, the protester submitted a letter, dated May 15, withdrawing its reservation. The third offeror was found to be technically unacceptable.

sources are permitted to submit competitive proposals. 10 U.S.C. § 2302(2); 41 U.S.C. §§ 403(6) and (7). Conversely, where an agency has an unusual and compelling need for the property or services, the agency is permitted to limit the number of sources from which it solicits proposals under the urgency exception. 10 U.S.C. § 2304(c)(2). Indeed, an agency using the urgency exception may restrict competition to the only firm that can properly perform the work on a sole-source basis. *See Forster Enters., Inc.*, B-237910, Apr. 5, 1990, 90-1 CPD ¶ 363. It follows that an agency which can award on a sole-source basis under the urgency exception can also dispense with discussions under this exception by awarding to the most advantageous offeror on the basis of initial proposals whether or not award to that offeror represents the lowest overall cost to the government. Accordingly, this protest ground is denied.[2]

Finally, the protester also challenges the agency's cost/technical tradeoff. The protester raised this issue at the bid protest conference, held at Raytheon's request on August 20. At that conference, our Office directed the protester to file a written protest raising this issue no later than August 27, 10 working days after the protester learned of its grounds for protest by its receipt of the agency report. *See* 4 C.F.R. § 21.2(a)(2) (1990). Under our Bid Protest Regulations, 4 C.F.R. § 21.1(b), protests must be filed in writing, and the protester's oral presentation at the August 20 conference did not therefore toll the timeliness requirements of our Office. The protester did not present in writing this issue to our Office until September 12, more than 10 working days after it learned its basis for protest.

The protest is denied in part and dismissed in part.

B-236327.2, November 13, 1990

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Travel time

The claims of four employees for compensatory time for travel are allowed where the employees traveled to or returned from meetings or hearings which could not be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5542(b)(2)(B)(iv) (1988).

Matter of: Department of Housing and Urban Development—Compensatory Time for Travel During Nonduty Hours

[2] As an additional ground, Raytheon protests the agency's failure to request cost and pricing data from the awardee. Except for the contingency in its option prices which the agency considered minor, Raytheon submitted a technically acceptable offer that was competitively priced. The agency thus received at least two proposals, and based on the record before us, we cannot find that the contracting officer was unreasonable in making the determination not to request cost and pricing data. *See* FAR § 15.804-3(a)(1) (FAC 84-35).

This action is in response to a joint request from the Department of Housing and Urban Development (HUD) and the American Federation of Government Employees, Local 476, for a decision as to whether certain HUD employees are entitled to overtime or compensatory time for travel outside normal work hours.[1] For the reasons set forth below, we hold that the employees are entitled to overtime or compensatory time for such travel.

Background

The agency has presented four fact patterns for which claims have been submitted. In the first, Employee A, a senior trial attorney stationed in Washington, D.C., was to appear at a previously scheduled court hearing at 8:30 a.m. on Monday, December 12, 1988, in Dallas, Texas. The employee is claiming 5 hours of compensatory time for outbound travel to Dallas during nonduty hours on Sunday, December 11. This travel was performed on Sunday because the court denied counsel for the parties any opportunity to request an alternate date for the hearing and because the employee was extremely busy with advance preparation for the hearing, which had to be done in Washington.

In the second situation, Employee B, a trial attorney stationed in Washington, D.C., was required to attend site visits of public housing projects in the Beaumont, Texas area. The site visits were scheduled by a court-appointed Special Master for Wednesday, December 7 through Friday, December 9, 1988. This employee completed outbound travel during regular duty hours but claims that there was no control over the time required to complete the site inspections. Consequently, the employee did not depart from Beaumont until 6 p.m. Friday evening and is claiming 6 hours of compensatory time for time spent traveling after the close of the regular workday on Friday.

In the third situation, Employee C, stationed in Washington, D.C., was required to attend a court-scheduled hearing in Chicago on Wednesday, December 7, 1988, at 9:30 a.m., and was unsuccessful in having the hearing postponed. According to the submission, the employee completed outbound travel during regular duty hours but missed the return flight due to the time required for the hearing and traffic congestion and returned to Washington, D.C., after regular duty hours. The submission states that the employee's work on another project necessitated an immediate return to Washington following the conclusion of the Chicago hearing and that travel outside the regular workday was more advantageous than having the employee remain in Chicago overnight and return the next day during regular duty hours.

In the last situation, Employee D, a senior trial attorney stationed in Washington, D.C., was required to attend a 9 a.m. meeting with a court-appointed Special Master on Friday, September 22, 1989, in Dallas, Texas, as well as a settlement conference at 1:30 p.m. in Dallas. The settlement conference concluded at

[1] The request was submitted by Harold I. Morrison, Director, Evaluation and Systems Division, Office of the Assistant Secretary for Administration, and Barbara Davidson, President, AFGE Local 476.

approximately 3:30 p.m. on Friday, September 22, and the employee claims 3-3/4 hours of compensatory time for time spent traveling outside of the regularly scheduled workday on Friday, September 22.

Opinion

Section 5542 of title 5, United States Code (1988), provides in pertinent part:

(b) For the purpose of this subchapter—

* * * * *

(2) time spent in travel status away from the official-duty station of an employee is not hours of employment unless

* * * * *

(B) the travel . . . (iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station.

The agency has specifically requested us to clarify what constitutes "an event which could not be scheduled or controlled administratively," particularly as it relates to court hearings which require employees to travel outside of their regularly scheduled duty hours.

The Federal Personnel Manual Supplement provision interpreting this phrase "could not be scheduled or controlled administratively" points to the ability of an executive agency as defined in 5 U.S.C. § 105 (1988) to control the event which necessitates an employee's travel. Control is assumed if an agency has sole control or if a group of agencies are acting in concert.[2] Since the regulation specifically refers to control by executive agencies, we conclude that an event scheduled by a federal court would not constitute an event subject to administrative control under subsection 5542(b)(2)(B)(iv).

We have interpreted subsection 5542(b)(2)(B)(iv) to require that in order to be compensated for overtime (1) the travel must result from an event which could not be scheduled or controlled administratively and (2) there must exist an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours. *Brown and Schacht,* 69 Comp. Gen. 385, (1990); *John B. Schepman, et al.,* 60 Comp. Gen. 681, 684 (1981). However, with respect to the "immediate official necessity" test, we recently noted in *William A. Lewis, et al.,* B-230405, June 29, 1990, 69 Comp. Gen. 545:

...this [test] has limited utility in situations like the instant case where an employee must be present at an event that has been scheduled for a particular time without any control on the part of the government. In these situations, the scheduling of the event itself supplies the immediate official necessity, depending on the timing, for travel outside regular duty hours in order to accommodate that schedule. *William A. Lewis, et al.,* B-230405, 69 Comp. Gen. 545, *supra,* at 3 (footnote omitted).

[2] FPM Supp. 990-2, Book 550, subchapter S1-3b (p. 550-11) (Inst. 68, Mar. 7, 1983).

Therefore, referring to the examples cited above, we note that Employee A traveled on Sunday in order to attend a hearing scheduled by a court for Monday morning. Since the hearing was scheduled by the court and not the agency, the employee would be entitled to overtime or compensatory time in accordance with subsection 5542(b)(2)(B)(iv) for the time spent traveling from his residence to the airport and the time of his airline flight to Dallas.[3]

The employee would also be entitled to overtime or compensatory time off for return travel from this hearing if performed outside the normal duty hours. *See* the 1984 amendment made to 5 U.S.C. § 5542(b)(2)(B)(iv) by subsection 101(c) of Title I of Pub. L. No. 98-473, 98 Stat. 1837, 1874 (Oct. 12, 1984), which provides for the payment of overtime or compensatory time for return travel from an event which could not be scheduled or controlled administratively. *See also Daniel L. Hubbel, et al.,* 68 Comp. Gen. 29, at 33 (1988); Federal Personnel Manual Letter 550-77, July 24, 1985. As noted in FPM Letter 550-77, the 1984 amendment necessitated a change in prior Office of Personnel Management guidance and GAO decisions which treated travel to the temporary duty station and return travel as separate and distinct travel situations requiring independent determinations whether such travel was compensable. As we noted in *Hubbel, supra,* if the event which necessitated travel could not be scheduled or controlled administratively, then return travel time would be considered hours of employment under subsection 5542(b)(2)(B)(iv) if performed outside normal duty hours.

Employees B, C, and D in the examples set forth above all request overtime or compensatory time off for travel returning to their official duty stations from events which could not be controlled administratively. Since the events which necessitated their travel could not be scheduled or controlled administratively, their return travel time likewise would be considered hours of employment under subsection 5542(b)(2)(B)(iv) if performed outside their normal duty hours.

Accordingly, the claims presented to the agency may be paid, if otherwise proper.

[3] *See* FPM Supp. 990-2, Book 550, subchapter S1-3b (Case No. 1) (Inst. 68, Mar. 7, 1983).

B-240420, November 13, 1990

Procurement

Bid Protests
■ Prime contractors
■■ Contract awards
■■■ Subcontracts
■■■■ GAO review

Procurement

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

Department of Energy prime contractor reasonably determined that the protester's low-priced, alternate proposal to produce coils for dipole magnets to be incorporated in an electron accelerator was technically unacceptable where the contractor found the alternate product may be less reliable and more risky and the protester did not provide sufficient documentation, even after discussions and a site visit, to demonstrate the acceptability of its alternate product.

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

Department of Energy prime contractor was not obligated to provide the protester with all specific information or data needed to establish the acceptability of its proposal of an alternate proprietary product; prime contractor satisfied its obligation to conduct meaningful discussions by repeated discussions requesting information to establish the acceptability of the alternate proprietary product.

Matter of: Elma Engineering

Karl W. Wiedle for the protester.

Hiroshi Yamashita, United Magnet Technologies, an interested party.

Eugene R. Desaulniers, Southeastern Universities Research Association, Inc., for the prime contractor.

Don R. Sloan, Department of Energy, 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.

Elma Engineering protests the award of a contract to United Magnet Technologies under request for proposals (RFP) No. SURA-90-R010, issued by Southeastern Universities Research Association, Inc. (SURA), under SURA's prime

contract with the Department of Energy (DOE) to design and construct DOE's Continuous Electron Beam Accelerator Facility (CEBAF). The RFP seeks the production of common arc dipole magnets to be incorporated into CEBAF's electron accelerator.[1]

The protest is denied.

Initially, we note that DOE does not dispute that our Office has jurisdiction to review this protest under 4 C.F.R. § 21.3(m)(10) (1990), which provides for our review of awards of subcontracts by government prime contractors where the awards are made "by or for the government." *See Babcock & Wilcox Co.*, B-235502, Sept. 18, 1989, 89-2 CPD ¶ 237. Since federal procurement statutes and regulations do not apply *per se* to a management contractor operating by and for the government (such a contractor must conduct procurements in accordance with its prime contract with the agency and its own agency-approved procedures), our review is limited to determining whether the procurement conforms to the "federal norm," *i.e.*, the policy objectives in the federal statutes and regulations. *Merrick Eng'g, Inc.*, B-238706.2, June 14, 1990, 90-1 CPD ¶ 564.

The RFP contemplated the award or awards of fixed-price subcontracts for the supply of four types of common arc dipole magnets. Each common arc dipole magnet consists of two distinct parts: a coil and a core. The coil is made from hollow copper conductor that is formed by "blacksmith" methods and insulated in a specialized, light manufacturing setting. The magnet core is fabricated by large machine tools to tight tolerances in a heavy manufacturing setting. The coil is assembled into the core to form a complete magnet assembly.

Offerors were informed that they could offer to: (1) produce both the magnet cores and coils and perform the final magnet assembly, (2) produce only magnet cores and perform the final magnet assembly, or (3) produce only magnet coils, and that offers would be evaluated for the purpose of making multiple awards. The RFP provided that award or awards would be made to the technically acceptable offeror or offerors for the items or combination of items that result in the lowest price to SURA, considering the assumed administrative cost.[2] The RFP contained detailed design and performance specifications for the production and assembly of the magnets, and provided that offerors could, for coil fabrication, "propose alternate manufacturing and testing methods and procedures which result in savings without compromising quality or performance of the coils."

SURA received nine proposals, including that of Elma for the production of coils, and included all offerors in the initial competitive range. Written discussions were conducted with all offerors. Regarding Elma's proposal, SURA informed Elma that its proposal to produce magnet coils using an alternate, pro-

[1] An electron accelerator "generates" a beam (continuous stream) of electrons at high velocity. The common arc dipole magnets guide the electron beam through the arcs at each end of the accelerator.

[2] In considering multiple awards the RFP provided that SURA would assume that $38,000 is the administrative cost to SURA for issuing and administering each subcontract. The RFP also provided that transportation costs and Buy American factors would be considered in evaluating offerors' prices.

prietary insulation design and manufacturing process was unacceptable because Elma did not demonstrate that its alternate approach was equal to that specified by the RFP.[3]

SURA received revised proposals and determined that only five offerors, including Elma, should remain in the competitive range. Elma was determined to be marginally acceptable[4] while the other four offerors were found to be technically acceptable. Specifically, SURA found that Elma's proposal to fabricate coils using its alternate, proprietary insulation scheme still lacked the details necessary to evaluate the acceptability of this approach.

SURA conducted further written discussions with the offerors and requested best and final offers (BAFO). Elma was informed that its "alternate insulation scheme was insufficient without greater details to prove it to be equal or better than that specified in SURA's statement of work." SURA requested that Elma provide data to allow for the technical evaluation of Elma's alternate approach and that Elma provide an offer to produce the coils in accordance the insulation scheme stated in the RFP specifications. SURA also conducted a site visit to Elma and orally discussed Elma's insulation scheme. Prior to the submission of BAFOs, SURA informed Elma that its proposed alternate insulation scheme would not be acceptable.

Elma provided further information in its BAFO to support its proprietary insulation scheme for the coils and also offered to produce the coils in accordance with the RFP specifications. SURA determined that Elma's low-priced, alternate proposal was technically unacceptable. Specifically, SURA concluded that, for the application sought by the RFP, the proposed alternate insulation scheme would not provide the same high degree of long-term reliability as the insulation system specified by the solicitation, because "[a]s a total system it still [had] deficiencies in that it is discontinuous and fails to provide a full membrane around each of the conductors."

Elma's basic offer, in its BAFO, to produce the coils in accordance with the RFP specifications was determined to be marginally acceptable.[5] SURA received the following BAFOs to produce the coils in accordance with the solicitation specifications:

Offeror	Evaluated Price
United Magnet	$1,433,949
Elma	$1,544,715
Offeror A	$1,816,695

[3] Because of the proprietary nature of Elma's insulation scheme, our discussion of the acceptability of Elma's alternate proposal is necessarily general.

[4] The source selection plan defined marginally acceptable as "fails to meet standards; low probability of success; significant deficiencies, but correctable."

[5] Elma's basic offer was found marginally acceptable because of deficiencies in Elma's manufacturing plan, quality control procedures, and key personnel. Although Elma contends that these deficiencies were not identified during discussions, the record shows otherwise. In any event, since Elma's basic offer was not the lowest-priced, technically acceptable offer, Elma would not be entitled to award.

Award of a subcontract for the coils was made to United Magnet, as the lowest priced, technically acceptable offeror.[6] This protest followed.

Elma protests that it is entitled to award because its alternate coil insulation scheme is superior to that specified in the RFP and Elma's proposed price for its alternate scheme is $212,846 lower than United Magnet's offer.[7] Elma argues that SURA acted unreasonably in rejecting its low, alternate proposal where Elma guaranteed the performance of its coils and offered to test its proprietary insulation scheme at three times the specified voltage to prove the superiority of Elma's coils.

The determination of the relative merits of proposals is primarily the responsibility of the contracting agency, which must bear the burden of any difficulties resulting from a defective evaluation. *Viking Instruments Corp.*, B-238183, Apr. 24, 1990, 90-1 CPD ¶ 414. In reviewing challenges to the evaluation of a technical proposal, we will not reevaluate the proposal and independently judge its merits, but instead will consider whether the evaluation was reasonable and consistent with procurement laws and regulations. *Id.*

We find from our review of the record that SURA acted reasonably in finding Elma's alternate proposal to be unacceptable. SURA was concerned that Elma's less expensive, proprietary insulation scheme would not provide the same reliability as the vacuum-pressure-impregnation process specified by the RFP. In this regard, SURA conducted discussions with, and received revised proposals from, Elma to obtain sufficient information and data from Elma to determine the acceptability of Elma's process. From the information provided, SURA concluded that Elma's insulation scheme could be subject to air entrapment between the layers of insulation that could compromise the coil's mechanical and electrical integrity.

Elma disagrees with SURA's technical assessment of its insulation scheme and argues that it not only guaranteed the performance and quality of the coils but offered to test its coils at three times the specified voltage. We do not think that SURA acted unreasonably in refusing to accept Elma's promises on their face; Elma's offers to warrant and test its alternate product do not overcome SURA's reasonable judgment that Elma's alternate product was too risky.[8] *See Unisys Corp.*, B-231704, Oct. 18, 1988, 88-2 CPD ¶ 360.

Elma argues that SURA did not specify what data Elma was required to supply to establish the acceptability of its alternate insulation scheme. While agencies generally must advise offerors in the competitive range of deficiencies in their proposals to afford them the opportunity to revise their proposals to fully satisfy the government's requirements, *see Secure Servs. Technology, Inc.*, B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421, this does not require agencies to identify for offerors the information or data needed to establish the acceptability of their pro-

[6] SURA awarded a subcontract to Process Equipment Company for the production of the magnet cores and final magnet assembly.
[7] Elma's price for its alternate proposal was $1,221,103.
[8] SURA asserts that the electron accelerator will not work if the common dipole magnets fail.

posals. Rather, the agency should impart sufficient information to the offeror to afford it a fair and reasonable opportunity in the context of the procurement to identify and correct deficiencies in its proposal. *Egan, McAllister Assoc., Inc.*, B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405. SURA satisfied this obligation by repeatedly informing Elma that it had not provided sufficient information in its proposal to establish the acceptability of its proprietary insulation scheme and by providing Elma with the opportunity to revise its proposal. Where offerors propose alternate products, they must provide sufficient documentation to reasonably demonstrate their product will satisfy the government's requirements. *See Rotair Indus., Inc.*, B-219994, Dec. 18, 1985, 85-2 CPD ¶ 683.

Elma also protests that SURA treated it unfairly by conducting site visits with several offerors, including United Magnet, during the discussions following the receipt of initial proposals, but not conducting a site visit with Elma until the discussions prior to the closing date for receipt of BAFOs. Elma argues that this indicates that SURA had "unofficially eliminated" Elma from the procurement after initial proposals. We do not agree. The record shows that Elma was not excluded from the competition; rather, as noted above, Elma received meaningful discussions and the opportunity to submit revised proposals to compete for award.

The protest is denied.

B-240422, November 14, 1990

Procurement

Bid Protests
■ GAO procedures
■ ■ Interested parties
■ ■ ■ Direct interest standards

Protester is not an interested party eligible to challenge agency's failure to include evaluation preference clauses favoring small disadvantaged businesses (SDB) in a partial small business set-aside where it would not be in line for award even if the SDB evaluation preferences were applied and its protest were sustained.

Matter of: GTA Containers, Inc.

Yatish J. Joshi for the protester.

Michael G. Winchell, Esq., United States Marine Corps, for the agency.

Sabina K. Cooper, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

GTA Containers, Inc. protests the Marine Corps' failure to include small disadvantaged business (SDB) evaluation preference clauses in request for proposals (RFP) No. M67004-90-R-0055, a partial small business set-aside for collapsible fuel tanks and ground cloths.

We dismiss the protest.

GTA argues that the solicitation should be amended to include two clauses—the Evaluation Preference for SDB Concerns, Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7007, and the Partial Small Business Set-Aside with Preferential Consideration for SDB Concerns, DFARS § 252.219-7010--in order to implement Federal Acquisition Regulation (FAR) § 52.219-8, which states that SDB concerns be given the maximum practicable opportunity to participate in performing contracts issued by federal agencies.

The RFP, issued April 24, 1990, contemplates multiple awards of fixed-price contracts to the low offerors under the small business set-aside and non-set-aside portions of the requirement. The fuel tanks are to be acquired under a partial small business set-aside and the ground cloths are to be procured under a total small business set-aside. The RFP did not contain DFARS § 252.219-7007, Notice of Evaluation Preference for SDB Concerns, cited by the protester. That clause provides for a 10 percent evaluation preference for SDBs that do not elect to waive the preference, after all other evaluation factors are applied. The Marine Corps also did not include in the RFP the provision found at DFARS § 252.219-7010, Partial Small Business Set-Aside with Preferential Consideration for SDB Concerns. That clause provides that offers on the non-set-aside portion of the RFP are to be evaluated first for award. The set-aside portion would then be awarded to one or more small business concerns with a preference, in declining order, for SDBs that are also labor surplus area (LSA) concerns; small business concerns that are LSAs; other SDBs; and other small businesses. Award to SDBs on the set-aside portion is to be at the lower of either the price offered by the concern on the non-set-aside portion or a price that does not exceed the award price on the non-set-aside portion by more than 10 percent. The Marine Corps based its decision not to include the SDB preference clauses on the existence of a limited industrial base and the prior purchase history of the items.

The Marine Corps received a number of offers by the July 29 closing date. GTA protested the exclusion of the clauses in a June 20 telefax to the agency. The Marine Corps asserts that it denied GTA's protest by letter of June 27, telefaxed to GTA by the Marine Corps on that day. GTA filed another telefaxed protest to the agency on June 28. That protest was denied by telefaxed letter of June 29; however, GTA asserts that it did not receive the June 29 letter from the Marine Corps denying its protest until July 5. GTA then filed a protest in our Office on July 13. The Marine Corps has not awarded the contract pending our decision on the protest.

The Marine Corps argues that GTA is not an interested party to protest the exclusion of the clauses, and that GTA's protest is untimely. Based on our

review of the record, we find that GTA is not an interested party to object to the exclusion of the clauses from the RFP.

Our Bid Protest Regulations define an interested party for purposes of filing a protest as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a) (1990). Where there are intermediate parties that have a greater interest than the protester, we generally consider the protester's interest to be too remote to qualify as an interested party. *Brunswick Corp. and Brownell & Co. Inc.,* B-225784.2; B-225784.3, July 22, 1987, 87-2 CPD ¶ 74. Specifically, a party will not be deemed interested where it would not be in line for the protested award even if its protest were sustained. *Seals Servs., Inc.,* B-235523, June 20, 1989, 89-1 CPD ¶ 581.

Here, the abstract of offers shows that GTA would not be in line for award even if the evaluation preference clauses favoring SDBs had been included in the RFP. First, with respect to DFARS § 252.219-7007, the Notice of Evaluation Preference for SDB Concerns clause, even if the agency had applied the 10 percent evaluation preference, the record demonstrates that GTA's offer[1] would be among the highest priced offers for all items. Second, with respect to DFARS § 252.219-7010, the Partial Small Business Set-Aside with Preferential Consideration for SDB Concerns clause, even if the Marine Corps had evaluated offers in accordance with that provision, the record demonstrates that several other offerors that qualify as LSAs and SDBs would be in line for award ahead of GTA, and that GTA's price, which is among the highest offered, exceeds the award price on the non-set-aside portion of the RFP by a great deal more than 10 percent.

Thus, GTA's economic interest has not been affected by the Marine Corps' decision not to include the SDB evaluation preferences since GTA would not be in line for award even if its protest were sustained. Accordingly, GTA is not an interested party to protest this issue and we will not address the timeliness or merits of its protest. *Technology Prods. Mfg. Corp.,* B-238182.3; B-238182.5, Apr. 10, 1990, 90-1 CPD ¶ 381; *Training Eng'g Aviation Management Corp.,* B-235553, May 26, 1989, 89-1 CPD ¶ 516.

The protest is dismissed.

[1] GTA submitted three offers, only one of which was found to meet the terms of the RFP.

B-238645.2, November 19, 1990

Procurement

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

A protest against agency's allegedly improper evaluation of proposals is without merit where review of the evaluation provides no basis to question the reasonableness of the determination that based on the solicitation evaluation formula, the awardee's proposal offered the combination of technical and price most advantageous to the government.

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

Where an agency advised offerors in the competitive range of all technical and cost concerns and gave the offerors an opportunity to revise their proposals based on these concerns, agency has satisfied the requirement that meaningful discussions be conducted. Even if an offeror's price is higher than the other offeror's price, the agency is not required to advise the high offeror of this fact if there is no indication that the agency found the high offeror's price to be unreasonable.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Point ratings

Protest that agency failed to follow stated evaluation methodology by using penalty points and bonus points in its actual scoring is denied since the solicitation advised offerors of the broad method of scoring to be employed and gave reasonably definite information concerning the relative importance of evaluation factors. The precise numerical weights in an evaluation need not be disclosed.

Procurement

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

Protest that agency relaxed certain solicitation requirements for the awardee is denied where record shows that the agency allowed both the protester and the awardee to make certain minor software and hardware changes to their products and nothing in the solicitation precluded such changes.

Matter of: Chadwick-Helmuth Company, Inc.

David A. Ringnell, Esq., Smith & Smith, for the protester.

Paul Shnitzer, Esq., Crowell & Moring, for Scientific Atlanta Company, Inc., an interested party.

Craig E. Hodge, Esq., and Stephanie A. Kreis, Esq., Department of the Army, for the agency.

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

Chadwick-Helmuth Company, Inc. (CHC) protests the award of a contract to Scientific Atlanta Company, Inc. under request for proposals (RFP) No. DAAJ09-89-R-1150, issued by the Army Aviation Systems Command for a 3-year requirements contract for the Army Vibration Analyzer (AVA). CHC contends that the Army relaxed its technical requirements for Scientific Atlanta without notifying CHC, improperly evaluated the proposals, and failed to conduct meaningful discussions with CHC.[1]

We deny the protest.

The AVA equipment is used in performing vibration analysis and rotor track and balance maintenance functions for the entire Army helicopter fleet, except for the CH-47 helicopter. Under the RFP, the AVA was to include components/equipment necessary to acquire, transmit, process, display and record vibration data.

The RFP advised that award would be made to the offeror whose product was evaluated as superior with respect to the attainment of the program objectives and goals. The Army also reserved the right to select the AVA that it determined would provide the government the best overall value. Proposals were to be evaluated in two phases. Phase I was to be a complete evaluation and scoring of the written proposals. Phase II was a "fly-off" in which the product's performance was to be evaluated on Army aircraft. A competitive range was to be established at the conclusion of Phase I, and those offerors determined to be within the competitive range were to be invited to compete in Phase II.

The evaluation was divided into four areas: (1) qualification; (2) technical; (3) integrated logistical support (ILS); and (4) cost. The qualification area consisted of elements considered to be mandatory and were to be scored on a pass/fail basis. The RFP also provided for the performance of a qualification validation of those AVAs within the competitive range to verify compliance with the qualification

[1] We note that shortly after the receipt of proposals in January 1990, the government inadvertently released two complete copies of CHC's proposal to representatives of Scientific Atlanta. The proposals were retrieved by the government less than 3 hours after their release. CHC filed a protest with our Office objecting to the disclosure and arguing that it created an auction and organizational conflict of interest. We dismissed the protest without prejudice on May 3, pending the results of an investigation by the Army Criminal Investigation Division (CID). *See Chadwick-Helmuth Co., Inc.*, B-238645, May 3, 1990, 90-1 CPD ¶ 445. The CID conducted an investigation which concluded that there was no evidence to indicate that CHC's proposal was compromised as a result of the release. In this current protest, CHC initially contended that the disclosure of its proposal along with alleged relaxation of the requirements for Scientific Atlanta tainted the integrity of the procurement. In its written comments on the agency report, CHC abandoned this protest ground. *See generally The Big Picture Co., Inc.*, B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

requirements. (This was to be done prior to the Phase II evaluation.) Under Phase I, ILS and cost were of equal importance and when combined were as important as the technical area. Under Phase II, technical was approximately three times as important as cost, and cost was approximately three times as important as ILS. The RFP further stated that some elements would be evaluated more than once, i.e., under Phase I and Phase II, and their resultant scores would be evaluated on a cumulative basis.

The Army received five proposals by the closing date of January 22, 1990. The technical proposals were then evaluated. As previously stated, the elements within the qualification area were deemed mandatory and scored on a pass/fail basis. Each element of the technical and ILS areas were evaluated and quantitatively scored. In some instances, penalty/bonus points were awarded. Each cost was evaluated to determine that it was reasonable, complete and affordable. After the Phase I evaluation, three offerors, CHC, Scientific Atlanta, and Dynamic Instruments, Inc. were determined to be within the competitive range.

The qualification validation was then performed on the equipment of the three competitive range offerors. Under this evaluation, the equipment was put on test helicopters to determine if they worked without problems and met the pass/fail criteria. During the course of the qualification validation, both CHC and Scientific Atlanta were allowed to make minor hardware changes determined to be necessary to complete the qualification validation. As a result of the qualification validation, Dynamic Instruments was excluded from the competitive range.

Phase II, the product evaluation, resulted in a 7-point differential (out of 100) between the two remaining offerors, favoring CHC. After the conclusion of Phase II, each offeror was given a list of deficiencies and asked to address them in updated technical volumes. The updated technical volumes were reviewed, and discussions were held with both offerors. Best and final offers (BAFO) were submitted by both CHC and Scientific Atlanta on June 8. The proposal and product evaluations were combined to yield a 3-point difference (out of 100) favoring Scientific Atlanta. A 3-year requirements contract for a total estimated quantity of 1250 AVA units, as well as adapter kits, training, technical publications, data and interim contractor support was awarded to Scientific Atlanta on June 22. This protest followed.

CHC argues that a number of requirements were relaxed to the advantage of Scientific Atlanta and maintains that Scientific Atlanta failed to meet certain RFP requirements. Specifically, CHC contends the RFP's requirement that data produced by the AVA be capable of reduction to hard copy required the mandatory inclusion of a printer, which Scientific Atlanta's equipment did not have. CHC maintains that the inclusion of the printing capability in its AVA added considerable cost to CHC's proposal and elimination of this requirement would have had a major impact on the final price. CHC also argues that Scientific Atlanta's user manuals were not specific to the make and model of the particular helicopter involved, which required the agency to impose a training require-

ment. CHC further argues that Scientific Atlanta's equipment failed to pass the necessary qualification on two-bladed aircraft.

Our review of the record demonstrates that there was not a requirement that a printer be included with the equipment. The solicitation provided at paragraph C.2.2.2.5 that:

> The AVA should be capable of presenting maintenance actions derived from the acquired data in aircraft specific units (i.e. clicks of pitch link, etc.) as well as any and all acquired data . . . . Any and all maintenance actions/data should be available on hardcopy as required by the user.

In addition, at a bidders conference held in December 1989, the following question was asked: "Does an AVA that is fully functional without external power and can easily be interfaced to IBM compatible printers meet the requirements of C.2.2.2.5.?" The Army's response was yes. The RFP did not state that a printer was required or mandatory but merely stated that the data "should" be available on hardcopy. Further, the Army's response to a specific question concerning this requirement clearly indicated that a printer was not required. We conclude that CHC made a business judgment on its own to include a printer with its equipment.

With respect to the training manuals, the solicitation did not require the user manuals to be aircraft specific. The Army reports that, during the technical flight evaluation, it became concerned that the manuals would not be clear to Army personnel, and that it decided to give each offeror the opportunity to update its manuals. The Army states that during the user flight evaluation it became clear that even the updated manuals of both offerors were insufficient. Consequently, the Army requested the offerors to present a 4-hour training course. We see nothing improper in the Army's action here, since the requirement for user manuals was not relaxed, and both offerors were given an equal opportunity to both update their manuals and present a training course.

The record further demonstrates that CHC and Scientific Atlanta passed all qualification tests except one. Both offerors failed a portion of the electromagnetic interference/electromagnetic compatibility requirement conducted by the Army during the qualification phase. Since the failure of the offerors to meet this requirement had no adverse affect during testing, the Army decided to modify this requirement and neither offeror was penalized. The record further shows that Scientific Atlanta also passed the qualification tests on two-bladed aircraft.

CHC also maintains that, contrary to the evaluation criteria, Scientific Atlanta was allowed to make certain hardware changes to its equipment during the product testing phase. The record indicates that both offerors were allowed to make what the Army considers to be minor hardware changes. For example, Scientific Atlanta was allowed to drill universal holes in its mounting bracket to allow for proper fit, and also was allowed to change from a 40-foot cable to a 50-foot cable. CHC was allowed to add an interrupter to its adapter kit and to also add an extra tie-down strap to secure its equipment to the aircraft. CHC argues that the changes it was allowed to make were not material and that the

changes Scientific Atlanta made were significant. The Army maintains, however, that without the allowable changes, CHC's equipment would not have passed the qualification validation. The Army further states that the changes Scientific Atlanta made were minor in nature and enabled it to pass the qualification validation. Our review of the record supports the Army's position.

There is nothing in the record to indicate that any requirements were relaxed or that Scientific Atlanta's proposal/product received a higher technical rating than was reasonable and consistent with the stated evaluation criteria. In view of the fact that CHC's proposal was only rated 7 points higher during the product evaluation than Scientific Atlanta's proposal, that both offerors passed all qualification tests (except the one that was waived), and that the combined proposal and product evaluations resulted in a 3-point advantage for Scientific Atlanta, we cannot find unreasonable the Army's determination that Scientific Atlanta's proposal offered the combination of technical and price most advantageous to the government. *See generally Lembke Constr. Co., Inc.*, B-228139, Nov. 23, 1987, 87-2 CPD ¶ 507.

Next, the protester objects to the fact that the evaluation team used a system of rating which included the assessment of penalty points. CHC contends that this was improper because the use of penalty points or how these points were to be calculated or even their relative importance was not disclosed in the evaluation approach set forth in the RFP. CHC maintains that it possibly could have structured its proposal differently had it known which areas would have been susceptible to penalty points.

Although not disclosed in the solicitation, under certain subfactors in the technical area a system whereby penalty or bonus points would be given was used by the evaluators in rating proposals. Under the actual scoring used for certain subfactors, a zero would be given for completely meeting the requirement, while penalty points (positive numbers) were given if proposal did not conform to all factors of the subfactor and bonus points (negative numbers) were given for exceeding the requirement. For example, the evaluation of the element, power, under the factor battery power would be as follows:

> The offeror's proposal shall be evaluated to determine if the AVA utilizes battery power. The factor evaluation shall be a summary of the subfactor evaluations for Rechargeable, Replaceable, Durable and Low Power. If the answer to all four (4) subfactors is yes the offeror receives a score of 0. For each no answer the offeror receives +10 penalty points with a maximum of +40 penalty points. If the answer to all subfactors is yes and A/C power provisions are not utilized, the offeror receives a -5 bonus point.

Although a solicitation must advise offerors of the broad method of scoring to be employed and give reasonably definite information concerning the relative importance of the evaluation factors, the precise numerical weight to be used in evaluation need not be disclosed. *See Technical Servs. Corp.*, 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152. Here, the RFP was very specific, and CHC was provided sufficient information to know what the evaluation factors and subfactors were and how its proposal would be evaluated. The relative importance of the evaluation factors and subfactors were also specifically identified. Notwithstanding the

use of bonus and penalty points, it is clear from the record that the actual weight given each factor in scoring the proposals was as stated in the evaluation criteria contained in the RFP. Thus, CHC had sufficient information to enable it to submit a proposal that fully satisfied the requirements of the RFP.

Further, offerors are on notice that qualitative distinctions will be made among proposals where technical factors are part of the competitive evaluation. *See generally Mutual of Omaha Ins. Co.,* B-203338.2, Sept. 24, 1982, 82-2 CPD ¶ 268. We do not think that it was improper for the Army to rate the proposals using a system of penalty and bonus points or that the Army was required to inform the offerors of its specific rating methodology. This aspect of CHC's protest is denied.

Finally, CHC argues that the Army failed to conduct meaningful discussions in that it was never informed that its proposal was overpriced. CHC states that the discussions centered exclusively on technical and functional requirements, and the issue of price was raised only once by CHC when it offered to include a discount formula.

In order for discussions in a negotiated procurement to be meaningful, contracting agencies must furnish information to all offerors in the competitive range as to areas in which their proposals are believed to be deficient so that offerors may have an opportunity to revise their proposals to fully satisfy the agency's requirements. *See* Federal Acquisition Regulation (FAR) § 15.610(c) (FAC 84-16); *Individual Dev. Assos., Inc.,* B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290. However, the actual content and extent of discussions are matters of judgment primarily for determination by the agency involved, and we will review the agency's judgments to determine if they are reasonable. *See Northwest Regional Educ. Laboratory,* B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74.

We find no duty owed by the Army in this case to advise CHC that its price was higher than Scientific Atlanta's price. The record shows that CHC's initial offer was not the highest received and that it was lower than the government's estimate. CHC's BAFO price was also lower than the government's estimate. Further, the Army reviewed CHC's price and determined it to be reasonable. *See Proprietary Software Sys.,* B-228395, Feb. 12, 1988, 88-1 CPD ¶ 143. Although CHC argues that the elimination of the printer from its system would have resulted in considerable cost savings, the inclusion of the printer, as we have found, was a business decision made by CHC and not a requirement. Otherwise, CHC has not stated that it would have or how it would have lowered its price to any substantial degree. CHC did lower its price in its BAFO submission but it was still higher than the awardee's. Consequently, we find that the Army did not fail to conduct meaningful discussions.

The protest is denied.

B-239867.2, November 19, 1990

Procurement

Bid Protests

■ GAO procedures

■■ Protest timeliness

■■■ Apparent solicitation improprieties

Protest challenging the application of the new individual surety regulations to the procurement is dismissed as untimely where protester did not protest this application within 10 working days of learning agency intention to apply the new regulations.

Procurement

Sealed Bidding

■ Bid guarantees

■■ Sureties

■■■ Acceptability

Protester properly was found nonresponsible where sureties pledged assets which are unacceptable under the current regulatory requirements.

Matter of: Bundick Enterprises, Inc.

Terry G. Bundick for the protester.

Sharon Matsumara, Esq., Acting Associate Counsel, Department of the Navy, for the agency.

Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Bundick Enterprises, Inc. protests the rejection of its bid under invitation for bids (IFB) No. N62474-89-B-6671, issued by the Department of the Navy for the installation of motor operated valves and a fuel pipeline stripping pump at Defense Fuel Supply Point, Ozol, California. The Navy rejected Bundick's bid because its individual bid bond sureties were found to be nonresponsible.

We dismiss in part and deny the protest in part.

The IFB was issued on December 21, 1989, and had an amended bid opening date of February 28, 1990. The IFB required bidders to submit a bid bond in an amount equal to 20 percent of the bid price. The solicitation contained a standard form (SF) 24 bid bond which instructed bidders who were proposing individuals as sureties to provide two or more responsible sureties to execute the bid bond. The bidder also was required to provide a completed standard form (SF) 28, Affidavit of Individual Surety, setting forth financial information for each individual. Amendments concerning the acceptability of individual sureties became effective on February 26, subsequent to issuance of the IFB. 54 Fed. Reg. 48,985 (1989). These new regulations at Federal Acquisition Regulation

(FAR) § 28.203 (FAC 84-53) contain specific criteria by which to judge the acceptability of individual sureties, including changes in the definition of acceptable assets as well as the new requirement that an offeror may submit from one to three individual sureties for each bond, provided that the pledged assets, alone or when combined, equal or exceed the penal amount of the bond.

Five bids were received by the amended bid opening date of February 28. The protester submitted the apparent low bid of $158,220, which was signed by "Terry G. Bundick, President," and provided a bid bond in the amount of 20 percent of its bid price executed by two individual sureties, Walter T. Robertson and Terry G. Bundick.

Mr. Bundick's SF 28 reflected a net worth of $216,255. The listed assets included: unencumbered, solely owned real estate valued at $4,800; construction equipment valued at $137,375; cash in banks in the amount of $9,230; accounts receivable in the amount of $39,255; cash value insurance in the amount of $2,800; automobiles valued at $13,500; personal property valued at $22,250; guns and jewelry valued at $8,400; musical equipment valued at $5,850; and office equipment valued at $5,320.

Mr. Robertson's SF 28 reflected a net worth of $675,000. The assets listed by Mr. Robertson included real estate equity in the surety's principal home and business address valued at $150,000; heavy construction equipment valued at $550,000; minus liabilities in the amount of $25,000.

By a letter dated March 14, the contracting officer requested that Bundick submit additional information in support of the purported net worths of the individual sureties, since it had failed to provide any evidence of such with its bid. The contracting officer informed Bundick in this letter that the new Federal Acquisition Regulation concerning the acceptability of individual sureties would apply and to therefore supply the type of information necessary. The contracting officer enclosed a copy of these regulations for Bundick's convenience. In a March 19 letter Bundick submitted only personal financial statements of the individual sureties. The contracting officer again requested additional information of the type required by the new regulations in a letter dated April 6. By a letter dated April 10, Bundick requested that the contracting officer permit Bundick to replace its individual sureties with a corporate surety since the new regulations render most of its individual sureties' assets unacceptable. The contracting officer did not respond to Bundick's request to substitute a corporate surety and ultimately determined that the individual sureties proposed by Bundick were unacceptable and rejected Bundick as nonresponsible pursuant to FAR § 28.203(c).

By a letter dated April 11, but not received until April 17, Bundick filed a protest in our Office challenging the contracting officer's application of the new regulations in this procurement, and alleging, in the alternative, that it was improper for the agency to refuse Bundick's request to substitute a corporate surety for its individual sureties under the "Substitution of Assets" clause, FAR § 28.203-4. Bundick challenges the nonresponsibility determination on the

grounds that it should not have been based upon the new regulations because they were not a part of the solicitation package.

Bundick's challenge against the applicability of the new regulations to this procurement was not timely filed. Bundick was informed by a letter dated March 14, and received sometime before its March 19 reply, that the new regulations would apply, but did not protest until April 17.[1] Although Bundick alleges that it was not aware of the new regulations until April 6, it offers no explanation of why the March 14 letter which enclosed a copy of the new regulations was not adequate notice that the new individual surety regulations would be applied. In order to be timely, a protest must be filed not later than 10 working days after the basis for protest is or should have been known. 4 C.F.R. § 21.2(a)(2) (1990). Since Bundick did not file a protest in our Office within 10 days after it received the March 14 letter its protest is untimely.

While under the new regulations it is still the contracting officer's obligation to determine the acceptability of individual sureties, the regulations also specifically delineate those assets which are acceptable and identifies some, but not all, of those that are unacceptable. FAR §§ 28.203-2(b) and (c). Here, Mr. Robertson listed his principal residence and construction equipment as the assets for security of his bond obligations. Both of these, however, are specifically proscribed in the new regulations as unacceptable assets and, therefore, the contracting officer did not err in determining Mr. Robertson to be an unacceptable surety. As Mr. Bundick acknowledges in his comments on the agency report, nearly all his listed assets also are unacceptable under the new regulations. *See* FAR §§ 28.203-2(c)(3)(ii) and (6).

Bundick's final argument is that it should be permitted to substitute a corporate surety for the two individual sureties rejected by the contracting officer under the "Substitution of Assets" clause. FAR § 28.203-4. That clause does not permit offerors to replace sureties, rather, it permits a surety to substitute new assets for those already pledged. Except in special circumstances not applicable here, the replacement of unacceptable sureties after bid opening is not allowable since the liability of the sureties is an element of responsiveness which must be established at the time of bid opening. *See e.g.,* FAR § 28.101-4; *Allied Prod. Management Co., Inc.,* B-236227.2, Dec. 11, 1989, 89-2 CPD ¶ 534.

The protest is dismissed in part and denied in part.

[1] Although Bundick's original protest letter is dated April 10, we did not receive it in our Office until April 17, which is the relevant date for determining timeliness. 4 C.F.R. § 21.0(g).

B-240484, November 19, 1990

Procurement

Bid Protests

■ GAO procedures

■■ Protest timeliness

■■■ 10-day rule

■■■■ Certified mail

A bid is late when received 6 days after the time set for opening in a contracting office in Guam, even though it was sent by certified mail at least 5 calendar days before the specified bid opening date, since the certified mail exception to the late bid rule is not applicable where bids are submitted outside the 50 states of the United States, the District of Columbia and Canada.

Matter of: Kentucky Bridge & Dam, Inc.

Gerald M. Woodrox, Esq., for the protester.

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

Kentucky Bridge & Dam, Inc. protests the rejection of its bid under invitation for bid (IFB) No. F64133-90-B-0006, issued by the Department of the Air Force at Anderson Air Force Base, Guam, for the provision and installation of lanai windows and screens in 48 military housing units. Kentucky complains that the Air Force improperly rejected its bid as late.

We deny the protest.

Two bids were received by the July 5, 1990, bid opening; Kentucky's bid was not received by that date. On July 6, Kentucky contacted contracting personnel about the bid opening. Contracting personnel informed Kentucky that no bid package had been received from that firm. On July 11, the contracting activity received Kentucky's bid, which had been sent by certified mail and was postmarked June 30. The Air Force declined to open Kentucky's bid which it returned to that firm. The contracting officer had determined that the bid was late pursuant to Federal Acquisition Regulation (FAR) § 52.214-32 (FAC 84-53), which was incorporated by reference in the IFB, because the bid had been received after bid opening and there was no provision for accepting it.

On July 19, Kentucky filed this protest with our Office. The protester claims that since its bid package was sent by certified mail 5 days prior to the date specified for bid opening, its bid could be considered under one of the limited exceptions provided for in FAR § 14.304-1(a)(1) to the late bid rule. The agency concedes the protester's bid was sent by certified mail 5 days prior to bid opening, but contends that this exception to the late bid rule does not apply to pro-

curements in Guam and other locations outside of the United States as currently defined in the FAR.

An agency may not consider a late bid unless it falls under one of the limited exceptions to the late bid rules specified in the FAR. *Medasys, Inc.*, B-236740, Sept. 7, 1989, 89-2 CPD ¶ 223; *West Canyon Boiler, Inc.*, B-232571, Dec. 9, 1988, 88-2 CPD ¶ 578. Since 1989, the FAR has had two standard clauses for late submissions and modifications of bids: one for IFBs issued for submission of bids within the United States and Canada, FAR § 52.214-7, and another where bids are submitted "overseas," outside the United States and Canada. *See* FAR §§ 14.201-6(c)(3), (4) (FAC 84-58). One of the changes that was made in 1989 for IFBs providing for the submission of bids outside of the United States or Canada was the removal of the certified mail exception to the late bid rule. While this exception continues in IFBs where bids are submitted in the United States or Canada, this exception was not in FAR § 52.214-32, which was expressly incorporated in the IFB at issue here.[1]

Kentucky asserts that notwithstanding the inclusion of the overseas late bid provision in the IFB, the certified mail exception should be applied because Guam is part of the United States. However, FAR § 2.101 (FAC 84-53) defines the geographical "United States" to mean "the 50 States and the District of Columbia"; and distinguishes, "Possessions," which term includes Guam. Kentucky contends that it is not clear this definition of the "United States" is the one applicable to the late bid clauses. However, FAR § 2.101 states that the defined terms are applicable to all provisions of the FAR unless the context in which they are used requires a different meaning. Nothing in the FAR provisions concerning late bids implies that the term "United States" means anything other than as defined in FAR § 2.101. Indeed, Kentucky was expressly advised of the applicable rules by the inclusion of the overseas late bid clause in the IFB.

The protest is denied.

[1] The only exception to the late bid rule remaining in this clause is where "it was determined by the government that the late receipt was due solely to mishandling by the government." FAR § 52.214-32(a). Kentucky does not claim this exception applies.

B-240426, B-240426.4, November 20, 1990

Procurement

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

Procurement

Contract Management
■ Contract administration
■■ Domestic products
■■■ Compliance
■■■■ GAO review

Where solicitation specification requires that offered product be one of a manufacturer's current models, proposal to provide a product which will require major modifications to meet domestic content provisions of solicitation should have been rejected as technically unacceptable.

Matter of: Omatech Service Ltd.

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

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

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

Omatech Service Ltd. protests the award of contract to Discount Machinery and Equipment Co. under request for proposals (RFP) No. F09603-88-R-74981, issued by the Department of the Air Force, for 25 engine and toolroom lathes. In its original protest, Omatech argued that Discount's offer did not comply with a solicitation provision which required that the lathes be manufactured in the United States or Canada and that the cost of components manufactured in the United States or Canada exceed 50 percent of the total cost of all components. Based on the Air Force's response to that allegation, Omatech filed a second protest alleging that Discount did not submit descriptive literature demonstrating that its product was technically acceptable and that Discount's product did not comply with various technical requirements. The two protests have been consolidated for purposes of this decision.

We sustain the protest.

The RFP was issued on October 27, 1988 and seven offers were received by the original closing date. In March 1989, the Air Force began negotiations during which Discount and another offeror were required to submit detailed information to prove compliance with Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7023 (DAC 88-4), which was incorporated

into the RFP and required that the machine tools be manufactured in the United States or Canada and that the cost of the components manufactured in the United States or Canada must exceed 50 percent of the cost of all its components. Discount apparently satisfied the agency that its product complied with DFARS § 252.225-7023. The Air Force received best and final offers by March 9, 1990, and on July 5 made award to Discount. Omatech filed its original protest with our Office on July 13. On July 18, the agency issued a stop-work order against the contract.

The RFP provided that the end product was to be manufactured in accordance with MIL-L-23249D. This specification requires that the lathe offered "shall be new and one of the manufacturer's current models capable of conforming to the accuracy requirements for an engine lathe, or toolroom lathe as specified herein." The RFP required that offerors submit descriptive literature with its offer. The RFP stated that the descriptive literature must be current, accurate, and of sufficient detail to support an engineering evaluation of the offer against the government's minimum specifications. It cautioned further that offerors shall insure that the literature submitted addresses all of the equipment characteristics stated in the specifications.

In responding to the protester's initial allegation that Discount did not offer to supply a domestic product, the Air Force explained to our Office how the awardee's proposal would comply with DFARS § 252.225-7023, including its subcontractor's production plan. Discount's subcontractor, HDS, will purchase from Mysore Kirloskar, a manufacturer in India, the foreign product absent numerous required technical components. After receipt of the foreign product, the subcontractor will add necessary components. The Air Force report shows that major domestic manufactured components, including the motor, are to be added to the machine which is foreign supplied. The Air Force explains that HDS, an American corporation, is the manufacturer of the end product, and the cost of the domestic components which HDS will add to the machine constitutes more than 50 percent of the total cost of the end product.

The only descriptive literature contained in Discount's proposal was a brochure for the "Enterprise 1675" lathe which showed the specifications of the machine it offered. Although the record shows that the machine depicted in the brochure did not comply with all the specifications, during negotiations and in revised proposals, Discount stated to the Air Force that its product would be modified to comply with all the specifications. The Air Force evaluation documents show that Discount proposed to change dimensions for five machine characteristics depicted in the original brochure. One of the documents concludes that since Discount proposes to modify the product shown in the descriptive literature, that the machine "is not currently in production or a different machine is being offered, for which a new brochure would be required." Another evaluation document, however, states without explanation that Discount's lathe meets the specifications.

The protester argues that the Enterprise line of lathes is a foreign product. Omatech submitted for the record a publication listing model numbers and op-

erating specifications showing that the Enterprise 1675 is manufactured by Mysore Kirloskar Ltd. of India. Omatech argues that the Air Force did not conduct a meaningful technical evaluation since the only descriptive literature showed the Enterprise 1675, which itself is noncompliant with the specifications. Finally, it argues that, in order to meet both the domestic content and specification requirements of the RFP, Discount intends to substitute various components of the Enterprise 1675--an end item in itself—with domestic components. Therefore, the protester concludes, the end product is a "customized" item which cannot meet the requirement that the product be the "manufacturer's current model."

In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. *Instruments S.A., Inc.; VG Instruments Inc.*, B-238452; B-238452.2, May 16, 1990, 90-1 CPD ¶ 476.

We find that Discount's product did not comply with MIL-L23249D, which requires that the lathe offered be one of a manufacturer's current models. The record clearly shows that the Enterprise 1675 is the only machine for which Discount submitted descriptive literature. While the Enterprise 1675, manufactured by Mysore Kirloskar of India, appears to be a current model, that is not the end product being offered by Discount. The evaluators concluded that HDS will have to modify the Enterprise 1675 lathe by adding domestic components including major items (such as the motor) which make a significant contribution to the product.

In response to the protester's assertion that Discount's product is a customized current product not in current production, the contracting officer merely states that "a commercial manufacturer must modify its machine to some degree in order to meet the government's technical requirements." We agree. The requirement that the lathe be one of the manufacturer's current models does not preclude minor modifications. *See Clausing Machine Tools,* B-216113, May 13, 1985, 85-1 CPD ¶ 533. Here, however, the record shows that the modifications to be made to the Indian component are significant and extensive. Domestic components to be added to the Indian machine include, in addition to the motor, bearings, jaw chucks, collets, and the cooling system. The resulting product, therefore, in our view, is a hybrid machine not in current production.

We find that the Air Force should have rejected Discount's offer as technically unacceptable. In view of the above, we recommend that the Air Force terminate the award to Discount and award to Omatech if its offer is determined to be the next low, technically acceptable offer. Further, we find that Omatech is entitled to the costs of pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

The protest is sustained.

B-237975, November 23, 1990

Military Personnel

Pay
■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

Military Personnel

Relocation
■ Reimbursement
■■ Payments
■■■ Foreign currencies
■■■■ Exchange rates

A Navy Captain who exchanged British pounds sterling, representing the proceeds from the sale of his London home, for dollars at a Navy disbursing office is indebted to the United States for the $29,000 overpayment he received as a result of the disbursing officer's use of an erroneous currency exchange rate that violated the applicable provisions in the Navy Comptroller Manual.

Matter of: Captain Don W. Medara, USN—Currency Exchange Rates

The Office of the Comptroller, Department of the Navy, has requested our decision concerning the validity of a claim the Navy is asserting against Captain Don W. Medara to recover an overpayment he received as a result of a currency exchange at a Navy disbursing office in London, England, that was based on an erroneous exchange rate.[1] For the reasons set forth hereafter, we concur with the Navy's position that Captain Medara is indebted to the United States for the $29,000 overpayment he received as a result of the erroneous currency exchange. Furthermore, we are unaware of any legal basis that would authorize the Navy to waive Captain Medara's indebtedness.

Background

On July 18, 1988, pursuant to a scheduled permanent change of station to the United States, Captain Medara exchanged 116,000 British pounds sterling, representing the proceeds from the sale of his England residence, for dollars at the Navy disbursing office in London, England. The disbursing officer made the currency exchange based upon the $1.90 per pound rate at which the disbursing office had acquired its holdings in pounds. Accordingly, Captain Medara received $220,400 for the 116,000 pounds he exchanged.

[1] In addition to the Navy's claim against Captain Medara, the Navy is asserting similar claims against other individuals who received overpayments resulting from foreign currency exchanges at the same disbursing office that were based on erroneous exchange rates. While this decision deals specifically with the Navy's claim against Captain Medara, our analysis and conclusions would be applicable to other Navy claims that arose under similar circumstances.

Subsequently, the Navy advised Captain Medara that the disbursing officer should have used an exchange rate of $1.65 per pound and that his unwarranted reliance on a higher rate had resulted in an $29,000 overpayment that Captain Medara was required to repay. After Captain Medara questioned the Navy's claim against him, the Navy agreed to ask us to determine the validity of its position and whether any basis exists for waiving Captain Medara's indebtedness.

Analysis

The rules and procedures governing the procurement, custody, and disposition of funds by Navy disbursing officers are set forth in Volume 4, Navy Comptroller's Manual (Manual),[2] Chapter 2. The Manual's introduction states that the Manual is issued by the Comptroller of the Navy for the information and guidance of "all persons in the Department of the Navy" and that compliance with its instructions is "mandatory except in the case of specific authority for deviation therefrom." According to the Navy, the disbursing office violated two separate provisions in the Manual when it made the currency exchange in question. First, under paragraph 042551-3c(4) disbursing officers are authorized to exchange foreign currency for military personnel departing an overseas area pursuant to a permanent change of station, subject to certain limitations. Under this paragraph disbursing officers cannot exchange foreign currency in an amount which exceeds an individual's monthly pay unless the individual had acquired the excess foreign currency as the result of rental refunds or from the authorized sale of personal property. Since the 116,000 pounds sterling that Captain Medara exchanged represented the proceeds from the sale of real property, the exchange appears to have violated this restrictive provision. However, the Navy's claim against Captain Medara is not based on the disbursing officer's apparent violation of this provision. Although the exchange of such a large amount of foreign currency may have been unauthorized,[3] the Navy would not have suffered a loss and would have no claim against Captain Medara if the disbursing officer had used the correct exchange rate.

The Navy's claim against Captain Medara is based on the Manual, paragraphs 042591-1a and 2a, the relevant portions of which read as follows:

1. a. . . . Except as provided in subpar. 2, [fluctuating] currencies will not be revalued, but will be expended from the disbursing officer's account at the average purchase rate of such currency on hand. . . .

2. a. . . . In certain of the countries which have fluctuating currencies, the concentration of military disbursing officers, military banking facilities, and nonappropriated fund activities has necessitated that an official uniform rate or series of rates be promulgated and adhered to by all concerned. Accordingly, on installations served by military banking facilities under contract with the Depart-

[2] Although an updated edition of Volume 4 of the Manual was issued in May 1990, all Manual references in this decision are based on the edition of the Manual in use when the transaction in question took place.
[3] We note that Captain Medara's request for a waiver of the restriction limiting the amount of foreign currency disbursing officers could exchange was granted by the Commander of the United States Naval Activities in England before the exchange was made. We need not consider the validity of the waiver since our decision does not require resolution of this issue.

ment of Defense, disbursing offices located on those installations shall value their holdings at the rates used by the military banking facility.

The American Express Bank is the military banking facility that services Navy personnel based in London, England. Under paragraph 042591-2a, the Navy disbursing office in London is required to use the same exchange rate the military banking facility uses in determining the value of its holdings in pounds and in making currency exchanges.[4] The obvious purpose of this requirement is to prevent the very situation that occurred here, in which the military banking facility and the Navy disbursing office at an installation use different exchange rates, thus allowing individuals to "shop" for the most favorable rate whenever they exchange currency.[5]

Captain Medara claims that the waiver he requested was granted by the Commander of the United States Naval Activities in England with full knowledge of the procedures the disbursing office was using to determine the currency exchange rate. Not only is this contention unsupported by any evidence, but even if true, the Commander had no more authority than the disbursing officer did to approve an exchange rate that was not consistent with the rate determining mechanism provided for in the Manual.

The record shows that in clear contravention of the express provision in the Manual, compliance with which is mandatory by all Navy personnel, the Navy disbursing officer made currency exchanges based on the average rate at which the disbursing office had acquired its holdings in pounds. As a result, Captain Medara received $220,400 for the 116,000 pounds he exchanged instead of the $191,400 to which he was entitled based on the rate used by the military banking facility at the time the exchange was made. This $29,000 overpayment represents a debt Captain Medara owes to the United States which he is legally required to repay. In addition, we note that the disbursing officer who was responsible for the overpayment is personally liable to the United States for any amount that is not recovered from Captain Medara unless the disbursing officer is relieved of liability by the Comptroller General in accordance with 31 U.S.C. § 3527(c).

While we sympathize with Captain Medara's plight and recognize that in making the currency exchange he relied upon the advice and actions of government officers and employees, it is well established that the "government is not liable for the erroneous advice or authorizations of its agents." 66 Comp. Gen. 642, 644 (1987). Moreover, we are not aware of any legal basis that would allow the Navy's claim against Captain Medara to be waived. In particular, the waiver authority provided under 10 U.S.C. § 2774 is not applicable here because the overpayment in question does not constitute an erroneous payment of pay

[4] While paragraph 042591 of the Manual specifically focuses on the exchange rate to be used when foreign currency is disbursed rather than when it is acquired, paragraph 042551-3c(1) specifies that the exchange rate a disbursing officer must use when he purchases local currency "will be the same rate as that which he uses for sale of local currency on that particular transaction day."

[5] By letter dated September 13, 1989, to the Secretary of the Navy, Captain Medara admits that he made the currency exchange at the disbursing office because it was offering a more favorable exchange rate than the military banking facility that he had gone to initially.

or allowance or travel and transportation allowances. Accordingly, we conclude that the Navy's claim against Captain Medara is valid and that the Navy should proceed expeditiously to collect the amount in question from him.

B-240511, November 23, 1990

Procurement

Bid Protests

■ GAO procedures

■■ Purposes

■■■ Competition enhancement

General Accounting Office (GAO) will not consider allegation that agency acted improperly in relaxing solicitation experience requirement in order to broaden competition since GAO's role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect a protester's interest in a more restrictive requirement.

Procurement

Specifications

■ Brand name/equal specifications

■■ Equivalent products

■■■ Acceptance criteria

Procurement

Specifications

■ Minimum needs standards

■■ Determination

■■■ Administrative discretion

Where protester argues awardee did not meet experience requirement that proposed software system, "without modifications, must have been implemented and operating" at one site for 6 months, but protester likewise proposed a system which was not in its entirety in use at any one site for 6 months, and agency has determined that awardee's system will satisfy its minimum needs, contracting officials have treated both offerors equally and there is no basis to sustain protest against award.

Matter of: Integral Systems, Inc.

David A. Kadish, Esq., for the protester.

Albert W. Duffield, for PeopleSoft, an interested party.

Michael L. Willis, Esq., Tennessee Valley Authority, for the agency.

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

Integral Systems, Inc. protests the Tennessee Valley Authority's (TVA) award of a contract to PeopleSoft, under request for proposals (RFP) No. YH-93492C, for human resources and payroll financial software. Integral challenges the evaluation of proposals and contends that PeopleSoft failed to meet a mandatory experience requirement in the solicitation.

We deny the protest in part and dismiss it in part.[1]

TVA requested proposals for the supply of a human resources and payroll financial software system, including a time and attendance module, a payroll module, and a human resources module (covering employee personnel information, employment status, and employee benefits). The solicitation as amended stated that "the system being offered, without modifications, must have been implemented and operating in at least one (1) customer site for six full months." (As issued, the solicitation required that the system being offered have been implemented and operating at two customer sites.) The solicitation required offerors to furnish as verification of their compliance with the above requirement the names and telephone numbers of three customer contacts. In addition, the solicitation advised offerors of the possibility that TVA might require a live test demonstration (LTD) of the proposed software.

The solicitation provided for an initial pass/fail evaluation of proposals on the basis of whether they met all of the mandatory requirements in the specifications. Only those proposals meeting all of the mandatory requirements then would be subject to a further evaluation in which offerors would receive points based upon their offer of listed optional features and upon system costs. Award was to be made to the responsible offeror whose complaint offer received the most evaluation points.

TVA received three proposals in response to the solicitation; it conducted discussions with and required LTDs by all offerors, and then requested best and final offers (BAFOs) from all three. Based upon its evaluation of these BAFOs, TVA concluded that PeopleSoft's proposal was most advantageous to the government. Specifically, TVA found PeopleSoft had offered the required mandatory features and awarded the firm the highest overall point score, 1,764 points; this total score included 1,314 points, the highest technical score, for evaluated optional features, and 450 points for its evaluated cost of $1,044,462. Integral received the second highest score, 1,555 points, including 1,184 technical points and 371 points for its evaluated cost of $1,265,655. Upon learning of the ensuing award to PeopleSoft, Integral filed this protest.

Integral first contends that TVA acted arbitrarily and capriciously when it relaxed the RFP requirement that the proposed system be implemented and oper-

[1] TVA contends our Office does not have jurisdiction to consider protests such as this against TVA procurement actions, but we have previously considered and rejected this contention. *See Monarch Water Sys., Inc.*, 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146. TVA is subject to the procurement procedures in the Federal Property and Administrative Services Act and the Federal Acquisition Regulation, absent a determination to the contrary by the TVA Board. *Newport News Indus. Corp. et al.*, B-220364, Dec. 23, 1985, 85-2 CPD ¶ 705. There is no indication that such a determination was made here. *See Schlumberger Indus.*, B-232608, Dec. 27, 1988, 88-2 CPD ¶ 626.

ating at only one customer site, rather than at two sites as specified in the solicitation as issued. According to Integral, the risks associated with the project justified greater, not lesser, scrutiny of offerors' ability to perform. Integral argues that, in any case, the customer referenced by PeopleSoft and contacted by TVA was not in fact using PeopleSoft's payroll software in the administration of the customer's payroll and that therefore PeopleSoft's proposal failed to satisfy either the relaxed specification or an additional specification requirement that an offeror have demonstrated the ability to complete a "comparable project."

TVA explains that it relaxed the experience requirement only after determining that none of the offerors could comply with the requirement as originally stated and in order to broaden competition. TVA reports that it determined that PeopleSoft met the requirements on the basis of information from both the referenced customer and PeopleSoft that the customer's system had been implemented and operating for 6 months, although "not in full production"; according to the agency, the contracting officer did not interpret the experience requirements as requiring that the system have been in full production such that every software module was processing useful work. The agency learned after award that PeopleSoft's referenced customer was not utilizing the entire PeopleSoft payroll module, although other customers were using this module (but not necessarily the other modules). While TVA believes PeopleSoft nevertheless met the experience requirements as properly interpreted by the contracting officer, it contends that, at the very least, PeopleSoft demonstrated a level of experience either equivalent to or in excess of that specified in the specification. In any case, TVA claims, and Integral does not deny, that Integral's two referenced customers also had not placed into full production and use the entire system proposed to TVA by Integral.

Our Bid Protest Regulations require that alleged improprieties incorporated into a solicitation by amendment be protested not later than the next closing date for receipt of proposals following the amendment. 4 C.F.R. § 21.2(a)(1) (1990). Integral's failure to protest TVA's amendment of the experience requirement, which accompanied the request for BAFOs, until after award therefore rendered its protest of the relaxation of the requirement untimely. In addition, our role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to consider a protester's assertion that the needs of the agency can only be satisfied under more restrictive specifications than the agency believes are necessary. *Matonuska Maid,* B-235607.2, June 30, 1989, 89-2 CPD ¶ 18; *Gould Elecs.,* B-233947.2, Mar. 27, 1989, 89-1 CPD ¶ 310.

Integral's argument that PeopleSoft's proposal should have been rejected because of the alleged failure of PeopleSoft's referenced customer to fully utilize the entire payroll module is without merit. TVA reports that PeopleSoft's proposed system successfully passed the LTD and will satisfy its needs, and given that neither of Integral's referenced customers had placed in full use the entire system proposed to TVA, both offerors were treated equally. Under these circumstances, there is no basis for sustaining Integral's protest. *O.V. Campbell &*

Sons Indus., Inc., B-236799 *et al.*, Jan. 4, 1990, 90-1 CPD ¶ 13; *Emulex Corp.*, B-236732, Dec. 27, 1989, 89-2 CPD ¶ 600.

Integral challenges the calculation of the technical point scores. It argues, first, that TVA acted improperly in evaluating compliance with the mandatory specifications on a pass/fail basis, without undertaking a relative ranking of offerors and, second, that TVA's calculation of the evaluation points awarded for proposal of various optional features was arbitrary and capricious.

We find that neither allegation provides a basis for overturning the award. The solicitation specifically advised offerors that calculation of evaluation scores would be based on proposed optional features and cost, and that compliance with mandatory requirements would be evaluated on a pass/fail basis. Likewise, the directions for the LTD, which were with the mandatory specifications during the LTD would be on a pass/fail basis. Integral's failure to protest the evaluation scheme prior to the closing date for receipt of initial proposals renders its protest in this regard untimely. 4 C.F.R. § 21.2(a)(1). As for TVA's scoring of the proposed optional features, Integral questions the evaluation only in areas where Integral could have increased its score relative to that of PeopleSoft by no more than of 192 points. Since an increase in Integral's score by this amount would have left PeopleSoft as the highest rated offeror, there is no need to address these allegations.

The protest is denied in part and dismissed in part.

B-240525, November 23, 1990

Procurement

Socio-Economic Policies
■ Small businesses
■ ■ Competency certification
■ ■ ■ Eligibility
■ ■ ■ ■ Criteria

Contracting agency is required to refer its finding that small business bidder is nonresponsible to the Small Business Administration (SBA) for consideration under certificate of competency procedures despite the fact that agency is located outside the United States, since statutory requirement for referral to SBA is unrelated to agency's location.

Matter of: Discount Machinery & Equipment, Inc.

Joseph Press for the protester.

Albert J. Joyce III, Esq., Panama Canal Commission, for the agency.

David R. Kohler, Esq., for the Small Business Administration.

Behn Miller and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Discount Machinery & Equipment, Inc. protests the award of a contract to any other bidder under invitation for bids (IFB) No. P-90-18, issued by the Panama Canal Commission for a brake machine.

We sustain the protest.

The IFB was issued as an unrestricted solicitation on February 12, 1990, with a scheduled bid opening date of April 11. In its bid, Discount certified that it was a small business and that all end items to be furnished under the contract would be manufactured by a small business concern in the United States. At bid opening, Discount was found to be the low responsive bidder; however, in reviewing Discount's responsibility, the Commission noted that the company had been terminated for default on an earlier Commission contract on July 26, 1988.[1] Because of this prior default, the agency conducted a responsibility survey of the company; based on the survey's results, by notice dated June 11, the Commission rejected Discount as nonresponsible.

On June 21, by facsimile, Discount protested the Commission's nonresponsibility determination; by facsimile on July 5, the Commission denied Discount's protest. By letter dated July 18, Discount protested to our Office; we received the protest on July 23.[2]

We sustain the protest because the failure to award to Discount was based on a finding that Discount was nonresponsible, which should have been, but was not, referred to the Small Business Administration (SBA) for consideration under its certificate of competency (COC) procedures.

Under the Small Business Act, the SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business bidder's responsibility by issuing or refusing to issue a COC; no small business may be precluded from award because of nonresponsibility without referral of the matter to the SBA for such a final disposition. *See* 15 U.S.C. § 637(b)(7)(A) (1988); *Lock Corp. of America,* B-238886, July 5, 1990, 69 Comp. Gen. 570, 90-2 CPD ¶ 12. In the event that the SBA does issue a COC to the small business, the procuring agency is required to accept this determination of responsibility as conclusive and if otherwise appropriate, award the contract to the small business concern. *See* 15 U.S.C. § 637(b)(7)(C).

In this case, the Commission argues that it was not required to refer the nonresponsibility determination to SBA since it is an agency located outside of the

[1] Apparently, Discount was terminated because of its failure to comply with the contract's delivery schedule.
[2] While the protest appears to be untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990), we are considering the protest under our significant issue exception because the protest involves an issue that has not been considered on the merits in our previous decisions and which may affect many procurements in the future. 4 C.F.R. § 21.2(b); *see Baszile Metals Serv.,* B-237925; B-238769, Apr. 10, 1990, 90-1 CPD ¶ 378.

continental United States in the Panama Canal Zone.[3] As support for its position, the Commission relies on Federal Acquisition Regulation (FAR) § 19.000(b), which describes the scope of the Small Business and Small Disadvantaged Business Concerns part of the FAR as follows:

> This part applies only inside the United States, its territories and possessions, Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia.

According to the Commission, this provision prohibits SBA review of any federal procurement if the procuring agency is located outside the United States. Based on our review of the Small Business Act and the applicable regulations, we find that the location of the contracting agency has no bearing on the applicability of SBA's COC program.

Nothing in the Small Business Act imposes any geographical limitation regarding a contracting agency's location which would exempt procurements from the Act's coverage. Rather, the factor which determines whether a small business concern qualifies for SBA's COC proceedings is the nationality of the small business. As defined by the SBA regulations:

> A business concern eligible for assistance as a small business is a business entity organized for profit, with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, materials and/or labor. 13 C.F.R. § 121.403(a) (1990).

In order to qualify for a COC, all products furnished by a nonmanufacturing small business concern such as Discount must be produced by a small business concern in the United States. 13 C.F.R. § 125.5(c). Requiring a small business concern to maintain a nexus with the United States fosters the underlying policy of the Small Business Act to benefit American rather than foreign small business concerns. Thus, under the regulations implementing the Small Business Act, geographic location is significant only with regard to whether a small business qualifies as an American concern; the location of the procuring agency has no bearing on the applicability of the COC program.[4]

As evidenced by the language of the Small Business Act, Congress intended the SBA to have broad review authority where an American small business concern is involved. In this regard, the Small Business Act, 15 U.S.C. § 637(d)(1), expresses its intended coverage in broad terms, as follows:

> It is the policy of the United States that small business concerns . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by *any* Federal agency . . . . (Italic added.)

The Small Business Act also adopts the Administrative Procedure Act's definition of "federal agency"; accordingly, the Act applies to "each authority of the

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[3] The Panama Canal Commission is responsible for carrying out the responsibilities and rights of the United States under the Panama Canal Treaty with respect to the management, operation, and maintenance of the Panama Canal.

[4] We note that the SBA agrees with our position that the COC program applies regardless of the location of the contracting agency. According to the SBA, Discount's nonresponsibility determination should have been referred to the SBA since the brake machine required under the contract is being manufactured by a small business concern located in the United States.

Government of the United States" excluding "the Congress." *See* 5 U.S.C. § 551(1) (1988); 15 U.S.C. § 632(b). The Act and the COC program it authorizes apply generally to agencies within the executive branch of the government. *Fry Communications, Inc.*, 62 Comp. Gen. 164 (1983), 83-1 CPD ¶ 109. The Commission is an executive branch agency. *See* 22 U.S.C. § 3611 (1988). With regard specifically to the COC procedures, the Small Business Act again defines its application broadly, stating that SBA determinations of a small business concern's responsibility are binding upon "Government procurement officers." *See* 15 U.S.C. § 637(b)(7)(A).

Since the Small Business Act evidences an intent to implement a government-wide policy fostering American small business interests, and since the Panama Canal Commission is an executive agency within the meaning of the Act, we see no basis to conclude that the Commission's procurements are exempted from the Act's coverage merely because the agency is physically located in the Panama Canal Zone. *Eastern Marine, Inc.*, 63 Comp. Gen. 551 (1984), 84-2 CPD ¶ 232 (fact that item is to be delivered in Panama does not affect applicability of SBA COC procedures to small business bidder).

Normally, we would recommend that the Commission's nonresponsibility determination be referred to the SBA for COC consideration since Discount otherwise qualifies for the COC program; however, such corrective action is not practicable in this case since the contract already has been performed. Accordingly, we find that Discount is entitled to recover the reasonable costs of preparing its bid and of pursuing the protest. 4 C.F.R. § 21.6(d). Based on our finding, by letter of today we are recommending to the FAR Council that FAR § 19.000(b) be amended to reflect the requirements of the Small Business Act in this respect.

The protest is sustained.

B-240597, November 23, 1990

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Orientation costs

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation errors
■■■ Prices

Where solicitation for custodial services provided that offers from other than incumbent contractor would be evaluated for award by adding orientation costs for a period beginning July 1, or date of award, whichever is later, through July 31, contracting agency reasonably included in the evaluation of protester's proposed price the cost of 8 days of orientation where contract was awarded on July 23, and protester was not the incumbent contractor.

Matter of: PCT Services, Inc.

Thomas E. Abernathy IV, Esq., Smith, Currie & Hancock, for the protester.

Lenton Swint, Jr., for M&S Cleaning Service, Inc., an interested party.

Dennis A. Walker, Esq., Department of the Air Force, for the agency.

Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

PCT Services, Inc. protests the award of a contract to M&S Cleaning Service, Inc. under request for proposals (RFP) No. F09650-90-R-0134, issued by the Department of the Air Force for custodial services for the Avionics Center at Warner Robins Air Force Base, Georgia. PCT contends that it would be the low offeror in line for award had proposal prices been properly evaluated.[1]

We deny the protest.

The solicitation, issued as a total small disadvantaged business set-aside on May 15, 1990, sought to acquire custodial services for a period of 10 months. Award was to be made to the low-priced, technically acceptable offeror.

The RFP included the following special contract requirement:

To ensure a smooth transition in the change of work effort from the current contract, the Contractor shall begin the orientation as required by line item 0001 Section "B." The purpose of the orientation is to:

(1) Observe work accomplished by current employees.

(2) Become thoroughly familiar with work requirements and work procedures.

(3) Complete personnel requirements (work force) including the hiring of personnel to assure satisfactory performance beginning on the contract start date.

(4) Obtain security clearances, if required.

(5) Complete training requirements and accomplish necessary training of contractor employees.

(6) Complete the development of necessary work plans/procedures.

(7) Complete the development of quality control plans and procedures.

(8) Become thoroughly familiar with the computation method for withholding payments resulting from deficiencies exceeding the number allowed by the PWS.

Line item [LI] 0001, Section B, is for an "Orientation Period in accordance with" this special contract provision. The RFP states that "Should award go to the incumbent contractor, LI 0001 will be reserved." This line item then provides an estimated 31 days of orientation for new contractors, and states that orientation

[1] In its comments to the agency report, the protester states that "While several issues were raised in the protest and responded to in the Agency Report, there is essentially only one issue as follows: Protest Issue: Which was the Lowest Priced Proposal?" In addition to the above statement the protester did not rebut the agency's responses to the other issues. We therefore consider it to have abandoned these issues. *See Joint Venture of Diversified Turnkey Constr., Co. & Holmes & Narver Constructors, Inc.*, B-239831; B-239831.2, September 18, 1990, 90-2 CPD ¶ 226.

will last from a period beginning July 1, 1990, *or the date of award,* whichever is later, through July 31, 1990. (Italic added.) Unit ("days") and extended prices for this item were requested.

Of the offers received, both PCT and the incumbent contractor, M&S, were determined to be technically acceptable, and based on M&S's lower evaluated price of $457,059.10, the agency awarded it the contract on July 23. PCT's evaluated price included 8 days of orientation, since award was made on July 23, and totaled $458,834.30. PCT filed a protest in our Office on July 27, challenging the award to M&S on the grounds that PCT's price was in fact lower than that of M&S when properly calculated.

The difference between these two offerors' evaluated prices is only $1,775.20, and includes the assessment against PCT as a non-incumbent of 8 days of orientation at its offered price of $750 per day. It is obvious that a slight difference in the number of orientation days assessed against PCT's proposal in the price evaluation could change the outcome of the competition. PCT contends that the number of orientation days to be included in a non-incumbent's price should have been calculated from the date of the pre-performance conference and not from the date of award, since the RFP stated that such a conference would have to occur before any work could be commenced under the contract. PCT argues that work to be performed during the orientation period is work "under the contract," and as such could not be commenced until after the pre-performance conference. The pre-performance conference was held on July 25, only 4 workdays before July 31, since the incumbent does not work on Saturday and Sunday. PCT notes that if only 4 days of orientation costs are assessed against its price proposal then it is the lowest offeror and presumably entitled to award.

We disagree with PCT's analysis. When a dispute exists as to the actual meaning of a solicitation provision, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation; to be reasonable, an interpretation must be consistent with such a reading. *Accudyne Corp.,* 69 Comp. Gen. 379 (1990), 90-1 CPD ¶ 356. As discussed above, the solicitation clearly provided that the orientation period would begin on July 1, or the date of contract award, whichever was later. Since the contract was awarded on July 23, the agency correctly added 8 days of orientation costs to PCT's proposal. Further, some of the tasks to be completed during orientation could very well be accomplished not only before the pre-performance conference, but also during the weekend. For example, PCT could complete its hiring of personnel and training requirements, as well as complete the development of the necessary work plans, to name a few. PCT's interpretation of the correct calculation method for the orientation period is simply at odds with the plain meaning of the solicitation language and, as such, is unreasonable.

Since the agency properly assessed the costs of 8 days of orientation against PCT's price proposal, we have no reason to disturb the award to M&S as the low-priced offeror.

The protest is denied.

Civilian Personnel

Compensation

■ Overtime

■■ Eligibility

■■■ Travel time

The claims of four employees for compensatory time for travel are allowed where the employees traveled to or returned from meetings or hearings which could not be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5542(b)(2)(B)(iv) (1988).

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Military Personnel

Pay
■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

A Navy Captain who exchanged British pounds sterling, representing the proceeds from the sale of his London home, for dollars at a Navy disbursing office is indebted to the United States for the $29,000 overpayment he received as a result of the disbursing officer's use of an erroneous currency exchange rate that violated the applicable provisions in the Navy Comptroller Manual.

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■ Reenlistment bonuses
■■ Computation

Under an Air Force early separation program a group of first-term enlisted members were released up to 5 months before their enlistments expired. Since these members were entirely free to separate from the service, their previously obligated service may be regarded as having been terminated. Therefore, when such a member reenlists immediately rather than separates from the service, the full period of the member's reenlistment may be counted as additional obligated service under 37 U.S.C. § 308(a)(1) for the purpose of computing the member's selective reenlistment bonus.

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Relocation
■ Reimbursement
■■ Payments
■■■ Foreign currencies
■■■■ Exchange rates

A Navy Captain who exchanged British pounds sterling, representing the proceeds from the sale of his London home, for dollars at a Navy disbursing office is indebted to the United States for the $29,000 overpayment he received as a result of the disbursing officer's use of an erroneous currency exchange rate that violated the applicable provisions in the Navy Comptroller Manual.

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Procurement

was technically unacceptable where the contractor found the alternate product may be less reliable and more risky and the protester did not provide sufficient documentation, even after discussions and a site visit, to demonstrate the acceptability of its alternate product.

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

Where solicitation provided that the lowest priced offeror would not necessarily receive award, and that the award would be based on the combination of technical merit and price which is most advantageous to the government, agency properly awarded to higher priced offeror since agency reasonably determined that the technical advantage associated with higher-rated proposal warranted the price premium.

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■ Contract awards
■■ Initial-offer awards
■■■ Propriety

Contracting agency conducting an urgent procurement under the authority of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(2) (1988), may make award on the basis of initial proposals whether or not such award represents the lowest overall cost to the government.

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■ Discussion
■■ Adequacy
■■■ Criteria

Department of Energy prime contractor was not obligated to provide the protester with all specific information or data needed to establish the acceptability of its proposal of an alternate proprietary product; prime contractor satisfied its obligation to conduct meaningful discussions by repeated discussions requesting information to establish the acceptability of the alternate proprietary product.

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■ Discussion
■■ Adequacy
■■■ Criteria

Where an agency advised offerors in the competitive range of all technical and cost concerns and gave the offerors an opportunity to revise their proposals based on these concerns, agency has satisfied the requirement that meaningful discussions be conducted. Even if an offeror's price is higher than the other offeror's price, the agency is not required to advise the high offeror of this fact if there is no indication that the agency found the high offeror's price to be unreasonable.

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■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Competitive range of one is unobjectionable where agency reasonably determined that due to initial substantial scoring and price differential the excluded firms lacked a reasonable chance for award.

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■ Offers
■■ Evaluation
■■■ Orientation costs

Where solicitation for custodial services provided that offers from other than incumbent contractor would be evaluated for award by adding orientation costs for a period beginning July 1, or date of award, whichever is later, through July 31, contracting agency reasonably included in the evaluation of protester's proposed price the cost of 8 days of orientation where contract was awarded on July 23, and protester was not the incumbent contractor.

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■ Offers
■■ Evaluation
■■■ Point ratings

Protest that agency failed to follow stated evaluation methodology by using penalty points and bonus points in its actual scoring is denied since the solicitation advised offerors of the broad method of scoring to be employed and gave reasonably definite information concerning the relative importance of evaluation factors. The precise numerical weights in an evaluation need not be disclosed.

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■ Offers
■■ Evaluation
■■■ Point ratings

Under solicitation for design and construction of a commissary, evaluation and assignment of points for innovative design features is proper, notwithstanding solicitation's general description of desired commissary as one operated and designed under standards similar to those found in commercial food stores, where solicitation provided that offerors would receive quality points for innovative or creative proposals and there is no language in the evaluation criteria requiring that design features meet only commercial food store standards.

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■ Offers
■■ Evaluation
■■■ Rates
■■■■ Mileage

Where solicitation provides that offerors' rates will be adjusted based on mileage determined by the Installation Transportation Officer (ITO) to reflect cost of roadmarch of a large convoy transporting tanks, trucks, and other heavy military equipment between Army base and offeror's railroad terminal, the ITO reasonably determined the protester's mileage on the basis of a four-lane interstate highway route which the ITO selected based on safety considerations. The agency was not required to calculate the mileage based on a shorter state highway route which the ITO considered less safe.

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■ Offers
■■ Evaluation
■■■ Technical acceptability

Department of Energy prime contractor reasonably determined that the protester's low-priced, alternate proposal to produce coils for dipole magnets to be incorporated in an electron accelerator was technically unacceptable where the contractor found the alternate product may be less reliable and more risky and the protester did not provide sufficient documentation, even after discussions and a site visit, to demonstrate the acceptability of its alternate product.

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■ Offers
■■ Evaluation
■■■ Technical acceptability

Where solicitation specification requires that offered product be one of a manufacturer's current models, proposal to provide a product which will require major modifications to meet domestic content provisions of solicitation should have been rejected as technically unacceptable.

99

■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

A protest against agency's allegedly improper evaluation of proposals is without merit where review of the evaluation provides no basis to question the reasonableness of the determination that based on the solicitation evaluation formula, the awardee's proposal offered the combination of technical and price most advantageous to the government.

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■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

Protest that agency relaxed certain solicitation requirements for the awardee is denied where record shows that the agency allowed both the protester and the awardee to make certain minor

■ Minimum needs standards
■■ Determination
■■■ Administrative discretion

Where protester argues awardee did not meet experience requirement that proposed software system, "without modifications, must have been implemented and operating" at one site for 6 months, but protester likewise proposed a system which was not in its entirety in use at any one site for 6 months, and agency has determined that awardee's system will satisfy its minimum needs, contracting officials have treated both offerors equally and there is no basis to sustain protest against award.

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■ Minimum needs standards
■■ Total package procurement
■■■ Propriety

An agency's decision to procure its immediate minimum need for modification kits and associated engineering services to upgrade jet engines on a total package basis rather than break out components for separate competitive procurements will not be disturbed where the agency reasonably determined that due to the magnitude and complexity of the upgrade program the purchase of the kits and engineering services on a total package basis is essential to maintain standardization and configuration control of the parts.

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