Decisions of The Comptroller General of the United States

VOLUME 65 Pages 59 to 86

NOVEMBER 1985

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300134500

U S GOVERNMENT PRINTING OFFICE

WASHINGTON 1986

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

COMPTROLLER GENERAL OF THE UNITED STATES

Charles A. Bowsher

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

GENERAL COUNSEL

Harry R. Van Cleve

DEPUTY GENERAL COUNSEL

James F. Hinchman

ASSOCIATE GENERAL COUNSELS

Rollee H. Efros

Seymour Efros

Richard R. Pierson

Henry R. Wray

TABLE OF DECISION NUMBERS

Cite Decisions as 65 Comp. Gen. —

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-219803]

Contracts—Negotiation—National Emergency Authority—Competition Consideration

In procurements conducted under provisions of the Competition in Contracting Act of 1984 pertaining to mobilization base producers, 10 U.S.C.A. 2304(b)(1)(B), 2304(c)(3), the usual concern for obtaining full and free competition is subject to the needs of industrial mobilization. Agencies properly may exclude a particular source or restrict a procurement to predetermined sources in order to create or maintain their readiness to produce critical supplies in case of a national emergency or to achieve industrial mobilization.

Contracts—Negotiation—National Emergency Authority—Restriction on Negotiation

Agency's refusal to accept protester as an approved mobilization base producer, so that it can compete in a procurement restricted to such producers, is proper, since the solicitation to be issued is to support the existing mobilization base and there is no need to expand this base. There is no legal requirement that all qualified firms be accepted as mobilization base producers without regard to whether the agency's anticipated needs will be sufficient to support additional producers.

Matter of: Martin Electronics, Inc., Nov. 1, 1985:

Martin Electronics, Inc. protests its exclusion from competition under request for proposals (RFP) No. DAAA09-85-R-1442, to be issued by the United States Army Armament, Munitions and Chemical Command, Rock Island, Illinois. This proposed acquisition, which was submitted to the Commerce Business Daily for synopsis on July 15, 1985, is for 58,400 MJU 8/B infrared flares and is to be restricted to five listed mobilization base producers. Although Martin is not such a producer for this flare, it insists that it is qualified to manufacture the flares and contends that by not permitting it to compete, the Army is violating the intent of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C.A. §§ 2301-2306 (West Supp. 1985).

We deny the protest.

Specifically, Martin states that it is currently under contract for the production of MK-46 infrared flares and that it is equally qualified to manufacture the MJU 8/B flare. Martin adds that the Army told it on March 20 that it could not be added to the mobilization base for the specified flare because of a temporary freeze on the issuance of DD Form 1519s.[1] Martin seeks our recommendation that it be added to the mobilization base and allowed to compete for the contract.

The Army responds that while there is indeed a temporary moratorium on processing DD Form 1519s, with exceptions on a case-by-case basis, Martin was actually denied inclusion in the mobilization base for this flare because the agency perceives no need to expand

[1] DD Form 1519 is an agreement between the government and the mobilization base producer concerning what is needed to sustain the latter's production capability.

the existing base. The Army further states that the proposed RFP is restricted so as to maintain this base.

Recently, we rendered a decision on a protest filed by Martin regarding its exclusion from the competition under a similar solicitation issued by the Army. See *Martin Electronics, Inc.*, B-219330, Sept. 20, 1985, 85-2 CPD ¶ 314. The RFP, for a quantity of MJU 7/B infrared flares, was also restricted to existing mobilization base producers. Issued on or about January 18, 1985 and thus before the effective date of the applicable provisions of CICA, the solicitation was restricted under authority of 10 U.S.C. § 2304(a)(16) (1982). The Army had restricted the procurement because it determined there was no need to expand the existing mobilization base; rather, its intent in issuing the RFP was to maintain the base. In challenging the procurement, Martin raised the same two arguments as it has here: Martin questioned the Army's decision to restrict the procurement and argued that as a qualified manufacturer of flares, it should have been accepted as a mobilization base producer.

In deciding these two issues, we recognized that in procurements negotiated under authority of 10 U.S.C. § 2304(a)(16), the normal concern of miximizing competition is subject to the needs of industrial mobilization. Thus, award to a predetermined contractor or contractors—in order to create or maintain their readiness to produce military supplies in the future—is proper. In rejecting Martin's contention that it should have been accepted as a mobilization base producer, we stated that there is no legal requirement that all qualified firms be accepted as mobilization base producers. Decisions on how many producers are to be included must be left to the discretion of the military agencies, and our Office questions those decisions only if the evidence convincingly shows that the agency has abused its discretion. No such evidence was presented by Martin, and we therefore denied the protest.

Although the proposed solicitation that Martin is currently challenging will be issued under authority of CICA, rather than 10 U.S.C. § 2304(a)(16), our September decision is nevertheless dispositive. Enacted in 1984 as part of amendments to the Armed Services Procurement Act, the CICA provisions do not make any substantive changes with regard to mobilization base producers. Agencies continue to have authority to conduct procurements in a manner that enables them to establish or maintain sources of supply for a particular item if the agency determines that to do so would be in the interest of the national defense in having facilities available to furnish such items for industrial mobilization purposes. See 10 U.S.C.A. §§ 2304(b)(1)(B) and 2304(c)(3).[2]

[2] Before the enactment of CICA, the preferred method of procurement under the Armed Services Procurement Act was formal advertising. Agencies were permitted to negotiate procurements only if one of the 17 stated exceptions to the requirement for formal advertising applied. One such exception was where the agency head determined that it was necessary to restrict competition on a particular purchase for

Here, the Army has again stated that it is restricting the proposed procurement for the stated quantity of MJU 8/B infrared flares because there is no need to expand the existing base and the procurement must be restricted to maintain this base. Martin has not demonstrated that the Army is abusing its discretion in restricting the proposed procurement to the five listed producers.

The protest is denied.

[B-219532]

Fines—Government Liability

Unless expressly waived by statute, a Federal agency is not liable for a civil fine or penalty by reason of sovereign immunity. Therefore, appropriated funds cannot be used to pay a penalty imposed by the Boston City Fire Department for answering false alarms resulting from a malfunction of a fire alarm system in a Veterans Administration Medical Center.

Matter of: Veterans Administration—False Alarm Charges, Nov. 4, 1985:

The Veterans Administration (VA) has requested an opinion as to its liability for fees charged by the City of Boston for malfunctions of a fire detection/suppression system in the West Roxbury Veterans Administration Medical Center which result in needless responses by the Boston Fire Department. The VA takes the position that the fee is actually a penalty from which the Federal Government is "insulated" as a matter of sovereign immunity. We agree that the VA is not liable for the fees for the reasons discussed below.

The City of Boston allows private fire alarm systems to be directly connected to the Fire Alarm Division of the Boston Fire Department. City of Boston Code, Ordinances, Title 14, Section 426, clause 262a. In addition to providing for the connection of fire alarm systems, the clause also provides:

an additional fee * * * [f]or every (private) alarm system malfunction resulting in a fire department response in the then next prior licensed year, $100.00 for each such through the fifth malfunction; $200.00 for each such in excess of five but less than eleven; $400.00 for each such in excess of ten but less than sixteen; and $800.00 for

---

the purpose of establishing an industrial mobilization base. CICA effectively eliminated this preference for formal advertising and therefore also repealed the exceptions to its use.

CICA requires that agencies, except in limited circumstances, obtain full and open competition when conducting procurements either through the use of sealed bidding (formerly referred to as formal advertising) or, where appropriate, competitive proposals (formerly referred to as negotiation). Agencies, however, need not obtain full and open competition where the procurement is conducted for industrial mobilization purposes. In these instances, agencies, depending on their unique requirements, can use competitive procedures, but exclude a particular source from the competition, 10 U.S.C.A. § 2304(b)(1)(B), or use other than competitive procedures where it is necessary to award the contract to a particular source or sources, 10 U.S.C.A. § 2304(c)(3). Thus, CICA, while labeling certain procedures as either competitive with the exclusion of a particular source or noncompetitive, rather than as negotiation, does not substantively alter the authority of agencies to conduct procurements for industrial mobilization base purposes.

each such in excess of fifteen. For the purpose of this ordinance, a malfunction is defined as the failure of an alarm system to operate in the normal or usual manner, due to improper installation and/or maintenance of the system, resulting in the transmittal of a needless alarm signal to the fire department.

Thus every private alarm licensee is potentially liable under this clause for the payment of "fees" when its fire alarm goes off and the Boston Fire Department responds to the false alarm.

As a general proposition, no authority exists for the Federal Government to use appropriated funds to pay fines or penalties incurred as a result of its activities or those of its employees. B-191747, June 6, 1978. In order for a Federal agency to be liable for a fine or penalty, there must be an express statutory waiver of sovereign immunity. *Cf. Hancock v. Train*, 426 U.S. 167 (1976). The VA can pay for the reasonable cost of services provided by the city, provided all property owners within the jurisdiction pay for such services under similar circumstances. See 24 Comp. Gen. 599; 49 Comp. Gen. 284 (1969). The issue therefore is whether the fee imposed by the Boston Fire Department is a penalty fee or a fee for services. In our view, the assessment against the VA is a fine or penalty rather than a fee for services. First, the fee structure itself indicates that it is a penalty. The obvious intent behind the ascending fee schedule based on the number of violations is to offer incentives to the owner of the malfunctioning fire alarm system to correct the problem. There is also no apparent relation between the ascending fee structure and the actual cost of the City of Boston of responding to a malfunction. Although we recognize that the fee could have the indirect effect of defraying the cost of answering such calls, the primary nature of the fee appears to be that of a fine or penalty. It is also apparent that the Boston Fire Department itself considers these fees to be penalties. In its notice to the VA, the Boston Fire Department consistently refers to the fee as a "penalty fee." For example, in a notice dated March 13, 1985, the City of Boston notified the VA that:

The property you own located at 1400 VFW Parkway had a total of 41 malfunctions during the period 1 January 1984 to 31 December 1984. The *penalty fee* for these malfunctions is $24,300. [Italic supplied.]

We know of no statutory authority which would operate as an express waiver of sovereign immunity and permit the payment of this penalty to the City of Boston for the malfunction of the VA's fire alarm system. Accordingly, appropriated funds cannot be used to pay the fee that has been charged against the VA in this case.

[B-219582]

Contracts—Negotiation—Offers or Proposals—Best and Final—Mistakes—Correction

Where, before award, a protester points out that its best and final offer may have been erroneously evaluated and argues that cost and pricing data submitted with its initial proposal clearly establishes what price it intended to offer, the protester is in

effect claiming a mistake in its proposal and the contracting agency should follow the regulatory procedures applicable to such claims.

Contracts—Negotiation—Offers or Proposals—Best and Final—Ambiguous—Clarification Propriety

When protester, claiming that its price was erroneously evaluated, as shown by cost and pricing data submitted with initial proposal, does not submit additional cost and pricing data during several rounds of best and final offers, it is not possible without reopening discussions to determine exactly what price the protester intended to offer in its final submission. Since this would result in the use of prohibited auction techniques, the proposed award to an allegedly higher priced offeror is not subject to objection.

Matter of: American Electronic Laboratories, Inc., Nov. 13, 1985:

American Electronic Laboratories, Inc. protests the proposed award of a contract to the Raytheon Service Company under request for proposals (RFP) No. N60921-85-R-A270, issued on December 10, 1984, by the Naval Surface Weapons Center, Dahlgren, Virginia. American argues that the contracting officer erroneously added $15,000 to its offered price, displacing the firm as the low offeror and putting Raytheon in line for the award.

We deny the protest.

The RFP solicited offers to provide metrology services (*i.e.*, to test, calibrate, and repair electronic equipment) at the Naval Surface Weapons Center and other field facilities for a base and 2 option years.[1] Offerors could submit proposals for either or both of two alternatives: one for a contractor-owned, contractor-operated facility (COCO) and the other for a government-owned, contractor-operated facility (GOCO). Award is to be made to the responsible offeror submitting the lowest price.

Section B of the RFP requested separate fixed prices for three line items, covering labor and materials at each type of facility for each year. For one additional line item, the Navy inserted the figure "$15,000," indicating that it would reimburse the contractor for travel costs up to this amount.

The pertinent part of Section B appeared in the RFP as follows:

001 The contractor shall provide all labor and materials necessary to provide metrology services to the Naval Surface Weapons Center as defined in the Performance Work Statement at Section C and the accompanying Exhibits.

[1] The solicitation was part of a cost comparison under Office of Management and Budget Circular No. A-76. However, because the government's estimated cost of performing in-house was more than the cost of contracting with either Raytheon or American, the cost comparison itself is not at issue here.

001AA The services described above shall be accomplished at contractor owned contractor operated facilities.
1 EA $ ____.

0001AB The services described at CLIN 0001 shall be accomplished at Government owned, contractor operated facilities.
1 EA $ ____

0002 Travel

0002AA Travel costs to field facilities (Wallops Island, Virginia; Brighton Dam, Maryland; Indian Head, Maryland; and Dam Neck, Virginia) will be reimbursed in accordance with provision G.2. 1 LOT $15,000.00 Not-to-exceed

The remaining line items (Nos. 0003 and 0004) involved the 2 option years for each type of facility and referred back to the services covered by subitems Nos. 0001AA and 0001AB. Section B provided no "bottom line" where a total figure for either type of facility could be placed, and it did not include a line item for travel for either of the option years. The Navy now states that the $15,000 was intended to cover the entire 3-year contract term.

The agency received five proposals, including the government's, and held discussions with the private contractors. After requesting and receiving three rounds of best and final offers, the last on June 11, 1985, the agency prepared an abstract showing offerors' prices for each year and determined that the following total prices, exclusive of travel, had been offered for operation of a GOCO facility (which it had decided to use):

Raytheon	$1,602,180
American	1,611,897
Government	2,295,103

(The other two offers exceeded the estimated cost of performing in-house.)

Upon learning of the Navy's intent to make an award to Raytheon at the above price, American notified the agency that item No. 0001AB of its best and final offer had included $15,000 for travel costs. Based on this, American argued that its total evaluated price should have been $1,596,897 ($1,611,897 minus $15,000) for the GOCO facility. The Navy, however, responded that it had evaluated the offer properly because none of American's submissions indicated that its price included travel costs. When American learned of

the Navy's decision, it protested to our Office, arguing that information submitted with its initial proposal clearly establishes its intended price.

In effect, American is claiming that it made a mistake in formulating its offer—that is, it erroneously included travel costs in the line item. The Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.607 (1984), provides specific procedures for a contracting officer to follow when a mistake is suspected or alleged before award in a negotiated procurement. In general, it contemplates that the mistake will be resolved through clarification or discussions. *Id.* §§ 15.607 (a) and (b). Discussions are required if communication with the offeror claiming the mistake prejudices the interest of other offerors, *id.* § 15.607(a), or if correction requires reference to documents, worksheets, or other data outside the solicitation and the proposal to establish the existence of the mistake, the proposal intended, or both. *Id.* § 15.607(c)(5).

The regulation does not specifically cover the situation here—a mistake claimed before award but after the agency has completed discussions and announced the proposed contract price. Nevertheless, we believe the principles inherent in the regulation are applicable. An examination of American's SF 1411 and attachments make it clear that American made a mistake in its initial offer, as well as what price the firm intended to offer.

American's intended treatment of travel costs appears in its cost and pricing data, attached to Standard Form (SF) 1411, "Contract Pricing Proposal Cover Sheet." Offerors submitted this information to comply with paragraph L.2.2.2 of the RFP, which instructed them to provide "full cost and pricing data" as required by the Federal Acquisition Regulation (FAR) 48 C.F.R. § 15.804-2 (1984). American's attachments, in which labor, materials, overhead, profit—and travel costs—are broken out, indicate that its price, as inserted for the alternate approaches under line items Nos. 0001, 0003, and 0004 in its Section B price proposal, and as typed on its SF 1411 cover sheet, includes $15,000 a year for travel costs. In other words, it appears that at least in its initial proposal, American did not include just $15,000 for travel costs, as its protest indicates, but $45,000 ($15,000 a year for each of 3 years). Although American revised its prices in subsequent best and finals, it did not submit revised cost and pricing data.

It appears that in Raytheon's initial proposal, that firm also mistakenly included an additional $30,000 to cover travel costs for the 2 option years. In its Section B price proposal, prices for both the COCO and GOCO approaches under line items Nos. 0003 and 0004 are followed by an asterisk. A typewritten note at the bottom of Raytheon's Section B states that these line items included "same estimated $15,000 (NTE) of travel as for Base Year." Raytheon's initial cost and pricing data confirms this. Thus, Raytheon at first did exactly what American did and included travel costs as part of

its price. Raytheon, however excluded the $15,000 a year in travel costs for the second and third years from its subsequent best and finals, as is shown by revised cost and pricing data submitted with them.

However, since American, unlike Raytheon, never submitted updated cost and pricing data during the three rounds of best and final offers, it is unclear whether its pattern of including $15,000 a year in travel costs as part of its proposed price continued. This uncertainty is increased by the fact that American's prices went up during the rounds of best and final offers, thus making it even more difficult to determine how American actually reached its final price, i.e., whether it continued to include travel costs in its total price or eventually dropped them as Raytheon did. Another difficulty in determining American's intended final price is the fact that it only claims a $15,000 mistake, when its cost and pricing data shows that it had actually added a total of $45,000 in travel costs to its initial proposed price.

Normally, our recommendation here would be that the Navy reopen discussions and request another round of best and final offers. This is because correction of the mistake would displace Raytheon. In addition, in our opinion, it is impossible to determine American's intended price from the proposal itself. It would therefore be necessary to refer to documents, worksheets, or other data outside the American proposal before correction could be accomplished. Applying the FAR principles, discussions with all offerors in the competitive range, i.e., Raytheon and American, would be appropriate. In this case, however, since the prices of both have now been exposed, such action would result in the use of prohibited auction techniques, see FAR, 48 C.F.R. § 15.610(d)(3), and in our opinion would compromise the integrity of the competitive system. Therefore, we do not believe further discussion would be appropriate, and we will not object to the award to Raytheon.

We deny the protest.

[B-219730]

Contracts—Protests—Authority to Consider—Housing and Urban Development Department Procurements

Under the Competition in Contracting Act of 1984, the General Accounting Office's bid protest authority extends to procurements by the Department of Housing and Urban Development for management of properties acquired through insurance of mortgages or loans under the National Housing Act.

Bids—Invitation for Bids—Amendments—Failure to Issue by Agency

Where a material change occurs after issuance of a solicitation for area management broker services, the procuring agency, i.e., the Department of Housing and Urban Development, is required to issue a written amendment to the solicitation so that bidders are properly apprised of the change. Oral advice at prebid conference and/or at bid opening is not sufficient for this purpose.

Matter of: CoMont, Inc., Nov. 14, 1985:

CoMont, Inc., protests the Department of Housing and Urban Development's (HUD) award of a contract for area management broker services[1] to James T. Ewing Real Estate Management Company. The services are required in connection with property acquired by HUD through its insurance of mortgages or loans under the National Housing Act, 12 U.S.C. § 1701, *et seq.* (1982). CoMont contends that there were numerous irregularities in the procurement process, including a failure by HUD to notify potential bidders of a material modification to the solicitation.

We find that our Office has jurisdiction over this procurement, and we sustain the protest.

Jurisdiction

A threshold issue involves our authority to consider this protest. Before the January 15, 1985, implementation of the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), we decided bid protests based upon our authority to adjust and settle government accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. § 3526 (1982).

The enactment of CICA both strengthened and, for the first time, expressly defined our bid protest authority: we are to decide protests concerning alleged violations of procurement statutes or regulations. 31 U.S.C.A. § 3552. This bid protest authority is not related to account or claim settlement authority over the contracting agency involved.

Before CICA, we declined to consider protests of procurement actions under the National Housing Act. See, for example, *Edward H. Pine Insurance*, B-211065, Apr. 11, 1983, 83-1 CPD ¶ 377; *Hanson Realty Co.*, B-186033, July 8, 1976, 76-2, CPD ¶ 23. Our position was based on a statutory provision authorizing the Secretary of HUD to make such expenditures as are necessary to carry out the disposal of property and other functions without regard to any other provisions of law governing the expenditure of public funds. 12 U.S.C. § 1702. In view of this extraordinary authority, we concluded that there was no legal basis for us to question expenditures of funds under the National Housing Act.

Under CICA, however, we concluded that protests of National Housing Act procurements are subject to our authority. HUD and, specifically, the Secretary's authority under the National Housing Act are clearly included within the definition of "federal agency" in the bid protest provisions of CICA, which is given the same meaning as that given by section 3 of the Federal Property and Ad-

[1] Management brokers inspect and secure property that has been assigned or on which mortgages have been foreclosed. They contract for necessary cleaning and repair, assist in selling or leasing the property, and provide other services as may be required.

ministrative Services Act of 1949 (FPASA) (40 U.S.C. § 472), 31 U.S.C.A. § 3551(3). That definition includes any "executive agency," which is in turn defined to mean any "department . . . in the executive branch of the Government, including any wholly owned Government corporation." The Secretary, when carrying out duties and powers related to the Federal Housing Administration Fund, which are at issue here, is among the entities defined as wholly owned government corporations under the Government Corporation Control Act, 31 U.S.C. § 9101(3)(L).[2]

Since the solicitation in question was issued June 6, 1985, after the effective date of the bid protest provisions of CICA, we will consider the merits of CoMont's protest.[3]

CoMont's Protest

The HUD's field office in Santa Ana, California, issued the solicitation, No. HC-3-85-046, seeking bids to provide real estate management broker services in the Santa Ana area for 3 years. CoMont, as the incumbent contractor, had been furnishing photographs of properties comparable to those for which, as part of its contractual duties, it had provided HUD with estimated fair market values. CoMont had not been paid separately for these photographs.

On June 11, officials at HUD's Washington, D.C., headquarters notified field offices that all area management broker contracts must in the future require photographs of comparable properties and stated that HUD would pay $10 to $15 for each form 9516 (filed for each property assigned to the contractor) for this service. The agency states that the contracting officer advised the attendees at a prebid conference, including CoMont, that the successful contractor would have to provide the photographs and would be compensated for the additional effort. While CoMont acknowledges that the contracting officer informed prospective bidders of the new requirement, it contends that she did not indicate that HUD would provide separate compensation until bid opening on July 8. At bid opening, Ewing was low bidder, and CoMont was second low.

In its protest, CoMont contends that in orally modifying the solicitation to require the contractor to provide the photographs, HUD failed to disclose that the contractor would be paid $10 for each assigned property and that this amount would be in addition to the contract price for management broker services. CoMont

[2] Although the term "wholly owned Government corporation" is not itself defined in the FPASA, we read it to include organizations so designated in the Government Corporation Control Act. See *Monarch Water Systems, Inc.*, B-218441, Aug. 5, 1985, 64 Comp. Gen. 756, 85-2 CPD ¶ 146; *aff'd sub nom. Tennessee Valley Authority—Reconsideration*, B-218441.2, Sept. 25, 1985, 85-2 CPD ¶ 335.

[3] HUD states that it believes that we may still lack jurisdiction over National Housing Act procurements, and that it is continuing to study the question. The agency does not contest our jurisdiction in this case, but states that it may do so in later cases. Our opinion is, therefore, reached without the benefit of the agency's views on the issue.

states that in calculating its bid for the new contract, it had included costs for the photographs that it planned to continue to provide to the agency. Had it known of the separate payment before bid opening, CoMont states, it would not have done so, and its bid therefore would have been low.

CoMont argues that HUD's oral modification of the solicitation violated the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.208 (1984), which requires agencies to make amendments to invitations for bids in writing, using standard form 30, and to provide the amendments before bid opening to everyone to whom invitations have been furnished.

The protester also argues that HUD improperly failed to provide it with a copy of the solicitation 30 days before bid opening; that when it was provided, the solicitation was illegible, incomplete, and ambiguous; and that the contracting officer sought to discourage bids by operating management companies and expressed a preference for newly formed companies. In addition, CoMont asks that we not consider matters presented in the agency's administrative report, since it was not filed within the 25-day period specified in our Bid Protest Regulations, 4 C.F.R. § 21.2(c) (1985).

HUD responds that the solicitation contained a number of provisions indicating that, upon government request, the contractor would be expected to obtain or arrange for such services as test reports concerning the condition of the properties (*e.g.*, soil, foundations, and roofs), pest inspections, and certain repairs. In each case, the solicitation stated that these services would be "at government expense." The only photographs required by the solicitation, however, were those of the properties being managed. HUD acknowledges that photographs of comparable properties were not among the reimbursable expenses listed in the solicitation, but seems to argue that since similar costs would be reimbursed, bidders could have assumed that the required photographs of comparable properties would also be at government expense.

GAO Analysis

HUD has broad procurement authority under the National Housing Act. See 40 U.S.C § 474(11); 12 U.S.C. §§ 1710(g), 1713(1), 1748b(h), 1749hh, and 1750(f). Nevertheless, absent a determination by HUD that the procurement procedures set forth in the regulations implementing the FPASA would impair or affect the carrying out of National Housing Act programs, those requirements are applicable. See 45 Comp. Gen. 277, 278-9 (1965) (discussing the regulations applicable to the Federal Housing Administration in exercise of the National Housing Act authorities that currently reside in the Secretary of HUD); *cf. Monarch Systems, Inc., supra* (when Tennessee Valley Authority has not advised us that it has determined not to follow the FAR, we will apply it in deciding a protest).

Therefore, we will apply the FAR provisions in deciding CoMont's protest.[4]

We do not agree that bidders reasonably should have assumed that they would be reimbursed for the photographs in question. Some, like CoMont, may have included an amount in their bid prices sufficient to cover these photos—in which case the government, by reimbursing them, would in effect be paying twice for the same photographs.

As the protester points out, the FAR requires written solicitation amendments. In addition, it specifically cautions agencies that the "fact that a change was mentioned at a pre-bid conference does not relieve the necessity for issuing an amendment." FAR, 48 C.F.R. § 14.208(a). This requirement for a written amendment serves to avoid the very type of dispute that has arisen here; it ensures that bidders compete on an equal basis by responding to the same terms and conditions, so that the government's needs can be met at the lowest price. See *Informatics, Inc.*, 56 Comp. Gen. 388 (1977), 77-1 CPD ¶ 152. Consequently, we have sustained protests where protesters deny that they were orally advised of material changes in solicitations. *Id.*; *I.E. Lovick and Associates*, B-214648, Dec. 26, 1984, 84-2 CPD ¶ 695.

Here, the contracting officer estimates that the requirement for photographs will result in payment of $4,500 to the contractor; CoMont, however, estimates that the additional payment will be $9,000. Even if we use the lower amount, it is not clear from the record that the relative standing of bidders would not change or that CoMont's bid would only have been second low if it had known of the additional payment for the photographs. HUD has not suggested that CoMont's bid would not have been low or provided information on this point; for whatever reason, its report does not even include an abstract of bids. Consequently, we consider the amendment of the solicitation to have been material.

Because HUD's failure to issue a written amendment resulted in prejudice both to the protester and to the agency, corrective action is warranted. By separate letter of today, we are recommending to the Secretary of HUD that the management broker services subject to this protest be resolicited and that the current contract with Ewing be terminated for the convenience of the government. In view of our recommendation that corrective action be taken, we need not address the other issues in CoMont's protest.

The protest is sustained.

---

[4] HUD adopted the Federal Procurement Regulations, predecessor to the FAR, for application to National Housing Act procurements in its Property Disposition Handbook, Contracting (4320.1, May 1973). We understand that the agency plans to revise this policy to incorporate the FAR.

[B-220497]

Contracts—Protests—Conflict in Statement of Protester and Contracting Agency

When the only evidence of the time that the bidder's representative arrived at the contracting office consists of a statement of the protester that the representative arrived prior to the bid opening time and a statement of the contracting agency that the representative arrived after that time, the protester has failed to sustain its burden of proving that the bid was not late.

Bids—Late—Bidders Responsibility for Delivery

It is the bidder's responsibility to assure timely arrival of its bid at the place of bid opening, and a bid that is late because the bidder failed to allow sufficient time for delivery of the bid may not be considered for award. The fact that bids had not been opened when the late bid was received is irrelevant, since the importance of maintaining the integrity of the competitive bidding system outweighs any monetary savings that might be obtained by considering a late bid.

Matter of: Arnold Rooter, Inc., Nov. 20, 1985:

Arnold Rooter, Inc. (ARI) protests the rejection as late of its bid under invitation for bid (IFB) No. F11623-85-B-0053, issued by the Department of the Air Force to test and seal the sanitary sewer system at Scott Air Force Base, Illinois. We deny the protest.

Bid opening was scheduled for 3 p.m. on September 16, 1985. ARI alleges that its representative was present at the base contracting office prior to the 3 p.m. deadline and tendered its bid to the procurement clerk. The clerk informed ARI's representative that a MSgt Koegle would have to be called from the bid opening room. According to the protester, it was 3:01 p.m. when MSgt Koegle came out, and he refused to accept the bid because the exact time for the opening of bids had passed.

ARI contends that the bid should have been accepted since it was offered to the clerk before 3 p.m. ARI, whose representative went to the bid opening room and noted that no bid had yet been opened, further argues that no advantage could have been gained by ARI if its bid were accepted, and that by putting form over substance the government loses the $47,000 by which ARI's bid allegedly is below the low accepted one. (The firm's attorney holds the bid, which the government never opened.)

According to the Air Force procurement clerk, who was the first person contacted by ARI, ARI's representative arrived at 3:03 p.m. When ARI offered its bid, the Air Force states, the procurement clerk advised ARI that the bid was late, but called MSgt Koegle to the office to talk to ARI's representative. MSgt Koegle also advised ARI that the bid was late and could not be accepted. The Air Force further alleges that the ARI representative acknowledged to several people at the bid opening that he was late because of traffic conditions and difficulty in finding the building and room.

When the only evidence on an issue of fact consists of conflicting statements of the protester and the agency, the protester has not satisfied its burden of proof. *Unico, Inc.*, B-216592, June 5, 1985,

85-1 C.P.D. ¶ 641. Therefore, although ARI contends that its representative arrived at the contracting office prior to the bid opening time, we are constrained to accept the Air Force's statement that the representative first arrived at the reception desk 3 minutes after the time for bid opening, and that the bid thus was late.

Moreover, it is not relevant that bids had not yet been opened when ARI's bid was received. The bidding rules and regulations are clear that it is the bidder's responsibility to assure timely arrival of its bid at the place of bid opening, and a bid that is late because the bidder failed to allow sufficient time to deliver the bid may not be considered for award. See *James L. Ferry and Sons, Inc.*, B-181612, Nov. 7, 1974, 74-2 C.P.D. ¶ 245; Federal Acquisition Regulation, 48 C.F.R. § 14.304 (1984). We consistently have taken the position that these guidelines must be enforced strictly, since maintaining confidence in the integrity of the competitive bidding system outweighs any monetary savings that might be obtained by consideration of a late bid. 51 Comp. Gen. 173 (1971); *Chestnut Hill Construction, Inc.*, B-216891, Apr. 18, 1985, 85-1 C.P.D. ¶ 443.

The protest is denied.

[B-218634.2]

Equipment—Automatic Data Processing Systems—General Services Administration—Responsibility Under Brooks Act

When a Brooks Act procurement is the subject of a protest to the General Services Administration Board of Contract Appeals (GSBCA), General Accounting Office (GAO's) Bid Protest Regulations effectively provide for the dismissal of any protest to GAO involving that same procurement in deference to the binding effect of a GSBCA decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit. The clear intent of the Competition in Contracting Act of 1984 is to provide for an election of mutually exclusive administrative forums to resolve challenges to Brooks Act procurements.

Matter of: Resource Consultants, Inc. Nov. 21, 1985:

Resource Consultants, Inc. (RCI) protests the proposed award of a contract to Tidewater Consultants, Inc, (Tidewater) under request for proposals (RFP) No. N00600-84-R-2359, issued by the Department of the Navy for the acquisition of automatic data processing (ADP) equipment support services. The proposed award would be made pursuant to a decision by the General Services Administration Board of Contract Appeals (GSBCA) that held that RCI had been improperly awarded a contract under the solicitation. We dismiss the protest.

Background

Contract award under the RFP was originally made to RCI. Tidewater protested to the GSBCA that the award was improper, and the GSBCA agreed. *Tidewater Consultants, Inc.*, GSBCA No. 8069-P, Sept. 4, 1985. Specifically, the GSBCA found that the protest presented "a clear case of prohibited technical leveling," because,

in a request for a second round of best and final offers, RCI and a third offeror received explicit suggestions from the agency for improving their technical proposals, but the protester did not. Accordingly, the GSBCA ordered the Navy to immediately terminate RCI's contract for the convenience of the government and to award any continuing requirements the Navy might have under the original solicitation to Tidewater. The Navy then filed a motion for reconsideration of the GSBCA decision, which the GSBCA denied. *Tidewater Consultants, Inc.*, GSBCA No. 8069-P-R, Sept. 27, 1985.

The Navy subsequently filed a motion for relief from the September 27 decision, asking the GSBCA to suspend temporarily its order to terminate RCI's contract for convenience and to award any continuing requirements to Tidewater. In its decision in *Tidewater Consultants, Inc.*, GSBCA No. 8069-P-R, Oct. 3, 1985, the GSBCA found no reason to stay its order to terminate RCI's contract and affirmed that order. (The Navy then immediately terminated the contract.) However, the GSBCA temporarily stayed its order to award any continuing requirements to Tidewater because of a protest filed by RCI with the Small Business Administration (SBA) challenging Tidewater's small business size status, and because the Navy was investigating a possible improper relationship between Tidewater and a former member of the technical review board that had evaluated and scored the technical proposals, who is now in Tidewater's employ. The stay order is still in effect.

RCI never intervened in any of the proceedings before the GSBCA, but filed this protest with our office on September 20, asserting that the GSBCA's decision of September 4 on the issue of technical leveling was erroneous in light of prior precedent of this Office, and, therefore, that the GSBCA's order to terminate RCI's contract for the convenience of the government was legally insupportable. Moreover, RCI strenuously urges that the order to award any continuing requirements to Tidewater would constitute a prohibited sole-source award. Hence, RCI contends that even if the GSBCA's order to terminate RCI's contract is allowed to stand, the remaining requirements should instead be recompeted rather than awarded to Tidewater. RCI also asserts that the GSBCA lacked jurisdiction to hear the original protest filed by Tidewater.

Analysis

Section 2713(a) of the Competition in Contracting Act of 1984 (CICA), 40 U.S.C.A. § 759(h) (West Supp. 1985), provides that, upon the request of an interested party, the GSBCA shall review any decision by a contracting officer regarding a procurement conducted under the authority of the Brooks Act, 40 U.S.C. § 759 (1982) (including procurements conducted under delegations of procurement

authority) which is alleged to violate a statute or regulation.[1] CICA also provides that an interested party who has filed a protest with this Office with respect to a procurement or proposed procurement under the Brooks Act may not file a protest with respect to that procurement or proposed procurement with the GSBCA. Concomitantly, our Bid Protest Regulations, which implement section 2741(a) of CICA, 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), provide that after a particular procurement is protested to the GSBCA, that procurement may not be the subject of a protest to this Office while the protest is before the GSBCA. 4 C.F.R. § 21.3(f)(6) (1985). Therefore, this language effectively provides that once the GSBCA has exercised jurisdiction, any protest to this Office involving the same procurement issue will be dismissed without consideration in deference to the binding effect of a GSBCA protest decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit. *Comdisco, Inc.*, B-218276.2, Apr. 4, 1985, 85-1 CPD ¶ 391.

It is clear that the intent of CICA is to provide for an election of mutually exclusive administrative forums to resolve challenges to procurements subject to the Brooks Act, whether the forum selected by the challenging party is the GSBCA or this Office. Since Tidewater chose to elect the GSBCA rather than this Office to resolve the matter, RCI should have intervened before the GSBCA to protect its interests and should have raised any questions regarding the GSBCA's jurisdiction at that time. Moreover, since CICA specifically provides that the proper avenue of appeal of a GSBCA decision is to the United States Court of Appeals for the Federal Circuit, 40 U.S.C.A. § 759(h)(6)(A) (West Supp. 1985), our consideration of RCI's protest would be inconsistent with the legislative intent because we would, in effect, become an appellate body to review the GSBCA's decision in this matter.

The protest is dismissed.

[B-220961]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Nonresponsibility Finding—Certificate of Competency Requirement

Protest that contracting officer failed to comply with Federal Acquisition Regulation 19.602-1(c)(2), by not including a letter from the protester with the agency referral to the Small Business Administration (SBA) for a certificate of competency (COC) determination is dismissed because the contracting officer is not required to refer to SBA information which does not support the contracting officer's determination that the prospective contractor is nonresponsible and because the burden is on the contractor to prove its competency to the SBA through its application for a COC.

[1] The Brooks Act grants exclusive procurement authority to the Administrator of General Services to provide for the economic and efficient purchase, lease, and maintenance of ADP equipment by federal agencies. The Administrator may, in turn, delegate such authority to the various federal agencies.

Bids—Preparation—Costs—Noncompensable

When a protest is without merit, GAO will deny a claim for attorney's fees and bid preparation costs.

Matter of: R.S. Systems, Nov. 21, 1985:

R.S. Data Systems (RSD), a section 8(a) minority contractor, protests the rejection of its bid under invitation for bids (IFB) No. 85-877 issued by the Department of Housing and Urban Development (HUD).

We dismiss the protest without receipt of a contracting agency report for the reasons indicated below. See section 21.3(f) of the Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1985).

HUD conducted a preaward survey of RSD's facility and the contracting officer determined that RSD was not a responsible contractor for this procurement. In accordance with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.602-1(c) (1984), to assist the Small Business Administration (SBA) in making a certificate of competency (COC) determination, the contracting officer forwarded information that supported his determination that RSD was not responsible. After RSD applied for a COC, the Philadelphia Regional Office of the SBA decided that RSD was not competent to perform the contract work and refused to issue a COC to RSD.

After RSD learned that SBA refused to issue a COC, RSD allegedly discovered that the referral from HUD to SBA did not include a copy of the solicitation and a letter which RSD gave to the members of the HUD preaward survey team which in RSD's opinion would support RSD's view that it is a responsible contractor. RSD contends that the contracting officer's failure to forward to SBA the letter favorable to RSD and a copy of the IFB violated FAR, § 19.602-1(c)(2).

FAR, § 19.602-1(c)(2), requires a contracting officer to refer to SBA for a COC determination:

> A copy of the solicitation, drawings and specifications, preaward survey findings, pertinent technical and financial information, abstract of bids (if available), and any other pertinent information that supports the contracting officer's determination.

The protester argues that the intent of this provision is for the contracting officer "to provide the SBA with every piece of data which is relevant to the decision of the contracting officer" and, therefore, the contracting officer should have included the RSD letter in its referral to SBA. However, we view this provision to merely require a contracting officer to supply the SBA with "pertinent information that supports the contracting officer's determination" that the contractor is not responsible. Therefore, the contracting officer was not required to supply the SBA with information tending to show that the contractor is responsible, such as the RSD letter, since the burden is on the contractor to prove through its COC application to SBA that it is responsible. See FAR, § 19.602-2(a); *JBS Construction Co.*, B-187574, Jan. 31, 1977, 77-1

C.P.D. ¶ 79; *Shiffer Industrial Equipment, Inc.*, B-184477, Oct. 28, 1976, 76-2 C.P.D. ¶ 366. Concerning the alleged failure of the SBA to receive a copy of the IFB, FAR, § 19.602-1(c)(2), does require the contracting officer to send a copy of the solicitation to SBA. However, if none was sent, we do not consider it material, since we are not aware of anything that would have precluded SBA from obtaining a copy from HUD if it was necessary for its COC determination.

The protester has requested that it be paid attorney's fees and bid preparation expenses. However, since we find the protest to be without merit, we deny the claim for costs. *Monarch Engineering Company*, B-218374, June 21, 1985, 85-C.P.D. ¶ 709.

[B-220083]

Bids—Ambiguous—Two Possible Interpretations—Clarification Prejudicial to Other Bidders—Rejection of Bid

Bid which contains an inconsistency between item prices and total bid price and is therefore susceptible to more than one bid price interpretation, one of which may make the bid high, must be rejected as ambiguous.

Matter of: Marsellis-Warner Corporation, Nov. 22, 1985:

Marsellis-Warner Corporation (MWC) protests the rejection of its bid and the award of a contract to C.J. Hesse, Inc. (Hesse) made pursuant to the Department of the Navy's invitation for bids (IFB) N62472-85-B-3990 for paving Normandy Road at the Naval Weapons Station Earle, Colts Neck, New Jersey.

The protest is denied.

The IFB requested prices on three bid items and a total bid price. Only one award at the total bid price was authorized by the IFB. MWC submitted its bid as follows:

Bid Item #1	$257,500
Bid Item #2	255,000
Bid Item #3	255,000
Total Bid	257,500

The contracting officer rejected MWC's bid because he found that it was subject to differing interpretations.

MWC states that its intended total bid of $257,500 was approximately $14,000 lower than Hesse's bid, and that MWC should therefore have been awarded the contract. MWC argues that since the solicitation called for bids to be evaluated solely on the total bid price and individual item awards were not contemplated, it was irrelevant what bidders quoted on the individual bid items. MWC

contends that the Navy should therefore have resolved the perceived ambiguity by adopting MWC's total bid price. MWC states that since the government's estimate for the total of the three items was $125,000 to $500,000, MWC's total bid could not reasonably be construed as being the total of the three items it bid as that sum would be $767,500.

MWC states that during bid opening it realized that its bid item allocations were erroneous and it so advised the contracting officer. The following day MWC informed the Navy that its individual item prices were in error because it had detached a particular sheet during the prebid process which contained a diagram allocating the bid items as different percentages of the total work. MWC supplied the corrected bid items as follows: Item #1—$182,250, Item #2—$54,650, and Item #3—$20,600, and stated that the total bid of $257,500 was correct. This breakdown is consistent with the government estimate for this work.

A bid which is subject to two reasonable interpretations may not be accepted if under one interpretation the bid is low and the other is not. *Broken Lance Enterprises Inc.*, 57 Comp. Gen. 410 (1978), 78-1 C.P.D. ¶279. On the other hand, where an alleged ambiguity in a bid admits of only one reasonable interpretation substantially ascertainable from the face of the bid, the bid may be accepted. *Ideker Inc.*, B-194293, May 25, 1979, 79-1 C.P.D. ¶379, *affirmed*, Aug. 21, 1979, 79-2 C.P.D. ¶140. We have also held in a substantially similar case that the fact that the individual item prices were not the basis for award does not negate the existence of ambiguity and possible error in the bid. *Miama Corp.*, B-204554, Dec. 28, 1981, 81-2 C.P.D. ¶ 499.

We believe that MWC's bid is subject to more than one reasonable interpretation and thus was properly rejected. Even assuming that MWC may be correct that it was unreasonable to interpret its bid as being $767,500, there is still more than one other reasonable interpretation of its bid. MWC's bid could have been interpreted that the total price was correct and the individual prices were incorrect as MWC argues, or that Item 1 was correct but that Items 2 and 3 were incorrect thus resulting in an unknown total price. In any event, it was impossible for the Navy to know from the bid itself which figures given were wrong, and, if so, by how much. That is, given the amounts on the bid items it was unclear what MWC's total bid was meant to be. See *Miama Corp.*, B-204554, *supra*.

Accordingly since the ambiguity could not be resolved from the bid itself, but only through MWC's post opening explanation, the bid was properly rejected.

The protest is denied.

[B-206699]

Compensation—Double—Concurrent Military Reservist and Civilian Service

A statutory provision limiting the combined military and civilian compensation of military Reserve technicians to the rate payable for level V of the Executive Schedule should have been applied on a biweekly pay period basis rather than an annual basis, since the statutory language and legislative history indicate that it is to be applied similarly to related statutory pay rate limitations for other employees which are applied on a pay period basis.

Matter of: Military Reserve Technicians' Pay, Nov. 25, 1985:

The issue presented in this matter is whether the pay limitation imposed by section 775 of the Department of Defense Appropriation Act, 1982, which operated to restrict the combined military and civilian compensation of Reserve and National Guard technicians to the rate payable for level V of the Executive Schedule in 1981 and 1982, should have been applied on a biweekly pay period basis rather than on an annual basis.[1] We conclude that this limitation on compensation should have been applied on a biweekly basis.

Background

Persons employed in a civilian capacity by the Departments of the Army and the Air Force as technicians for the support of certain Reserve component programs are required to maintain a concurrent military status as reservists.[2] They receive salaries as full-time civilian employees and, in addition, they receive military pay and allowances for duty they perform under orders as members of the Reserve. With respect to those persons, section 775 of the Department of Defense Appropriation Act, 1982, provides that:

SEC. 775. None of the funds appropriated by this Act for the pay of Reserve and National Guard technicians based upon their employment as technicians and their performance of duty as members of the Reserve components of the Armed Forces shall be available to pay such technicians a combined compensation in excess of the rate payable for level V of the Executive Schedule: *Provided*, That for purpose of calculating such combined compensation, no military compensation other than basic pay will be included.[3]

The pertinent congressional committee report relating to the enactment of section 775 contains this explanation concerning its purpose:

---

[1] This action is in response to a request for a decision dated April 16, 1985, from the Secretary of the Air Force. The Secretary's request has been assigned control number SS-AF-1452 by the Department of Defense Military Pay and Allowance Committee.

[2] See, generally, 32 U.S.C. § 709; and 53 Comp. Gen. 493 (1974).

[3] Public Law 97-114, § 775, approved December 29, 1981, 95 Stat. 1565, 1590-91.

PAY CAP FOR GUARD AND RESERVE TECHNICIANS

The committee recommends a new general provision * * * which would limit the pay of Guard and Reserve technicians to $50,112 annually. This is the same level at which all other government employess are capped.

Currently some Guard and Reserve full time technician personnel in GS grades 14 and 15 earn in compensation considerably more than $50,112 annually which is the rate of pay at which most other government employees are capped. These technicians do what is essentially one job, even though the conditions of their employment require they be uniformed members of the Unit in which they serve as "full-time" technicians. In other words, they cannot hold the one job without the other. This is also different from the Government employee who is a member of a Reserve or Guard unit. In this case his membership is purely voluntary and this represents a second job. Personnel who support the Navy Reserve and Marine Corps Reserve do not receive two separate pay checks for performing one job.

The continuation of the pay cap has led to a situation where high level technicians, serving in GS grades 14 and 15 receive maximum pay or nearly the maximum of $50,112 in pay for a full time job and then receive anywhere from 60 to 100 additional days of pay at the Lt. Colonel or Colonel level. This has the effect of making their total pay level from the Federal Government more than that provided to high ranking generals and top ranking civilian officials of the Department of Defense.[4]

This provision limiting the combined compensation of the technicians to the rate payable for employees at level V of the Executive Schedule became effective upon its enactment on December 29, 1981, and was continued in effect into the beginning of fiscal year 1983 on October 1, 1982, by operation of a continuing appropriations resolution.[5] Authority under that continuing resolution expired on December 17, 1982, and the Department of Defense Appropriation Act, 1983, enacted on December 21, 1982, contained no similar technician pay limitation.[6]

The rate payable for employees holding positions at level V of the Executive Schedule, as prescribed by 5 U.S.C. § 5316, is "the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title." [7] During the period in question, per annum level V basic pay was set at $50,112, until January 1, 1982, when it was increased to $57,500.[8] As indicated in the congressional report, with certain exceptions the maximum compensation of Federal employees is limited by law to the rate of pay prescribed for level V of the Executive Schedule.[9]

A biweekly pay period is fixed by law for employees of Federal executive agencies.[10] We have consistently held that the statutory

---

[4] H.R. Rep. No. 333, 97th Cong., 1st Sess. 287-288 (1981).

[5] Public Law 97-276, approved October 2, 1982, 96 Stat. 1186.

[6] Public Law 97-377, approved December 21, 1982, 96 Stat. 1830, 1833.

[7] That is, the rate fixed under the quadrennial review provisions of 2 U.S.C. §§ 351-361, as adjusted yearly following the comparability increases in rates payable under the General Schedule.

[8] By Public Law 97-92, §§ 101(g) and 141, approved December 15, 1981, 95 Stat. 1183, 1190, 1200. Per annum level V pay was again increased to $63,800 4 days after the technicians' pay cap expired on December 17, 1982. Public Law 97-377, § 129, December 21, 1982, 96 Stat. 1830, 1914.

[9] See, e.g., 5 U.S.C. §§ 5308, 5547.

[10] See 5 U.S.C. § 5504.

provisions described in the previous paragraph, limiting pay to the rate prescribed for level V of the Executive Schedule, are to be applied on a pay period basis rather than on a calendar or fiscal year basis for agency employees, including those employed temporarily or intermittently.[11]

Nevertheless, in a memorandum dated January 26, 1982, the Office of the Secretary of Defense advised the Departments of the Army and the Air Force that the compensation limitation at issue prescribed by section 775 of the Department of Defense Appropriation Act, 1982, should be applied on an annual rather than a pay period basis. The memorandum noted that if the compensation limitation were applied on a biweekly pay period basis, the technicians would be limited to combined compensation of $2,221 per pay period. It was indicated that this would affect about 3,250 Air National Guard and Air Force Reserve technicians and 1,420 Army National Guard and Army Reserve technicians, and it was asserted that "[a]n impact of * * * [this] magnitude would * * * cause * * * unnecessary turbulence surely not intended by the Congress." It was also noted that because the technicians served on active military duty intermittently, the compensation limitation would have a minimal effect if it were instead applied on an annual basis. The memorandum contained statements to the effect that because section 775 did not specifically direct that the compensation limitation be applied on a pay period basis, and because it appeared desirable to minimize the pay limitation required by the provision, the limitation should instead be applied on an annual basis.

Air Force officials report that doubts arose concerning the propriety of applying the limitation on an annual basis. In a June 1984 opinion the Office of the Judge Advocate General of the Air Force stated that "the cap should have been properly applied on a 2-week pay period rate," and recommended that the issue be referred here for resolution. The Secretary of the Air Force now requests our decision in the matter.

Analysis and Conclusion

Congress did not state specifically in section 775 of the Department of Defense Appropriation Act, 1982, whether the limitation on the technicians' compensation was to be applied on a pay period basis, or an annualized basis, or on some other basis. We observe, however, that section 775 did place the cap on the "rate payable" for level V employees, and under law level V employees are not paid annually but are paid on a 2-week pay period basis. Moreover, as indicated previously, statutes capping the pay of other employees at the level V rate are applied on a pay period basis. Thus, our view is that a consistent construction placed on the related provi-

---

[11] See, e.g., *Jerome E. Hass*, 58 Comp. Gen. 90, 93-94 (1978); *Donald Bodine*, 60 Comp. Gen. 198, 199 (1981); *Lieutenant Colonel Robert C. McFarlane, USMC (Retired)*, 61 Comp. Gen. 221, 222-223 (1982); and *Lieutenant General Ernest Graves, Jr., USA (Retired)*, 61 Comp. Gen. 604, 606 (1982).

sions of section 775 of the Department of Defense Appropriation Act, 1982, required that the limitation on the technicians' pay be applied on a biweekly pay period basis rather than on some other basis.

In addition we note that, prior to this pay limitation being adopted, these technicians were already subject to the level V pay limitation on their civilian salaries under 5 U.S.C. § 5308, applicable on a biweekly pay period basis. What the additional limitation did, in our view, was include both military and civilian compensation within the limitation. This view is consistent with the legislative history's explanation that the limitation was adopted because technicians "do what is essentially one job," whether in a civilian or military capacity, and, therefore, their combined compensation should be limited to "the same level at which all other government employees are capped."

We conclude, therefore, that the limitation on the technicians' compensation contained in section 775 should have been applied on a biweekly pay period basis, and that the alternative method used was improper.

[B-216821]

Checks—Delivery—Direct to Payee

Generally, Treasury Department Financial Centers should deliver vendor checks directly to payees using United States Postal Service first class mail. However, the Centers may deliver vendor checks to involved agencies for forwarding to payees in cases in which the forwarding agencies determine that there is an administrative, litigative, contractual or ceremonial reason for so doing, provided that the interests of the United States are adequately protected. 16 Comp. Gen. 840 (1937) discussed and explained.

Matter of: Delivery of Vendor Checks, Nov. 26, 1985:

The Director of the Washington Financial Center, Bureau of Government Financial Operations, Fiscal Service, Department of the Treasury, has asked for guidance concerning the requirement that "vendor checks" [1] be delivered directly to payees. Specifically, we are asked whether it would be legally objectionable for Treasury Financial Centers to deliver checks to Government agencies at their request for forwarding to the payees in certain cases.

Based on our review of applicable decisions, we find that, as a general proposition, vendor checks should be mailed directly to payees. However, this has never been an absolute requirement. It is not necessary that Treasury disbursing officials send vendor checks directly to payees in all cases. The Department may deliver vendor checks to involved agencies for forwarding to payees in cases in which the forwarding agencies determine that there is an administrative, litigative, contractual or ceremonial reason for so

[1] For purposes of this decision, "vendor checks" are defined as checks written to persons or organizations other than Federal employees.

doing, provided that the interests of the United States are adequately protected as outlined below.

BACKGROUND

The Treasury Regional Financial Centers issue miscellaneous vendor checks (nearly 15 million in fiscal year 1983) for Federal agencies to pay amounts due corporations, financial organizations, Federal Reserve Banks and state and local governments. The funds come from the "owing" agency's appropriations. The Centers issue the checks based on certified vouchers. The names and addresses of payees are specified on the vouchers or, by bulk payments, on magnetic tapes which accompany the vouchers. Checks are mailed directly to the named payees at the addresses given, using first class United States mail.

The Department's practice of sending checks directly to payees stems from its interpretation of our decision at 16 Comp. Gen. 840 (1937), which it views as requiring that procedure in all cases.

The Director believes, however, that there are cases in which it is more appropriate for Centers to send vendor checks to agencies for forwarding to payees. Agencies often ask the Centers to send checks to them so that they can deliver the checks along with other pertinent documents. Examples are checks issued in connection with litigation and checks for ceremonial presentation. Also, agencies occasionally request that checks be returned to them for special handling or so they can employ special mailing methods to meet a specified need. The Director suggests that in light of current check issuance procedures and the needs of Federal agencies to pay their obligations in a timely manner, agencies should be allowed to decide how the delivery of specific miscellaneous vendor payments should be made when circumstances known to the agency warrant action different from direct mailing by the Centers.

DISCUSSION

As noted, Treasury attributes its practice of sending checks directly to payees to 16 Comp. Gen. 840 (1937). In that decision (16 Comp. Gen. 842), we stated:

> As a general rule, checks issued in payment of obligations of the United States should be delivered direct to the payees. The reason for this is that in time it may become important to show that the check was delivered to and received by the person entitled to payment, particularly if the endorsement or negotiation of the check should come into question.

The "general rule" established in 16 Comp. Gen. 840 has been reiterated in several later decisions, for example, A-93726, April 3, 1942; A-89775, November 14, 1938. See also A-44019, November 30, 1935.

The situation involved in 16 Comp. Gen. 840 was proposal by an agency that *all* checks be routed through the agency as a matter of

routine procedure. The agency's concern in that case was keeping a correct record of expenditures. A procedure which could increase the risk of irregularities (the risk increases in direct proportion to the complexity of the payment process) was simply not necessary to achieve the desired objective. In the context of that particular proposal, our answer was correct then and is still correct now. However, that decision was not intended to say, and should not be construed as saying, that direct mail to payees is a rigid requirement from which there can be no deviation.

There is precedent for check delivery through a responsible Government official when warranted by the needs of a particular situation. For example, checks issued in satisfaction of United States district court judgments are mailed in care of United States Attorneys to assure proper release and satisfaction of the judgments. This arrangement was developed jointly by GAO and the Department of Justice shortly after the passage in 1956 of the permanent, indefinite appropriation for the payment of judgments against the United States (now codified at 31 U.S.C. § 1304).[2] The Government is protected under this procedure because the United States Attorney's Office obtains a signed release from the payee in exchange for the check. Also, although never addressed in a formal decision, we have occasionally authorized the delivery of judgment checks at ceremonial presentations. See also B-214446, October 29, 1984.

Accordingly, unless otherwise required by statute, if an agency has an administrative, litigative, contractual or ceremonial need which is clearly best met by having a vendor check delivered through the agency rather than directly to the payee, the agency may do so provided the procedure it follows adequately protects the Government's interests. This includes compliance with any applicable Treasury Department requirements. Whenever possible, the agency involved should obtain the payee's prior written authority for such indirect deliveries.

Having approved "indirect" deliveries in certain cases, we note several considerations of which agencies should be mindful when check deliveries are made through Government officials instead of directly to payees. Any agency employee who has custody of Government funds by reason of his employment is an accountable officer. 59 Comp. Gen. 113 (1979). Thus, officials holding vendor checks for subsequent transfer to payees would be accountable officers with respect to the funds the checks represent. As such they would assume all of the liabilities and responsibilities imposed upon accountable officers, including strict liability for fund replacement in the event of a loss while in the employee's custody.

Moreover, cost effectiveness should be taken into consideration. Agencies should be cognizant of the provisions of the Prompt Payment Act, 31 U.S.C. §§ 3901-3909 (1982), when deciding if check delivery through an agency official is appropriate. The Act provides generally that an agency must make an interest penalty payment

[2] This agreement was recorded in an internal memorandum B-63622/B-90307-O.M., August 15, 1956.

to a vendor if the agency fails to pay for a delivered property or service by the required payment date. 31 U.S.C. § 3902 (1982). With respect to prompt payment discounts, the Treasury Fiscal Requirements Manual states:

> When a cash discount has been offered for prompt payment, every effort should be made to process the invoice within the discount period, if the discount is cost effective to the Government * * *.

1 TFRM § 4-2025.60. Absent some overriding justification, an "indirect delivery" would generally be inappropriate if it results in an interest payment under 31 U.S.C. § 3902 or in the loss of a discount.

In addition, as we noted in A-89775, November 14, 1938, any payment procedure in which checks are sent to the same individual who incurred the obligation and approved the voucher "might result in the gravest irregularities." See also A-86840, September 2, 1941. Accordingly, this practice should be avoided.

As a final note, this decision relates solely to the method of delivery. Nothing we have said should be construed as authorizing checks to be drawn in favor of anyone other than the person legally entitled to receive payment unless expressly authorized by law.

[B-218844]

Transportation—Bills of Lading—Government—Rate on Bill of Lading *v.* Applicable Rates

A "Deferred Service Requested" annotation on each of several Government Bills of Lading (GBL) satisfied an air carrier's Tender No. 17 requirement for application of relatively low deferred service rates. The carrier, however, applied higher rates published in Tender No. 14 applicable to regular air service allegedly because ambiguities in the GBL caused it to conclude that the shipper really did not desire deferred service. The General Services Administration's determination that deferred service rates (Tender No. 17) were applicable is sustained. The precise deferred service annotation on the GBL's required by Tender No. 17 was strong evidence of the shipper's intention to procure deferred service. If the carrier was confused by the shipper's actions it had a duty to clarify the shipper's intent.

Matter of: Starflight, Inc., Nov. 26, 1985:

Starflight, Inc., a certified air charter and air freight carrier, asks the Comptroller General, pursuant to 31 U.S.C. § 3726 (1982), to review action taken by the General Services Administration in the exercise of the agency's transportation audit responsibilities. The General Services Administration, based on a technical rate determination that Starflight collected overcharges on bills relating to three Government shipments,[1] caused the overcharge amounts

[1] Starflight's request and the General Services Administration's report relate to three Government Bills of Lading, S-4683092, S-4683107, and S-463109. Subsequently, the carrier asked for review of action taken by the General Services Administration on Government Bill of Lading S-4683624. On the representation that it is identical to the other three, our decision applies, as well, to it.

to be deducted from monies due the carrier on other bills.

We sustain the General Services Administration's audit action.

Facts

The dispute involves several small shipments Starflight picked up in October 1983 and February 1984 at the Army Ammunition Plant, McAlester, Oklahoma, which were consigned to different installations. The shipments, consisting of special fireworks (class B explosives), were tendered to the carrier on Government Bills of Lading which contained the annotation "DEFERRED SERVICE REQUESTED," in the "Marks" block and the annotation "STFF 0018" in the "Tariff" block.

A "Deferred Service Requested" annotation on a Government Bill of Lading satisfies a requirement in Uniform Rate Tender No. 17. Tender No. 17 applies to requests for a particular type of air service, referred to as deferred service. The distinguishing feature of this service appears to be that the carrier reserves the right to defer pickup of shipments for up to 72 hours after being notified of a shipment's availability. The notation "STFF 0018" on the bills of lading refers to Tender No. 18, which offers lower rates for air/truck service. However, the lower air/truck service rates were not applied because the bills did not contain an annotation "Air/Truck Service Requested," as specifically required by note 4 of Tender No. 18.

The carrier indicates that it doubts that the Government had any intention of requesting "deferred" service, despite the "deferred service" annotation, because Tender No. 18, which was referred to on the bills of lading offers lower rates than the rates offered by Tender No. 17 for deferred service. Also, the carrier alleges that oral requests for air/truck service were made by the shipper when the carrier was called to pick up the shipments.

The carrier billed and was paid charges derived from its Tender No. 14, which applies to regular air service. While the record is not entirely clear it appears that, notwithstanding any doubts as to the shipper's intent, the carrier actually provided deferred service—rather than the less expensive air/truck service it alleges was orally requested or the higher cost regular air service for which it billed under Tender No. 14.

In its audit the General Services Administration applied the rates in Tender No. 17 on the theory that the Government Bill of Lading notations, "Deferred Service Requested," satisfied the prerequisite for applicability required by note 3 of that tender. Note 3 reads:

> These rates apply only when Bill of Lading is annotated: "Deferred Service Requested."

The General Services Administration contends that Tender No. 14

does not apply because the bills here contain requests for deferred service. and Tender No. 14 expressly states that:

> This Tender is being offered for shipments that do not meet the requirements of Deferred Service or Weapons Service.

As further support for its position, the General Services Administration refers to another case involving conflicting annotations on the face of the Government Bills of Lading. *Starflight, Inc.*, B-213733, July 23, 1984. The General Services Administration points out that in that case—which involved a conflict between a "Deferred Service Requested" annotation and a commodity description of palletized explosives, an item expressly excluded by the deferred-service tender—we held the carrier was bound by the lower deferred-service rates on the premise that the Army intended deferred service and the carrier neglected its duty to inquire to resolve the ambiguity on the Government Bill of Lading before it performed more expensive, emergency air service.

Discussion

The carrier has the burden of establishing the validity of its claim. See *Starflight, Inc.*, B-210740, September 27, 1983. The contract of carriage under which an air carrier transports goods includes the terms of the bill of lading and the applicable tariff or tender, including its rules, and it is settled that ambiguities in the contractual terms are to be resolved against the carrier, which is responsible for the document, and in favor of the shipper. *Eastern Airlines, Inc.*, 55 Comp. Gen. 958 (1976).

It is our opinion that Starflight has not established the validity of its claim. The Government Bill of Lading annotations, "Deferred Service Requested," strongly indicate that the intent of the Government was to procure deferred air service and should have served to put the carrier on notice in that regard. While the reference to Tender No. 18 in the tariff block could have caused the carrier some confusion, if it was unsure as to the type of service it was to perform, it had the obligation of clarifying that with the shipper in advance. *Starflight, Inc.*, B-213773, *supra*, at 3-4.

We have held that the insertion of a tender number on a bill of lading, while providing some indication of the parties' intent, is not conclusive as to the agreement and is not necessarily determinative of the Government's obligations at law. *American Farm Lines*, B-200939, May 29, 1981. Thus, in this case the mere reference in the bill of lading tariff block to Tender No. 18 is not sufficient to overcome the clear annotation that deferred service was requested.

Accordingly, we agree that Tender No. 17, which applies to deferred service, is applicable, and on that basis we sustain the General Services Administration's audit action.