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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., 67 Comp. Gen. 10 (1987). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-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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March 1990

B-235845, March 12, 1990

Civilian Personnel

Travel

■ Travel expenses

■■ Reimbursement

■■■ Witnesses

The statutory provision in 5 U.S.C. § 5751, authorizing reimbursement of travel expenses of government employees called as witnesses and the implementing regulations in 28 C.F.R. Part 21 are applicable to discrimination hearings before an Administrative Judge of the Equal Employment Opportunity Commission (EEOC). An employee who appears as a witness at such a hearing is in an official duty status and entitled to reimbursement for travel expenses.

Civilian Personnel

Travel

■ Travel expenses

■■ Reimbursement

■■■ Witnesses

A current employee of the Department of Veterans Affairs (VA) was summoned to testify at an EEOC hearing concerning the witness's official duties at his former agency, the Coast Guard. The VA must initially authorize and pay the employee's travel expenses so as not to disrupt the equal employment opportunity process. Then, the VA is entitled to reimbursement from the respondent agency (Coast Guard), which is ultimately responsible for the cost of the employee's travel to attend the hearing.

Matter of: John Booth—Travel Expenses of Witness—Agency Responsible

This decision is in response to a request from the Secretary, Department of Veterans Affairs, concerning the issue of which agency, if any, is responsible for paying travel costs of a VA employee summoned to appear as a witness at a hearing on a discrimination complaint against the Coast Guard. We conclude that the VA is obligated to authorize and pay for the employee's travel and is then entitled to reimbursement from the Coast Guard, the respondent agency. The Coast Guard, and not the VA, is ultimately responsible for payment of the travel costs since the testimony concerns the witness's official duties at his former agency, the Coast Guard.

Background

In 1987, Ms. Carmen Hypolite filed a discrimination complaint against the United States Coast Guard in which she alleged that her nonselection for a grade GS-12 position was due to discrimination. The selecting official was Mr. John Booth, who was then employed by the Coast Guard in Alameda, California. In 1988, Ms. Hypolite disagreed with the agency's proposed disposition of her case and requested a hearing before the Equal Employment Opportunity Commission. Ms. Hypolite requested that Mr. Booth appear at the hearing as a witness. The EEOC Administrative Judge assigned to Ms. Hypolite's complaint ruled that Mr. Booth's testimony is relevant and necessary because he was the selecting official and there are issues of credibility to decide concerning the manner in which he made his selection.

Since Mr. Booth had transferred from the Coast Guard to a position with the VA in its Regional Office, Waco, Texas, the Administrative Judge sent a request to the VA to make Mr. Booth available as a witness at a hearing in Alameda, California, and to reimburse him for his travel expenses and per diem. The EEOC contends that the VA must make Mr. Booth available as a witness in view of EEOC's authority in 29 C.F.R. § 1613.218(f) (1988). That section provides that an EEOC Administrative Judge may request the appearance of an employee of any federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. Further, the agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the Administrative Judge, unless it is administratively impracticable to comply with the request. The EEOC also says that 5 U.S.C. § 5751(a) (1982) provides, under regulations prescribed by the Attorney General, for payment of travel expenses of witnesses who work for the federal government and that the VA must pay such expenses under that authority.

The VA disagrees on the basis that none of the authorities cited by EEOC specifically address the factual situation here. The VA agrees that the EEOC provision (29 C.F.R. § 1613.218(f)) requires that all agencies make their employees available as witnesses and in a duty status, but contends that it does not address which agency pays the travel costs. In addition, the VA contends that the provisions of 5 U.S.C. § 5751(a), and the regulations issued by the Attorney General in 28 C.F.R. § 21.2 (1988) apply only to civil actions in court and to agency proceedings under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, and not to EEOC hearings. The VA also contends that, if anyone is obligated to pay Mr. Booth's expenses, it should be the Coast Guard since Mr. Booth is being called to testify concerning matters related to his prior employment and not in his current official capacity.

The Coast Guard's position is that it is not responsible for Mr. Booth's travel expenses and that either the EEOC or Ms. Hypolite should pay for them. The Coast Guard also contends that Mr. Booth's personal attendance and the ex-

penses involved are unnecessary since the witness can be examined "telephonically."

Opinion

Travel on Official Business

We believe the statutory language in 5 U.S.C. § 5751 and the implementing regulations in 28 C.F.R. Part 21 are sufficiently broad in scope and applicability to govern here, and, contrary to VA's contention, are applicable to EEOC hearings.

Although Mr. Booth has been summoned to appear in person at the request of the complainant, he is being summoned by the EEOC Administrative Judge to provide evidence on behalf of the government concerning his official duties while employed at the Coast Guard. Thus, 5 U.S.C. § 5751(a), which provides in pertinent part as follows, applies here.

(a) Under such regulations as the Attorney General may prescribe, an employee . . . summoned, or assigned by his agency, to testify or produce official records on behalf of the United States is entitled to travel expenses under subchapter I of this chapter. If the case involves the activity in connection with which he is employed, the travel expenses are paid from the appropriation otherwise available for travel expenses of the employee under proper certification by a certifying official of the agency concerned. If the case does not involve its activity, the employing agency may advance or pay the travel expenses of the employee, and later obtain reimbursement from the agency properly chargeable with the travel expenses.

The Attorney General's regulations implementing 5 U.S.C. § 5751(a) provide that an employee is entitled to travel expenses in connection with any judicial or agency proceeding with respect to which the employee is summoned, and is authorized by the employee's agency to respond to such summons, or is assigned by his or her agency to testify or produce official records on behalf of the United States. 28 C.F.R. § 21.2(b)(1) (1988). A "summons" is defined as an official request by the party responsible for the conduct of the proceeding. 28 C.F.R. § 21.1(f) (1988). An "agency proceeding" means an agency process as defined by 5 U.S.C. §§ 551(5), (7), and (9), the Administrative Procedure Act, which includes an adjudication by an agency through formulation of an order. 28 C.F.R. § 21.1(a); 5 U.S.C. § 551(7).

Contrary to VA's contention, we do not believe that the above-cited provisions limit the application of 5 U.S.C. § 5751 solely to proceedings held under the APA. Section 5751 and the implementing regulations in 28 C.F.R. make no such limitation.[1] An EEOC proceeding fits the definition in 5 U.S.C. § 551(7) since it is an agency process for the formulation of an order.

In this case Mr. Booth has been summoned by an Administrative Judge to appear as a witness at a discrimination hearing where the United States (Coast Guard) is a party, and to testify in his official capacity as a former employee of

[1] An official of the Department of Justice advised us that in his view section 5751 is broad enough to cover all administrative hearings, including those of the EEOC.

the Coast Guard. Accordingly, when Mr. Booth responds to the summons, he will be in an official duty status and entitled to reimbursement for travel expenses. *See* 28 C.F.R. §§ 21.2(b), and (e) (1988).

Agency Responsible For Payment Of Travel Expenses

In cases decided under predecessor language to the current 5 U.S.C. § 5751(a), we have held that if the facts or circumstances in the case that an employee is called to testify on arose from his prior employment with another agency, that agency and not the employee's current agency is responsible for payment of travel expenses. 46 Comp. Gen. 613 (1967); 22 Comp. Gen. 1074 (1943). This responsibility for payment is consistent with the language in 5 U.S.C. § 5751(a) quoted above, and the Attorney General's instructions on payment and reimbursement of travel expenses to government employees serving as witnesses. 28 C.F.R. § 21.2(d)(1) (1988).

Further, 29 C.F.R. § 1613.218(f) authorizes the Administrative Judge to request the appearance of an employee of any federal agency whose testimony is necessary to the proceeding and the agency must make the employee available unless it is impracticable to do so. If the employing agency objects, it shall provide an explanation to the Administrative Judge. If the Administrative Judge finds the explanation inadequate, the agency "shall make the employee available as a witness at the hearing." While that regulation does not specifically provide for travel expenses, it must be read together with 28 C.F.R. § 21.1 which clearly calls for payment by the employing agency and subsequent reimbursement by the agency whose activities are involved in the hearing.

Accordingly, since Mr. Booth has been ordered by the EEOC Administrative Judge to appear as a witness, we believe that it is incumbent on the VA to initially authorize and pay Mr. Booth's travel expenses in accordance with 5 U.S.C. § 5751(a) and the Justice Department's implementing regulations, since a failure to do so would be disruptive of the EEOC process. The VA is then entitled to be reimbursed the travel expenses by the Coast Guard.

While the Coast Guard may believe the personal appearance is unnecessary, the appropriate forum in which to challenge that determination is before the EEOC Administrative Judge. If the Administrative Judge rules that Mr. Booth must appear, the Coast Guard will be obligated to pay for his travel through reimbursement to the VA.

B-236146, March 13, 1990

Miscellaneous Topics

Finance Industry
■ Financial institutions
■■ Accounting services
■■■ Contract awards
■■■■ Propriety

So long as a federal disbursing officer exercises managerial responsibility for reviewing and overseeing disbursement operations and discharges other judgmental tasks set forth in 31 U.S.C. § 3325, 31 U.S.C. § 3321 does not preclude an agency from contracting with a private bank to perform the ministerial, operational aspects of disbursement, such as printing checks, delivering checks to payees, and debiting amounts from accounts.

Matter of: The Honorable Mike Synar, House of Representatives

This opinion responds to your letter, dated July 10, 1989, in which you raised several questions concerning a contract awarded by the Bureau of Indian Affairs (BIA) to the Security Pacific National Bank (Security Pacific), for various accounting and financial trust services.[1] Specifically, you asked whether BIA has authority to contract out for such services as cash collection and concentration, investment advice and assistance, and certain disbursement services. For the reasons set forth in this letter, it is our view that BIA has authority, as a general matter, to contract for such assistance, so long as it retains its managerial and fiduciary responsibilities with regard to the Indian trust funds.

Background

The Secretary of the Interior is responsible for the management of Indian affairs. *See* 43 U.S.C. § 1457. *See also* 25 U.S.C. §§ 1a and 2. As such, the Secretary is the designated trustee on behalf of the tribal and individual beneficiaries of all Indian trust funds for which the United States is responsible. The Secretary has in turn delegated authority for management of the Indian trust funds to the Assistant Secretary-Indian Affairs, who carries out his trust management responsibilities through BIA. According to BIA, as of October 31, 1987, BIA was managing more than $1.8 billion in trust funds[2] belonging to Indian tribes, individual Indians, Alaska natives and Native Corporations, and irrigation and power projects. *See* table 1 of BIA's request for proposals (RFP) for financial trust services, dated February 18, 1988. The primary sources of money in the various Indian trust funds are court judgments, income generated from the sale

[1] In an earlier letter, dated June 19, 1989, you raised several other questions concerning this contract. As your office agreed, we responded to your June 19 letter in two separate responses dated August 22, 1989, and September 28, 1989.

[2] Since the bulk of the $1.8 billion in trust fund moneys is contained in tribal trust fund accounts and individual Indian money accounts, our examination of the issues you raise focused primarily on these trust funds.

or lease of trust resources such as timber, oil, gas, rangeland, and water rights, and collections from irrigation and power projects.

As trustee and manager of the Indian trust funds, BIA historically has performed, in house, all of the trust management functions including receipt, control, investment, and disbursement of trust funds, with some assistance from the Department of Treasury. However, BIA recently determined that it could achieve monetary savings and operate more efficiently by procuring certain financial services from the private sector.[3] After soliciting proposals, BIA decided to contract with Security Pacific. BIA expects Security Pacific to provide "integrated external services encompassing cash collection and concentration . . ., investment services . . ., disbursement services, custody of trust fund accounts (recording, accounting for, maintaining), distributing earnings, depositing funds into the Treasury, and reporting." *See* RFP § C.1.1, p. C-1.

BIA's Fiduciary Responsibilities as Trustee

The Supreme Court has held that in managing Indian trust funds the United States has charged itself with "moral obligations of the highest responsibility and trust" and that its conduct in dealing with Indians should be judged by the most "exacting fiduciary standards." *See Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942). Moreover, the courts have held that if the federal government has control or supervision over tribal moneys or properties, the government's fiduciary responsibility for such tribal assets would normally exist even though nothing is said expressly in the underlying statute about trust funds or a fiduciary relationship. *See Navajo Tribe v. United States,* 624 F.2d 981, 987 (Ct. Cl. 1980).

Ordinarily, trustees cannot delegate any fiduciary responsibilities involving the exercise of judgment and discretion. *See* G. Bogert, *The Law of Trusts and Trustees* § 555, at 115 (rev. 2d ed. 1980). In this regard, OMB Circular A-76 specifically provides that the "administration of public trusts is an inherently Governmental function that should only be performed by Federal employees."

With regard to Indian trusts, in particular, the Attorney General, in 1929, addressed the question whether the Secretary of the Interior had the authority to approve the creation of a private trust for Indian trust funds. The Attorney General said that Congress had vested authority over Indian trust funds with the Secretary of Interior who could not lawfully transfer such authority to a private trustee. *See* 36 Op. Atty. Gen. 98 (1929).

This does not mean that the government is prohibited from hiring private contractors to assist it in discharging its fiduciary responsibilities. *See* G. Bogert, *above,* § 555, at 113. Indeed, it is BIA's position, as set forth in its letter of July 31, 1989, that its contract with Security Pacific does not involve "any manage-

[3] BIA reached this conclusion after a study of its trust fund operations in accordance with Office of Management and Budget (OMB) Circular A-76. OMB Circular A-76 allows agencies to procure services from the private sector if, after a competition between private sector contractors and in-house resources and employees, the agency determines procurement to be the most cost-effective method of obtaining the service.

ment functions of its Indian trust fund program." BIA maintains that the services it contracted for "are transactional or advisory in nature" and that "[M]anagement or decision-making functions will continue to be a BIA responsibility." Thus, the issue in this case is whether Security Pacific is required contractually to perform any functions or activities that BIA cannot lawfully contract out, either because they involve BIA's fiduciary responsibility to manage the Indian trust funds or because they must otherwise be performed by government officials.

Analysis

BIA anticipates that Security Pacific will perform services that fall primarily into the following categories:

1) Maintaining trust fund accounts, including cash collection and concentration;

2) Record-keeping and reporting on trust fund accounts;

3) Providing investment advice and executing investment transactions as directed by BIA; and

4) Disbursement services in accordance with BIA instructions.

We do not question BIA's authority, as a general matter, to contract for these services. With regard to disbursement services, however, we are unable to judge the propriety of BIA's Security Pacific contract; the contract documents furnished to us do not clearly outline the respective roles of the parties, and we, thus, cannot be sure that BIA has adequately protected its fiduciary responsibility in this regard.

Maintaining Trust Fund Accounts

Federal law provides that the Secretary of the Interior may deposit in banks he selects funds he holds in trust for Indian tribes and individual Indians. 25 U.S.C. § 162a. [4] *See also* 25 U.S.C. § 151. Moreover, the law authorizes the Secretary of the Treasury to designate insured banks to serve as "depositaries of public money of the United States . . ." 12 U.S.C. § 265. Accordingly, BIA may contract with a private banking institution, such as Security Pacific, to serve as a depositary for trust fund moneys. (The contract specifically provides that the contractor must be a Treasury depositary in accordance with 12 U.S.C. § 265.)

Record-keeping and Reporting on Trust Fund Accounts

As a necessary corollary of the above authority, the Secretary of Interior may require any bank selected as a depositary for trust fund moneys to keep accurate records of all trust fund transactions and make reports to BIA and/or the trust fund account holders. Of course, as trustee, BIA ultimately is responsible

[4] Under 25 U.S.C. § 162a, trust funds cannot be deposited in any bank until the bank has satisfied certain bonding and interest rate requirements.

for ensuring that the trustee's fiduciary obligation to provide the account holders with a complete and accurate accounting of all trust fund moneys is satisfied, although BIA retains some flexibility in deciding how to discharge this function. *See American Indians Residing on the Maricopa-AK Chin Reservation v. United States,* 667 F.2d 980, 1002 (Ct. Cl. 1981); and *Manchester Band of Pomo Indians v. United States,* 363 F. Supp. 1238, 1248 (N.D. Cal. 1973).

Investment Services

Federal law provides that:

> . . . the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States . . . .

25 U.S.C. § 162a.

The Secretary of the Interior cannot contractually delegate to a non-governmental third party his fiduciary responsibility to determine whether and in what manner to invest trust funds in public debt obligations of the United States or other federally guaranteed obligations. The Secretary, however, can contract for investment advice and assistance. So long as BIA retains full responsibility for making all trust fund investment decisions, and imposes adequate controls and safeguards to ensure that Security Pacific invests trust fund moneys only as instructed by BIA, we have no objection to BIA contracting for investment advice and services. In this regard, see sections C.3.3 and C.4.2 of RFP.

Disbursement Assistance

The question of BIA's authority to contract with a private bank for assistance in carrying out BIA's disbursement[5] responsibilities arises from the language of 31 U.S.C. § 3321. Under that provision, unless otherwise authorized by law, the disbursement of public money available for expenditure by an executive agency can only be made by officers and employees of the Department of Treasury or other executive agencies to whom the Secretary of Treasury delegates such authority.[6] *See also* 31 U.S.C. § 3325.

BIA argues that section 3321 does not apply to Indian trust fund moneys because they are not "public money" for purposes of that statute. BIA's current position, as set forth in a letter to our Office dated July 31, 1989, from the Assistant Secretary-Indian Affairs, is that since amounts in the IIM and tribal trust funds are held in trust for either specific individuals or tribal entities,

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[5] As explained by BIA in its letter to us of July 31, 1989, Security Pacific will provide disbursement services only for tribal and Individual Indian Monies (IIM) trust funds; the Treasury Department will continue to disburse the other types of Indian trust funds.

[6] The requirement in 31 U.S.C. § 3321 derives from section 4 of Executive Order 6166 (June 10, 1933), as amended, 5 U.S.C. § 901 note.

they are not public moneys of the United States.[7] The Assistant Solicitor, Division of Indian Affairs, Department of the Interior and the Chief Counsel of the Financial Management Service, Department of the Treasury agree. In a memorandum dated January 24, 1989, the Assistant Solicitor cited various court opinions in support of BIA's conclusion. In a letter to us, dated November 8, 1989, the Chief Counsel referred to "applicable case law" and "the statutory scheme" to reach the same result.[8]

For the most part, the cases cited in the Assistant Solicitor's memorandum and in the Chief Counsel's letter do not focus on issues concerning the control and handling of, and accountability for, Indian money. While those cases distinguish between public moneys belonging to the government and trust fund moneys that belong to individual Indians or Indian tribes, we do not find such distinctions persuasive where the issue involves, as here, the control over and disbursement of funds for which the government ultimately is responsible.

In that regard, we have consistently treated Indian money in the same manner and subject to the same rules and regulations as public money. *See* A-22880, December 7, 1928, concluding that the United States, as trustee, has title to and responsibility for all IIM funds entrusted to it, whether such funds are deposited in an account maintained by the Treasury Department, a BIA disbursing agent, or a private bank. *See also* 67 Comp. Gen. 342 (1988); 65 Comp. Gen. 533 (1986); B-192109, June 3, 1981; B-192109, Oct. 11, 1978, all treating a BIA accountable officer as personally liable for erroneous payments from an individual Indian trust fund account unless the Comptroller General relieves him of liability.[9] Since the United States is liable for any breach of its fiduciary duty as trustee, the responsibility of the government to ensure that the trust beneficiaries are fully reimbursed for any erroneous disbursement or other loss of trust fund moneys is clear and unquestioned. *See United States v. Mitchell,* 463 U.S. 206, 226 (1983).

While we disagree, in this instance, with BIA's conclusion that Indian trust fund money is not "public money" for purposes of section 3321, we conclude

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[7] This has not always been BIA's position. In a memorandum to the Deputy Assistant Secretary-Indian Affairs, dated May 13, 1985, concerning the extent of BIA's authority to contract with private vendors, the Associate Solicitor, Division of Indian Affairs, said the following:

With respect to the disbursement by the money center bank through checks or electronic funds transfers of Indian trust funds deposited with it, since the funds even though deposited with the bank would still be held in trust by the United States, their disbursement could only be made by an authorized disbursing agent of the United States. We assume that the money center bank would not so qualify.

In addition, a notice BIA published in the Federal Register on April 29, 1986, regarding its then planned procurement of trust management services, states that "Treasury responsibility . . . to disburse trust funds will not be affected."

[8] *See, e.g., Quick Bear v. Leupp,* 210 U.S. 50 (1908) (cited by the Assistant Solicitor), in which the Court, for purposes of applying a restriction on the use of appropriated funds, distinguished between "public moneys belonging to the government" and tribal trust fund money; *United States v. Brindle,* 110 U.S. 688 (1884) (cited by the Chief Counsel), in which the Court held that notwithstanding a statutory restriction on the salary of government employees, a receiver of public moneys for a public land district who also held an appointment as agent for the sale of Indian lands could retain the sales commission he received from sales of the Indian land.

[9] *See also Bramwell v. U.S. Fidelity & Guaranty Company,* 269 U.S. 483 (1926). When a federal officer deposits in a private bank funds held in trust for individual Indians and Indian tribes, the amounts deposited represent a "debt due to the United States."

that section 3321 does not preclude BIA from contracting for disbursement assistance.

The specific responsibilities of disbursing officers are set forth in 31 U.S.C. § 3325. Section 3325 provides that disbursing officers can only disburse funds on a voucher certified by a certifying officer or agency head. In addition, the disbursing officer must examine the voucher to determine that it is "in proper form" and has been "certified and approved, and is computed correctly on the facts certified."

We do not read section 3325 to require the disbursing officer to personally pay out public money. The control over public money that section 3325 is designed to enhance derives from the exercise of judgment and supervision necessary to ensure that only funds certified and approved by a certifying officer (or head of an agency) on a voucher correct in form and amount are paid out. So long as a BIA disbursing officer discharges this function, section 3325 is satisfied.

Whether the operational, ministerial acts involved in the discharge of the disbursement function are performed by contractor or agency employees is not a legal issue as much as it is a management policy issue. It remains nonetheless clear that the disbursing officer must be positioned to discharge the core judgmental functions required by section 3325. However, as the disbursing function becomes more complex and the volume and magnitude of transactions increase, the disbursing officer necessarily must rely less on direct personal supervision of the disbursing operations and more on sophisticated albeit indirect supervision of such functions.

In this regard, agencies increasingly use automated systems for the examination, certification, and disbursement of payments. In such cases, agencies must satisfy the following criteria:

> (1) in automated systems, evidence that the payments are accurate and legal must relate to the system rather than to the individual transaction; (2) certifying and disbursing officials should be provided with information showing that the system on which they are largely compelled to rely is functioning properly; and (3) reviews should be made at least annually, supplemented by interim checks of major system changes, to determine that the automated system is operating effectively and can be relied on to make accurate and legal payment.

B-234828, Nov. 14, 1989, 69 Comp. Gen. 85, citing audit report entitled *New Methods Needed for Checking Payments Made by Computer*, GAO/FGMSD-76-82, November 7, 1977. In a like manner, we see no reason to object to a contractual arrangement whereby a private contractor provides disbursement services, so long as a government disbursing officer remains responsible for reviewing and overseeing the disbursement operations through agency installed controls designed to assure accurate and proper disbursements.

However, since the contract documents furnished to us do not clearly delineate what role, if any, a BIA disbursing officer would have with respect to overseeing the contractor's disbursement operations, we are unable to express an opinion with respect to this aspect of BIA's contract with Security Pacific. So long as the contract provides, or is amended to provide, that a BIA disbursing officer

will exercise managerial responsibility for disbursement and will discharge other judgmental tasks set forth in 31 U.S.C. § 3325, including reviewing the requested disbursement to assure that the expenditure has been certified and approved for payment, *see* 31 U.S.C. § 3528 (responsibilities of certifying officers), BIA may contract with a private bank to perform the ministerial, operational aspects of disbursement, such as printing checks, delivering checks to payees, and debiting amounts paid from accounts. *See* G. Bogert, *above*, § 555, at 113 (a fiduciary may procure assistance in discharging his fiduciary responsibilities).

In accordance with our general policy, we will furnish BIA a copy of this letter 3 days from today and will make the letter generally available to other interested parties at that time.

B-237866, March 19, 1990

Procurement

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

Protest that agency improperly rejected protester's quotation as nonresponsive to request for quotations is dismissed where protester is not an interested party since another firm that was rejected on the same basis had a lower evaluated price and protester therefore would not be in line for award even if its protest were sustained.

Matter of: Herman Miller, Inc.

Else V. Friborg, for the protester.

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

Amy M. Shimamura, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Herman Miller, Inc., protests the rejection of its quotation by the Department of the Air Force, Arizona Air National Guard, and the issuance of delivery order Nos. DAHA02-90-F-2086 and DAHA02-90-F-2074 to Haworth, Inc., a contractor for systems furniture workstations purchased under General Services Administration (GSA), Federal Supply Schedule (FSS) contract No. GS-00F-07010. Herman Miller, also an FSS contractor, contends that the Air Force's rejection of its furniture systems' eight-wire electrical system as unacceptable was improper and that its firm should have been issued the delivery orders under the GSA FSS contract based on its low responsive quotation.

We dismiss the protest.

The agency issued request for quotations (RFQ) No. DAHA02-89-Q-0241, for the purchase of systems furniture workstations, including design and installation services, on September 1, 1989. The RFQ, as amended, specified that the furniture systems' powered panels must have the capacity to provide not less than three circuits, all of which can be dedicated and have accessibility to an isolated ground.

Four vendors responded to the RFQ by the October 13 closing date for quotations. Westinghouse, Inc., submitted the lowest price quotation; Herman Miller was the second-low bidder. However, both Westinghouse and Herman Miller were found technically unacceptable because each had offered to provide workstations with eight-wire electrical systems which, the agency determined, could not meet the specification requirement for three dedicated circuits. On November 9, a letter of award was sent to Haworth based upon the agency's determination that the firm was the lowest responsive and responsible offeror.

Herman Miller contends that its eight-wire electrical system meets the specification requirement for three dedicated circuits and that its firm, therefore, should have been awarded the orders under the FSS contract.

The record indicates that both Westinghouse and Herman Miller offered eight-wire electrical systems which are essentially the same. As a result, the agency maintains that Herman Miller is not an interested party and that its protest should be dismissed because Westinghouse, rather than Herman Miller, had the lower evaluated price and thus would be in line for award if the agency were to determine that the offered eight-wire electrical system is responsive to the RFQ's specifications.

Herman Miller disagrees, contending that Westinghouse's quotation could not be accepted since that firm's eight-wire electrical system was not yet approved by GSA as of September 1, the RFQ issuance date, contrary to the limitation in section 16 of the FSS that contractors may only offer items that are on their FSS contract's approved schedules as of the RFQ issuance date.[1] According to the protester, Westinghouse's eight-wire electrical system was not approved by GSA until November 3, 2 months after the RFQ's issuance date.

The agency concedes that Westinghouse's electrical system was not on the firm's GSA contract schedule as of September 1. However, the agency argues that section 16 of the FSS does not require the rejection of such an item because that section specifically states that the offering of items that are not on a supplier's contract schedule *may* result in the rejection of a proposal. The agency maintains that the permissive word "may" gives the contracting officer discretion to accept "open market" items that are not listed on approved schedules.

Where, as here, there is a mandatory FSS contract in effect, agencies designated as mandatory users are required to purchase their requirements from the schedule if their minimum needs will be met by the items listed on the schedule. *See Insinger Mach. Co.*, B-235320, Aug. 3, 1989, 89-2 CPD ¶ 104. In this case,

[1] FSC Group 71, Part II, Section E, FSC Class 7110 for the period Oct. 1, 1988, through Sept. 30, 1991.

however, section 7 of the FSS specifically states that the Department of Defense (DOD), and therefore the Air Force, is not a mandatory user of the schedule. Further, all contracts issued under the FSS state that although DOD must consider use of FSS sources, DOD contracting officers may use other procedures to obtain items from nonscheduled sources if, in the contracting officer's judgment, it would be in the government's best interest in terms of quality, responsiveness, or costs. Thus, under the circumstances here, if the eight-wire electrical system were determined to be responsive to the RFQ's specifications, the contracting officer would have the discretion to select the lower-priced Westinghouse furniture systems notwithstanding the fact that the firm's eight-wire electrical system was not approved by GSA as of the RFQ issuance date.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (Supp. IV 1986), and our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1989), a protest may be brought only by an interested party defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award a contract. In general, a party will not be considered interested where it would not be in line for award even if its protest were sustained. *JC Constr. Co.*, B-229486, Dec. 29, 1987, 87-2 CPD ¶ 640.

Here, if Herman Miller's protest were sustained, the agency states that Westinghouse, rather than Herman Miller, would be in line for award because Westinghouse offered the same eight-wire electrical system but had a lower evaluated price. In these circumstances, since Herman Miller would not be in line for the award of orders even if its protest were sustained, the protester is not an interested party to challenge the award to Haworth. 4 C.F.R. § 21.1(a).

The protest is dismissed.

B-237726, March 20, 1990

Procurement

Sealed Bidding
■ Conflicts of interest
■■ Competition rights
■■■ Contractors
■■■■ Exclusion

A prospective bidder who, at the using agency's request, furnished a specification which the purchasing activity incorporated into its solicitation not knowing that it was descriptive of the protester's product, may not be declared ineligible for any subsequent award under that solicitation on the grounds that the bidder has an organizational conflict of interest where the government had not contracted with that firm to prepare the specification and because the government has an obligation to screen for unduly restrictive specifications furnished by prospective vendors.

Procurement

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Terms
■■■■ Deviation

Bid which offered to supply a machine tool with a hydraulic drive instead of the mechanical drive required by the solicitation specifications was nonresponsive.

Matter of: Viereck Co.

John Hartlove, for the protester.

Herbert F. Kelley, Jr., Esq., Office of the Judge Advocate General, Department of the Army, for the agency.

Paula A. Williams, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Viereck Co. protests the award of a contract to Midwest Marketing Services under invitation for bids (IFB) No. DAEA08-89-B-0008, issued by the Department of the Army, 7th Signal Command, Fort Ritchie, Maryland, for a metal punching machine. Viereck contends that the awardee's bid was nonresponsive because the equipment which it offered did not conform to the IFB's specification requirements.

We sustain the protest.

In brief, this procurement was conducted by Fort Ritchie in support of the White House Communications Agency (WHCA), which had a need to replace certain old or obsolete metal working equipment. Unknown to contracting personnel at Fort Ritchie, until after the award had been protested, the specifications which had been provided to them by WHCA had been obtained from Viereck. These specifications were descriptive of the machine Viereck had bid, but would exclude the awardee's—an unintended result, according to WHCA, which states that either bidder's design would meet its needs.

The record shows that when the need for replacing the older machinery arose, WHCA tasked a senior noncommissioned officer and master machinist to draw up the requirements for the replacement equipment. In an affidavit furnished with the Army's report, this technical representative states that to this end he first contacted the Phillips Corporation, the firm which had made several of the machines that were being replaced, to obtain certain information and was referred to Viereck, which is owned by Phillips and is a machine tool distributor. The technical representative obtained brochures on equipment and prices from Viereck and an oral "quote" from the protester which was used "to prepare our budget." Not knowing "how to write specifications," the technical representa-

tive states that he asked Viereck for "specifications 'for a punch that would meet military specifications.'" In response, Viereck furnished the WHCA representative a document entitled "Government Purchase Description Strippit Super AG" which the representative in turn forwarded to the contracting officials at Fort Ritchie.

This "Government Purchase Description" refers to, and amends, military specification MIL-P-80072B, which covers power driven metal punching machines of the type procured here. Because a copy of this military specification was not readily available to the personnel at Fort Ritchie, they asked the WHCA representative for a copy. This document, too, was obtained from Viereck, forwarded to Fort Ritchie, and incorporated into the solicitation.

The solicitation's bid schedule requested prices, and "manufacturer's name, brand and model number," for supplying a punch machine and certain accessory punches and dies, in accordance with the attached statement of work and military specification MIL-P-80072A. Paragraph 3.4.3 of the military specification provides with regard to the machine drive that:

> Unless otherwise specified, the punching action of the machine shall be accomplished by either a mechanical type drive or a hydraulic type drive. When only one type drive is acceptable, the particular drive shall be as specified (see 6.2.1). . . .

Paragraph 6.2.1 lists 29 different procurement requirements or ordering data, identified as "a." through "cc." Requirement "k." states: "If machine drive is to be a specific type, state required type (see 3.4.3)." As to requirement "k.," the "Government Purchase Description" furnished by Viereck and used in the IFB states: "mechanical type per 3.4.3.1 (as amended)."[1] There is no question, therefore, but that the specifications required a mechanical type drive.

Two bids were received in response to the IFB. Midwest bid a price of $61,713 based on supplying a W.A. Whitney brand model 630 CNC Fabricator, for which it provided a complete "technical proposal" even though none was required by this sealed bid solicitation. Exhibit B to Midwest's technical literature explicitly addressed the drive requirements and stated "the machine offered in this proposal has hydraulic type drive." Viereck's bid of $62,013.95, some $300 higher, was based on supplying a Strippit brand Super AG model, which was the same item identified in the heading of the purchase description it earlier had provided to the WHCA. Award was made to Midwest as the low bidder.

Upon being advised that the agency had made award to Midwest, Viereck filed an agency-level protest alleging that Midwest's equipment bid was nonresponsive because it did not meet a number of the IFB requirements, including that for a mechanical drive. The Army initially denied Viereck's protest. Viereck submitted a "rebuttal" to the Army, as a result of which the Army subsequently reexamined Midwest's bid and concluded that the Whitney Model 630 did not meet the specifications because a mechanical not hydraulic drive was required. It therefore advised Viereck that Midwest's contract would be terminated for

[1] The "amendment" incorporates a requirement for a "hydraulic overload jaw relief system" which literature submitted by Viereck shows is a feature of the Strippit Super AG machine it offered.

convenience, that the specifications would be rewritten, and that the requirement would be resolicited. Several weeks later, however, the Army reversed itself and advised Viereck that upon further review it had determined that the specifications "when read as a whole" allowed for either a mechanical or hydraulic drive system. Moreover, based on information it had recently obtained, the agency further advised Viereck that it did not consider the firm eligible for award because of its "technical assistance" to the government in the preparation of the specifications used in this procurement. This protest followed.

Viereck maintains that there is no basis for the Army's assertion that Viereck is ineligible for an award under this procurement because of the role the firm played with respect to the specifications, since the firm was never under contract to provide "consulting services" to the government. It therefore contends that it is an interested party to protest the award to Midwest, which it states was improper because the Whitney Model 630 on which Midwest bid has a hydraulic drive system which does not meet the solicitation requirements. As a remedy, Viereck asks that the contract be terminated and the requirement resolicited.

The Army first asserts that Viereck was ineligible for any award under this procurement because the company's role with regard to the specifications used in the IFB place it in the type of conflict of interest situation prohibited by the Federal Acquisition Regulation (FAR) § 9.505 and, in particular, FAR § 9.505-2, which contains prohibitions against permitting contractors to furnish items for which they have prepared the specifications. Viereck points out, however, that the Army did not contract with it to prepare the specifications for this procurement but rather, as a vendor, Viereck provided, at the government's request, information on the equipment it had to sell keyed to the relevant military specification's requirements.

The organizational conflict of interest provisions on which the Army relies are intended to assure that the government receives unbiased advice when it employs a firm— "the contractor"—to prepare specifications used in the competitive procurement of items. Viereck, however, was not hired by the government to prepare the specifications here. The firm was asked by a representative of a government agency which was a potential customer if it could provide "specifications 'for a punch that would meet military specifications,'" and it responded with a document entitled "Government Purchase Description *Strippit Super AG*" (italic added) which described that make and model machine keyed to the ordering data required by the military specification.[2]

It is not unusual for a potential vendor to draw up and furnish suggested or sample specifications for ordering products of the type it sells. It is the government's responsibility to screen such documents for requirements which do not reflect its actual minimum needs. That did not occur here, it appears to us, because the using agency's technical representative—although well intentioned—was not experienced in drafting specifications and unduly relied on a single

[2] The heading to the purchase description may not have been passed along to Fort Ritchie.

vendor. In these circumstances, Viereck's furnishing of the specifications at a potential customer's request should not bar it under the organizational conflict of interest provisions from any award under this solicitation. It therefore is an interested party to protest the responsiveness of Midwest's bid. 4 C.F.R. § 21.0(a) (1989).

With regard to the responsiveness issue, our prior analysis of the IFB's specifications establishes beyond any doubt that they required a mechanical rather than hydraulic drive. The governing military specification permits the use of either type of mechanism but item "k." of the ordering data permits the selection of one to the exclusion of the other. In this case, item "k." required the use of a "mechanical type" drive. It is undisputed that Midwest offered a machine with a hydraulic type drive and its bid therefore was nonresponsive.

We sustain the protest. We note, however, that termination of Midwest's contract and recompetition of the requirement is not feasible since we are advised that performance under the contract is substantially complete. Nevertheless, because we have sustained the protest, Viereck is entitled to its costs of filing and pursuing its protest and of preparing its bid. Bid Protest Regulations, 4 C.F.R. §§ 21.6(d)(1) and (2). Viereck should submit its claim to the Army.

B-237724, March 21, 1990

Procurement

Contractor Qualification

■ **Contractor personnel**

■■ **Misrepresentation**

Where solicitation did not require personnel to be committed to performance under the resulting contract, awardee did not misrepresent the availability of persons it "intended for assignment" by submitting the resumes of three of the protester's employees as part of its proposal since the record discloses that, prior to the submission of the resumes, two of the individuals took direct actions expressing a willingness to consider employment with the awardee, and the third individual relayed a similar willingness through his supervisor.

Matter of: Agusta International S.A.

David B. Dempsey, Esq., and Janet Z. Barsy, Esq., Akin, Gump, Strauss, Hauer & Feld, for the protester.

Laura K. Kennedy, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for Kay & Associates, Inc., an interested party.

Lt. Col. Howard G. Curtis, Office of the Judge Advocate General, Department of the Army, for the agency.

Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Agusta International S.A. protests the award of a fixed-price requirements contract to Kay & Associates, Inc., under request for proposals (RFP) No. DAJA37-89-R-0169, issued by the Department of the Army for helicopter maintenance services to be performed in several NATO countries as part of the agency's "South-of-the-Alps" (SOA) program. Agusta alleges that Kay acted in bad faith when it included three resumes in its proposal without first obtaining the permission of the individuals involved. We do not agree that the record establishes that Kay acted in bad faith, and we therefore deny the protest.

The RFP was issued on June 14, 1989, and closed on August 14. Award was to be made to the offeror whose proposal was determined to provide the greatest value to the government based on an integrated assessment of three evaluation factors: technical, management, and price. The technical and management factors were of approximately equal importance and each was more important than price; however, the RFP provided that price could become determinative if the proposals were considered "essentially equivalent."

In the technical evaluation area, there was a subfactor which indicated that "[r]esumes of personnel intended for assignment" to 19 service positions described in the RFP would be evaluated. The RFP did not require offerors to obtain letters of intent or other forms of personnel commitments from the individuals they were proposing for assignment. Moreover, there was not a separate evaluation factor for personnel availability and, although the Army could order a contractor to remove personnel for reasons of security or safety, there was no provision for the agency to preapprove substitute personnel. Rather, the RFP required the contractor to use only experienced, responsible and duly licensed personnel.

Agusta, who was the incumbent SOA maintenance contractor, and Kay were the only offerors. Both were determined to have submitted technically acceptable offers. In the case of 3 out of 19 service positions for which the firms submitted resumes, they both proposed the same individuals: Mr. R. Rambo as a UH-1 helicopter specialist; Mr. G. Liska as a supply specialist; and Mr. B. Cleary as an aircraft mechanic/site supply specialist. All three individuals were, and remain, employees of Agusta.

As a result of the combined technical/management evaluation, Agusta received 95.29 percent of the total points possible while Kay received 90.84 percent. However, Agusta's price for the 9-month basic period with two 1-year options was higher than Kay's for the same period.

The Source Selection Authority (SSA) concluded that Agusta's slightly higher (4.45 percent) technical/management score was probably attributable to the firm's status as an incumbent on the SOA maintenance contract and determined the proposals to be "essentially equal." Although personnel factors were not specifically mentioned by the SSA in his decision, he did note that Kay had ten similar helicopter maintenance and repair contracts with the Air Force and the Navy which demonstrated "the firm's ability to perform both technically and managerially." The SSA concluded that Agusta's slightly higher

technical/management score did not warrant the higher price. Kay was then awarded a contract on October 31.[1]

Agusta has submitted affidavits from Messrs. Rambo, Liska and Cleary in which they describe their contacts with Kay representatives concerning possible employment. Among other things, Agusta submits that these statements establish that none of the individuals involved ever gave the awardee permission to use his resume in its proposal in response to this particular RFP. Further, the protester argues that the record of contacts between the individuals and the awardee discloses that there was no other basis to believe that any of the individuals would be available to work for Kay upon contract award. As a result, Agusta alleges that Kay misrepresented the availability of its personnel and argues that, therefore, its contract should be terminated because the procurement process was impermissibly tainted.

Agusta argues that our decisions over the last 10 years, and most notably in *Ultra Tech. Corp. et al.—Requests for Recon.*, B-230309.7, B-230309.8, June 6, 1989, 89-1 CPD ¶ 528, establish a single test to determine whether an offeror acted in "good faith" in submitting resumes of key personnel.[2] According to Agusta, an offeror does not act in good faith unless: (1) it has sufficient, direct, contacts with an individual concerning a specific solicitation to be able to represent that he expressed a willingness to work for the offeror; and (2) the individual has actually given his express permission to use his name in a proposal for that specific solicitation.

With respect to the first part of the "test" described by Agusta, the protester submits that Kay had insufficient contacts with Messrs. Rambo and Liska and no direct contact at all with Mr. Cleary. As to the second part of the "test," Agusta reiterates that each individual has denied giving Kay permission to use his resume. The protester has submitted affidavits from all three individuals in support of its position.

Kay, on the other hand, has submitted affidavits, principally from its chief recruiter, Mr. L. Hudson, describing events surrounding the firm's use of the three individuals' resumes. Kay submits that these statements establish that Messrs. Rambo and Liska were contacted directly concerning the SOA solicitation and that each gave the firm permission to use his resume. With respect to Mr. Cleary, Kay acknowledges that he was not directly contacted, but submits that it reasonably relied on representations from his supervisor, Mr. J. Nelson, to the effect that Mr. Cleary had indicated his willingness to work for the firm under the 1989 SOA contract. Kay maintains that, in light of the RFP terms which did not require formal letters of commitment, and in consideration of the totality of circumstances involved in this procurement, it acted reasonably in representing that it intended to assign Messrs. Rambo, Liska and Cleary to the service positions indicated in its proposal.

[1] The Army advises us that Agusta is continuing to perform the maintenance services for the SOA program, as the incumbent, pending resolution of this protest.
[2] The Army has stipulated that all 19 service positions under the RFP involve "key personnel."

Contrary to Agusta's characterization of our decisions in the area, no strict "consent/permission test" has ever been established as the single measure by which an offeror's good faith in proposing personnel is to be determined. While various factors contained in the protester's formulation of the "test" may well have provided sufficient indicia of an offeror's good faith in a given set of circumstances, we do not agree that they necessarily apply in some rigid form to every situation involving the use of resumes.

In the absence of a specific solicitation provision requiring personnel whose resumes are included in proposals to be committed to any resulting contract, "no general principal may be derived from our decisions requiring that such personnel must be committed to the contract." *QED Sys., Inc.*, B-189410, Dec. 15, 1977, 77-2 CPD ¶ 467. As a general rule, the evaluation of an offeror's proposed personnel is not objectionable where the names are submitted in good faith by the offeror with "some type of consent" from the individuals in question. That permission need not be direct in every case, as suggested by Agusta, and, in determining whether "some type" of permission has been obtained, we look to the entire record. *Scheduled Airlines Traffic Offices, Inc.*, B-235134, July 18, 1989, 89-2 CPD ¶ 57.

Accordingly, we will examine the circumstances surrounding Kay's actions with respect to each of the individuals involved to determine whether the awardee acted reasonably in believing that each would be available for employment with the firm, *Pacific Architects & Eng'rs Inc.*, B-236432, Nov. 22, 1989, 89-2 CPD ¶ 494, and, thus, whether the awardee acted in good faith in representing that it "intended" to assign them to the contract.

In order to place our analysis of the communications between the three individuals and Kay in the proper context, we think it is important that certain factors which constitute important elements of the circumstances surrounding this procurement be borne in mind.

First, the RFP merely required the submission of resumes for individuals "intended for assignment," and did not require any form of personnel commitments; it also did not require a contractor to begin or continue performance with the individuals it initially proposed insofar as the RFP did not provide for agency preapproval of substitute personnel. In our view, any analysis of Kay's good faith in proposing individuals with whom it had contact should not require more of the offeror in terms of the degree of assurances obtained from prospective employees during the preaward recruitment stage than the RFP required of a successful contractor during performance.

Further, we note that the affidavits of all three individuals involved contain almost identical statements about their practice of never committing themselves to the employ of a firm before a contract award. We believe these statements to be indicative of the available European aircraft maintenance labor force in general. From the record, it appears that prospective service employees in that labor market do not often establish formal commitments to work for another firm during the procurement process. This conclusion is underpinned by the

Army's explanation that it avoided requiring letters of commitment in the protested RFP in an effort to broaden competition beyond the incumbent. In our view, this is further supported by a post-award statement attributed by Agusta to Kay's Regional Director, Mr. Floyd, to the effect that the firm was never sure until it surveyed the incumbent's personnel after award as to whether the persons it had proposed would actually work for the firm. Although Agusta characterizes this alleged remark as confirming its theory that Kay knowingly misrepresented personnel in its offer, we believe that the remark, at best,[3] confirms our conclusion that significant assurances of a willingness to work for a particular firm are difficult, if not impossible, to obtain in the relevant labor market.

Also, the uncontradicted record discloses that each of the three individuals in issue met with Mr. Floyd in November 1989, following the announcement of the contract award, to discuss employment under the SOA contract. The record indicates that none of the individuals reached agreement on such matters as salary and none signed a "letter of intent" to work for Kay. Although Agusta suggests that this failure to reach a formal agreement shows that Kay's earlier decisions to propose the men were baseless, we disagree. The November meetings, in our view, evidence the culmination of earlier expressions of a willingness to consider serious employment discussions once a contract was in place. Furthermore, in our view, unsuccessful post-award salary negotiations are not necessarily an indication of an offeror's bad faith in proposing specific individuals. *Individual Dev. Assocs., Inc.*, B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290.

We think that these matters form part of the surrounding circumstances which must be considered as we analyze the reasonableness of Kay's actions to determine whether the awardee acted in bad faith in proposing each of the three individuals. Recognizing that the statements submitted by both sides do, at times, contain conflicting accounts of relevant events, our analysis uses the protester's version of those events in most cases, and sets forth the awardee's conflicting version where necessary.

Mr. Rambo

The record establishes that Mr. Rambo sent Kay a letter forwarding his resume in April 1989--2 months before the RFP was issued. The letter noted that the contract under which he was working was due to expire at the end of September 1989, and stated that "after this date I will be available." It also requested "consideration for possible employment by your firm."

Mr. Rambo states that he then received a mailgram from Kay requesting a collect call; although he does not recall whether the mailgram referred to the SOA contract, Mr. L. Hudson (Kay's chief recruiter) states that it did.[4] Mr. Rambo

[3] Mr. Floyd's statement, even if accurately reported in all respects, appears to be of little relevance to the preaward recruitment of the individuals involved in this case because the record reflects that Mr. Hudson, and not Mr. Floyd, had responsibility for, and actually conducted, those efforts.

[4] It appears that Mr. Liska received a similar mailgram from Kay. He states in his affidavit that the mailgram he received did indeed refer to the 1989 SOA contract.

states that he called Mr. Hudson in May and was asked if Kay could use his resume. While Mr. Hudson states that Mr. Rambo gave his permission, Mr. Rambo states that he told Mr. Hudson that he would have to discuss salary before he could decide about the use of his documents. According to Mr. Rambo, he requested an employment application, which he apparently never received.

Mr. Rambo also states that, during the May conversation, he told Mr. Hudson that he would not discuss "wages until Kay got the contract." Contrary to the conclusion reached by Mr. Hudson, Mr. Rambo states that there was "no understanding at all . . . that Kay could use my resume. . . ." As indicated earlier, Mr. Rambo later met with Kay to discuss possible employment.

Agusta argues that, during the May conversation, Mr. Rambo expressly conditioned the use of his resume on salary discussions; since these did not occur before Kay submitted its proposal, the protester argues that the awardee acted in bad faith in using the resume.

In our view, the disparate recollections of the May telephone conversation provide an insufficient basis for concluding that Kay acted in bad faith. Even if we consider Mr. Rambo's version as being entirely accurate, we believe that, at best, it placed Kay in a difficult position of determining what Mr. Rambo actually intended. He seemed to want to work for Kay if it got the job, but was reluctant to make a firm commitment prior to that time. On the other hand, Mr. Hudson's recollection of the conversation (i.e., that Mr. Rambo gave permission to use the resume) is at least consistent with earlier, uncontradicted, documentary evidence in the form of the letter and resume Mr. Rambo sent to Kay indicating a desire to be employed by the firm in October. We think it is also significant that Mr. Rambo initiated the contact with this specific contract in mind. Under the circumstances, and based on the uncontradicted documentary record, we believe that Kay had a reasonable basis for believing that it could use Mr. Rambo's resume in its proposal. As stated above, we will not infer bad faith simply in the absence of successful salary negotiations. *Individual Dev. Assocs., Inc.*, B-225595, *supra.*

Mr. G. Liska

Mr. Liska states that he first sent his resume to Kay in late 1986 and at that time expressed an interest in employment under an earlier SOA contract. Upon learning that Agusta, and not Kay as he had been informed, received the award, Mr. Liska joined the protester's firm. Mr. Liska also states that in June 1989, Mr. Hudson called him and asked if he had received a mailgram from the firm. Upon receiving the mailgram, which referenced Kay's intention to compete for the 1989 SOA contract, Mr. Liska states that he called Mr. Hudson. According to Mr. Liska, he was asked if he wanted to be part of Kay's "team" and replied that he "did not want to be part of any team until someone was awarded the contract." According to Mr. Hudson, Mr. Liska gave his express permission to use his resume in Kay's proposal at this time. The record indicates that salary was briefly discussed.

Mr. Liska then states that he was asked to send his resume to Kay to update its files. Mr. Hudson denies that he indicated the resume was sought for that purpose. In any event, Mr. Liska then sent this resume to Kay. On July 5, Kay sent him an employment application which he began to fill out on July 17. He states that he stopped on July 21 at the request of Agusta's Project Manager, who had asked all of the firm's employees not to submit applications or resumes to competing firms until after August 14, when proposals were due.

According to both Messrs. Hudson and Liska, Kay attempted to contact Mr. Liska about the status of his application in early August 1989; Mr. Liska states that he did not respond at that time because of Agusta's standing request not to have such contacts. On September 11, Mr. Liska sent his completed application to Kay.[5] As discussed above, Mr. Liska later met with Kay to conduct further negotiations. Like Mr. Rambo, Mr. Liska states that he does not believe that he said anything to Mr. Hudson during their June conversation which would lead to the belief that he was willing to work for Kay on the 1989 SOA contract.

As with Mr. Rambo, we do not believe that the conversation between Mr. Hudson and Mr. Liska provides a basis for concluding that Kay acted in bad faith. While the participants have conflicting recollections about the purpose of Kay's soliciting a resume, neither mentions how the subject of an employment application came up. Nonetheless, an employment application was sent to Mr. Liska and he began to fill it out quite promptly. These actions are, in our view, consistent with Mr. Hudson's assertion that he had obtained some expression of willingness from Mr. Liska about considering employment with Kay on the SOA contract. Also, Mr. Liska's actions in beginning to fill out the employment application, which were cut short by Agusta's request, appear to be at variance with his assertion that he only sent a resume to Kay to update its files. In the absence of any convincing evidence to the contrary, we conclude that Kay reasonably relied on the June conversation, and Mr. Liska's submission of a resume after that conversation, as expressions of a willingness to consider working on the 1989 SOA contract.

Mr. B. Cleary

The record discloses that Mr. Cleary sent Kay an employment application in December 1986; the application contained resume information which was later updated and used by Kay in its proposal under the protested procurement. According to Mr. Cleary, he was contacted by Kay in October 1987 and offered a job which he initially accepted, but later declined. Mr. Cleary also states that he spoke to Mr. Hudson in November 1988 about an offer of upcoming employment in El Salvador, which he declined by saying he "wasn't interested in moving without a firm job commitment." Mr. Hudson recalls the November 1988 conversation as referencing the upcoming 1989 SOA contract competition and he recalls that Mr. Cleary expressed an interest in working on the project for Kay;

[5] Mr. Liska's resume was not part of Kay's initial proposal; rather, it was submitted on or about September 7 as a response to written discussions with the Army.

Mr. Cleary states he has no recollection of discussing the 1989 SOA contract at that time. Mr. Cleary does, however, state that, during the November 1988 conversation, he informed Mr. Hudson that, because he did not have a telephone at his job location in Izmir, Turkey, he could be reached at his supervisor's home phone—*i.e.,* Mr. J. Nelson's phone—to discuss further employment matters.[6]

According to the statements of Messrs. Hudson and Nelson, in May or June 1989, Mr. Hudson called Mr. Nelson in Izmir, Turkey. Mr. Nelson states that Kay's recruiter told him he wanted to contact Mr. Cleary about employment on the 1989 SOA contract. Mr. Nelson states that, on the following day he asked Mr. Cleary if he would work for Kay if it got the contract and that Mr. Cleary stated that he would "stay on." Mr. Nelson also states that Mr. Cleary said he did not need to talk to Kay himself, but that Mr. Nelson should relay the message about his willingness to work for Kay. Mr. Cleary denies that the conversation took place. Messrs. Nelson and Hudson both state that Mr. Cleary's message was promptly relayed to Kay.

Mr. Cleary does, however, recall that he and Mr. Nelson had a conversation in early October 1989 when he informed his supervisor that he would be willing to "stay on" in Izmir if Kay won the contract, assuming that a successful salary could be negotiated. As with Messrs. Rambo and Liska, Mr. Cleary later conducted unsuccessful employment negotiations with Kay.

We think that Mr. Cleary's situation presents a closer question than the other individuals because of the lack of any direct contact with Kay during the proposal process. While, as Agusta maintains, there may have been other ways for Kay to contact Mr. Cleary rather than through Mr. Nelson, we note that Mr. Cleary himself had earlier authorized this form of contact as a method to discuss employment matters, and, in essence, admits that he was somewhat difficult to reach at his location in Izmir, Turkey. Also, while Mr. Cleary denies he ever had a conversation in May or June telling Mr. Nelson he was interested in employment with Kay, we cannot simply dismiss Mr. Nelson's detailed account of such a conversation.

Mr. Nelson states that he told Kay that Mr. Cleary had indicated he would "stay on" shortly after the May/June conversation—well before Kay used Mr. Cleary's name in its proposal. Mr. Hudson's statement confirms that he received and relied on this precise advice. Mr. Cleary's denial that the conversation took place at all, however, stands alone. We also note that Mr. Cleary does not contradict Mr. Nelson's version of what transpired, before award in early October, to the effect that he then expressed a willingness to "stay on" to work for Kay—substantially the same advice that Mr. Nelson reported to Kay earlier in the year. In view of these circumstances, we think the record supports the conclusion that Mr. Nelson did, in fact, believe in May or June that Mr. Cleary was willing to work for Kay, and that Kay then reasonably relied on the assurances of Mr. Nelson—Mr. Cleary's friend and supervisor—in using his resume in its proposal. *See Scheduled Airlines Traffic Offices, Inc.,* B-235134, *supra.*

[6] Mr. Nelson has accepted employment with Kay.

Finally, in its comments on the agency report, Agusta alleges that the Source Selection Board (SSB) should have independently questioned Kay's submission of three resumes that were also included in Agusta's proposal on the basis that the prospective awardee's low price reflected an indication that Kay had not entered into serious salary discussions with the individuals and, therefore, probably did not have permission to use their resumes. Apart from requiring a rather attenuated analysis on the part of the SSB, we believe that Agusta's line of reasoning fails to recognize that detailed salary negotiations with proposed personnel are not generally required to establish an offeror's good faith in submitting personnel resumes in its proposal. *See Individual Dev. Assocs., Inc.*, B-227595, *supra.*

The protest is denied.

B-237779, March 22, 1990

Procurement

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

Protest challenging the propriety of a subcontract awarded by a government prime contractor, designated as a federal contract research center, is dismissed since it was not made "by or for the government" where the prime contractor, which is performing research and development services, is not operating or managing a government facility or otherwise providing large scale management services.

Matter of: SRI International

Patricia A. Meagher, Esq., Rogers, Joseph, O'Donnell & Quinn, for the protester.

Marc Stec, Esq., Bogle & Gates, for Sterling Software, Inc., an interested party.

Francis L. Carroll, Lincoln Laboratory, Massachusetts Institute of Technology, for the prime contractor.

George P. Kinsey, Esq., Federal Aviation Administration, Department of Transportation, for the agency.

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

SRI International protests the award of a subcontract, under request for proposals (RFP) No. 44809, by Lincoln Laboratory, Massachusetts Institute of Technol-

ogy (MIT), to Sterling Software, Inc., to perform site surveys for the Terminal Doppler Weather Radar (TDWR) system at 27 airports within the United States.

We dismiss the protest, since this subcontract protest is not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1989).

MIT has a cost reimbursement contract with the Electronic Systems Division, Department of the Air Force, for on-going research and development pertinent to the national defense with a particular emphasis on advanced electronics. In order to carry out this mission, MIT and the Air Force established Lincoln Laboratory in 1951 as a federal contract research center (FCRC) with the Air Force as the Laboratory's primary sponsor. A FCRC is one type of the approximately 36 federally funded research and development centers (FFRDC).

Since 1971, Lincoln Laboratory, pursuant to an interagency agreement between the Air Force and the Federal Aviation Administration (FAA), Department of Transportation, has provided the FAA with engineering and technical support for various electronics programs. Currently, Lincoln Laboratory is providing support for the FAA's weather radar programs, including the TDWR program.[1] Specifically, the Laboratory is required to: (1) furnish a Doppler weather radar test facility and computer system that has the capability of emulating the characteristics of the weather radar systems being procured by the FAA; (2) develop meteorological algorithms for use in the weather radar programs; (3) collect and analyze data in a variety of meteorological conditions to determine the characteristics of hazardous weather phenomena; and (4) develop siting criteria for the TDWR system and perform the necessary coverage and clutter analysis to permit the selection of TDWR sites.

The RFP issued by Lincoln Laboratory sought the performance of field surveys, and related work, at 27 designated airports to select candidate sites for the installation of TDWR systems. The RFP informed offerors that the subcontractor selection would be made by Lincoln Laboratory and that the subcontract work would be performed under the direction of the Laboratory. Proposals were received from SRI and Sterling, and award made to Sterling. This protest followed.

Lincoln Laboratory argues that the protest should be dismissed because it involves a subcontract award which was not made "by or for the government." In this regard, under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(1) (Supp. IV 1986), our Office has jurisdiction to decide protests involving contract solicitations and awards by federal agencies. We have interpreted this provision as authorizing us to decide protests of subcontract solicitations and awards only when the subcontract is "by or for the government." 4 C.F.R. § 21.3(m)(10).

[1] The TDWR system will be used to detect hazardous weather phenomena such as windshears. The TDWR system is currently being produced by Raytheon Company under contract with FAA and will be installed by Raytheon after FAA furnishes the site selection information.

SRI contends that the Laboratory, as an FCRC, has a "special relationship" with the government and was acting "for" the government in awarding the subcontract and, therefore, we should consider this protest. SRI also argues that, while the FAA did not select the subcontractor, that the Laboratory was in effect a "conduit" for the agency.

A subcontract is considered to be "by or for the government" where the prime contractor principally provides large-scale management services to the government and, as a result, generally has ongoing purchasing responsibility. In effect, the prime contractor acts as a middleman or a conduit between the government and the subcontractor. *Am. Nuclear Corp.*, B-228028, Nov. 23, 1987, 87-2 CPD ¶ 503. Such circumstances may exist where the prime contractor operates and manages a government facility, *Westinghouse Elec. Corp.*, B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145, otherwise provides large scale management services in a government facility, *Union Natural Gas Co.*, B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44, serves as an agency's construction manager, *C-E Air Preheater Co., Inc.*, B-194119, Sept. 14, 1979, 79-2 CPD ¶ 197, or functions primarily to handle the administrative procedures of subcontracting with vendors effectively selected by the agency. *Univ. of Michigan, et al.*, 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. Except in these limited circumstances in which the prime contractor is basically acting as the government's agent, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered "by or for the government." *ToxCo, Inc.*, 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170.

SRI contends that Lincoln Laboratory's subcontract with Sterling was "for" the government because Lincoln Laboratory, as an FCRC, has a special relationship with the government which "carrie[d] with it duties and responsibilities beyond that of an independent contractor." In this regard, SRI states that Lincoln Laboratory is funded by the government, performs its research duties in rent-free, government furnished buildings at Hanscom Air Force Base, and receives rent-free use of government furnished property.

We recognize that there is a unique relationship between FFRDCs, including FCRCs, and the government. FFRDCs are largely funded by the government to perform, analyze, support and manage research and development activities pursuant to a long-term agreement with a sponsoring agency. *See* OFPP Policy Letter 84-1, *reprinted in*, 49 Fed. Reg. 14,464 (1984). There is no prescribed organizational structure for FFRDCs. They "can range from traditional contractor owned/contractor operated or government owned/contractor operated (GOCO) organizational structures to various degrees of contractor/government control and ownership." *Id.* Because of the variety of relationships between federal agencies and FFRDCs, we cannot say that an FFRDC such as Lincoln Laboratory was acting "for" the government simply by virtue of its FCRC status. We must review the specific contractual relationship between the government and the FFRDC prime contractor to determine whether the contractor is operating or managing a government facility or is otherwise providing large scale management services. *See Ocean Enters., Ltd.*, 65 Comp. Gen. 585 (1986), 86-1 CPD

¶ 479, *aff'd,* 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10; *Optimum Sys., Inc.,* 54 Comp. Gen. 767 (1975), 75-1 CPD ¶ 166.

Under Lincoln Laboratory's prime contract with the Air Force, Lincoln Laboratory is not operating or managing a government facility or otherwise providing large scale management services; it is simply a research contractor that has been provided with government base support. Lincoln Laboratory's primary duty under the contract is to provide research and development support for approved programs. In this regard, Lincoln Laboratory is responsible for formulating its own research and development programs, which are submitted to the government for approval. Other than minor incidental services, there is no requirement that the Laboratory operate or manage the base facilities it uses. To the contrary, the Lincoln Laboratory contract enumerates the larger variety of facilities and services to be provided by the Air Force under the contract.

SRI argues that Lincoln Laboratory's relationship with the government is similar to that of the Department of Energy (DOE) with its sponsored FFRDCs and that we consider subcontract protests involving DOE's research laboratories. *See, e.g., Northwest Digital Sys.,* B-232959.2, Mar. 2, 1989, 89-1 CPD ¶ 221; *Westinghouse Elec. Corp.,* B-227091, *supra; Nickum and Spaulding Assocs., Inc.,* B-222468, Jun. 10, 1986, 86-1 CPD ¶ 542; and *Rosemount, Inc.,* B-218121, May 16, 1985, 85-1 CPD ¶ 556. However, DOE (as did its predecessors, the Atomic Energy Commission and Energy Research and Development Administration) has a unique historic relationship with the prime contractors operating and managing its government-owned laboratories. *See Optimum Sys., Inc.,* 54 Comp. Gen. 767, *supra; Probe Sys., Inc.,* B-182236, Apr. 25, 1975, 75-1 CPD ¶ 260. In each of these cases, unlike Lincoln Laboratory, the DOE contractor is responsible for managing and operating the pertinent DOE laboratory, rather than simply using government furnished facilities.

SRI argues, citing *Univ. of Michigan, et al.,* 66 Comp. Gen. 538, *supra,* that Lincoln Laboratory is a mere conduit for the FAA because the Laboratory's role in the subcontract procurement is limited to an administrative and consulting function. In *Univ. of Michigan,* we found that we had jurisdiction over a subcontract protest where the subcontractor was actually selected by a government-controlled evaluation team. Here, SRI admits that Sterling was not selected by the government but by Lincoln Laboratory. Furthermore, Lincoln Laboratory's role in this subcontract is more than merely administrative; this subcontract work needed to be integrated by Lincoln Laboratory with its other functions to accomplish the FAA work. Thus, we do not find *Univ. of Michigan* controlling in this case.

Finally, SRI argues that Lincoln Laboratory in awarding a subcontract to Sterling must be acting for the government because the Laboratory, as an FCRC, is limited to performing only research and development work and that the work to be performed for the TDWR program is not research or development. SRI contends that since the Laboratory could not perform the work directly that therefore the subcontract to perform site surveys must be "for" the government.

We do not agree that Lincoln Laboratory is precluded, as an FCRC, from performing the program support and analysis required under FAA's interagency agreement with the Air Force. Lincoln Laboratory's charter provides that, in carrying out its mission of research and development pertinent to the national defense, the Laboratory, among other things, could provide technical advice and consultation in areas of its demonstrated competence to military services and other government agencies. Furthermore, the Lincoln Laboratory's prime contract provides that the Laboratory's research and development program extends from the fundamental investigation in science through the development of new electronic devices and components to the design, development and field demonstrations of prototype systems embodying the new technology.

Lincoln Laboratory, under the interagency agreement between the FAA and the Air Force, is required to perform technical studies and assessments of hardware and software in support of FAA's weather radar programs, including the TDWR system. As a part of this support, the Laboratory is required to conduct field tests and data analysis in a variety of meteorological conditions to determine the characteristics of hazardous weather phenomena and will "develop siting criteria for the TDWR and perform the necessary coverage and clutter analysis to permit the selection of TDWR." We think that the FAA work being performed by the Laboratory is the kind of technical advice and consultation contemplated by its charter and contract.

The protest is dismissed.

B-238189, March 22, 1990

Military Personnel

Pay
■ Retirement pay
■■ Computation
■■■ Dual compensation restrictions
■■■■ Bonuses

Military Personnel

Pay
■ Retirement pay
■■ Reemployed annuitants
■■■ Dual compensation restrictions
■■■■ Bonuses

A bonus received by a retired member employed in a civilian position with the government should not be considered in computing the reduction in retired pay required by 5 U.S.C. § 5532(c) when an individual's combined retired pay and pay for the civilian position exceeds level V of the Executive Schedule as a result of the bonus, since the statute refers to the basic pay of the position.

Matter of: Captain Milton D. Beach, USN, Retired—Dual Compensation

Captain Milton D. Beach, USN, retired, has submitted a claim for amounts of retired pay withheld under the provisions of 5 U.S.C. § 5532(c) for periods when his retired pay when combined with his pay for a civilian position with government exceeded the pay for level V of the Executive Schedule. For the following reasons, the claim is allowed.

Background

Captain Beach is a retired regular Naval officer and is employed by the United States Senate. As such he is subject to the provisions of the Dual Compensation Act, 5 U.S.C. § 5532 which requires a reduction in the retired pay of regular retired officers who are employed in a civilian position with the government. It also requires an additional reduction in retired pay when an individual's annual retired pay as reduced combined with the pay of his civilian position exceeds level V of the Executive Schedule. This reduction is implemented on the basis of civilian pay periods.

Captain Beach's reduced retired pay when combined with his normal salary ordinarily does not exceed level V of the Executive Schedule. However, just prior to the end of the fiscal year in 1985 and 1988 the Senator who employed him awarded him a bonus. This bonus was paid in three installments at the end of the fiscal year and was added to his regular pay because the Senate Disbursing Office has no mechanism for paying bonuses other than to raise an individual's pay for a period of time and then reduce it to its previous level. This temporary increase caused Captain Beach's combined retired pay and civilian pay for each of the pay periods in which bonus payments were added to his salary to exceed the pay period rate for level V of the Executive Schedule. His retired pay was reduced so that the combined pays equaled level V. Captain Beach contends his pay in 1985 should not be reduced because his annual retired pay, his annual civilian pay, and his bonus, when totaled, do not equal the annual rate of pay for level V of the Executive Schedule. It is not clear why he did not contest the reduction in retired pay which occurred in 1988.

Analysis And Conclusion

Subsection 5532(c) of Title 5, U.S. Code provides that if a member or former member is receiving retired or retainer pay and is employed in a position the annual rate of basic pay for which, when combined with the member's annual rate of retired pay, exceeds the rate of basic pay of level V of the Executive Schedule, the member's retired pay will be reduced. The reduction is computed on a pay period basis. We have held that the term "pay period" as used in the law refers to the biweekly pay periods applicable to civilian employees of the government. *See Lieutenant General Ernest Graves, Jr., USA (Retired),* 61 Comp. Gen. 604 (1982).

It is suggested that the law was intended to be applied when an individual's yearly retired pay and yearly civilian salary exceed the yearly pay of level V of

the Executive Schedule. We do not agree. The specific terms of the statute refer to a reduction in retired pay allocable to a pay period. In view of this, we can only conclude that Congress intended to apply the limitation on a pay period basis rather than an annual basis. *See Lieutenant Colonel Robert C. McFarlane, USMC (Retired),* 61 Comp. Gen. 221 (1982).

Notwithstanding the above, it is our view that the plain language of the statute requires that Captain Beach's claim be paid. The statute specifically refers to the "basic" pay of the civilian position. The payments received by Captain Beach in 1985 and 1988 were not basic pay but were bonuses. This is fully supported by a letter from the Financial Clerk of the Senate. It is clear that the Congress intended only basic pay to be considered in applying the limitation. Accordingly, any amounts withheld from Captain Beach's retired pay in 1985 as well as those amounts withheld in 1988 in these circumstances should be refunded to him.

B-230703, March 23, 1990

Civilian Personnel

Relocation

■ Residence transaction expenses

■■ Loan origination fees

■■■ Reimbursement

■■■■ Amount determination

If an employee retains a mortgage broker who performs necessary administrative services that assist the ultimate lender in processing a loan, the employee may be reimbursed for the loan origination fees charged by both the broker and lender. The employee's total reimbursement, however, is limited to the customary fee charged by financial institutions in the area of the residence. Furthermore, the services of the broker must not be duplicated by the lender and must not increase the loan origination fee over what the lender would have charged in the absence of a broker having been involved.

Civilian Personnel

Relocation

■ Residence transaction expenses

■■ Loan origination fees

■■■ Reimbursement

■■■■ Amount determination

The fact that an employee's loan obtained to purchase a residence at his new station includes an amount for prepaid finance charges would not affect the amount he may be reimbursed for a loan origination fee which is charged as a percentage of the total loan.

Matter of: Roy Dye, *et al.*—Loan Origination Fees—Mortgage Brokers

The Bonneville Power Administration (BPA) presents for our consideration five claims for loan origination fees charged employees incident to purchases of residences at a new duty station.[1] Four of the claims involve loan origination fees paid to mortgage brokers. The fifth concerns inclusion of prepaid finance charges in the amount of a loan on which a loan origination fee is based.

Background—Brokers

Apparently, it is becoming common in the Pacific Northwest for home buyers to retain the services of a mortgage broker to obtain permanent financing for the purchase of a residence. Generally, the broker performs much of the administrative work necessary for preparing a loan application such as obtaining and reviewing credit reports and verifying employment. The broker then presents the application to a financial institution which makes the loan. The broker often receives part of the fees charged the employee for obtaining the financing that usually, but not always, are referred to as loan origination fees on the loan closing statement. The statement may show that both a broker and lender received a loan origination fee or that only one of them received a fee, although the broker and lender actually split the fee.

BPA presents claims from four employees for loan origination fees paid mortgage brokers, and BPA asks several questions in relation to these claims. The substance of the questions is answered in the following analysis and the individual claims are then addressed.

Analysis—Brokers

Pursuant to 5 U.S.C. § 5724a(a)(4), and implementing regulations, an employee may be reimbursed expenses of purchasing a residence at the new duty station, including a loan origination fee. *See* Federal Travel Regulations (FTR), para. 2-6.2d(1), FPMR 101-7 (Supp. 4, August 23, 1982). The term "loan origination fee" as used in FTR, para. 2-6.2d(1), refers to the lender's fee for administrative expenses, including costs of originating the loan, processing the documents, and related work. *See William K. Dickinson,* B-229322, Dec. 8, 1988. Typically, the fee charged is based on a percentage of the total loan.

The regulations contemplate that ordinarily the loan origination fee is charged by the lender for administrative services it performs. However, if it is clear that these services were performed by another party who charges the loan origination fee, the employee may be reimbursed for the fee paid. *See Edward Romoff,* B-234969, Sept. 14, 1989, concerning the services rendered and fee charged by an escrow company. In such a case, however, it must be clear that the actual services rendered for which the fee is charged are the administrative services for which a loan origination fee is reimbursable. A charge for services such as

[1] The matter was presented by the Authorized Certifying Officer, Bonneville Power Administration, Portland, Oregon.

merely finding a lending institution willing to make the loan or for commitment of the funds is considered a finance charge which is not reimbursable. *See e.g., Leslie E. Russell, Jr.,* B-217189, May 6, 1985.[2] In addition it must be clear that the total fees are not greater than would have been charged without a broker being involved and the charge is not for services duplicated by the lending institution.

Where there is doubt as to what a broker's charges represent, reimbursement should be denied pending submission of substantiating evidence. The burden of proof is on the claimant, and the agency is not bound to accept as conclusive the broker's description of the services or a description on the settlement sheet. *See James P. Moore,* B-222899, Mar. 16, 1987.

The general rules applicable to reimbursement for loan origination fees would also apply when such fees are charged by brokers. That is the fee, or the combination of the broker's and the lending institution's fees, whichever is the case, may not exceed the customary fee charged by financial institutions in the locality where the *residence* is located. 5 U.S.C. § 5724a(4)(A) (1988); and FTR, para. 2-6.2d(1). *See also Constance B. Chevalier,* 66 Comp. Gen. 627, 629 (1987). A mere showing that a specific fee falls within a range of fees charged by financial institutions does not establish that fee as customary; it must be the dominant or prevailing fee. *See James F. Trusley III, et al.,* B-219076, Nov. 25, 1983, and *Gary A. Clark,* B-213740, Feb. 15, 1984. In the absence of such a showing, we have held that it is appropriate to limit the employee's reimbursement to 1 percent of the loan amount. *See Abbas M. Shakir,* B-226876, Aug. 22, 1988.[3]

Individual Claims—Use Of Brokers

1. Roy Dye

Mr. Dye transferred from Dallas, Oregon, to Vancouver, Washington, and purchased a new residence in September 1987. He paid a loan origination fee of 5-1/2 percent with 1 percent going to a mortgage broker and 4-1/2 percent to the financial institution. We are told that the customary charge in the locality of the residence purchased is 2 percent, and Mr. Dye was reimbursed this amount. We agree with the agency that in the absence of evidence establishing the customary charge to be higher than 2 percent, an additional amount may not be paid to Mr. Dye.

[2] *See also* B-173814, Oct. 21, 1971, in which a broker's entire fee was disallowed as a finance charge. That decision, however, was rendered at a time when the regulations did not authorize reimbursement of loan origination fees.
[3] We note that for employees whose effective date of transfer is on or after October 1, 1987, FTR, para. 2-6.2d(1)(b) was amended to require employees who claim a loan origination fee of greater than 1 percent to show by clear and convincing evidence, including an itemization of the lender's administrative charges, that the fee does not include points, prepaid interest or a mortgage discount. *See Wayne Pfeffer,* B-234288, Feb. 8, 1990. This regulation does not apply to the claims in this case.

2. Cheri Sayer

Ms. Sayer transferred from Auburn, California, to Kent, Washington, and purchased a new residence in August 1985. She claimed a loan origination fee of 3.48 percent ($1,900), and the agency only reimbursed her 2 percent. Ms. Sayer contested this and obtained a letter from her mortgage broker stating that it received a fee of $1,229 for placing the loan, and the lender received a fee of $671 for funding the loan. Ms. Sayer also obtained a letter from the local HUD office stating that a loan origination fee of 3 percent was usual and customary.

BPA asks us if the placement fee and funding fee are analogous to a loan origination fee, and, if so, whether Ms. Sayer should be reimbursed up to the 3 percent amount stated by HUD.

While the nature of a fee is not necessarily determined by its designation but rather by its purpose, the designations given these fees by the broker indicate they are in the nature of a finders fee and a commitment fee which, as discussed above, are not reimbursable. Therefore, without further evidence establishing that these fees were to reimburse the broker and lender for administrative costs of processing the loan, they cannot be considered loan origination fees. If Ms. Sayer can produce further information sufficient to satisfy BPA that the services for which these fees were charged were the type for which a loan origination fee is charged, we would have no objection to Ms. Sayer receiving reimbursement.

As to the amount of the fee, HUD's advice created a rebuttable presumption that 3 percent was customary. Apparently, BPA had generated other information indicating that the customary fee was 2 percent but is willing to accept the HUD advice that 3 percent is now customary. We have no objection to that.

3. Dennis Myers

Mr. Myers transferred from Kent, Washington, to Wenatchel, Washington, and purchased a new residence in October 1986. He paid a 2-1/2 percent loan origination fee, with the broker receiving 1-1/2 percent and the lender receiving 1 percent. BPA reimbursed the claimant only 1 percent. Mr. Myers claims he should have been reimbursed the total 2-1/2 percent since this is the customary charge in the area of his residence. BPA, however, while only reimbursing him 1 percent, does indicate that the customary fee is 2 percent in the area.

In support of his claim, Mr. Myers has submitted a letter from the broker in which the broker states that it fully processed the loan application and then placed the loan with a lender who actually lent the money to Mr. Myers. According to the broker, the lender would have charged Mr. Myers a loan origination fee of 2-1/2 percent had Mr. Myers dealt directly with the lender. Instead the lender only charged 1 percent because much of the administrative work had been done by the broker. There appears to have been no duplication of effort by the broker and lender.

We would not object to Mr. Myers being reimbursed the customary loan origination fee of 2 percent.

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4. Marlene Ciraulo

Ms. Ciraulo transferred from Oakland, California, to Seattle, Washington, and purchased a new residence in September 1987. She paid a 2 percent loan origination fee, with the broker receiving 1 percent and the lender receiving 1 percent. She was reimbursed for only 1 percent although BPA acknowledges that 2 percent is the customary loan origination fee in the Seattle area.

As in the Myers situation above, it appears that in this case there was no duplication of effort or increase in the loan origination fee because of a broker being involved in the processing of the loan. Both the broker and the lender performed distinct tasks and each charged 1 percent for its administrative costs which totaled the customary fee in the area.

Accordingly, Ms. Ciraulo may be reimbursed her total fee of 2 percent.

Loan Including Prepaid Finance Charges

BPA presents an additional question concerning whether it may reimburse an employee his full loan origination fee where a portion of the loan on which the fee was based was used to pay prepaid finance charges. Apparently, the question arises because the finance charges themselves are not reimbursable.

In the case in question Mr. David Morgan purchased a new residence and his loan origination fee was 1 percent of his total loan which included $2,092 used to cover prepaid finance charges. Thus, part of the loan origination fee, $20.92, is predicated on a prepaid finance charge. As explained previously, the regulations authorize reimbursement of loan origination fees, and these fees are usually computed based on a percentage of the loan amount. The regulations make no provision for excluding an amount of the fee which is derived from a portion of the loan used to pay finance charges. Therefore, the fact that part of the loan was used to pay these charges would not prevent reimbursement of the full amount of the loan origination fee. Accordingly, Mr. Morgan may be paid the total loan origination fee of 1 percent.

B-234682.2, March 23, 1990

Procurement

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

Procurement

Sealed Bidding
■ Bid guarantees
■■ Sureties
■■■ Acceptability

Decision sustaining protest against agency's determination that individual sureties on bid guarantee were unacceptable for pledging their personal residences—when in fact there was no prohibition against pledging of personal residences in support of guarantee—is affirmed on reconsideration even though, after issuance of original decision, agency undertook investigation that revealed other bases for rejecting sureties; original decision was correct based on issues, record and arguments developed by the agency and protester.

Procurement

Bid Protests
■ GAO decisions
■■ Recommendations
■■■ Modification

Where prior decision correctly held that agency improperly found individual sureties unacceptable for pledging their personal residences in support of bid guarantee, and agency presents new information in requesting reconsideration that shows sureties properly were determined unacceptable for different reasons, decision is modified to eliminate recommendation that award be made to protester.

Procurement

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

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs

Protest costs awarded in connection with sustained protest are disallowed on reconsideration where information surfaces after issuance of decision indicating that the protest was filed even though protester knew or should have known that sureties' personal residences—which, protester had argued and General Accounting Office ultimately found, had improperly been disregarded by agency in rejecting sureties based on inadequate assets—were not solely owned by sureties and thus could not properly be pledged on bid guarantee, as the agency originally had concluded.

Matter of: General Services Administration—Reconsideration

Sam Zalman Gdanski, Esq., for the protester.

Robert C. MacKichan, Jr., Esq., General Counsel, General Services Administration, for the agency.

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

The General Services Administration (GSA) requests reconsideration of our decision, *Romac Bldg. Servs., Inc.*, 68 Comp. Gen. 529 (1989), 89-2 CPD ¶ 2, in which we sustained Romac's protest under invitation for bids (IFB) No. GS-02-PPB-SS-089-S036, issued by GSA for janitorial services at federal buildings at JFK Airport, Jamaica, New York.

We affirm our prior decision, but modify the recommendation.

Our prior decision was precipitated by GSA's elimination of Romac from consideration for award as nonresponsible based on inadequate net worths of the individual sureties named on Romac's bid guarantee. The agency reported to us that it found the sureties unacceptable solely because their stated net worths were comprised largely of equity in their personal residences; GSA did not consider personal residences to be readily marketable assets, and thus found both sureties unacceptable and rejected Romac as nonresponsible. We sustained the ensuing protest on the ground that there was no general prohibition against sureties pledging their personal residences under a bid guarantee, and that GSA had not established any legal basis for disregarding the sureties' personal residences pledged in this case. We recommended that the agency terminate Prompt Maintenance Services, Inc.'s, contract for the convenience of the government and award a contract to Romac. In addition, we found Romac entitled to recover its costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d) (1989).

In its request for reconsideration, the agency concedes the correctness of our holding that it improperly precluded Romac's sureties from pledging their personal residences in support of the bid guarantee solely on the basis that personal residences are not readily marketable assets. GSA explains, however, that it now has determined that our decision was based on misrepresentations by Romac that the sureties solely owned their residences under titles that would make them suitable as assets in support of a bid guarantee. Specifically, GSA determined, through an investigation conducted after issuance of our decision, that one of the sureties, Mr. Latham, holds title to his personal residence jointly with his wife, and that the other surety, Mr. Bertuglia, does not hold title to his personal residence, the title residing solely with his wife. Since neither surety's wife signed the Affidavit of Individual Surety (SF 28), setting forth the information on each surety's net worth, GSA determined that both sureties' personal residences would be exempt from execution and sale by the government in case

of default by Romac, and that the sureties therefore were unacceptable. GSA concludes that it would be inappropriate to award a contract to Romac, as we recommended, and that, under the circumstances, we also should find that Romac is not entitled to its protest costs.

We will reconsider a decision only where the requester shows that our decision was based on factual or legal errors, or presents evidence not previously considered that warrants reversal or modification of our prior decision. *G & C Enters., Inc.—Reconsideration*, B-233537.2, May 10, 1989, 89-1 CPD ¶ 439. We are not inclined to reconsider a prior decision where an agency bases its reconsideration request on information it could have but did not present during our initial consideration of the protest. *Department of the Navy—Request for Reconsideration*, B-220991.2, Dec. 30, 1985, 85-2 CPD ¶ 728.

Although GSA's reconsideration request is based on information it did not have, and that we therefore did not consider during our resolution of Romac's protest, this clearly was information that GSA could have obtained by conducting a thorough review of Romac's proposed sureties prior to submitting its report. GSA's failure to do so until after we had issued a decision contrary to its position undermines the goal of our bid protest forum to produce decisions based on a fully developed record. *Department of the Navy—Request for Reconsideration*, B-220991.2, *supra*.

We conclude that our prior decision was correct based on the record developed by GSA and Romac, and we will not reconsider that decision based on GSA's arguments. However, based on the information GSA now has furnished, we agree with the agency that our recommendation and award of protest costs no longer are appropriate.

Our recommendation that GSA terminate the awardee's contract and make award to Romac was not intended to preclude GSA from fulfilling its responsibility for determining whether Romac was otherwise eligible for the award. Specifically, GSA was not bound to make award to Romac as a responsible bidder if information subsequently obtained showed that its proposed sureties in fact are unacceptable; the acceptability of an individual surety, as a matter of responsibility, may be established any time prior to contract award. *See Carson & Smith Constructors, Inc.*, B-232537, Dec. 5, 1988, 88-2 CPD ¶ 560. The contracting officer is vested with a wide degree of discretion and business judgment in determining surety acceptability, and we will defer to the contracting officer's decision where it is reasonable. *Id.*

Applying this standard, we find that the information obtained by GSA subsequent to our decision provided a reasonable basis for finding the sureties unacceptable. As stated above, the agency's investigation revealed that neither surety solely owned their personal residence, contrary to the representations in their SF 28s, under the asset category entitled "fair value of solely-owned real estate." GSA also found that another parcel of real property pledged as solely-owned real estate in fact was only leased by the surety, with New York City retaining title to the property. In view of the sureties' misstatements concern-

ing their assets, we think GSA properly concluded that they were unacceptable, and that Romac therefore is nonresponsible. *Farinha Enters., Inc.*, 68 Comp. Gen. 666 (1989), 89-2 CPD ¶ ———.

The protester does not dispute the agency's findings, but asserts that the listed properties nevertheless have substantial value and that its sureties possess other unquestioned assets establishing adequate net worth and that they should be given the opportunity to establish this fact. However, once a surety's integrity reasonably has been called into question based on misstatements in the SF 28, the agency is justified in rejecting the sureties without considering the sufficiency of other surety assets. *Farinha Enters., Inc.*, 68 Comp. Gen. 666, *supra.* Our view in this regard reflects the nature of the surety obligation as a financial guarantee and the importance we think an agency is entitled to place on the accuracy, thoroughness, and verity of surety financial information. *Id.*

We also withdraw our award of Romac's protest costs. Romac did successfully argue a point of law in its protest—in considering the adequacy of sureties' assets pledged on a bid guarantee, agencies cannot disregard the value of personal residences pledged by the sureties. The information now presented by GSA, however, establishes that Romac advanced this argument even though the sureties' personal residences were of no value for the purpose they were pledged. One of the sureties, Mr. Bertuglia, is Romac's president and signed the firm's bid. Thus, it is clear that Romac pursued its protest even though it knew or should have known that Mr. Bertuglia's personal residence was not an acceptable surety asset, and that Mr. Bertuglia had misrepresented it as solely owned real property on his SF 28. The record does not reflect whether Mr. Latham also is an officer or director of the protesting corporation. Even if Mr. Latham is not related to Romac, in view of the fact that Mr. Bertuglia was not the sole owner of his residence, we believe that Romac had a duty to determine the ownership of Mr. Latham's residence before protesting GSA's failure to consider the assets. It evidently did not do so. In these circumstances, Romac is not entitled to reimbursement of its protest costs.

Our prior decision is affirmed; our recommendation is modified.

B-237237, March 23, 1990

Civilian Personnel

Relocation

■ Taxes

■■ Allowances

■■■ Eligibility

A transferred employee sold her residence at her old duty station and requests reimbursement for state income taxes required to be paid on the profit realized from that sale as a Relocation Income Tax (RIT) allowance under 5 U.S.C. § 5724b (1988). The claim is denied. Under the statute and chapter 2, part 11 of the Federal Travel Regulations (FTR), only those relocation expenses and allowances which are reimbursable elsewhere in the FTR, chapter 2, may be included in the computation

of a RIT allowance. Since state income taxes paid on the residence sales profit are not reimbursable under the FTR in the first instance, such taxes are not includable in computation of a RIT allowance. *See Guerry G. Notte,* B-223374, Feb. 17, 1987, and decisions cited.

Civilian Personnel

Relocation

■ Taxes

■■ Allowances

■■■ Eligibility

A transferred employee who was required to have Federal Insurance Contributions Act (FICA) taxes withheld from her relocation expense reimbursement, may not be reimbursed those taxes under the provisions of 5 U.S.C. § 5724b (1988) and chapter 2, part 11 of the Federal Travel Regulations (FTR). Only the moving and relocation expenses listed in paragraph 2-11.3(a) through (i) of the FTR may be included in the computation of a Relocation Income Tax allowance.

Matter of: Carolyn S. Fleming—Relocation Income Tax Allowance—Taxes not included

This decision is in response to a request from J. R. Burkett, Director, Division of Finance, Office of the Regional Director - Region VI, Department of Health and Human Services. The request concerns an employee's right to be reimbursed as a Relocation Income Tax (RIT) allowance, state income taxes paid on the sale of her residence and Federal Insurance Contributions Act (FICA) withheld from her relocation expense reimbursement. We conclude that the employee is not entitled to additional reimbursement for the following reasons.

Background

Mrs. Carolyn S. Fleming, an employee of the Department of Health and Human Services, was transferred in the interest of the government from Mountain Home, Arkansas, to McKinney, Texas, in October 1988. She sold her residence near her old duty station in Arkansas and purchased another in the area of McKinney, Texas. While the federal income tax on the sale was deferred because the purchase price of the new residence exceeded the sales price of the old residence, the state income tax on the sale of the Arkansas residence could not be deferred because the replacement home was out of state. As a result, Mrs. Fleming's Arkansas income tax for 1988 was increased by $1,457. She was paid a RIT allowance, but, based on the state tax on her capital gain, she claims entitlement to additional reimbursement.

In addition, the agency asks whether social security and Medicare taxes withheld from her relocation expense reimbursement should also be reimbursed.

Analysis And Conclusion

The statutory authority for payment of a RIT allowance is codified at 5 U.S.C. § 5724b (1988).[1] Under regulations prescribed by the President, section 5724b authorizes reimbursement of substantially all federal, state, and local income taxes incurred by an employee arising out of reimbursement for travel and transportation expenses and authorized relocation allowances incident to a permanent change of station. The governing regulations issued under that authority are found in chapter 2, part 11 of the Federal Travel Regulations (FTR).[2] Employees transferred on or after November 14, 1983, are eligible for the allowance. Paragraph 2-11.3 of the FTR states that the RIT allowance is limited by law as to the types of moving expenses that can be covered, with the proviso that those expenses must be actually incurred and are not allowable as a moving expense deduction for income tax purposes. Clauses (a) through (i) of that paragraph list the types of moving and relocation expenses or allowances which may be included in the computation of a RIT allowance. In brief, only those expenses and allowances which are reimbursable under the FTR in the first instance may be included in the RIT allowance computation.

Capital Gain on Residence Sale

We have held that a personal income tax imposed by a state on the capital gain realized on the sale of a residence incident to an out-of-state transfer may not be reimbursed under 5 U.S.C. § 5724a and the FTR either as a real estate expense or as a miscellaneous expense. *Guerry G. Notte*, B-223374, Feb. 17, 1987, and decisions cited. Therefore, since the state income tax paid by Mrs. Fleming on the profit realized on the sale could not be reimbursed under any provision of the FTR, she may not be reimbursed any additional RIT allowance based on that tax. *Guerry G. Notte, supra.*

FICA Tax Reimbursement

As previously observed, the RIT allowance was enacted to permit reimbursement to an employee of "substantially all" federal, state, and local income taxes the employee would be required to pay as a result of reimbursements for expenses incurred and relocation allowances authorized incident to a transfer. Since required FICA withholdings from wages are not included in FTR, para. 2-11.3(a) through (i) as a covered moving expense, such withholdings may not be reimbursed as a RIT allowance.

[1] Public Law No. 98-151, November 14, 1983, 97 Stat. 978, as amended by Public Law No. 98-473, October 12, 1984, 98 Stat. 1969.

[2] Supp. 27, 53 Fed. Reg. 16899-16911, May 12, 1988. *Incorp. by ref.*, 41 C.F.R. § 101-7.003 (1988).

B-237853, March 23, 1990

Procurement

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

Protester was properly excluded from the competitive range where agency reasonably concluded that firm had no reasonable chance for award because of significant technical deficiencies identified in its proposal which was rated by agency's technical evaluators as "unacceptable" in seven of the solicitation's nine technical and management evaluation areas.

Matter of: Intraspace Corporation

Robert F. D'Ausilio, for the protester.

Colonel Herman A. Peguese, Department of the Air Force, for the agency.

Scott H. Riback, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Intraspace Corporation protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. F04701-88-R-0035, issued by the Department of the Air Force for a space vehicle system, related data and operational support services in connection with its space test experiments platform (STEP) program. Intraspace argues that the number and nature of deficiencies identified in its proposal were insufficient to eliminate it from the competitive range in view of the significant cost savings which the firm's proposal allegedly offered the Air Force.

We deny the protest.

The RFP called for the submission of separate cost and technical/management proposal volumes and provided that proposals would be evaluated on the basis of technical, management and cost criteria to determine which proposal was most advantageous to the government. With respect to the relative importance of the evaluation criteria, the RFP specified that technical was the most important, management second and cost third. Within the technical area, proposals were to be evaluated on the basis of two major factors, "space vehicle system" (SVS) and "supporting technical activities," which were further divided into a total of seven technical "items." Within the management area, the RFP specified that proposals would be evaluated on the basis of organization, project/systems engineering management and process control. The RFP also specified that for each of the evaluated items, firms would be rated either exceptional, acceptable, marginal, or unacceptable. In addition, the technical and management areas would be rated using a "risk factor" assessment of either

high, medium, or low. Finally, cost was to be evaluated for completeness, reasonableness, and realism.

In response to the solicitation, the Air Force received eight initial proposals. After evaluation of the initial proposals by the source selection evaluation team (SSET), the contracting officer, with the concurrence of the source selection authority (SSA), concluded that the proposal of Intraspace was not within the competitive range and so informed the firm. The agency found Intraspace's proposal technically deficient in numerous areas, requiring major revisions, and also found that the firm had submitted an unrealistically low cost proposal. Intraspace filed an agency-level protest. In response, the Air Force for informational purposes provided the firm with a listing of some 13 clarification requests (CRs) and 16 deficiency reports (DRs) relating to the firm's technical/management proposal as well as a listing of various CRs and DRs relating to the firm's cost proposal.[1] Intraspace remained dissatisfied and filed this protest with our Office.

Intraspace argues that it was improperly excluded from the competitive range because its proposal met RFP requirements, and its offer provided the government with substantial cost savings. With regard to the evaluation, Intraspace generally states that it "disagrees" with the agency's technical judgments regarding its proposal and also argues that the Air Force ignored various innovative solutions contained in its proposal. Intraspace also alleges that other firms also received a similar number of CRs and DRs and that, therefore, it should have been considered within the competitive range along with these other firms. As to its cost proposal, Intraspace argues that the Air Force erroneously concluded that the firm had offered an unrealistically low proposal, because its expected nonrecurring developmental costs for the design of the spacecraft have already been incurred since its proposal offered a modified version of an already developed spacecraft.

The Air Force responds that it reasonably determined Intraspace to be outside the competitive range after a thorough review of the firm's proposal. The Air Force points out that its SSET rated Intraspace's proposal "unacceptable" in each of the six technical evaluation areas and rated the firm's proposal "unacceptable" in one of the three management areas and only "marginal" in the other two management areas. In addition, the agency notes that Intraspace's technical proposal was given a risk rating of "high" while its management proposal received a risk rating of "moderate." Finally, the Air Force states that Intraspace's proposal was not eliminated solely on the basis of the number of CRs and DRs but, rather, on the basis of the nature of and cumulative effect of these CRs and DRs on the firm's probability of successful contract performance.

Our Office will not disturb an agency's decision to exclude a firm from the competitive range unless this determination was unreasonable. *Ameriko Mainte-*

[1] The CRs and DRs had been prepared by the SSET in contemplation of discussions before the decision to eliminate Intraspace from the competitive range had been made. The Air Force hoped this information would cause the firm to withdraw its protest.

nance Co., Inc., B-216406, Mar. 1, 1985, 85-1 CPD ¶ 255. A protester has the burden of proving that the agency's evaluation was unreasonable. *Robert Wehrli*, B-216789, Jan. 16, 1985, 85-1 CPD ¶ 43. This burden is not met by the protester's mere disagreement with the agency's judgment. *Wellington Assocs., Inc.*, B-228168.2, Jan. 28, 1988, 88-1 CPD ¶ 85. In this regard, an agency's decision to exclude an offeror from the competitive range is proper where the offeror's technical proposal is so deficient that it would require major revisions before it could be made acceptable. *Ameriko Maintenance Inc.*, B-216406, *supra*. In addition, the mere fact that a firm has offered a lower price is irrelevant where the firm's offer has properly been found to be technically unacceptable since a technically unacceptable proposal cannot be considered for award regardless of the potential cost savings to the government. *See William B. Hackett & Assocs., Inc.*, B-232799, Jan. 18, 1989, 89-1 CPD ¶ 46.

We have examined the record with respect to the evaluation of Intraspace's proposal and conclude that the Air Force reasonably excluded the firm from the competitive range on the basis of that evaluation. As noted above, Intraspace's proposal had been found unacceptable in each of the six technical evaluation areas and in one of the three management evaluation areas. In this regard, we point out that, for example, in the "SVS concept" area, the evaluators found that Intraspace's proposal failed to address or inadequately addressed the RFP's requirements concerning its proposed SVS' ability to meet current and future missions requirements and also failed to adequately address the experiment requirements for which the SVS is to be designed. In the area of "fabrication and assembly," the evaluators found that Intraspace had failed to present a comprehensive approach to the construction of the SVS and had failed to describe the parts program required by the RFP such that, in the opinion of the SSET, mission reliability was jeopardized. In the area of "integration" the evaluators found that Intraspace had failed to describe how it would integrate the various experiment equipment into its spacecraft or how it would integrate its SVS into the Air Force's chosen launch system. These deficiencies, along with the other deficiencies identified by the SSET, led the Air Force to conclude that for Intraspace to be considered technically acceptable, the firm would have to submit almost an entirely new proposal.

In response, Intraspace has merely stated that it disagrees with the judgment of the agency's technical evaluators but has not presented our Office with any evidence which would show that the Air Force's evaluators erred in reaching their conclusions.[2] Indeed, the protester has not even attempted to rebut the numerous technical deficiencies found by the Air Force in its proposal. In addition, we note that, contrary to Intraspace's position, the record shows that it was the nature and gravity of the identified CRs and DRs, not just the number of them, which led to the firm's exclusion from the competitive range. Under these circumstances, we have no basis upon which to question the Air Force's judgment

[2] In this regard, we note that Intraspace is fully aware of the agency's concerns regarding its proposal since it was provided with the various CRs and DRs identified by the SSET in contemplation of possible discussions with the firm.

that Intraspace's proposal was outside of the competitive range for purposes of this procurement regardless of its low cost.

The protest is denied.

B-238021, March 23, 1990

Procurement

Bid Protests

■ GAO procedures

■■ Preparation costs

Where General Accounting Office sustains protest against award on basis that agency concedes it made award to nonconforming offeror, but contract has been performed so that recompetition of the requirement no longer is a practicable remedy, protester is entitled to reimbursement of protest and proposal preparation costs.

Procurement

Bid Protests

■ GAO procedures

■■ Protest timeliness

■■■ Conflicting evidence

■■■■ Burden of proof

Protest was not untimely filed—such that General Accounting Office would not have sustained protest against award agency concedes was improper—where agency asserts, without documentation, that it advised protester of denial of agency-level protest more than 10 working days before protest was filed, but protester denies receiving such advice and circumstances tend to support protester's position; doubt as to timeliness is resolved in favor of the protester.

Procurement

Bid Protests

■ GAO procedures

■■ Interested parties

Protester, the third low acceptable offeror, did not fail to qualify as an interested party eligible to bring protest—such that General Accounting Office would not have sustained protest against award agency concedes was improper—where protest alleged award improperly was based on relaxed requirements; appropriate remedy for successful protest on this ground could be recompetition, which would afford protester opportunity to offer different price on changed requirements.

Matter of: Eklund Infrared

Paul F. Khoury, Esq. and Rand L. Allen, Esq., Wiley, Rein & Fielding, for the protester.

Thomas G. Jacques, for the interested party, Inframetrics, Inc.

Colonel Herman A. Peguese, Department of the Air Force, for the agency.

Stephen J. Gary, Esq. and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Eklund Infrared protests the award of a contract to Inframetrics, Inc., under request for proposals (RFP) No. F04700-89-R-A101, issued by the Air Force for a thermal imaging system. The RFP was for a brand name (Eklund Infrared Model 88LWB) or equal item, and listed the minimum salient characteristics required of the product. Eklund asserts that Inframetrics' product failed to comply with the RFP's salient characteristics.

We sustain the protest.

The solicitation stated that award would be made to the lowest priced technically acceptable offeror, and that award could be made on the basis of initial proposals. Of the four proposals received, the agency found the lowest priced to be technically unacceptable. Of the three remaining, the proposed prices were as follows:

Inframetrics, Inc. (Model 600)	$62,200
UTI Instruments	$62,750
Eklund Infrared	$81,463

The Air Force awarded the contract to Inframetrics on September 29, 1989, and Eklund filed an agency-level protest of the award on October 6, alleging that Inframetrics failed to meet the specifications for a product equal to its own. On October 20, the contracting officer received a telephone inquiry from Eklund on the status of its protest. According to the contracting officer, in the course of a 90-minute conversation she informed Eklund that its protest was "denied totally" and that a written letter of denial would be forthcoming. The agency's written denial of the protest was dated November 17, and was received and date-stamped, Eklund alleges, on November 28. On December 11, Eklund filed its protest with our Office.

In a letter to our Office dated January 19, 1990, the Air Force concedes the merits of the protest. According to the agency, it has concluded that the "equal" product on which the award was based failed to meet performance features identified as salient characteristics of the listed brand name. We find nothing in the record that would indicate the agency is incorrect. The agency asserts, however, that, although it agrees that the award to Inframetrics was improper, the protester is not entitled to any relief. Specifically, resolicitation or award to Eklund would be impracticable since Inframetrics has completed performance, and the Air Force asserts that because the protest is untimely and Eklund, as the third low offeror, is not an interested party, Eklund's protest would not have been successful absent the Air Force's corrective action, and the protester thus is not entitled to reimbursement of its proposal preparation and protest costs. We disagree.

Under our Bid Protest Regulations, where a protest initially is filed with the contracting agency, a subsequent protest to our Office must be filed within 10 working days after the protester learns of adverse action at the agency level. 4 C.F.R. § 21.2(a)(3) (1989). We have held that oral notification of the contracting agency's denial of the protest starts the 10-day period running, and that a protester may not delay filing its protest with our Office until it receives written notice of the agency action. *Universal Fuel, Inc.*, B-231870, Oct. 4, 1988, 88-2 CPD ¶ 318.

According to the Air Force, since Eklund received notice of the denial of its agency-level protest during the October 20 telephone conversation, as discussed above, its failure to file a protest with our Office until December 11, more than 10 working days later, renders it untimely. In the alternative, the agency argues that even if the firm did not become aware of the adverse agency action until it received written notice, it is "highly unlikely" that 11 days (November 17 to November 28) were necessary for the Postal Service to deliver the written notice; the Air Force argues that we instead should assume that the notice was received within 1 week of mailing, in accord with *Technology for Advancement, Inc.*, B-231058, May 12, 1988, 88-1 CPD ¶ 452. Based on this calculation, the protest would be untimely even if based on receipt of written notice.

We find the protest was timely. The agency's account of the facts notwithstanding, the evidence is at best inconclusive as to the content of the telephone conversation of October 20. The protester asserts that it was not advised of the denial of its protest; that while the contracting officer advised it was her impression the protest would be denied, the evaluation was still ongoing. Eklund also asserts that the fact that the conversation was 90 minutes long and that the contracting officer permitted Eklund considerable time to explain its position tends to support its conclusion that no decision had been made on the protest at that time. The agency has not submitted any contemporaneous documentation to support its assertion that it notified Eklund that its protest was denied during this conversation. We agree that the points noted by Eklund concerning the nature of the conversation, as well as the fact that the denial letter was dated November 17, almost 1 month later, supports Eklund's position that it was not advised of the denial of its protest and, indeed, that a decision had not even been reached at that time. Because there remains a dispute between the agency and protester on this point, we are unable to rule conclusively as to timeliness. However, it is well-established that we will resolve doubt as to when the protester became aware of its basis for protest, the situation here, in favor of the protester for purposes of determining timeliness. *See Apex Micrographics, Inc.*, B-235811, Aug. 31, 1989, 89-2 CPD ¶ 205. The protest therefore is not untimely based on the October 20 telephone conversation.

As there is no clear evidence of earlier notice, we can only conclude that Eklund learned of its protest basis upon receipt of the November 17 written notice. In this regard, the case cited by the Air Force as creating a presumption of receipt within 7 days is relevant only to those situations in which there is no evidence to the contrary that the notice was received later than 1 week from

the time of mailing. *See Technology for Advancement Inc.*, B-231058, *supra*. Here, the protester claims it did not receive the written notice until November 28, and has submitted a copy of the notice that is date-stamped November 28. At the same time, the agency has not submitted a return receipt or other documentary evidence indicating delivery any time prior to that date. Consequently, there is no basis for assuming receipt of the November 17 letter prior to November 28. As Eklund then filed its protest on December 11, fewer than 10 working days after November 28, its protest was timely.

The Air Force argues that Eklund is not an interested party, 4 C.F.R. § 21.0(a), because, even if its protest of the award to Inframetrics were sustained, it is not next in line for award; since Eklund's price is only third low and the solicitation provided that award would be made to the lowest priced technically acceptable offeror, the agency contends that the intermediate offeror, UTI, and not the protester, is next in line for award. Thus, according to the agency, Eklund has no direct economic interest in the matter.

We disagree. Eklund's protest raised the question of whether the agency improperly waived specifications in a brand name or equal procurement without notifying Eklund and giving the firm an opportunity to offer on the allegedly relaxed requirements at a revised price. The appropriate relief for such an impropriety could have been a recommendation that the protester and any other offerors be given an opportunity to compete on the revised specifications. In these circumstances, we consider Eklund to have a sufficient economic interest in the outcome to be deemed an interested party, notwithstanding the fact that the firm was only third low in price and the second low offer was found acceptable. *See Tri Tool Inc.*, B-229932, Mar. 25, 1988, 88-1 CPD ¶ 310.

While we therefore sustain the protest, since the contract already has been performed, recompetition no longer is available as a remedy. By separate letter of today, however, we are advising the Secretary of the Air Force that we find Eklund entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees, as well as its proposal preparation costs. 4 C.F.R. § 21.6(d); *Rotair Indus., Inc.*, B-232702, Dec. 29, 1988, 88-2 CPD ¶ 636. Eklund should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

Civilian Personnel

Only the moving and relocation expenses listed in paragraph 2-11.3(a) through (i) of the FTR may be included in the computation of a Relocation Income Tax allowance.

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Travel
■ Travel expenses
■■ Reimbursement
■■■ Witnesses

A current employee of the Department of Veterans Affairs (VA) was summoned to testify at an EEOC hearing concerning the witness's official duties at his former agency, the Coast Guard. The VA must initially authorize and pay the employee's travel expenses so as not to disrupt the equal employment opportunity process. Then, the VA is entitled to reimbursement from the respondent agency (Coast Guard), which is ultimately responsible for the cost of the employee's travel to attend the hearing.

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■ Travel expenses
■■ Reimbursement
■■■ Witnesses

The statutory provision in 5 U.S.C. § 5751, authorizing reimbursement of travel expenses of government employees called as witnesses and the implementing regulations in 28 C.F.R. Part 21 are applicable to discrimination hearings before an Administrative Judge of the Equal Employment Opportunity Commission (EEOC). An employee who appears as a witness at such a hearing is in an official duty status and entitled to reimbursement for travel expenses.

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Military Personnel

Pay
■ Retirement pay
■■ Computation
■■■ Dual compensation restrictions
■■■■ Bonuses

■ Retirement pay
■■ Reemployed annuitants
■■■ Dual compensation restrictions
■■■■ Bonuses

A bonus received by a retired member employed in a civilian position with the government should not be considered in computing the reduction in retired pay required by 5 U.S.C. § 5532(c) when an individual's combined retired pay and pay for the civilian position exceeds level V of the Executive Schedule as a result of the bonus, since the statute refers to the basic pay of the position.

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Miscellaneous Topics

Procurement

requirement no longer is a practicable remedy, protester is entitled to reimbursement of protest and proposal preparation costs.

313

■ GAO procedures
■■ Protest timeliness
■■■ Conflicting evidence
■■■■ Burden of proof

Protest was not untimely filed—such that General Accounting Office would not have sustained protest against award agency concedes was improper—where agency asserts, without documentation, that it advised protester of denial of agency-level protest more than 10 working days before protest was filed, but protester denies receiving such advice and circumstances tend to support protester's position; doubt as to timeliness is resolved in favor of the protester.

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

Protest challenging the propriety of a subcontract awarded by a government prime contractor, designated as a federal contract research center, is dismissed since it was not made "by or for the government" where the prime contractor, which is performing research and development services, is not operating or managing a government facility or otherwise providing large scale management services.

293

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

Protester was properly excluded from the competitive range where agency reasonably concluded that firm had no reasonable chance for award because of significant technical deficiencies identified in its proposal which was rated by agency's technical evaluators as "unacceptable" in seven of the solicitation's nine technical and management evaluation areas.

310

Contractor Qualification
■ Contractor personnel
■■ Misrepresentation

Where solicitation did not require personnel to be committed to performance under the resulting contract, awardee did not misrepresent the availability of persons it "intended for assignment" by