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Notice

Effective October 1, 1987, a revised vocabulary has been used to index Comptroller General decisions and other legal documents. The new vocabulary used three types of headings—class headings, topical headings, and subject headings—to construct index entries which represent the subject matter of the documents. An explanation of the revised vocabulary is provided in the GAO Legal Thesaurus. Copies of the Thesaurus are available from the GAO Document Distribution Center, Room 1000, 441 G Street, N.W. 20548, or by calling (202) 275-6241.

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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 of the Published Decision of the Comptroller" 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., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General which do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

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 research of 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-230372, July 1, 1988

Civilian Personnel

Relocation

■ **Residence Transaction Expenses**

■■ **Settlement**

■■■ **Agents**

■■■■ **Fees**

Two transferred employees were denied reimbursement for settlement agent fees charged by the same lender who earlier charged them fees for originating their mortgage loans. The claims may be allowed. Each described activity is separate and distinct. Where a fee is charged a purchaser by an individual to act as settlement agent at a real estate closing, it may be allowed under FTR para. 2-6.2c and f, if it is customary in the locality for the purchaser to pay and does not exceed the usual amount charged in the area.

Matter of: Brock and Van Orden—Reimbursement for Settlement Agent Fees

This decision is in response to a request from an Authorized Certifying Officer, Bonneville Power Administration (BPA), Department of Energy. It concerns the entitlement of two BPA employees to be reimbursed settlement agent fees incurred incident to permanent change-of-station real estate transactions. We conclude that the fees may be reimbursed for the following reasons.

Background

Messrs. Michael F. Brock and Richard J. Van Orden, employees of BPA, were transferred to Walla Walla, Washington, in June 1985 and February 1986, respectively. Both purchased residences near their new duty station in 1986 and submitted vouchers for real estate purchase expenses.

In both situations, the expenses claimed for settlement fees were disallowed on the basis that their mortgage lender, which was the same for both and which charged each of them a loan origination fee, also conducted the settlement on their respective properties. The Federal Housing Administration (FHA) advised BPA that separate fees should not be charged where a lending institution charges a loan origination fee and also conducts settlement on the property transaction since no additional costs are incurred associated with the sending of documents to another office for that settlement.

The Authorized Certifying Officer believes that such settlement costs should be reimbursed since two separate and distinct services are performed, the origination of a loan and the settlement or closing of the property transaction between the buyer and the seller. In this connection, the Authorized Certifying Officer points out that some lending institutions employ "limited practice officers" whose only job is to handle real estate settlement transactions.

Based on the above, the following questions are asked:

Would reimbursement for settlement agent fees charged by a lending institution depend on:

a. Whether an FHA, VA or conventional loan was involved?

b. Whether the fee was for the sale or for the purchase of a residence?

c. Whether the lender employs limited practice officers?

Ruling

Reimbursement for real estate related expenses is governed by chapter 2, part 6 of the Federal Travel Regulations (FTR), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1986), as amended. Paragraph 2-6.2c of the FTR provides in part:

> c. *Legal and related expenses.* To the extent such costs have not been included in brokers' or similar services for which reimbursement is claimed under other categories, the following expenses are reimbursable . . . if customarily paid by the purchaser of a residence at the new official station, to the extent they do not exceed amounts customarily charged in the locality of the residence: . . . costs of preparing conveyances, other instruments, and contracts and related notary fees and recording fees . . . .

In addition, paragraph 2-6.2f provides:

> f. *Other expenses of sale and purchase of residence.* Incidental charges made for required services . . . may be reimbursable . . . if customarily paid by the purchaser of a residence at the new official station, to the extent they do not exceed amounts customarily charged in the locality of the residence.

A loan origination fee is not included in the above-quoted general reimbursement provisions. It is separately listed in FTR para. 2-6.2d(1)(b) as a specifically reimbursable item.

Generally, a loan origination fee is a fee assessed a mortgagor by a lending institution to compensate the lender for its administrative costs associated with the extension of credit to the mortgagor. It would include, but is not entirely limited to, the processing of the prospective mortgagor's loan application, securing a credit investigation and reviewing all pertinent documents to determine whether the property to be purchased qualifies for the loan sought and whether the prospective mortgagor is financially able to repay the loan. Upon approval of the loan, the administrative process for which a loan origination fee is charged essentially terminates.

A settlement or closing on a purchase and sale of property is a separate and distinct activity and is not an integral part of the loan origination process, re-

gardless of who may conduct settlement. It has been suggested that the fee covers the cost of moving documents from one office to another for closing. While this may be an activity which is included in the fee, considerably more is involved. The major part of conducting any settlement is insuring the proper disbursement of the funds represented by the purchase price. Title to the property must be traced and examined; the seller's mortgage or mortgages, if any, must be satisfied; real estate taxes owed by the seller paid; and the deed and other various and sundry release agreements must be prepared and executed. All these steps are necessary to assure that clear title can pass to the purchaser and the purchaser's mortgagee, and that the interests of all parties to the transaction are protected.

Normally, a fee is charged for the performance of such duties by the individual acting as settlement or escrow agent. That agent has no direct interest in the settlement transaction being concluded, even if he happens to be employed by the lending institution which is funding the mortgage loan. Therefore, in answer to questions a and c, reimbursement of the settlement agent fee would not depend on the type of financing or on whether the lender employed limited practice officers.

As to question b concerning reimbursement for the fee on a sale or purchase of a residence, we note that ordinarily administrative expenses charged by a settlement agent are to be borne by the purchaser. Thus, whether the mortgage lender makes such a service available or requires the use of its own service as a condition of extending credit, a service charge imposed on an employee as purchaser is reimbursable under FTR para. 2-6.2f to the extent that the conditions thereunder are met. *Ronald L. Perkinson,* B-188253, Sept. 28, 1977.

In the present situations, there seems to be little doubt that, as a matter of local practice, the basic obligation to pay the cost of settlement is on the purchaser and the costs assessed for that service were reasonable. Therefore, in the absence of information to the contrary, Mr. Brock may be reimbursed $167.75 and Mr. Van Orden, $101.75, for their settlement expenses.

B-230902, July 1, 1988

Procurement

Payment/Discharge

■ **Payment Priority**

■■ **Assignees/IRS**

An assignee bank receives priority of payment over an IRS tax levy against the contractor under an Army Corps of Engineers Contract. A valid assignment under a government contract gives the assignee priority over government claims against the assignor arising after perfection of the assignment.

Matter of: Corps of Engineers—Priority of Payment

A disbursing officer in the U.S. Army Corps of Engineers requests our decision on whether the Internal Revenue Service (IRS) or an assignee has priority to receive payments under a government contract. For the reasons indicated below, we conclude that the order of payment should be first to the assignee and then to the IRS.

Background

On August 20, 1985 the Corps entered into a contract with the Small Business Administration (SBA) for a flood control and river maintenance project in Minnesota. The SBA in turn awarded the contract to Walter Ervin and his business, Minnesota Drillers. The Corps administered both contracts and made direct payments to the contractor. The contract work was commenced on August 26, 1985.

On August 27, 1985 the contractor executed an assignment to the Tri-County State Bank under the Assignment of Claims Act, 31 U.S.C. § 3727 (1982). The assignment was acknowledged by the Corps on September 3, 1985 and is considered by the Corps to be a proper assignment under the Act. The bank stated that the assignment was made for the purposes of financing the contract. We have held that assignments are valid if made to secure a loan which the assignee has made to the assignor to finance the assignor's performance of the contract, provided all the other provisions of the Act have been met. 65 Comp. Gen. 554; 62 Comp. Gen. 683. The assignment thus appears to be a valid assignment.

On February 3, 1987 the IRS issued the Corps a tax levy in the amount of $17,391.27 against the payments owed to the contractor for unpaid employment taxes for periods ending December 31, 1985, September 30, 1986, and December 31, 1986. The Corps has retained payments totaling $13,618.33 under the contract.

Discussion

The question arises over who has priority to receive payment because the contract did not contain a no set-off provision as defined in 31 U.S.C. § 3727 and 41 U.S.C. § 15 (1951).[1]

This Office has held that, in the absence of a no set-off clause, "the Government's common law right to set-off a tax debt of the assignor that was in existence, even if not yet due (mature), prior to the date on which the contracting agency was notified of the assignment will not be extinguished by the assignment . . . ." 60 Comp. Gen. 510, 516-517 (1981). In that decision we considered

[1] Contracts such as the one in this case are required by Army regulations to have a no set-off clause or at least a determination that such a provision is unnecessary. DOD FAR Supplement 32.806(a)(2) and Army FAR Supplement 32.803(d). There is no explanation in the record for the absence of either the clause or a justification for its omission in this case.

the priority of a federal tax lien against a government contractor and the claim of a bank to which the contractor had assigned his rights under the contract. We held that when a contract did not contain a no set-off provision, a claim by the IRS that arose before the assignment became effective could be set off against the payments to be made to the assignee. Thus if the assignor's obligation to pay the taxes in question had already come into existence before the assignment was made, the tax claim would have priority over the assignment.

Specifically, in regard to employment taxes, we have held:

> An employer's obligation to pay the Government amounts withheld from his employee's salaries for tax . . . purposes comes into existence . . . at the time the employee has completed earning the salary to which the obligation applies, i.e., in general, on pay day, even though the actual payment to the Government need not be made until later. During the interim between the withholding and the satisfaction of the liability to the Government, an employer holds the amounts involved as a constructive trustee for the Government. Thus a notice of assignment received by the Government does not render the assignee immune from set-off of newly arising withholding liabilities of the assignor until the beginning of the pay period . . . following the pay period . . . during which notice of assignment is received.

B-152008, Sept. 10, 1963, quoted in 60 Comp. Gen. at 516.

The important question in the present case, therefore, is whether the contractor's tax debt arose before the assignment of the contract to the bank. If, on the one hand, the contractor owed the IRS taxes before he assigned his right to the government proceeds, the debt and the government's right to set it off are not extinguished. 60 Comp. Gen. at 515. On the other hand, if the tax debts owed by the contractor to the government arose after perfection of the assignment, these debts may not be set off against payments due the assignee. 60 Comp. Gen. at 516. B-152008, Sept. 10, 1963. Once an assignment has been properly made, the assignor "does not retain any property interest in the assigned contract which would be subject to attachment by any lien creditor, including the Federal Government." 60 Comp. Gen. at 514; *see also* 37 Comp. Gen. 318, 320 (1957).

The assignment in the present case appears to have been perfected prior to any pay period in the last quarter of 1985, the earliest quarter for which the assignor's tax liability is claimed by the IRS. Since these unpaid employment taxes arose as a liability after the assignment was perfected, the levy by the IRS cannot be set off against payment due the assignee.

B-224702.2, July 7, 1988

Appropriations/Financial Management

Claims Against Government

■ Unauthorized Contracts

■■ Quantum Meruit/Valebant Doctrine

■■■ Amount Determination

The Department of Labor may include a fee (or profit) in calculating the amount of a *quantum meruit* payment to Acumenics Research and Technology. To the extent profits are determined to be

reasonable and constitute compensation for what the government received under the circumstances, inclusion of profits as an element of value in a *quantum meruit* recovery is not prohibited.

Matter of: Acumenics Research and Technology, Inc.—*Quantum Meruit* payments

This decision is in response to a request from the United States Department of Labor (DOL) for our opinion regarding a determination we made in *Acumenics Research and Technology,* B-224702, Aug. 5, 1987.

In that case we held that the DOL had no authority to make certain contract extensions for the services of Acumenics, which had lost its eligibility to participate in the 8(a) small business program. Although we determined that the affected contract extensions had no binding effect, we stated that the "contractor [Acumenics] is entitled to be paid for the services it performed on a *quantum meruit* basis." *Id.* at 10.

It is the latter holding which has created the new dispute between Acumenics and DOL; namely, whether the applicability of the doctrine of *quantum meruit* entitles Acumenics to be paid the fee it would have earned under the now voided contract extensions.

DOL is of the opinion that *quantum meruit* does not allow payment of a fee. Therefore, DOL has sought reimbursement from Acumenics of $165,197.27 in fees accrued in the time period encompassed by the voided contract extensions. Accordingly, DOL has already withheld payment totaling $74,450.04 on two of Acumenics' contract invoices and is demanding repayment from Acumenics for the balance of the allegedly unearned fees of $90,747.23.

Acumenics, on the other hand, asserts that *quantum meruit* does not exclude an allowance for fees or profits, strongly objects to DOL's actions in this matter, and has advanced several legal arguments supporting its position.

After reviewing the relevant law on the subject, we conclude that under the doctrine of *quantum meruit,* the payment of fees or profits is not *per se* prohibited, and Labor may include a fee in its *quantum meruit* payment to Acumenics.

Discussion

The term *quantum meruit* means "as much as he deserved," and provides for payment of the reasonable value of work or labor done. *Black's Law Dictionary* (5th ed. 1979).

Our Office has firmly established the proposition that if contracts are executed in contravention of statutory prohibition or in the absence of statutory authority, there is no legal obligation upon the government to make payments to contractors or others who have provided goods or services under such invalid contracts. B-212430, July 11, 1984; B-207557, July 11, 1983; *See also, Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947). Nevertheless, our Office, as well as the courts, has adhered to the principle that if goods are furnished or serv-

ices rendered, and accepted by the government, even though the contract under which the performance occurred is void, an obligation arises in the government to pay the contractor the reasonable value of the goods or services actually furnished and utilized. 58 Comp. Gen. 654, 655 (1979); 33 Comp. Gen. 533, 537 (1954). To hold otherwise would permit the government to be unjustly enriched.

The question is whether profits or fees are part of the proper measure of recovery in *quantum meruit.* Our Office has previously allowed *quantum meruit* awards which included profit.

In 38 Comp. Gen. 38 (1958), we concluded that a contract which violated the cost-plus-a-percentage-of-cost contract prohibition was an illegal contract. Nevertheless, we allowed payments on a *quantum meruit* basis and specifically recommended that a fair and reasonable rate of profit be determined commensurate with the considerations of the specific case. *Id.* at 43.

In B-167723, September 12, 1969, we concluded that the questioned contract violated the Anti-Pinkerton law, but pointed out that *quantum meruit* payments might be justified for those services or supplies accepted by the government, "including such amount of profit thereon as would constitute just compensation under the circumstances." *Id.* at 3.[1] *See also* B-151632, July 9, 1963 (*quantum meruit* plus fee representing a 3 percent allowance for profit approved).

Additionally, review of the relevant court cases has shown that fees or profits may be awarded as a part of *quantum meruit* recovery.

In *Urban Data Systems, Inc. v. United States,* 699 F.2d 1147 (Fed. Cir. 1983), an 8(a) contractor claimed monies due under its 8(a) subcontract price adjustment provisions plus a profit figure of 10 percent. The Court held that the price adjustment clauses amounted to federally proscribed cost-plus-a-percentage-of-cost contracts and were thus invalid. *Id.* at 1150. The Court remanded the case to the Board of Contract Appeals (Board) and ruled that the contractor was entitled to recover in *quantum valebant. Id.* at 1154-1155. The Court left the decision of whether to award the 10 percent profit or some other profit to the Board on remand, *Id.* at 1155, but it noted that no better answer to the question of fair compensation can be given "than what the parties agreed upon" (also citing 38 Comp. Gen. 38, *supra*).[2] *Cf., Ferber Company v. Ondrick,* 310 F.2d 462, note 4 (1st Cir. 1962) (profit and overhead may be recovered by a subcontractor under a *quantum meruit* theory); *Central Steel Erection Co. v. Will,* 304 F.2d 548 (9th Cir. 1962) (some allowance for profit is permissible and proper in *quantum meruit* as recovery representing an actual amount laid out by a contractor in the performance of work).

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[1] Although 57 Comp. Gen. 480 (1978) overruled this decision, only our holding relating to the applicability of the Anti-Pinkerton Law, not our quantum meruit determination, was overruled.

[2] In the lawsuit, Urban claimed a net amount due of $144,429 (a significant percentage of this set figure constituted profit). The government calculated the net amount due as $21,846 (of which an insignificant percentage was profit). The contractor and the government subsequently settled by joint stipulation for $78,853 plus interest. *Appeal of Urban Data Systems, Inc.,* GSBCA No. 6966 [5545]-Rem, February 6, 1985 (Slip Opinion).

One circuit court has stated that fees or profits *per se* have no place in a *quantum meruit* recovery. Nevertheless, the court did not rule out profits as part of *quantum meruit* recovery and held that they may be considered to the extent that they have a bearing on the reasonable value of the contractor's services. *W.F. Magann Corporation v. Diamond Manufacturing Company, Inc.,* 775 F.2d 1202, 1208 (4th Cir. 1985) (United States of America, *Amicus Curiae*).

In light of these decisions, it is apparent that, under the facts of this case, the calculation of reasonable value in a *quantum meruit* recovery may include consideration of a fee as one of the elements of value. To the extent that the fee is determined to be reasonable and constitutes adequate compensation for what the government received under the circumstances, we think that Labor may include a fee as an element of value in Acumenics' *quantum meruit* recovery.[3]

B-226004, July 12, 1988

Appropriations/Financial Management

Budget Process

■ Miscellaneous Revenues

■■ Applicability

■■■ In-Kind Replacement

Even though an agency may have a specific appropriation to cover the costs of replacing agency vehicles, the acceptance of in-kind replacement of vehicles damaged beyond repair by a negligent third party in lieu of cash payment does not require the agency to make an offsetting transfer of funds from its current appropriations to the miscellaneous receipts fund of the Treasury in order to comply with the requirements of 31 U.S.C. § 3302(b), since the statute only applies to moneys received for the use of the United States. 22 Comp. Gen. 1133, 1137 (1943) clarified.

Matter of: Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties

In a letter of December 23, 1986, the Chief of Financial Management of the Bureau of Alcohol, Tobacco, and Firearms (ATF), requested our decision on whether ATF may legally accept a replacement vehicle from a negligent third party who damages an ATF vehicle beyond repair without transferring an amount equal to the value of the replaced vehicle from ATF's current appropriations to the miscellaneous receipts fund of the Treasury. As explained below, we conclude that ATF is not required to make such a transfer in order to comply with 31 U.S.C. § 3302(b) since, by its terms, that section applies only to *moneys* received for the use of the government.

[3] We note that Labor's contracting officer in the Acumenics case has already determined that the amounts claimed by Acumenics, including fees, represent a reasonable market value for the services. Moreover, according to Labor, when compared with similar fixed price contracts for litigation support services the amounts claimed by Acumenics do not appear excessive.

Background

The ATF appropriation for fiscal year 1987 is available "for necessary expenses of [ATF], including purchase of three hundred vehicles for police-type use for replacement only. . . ." Pub. L. No. 99-591, 100 Stat. 3341, 3341-310 (1986). ATF is concerned that this provision might be construed to require it to make an offsetting transfer of funds from its current appropriations to the miscellaneous receipts fund if it allows negligent third parties to replace ATF vehicles damaged beyond repair with equivalent vehicles. ATF does not think this is required, but seeks our concurrence.

ATF's concern focuses upon the following statement in 22 Comp. Gen. 1133, 1137 (1943):

> . . . Where funds have been appropriated for the specific purpose of repairing or replacing certain property, a failure to transfer [from current appropriations to miscellaneous receipts] such an amount [i.e., the value of the repairs or replacements received] *might* be deemed an unauthorized augmentation of the appropriated funds. (Emphasis added and citations omitted.)

Discussion

Consistent with the requirements of 31 U.S.C. § 3302(b) (1982), we have long held that when a private party damages property of the United States and agrees or is compelled to make restitution by means of cash payments to the government, the amount recovered is generally for deposit into the Treasury as a miscellaneous receipt. *E.g.,* 3 Comp. Gen. 808 (1924); 26 Comp. Gen. 618 (1947); 64 Comp. Gen. 431 (1985). At the same time, however, we have also held that where a private party damages government property and agrees or is compelled to make restitution by either replacing the damaged property "in kind," or arranging and making payment directly for its repair to the government's satisfaction, there are no funds received for the use of the government which are required by 31 U.S.C. § 3302(b) to be promptly deposited in the Treasury. In other words, the miscellaneous receipts statute is applicable only when money, as opposed to goods or services, has been provided to the agency. There is thus no reason to require it to make an offsetting transfer from current appropriations to miscellaneous receipts. *E.g.,* A-24076, June 2, 1931 (citing 14 Comp. Dec. 310 (1907)); B-87636, Aug. 4, 1949; 64 Comp. Gen. 217, 219-20 (1985); 64 Comp. Gen. 431, 433 (1985). This is true despite the fact that, had the tortfeasor paid the government rather than the person making the repairs, the money would have to be deposited as miscellaneous receipts. *E.g.,* B-87636, *supra.* As was observed in 64 Comp. Gen. at 433, these cases represent an "exception [to the general rule] that may be advantageous if the timing of repair and payment can be made to coincide."

We note that the position suggested in 22 Comp. Gen. at page 1137 was just dicta since the property damage involved in that case was covered by an insurance policy, the proceeds of which "might be used to effect the purpose of the insurance—namely, the repair or replacement of the property damaged." To the extent that case suggests that an off-setting transfer of funds from an agency's

current funds to the miscellaneous receipts fund of the Treasury is required when damaged property is repaired or replaced in kind, we do not adopt that principle.

We note that ATF seems to suggest in its argument that it does not have authority to pay for the replacement of vehicles accidentally destroyed in the course of its operations. For purposes of clarification, we think the appropriation is broad enough to cover such replacement since the appropriation language does not limit its use to replacements necessitated by "age, mileage, and condition" only. We think that the periodic, accidental destruction of vehicles can be anticipated in any large fleet of vehicles.

B-230019.2, July 12, 1988

Procurement

Competitive Negotiation
■ Discussion Reopening
■ ■ Auction Prohibition

Procurement

Competitive Negotiation
■ Discussion Reopening
■ ■ Propriety

Where there was a reasonable possibility that the failure of a solicitation adequately to advise offerors of the actual basis for award resulted in competitive prejudice, then the determination of the contracting agency to reopen negotiations was proper, notwithstanding the prior disclosure of offerors' proposed costs, the alleged disclosure of proprietary information from the awardee's proposal, and the cost to the government of terminating the awardee's contract if another offeror ultimately received the award.

Matter of: Unisys Corporation

Unisys Corporation protests the decision of the Department of the Navy to reopen negotiations, after having awarded a contract to Unisys, under request for proposals No. N00123-86-R-0246, for engineering and technical services in support of combat systems programs. Unisys challenges the agency's determination that the solicitation was deficient and that there was a failure to conduct meaningful discussions such that reopening negotiations was proper.

We deny the protest.

The solicitation requested proposals to supply engineering and technical services on a cost-plus-fixed-fee basis for a base period of 1 year plus 2 option years, and generally provided for award to the responsible offeror whose conforming proposal was most advantageous to the government, cost and other factors considered. The solicitation listed the following specific evaluation factors:

1. Personnel Background and Experience
2. Company Background and Experience

3. Plan to Manage and Accomplish Work

Cost is not as important as Factor 1 and will not necessarily be controlling. The degree of its importance will increase with the degree of equality of proposals in relation to other factors on which selection is to be based. Cost will be evaluated on the basis of realism, reasonableness and reliability. The factors are listed in descending order of importance; Factor 1 is at least twice as important as any other factor.

Proposals were received from four offerors; all offerors were included in the competitive range and were requested to clarify their proposals. Additional questions and requests for clarification were sent to offerors in a subsequent request for best and final offers (BAFOs). The Navy's initial evaluation plan, which was not disclosed to offerors, assigned a weight of 70 percent to the technical evaluation criteria and 30 percent to cost. BAFOs, however, were evaluated under a modified technical/cost tradeoff in which the weight assigned cost increased to 40 percent of the total evaluation points. As revised, the evaluation plan distributed the 100 possible total evaluation points as follows: personnel—34.28 points; company background and experience—12.855 points; plan to accomplish work—12.855 points; and cost—40 points.

Vitro and Unisys received the highest evaluation scores. Vitro's BAFO was evaluated as offering the highest evaluated cost to the government; Vitro's technical proposal, however, received the highest technical score (60 points) and Vitro received an overall total of 92 (technical and cost) evaluation points. While Unisys' BAFO received a somewhat lower technical score (55 points), it was evaluated as offering a significantly lower cost to the government; as a result, Unisys also received an overall evaluation score of 92 points. The next highest overall evaluation score was 86 points.

Notwithstanding the fact that both offerors received the same overall evaluation score, the contracting officer determined that Unisys' proposal in fact offered substantially greater value than Vitro's proposal. The contracting officer attributed Vitro's overall higher technical score, which primarily resulted from the firm's significantly higher score under the criterion for personnel, to Vitro's position as the incumbent contractor for the prior 10 years. The contracting officer noted that Unisys, by contrast, had received a slightly higher score under the subcriterion for general company experience with combat systems. While recognizing that Unisys' proposal contained some technical weaknesses, the contracting officer considered the proposal to be technically acceptable, and concluded that "with the experience possessed by Unisys, there is no reason to believe that this firm will be unable to successfully perform the required task at considerable savings to the Government."

When the Navy then made award to Unisys, Vitro protested to our Office that the proposal evaluation was inconsistent with the evaluation criteria set forth in the solicitation. The Navy subsequently reached the same conclusion, finding the award to Unisys to be improper. Specifically, the Navy determined that the solicitation statement of evaluation criteria did not adequately describe the criteria actually used in evaluating proposals. For example, the agency asserts that the solicitation statement that "Factor 1 [Personnel] is at least twice as im-

portant as any other factor" is reasonably susceptible of the interpretation that the criterion for personnel would be at least twice as important as cost, as well as any other criterion. In fact, as indicated above, up to 40 points were available for cost, while only 34.28 points were available for personnel. In addition, the agency determined that offerors had not been advised during negotiations of all of the deficiencies in their proposals. As corrective action, the agency amended the solicitation statement of evaluation criteria, reopened negotiations, and requested a second round of BAFOs.

Unisys contends in its protest that the most reasonable interpretation of the solicitation statement that "Factor 1 is at least twice as important as any other factor" is that personnel would be at least twice as important as any other *technical* criterion, but not necessarily twice as important as cost. In this regard, Unisys notes that cost is not one of the three numbered evaluation criteria, and that cost, and its relation to Factor 1 ("Cost is not as important as Factor 1 and will not necessarily be controlling"), is specifically discussed in a separate paragraph. Furthermore, Unisys interprets the phrase "will *not necessarily* be controlling" [italic supplied] as implying that cost might in some circumstances actually be more important than personnel. Unisys has provided our Office with an affidavit in which the contracting officer for the early stages of this procurement (who since has left the position) claims that all offerors had previously interpreted similar language in prior solicitations as indicating that the first technical factor was more important than cost, but not necessarily twice as important.

It is fundamental that offerors must be advised of the basis upon which their proposals will be evaluated. *The Faxon Co.,* B-227835.3, B-227835.5, Nov. 2, 1987, 67 Comp. Gen. 39, 87-2 CPD ¶ 425. In particular, contracting agencies are required to set forth in a solicitation all significant evaluation factors and their relative importance, 10 U.S.C. § 2305(a)(2)(A) (Supp. IV 1986); Federal Acquisition Regulation § 15.605(e) (FAC 84-16); agencies may not give importance to specific criteria beyond that which would reasonably be expected by offerors. *See Coopers & Lybrand,* B-224213, Jan. 30, 1987, 66 Comp. Gen. 216, 87-1 CPD ¶ 100. Where a solicitation does not set forth a common basis for evaluating offers, which ensures that all firms are on notice of the factors for award and can compete on an equal basis, the solicitation is materially defective. *See The Faxon Co.,* B-227835.3, B-227835.5, *supra.*

We agree with the Navy that nothing in the solicitation advised offerors that cost would be assigned a greater weight in the evaluation than would personnel. On the contrary, the solicitation expressly stated that cost would not be as important as personnel and was reasonably susceptible of the interpretation that personnel was at least twice as important as any other factor, including cost. The fact that the solicitation left open the possibility that cost could be controlling if the other evaluation factors were equal establishes nothing since any significant evaluation factor can be determinative of award if proposals are viewed as essentially equal under the other factors.

Furthermore, we note that Vitro states that it relied upon the strong emphasis in the solicitation on technical excellence and that it would have significantly altered its technical and cost proposals had it been made aware of the actual relative weights of the evaluation criteria. In this regard, we note that Vitro's BAFO already included certain cost-containment measures, such as a limitation on overhead and general and administrative costs to rates below historic levels and the proposal of less expensive labor than used to perform related contracts. Although the agency questioned the structure and effectiveness of the limitation on costs and the realism of the reduction in labor rates, and therefore evaluated Vitro's proposal on the basis of the agency's evaluation of probable cost rather than Vitro's lower proposed cost, we believe that these cost-containment measures indicate that Vitro might have proposed a still lower overall cost had it known the actual relative weight of cost in comparison with the other evaluation criteria.

In view of the fact that Unisys received an overall evaluation score equal to that received by Vitro only because Unisys' significantly lower price offset Vitro's higher technical score, it appears to us that there was a reasonable possibility that Vitro was displaced by its reliance upon the understatement of the true importance of cost. In light of this possibility of prejudice (as we have previously indicated, there need not be a showing that but for the defect another offeror definitely would have been the successful offeror, *see Wheeler Brothers, Inc.; et al.—Request for Reconsideration,* B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388), the Navy properly determined to reopen the competition. *See The Faxon Co.,* B-227835.3, B-227835.5, *supra.*

We recognize that Unisys believes that proprietary information concerning its technical proposal has been released to at least one other offeror. In view of this purported disclosure, and considering the likely cost to the government if it subsequently terminated Unisys' contract, Unisys argues that reopening negotiations is not appropriate here. We note, however, that while the notice of award disclosed Unisys' proposed cost, the notice of the reopening of negotiations disclosed to each offeror the costs (and award fees) proposed by its competitors, thus offsetting any competitive advantage Unisys' competitors received from the notice of award. Moreover, while Vitro's initial protest to our Office included raw technical scores received by offerors, the Navy reports that an agency investigation has been unable to confirm that anyone in the contracting office disclosed proprietary information from the proposals.

In any case, where the reopening of negotiations is properly required, the prior disclosure of an offeror's proposal does not preclude reopening negotiations, and reopening does not constitute either improper technical leveling or an improper auction. The possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirements for competition take priority over the regulatory prohibitions of auction techniques and technical leveling. *See id.* The possible cost to the government of terminating Unisys' contract, if ultimately required, also does not pro-

vide a basis for our Office to question the agency's determination to take corrective action. *Amarillo Aircraft Sales & Services, Inc.*, 63 Comp. Gen. 568, 84-2 CPD ¶ 269.

In view of our conclusion that the solicitation's failure adequately to advise offerors of the actual basis for award justified the Navy's decision to reopen negotiations, we need not consider the agency's determination that meaningful discussions were not conducted.

The protest is denied.

B-230610, July 12, 1988

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Evaluation Criteria
■■■ Level-of-Effort Contracts

Protest is sustained where, in violation of solicitation provision, agency failed to upwardly adjust awardee's estimated labor rates in cost realism analysis even though contracting officials expressed concern that the labor rates included deflated hourly rates, i.e., rates based on an individual working more than 2,080 hours per year.

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Evaluation Criteria
■■■ Cost Reimbursement
■■■■ Cost Realism

Provision in solicitation for cost reimbursement type contract that cautions offerors not to use deflated hourly rates, i.e., rates based on an individual working more than 2,080 hours per year, should be read as requiring that cost estimates based on deflated hourly rates will not be accepted as is but will instead be adjusted in the cost realism analysis to take deflated hourly rates into account.

Matter of: PAI, Inc.

PAI, Inc., protests the award of a contract to Resource Consultants, Inc., under request for proposals (RFP) No. N00039-87-R-0117(Q) issued by the Navy's Space and Naval Warfare Systems Command (SPAWAR) for engineering and technical support services. PAI contends that Resource's proposal was based on deflated hourly labor rates and SPAWAR's failure to adjust Resource's cost estimate to compensate for this resulted in SPAWAR's failure to properly evaluate that firm's cost proposal. We sustain the protest.

The solicitation requested proposals for a base and four option years. Under the solicitation's level of effort clause, the total staff hours of direct labor required

for each of the four option years was 98,390, 97,890, 108,850 and 113,850. The solicitation contemplated award of a cost-plus-fixed-fee (CPFF) contract to be performed through the issuance of task orders for 13 tasks set out in the RFP.

The RFP included three minimum requirements that must be met for a proposal to be considered for award: (1) a work site within a 25-mile radius of SPAWAR's offices, with sufficient resident professional staff to provide a quick reaction capability; (2) acceptance of an organizational conflict of interest clause, and (3) a secret facility clearance. The technical evaluation, which was considered by the RFP to be substantially more important than estimated cost, included consideration of, in descending order of importance, technical approach, personnel experience, management structure and corporate experience.

The RFP stated that the cost evaluation will consider the two following factors of equal importance: total proposed cost and reasonableness/realism of labor costs with respect to the proposed labor mix. Thus, under the source selection plan (SSP), total proposed cost and cost reasonableness/realism were each assigned 20 points. Also, the RFP indicated that cost estimates would be evaluated to determine if they are "reasonable and realistic" for the proposed technical/management approach as well as to determine the offeror's understanding of the effort. Finally, the RFP stated:

> Offerors are cautioned *not* to use deflated hourly rates, i.e., those based on an individual working more than 2080 hours per year. Offerors are required to meet the full level of effort specified. The evaluation of costs will therefore include an evaluation of the suitability of the categories of labor offered and the number of hours for each category, i.e., the mix of labor relative to the total level of effort required.

SPAWAR received five initial proposals including proposals from PAI and Resource. As part of the cost evaluation, according to SPAWAR, its negotiator verbally verified the offerors' proposed rates with the Defense Contract Audit Agency (DCAA). This rate check consisted of the contract negotiator asking a DCAA auditor to compare the offeror's labor rates for each proposed position with those that DCAA had previously approved for billing and payment purposes. The rate check included rates for such indirect cost categories as general and administrative (G&A) and overhead and included a check of subcontractors' proposed rates.

According to SPAWAR, each member of the evaluation panel also individually reviewed each cost proposal for realism/reasonableness of labor costs according to the criteria of the RFP. The evaluation panel chairperson applied predetermined weights set out in the agency's SSP to raw evaluation scores provided by the evaluation panel. The results for the protester and the awardee, which include the scoring for both technical and estimated cost factors, were as follows:

Offerors	Total Points
Resource	79.41
PAI	79.05

The chairperson forwarded to the contracting officer the evaluation panel's report including raw evaluation scores, weighted scores, a competitive range recommendation of PAI and Resource and negotiation questions for those two firms. PAI proposed an estimated cost of $12,512,649 while Resource proposed an estimate of $9,955,085. The only negotiation questions regarding the offerors' cost proposals related to ensuring that subcontractors provide complete cost data. The contracting officer, as the source selection authority, accepted the evaluation panel's competitive range recommendation and forwarded the negotiation questions to PAI and Resource and requested best and final offers (BAFOs).

PAI and Resource submitted timely BAFOs. Both offerors reduced their total estimated costs; PAI reduced its estimate to $11,813,120 and Resource reduced its estimate to $8,140,133. The BAFOs were reevaluated by the evaluation panel. The contract negotiator again checked the offerors' proposed labor rates against current DCAA rates that the firms had billed on other contracts. With respect to Resource, the DCAA rate check revealed that six of the firm's proposed labor rates were identical to what the firm currently was billing while the five remaining rates were, according to SPAWAR, "very close" (within 5 to 20 percent).

The evaluation panel chairperson then reapplied the evaluation formula set out in the SSP and arrived at the revised weighted scores including cost scores of 77.90 for PAI and 81.13 for Resource. Out of 20 possible points for total estimated cost, Resource received 20 points while PAI received 10.98 and for cost reasonableness/realism, out of 20 possible points, Resource received 14 points while PAI received 16.40 points. The evaluation panel recommended to the contracting officer award to Resource. In the evaluation panel's report on the BAFO evaluation, the panel chairperson concurred in the award recommendation but noted a "severe reservation regarding cost," since some of Resource's proposed staff hour rates were lower than industry standards. The contracting officer accepted the recommendation to award to Resource and, in a memorandum to the file, noted the concerns of the evaluation panel regarding estimated costs, but stated that "due consideration had been given to that in my determination. It is my opinion that close management and careful attention to tasking by the Government will eliminate any reservations that the [evaluation panel] has toward the cost proposed by [Resource]."

The contracting officer's recommendation of award to Resource was forwarded to SPAWAR's Executive Director for Contracts who noted with regard to Resource's proposal: "The labor rates appear to be unrealistically low. . . . I am concerned that the contractor is playing a game, but I am not sure how to prevent it. . . ."

In response to these concerns, the contracting officer attempted but failed to negotiate with Resource a cap on labor rates or a limit on indirect costs. According to SPAWAR, the contracting officer and the contracting officer's technical representative (COTR) decided on a plan for controlling hours worked and ex-

penditures under the contract by tightly controlling the labor rates and hours and work to be performed under each task order.

Based on the slight technical difference between the two competitive range offerors—PAI scored 50.52 under all the technical factors and Resource 47.13—and Resource's significant estimated cost advantage, SPAWAR awarded the contract to Resource.

PAI's principal complaint is that Resource's proposal is based on the use of deflated hourly labor rates in violation of the RFP prohibition and that SPAWAR failed to apply that prohibition in evaluating Resource's proposal. In this respect, PAI maintains that Resource's professional employees that are exempt from the 40 hour work week requirement of the Fair Labor Standards Act generally work greater than 40 hours a week and that Resource's proposed labor rates are based on greater than 40 hour work weeks, or more than 2,080 hours per year (52 weeks per year multiplied by 40 hours per week equal 2,080 hours).

In support of its position, PAI submitted statements from a number of former Resource professional employees stating that they routinely worked greater than 40 hours a week. Further, PAI argues that the large total difference in the estimated costs between its proposal and Resource's can only be explained by Resource's use of deflated hourly rates.

PAI argues that the deflated hourly rate clause of the solicitation requires that the agency affirmatively determine as part of its evaluation of cost realism that the hourly rate for each employee in each offeror's proposal is based on 2,080 hours per year. To do so, according to PAI, SPAWAR could not simply compare estimated rates by position with DCAA approved rates without verifying whether those previously approved rates were based on deflated labor hours. In this respect, PAI argues that SPAWAR merely assumed that DCAA approved rates from previous Resource contracts were based on 2,080 hours and that agency officials did not ask DCAA about deflated hourly rates during proposal evaluation. Moreover, according to the protester, none of the actions taken by SPAWAR and described in the agency's report demonstrate that the agency verified whether Resource used deflated hourly rates in its cost estimate.

In response to PAI's allegations, SPAWAR maintains that it properly evaluated proposals in accordance with the solicitation's evaluation scheme including the caution concerning deflated labor hours. SPAWAR explains that the contract negotiator's verbal rate check confirmed that Resource was using labor rates in its estimate in accordance with DCAA approved rates. Further, SPAWAR says that, based on a recent audit, DCAA determined that Resource's direct and indirect costs, including hourly rates, were reasonable, allowable and properly allocable under the cost principles. According to SPAWAR, based on this review, the contract negotiator concluded that there was no evidence to suggest that Resource's proposal included deflated hourly rates. SPAWAR also explains that each member of the evaluation panel reviewed and scored each proposal for cost reasonableness/realism based on the SSP and the criteria of the RFP, including consideration of the estimated staff hours.

Under a cost-reimbursement type contract, an offeror's proposed costs of performance should not be considered controlling since the estimates proposed may not provide valid indications of final actual costs. Federal Acquisition Regulation (FAR) § 15.605(d). Accordingly, where as here, the RFP contemplates the award of a cost-type contract, the agency is required to analyze each offeror's estimated costs for realism. *Kinton, Inc.,* B-228260.2, Feb. 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112. Moreover, when an offeror's proposed labor rates are found to be understated, the contracting agency has an obligation to adjust those rates for purposes of the evaluation. *See Hardman Joint Venture,* B-224551, Feb. 13, 1987, 87-1 CPD ¶ 162; *Marine Design Technologies, Inc.,* B-221897, May 29, 1986, 86-1 CPD ¶ 502; *Computer Sciences Corp.,* B-210800, Apr. 17, 1984, 84-1 CPD ¶ 422. Such a determination of evaluated realistic costs is nothing more than an informed judgment of what costs should be reasonably incurred by accepting a particular proposal. *CACI, Inc.-Federal,* 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. A contracting agency's analysis of cost estimates involves the exercise of informed discretion and we will not disturb an agency's cost realism determination absent a showing that it lacks a reasonable basis. *DDL Omni Engineering,* B-220075, *et al.,* Dec. 18, 1985, 85-2 CPD ¶ 684.

Here, an essential aspect of the required cost realism analysis is the RFP provision relating to the use of deflated hourly rates. We read that provision as stating that cost estimates based on deflated hourly rates will not be accepted as is but instead will be adjusted to take those rates into account in the cost realism analysis. *See Hardman Joint Venture,* B-224551, *supra.* Based on our review of the record, we conclude that SPAWAR's cost realism analysis was unreasonable since, in spite of the wide disparity between the hourly rates and total cost estimates of PAI and Resource and in spite of the concerns of a number of contracting officials regarding Resource's hourly rates, SPAWAR did not verify the rates with Resource during discussions or attempt to adjust the rates in the cost evaluation, but simply accepted them as offered. As set out above, the panel chairperson expressed reservations regarding Resource's labor rates and noted that some of the firm's rates were lower than industry standards. Also, the agency's chief procurement executive raised the concern that Resource's labor rates were unrealistically low and that the agency would have no way of holding costs down under the contract.[1]

We also reject SPAWAR's contention that its contract negotiator verified the realism of Resource's labor rates including compliance with the prohibition on the use of deflated hourly rated by comparing Resource's labor rates to previously billed, DCAA-approved Resource labor rates. Here, a comparison of estimated rates with approved rates would only assure the realism of the estimated rates if those prior approved rates were based on 2,080 hours. During proposal evaluation, however, contracting officials did not ask DCAA whether Resource's previous rates were based on 2,080 hours and there is evidence in the record that tends to confirm that those rates were, in fact, deflated, i.e., based on em-

[1] In addition, during the evaluation of the initial proposals, two members of the evaluation panel expressed concern that Resource's labor rates were too low.

ployees working more than 2,080 hours per year. On March 7, 1988, after the protest was filed, in a written response to a SPAWAR request for updated information regarding Resource's labor rates, a DCAA auditor, referring to the approved rates used for comparison with Resource's proposal, stated "Labor rates are based on actuals and do include uncomp [uncompensated] overtime." The DCAA auditor, in an affidavit submitted in connection with the protest, explains that, based on a review of audit files on Resource, she found that Resource had in the past reflected uncompensated overtime in the labor rates which it had billed and which DCAA had approved. The auditor states that no information is available in DCAA files showing the number of hours worked by each Resource employee and that without that information DCAA could not determine what amount, if any, of uncompensated overtime was included in Resource's estimated rates. According to the auditor, if an evaluation of Resource's use of deflated hourly rates is needed, a "special audit" would be necessary.

The DCAA auditor's response confirms our conclusion that SPAWAR did not properly evaluate proposals for compliance with the no deflated hourly rate provision and thus did not reasonably evaluate proposals for cost realism. Prior to the protest, SPAWAR did not attempt to verify whether the DCAA approved rates were based on more than 2,080 hours per year. Although, as the DCAA auditor explains, a special audit would be required to evaluate the possible use of deflated hourly rates, since the RFP required evaluation of cost realism, including compliance with the 2,080 hour requirement, such an audit should have been requested here based on agency concerns regarding such rates.

We also reject SPAWAR's contention that, because of the significant difference in the cost estimates of Resource and PAI, it is not likely that any adjustment of Resource's evaluated costs would affect the selection decision. The agency has not presented adequate evidence to support such a conclusion. There is no information in the record, for instance, to show the number of work hours upon which Resource based its labor rate calculations. Neither we nor SPAWAR knows whether, or to what extent, Resource's estimated labor costs may be understated. As explained by the DCAA auditor, an audit is necessary to make that determination.

Accordingly, we sustain the protest on this basis. Although PAI raises a number of other issues relating to SPAWAR's evaluation of Resource's proposal, including whether the proper labor mix was proposed and whether SPAWAR properly determined whether Resource's personnel were actually located within the required 25 miles, we find that there is clearly no merit to these contentions.

We recommend that SPAWAR reevaluate the realism of Resource's proposed labor rates taking into consideration the caution regarding deflated hourly rates. If necessary, the agency should request a DCAA audit of Resource to determine whether, and to what extent, the firm's cost estimate is based on deflated hourly rates. To the extent that Resource's cost estimate is based on deflated hourly rates, it should be adjusted for evaluation purposes before rescoring.

Further, as we noted earlier, the RFP cost evaluation scheme provided that cost estimates be scored a maximum of 20 points for the quantum of the cost estimate proposed and 20 points for the realism of that estimate. Under this scheme, Resource received 20 points for its low cost estimate and PAI only 10.98 points. While the agency attempted to temper this result by also scoring realism (Resource received 14 and PAI 16.40 points under the realism factor), it is clear that Resource's lower estimated cost, despite the serious questions raised as to its validity, resulted in a higher overall cost score. We question this scoring method because it appears to assign a higher score to the lowest estimate without a sufficient adjustment for realism. While it is not possible from the record here to determine exactly how realism was scored, we think that any scoring of the quantum of the costs proposed should be based only on the cost estimate as adjusted in a realism evaluation. *See Group Operations, Inc.,* 55 Comp. Gen. 1315 (1976), 76-2 CPD ¶ 79.

We recommend that the reevaluation be undertaken pursuant to these guidelines and if after the reevaluation, the agency concludes that Resource should not have received the award under the solicitation's evaluation criteria, the contract should be terminated and, if otherwise proper, the award made to PAI. Further, since we have determined that the cost evaluation was not conducted properly, PAI is entitled to the costs of filing and pursuing its protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988).

The protest is sustained.

B-230632, July 13, 1988

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Small Business Set-Asides

■ ■ ■ ■ Compliance

Bid submitted in response to a total small business set-aside which failed to certify that all end items will be manufactured or produced by small business concerns properly was rejected as nonresponsive.

Procurement

Contractor Qualification

■ Responsibility/Responsiveness Distinctions

Generally, completion of Place of Performance clause relates to responsibility of bidder and not responsiveness of bid; therefore, completion of clause does not cure failure to certify that all end items will be manufactured or produced by a small business. Case holding otherwise (B-216293, Dec. 21, 1984) no longer will be followed.

Matter of: Delta Concepts, Inc.

Delta Concepts, Inc., protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DAAB07-88-B-C032, a small business set-aside issued by the Department of the Army for a 2-year requirements contract for dry batteries. The Army rejected the bid because Delta did not complete the IFB's Small Business Concern Representation provision. That standard provision, which also is set forth in Federal Acquisition Regulation (FAR) § 52.219-1 (FAC 84-28), requires a bidder to certify whether it is a small business concern and whether all of the items to be furnished will be small business products. Delta indicated in its bid that it was a small business concern, but failed to certify that all end items to be furnished will be manufactured or produced by small businesses.

We deny the protest.

As a general matter, where a bid on a small business set-aside omits the certification in issue it is viewed as failing to establish the bidder's legal obligation to furnish end items manufactured or produced by a small business concern, and the bid must be rejected as nonresponsive;[1] otherwise, the small business contractor would be free to provide the end items from either small or large businesses as its own interests might dictate, thus defeating the purpose of the set-aside program. FAR § 14.404-2 (FAC 84-5); *Rocco Industries, Inc.,* B-227636, July 24, 1987, 87-2 CPD ¶ 87.

Delta contends that its bid falls within a limited exception we have recognized to the above rule. In *ASC Industries,* B-216293, Dec. 21, 1984, 84-2 CPD ¶ 684, we held that a bid in a small business set-aside that did not contain the certification that all supplies would be manufactured by a small business nevertheless could be accepted since the bidder had bound itself through the Place of Performance clause to use a specific supplier, and the agency had information on file indicating that the named supplier was a small business. We said that since the IFB advised that failure to list the place of performance could be cause to reject the bid, and that performance of work at other than the listed location would be prohibited unless approved in writing in advance by the contracting officer, the listing of a supplier the agency knew was a small business effectively established the necessary commitment.

In the IFB Place of Performance clause here, Delta listed "Joseph Pileri" as the owner of the "producing facilities," and indicated an address for such facilities that was the same address as Delta's. The protester contends that the Army should have recognized "Joseph Pileri," who is Delta's vice president and the sole owner of Pileri Industries, as a small business. Delta further points out that completion of the Place of Performance clause was required in this case and that the clause provides that the designated location could not be changed without the contracting officer's prior written permission. These factors, according

[1] A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. FAR § 14.301 (FAC 84-11).

to Delta, clearly established that the firm would furnish only small business items.

In response, the Army points out that, unlike the solicitation in *ASC Industries,* the IFB here did not state that the failure to list the place of performance could be cause to reject the bid. The Army argues that the Place of Performance clause therefore cannot be used to make Delta's bid responsive with respect to the requirement to supply small business end items. The Army also states that it was not reasonably able to ascertain whether the listing of "Joseph Pileri" indicated that the batteries would be produced at a small business facility.

We do not agree with the protester that the Place of Performance clause can be used to establish bid responsiveness to a small business product requirement. We first point out that the language of the clause makes no reference to the small business commitment. Moreover, except for those infrequent instances where an agency has a need for contract performance to occur in a particular locality, *see, e.g.,* 53 Comp. Gen. 102 (1973) (agency properly rejected bid indicating a place of performance 100 miles from San Diego where the solicitation required that ship repair work be performed in the San Diego area), it is well-established that completion of the Place of Performance clause is only for informational purposes, expressing the bidder's present intent, and relates to bidder responsibility rather than to responsiveness. *Automatics Limited,* B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535. As such, the clause does not necessarily have to be complete in the bid as submitted, *see Steel Style, Inc.—Reconsideration,* B-219629.3, Sept. 24, 1985, 85-2 CPD ¶ 330, and a bidder is not necessarily precluded from changing its place of performance after bid opening in order to enhance its ability to perform the contract properly. *Hanson Industrial Products,* B-218723 *et al.,* May 9, 1985, 85-1 CPD ¶ 521.

In sum, a bidder's compliance with solicitation instructions concerning the Place of Performance clause is not related to what the bidder is obligating itself to do through the submission of its bid; we do not think a bidder can be said to have assumed an obligation to furnish a product manufactured by a small business product merely by virtue of listing a small business concern in the Place of Performance clause. *Automatics Limited,* B-214997, *supra.*

Further, the prohibition in the solicitation regarding changing the performance location does not convert a bidder's entry in the Place of Performance clause into the necessary obligation. The reason is that the prohibition—which, like the Place of Performance clause, has no mention of the small business commitment—essentially addresses a post-award situation. The provision contemplates a case in which an awardee wants to change its performance location, and permits the contracting officer to insure the government receives the same quality of performance to which the parties agreed. We question whether an agency, having accepted a bid that lacked an expression of intent to furnish only small business products, legally could preclude a contractor from changing performance locations by claiming the change would breach some commitment to supply such items.

In view of the above, we need not decide whether the facts of this case bring it within the holding in *ASC Industries.* Upon further consideration of the result reached in *ASC,* we now believe that to the extent that case indicates that the Place of Performance clause may be used to cure a bidder's failure to certify that all end items will be manufactured or produced by a small business, that case will no longer be followed. In *ASC Industries,* we distinguished *Automatics Limited* on the basis that in *ASC* the solicitation warned that failure to list the place of performance could be cause to reject the bid and prohibited changing the performance location without prior written permission. We are now of the view that the existence of these provisions should not have warranted a result in *ASC* different than that reached in *Automatics Limited.*

Because acceptance of Delta's bid thus would not legally obligate the company to furnish small business products, the bid properly was rejected as nonresponsive. With respect to Delta's post-bid explanation of what it actually intended, responsiveness is determined from the face of the bid itself; to allow a bidder to make its nonresponsive bid responsive after opening would be tantamount to permitting it to submit a new bid, and thus may not be permitted. *Jack Young Associates, Ltd.,* B-195531, Sept. 20, 1979, 79-2 CPD ¶ 207.

The protest is denied.

B-230821, B-230821.2, July 18, 1988

Procurement

Competitive Negotiation
■ Discussion
■ ■ Propriety
■ ■ ■ Post-Award Error Allegation
■ ■ ■ ■ Contract Rescission

Where awardee's proposal is found, subsequent to award, to be materially defective, agency decision to rescind award made on basis of initial proposal and to hold discussions with all offerors in competitive range, including initial awardee, is proper.

Procurement

Competitive Negotiation
■ Discussion
■ ■ Error Correction
■ ■ ■ Post-Award Error Allegation

Where awardee's proposal is found to be deficient after award, agency is not required to terminate and make award to higher-priced offeror without first allowing awardee to correct deficiencies through discussions.

Procurement

Competitive Negotiation
■ **Discussion**
■■ **Propriety**
■■■ **Post-Award Error Allegation**
■■■■ **Contract Rescission**

Procurement

Competitive Negotiation
■ **Discussion Reopening**
■■ **Auction Prohibition**

Once agency has determined that initial proposal on which award was based is materially deficient, rescinding the award and initiating competitive range discussions, even though prices have been disclosed, is the appropriate remedy; the statutory requirements for competition take primacy over regulatory prohibitions of auction techniques.

Matter of: Industrial Lift Truck Company of New Jersey, Inc.; Doering Equipment, Inc.

Industrial Lift Truck Company of New Jersey, Inc., and Doering Equipment, Inc., protest a decision of the Department of the Navy to rescind an award made to Doering under request for proposals (RFP) No. N00140-88-R-RF00, for the purchase or lease of telescoping aerial work platforms for the Philadelphia Naval Shipyard and, prior to making a new award, to conduct discussions with all offerors within the competitive range, including Industrial and Doering. Doering protests the rescission of its award, asserting that it should be reinstated as the awardee on the basis of its initial proposal, without opening discussions. Industrial, which filed a protest of the award to Doering prior to the rescission, agrees that rescission of the award is appropriate, but asserts that Industrial is the only responsive and responsible offeror and should receive the award on the basis of its own initial proposal, again, without holding discussions.

We deny the protests.

The RFP solicited offers on two models of aerial lift platforms for use in the Philadelphia Naval Shipyard, and also required offerors to furnish technical manuals and operator safety manuals for the equipment, and included separate delivery schedules for the equipment and the two kinds of manuals. The RFP provided that award could be made on the basis of initial proposals, without discussions, and that award would be made to the responsible offeror whose offer conformed to the solicitation and was most advantageous to the government, cost or price and other factors considered. The RFP further stated that offers not proposing to meet the required delivery schedule would be rejected. Of the nine offers submitted, Doering's was the low, technically acceptable offer; the Navy thus made award to the firm.

Industrial Lift protested the award on the ground that, among other things, Doering's proposal was nonresponsive, and Doering was nonresponsible. In the

course of preparing its response to Industrial's protest, the Navy discovered what it considered to be a material defect in Doering's proposal that, although not raised in Industrial's protest or noticed previously by the agency, led the Navy to conclude that award on the basis of Doering's initial proposal had been improper. Specifically, the agency determined that Doering's proposal took express exception to the required delivery schedule with respect to 400 operator safety manuals required by the RFP (200 for each model of platform). The solicitation specified delivery of the manuals 30 days after contract, and Doering proposed delivery 125 days after contract, when delivery of the platforms was required. Consequently, the Navy notified Doering that the previously overlooked discrepancy in the firm's proposed delivery schedule required rescission of the award, and that it would hold discussions with Doering and all other offerors in the competitive range prior to making a new award.

Doering's Protest

Doering protests the proposed action on the ground that, although its proposal did indicate that all deliverables, including the safety manuals, would be delivered at the time specified in the RFP for delivery of the platforms, namely, 125 days after contract, this was a minor oversight or mistake that should have been resolved through a simple request for clarification by the Navy. The firm states it was at all times ready, willing, and able to deliver the manuals within 30 days of contract award, as required by the RFP, and that if the Navy had sought clarification of the discrepancy Doering would have advised the agency that it could meet the 30-day delivery schedule. In any case, Doering asserts that the discrepancy in question was immaterial. According to the firm, it did not affect the contract price, since the manuals were not separately priced and were a negligible fraction of the total cost of the contract; nor did it have an effect on the agency's actual requirements, since, according to Doering, the requirement in the RFP that manuals be delivered in 30 days apparently was not part of the Navy's real minimum needs. Doering concludes that the deficiency in its proposal provided no basis for rescission of the firm's award.

Delivery ordinarily is considered to be a material term of a solicitation, and award generally cannot be made on the basis of a proposal that takes exception to a required delivery schedule. *See Environmental Tectonics Corp.—Reconsideration,* B-225474.2, *et al.,* Apr. 9, 1987, 87-1 CPD ¶ 391; *Granger Assocs.,* B-222855, Aug. 11, 1986, 86-2 CPD ¶ 174. In the present case, the RFP unequivocally placed offerors on notice that proposals that failed to conform to the required delivery terms would be rejected, and the Navy explains that it needed prior delivery of the manuals to review their technical acceptability before arrival of the equipment. According to the agency, if it specified delivery of both at the same time, it could have faced the prospect of paying a substantial monthly rental for equipment that its operators could not use because they lacked suitable safety manuals. In our view, the Navy has established it had a legitimate need for early delivery of the manuals, and that the delivery requirement therefore was material.

The fact that Doering asserts that it would have made delivery within the required 30-day period if the Navy had asked is irrelevant. Even in negotiated procurements, an agency does not have discretion to disregard an offeror's failure to satisfy a material RFP requirement in its proposal. *See System Development Corp. and Cray Research, Inc.—Reconsideration,* B-208662.2, Apr. 2, 1984, 63 Comp. Gen. 275 84-1 CPD ¶ 368. Rather, under these circumstances, since information solicited from Doering was essential to determine compliance of the firm's proposal with the material delivery requirements, Doering's proposal could not be corrected other than by conducting discussions. Discussions are to be distinguished from clarifications, which are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal. *See* Federal Acquisition Regulation (FAR) § 15.601 (FAC 84-28); *see also Corporate America Research Assoc., Inc.,* B-228579, Feb. 17, 1988, 88-1 CPD ¶ 160. Moreover, discussions could not be held only with Doering; it is fundamental that where discussions are held with one offeror, they must be held with all other offerors in the competitive range. *See E.C. Campbell, Inc.,* B-222197, June 19, 1986, 86-1 CPD ¶ 565.

In our view, therefore, the Navy's proposal to hold discussions with Doering and others in the competitive range is an appropriate means of providing Doering an opportunity to modify its proposal to comply with the RFP's delivery requirements.

Doering cites *Hollingsead International,* B-227853, Oct. 19, 1987, 87-2 CPD ¶ 372, for the proposition that award may be made on the basis of an initial proposal whose delivery terms deviate from those specified in the RFP, but meet the agency's actual needs. Doering's reading of our decision is incorrect. In that case, the agency did not make award on the basis of the initial, nonconforming proposal, but rather, only after holding discussions with all offerors and requesting their revised proposals on the changed delivery terms. This is the proper course of action and is essentially what the Navy proposes to do here, after reviewing its needs and the terms of the solicitation.

Doering also challenges the propriety of opening discussions here on the ground that critical information about its approach to the solicitation has been disclosed, so that it would suffer competitive harm from discussions, and doing so would result in an improper auction. As we have made clear in similar situations, the importance of correcting an improper award through further negotiations overrides any possible competitive disadvantage. *See Norden Systems, et al.—Reconsideration,* B-227106.3, *et al.,* Oct. 16, 1987, 87-2 CPD ¶ 367. In any event, the statutory requirements for competition take primacy over the regulatory prohibitions of auction techniques. *See The Faxon Company,* B-227835.3, B-227835.5, Nov. 2, 1987, 67 Comp. Gen. 39 87-2 CPD ¶ 245. We note that the Navy has stated it will provide copies of each disclosed document to all offerors here in order to eliminate any possible advantage gained through disclosure of documents.

Industrial's Protest

Industrial protests that it should have received the award on the basis of its own initial proposal because it was the only one that was technically acceptable. Under the Competition in Contracting Act of 1984, however, an agency may not make an award based on initial proposals, without discussions, that would not result in the lowest overall cost to the government. *See Pride Computer Service, Inc.,* B-227805, Sept. 25, 1987, 87-2 CPD ¶ 302; *see also,* FAR § 15.610(a)(3). Here, since Doering was the low offeror, the Navy was required to determine whether Doering's low-priced proposal was reasonably susceptible of being made acceptable through discussions; it could not, as Industrial suggests, simply make award to another firm on the basis of its higher-priced initial proposal. Further, as for Industrial's argument that Doering's proposal should be rejected as nonresponsive (*i.e.,* technically unacceptable), it is fundamental that in a negotiated procurement, proposal deficiencies do not automatically warrant rejection; rather, the agency should employ discussions where, as here, the proposal is deemed susceptible to correction, to afford offerors an opportunity to make their proposals acceptable. *See Hollingsead,* B-227853, *supra.*

The protests are denied.

B-230871, July 18, 1988

Procurement

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Ambiguous Prices

Procurement

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Clerical Errors

An ambiguity as to the low bidder's intended price does not render the bid nonresponsive or otherwise unacceptable where the bid would be low by a significant margin under the least favorable interpretation. The intended price may be verified after bid opening.

Matter of: NJS Development Corporation

NJS Development Corporation protests the award of a contract to RCR General Contractors, Inc., under invitation for bids (IFB) No. N62474-86-B-0253 issued by the Naval Facilities Engineering Command for the construction of MCON Project P-459, a multi-purpose range complex at the Marine Corps Air Ground Combat Center, Twenty-nine Palms, California. NJS asserts that RCR's bid is ambiguous.

We deny the protest.

NJS contends that RCR's bid is ambiguous and should be rejected as nonresponsive because the bid documents contain discrepancies, and RCR's bid price cannot be positively determined. RCR submitted an original and two copies of its bid as required by the solicitation. RCR had written in the bid schedule prices not only on the bid bearing an authorized original signature, but also on the two photocopies. The contracting officer designated the bid with the original signature as the original bid and the other two bids as copies. RCR's original bid contained entries of $1,898,000, for base bid item 1, $3,039,000 for additive bid item 1A, $144,000 for additive bid item 1B and $82,000 for additive item 1C. Of RCR's two bid copies, one had the same price entries as those on the original bid, but the other copy varied by showing an entry of $1,890,000 for base bid item 1.

NJS submitted a bid of $2,091,935 for base bid item 1, $204,695 for additive bid item 1A, $86,520 for additive bid item 1B, and $65,835 for additive bid item 1C.

Paragraph 22 of the IFB's instructions to bidders provides that when the total of the base bid item and any additive item exceeds the control amount, (that is, the amount of funds available) that additive bid item "shall be skipped and the next subsequent additive bid item in a lower amount shall be added." The control amount was set at $2,204,000, which was exceeded by all bids for the base bid item plus additive item 1A. In accordance with paragraph 22, the contracting officer skipped additive bid item 1A. RCR's bid for base bid item 1 plus additive bid items 1B and 1C was $2,124,000, which was less than the control amount. NJS' bid for the same bid items was $2,244,290, which was higher than RCR's bid and the control amount. On March 25, 1988, the day after bid opening, RCR submitted bid verification including bid sheets and an affidavit which indicated that its intended bid for the base bid item was $1,898,000, and its intended bid for additive bid item 1A was $339,000.

NJS asserts that the ambiguity as to RCR's intended bid is evident from the Navy's bid abstract on which RCR's base bid item 1 was first entered as $1,890,000 then rewritten as $1,898,000, and additive bid item 1A was originally entered as $3,039 then rewritten as $3,039,000. NJS further contends that on one copy of RCR's bid, additive bid item 1A could be read as $30,090.

Our review of the original and two copies of RCR's bid shows that RCR entered a bid in the amount of $3,039,000 on all three copies for additive bid item 1A. It appears that the contracting officer suspected a mistake in this item, as the government's estimate was $185,000 and the range of other bids was from $129,000 to $325,403. Apparently confused by the excessive bid for additive bid item 1A and prior to confirming RCR's intended bid, which RCR stated was $339,000, the contracting officer entered the amount of $3,039 on the bid abstract. However, additive bid item 1A was not evaluated by the contracting officer because all of the bids exceeded the control amount when this additive was included. This is consistent with the principle that under a solicitation which includes additives, bids must be evaluated only on the basis of the work actually awarded. *Rocky Ridge Contractors, Inc.,* B-224862, Dec. 19, 1986, 86-2 CPD ¶ 691. Accordingly, RCR's mistake under additive bid item 1A is of no consequence.

There is a clerical error in RCR's base bid item 1 since the original and one copy of RCR's bid state $1,898,000 and the other copy states $1,890,000. However, this ambiguity as to RCR's price does not, by itself, render the bid nonresponsive or otherwise unacceptable. *Energy Maintenance Corp., Turbine Engine Service Corp.*, 64 Comp. Gen. 425 (1985), 85-1 CPD ¶ 341. A bid which is ambiguous as to price need not be rejected if it is low under all reasonable interpretations. *Central Mechanical Construction, Inc.*, B-220594, December 31, 1985, 85-2 CPD ¶ 730; *Vrooman Constructors, Inc.*, B-218610, Oct. 2, 1985, 85-2 CPD ¶ 369. Here, since RCR's bid would be low by a significant margin even under the least favorable interpretation, it was a matter which properly could be verified by RCR after bid opening. *Energy Maintenance Corp., Turbine Engine Service Corp*, 64 Comp. Gen. 425, *supra*. Since RCR has submitted its bid worksheets showing that the correct amount it intended to bid for item 1 was $1,898,000, its bid, which is substantially lower than NJS', was properly accepted by the Navy.

The protest is denied.

B-231174, July 20, 1988

Procurement

Bid Protests

■ GAO Procedures

■■ Interested Parties

■■■ Direct Interest Standards

A protester which did not submit a bid under a challenged invitation for bids (IFB) is an interested party to protest IFB requirements as unduly restrictive where the protester indicates that restrictions prevented it from bidding.

Procurement

Specifications

■ Minimum Needs Standards

■■ Total Package Procurement

■■■ Propriety

An agency determination to award a single contract for brand-name intravenous (IV) solutions and IV administration sets under a total package approach is reasonable where such approach was necessary to meet the agency's minimum need that the solutions and sets be compatible and will achieve economies of scale.

Matter of: IVAC Corporation

IVAC Corporation protests award of a requirements contract for intravenous (IV) solutions and general purpose IV administration sets, under invitation for bids (IFB) No. M5-1-88, issued by the Veterans Administration (VA). IVAC contends that the single-award solicitation unduly restricts competition because it is limited to three brand-name manufacturers of both IV solutions and sets.

We deny the protest.

This IFB is intended to implement an agency and government-wide standardization program consolidating the VA's requirements for IV solutions and compatible general purpose IV sets at its 172 VA Medical Centers (VAMCs) for a period of one base year and up to four option years. The IFB schedule lists more than 100 line items comprising the six most commonly used general purpose IV sets and the most commonly used IV solutions in containers of various capacities. The IFB specified part numbers for the six sets produced by the three most widely used manufacturers of solutions and sets, Kendall McGaw Laboratories, Inc., Baxter Healthcare Corporation, and Abbott Laboratories. The IFB specifically excluded "equal" items.

The VA currently purchases these pharmaceutical requirements from the Federal Supply Schedule (FSS), generally ordering IV solutions from one FSS contract and IV sets produced by the same manufacturer from a separate FSS contract. Upon award of the subject contract, these general purpose IV sets will be deleted from the FSS.

The general purpose IV sets are designed to dispense the contents of a solution container to a patient at a particular drip rate (e.g., 10, 15, 20 drops per ml.) which varies from brand to brand of IV set. Special or enhanced purpose IV sets are designed to accommodate additional instruments such as controllers, pumps, or specialized drug delivery systems. Since special purpose sets were not included in the IFB, VAMCs will continue to order them from the FSS to meet patient needs.

Bids were received from Kendall, Baxter, and Abbott, with Kendall the apparent low bidder. IVAC did not submit a bid, but filed a protest with this Office prior to bid opening. Award has been postponed pending our decision.

As a preliminary matter, the VA contends that IVAC is not an interested party entitled to protest because it does not have a sufficient direct economic interest to be an interested party under our Bid Protest Regulations. 4 C.F.R. § 21.0(a) (1988). The VA claims that IVAC does not produce any of the items on the IFB schedule; did not submit a bid; and seeks only to have the IV sets deleted from the IFB schedule.

IVAC responds that the single award, brand-name solicitation prevented it from bidding its IV sets. In this regard, although IVAC manufactures special purpose IV sets, designed for use with its instruments, it maintains that they can be used independently, as general purpose sets, to administer the solution of the brand-name manufacturers. Under the circumstances, we find that IVAC has the requisite interest in this procurement to maintain a protest of the IFB requirements. *M. C. & D. Capital Corporation,* B-225830, July 10, 1987, 87-2 CPD ¶ 32. We therefore decline to dismiss the protest on this basis.

IVAC protests as overly restrictive the single award to a manufacturer of both IV solutions and IV sets for the VAMCs requirements for as much as 5 years. We have recognized that such a "total package" procurement approach can re-

strict competition. *The Caption Center,* B-220659, Feb. 19, 1986, 86-1 CPD ¶ 174. However, the decision whether to procure on a total package basis, rather than by separate procurements or awards for divisible portions of a requirement, is generally a matter within the discretion of the procurement agency. *MASSTOR Systems Corp.,* B-211240, Dec. 27, 1983, 84-1 CPD ¶ 23. We will not disturb an agency's decision to procure using a total package approach, or the technical judgment forming the basis for that decision, absent a clear showing that the determination lacks a reasonable basis. *Id.; Korean Maintenance Company,* B-223780, Oct. 2, 1986, 66 Comp. Gen. 12, 86-2 CPD ¶ 379.

The director of the VA's Pharmacy Service and a panel of medical, surgical, nursing and other pharmacy experts determined that inclusion of the six general purpose IV sets in combination with the IV solutions were necessary to meet the VA's minimum needs. An important consideration in this determination was the requirement for 100 percent compatibility between solution containers and IV sets. The need for such compatibility is reflected in the VA's current purchasing practices from the FSS and the standard industry practice of ordering solutions and sets from the same manufacturer. Absent such compatibility, there is no assurance that these components will fit together properly and stay connected during use. Since manufacturers design their own IV sets and solution containers to be compatible with each other, mixing of the components of different manufacturers can cause IV set "fallout" (separation of the set from the container) or make it more difficult to remove the set spike from the container. Set fallout risks an air embolism or an increased risk of contamination of the patient. Any difficulty in removal of the container from the set can require replacement of the set between successive solution containers, which increases costs.

Moreover, the VA states that the total package approach will achieve economies of scale (here, volume discounts). *See The Caption Center,* B-220659, *supra.* Based upon the difference between the low bid and its estimate, the VA calculates that volume discounts under the single-award contract will save approximately $55 million over the potential 5-year contract period. Further, as noted by Kendall, deletion of the IV sets from the IFB would result in a substantially higher bid for the solutions alone.

IVAC has alleged that its special purpose IV sets *can* be used with the solution containers manufactured by Kendall, Baxter, and Abbott. However, it has neither alleged nor shown that its IV sets meet the VA's minimum requirement for 100 percent compatibility between sets and containers or that the compatibility requirement is unreasonable. It also has not shown that it would be appropriate to use its special purpose sets as general purpose sets or that separate purchase of its IV sets from the FSS or under the current IFB would result in any cost savings through economies of scale. Consequently, we find the VA's total package approach is reasonable.

IVAC also has speculated on how the contract will be administered. Based upon conversations with unidentified VA personnel at two VAMCs, IVAC claims that the contract will lead VAMCs erroneously to believe that all IV sets, even those

not covered by the contract, will have to be ordered from the awardee resulting in a competitive bias against IVAC. The VA states that any misunderstandings of the contract are isolated and unwarranted given the plain scope of the contract, but that in any event it will clarify the purpose of the contract to the VAMCs. We, too, believe the contract is clear on this point.

IVAC also claims that this approach could negate the purchasing policies of some VAMCs. IVAC claims that some VAMCs may have the policy of acquiring all IV sets from the same manufacturer to ensure uniform drip rates in all sets. However, the determination of the government's needs and the best method of accommodating them are primarily the responsibilities of the procuring activity. *Kisco Co., Inc.,* B-216953, Mar. 22, 1985, 85-1 CPD ¶ 334. IVAC has not shown that the VA abused its discretion in the exercise of these responsibilities. Further, to the extent that IVAC's concerns relate to the VA's medical policies, we will not consider them under our bid protest functions. *Travenol Laboratories, Inc.,* B-215739, B-216961, Jan. 29, 1985, 85-1 CPD ¶ 114.

Accordingly, the protest is denied.

B-231105, July 21, 1988

Procurement

Bid Protests
■ GAO Procedures
■■ Protest Timeliness
■■■ 10-Day Rule
■■■■ Adverse Agency Actions

Protest challenging rejection of protester's offer is timely despite contracting agency's contention that it sent letter to protester advising of rejection more that 10 days before the protest was filed where protester denies ever receiving the letter and protest was filed within 10 days after protester was orally notified that award was made to another offeror.

Procurement

Competitive Negotiation
■ Discussion
■■ Determination Criteria

Procurement

Competitive Negotiation
■ Discussion
■■ Offers
■■■ Clarification
■■■■ Propriety

Contracting agency engages in discussions, not clarifications, where it asks offeror to provide information relating to essential functions of its proposed equipment and offeror's responses have a determinative effect on the agency's evaluation of the proposal.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Technical Acceptability

Protester's proposal was properly rejected as technically unacceptable where protester fails to show that its proposal or other descriptive material submitted as a result of discussions demonstrated that the equipment it offered would include an essential feature required by the solicitation; protester's subsequent submission of detailed explanation with its protest does not satisfy protester's obligation to show through its proposal that its equipment meets the solicitation requirements.

Procurement

Competitive Negotiation
■ Offers
■■ Competitive Ranges
■■■ Exclusion
■■■■ Discussion

Where proposal is included in the competitive range only because it is susceptible to being made acceptable and discussions later make clear that proposal should not have been included in the competitive range initially, proposal may be eliminated from the competitive range without an opportunity to submit a revised proposal.

Matter of: McManus Security Systems

McManus Security Systems protests the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. N00014-87-R-HP29, issued by the Naval Research Laboratory (NRL) for a video intrusion detection system. McManus principally contends that NRL failed to hold meaningful discussions or allow McManus to submit a best and final offer (BAFO) and improperly evaluated McManus' proposal as technically unacceptable. We deny the protest.

The RFP, issued on August 13, 1987, called for offerors to provide a video intrusion detection system for the perimeter of NRL's facility. As described in the RFP, the purpose of the system is to allow a guard located in a central alarm room to monitor activities around the perimeter of the NRL facility through the use of closed circuit television cameras mounted along the perimeter and linked to an intrusion detection signal analyzer. In the event that changes in the scenes being monitored indicate attempts at penetrating the facility, the detection system is to go into its alarm state and the scene is to be displayed on a video monitor to the dispatcher who can then deploy a response team. The performance requirements and specifications for the system are set out in Attachment J-1 of the RFP. Award was to be made to the lowest priced, technically acceptable offeror.

Initial proposals were submitted by 10 offerors. The technical proposals were forwarded to NRL's technical evaluator, who found that one offer was acceptable, one was unacceptable, and eight, including McManus', were unacceptable but susceptible to being made acceptable. NRL then sent a letter dated Decem-

ber 8 to McManus asking it to respond to five questions concerning its technical proposal. According to the contracting officer, similar letters were sent to the other seven offerors whose proposals were found unacceptable but susceptible to being made acceptable. McManus responded to NRL's inquiry by letter dated December 21. After submission of the letter, McManus states that oral discussions with the NRL technical evaluator continued. In response to one such conversation, in late January 1988 McManus submitted a preliminary translation from the original German of the specifications for one part of the system it offered, the video signal analyzer.

According to NRL, final evaluation of the proposals was delayed due to filing of an agency-level protest by the offeror found technically unacceptable. Accordingly, by letter dated January 26, NRL requested and later received extensions of their acceptance periods from McManus and the other offerors. NRL states that a final technical evaluation of the proposals subsequently was performed. Based on the offerors' responses to NRL's inquiries regarding their technical proposals, the NRL evaluator concluded that four of the eight offerors initially considered susceptible to being made acceptable, including McManus, were technically unacceptable; a total of five offerors were considered technically acceptable. NRL then made award to the lowest priced of the five offerors, without calling for submission of BAFOs.

NRL states that it advised McManus by letter dated March 25 that it was no longer being considered for award. McManus denies receiving the letter and states that it first became aware that it had been eliminated from the competition on April 11, when it was orally advised by NRL that award had been made to another offeror. McManus then filed its protest with our Office on April 21.

McManus challenges NRL's determination that its proposal was technically unacceptable, arguing that the discussions held with McManus were not meaningful and, in any event, NRL improperly failed to give McManus an opportunity to submit a BAFO after discussions were concluded. McManus also contends that NRL failed to follow the evaluation scheme in the RFP since the system McManus offered was compared to the brand name equipment on which the specifications in the RFP were based rather than to the specifications themselves and since NRL did not allow McManus to present a live demonstration of its system. McManus also challenges NRL's failure to solicit BAFOs from other offerors in the competitive range after discussions were held with McManus.[1]

As a preliminary matter, NRL contends that the protest is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1988), protests such as this one must be filed within 10 working days after the protester is or should be aware of the basis of protest. Here, NRL states that it notified McManus by letter dated March 25 that its proposal had been eliminated from the competitive range. Since the protest was not filed until April 21, NRL argues that it is un-

[1] In its initial submission, McManus also contended that NRL had improperly disclosed the identities of the offerors and McManus' proposed price to the other offerors while the procurement was still ongoing. McManus subsequently abandoned this contention.

timely. McManus, however, has submitted affidavits from its employees responsible for opening the firm's mail stating that the March letter was never received. According to McManus, it first became aware that its proposal was no longer being considered for award on April 11, when it was orally notified by NRL that award had been made to another offeror. Since the protest was filed less than 10 days later on April 21, McManus argues that it is timely.

We generally resolve disputes over timeliness in the protester's favor if there is at least a reasonable degree of evidence to support the protester's version of the facts. *Packaging Corp. of America,* B-225823, July 20, 1987, 87-2 CPD ¶ 65. Here, McManus states that it never received the March 25 letter from NRL; NRL has no basis upon which to dispute McManus' statement. As a result, we find that the protest is timely since it was filed within 10 days after April 11, when McManus states that it was first notified that it had not been selected for award.

As discussed in detail below, we agree that NRL engaged in discussions rather than mere clarifications with McManus regarding its technical proposal. In our view, however, NRL was not required to give McManus an opportunity to submit a revised proposal after discussions were completed since NRL reasonably found, based on McManus' response to NRL's inquiries, that McManus' proposal was technically unacceptable.

After an initial technical review of McManus' proposal, NRL in a letter dated December 8, 1987, posed five questions to McManus regarding its technical proposal. The letter asked McManus to furnish proposed camera angles and its system's specifications for minimum pixels and gray scales, as well as to explain how the system would meet the RFP requirements for evaluating targets in relation to size, speed and direction and for a trace feature relating to an intruder's path. NRL maintains that the December 8 letter merely requested clarification of McManus' proposal and did not rise to the level of discussions. We disagree.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation (FAR) § 15.601. In contrast, a request for clarifications is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. *Motorola, Inc.,* B-225822, June 17, 1987, 66 Comp. Gen. 519 87-1 CPD ¶ 604. Here, the questions NRL posed in its December 8 letter related to essential functions of the detection system called for by the RFP. Further, McManus' responses to these questions had a determinative effect on NRL's evaluation of its proposal. After considering McManus' responses as well as other descriptive material later provided by McManus, the technical evaluator, who originally found McManus' proposal susceptible to being made acceptable, concluded that it was technically unacceptable. Under these circumstances, we find that NRL's contacts with McManus clearly constituted discussions, not clarifications. *Id.* McManus contends that once discussions were opened, NRL was required to give McManus an opportunity to submit a revised proposal. In view of our con-

clusion, discussed below, that NRL properly concluded that McManus' proposal was technically unacceptable, we find this argument to be without merit.

NRL states that there were two principal reasons for its conclusion that McManus' proposal was technically unacceptable, first, that McManus failed to furnish adequate specifications on its system as called for by the RFP, and, second, that McManus failed to demonstrate that its system provided the tracking feature required by the RFP.[2] Since we find that NRL properly concluded that McManus' proposal was unacceptable for failure to demonstrate the required tracking feature, we need not address the alleged lack of specifications.

The performance requirements and specifications of the detection system were set out in Attachment J-1 of the RFP. Paragraph 2.f of Attachment J-1 requires the signal analyzer of the system to have a tracking feature which will cause the system to go to alarm condition only if the intruder makes a logical progression across the zone being monitored. The object of the requirement is to have the system disregard nuisance activity such as blowing vegetation. NRL maintains that even though the requirement was set out in the RFP and was raised in the December 8 letter, McManus failed to show that its system would provide the tracking feature. According to the NRL technical evaluator, the descriptive material submitted by McManus shows that its system will sound an alarm whenever any one of the sensitive cells in each camera is disturbed, rather than delaying the alarm until a "track" across the sensitive cells is made by the intruder. McManus contends that its system does provide the tracking feature and that the NRL evaluator was unable to accurately evaluate the system's capability because it functions differently than the brand name system on which the specifications were based and with which the evaluator is familiar.

In reviewing an agency's technical evaluation, our Office will not independently determine the relative merit of an offeror's technical proposal; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation and the procurement laws and regulations. The protester bears the burden of establishing that an evaluation was unreasonable; mere disagreement with the agency's judgment does not meet this burden. *Wellington Associates, Inc.*, B-228168.2, Jan. 28, 1988, 88-1 CPD ¶ 85. A clear showing of unreasonableness is particularly necessary where an agency is procuring sophisticated technical equipment. *Ionics Inc.*, B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290. Moreover, in evaluating proposals an agency properly may eliminate a proposal from the competitive range based on informational deficiencies which are so material that major revisions or additions would be required to make the proposal acceptable. *ASEA Inc.*, B-216886, Feb. 27, 1985, 85-1 CPD ¶ 247.

Here, McManus has not shown where in its proposal the tracking feature is discussed in any detail; on the contrary, the proposal merely repeats the language

[2] NRL also maintains that McManus' proposal lacked warranty and service information called for by the RFP. Unlike the alleged lack of specifications and failure to demonstrate the tracking feature, however, there is no indication that NRL's concerns about the warranty and service information were raised with McManus at any time before its proposal was eliminated from the competition.

in the RFP. Such a blanket statement of full compliance with solicitation requirements is not sufficient to establish that the equipment meets those requirements. *AZTEK*, B-229525, Mar. 2, 1988, 88-1 CPD ¶ 218. Further, although McManus' compliance with paragraph 2.f was clearly raised in NRL's December 8 letter, McManus' brief reply in its December 21 letter did not directly address the tracking feature; rather, the letter focuses on the system's capability to analyze targets moving in all directions and to be preset to handle varying traffic movement conditions. In contrast to the discussions in its proposal and December 21 letter, McManus furnished detailed technical explanations with its protest submissions regarding how its system provides the tracking feature. McManus was required, however, to furnish sufficient detailed information showing that the system offered would meet the RFP requirements while its proposal was being considered, or risk rejection. *See Johnston Communications*, B-221346, Feb. 28, 1986, 86-1 CPD ¶ 211. In view of the limited discussion of the tracking feature provided with its proposal and in response to NRL's December 8 letter, McManus has not shown that the technical evaluator acted unreasonably based on the information before him in concluding that McManus' system did not offer the tracking feature required by the RFP.

Since McManus was properly found technically unacceptable, there was no requirement that it be given an opportunity to submit a revised proposal after discussions were concluded. If, as in this case, a proposal is included in the competitive range only because it is susceptible to being made acceptable, and discussions later make clear that the proposal does not belong in the competitive range because it is technically unacceptable, the proposal may be eliminated from the competitive range without an opportunity to submit a revised proposal.[3] *See* FAR § 15.609(b); *Operations Research, Inc.*, 53 Comp. Gen. 860 (1974), 74-1 CPD ¶ 252; *RAM Enterprises, Inc.*, B-209455, June 13, 1983, 83-1 CPD ¶ 647.

Further, we see no merit to McManus' contentions that NRL's evaluation of its system was improperly based on a comparison with another company's system rather than the specifications in the RFP, or that NRL improperly denied McManus an opportunity to present a live demonstration of its system. While it appears that the specifications in the RFP were based on another company's system, there is no indication that McManus' system was improperly compared to that system rather than to the RFP requirements; on the contrary, as discussed above, NRL reasonably found that McManus failed to show that its system offered the tracking feature clearly set out in the RFP. Further, there was no requirement in the RFP for a live demonstration and even assuming, as McManus contends, that the technical evaluator was familiar with the actual operation of the other company's system, we see no reason why the evaluator was obligated to attend a demonstration of McManus' system. Rather, McManus

[3] McManus also challenged NRL's failure to solicit BAFOs from the other offerors in the competitive range after discussions were completed. McManus is not an interested party to raise this issue since it was properly eliminated from the competition as technically unacceptable and therefore would not be entitled to submit a BAFO even if its protest were sustained on this ground. *See* 4 C.F.R. § 21.0(a); *Atrium Building Partnership*, B-228958, Nov. 17, 1987, 67 Comp. Gen. 93, 87-2 CPD ¶ 491.

bore the burden of demonstrating in its proposal that its system met the RFP requirements, and risked rejection if it failed to do so.

The protest is denied.

B-222155, July 25, 1988

Civilian Personnel

Travel
■ Temporary Duty
■■ Per Diem Rates
■■■ Reduction
■■■■ Shared Lodging

The Food and Drug Administration reduced the per diem rate authorized for a group of employees performing official travel to attend a training course, based on an agency policy of arranging for shared hotel accommodations to be made available to groups of employees when they are attending training courses, as a means of reducing their lodging expenses. There is nothing inherently objectionable about this policy under the applicable laws and regulations, and the reduction of authorized per diem is consistent with the requirement of the Federal Travel Regulations that per diem rates be reduced when lodgings are available at a reduced cost. Hence, an employee who elected to have single accommodations as a matter of personal preference may not be allowed per diem at a higher rate on the basis of a theory that the shared lodgings policy is invalid.

Civilian Personnel

Travel
■ Travel Expenses
■■ Reimbursement
■■■ Amount Determination
■■■■ Administrative Discretion

Federal agencies are not required by law to establish identical maximum expense reimbursement rates for different employees performing the same or similar travel assignments, but reimbursement rates should be reasonably fixed under uniform policies applicable to all employees. Under this standard the Food and Drug Administration properly adopted a uniform policy of reducing per diem rates for employees on group training assignments when they are able to reduce their lodging expenses by sharing hotel accommodations, and of granting exemptions when room sharing is unavailable for a particular employee or would be unreasonable because of a medical problem or other factor.

Matter of: Laurie S. Meade, Jr.—Official Travel—Per Diem—Shared Lodgings

The question presented here is whether the Food and Drug Administration (FDA) may reduce the per diem rate authorized for employees attending training courses based on a policy of arranging for the employees to share hotel accommodations at the training site so that they may reduce their lodging expenses.[1] We have no legal objection to the policy adopted by the agency in the

[1] This action is in response to a request for a decision received from Mr. David Petak, Chief, Accounting Branch, HFA-120, Food and Drug Administration, Public Health Service, Department of Health and Human Services.

particular circumstances described. We consequently deny a claim for additional per diem submitted by an agency employee, Mr. Laurie S. Meade, Jr., who questions the propriety of that policy.

Background

Food and Drug Administration officials state that beginning with fiscal year 1985 the agency instituted a policy as a cost saving measure of arranging double lodging accommodations for employees at training courses of less than 30 days duration. Under this policy FDA encourages and assists employees to share accommodations, and per diem rates are based on the availability of shared lodgings. The agency does not directly lease hotel rooms through government contract, however, nor does the agency attempt to impose an involuntary requirement on employees that they share hotel rooms.

Instead, FDA officials report that the employees are responsible for obtaining and paying for their own lodging accommodations. After a group of employees has been selected to attend a particular training course, however, the members of the group are furnished with a list of the prospective attendees so that they may choose a person with whom they would prefer to share lodgings. Employees who do not select roommates by mutual agreement from among the group may be randomly assigned a roommate of the same sex. Employees who elect not to share accommodations through these procedures may obtain single accommodations of their choice, but their reimbursement is limited based on the fact that shared lodgings at a reduced price are available to them.

The FDA officials report further that exemptions from this double occupancy policy are granted on a case-by-case basis. Thus, in situations where there are an odd number of men or an odd number of women who are willing to share a room, the odd person is exempted and is authorized per diem at a higher rate. In addition, persons may be granted exemptions from the double occupancy policy for reasons of physical handicap, medical necessity, or other compelling factors.

The agency has forwarded for our decision a claim for additional per diem submitted by Mr. Laurie S. Meade, Jr., an FDA employee who suggests that this policy may be improper. Mr. Meade was directed to travel from his permanent duty station at Arlington, Virginia, to Baltimore, Maryland, for the purpose of attending a course of instruction at Baltimore between September 23 and 27, 1985. At that time, a maximum per diem rate of $75 was established under law and regulation for Baltimore. The agency reduced the per diem rate to $68 for the training course in a memorandum dated August 22, 1985, which was sent to Mr. Meade and the other attendees. The memorandum provided this explanation:

> The per diem rate has been set at $68, including tax. This figure was arrived at by averaging double occupancy rates of a number of hotels/motels in the area and adding the meal allowance as follows:

"Average double room rate including tax	$67.25
"Half of double room rate	= 33.63
"Meals (45% of $75)	= 33.75
	67.38
"Per diem rate rounded to	$68.00

The memorandum also provided information to assist employees in selecting roommates if they so desired, and also explained that the reduced rate would not apply to an individual exempted from the double occupancy policy.

Mr. Meade was not exempted from this shared accommodation program. As a matter of personal preference, however, he obtained single hotel accommodations at the rate of $49.95 per day during the 4-day training course. Under the double occupancy policy, his reimbursement for lodgings was limited to $33.63 per day. He questions the propriety of this limitation and claims additional amounts apparently on the theory that this policy is invalid.

In requesting our decision concerning Mr. Meade's claim, FDA officials ask generally whether the agency's double occupancy policy, as well as the practice of granting exemptions from that policy on a case-by-case basis, are permissible under the applicable statutes and regulations.

Analysis and Conclusion

A provision of the Government Employees Training Act, as amended, and as codified at 5 U.S.C. § 4109(a), authorizes the head of an agency, under regulations prescribed by the Office of Personnel Management, to pay or reimburse an employee for all or a part of the necessary expenses of training, including the costs of travel and per diem.

Regulations issued by the Office of Personnel Management direct that for training assignments of 30 days or less an agency has the authority "to pay all or—if agreed to by the employee—a part" of the subsistence expenses of an employee assigned to training at a temporary duty station.[2] Subsistence expenses may be reimbursed through payment of per diem in accordance with 5 U.S.C. §§ 5701-5709.[3] "Agencies are governed by the Federal Travel Regulations issued by the General Services Administration in paying these costs."[4]

Thus, the Government Employees Training Act and the implementing regulations of the Office of Personnel Management require an agency to reimburse employees undergoing training in the manner generally prescribed for employees on official travel assignments under 5 U.S.C. §§ 5701-5709 and the Federal

[2] *See* 5 C.F.R. § 410.603(a); and Federal Personnel Manual (FPM), ch. 410, subch. 6.
[3] FPM, ch. 410, § 6-3.
[4] FPM, ch. 410, § 6-3; *see also* also 5 U.S.C. § 5707(a). Prior to 1981 regulations of the Office of Personnel Management gave agencies the authority to pay all, part, or none of the subsistence expenses of employees during their performance of training assignments, regardless of the employees' agreement in the matter, so that the employees' maximum daily rate of reimbursement, if any, was primarily within the employing agency's discretion. *See* 5 C.F.R. §§ 410.601-604 (1980 ed., superseded); and *Dr. Elynore Cucinell*, B-187453, Sept. 30, 1977.

Travel Regulations, except in situations involving employees who voluntarily agree to accept reimbursement in a lesser amount. Hence, since Mr. Meade did not volunteer to attend the training course at issue here, and since he did not agree to accept only partial reimbursement of the amount otherwise allowable by law and regulation, it is our view that his entitlements are for determination under the provisions of 5 U.S.C. §§ 5701-5709 and the Federal Travel Regulations.

Under 5 U.S.C. § 5702 and the implementing provisions of the Federal Travel Regulations[5] reimbursement of an employee's subsistence expenses on a per diem allowance basis is authorized, and maximum locality rates are established for per diem allowances. The regulations provide that each agency may authorize only those allowances that are justified by the circumstances affecting the travel, however, and make each agency responsible for reducing the per diem allowance to rates lower than the maximum authorized when warranted by the particular circumstances affecting the travel.[6] Among the circumstances cited as a proper basis for reducing the rate are situations in which lodgings can be obtained at reduced cost.[7] The statutes and the implementing regulations do not prohibit shared or double accommodations available at a reduced cost for a group of employees on the same travel assignment to be used as a basis for reducing the maximum allowable per diem rate.[8]

We have recognized that under 5 U.S.C. § 5702 and the implementing provisions of the Federal Travel Regulations, agencies have the responsibility and the discretionary authority to reduce a per diem allowance rate to an amount less than the maximum authorized when warranted by the circumstances affecting the travel, and we have consistently disallowed employees' claims for reimbursement at a rate in excess of that authorized by their employing agency, notwithstanding the employees' personal belief that the amounts authorized may have been inadequate to cover all of their necessary and reasonable subsistence expenses.[9] In addition, we have expressed the view that while agencies should limit per diem under uniform policies applicable to all employees, the statutes and regulations do not require agencies to establish the same rates for different employees performing the same or similar travel assignments.[10]

In this case, therefore, we recognize that FDA has the authority under 5 U.S.C. §§ 5701-5709 and the Federal Travel Regulations to reduce the per diem rate for groups of employees attending training courses based on the availability of lodgings at a reduced cost. Moreover, we have no basis for taking exception to the agency's use of the reduced cost of available shared accommodations in establishing the reduced reimbursement rates, since this is not currently prohibited by statute or regulation and does not otherwise appear inherently unreasonable

[5] FTR, *incorp. by ref.*, 41 C.F.R. § 101-7.003.
[6] *See* FTR, para. 1-7.1e (Supp. 20, May 9, 1986) (current); and para. 1-7.3 (Supp. 1, Sept. 28, 1981) (superseded).
[7] FTR, para. 1-7.1e (Supp. 20, May 9, 1986) (current); and para. 1-7.3 (Supp. 1, Sept. 28, 1981) (superseded).
[8] *See, generally,* 5 U.S.C. §§ 5701-5709; and FTR Part 1-7.
[9] *See, generally, Gilbert C. Morgan,* 55 Comp.Gen. 1323, 1326-1327 (1976); *Johnny S. Taylor, Jr.,* B-200794, July 23, 1981; *Rodney D. Johnson,* B-201508, July 15, 1981; *Barbara J. Protts,* B-195658, Mar. 19, 1980.
[10] *Savings and Loan Examiners,* B-198008, Sept. 17, 1980.

in the reported circumstances. Further, we do not find that the agency's policy of exempting some employees for reasonable cause, and of authorizing them per diem at a higher rate, contravenes 5 U.S.C. § 5702 and the Federal Travel Regulations because, as noted, the statutes and regulations do not require the identical maximum reimbursement rate for all employees performing the same travel assignment.

Hence, we have no basis to conclude that the policy adopted by FDA is invalid. We accordingly deny Mr. Meade's claim.

B-229414, July 25, 1988

Civilian Personnel

Relocation
■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Reimbursement
■■■■ Eligibility

A transferred employee requests reimbursement for a fee he paid to a relocation company so that his family could remain in their former residence 23 days after the residence was purchased. The claim is denied since the employee's home was not vacated as required by the applicable provisions of the Federal Travel Regulations.

Matter of: Edward Carlin—Temporary Quarters in Former Residence

This decision is in response to a request by Roslyn A. Miller, Supervisory Voucher Examiner, National Park Service, United States Department of the Interior, for a decision regarding a travel voucher submitted by Mr. Edward Carlin, an employee of the agency. The claim is for reimbursement of a fee charged to him by a relocation company for his family's use of their former residence for 23 days after the residence had been purchased by the relocation company. For the reasons set forth below, we hold that the voucher may not be paid.

Background

Mr. Carlin transferred from Albuquerque, New Mexico, to Omaha, Nebraska, in January 1987. He moved to Omaha on March 4, and he was reimbursed temporary quarters subsistence expenses for the period he occupied temporary quarters in Omaha. Mr. Carlin informed the National Park Service in January 1987 that his family would continue to reside in their home in Albuquerque until his children completed the school year and until he had found a new home in Omaha.

A relocation company made Mr. Carlin an offer to purchase his home in Albuquerque on April 8, 1987, and gave him 45 days to accept or reject the offer. Mr.

Carlin accepted the offer on May 15, 1987, but his family remained in the home until June 7, 1987, 23 days after his acceptance. The relocation company charged Mr. Carlin $22.64 per day, totalling $520.72, for his family to continue living in their old residence. Mr. Carlin now requests reimbursement for this fee.

The National Park Service allowed Mr. Carlin's claim for his temporary quarters in Omaha, but the agency was uncertain as to how to classify the claim for the housing fee charged by the relocation company.

Opinion

The statute, 5 U.S.C. § 5724a(a)(3) (1982), and the implementing regulations contained in chapter 2, part 5, of the Federal Travel Regulations (FTR), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1987), govern the payment of temporary quarters subsistence expenses. According to the regulation, temporary quarters generally refers to lodging obtained after the employee and his family have vacated the residence occupied before the transfer was authorized. FTR para. 2-5.2c.

The regulation does not specifically define the word "vacate;" however, decisions of this Office have given substantial weight to the intent of the employee to vacate the residence as a permanent residence. Intent is determined in light of all the facts and circumstances manifested by objective evidence. *Charles C. Werner,* B-185696, May 28, 1976.

Ordinarily, employees are ineligible for reimbursement of subsistence expenses incurred while renting their permanent residence following its sale at their old duty station. *Kenneth M. Smith,* B-201418, Sept. 22, 1981. However, in certain decisions, we have allowed reimbursement of temporary quarters in cases where the prior residence was not actually vacated. We have considered evidence of the actions taken by the employee prior to or after departure from the prior residence which demonstrate the employee's intent to cease occupancy of that residence. If an employee and his family cease to occupy it for the purposes intended, it can be deemed "constructively vacated." *See Quinea D. Minton,* B-218886, Mar. 24, 1986.

For example, in *Beverly L. Driver,* B-181032, Aug. 19, 1974, we held that an employee, who rented his former home when a moving van broke down the day he intended to leave, could be reimbursed for temporary quarters until the moving van arrived. Likewise, we held that a family that moved back into their old residence after it had been vacated, because of an unexpected cancellation of the contract for a new home, could also be reimbursed. *Patrick T. Schluck,* B-202243, Aug. 14, 1981.

However, the facts in the present case do not demonstrate an intent to vacate as in the cases previously cited. In the present case, Mr. Carlin planned for his family to remain in their home at his old duty station after his home had been purchased. Mr. Carlin did not show the necessary intent to vacate his former residence at the time it was purchased and, therefore, reimbursement is clearly

not authorized by the regulation. We have consistently held that when a transferred employee arranges in advance to rent his former home he cannot be reimbursed for temporary quarters. *Gerald L. Modjeska,* 56 Comp. Gen. 481 (1977); *Michael J. Johnson,* B-215708, Oct. 11, 1984.

This case is similar to *James P. Driscoll,* B-198920, Nov. 28, 1980, where the employee arranged to rent his former residence after the date of sale in order for his children to complete their school term. We held in *Driscoll* that temporary quarters could not be reimbursed because the employee had no present intent to vacate the home.

Accordingly, we hold that the employee may not be reimbursed for the cost of occupying his former residence after settlement on that residence.

B-231412, July 27, 1988

Procurement

Sealed Bidding
■ Bid Guarantees
■ ■ Responsiveness
■ ■ ■ Letters of Credit
■ ■ ■ ■ Adequacy

Where letter of credit submitted as a bid guarantee is conditioned upon assignment of the contract to a commercial banker in the event of default, thereby limiting the government's rights under the standard Default clause, agency properly rejected the bid as nonresponsive.

Matter of: Mycon Construction Co. Inc.

Mycon Construction Inc. protests the rejection of its low bid under invitation for bids (IFB) No. DACA63-88-B-0097, issued by the Corps of Engineers, Fort Worth District. The contracting officer rejected the protester's bid because of defects in the letter of credit submitted with the protester's bid as a bid guarantee.

We deny the protest.

On March 2, 1988, the agency issued the solicitation as a 100 percent set-aside for small disadvantaged business concerns for replacement of water mains, fire hydrants and post indicator valves, and replacement of barricades at the Louisiana Army Ammunition Plant in Shreveport, Louisiana. The IFB required potential bidders to furnish a bid guarantee in the amount of 20 percent of the bid price or $3,000,000, whichever was less. The IFB also contained Federal Acquisition Regulation (FAR), § 52.228-1, Bid Guarantee, allowing bidders to furnish a bid guarantee in the form of a firm commitment such as a bid bond, postal money order, certified check, cashier's check, or a irrevocable letter of credit. That provision also advised bidders that the failure to submit a bid guarantee in the proper form could cause rejection of a bid, and establish the government's right to terminate the contract for default if the successful bidder failed to execute payment and performance bonds within a specified time. The IFB also con-

tained FAR § 52.249-10, Default, reserving for the government the right to complete work by contract or otherwise in the event of default.

The protester submitted with its bid an irrevocable letter of credit issued by the American Mortgage Corporation of Newport Beach, California. The letter was for $1 million and stated that "strict adherence by the Beneficiary" to certain conditions was required. One of the conditions read, "Drafts must be preceded by the assignment of the contract for construction . . . duly executed by the Beneficiary hereby to American Mortgage Corporation." On April 22, the agency notified the protester that the contracting officer was rejecting Mycon's bid as nonresponsive because, among other things, the letter of credit was conditioned on the assignment of the contract to American Mortgage Corporation. This protest followed.

The question of responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items or services in total conformance with the requirements specified in the IFB. *Free-Flow Packaging Corp.,* B-204482, Feb. 23, 1982, 82-1 CPD ¶ 162. Because all bidders must compete for advertised contracts on a common basis, no individual bidder can reserve rights to immunities from responsibility that are not extended to all bidders by the conditions and specifications advertised in the IFB. *Id.* Where a bidder qualifies its bid to protect itself or reserves rights which are inconsistent with a material portion of the IFB, the bid must be rejected as nonresponsive. *Data Controls/North Inc.,* B-205726, June 21, 1982, 82-1 CPD ¶ 610, *aff'd upon reconsideration,* B-205726.2, Aug. 16, 1982, 82-2 CPD ¶ 131.

Here, the letter of credit submitted by the protester required the assignment of the defaulted contract to the surety who, according to the protester, would then comply with all contract terms, including the furnishing of payment and performance bonds. However, it follows that by requiring assignment of the contract to its surety, the protester also required the government to relinquish the right to complete the work in-house in accordance with the standard default clause. As stated above, that clause provides that, upon default, the government "may take over the work and complete it by contract *or otherwise.*"

Under appropriate circumstances, the right to complete work in-house is potentially a valuable right that the government may invoke, charging any excess costs to the defaulted contractor. For example, the government may use in-house personnel to complete all or part of terminated construction work and assess excess costs against the defaulted contractor, so long as it acts reasonably in doing so. *Cf. Brent L. Sellick,* ASBCA No. 21869, 78-1 BCA ¶ 13,510 (1978) (use of in-house public works crew not reasonable). Accordingly we think that the condition in the letter of credit, requiring assignment, limited the right of the government under the default clause and therefore rendered the bid nonresponsive.

Because we find that the protester's bid guarantee contained an unacceptable condition, and that the rejection of the protester's bid was proper, we need not address the protester's allegations concerning the other reasons for which the

agency found the bid guarantee to be deficient. *See BKS Construction Co.,* 66 Comp. Gen. 492, 87-1 CPD ¶ 558.

We deny the protest.

B-231532, July 27, 1988

Procurement

Bid Protests

■ Allegation Substantiation

■■ Lacking

■■■ GAO Review

Procurement

Bid Protests

■ Moot Allegation

■■ GAO Review

Protest that contracting agency improperly induced protester to compete for and accept award of a contract which included several option years when in fact agency intended to acquire the services under a different, more comprehensive contract to be awarded a short time later, is without merit since the agency only decided to acquire the services under the comprehensive contract once it became clear, after award had been made to the protester, that the services could be acquired at a lower price under that contract than under the protester's contract.

Matter of: James M. Smith, Inc.

James M. Smith, Inc., protests the decision by the Air Force to procure bus shuttle services under a contract awarded to TECOM, Inc., instead of under a contract awarded to Smith. We deny the protest.

On June 8, 1987, the Air Force issued request for proposals (RFP) No. F05604-87-R0032 for vehicle operations and maintenance services at Peterson Air Force Base, Colorado. Prior to that date, the services called for by the RFP, except for bus shuttle services between the base and the Cheyenne Mountain Complex, had been provided by government personnel. The RFP was issued as part of a study under Office of Management and Budget Circular No. A-76 to compare the cost of in-house performance of the services with the cost of contracting out for them. Proposals under the RFP were due on December 23. As a result of the cost comparison, a contract was awarded to TECOM, Inc., on April 21, 1988.

On August 14, 1987, while the A-76 cost comparison was still ongoing, the Air Force issued invitation for bids No. F0564-87-B0074 for the bus shuttle services only. (As noted above, unlike the other items included in the A-76 RFP, the shuttle services already were being provided by an outside contractor, not government personnel). Award under the IFB was made to Smith on November 20, 1987. The base period of performance was from December 1, 1987, to September 30, 1988, with four 1-year options.

Subsequently, after the comprehensive services contract had been awarded to TECOM, the Air Force conducted a study of the shuttle services and determined that it could obtain the services at a lower price under TECOM's contract than under Smith's contract. As a result, in May 1988, the Air Force terminated Smith's contract for convenience effective June 30 after 7 months of performance, after which it would acquire the services from TECOM.

Smith argues that it was improper to award a contract to Smith for the shuttle services when the Air Force in fact intended to obtain those services under TECOM's comprehensive contract once it was awarded. Smith contends that it was unfairly induced to compete for and accept award of a contract which included 4 option years when the Air Force actually intended to procure the services for only a short period.

To the extent that Smith argues that, in bidding on the shuttle services contract, it relied on the options to be exercised and, as a result, was treated unfairly when its basic contract was terminated without exercise of the options, Smith's argument is without merit. Firms which bid on contracts containing option provisions assume the risk that the contracting agency might not exercise the options. *Federal Contracting Corp.,* B-227269, June 5, 1987, 87-1 CPD ¶ 577. In this connection, we note that the IFB under which Smith was awarded the contract advised prospective bidders that award of the options may be impacted by award under the A-76 RFP. Further, while Smith maintains that the Air Force knew when it made the award to Smith that it would be for only a short period, there is no support in the record for this contention. Rather, as noted above, Smith's contract was awarded before the A-76 cost comparison on the RFP was completed, at a time when the Air Force did not know whether the result of the cost comparison would be to contract out for the services or retain the function in-house. The fact that the Air Force later decided to award a contract to TECOM and procure the shuttle services under that contract at a lower price than under Smith's contract, does not indicate any impropriety in the earlier award to Smith.

Smith also states that while it generally is not interested in competing for vehicle maintenance contracts of the type awarded to TECOM, it would have submitted a proposal under the RFP had it known that its own shuttle services contract would be terminated after the comprehensive contract was awarded. Since there is no indication that the Air Force knew at the time proposals were due under the A-76 RFP that Smith's contract would be terminated, it had no basis to so advise Smith.

The protest is denied.

B-229926.4, July 28, 1988

Procurement

Competitive Negotiation
■ Contract Awards
■■ Government Delays
■■■ Procedural Defects

While an agency is required to award a contract with reasonable promptness, 8-month period from closing date to award for a negotiated procurement is not *per se* unreasonable where agency conducts three reevaluations in response to offerors' complaints and protests. In any case, delay in award of contract generally is a procedural deficiency which does not provide a basis of protest because it has no effect on the validity of the procurement.

Matter of: Trim-Flite, Inc.

Trim-Flite, Inc., protests the agency's delay in making award under DACWO-1-87-R-0056, issued by the United States Army Corps of Engineers for maintenance and operation services at Lake Sidney Lanier, Buford, Georgia. Trim-Flite seeks award of a contract or delay damages in the amount of $228,250.34.

We dismiss the protest.

Trim-Flite was initially notified on December 17, 1987, that it was the successful offeror under the solicitation; the agency reaffirmed its determination to make award to Trim-Flite after two reevaluations of all proposals conducted in response to protests by other offerors. However, as a result of still further protests against the evaluation of proposals, the agency concluded that it was necessary to conduct a fourth evaluation with a revised government cost estimate and a new evaluation board.

Trim-Flite complains that the resulting delay in award after initial notification that it was the successful offeror was "adverse agency action" caused by agency error in conducting the procurement.

We find the delay unobjectionable. A delay in meeting procurement milestones generally is a procedural deficiency which does not provide a basis of protest because it has no effect on the validity of the procurement. *American Identification Products, Inc.*, B-227599, July 13, 1987, 87-2 CPD ¶ 42. While an agency is required to award a contract with reasonable promptness, the 8-month period here from closing date to award is not unreasonable *per se* given the attempts by the agency to correct the matters raised in offerors' complaints and protests through reevaluations. *See Id.* The fact that the delays may have been the result of initial agency errors in the procurement is irrelevant; once the errors occurred (Trim-Flite does not allege that errors were not made), the Corps' proper course of action was to take steps to correct the errors. The award delay was merely an unfortunate, but necessary, by-product of the Corps' proper action.

Trim-Flite contends that the agency "accidently" disclosed its cost information to a competitor, W. B. & A., during that firm's protest to this Office. In a letter

submitted by Trim-Flite, however, the agency denies release of Trim-Flite's proposal in connection with either W. B. & A.'s bid protest or that firm's Freedom of Information Act request concerning the subject solicitation. In any event, even assuming an improper price disclosure, there is no indication that it could have prejudiced Trim-Flite in any way, as the disclosure is alleged to have occurred after best and final offers (BAFOs) were received. Although the agency conducted subsequent reevaluations, there is no indication or allegation that any offeror was allowed to change its price through the subsequent rounds of BAFOs.

Finally, Trim-Flite seeks as damages the recovery of its proposal preparation and protest costs, as well as its lost profits. However, there is no legal authority that permits the recovery of anticipated profits through the bid protest process, even (in the presence) of wrongful agency action. *Consolidated Devices, Inc.*, B-228065, Aug. 24, 1987, 87-2 CPD ¶ 201. Our Bid Protest Regulations provide only for the recovery of bid preparation costs and the costs of filing and pursuing a protest, and then only where a protest is found to have merit. 4 C.F.R. § 21.6(d) (1988). Since Trim-Flite's protest is without merit, there is no basis for reimbursement of its proposal preparation or protest costs.

The protest is dismissed.

Appropriations/Financial Management

Budget Process
■ Miscellaneous Revenues
■■ Applicability
■■■ In-Kind Replacement

Even though an agency may have a specific appropriation to cover the costs of replacing agency vehicles, the acceptance of in-kind replacement of vehicles damaged beyond repair by a negligent third party in lieu of cash payment does not require the agency to make an offsetting transfer of funds from its current appropriations to the miscellaneous receipts fund of the Treasury in order to comply with the requirements of 31 U.S.C. § 3302(b), since the statute only applies to moneys received for the use of the United States. 22 Comp. Gen. 1133, 1137 (1943) clarified.

510

Claims Against Government
■ Unauthorized Contracts
■■ Quantum Meruit/Valebant Doctrine
■■■ Amount Determination

The Department of Labor may include a fee (or profit) in calculating the amount of a *quantum meruit* payment to Acumenics Research and Technology. To the extent profits are determined to be reasonable and constitute compensation for what the government received under the circumstances, inclusion of profits as an element of value in a *quantum meruit* recovery is not prohibited.

507

Civilian Personnel

Relocation
■ Residence Transaction Expenses
■■ Settlement
■■■ Agents
■■■■ Fees

Two transferred employees were denied reimbursement for settlement agent fees charged by the same lender who earlier charged them fees for originating their mortgage loans. The claims may be allowed. Each described activity is separate and distinct. Where a fee is charged a purchaser by an individual to act as settlement agent at a real estate closing, it may be allowed under FTR para. 2-6.2c and f, if it is customary in the locality for the purchaser to pay and does not exceed the usual amount charged in the area.

503

■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Reimbursement
■■■■ Eligibility

A transferred employee requests reimbursement for a fee he paid to a relocation company so that his family could remain in their former residence 23 days after the residence was purchased. The claim is denied since the employee's home was not vacated as required by the applicable provisions of the Federal Travel Regulations.

544

Travel
■ Temporary Duty
■■ Per Diem Rates
■■■ Reduction
■■■■ Shared Lodging

The Food and Drug Administration reduced the per diem rate authorized for a group of employees performing official travel to attend a training course, based on an agency policy of arranging for shared hotel accommodations to be made available to groups of employees when they are attending training courses, as a means of reducing their lodging expenses. There is nothing inherently objectionable about this policy under the applicable laws and regulations, and the reduction of authorized per diem is consistent with the requirement of the Federal Travel Regulations that per diem rates be reduced when lodgings are available at a reduced cost. Hence, an employee who elected to have single accommodations as a matter of personal preference may not be allowed per diem at a higher rate on the basis of a theory that the shared lodgings policy is invalid.

540

■ Travel Expenses
■■ Reimbursement
■■■ Amount Determination
■■■■ Administrative Discretion

Federal agencies are not required by law to establish identical maximum expense reimbursement rates for different employees performing the same or similar travel assignments, but reimbursement rates should be reasonably fixed under uniform policies applicable to all employees. Under this standard the Food and Drug Administration properly adopted a uniform policy of reducing per diem rates for employees on group training assignments when they are able to reduce their lodging expenses by sharing hotel accommodations, and of granting exemptions when room sharing is unavailable for a particular employee or would be unreasonable because of a medical problem or other factor.

540

Procurement

Bid Protests
■ Allegation Substantiation
■■ Lacking
■■■ GAO Review

■ Moot Allegation
■■ GAO Review

Protest that contracting agency improperly induced protester to compete for and accept award of a contract which included several option years when in fact agency intended to acquire the services under a different, more comprehensive contract to be awarded a short time later, is without merit since the agency only decided to acquire the services under the comprehensive contract once it became clear, after award had been made to the protester, that the services could be acquired at a lower price under that contract than under the protester's contract.

548

■ GAO Procedures
■■ Interested Parties
■■■ Direct Interest Standards

A protester which did not submit a bid under a challenged invitation for bids (IFB) is an interested party to protest IFB requirements as unduly restrictive where the protester indicates that restrictions prevented it from bidding.

531

■ GAO Procedures
■■ Protest Timeliness
■■■ 10-Day Rule
■■■■ Adverse Agency Actions

Protest challenging rejection of protester's offer is timely despite contracting agency's contention that it sent letter to protester advising of rejection more that 10 days before the protest was filed where protester denies ever receiving the letter and protest was filed within 10 days after protester was orally notified that award was made to another offeror.

534

Competitive Negotiation
■ Contract Awards
■■ Government Delays
■■■ Procedural Defects

While an agency is required to award a contract with reasonable promptness, 8-month period from closing date to award for a negotiated procurement is not *per se* unreasonable where agency conducts three reevaluations in response to offerors' complaints and protests. In any case, delay in

award of contract generally is a procedural deficiency which does not provide a basis of protest because it has no effect on the validity of the procurement.

550

■ Discussion
■■ Error Correction
■■■ Post-Award Error Allegation

Where awardee's proposal is found to be deficient after award, agency is not required to terminate and make award to higher-priced offeror without first allowing awardee to correct deficiencies through discussions.

525

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

Contracting agency engages in discussions, not clarifications, where it asks offeror to provide information relating to essential functions of its proposed equipment and offeror's responses have a determinative effect on the agency's evaluation of the proposal.

534

■ Discussion
■■ Propriety
■■■ Post-Award Error Allegation
■■■■ Contract Rescission

Where awardee's proposal is found, subsequent to award, to be materially defective, agency decision to rescind award made on basis of initial proposal and to hold discussions with all offerors in competitive range, including initial awardee, is proper.

525

■ Discussion Reopening
■■ Auction Prohibition

Once agency has determined that initial proposal on which award was based is materially deficient, rescinding the award and initiating competitive range discussions, even though prices have been disclosed, is the appropriate remedy; the statutory requirements for competition take primacy over regulatory prohibitions of auction techniques.

526