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**Decisions of the
Comptroller General
of the United States**

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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.

Preface

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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Civilian Personnel

Compensation

- Overtime
- ■ Eligibility
- ■ ■ Travel time

Two Navy employees are not entitled to overtime or compensatory time for time spent in travel outside normal work hours to ships in response to messages requesting technical assistance to correct equipment breakdowns. The employees have not presented sufficient evidence or documentation which would indicate that travel was of an immediate official necessity and to an event that was unscheduled and administratively uncontrollable so as to permit payment under 5 U.S.C. § 5542 (1988). The burden of proof is upon the claimants to establish the liability of the United States and the claimant's right to payment.

385

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

Employee was transferred from Columbus to Dayton and then back to Columbus within 1 year. She sold her Columbus residence within 1 year from effective date of first transfer and prior to official notice of retransfer. Subsequent transfer does not extinguish the right to reimbursement created by the initial transfer. Employee is entitled to reimbursement of residence sale expenses incident to initial transfer to Dayton. Further, employee is entitled to residence purchase expenses incident to the retransfer to Columbus.

414

- Temporary quarters
- ■ Actual subsistence expenses
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

A transferred employee claimed temporary quarters subsistence expenses for herself for 4 days when inclement weather prevented her from returning to her residence at old duty station which she had not vacated in order to allow daughter to complete school session. Her claim is disallowed since she had not vacated her old residence as required by the Federal Travel Regulations before temporary quarters expenses may be reimbursed.

414

- Temporary quarters
- ■ Determination
- ■ ■ Criteria

Employee whose old and new residences were in Columbus occupied temporary quarters for 30 days in connection with successive transfers. She acquired a new permanent residence but was unable to occupy new residence immediately because of a holdover provision allowing the sellers to remain in possession. Paragraph C13006 of the Joint Travel Regulations, volume 2 (FTR para. 2-5.2h), which

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(69 Comp. Gen.)

generally prohibits payment of TQSE for short distance transfers, is not a bar to payment since this provision was not intended to apply to situations where the old residence sale is under one transfer order and the new residence purchase is under another order as the timing of the sale and purchase are no longer within the employee's control.

414

- Travel expenses
 - ■ Privately-owned vehicles
 - ■ ■ Mileage

- Travel expenses
 - ■ Reimbursement
 - ■ ■ Eligibility

An employee, permanently transferred to the place where he was on a temporary duty assignment, returned to his old duty station by privately owned vehicle to retrieve stored household goods. The employee is entitled to en route per diem and mileage expenses for the round-trip since relocation travel by privately owned vehicle is deemed advantageous to the government under the Federal Travel Regulations, para. 2-2.3a.

424

Travel

- Temporary duty
 - ■ Return travel
 - ■ ■ Administrative discretion

A construction employee who is required to perform long periods of temporary duty away from his official station and does not maintain a permanent residence at his official station may be reimbursed for the expenses of periodic, authorized return travel for nonworkdays to his permanent residence, not to exceed the constructive cost of travel to his official station.

401

Military Personnel

Pay

■ Variable housing allowances

■ ■ Amount determination

A member who is entitled to Basic Allowance for Quarters (BAQ) at the with-dependent rate, based on his payment of child support, and who is also entitled to a Variable Housing Allowance (VHA), may not receive VHA at the higher with-dependent rate solely by reason of a separation agreement that also awards "primary custody" of dependent children to the former spouse, but with "temporary" and "physical" "secondary custody" to the member at other times. However, the member is entitled to VHA at the with-dependent rate where he can demonstrate that he had actual physical custody of the children for periods in excess of 3 months. The computation of such VHA should take into consideration only the member's direct housing costs and not the costs incurred by the former spouse.

407

Miscellaneous Topics

Environment/Energy/Natural Resources

■ Environmental protection

■ ■ Recycled materials

■ ■ ■ Use

■ ■ ■ ■ Cost increase

Award to lowest bidder offering to comply with mandatory solicitation requirement for 50 percent waste paper content, even though there was lower bid not meeting requirement, is consistent with Resource Conservation and Recovery Act of 1976 and Environmental Protection Agency implementing Guideline; although narrative accompanying Guideline indicates EPA's view that higher price for paper meeting minimum waste paper content requirement is unreasonable, neither statute nor Guideline prohibits paying such a premium.

410

Procurement

Bid Protests

- **Agency-level protests**
- ■ **Information adequacy**

The fact that, under an agency's protest regulations, an agency-level protest may be untimely or the protester may lack interested party status, does not provide a basis for questioning the agency's subsequent determination to undertake corrective action based on information presented in connection with the protest.

399

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **Apparent solicitation improprieties**

Protester's objection to the use of negotiated rather than sealed bid procedures is untimely when filed after award rather than prior to the closing date for receipt of proposals.

365

Competitive Negotiation

- **Contracting officer duties**
- ■ **Information evaluation**
- ■ ■ **Fairness**

While contracting officer, acting in good faith, may ordinarily rely on information provided by transportation rate specialists in calculating transportation costs on f.o.b. origin offers, he may not automatically do so if it leads to an improper or unreasonable evaluation of the offered prices.

364

- **Multiple offers**
- ■ **Acceptance**
- ■ ■ **Propriety**

Multiple offers from commonly owned and/or controlled companies may be accepted unless the acceptance of such offers is prejudicial to the interests of the government or other offerors.

364

- **Offers**
- ■ **Competitive ranges**
- ■ ■ **Exclusion**
- ■ ■ ■ **Evaluation errors**

Under request for proposals calling for award to low technically acceptable offerors, agency determination that protester's proposal was outside of the competitive range was improper where agency determination was based on proposal's relative technical ranking, without consideration of price, and consequently agency violated Federal Acquisition Regulation § 15.609(a) (FAC 84-16) in establishing the competitive range.

403

-
- Offers
 - ■ Evaluation
 - ■ ■ Cost estimates

Contention that where solicitation contemplates award of a fixed-price, time and materials contract and requires the submission of cost and pricing data, agency must perform a cost analysis, is denied where adequate price competition was obtained, permitting agency to waive further submission of such cost data and perform a price analysis in lieu of a cost analysis.

368

- Offers
- ■ Evaluation
- ■ ■ Options
- ■ ■ ■ Prices

Where solicitation provided that offers would be evaluated for award "by adding the total price for all options to the total price for the basic requirement," contracting agency reasonably included in the evaluation the prices for option quantities of artillery fuzes that were not included in the basic requirement.

379

- Offers
- ■ Evaluation
- ■ ■ Personnel

Where none of the personnel required to perform the statement of work were "professional employees" as defined in the Federal Acquisition Regulation (FAR), contracting officer was not required to evaluate proposed professional employee compensation as specified in the standard FAR clause regarding evaluation of such compensation.

368

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Where evaluation under technical evaluation criteria for proposed facilities and production approach was based on detailed information in proposal and in-plant survey, protester's disagreement with agency determination that awardee's approach was acceptable does not establish that the termination was unreasonable.

379

■ Offers

■ ■ Evaluation errors

■ ■ ■ Non-prejudicial allegation

Even though evaluation of transportation costs on f.o.b. origin supply solicitation appears unreasonable, protest against the evaluation is denied, where the protester would not be in line for award, even assuming the application of its own transportation calculations.

364

■ Offers

■ ■ Prices

■ ■ ■ Rent

■ ■ ■ ■ Government property

In calculating imputed rental evaluation factor to be added to offeror's price to account for rent-free use of government-furnished property, agency reasonably relied upon period of use entered by offeror in evaluation clause, rather than authorized period of use on delivery schedule, where solicitation provided for evaluation based on period entered by offeror and where offeror would be required to pay rent if its use exceeded entered period.

379

■ Offers

■ ■ Risks

■ ■ ■ Pricing

Fact that original equipment manufacturer (OEM), the only source of necessary spare parts, is in position to influence competition by imposing restrictions upon spare parts availability does not render procurement defective where (1) the restrictions appear reasonable and have not been applied to prevent any particular firm from purchasing the parts and (2) the only alternative procurement method would be a sole-source award to the OEM, but record does not support conclusion that OEM is only acceptable source. Ability to obtain parts is matter of firm's ability to develop business relationship with OEM, a matter outside the General Accounting Office's purview.

418

■ Offers

■ ■ Submission time periods

■ ■ ■ Time restrictions

■ ■ ■ ■ Propriety

Where the protester effectively was permitted 2 hours to submit an offer due to the agency's unjustified failure to provide reasonable time to solicit offers, the protester was improperly deprived of an opportunity to compete.

427

■ Unbalanced offers

■ ■ Materiality

■ ■ ■ Determination

■ ■ ■ ■ Criteria

Awardee's offer of base and option quantities is not subject to rejection as materially unbalanced where there is no showing that the offer is unbalanced or that the award will not result in lowest ultimate cost to government.

380

Contract Management

■ Contract administration

■ ■ Contract terms

■ ■ ■ Compliance

■ ■ ■ ■ GAO review

Whether awardee actually complies with its contractual obligations is a matter of contract administration that is not reviewable under General Accounting Office's bid protest function.

369

■ Contract administration

■ ■ Convenience termination

■ ■ ■ Competitive system integrity

Where timely size protest is filed after small business-small purchase set-aside award and awardee does not contest Small Business Administration finding that it is other than a small business, intent of Small Business Act and integrity of competitive system is served by terminating the contract and, if otherwise appropriate, making award to only small business quoter.

392

Contractor Qualification

■ Responsibility

■ ■ Contracting officer findings

■ ■ ■ Affirmative determination

■ ■ ■ ■ GAO review

General Accounting Office will not review a protest of an affirmative determination of responsibility absent a showing that it may have been made fraudulently or in bad faith, or that definitive responsibility criteria set out in the solicitation were not met.

368

■ **Responsibility**

■ ■ **Contracting officer findings**

■ ■ ■ **Negative determination**

■ ■ ■ ■ **GAO review**

Protester properly was found nonresponsible where it failed to provide sufficient information to permit finding that individual sureties on its bid bond were acceptable and the record shows the contracting officer's nonresponsibility determination was reasonable.

387

■ **Responsibility**

■ ■ **Contracting officer findings**

■ ■ ■ **Negative determination**

■ ■ ■ ■ **Prior contract performance**

■ **Responsibility criteria**

■ ■ **Organizational experience**

Agency may properly consider manufacturing experience of parent corporation in finding that awardee subsidiary corporation met definitive responsibility criterion (5-year manufacturing experience requirement), where bid stated that product would be manufactured at parent corporation's facilities.

359

Noncompetitive Negotiation

■ **Use**

■ ■ **Justification**

■ ■ ■ **Urgent needs**

Protest is sustained where the agency, using noncompetitive procedures to award contract extension on a sole-source basis, fails to establish that the time constraints imposed by urgency prevented the agency from soliciting offers from other potential sources including the protester.

426

Sealed Bidding

■ **Bid guarantees**

■ ■ **Sureties**

■ ■ ■ **Acceptability**

Even though an individual surety may have been accepted by a contracting agency, another agency is not required to accept the surety where it reasonably finds the surety to be unacceptable based on information submitted to it.

388

■ Bids

■ ■ Acceptance time periods

■ ■ ■ Expiration

Where contracting officer deliberately allowed bid acceptance period to expire without making award in order to effect cancellation of solicitation which she had determined was warranted, General Accounting Office will review propriety of the decision to cancel.

395

■ Bids

■ ■ Responsiveness

■ ■ ■ Determination criteria

Where the identity of the bidder is clear from the bid as submitted and there is no indication that the bidder will not perform in accordance with the requirements of the solicitation, the bid is responsive.

359

■ Bids

■ ■ Responsiveness

■ ■ ■ Terms

■ ■ ■ ■ Deviation

Protester's bid for printing paper was properly rejected as nonresponsive where solicitation as a whole required bidders to agree to furnish paper with 50 percent waste paper content, and protester's bid offered zero percent content.

410

■ Contract awards

■ ■ Propriety

■ ■ ■ Recycled materials

■ ■ ■ ■ Cost increase

Award to lowest bidder offering to comply with mandatory solicitation requirement for 50 percent waste paper content, even though there was lower bid not meeting requirement, is consistent with Resource Conservation and Recovery Act of 1976 and Environmental Protection Agency implementing Guideline; although narrative accompanying Guideline indicates EPA's view that higher price for paper meeting minimum waste paper content requirement is unreasonable, neither statute nor Guideline prohibits paying such a premium.

410

■ Invitations for bids

■ ■ Cancellation

■ ■ ■ Justification

Contracting agency lacked compelling reason to cancel invitation for bids (IFB) for rental of construction equipment where apparent inconsistency between IFB provisions—which described certain requirements in terms of hourly and daily rates, but called for pricing on the basis of daily and

Procurement

weekly unit rates—did not prejudice any bidder, all bidders understood that daily and weekly unit pricing was required, they provided such pricing which was evaluated on a common basis, and an award under the IFB would meet the agency's actual needs.

395

■ Invitations for bids

■ ■ Cancellation

■ ■ ■ Justification

Where contracting officer deliberately allowed bid acceptance period to expire without making award in order to effect cancellation of solicitation which she had determined was warranted, General Accounting Office will review propriety of the decision to cancel.

395

Socio-Economic Policies

■ Preferred products/services

■ ■ American Indians

Determination of Bureau of Indian Affairs that joint venture comprised of Indian-owned concern and concern not Indian-owned does not qualify as a 51 percent Buy Indian Act concern, as required by the solicitation, is not unreasonable where, although the Indian firm controls 51 percent of the joint venture, only 55 percent of the Indian firm is owned by Indians and the aggregate total of Indian ownership of the joint venture therefore amounts to only 28 percent.

398

■ Small business set-asides

■ ■ Use

■ ■ ■ Procedural defects

Agency decision not to set aside procurement for small disadvantaged business (SDB) concerns is unreasonable where agency made no effort to ascertain SDB interest and capabilities and it appears that the agency reasonably should have expected to obtain offers from at least two responsible SDBs and make award at a price not exceeding the fair market price by more than 10 percent.

374

■ Small businesses

■ ■ Size status

■ ■ ■ Self-certification

■ ■ ■ ■ Good faith

Contracting officer properly accepted, at face value, the awardee's self-certification that it was a small business, in the absence of information that reasonably impeached the awardee's certification.

364

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Multiple/aggregate awards
- ■ ■ Price reasonableness

Finding of price unreasonableness under multiple-award Federal Supply Schedule solicitation was reasonable where proposal did not offer either most favored customer pricing—prices equal to or lower than lowest commercial prices—when evaluated on a product-by-product basis or lowest net price available to the government.

421

Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Justification
- ■ ■ ■ Sufficiency

Solicitation requirement that offerors complete original equipment manufacturer's (OEM's) maintenance training prior to preaward survey is unobjectionable where OEM, the only source of acceptable spare parts, will make parts available only to firms with training and there would be risk of delay in contract performance if training was not completed prior to award.

418

**Compiled in the Office of the General Counsel
Legal Publications and Writing Resources Section**

B-237938, April 2, 1990

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Determination criteria

Where the identity of the bidder is clear from the bid as submitted and there is no indication that the bidder will not perform in accordance with the requirements of the solicitation, the bid is responsive.

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ Prior contract performance

Procurement

Contractor Qualification

- Responsibility criteria
- ■ Organizational experience

Agency may properly consider manufacturing experience of parent corporation in finding that awardee subsidiary corporation met definitive responsibility criterion (5-year manufacturing experience requirement), where bid stated that product would be manufactured at parent corporation's facilities.

Matter of: Hardie-Tynes Manufacturing Company

L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for the protester.

Douglas K. Olson, Esq., Kilcullen, Wilson and Kilcullen, for IMPSA-International, Inc., an interested party.

Justin P. Patterson, Esq., Department of the Interior, for the agency.

Mary G. Curcio, Esq., Peter A. Iannicelli, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Hardie-Tynes Manufacturing Company protests the award of a contract for flow gates under invitation for bids (IFB) No. 9-SI-30-07760/DS-7800, to IMPSA International, Inc. (IMPSA-International), by the Bureau of Reclamation, Department of the Interior. Hardie-Tynes alleges that IMPSA-International submitted a nonresponsive bid and is a nonresponsible bidder.

We deny the protest.

Issued on July 28, 1989, the IFB solicited bids to design, furnish and deliver flow gates for the Roosevelt Dam, Salt River Project, Arizona, and the Hoover Dam, Boulder Canyon Project, Arizona-Nevada. Section L-22 of the IFB provided:

The bidder shall have experience in the manufacture of high-head slide gates and hydraulic hoists and in this respect shall have had equipment of similar complexity to that required by this solicitation/specifications in satisfactory operation for not less than 5 years.

At bid opening on September 28, the Bureau received six bids; IMPSA-International submitted the low bid of \$3,430,012, and Hardie-Tynes submitted the second-low bid of \$4,730,976. IMPSA-International, a Pennsylvania corporation with no manufacturing facility, stated in its bid that the gates would be manufactured in Argentina at the manufacturing facilities of its parent corporation, Industrias Metalurgicas Pescarmona S.A. (IMPSA-Argentina).

On October 5, Hardie-Tynes protested to the Bureau that IMPSA-International was ineligible for award because the firm did not meet the 5-year manufacturing experience requirement set out in section L-22 and was not a manufacturer for purposes of the Walsh-Healey Public Contracts Act. 41 U.S.C. §§ 35-45 (1982 and Supp. V 1987). The Bureau initially agreed that IMPSA-International was ineligible for award because it was not a manufacturer under the Act. Subsequently, IMPSA-International submitted three corporate documents (a power of attorney and agency agreement, a special power of attorney, and a document entitled "unanimous written consent of sole shareholder in lieu of annual meeting") to show that IMPSA-International represented IMPSA-Argentina and was authorized to bind IMPSA-Argentina in contracts for projects in the United States. The Bureau then determined that, because the equipment would be manufactured in Argentina and shipped directly to the United States government installations, the Walsh-Healey Public Contracts Act was not applicable. On November 27, the Bureau awarded the contract to IMPSA-International. Hardie-Tynes filed its protest with our Office on December 1.

Hardie-Tynes first alleges that the bid submitted by IMPSA-International is nonresponsive because it does not contain an unequivocal commitment to perform the contract. Specifically, Hardie-Tynes argues that, because IMPSA-International relied on the manufacturing experience of IMPSA-Argentina, it could have chosen to avoid the contract by not disclosing its relationship with IMPSA-Argentina. Hardie-Tynes also argues that the bid is nonresponsive because it is ambiguous as to whether IMPSA-International or IMPSA-Argentina is the bidding party, and, therefore, it is not clear which firm is obligated to perform the contract.

The test for responsiveness is whether a bid as submitted represents an unequivocal commitment to provide the requested supplies or services at a firm, fixed-price. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the solicitation, the bid is responsive. *Haz-Tad, Inc., et al.*, 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486. The determination as to whether a bid is responsive must be based solely on the bid documents as they appear at the time of bid opening. *Id.*

Here, the bid was submitted in the name of IMPSA-International and there was nothing on its face to indicate that IMPSA-International would not perform in accordance with the terms of the solicitation. Consequently, the bid as submitted was responsive. In examining the responsiveness of the bid, it would have been improper for the contracting officer to have relied on post-bid opening submissions concerning whether IMPSA-International met the solicitation requirement for manufacturing experience since, as explained below, that requirement relates to responsibility and has no bearing on the responsiveness of the bid. Insofar as Hardie-Tynes is arguing that the bid is ambiguous as to whether IMPSA-International or IMPSA-Argentina is the bidding party, it is clear from the bid itself that IMPSA-International was the bidder and that, even though the flow gates will be manufactured by IMPSA-Argentina, IMPSA-International is obligated to supply the flow gates to the government under the contract.

Furthermore, we find unpersuasive Hardie-Tynes' argument that IMPSA-International could have chosen not to disclose its corporate affiliation with IMPSA-Argentina in order to avoid being awarded the contract. IMPSA-International's bid clearly disclosed the only critical relationship between the two firms—that is, that IMPSA-Argentina would be doing the actual manufacturing for IMPSA-International, which had agreed to furnish the gates to the government. Theoretically, any bidder could attempt to be found nonresponsible by not cooperating with contracting officials who ask for relevant financial or corporate documents during the course of a responsibility determination. However, here, IMPSA-International cooperated fully by furnishing the corporate documents and, once found responsible and awarded the contract, was bound to perform the work.

Hardie-Tynes also protests that IMPSA-International, a Pennsylvania corporation with approximately 12 employees and no manufacturing facilities, is not a responsible bidder because it does not meet the manufacturing experience requirement of the IFB. Hardie-Tynes contends that while IMPSA-Argentina, the parent corporation, is a manufacturing company, IMPSA-International cannot rely on the experience of IMPSA-Argentina to meet the 5-year manufacturing experience requirement. To support this position Hardie-Tynes cites Federal Acquisition Regulation (FAR) § 9.104-3(d), which provides that affiliated concerns are normally considered separate entities in determining whether a contractor meets applicable standards for responsibility. Hardie-Tynes also argues that while the experience of a nonbidding entity can be used to determine the responsibility of a bidding party in appropriate circumstances, the bid must first

establish that the nonbidding entity whose experience is being relied upon is committed to perform the contract. Hardie-Tynes contends that the corporate documents submitted by IMPSA-International do not establish that IMPSA-Argentina made any commitment to manufacture flow gates for IMPSA-International when IMPSA-International acts in its own name; thus, Hardie-Tynes argues that the documents provide no basis for the Bureau to rely upon the experience of IMPSA-Argentina to find IMPSA-International responsible.

The Bureau agrees that IMPSA-International alone does not meet the experience requirement. The Bureau argues, however, that IMPSA-International properly may satisfy the 5-year experience requirement based on the manufacturing experience of its parent corporation, IMPSA-Argentina. According to the Bureau, it determined from the documents submitted by IMPSA-International—the unanimous written consent of sole shareholder in lieu of annual meeting, the special power of attorney, and the power of attorney and agency agreement—that IMPSA-Argentina was bound to manufacture the flow gates which IMPSA-International agreed to provide under the contract.

The Bureau further argues that the FAR does not prohibit using a parent corporation's experience to determine that a subsidiary corporation is responsible. In this connection, the Bureau cites FAR § 9.104-1, which provides in part that to be responsible, a prospective contractor must have the necessary experience or the ability to obtain it, and the necessary production facilities or the ability to obtain them. The Bureau concludes that it properly found IMPSA-International responsible based on the experience of IMPSA-Argentina, because the corporate documents provided to the Bureau by IMPSA-International clearly showed that IMPSA-International had the ability to obtain both the required manufacturing experience and facilities from the parent corporation.

Our Office does not generally review affirmative responsibility determinations since a contracting agency's determination that a particular bidder or offeror is responsible is based in large measure on subjective judgments. *Tama Kensetsu Co., Ltd., and Nippon Hodo*, B-233118, Feb. 8, 1989, 89-1 CPD ¶ 128. One exception to this rule is where a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure a bidder's or an offeror's ability to perform the contract. *Id.* A solicitation requirement that the prospective contractor have a specified number of years of experience in a particular area is a definitive responsibility criterion. *DJ Enters., Inc.*, B-233410, Jan. 23, 1989, 89-1 CPD ¶ 59. Where an allegation is made that definitive responsibility criteria have not been satisfied, the scope of our review is limited to ascertaining whether sufficient evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criteria have been met. *Id.*

In the present case the parties agree that IMPSA-International does not meet the experience requirement on its own, nor is there any dispute that IMPSA-Argentina does meet the experience requirement. The issue for resolution thus is whether IMPSA-International properly may be found responsible by considering the manufacturing experience of IMPSA-Argentina.

The experience of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience for a prime contractor-bidder. *Tama Kensetsu Co., Ltd., and Nippon Hodo*, B-233118, *supra*; *Allen-Sherman-Hoff Co.*, B-231552, Aug. 4, 1988, 88-2 CPD ¶ 116; *BBC Brown Boveri, Inc.*, B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309. We see little difference in this situation, where a subsidiary corporation is relying on its parent corporation to perform the work in question. See *Unison Transformer Servs., Inc.*, 68 Comp. Gen. 74 (1988), 88-2 CPD ¶ 471 (in performing a technical evaluation under a negotiated procurement, the procuring agency may consider the experience of a parent company where the offeror's subsidiary company represents that the resources of the parent company will be available to it). Accordingly, as IMPSA-International represented in its bid that the manufacturing would be performed by IMPSA-Argentina at the facilities in Argentina, we believe the Bureau properly considered IMPSA-Argentina's experience in determining that IMPSA-International met the experience requirement.

In reaching this conclusion, we note that, contrary to Hardie-Tynes' position, evidence of a firm commitment from the subcontractor to the prime contractor is not a prerequisite to considering the subcontractor's experience in determining that the prime contractor is responsible. See *Allen-Sherman-Hoff Co.*, B-231552, *supra*; *Contra Costa Elec., Inc.—Reconsideration*, B-200660.2, May 19, 1981, 81-1 CPD ¶ 381. Nevertheless, from IMPSA-International's bid and the corporate documents submitted to the Bureau, it is clear that IMPSA-Argentina was committed to IMPSA-International to manufacture the flow gates. The power of attorney and agency agreement, and the unanimous written consent of the sole shareholder in lieu of an annual meeting, give IMPSA-International the power to do all things necessary, and to execute all agreements and documents in the name of IMPSA-Argentina which IMPSA-International deems necessary or advisable, in order to submit bids for projects in the United States. In addition, the special power of attorney gives IMPSA-International's president the power to sign contracts of any kind on behalf of IMPSA-Argentina. Thus, IMPSA-International had the authority to commit IMPSA-Argentina to manufacture the flow gates, and, in fact, indicated its intention to do so by specifying in its bid that the flow gates would be manufactured by its parent.

Finally, we do not agree that FAR § 9.104-3(d) precludes a contracting agency from considering the experience of a parent corporation to find a subsidiary corporation responsible. While the provision does state that affiliated concerns are normally considered separate entities in determining whether the firm that is to perform meets the applicable standards of responsibility, it does not provide that a contracting agency may never rely on an affiliate to find a prospective contractor responsible. In our view, the provision would preclude using an affiliate's experience simply because it was an affiliate. However, where, as here, the bidder represents that the parent-affiliate will be performing the contract, we think the affiliate's experience properly may be considered. See FAR § 9.104-3(b), which recognizes that a contractor may be found responsible through its own resources or those of a subcontractor or by otherwise demonstrating that it has the ability to obtain the needed resources.

The protest is denied.

B-237716.2, April 3, 1990

Procurement

Competitive Negotiation

- Contracting officer duties
- ■ Information evaluation
- ■ ■ Fairness

While contracting officer, acting in good faith, may ordinarily rely on information provided by transportation rate specialists in calculating transportation costs on f.o.b. origin offers, he may not automatically do so if it leads to an improper or unreasonable evaluation of the offered prices.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation errors
- ■ ■ Non-prejudicial allegation

Even though evaluation of transportation costs on f.o.b. origin supply solicitation appears unreasonable, protest against the evaluation is denied, where the protester would not be in line for award, even assuming the application of its own transportation calculations.

Procurement

Socio-Economic Policies

- Small businesses
- ■ Size status
- ■ ■ Self-certification
- ■ ■ ■ Good faith

Contracting officer properly accepted, at face value, the awardee's self-certification that it was a small business, in the absence of information that reasonably impeached the awardee's certification.

Procurement

Competitive Negotiation

- Multiple offers
- ■ Acceptance
- ■ ■ Propriety

Multiple offers from commonly owned and/or controlled companies may be accepted unless the acceptance of such offers is prejudicial to the interests of the government or other offerors.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ Apparent solicitation improprieties

Protester's objection to the use of negotiated rather than sealed bid procedures is untimely when filed after award rather than prior to the closing date for receipt of proposals.

Matter of: Fiber-Lam, Inc.

Gordon Ayotte, for the protester.

Edward J. Korte, Esq., Office of Command Counsel, U.S. Army Materiel Command, for the agency.

Kathleen A. Gilhooly, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Fiber-Lam, Inc., protests the award of a contract to The Great Divide Defense Products under request for proposals (RFP) No. DAAA09-89-R-0773, issued by the U.S. Army Armament, Munitions and Chemical Command (AMCCOM) for a quantity of silhouette targets. Fiber-Lam contends that the Army's evaluation of transportation costs was in error, that the awardee's joint venture agreement did not meet the RFP's small business set-aside requirements, that the awardee and another offeror are commonly owned and should not have been allowed to submit separate offers, and that the procurement should have been conducted under sealed bid rather than negotiated procedures.

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

The RFP invited offers on the basis of both f.o.b. origin and f.o.b. destination, and provided that the government would award on the basis the contracting officer determined to be most advantageous to the government. The RFP further advised that transportation evaluation of offer(s) would be based on the f.o.b. origin prices plus government transportation costs from delivery point(s) to the destination(s) named, and that freight rates used in the evaluation would be those furnished by the Commander, Eastern Area, Military Traffic Management Command, Military Ocean Terminal, Bayonne, New Jersey.

Eleven offers were received by the July 7, 1989, closing date. Great Divide submitted the low f.o.b. origin offer of \$534,658 and Fiber-Lam the next low offer of \$566,040.10.¹ The Procurement Traffic Branch of AMCCOM computed transportation costs for the five low offerors, including Fiber-Lam and Great Divide, using transportation rates furnished by the Military Traffic Management Command (MTMC). This transportation evaluation showed \$3,813.29 in transportation costs for Great Divide and \$2,874 for Fiber-Lam. Based on this evaluation,

¹ Great Divide's f.o.b. destination offer was also the lowest received.

the contracting officer determined the f.o.b. origin offer submitted by Great Divide was the most advantageous and awarded that firm the contract on October 18, 1989.

Fiber-Lam contends that the Army's evaluation of transportation costs is obviously in error, since the government freight rates used in the computation are substantially lower than the rates quoted to Fiber-Lam by commercial carriers.

A contracting officer, acting in good faith, has a right to rely on the information provided by transportation rate specialists. *Pyrotechnics Indus., Inc.*, B-221886, June 2, 1986, 86-1 CPD ¶ 505; *Applied Optic Kinetics, Ltd.*, B-212332, Feb. 7, 1984, 84-1 CPD ¶ 150. However, the contracting officer may not automatically rely upon such information if it leads to an improper or unreasonable evaluation of the offered prices. See *Isometrics, Inc.*, B-219057.3, Jan. 2, 1986, 86-1 CPD ¶ 2.

In the present case, it does appear that the transportation costs are unrealistically low given the quantity of the silhouette targets and multiple locations to which they are to be delivered. Moreover, the record does not indicate the basis for MTMC's rates or whether this information was properly used by the contracting officer in calculating the transportation costs. Nor is there any indication these calculations were confirmed, even after they were questioned in the protest. Compare *Pyrotechnics Indus., Inc.*, B-221886, *supra*.

By Fiber-Lam's calculations, Fiber-Lam's transportation costs should be \$14,850 less than Great Divide's transportation costs.² Inasmuch as Great Divide's f.o.b. origin offer is \$31,382.10 less than Fiber-Lam's f.o.b. origin offer, it is apparent that Fiber-Lam is not prejudiced, even assuming the transportation costs were miscalculated. See *Donaldson Co., Inc.*, B-236795, Dec. 4, 1989, 89-2 CPD ¶ 514. Therefore, we deny this protest basis.

Fiber-Lam next contends that a "board manufacturer in Michigan" backed the awardee in "a joint venture situation," and asks for the name of the board manufacturer and whether the joint venture is eligible for the small business set-aside.

An offeror's eligibility for a small business set-aside involves a matter of its size status, which our Office generally will not review. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(2) (1989). The Small Business Administration (SBA) has conclusive statutory authority to determine matters of small business size status of federal procurements. See 15 U.S.C. § 637(b)(6) (1988). However, our Office will consider whether an offeror's self-certification that it is a small business should have been challenged by the contracting officer on a particular procurement. *Robertson and Penn, Inc., d/b/a Nat'l Serv. Co.*, 65 Comp. Gen. 874 (1986), 86-2 CPD ¶ 350. In this respect, although a contracting officer generally may accept, at face value, an offeror's self-certification, the contracting officer should refer the matter to the SBA if he has information prior to award that reasonably im-

² Based on commercial quotes, Fiber-Lam states its transportation costs would be \$43,050 while Great Divide's costs are \$57,900.

peaches the certification. *Creativision, Inc.*, 66 Comp. Gen. 585 (1987), 87-2 CPD ¶ 78.

The record here indicates that the contracting officer requested a pre-award survey of the awardee, reviewed the survey's section on the awardee's financial arrangements and saw no indication of any improper joint venture or other arrangement which would indicate that the awardee's small business certification was incorrect. On the contrary, information in the survey tended to confirm that the awardee was indeed small. Given the absence of information that would reasonably impeach Great Divide's self-certification, the contracting officer properly accepted Great Divide's small business certification as correct on its face.

Fiber-Lam also questions whether the awardee and another offeror, Great Divide Mfg., which are owned by essentially the same parties, should be allowed to submit separate offers on the same procurement. Fiber-Lam contends that it is not in the best interest of the government to allow submission of separate offers if it is possible for the lower priced offeror to withdraw its offer if the related higher priced offeror is next low.

The Army responds that it sees no prejudice to the government or other bidders in this instance, noting that the second corporation was formed "to qualify the company for 8(a) set-aside opportunities in the hope that more business can be generated." The Army states that the item being procured has not been nominated for consideration under the 8(a) program.

Multiple bidding, that is, the submission of bids on the same requirement by more than one commonly owned or commonly controlled company, or the same entity, is not objectionable where it does not give those bidders an unfair advantage and is thus not prejudicial to the interests of the government or other bidders. *Atlantic Richfield Co.*, 61 Comp. Gen. 121 (1981), 81-2 CPD ¶ 453 (prejudice found where awardee was to be selected by lottery, because the submission of multiple bids unfairly increased chance for award). We have found no prejudice from multiple bidding by two divisions of the same company where award was based on the lowest bid and all offerors had the same opportunity to submit the lowest bid. See *Pioneer Recovery Sys., Inc.*, B-214700; B-214878, Nov. 13, 1984, 84-2 CPD ¶ 520. The situation here is analogous to that in the *Pioneer* case since award here was made to the offeror submitting the lowest evaluated price, and all offerors had the same opportunity to submit the lowest offer. We see little potential for prejudice to the government from related offerors withdrawing lower priced offers on an RFP, as is speculated by the protester, since prices under an RFP are not publicly disclosed before award. Indeed, in this case, if Great Divide had withdrawn its offer, Fiber-Lam would have been the low offeror.

In its comments on the agency report, Fiber-Lam questions whether the awardee had an opportunity to submit a best and final offer or whether it submitted its offer before the RFP closing date. Our review of the record indicates that

award was made to Great Divide on the basis of its initial offer submitted by the RFP closing date.

Finally, Fiber-Lam's protest allegation concerning the use of negotiated rather than sealed bid procurements relates to an apparent solicitation impropriety which, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), must be filed prior to the closing date for the receipt of initial proposals. *Benju Corp.*, B-228571, Nov. 4, 1987, 87-2 CPD ¶ 445. Since Fiber-Lam did not protest until after award, this aspect of its protest is untimely and will not be considered.

The protest is denied in part and dismissed in part.

B-237865, April 3, 1990

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Cost estimates

Contention that where solicitation contemplates award of a fixed-price, time and materials contract and requires the submission of cost and pricing data, agency must perform a cost analysis, is denied where adequate price competition was obtained, permitting agency to waive further submission of such cost data and perform a price analysis in lieu of a cost analysis.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Personnel

Where none of the personnel required to perform the statement of work were "professional employees" as defined in the Federal Acquisition Regulation (FAR), contracting officer was not required to evaluate proposed professional employee compensation as specified in the standard FAR clause regarding evaluation of such compensation.

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Affirmative determination
- ■ ■ ■ GAO review

General Accounting Office will not review a protest of an affirmative determination of responsibility absent a showing that it may have been made fraudulently or in bad faith, or that definitive responsibility criteria set out in the solicitation were not met.

Procurement

Contract Management

- Contract administration
- ■ Contract terms
- ■ ■ Compliance
- ■ ■ ■ GAO review

Whether awardee actually complies with its contractual obligations is a matter of contract administration that is not reviewable under General Accounting Office's bid protest function.

Matter of: Research Management Corporation

Donald P. Young, Esq., Saul, Ewing, Remick & Saul, for the protester.

Lori S. Chofnas, Esq., Office of the General Counsel, Department of the Navy, for the agency.

Aldo A. Benejam, Esq., Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Research Management Corporation (RMC) protests the award of a contract to George G. Sharp, Inc., under request for proposals (RFP) No. N00140-89-R-1901, issued by the Navy as a total small business set-aside, for engineering and technical advisor services in support of the Habitability Self-Help Program. RMC, the incumbent contractor, contends that the Navy improperly failed to conduct a cost analysis of all offers as required by the applicable regulations and the RFP; failed to follow the evaluation criteria stated in the RFP; and failed to evaluate proposed compensation for professional employees in accordance with applicable regulations. RMC alleges that if the Navy had evaluated offers properly, it would have concluded that RMC was the lowest realistically-priced, acceptable offeror.

We deny the protest.

The Navy issued the RFP on March 29, 1989, for a 1-year base period with four 1-year options. The RFP sought offers for an indefinite quantity, time and materials contract, with fixed hourly labor rates, under which tasks would be required by delivery orders. The estimated level of effort for this project was 243,000 hours during the base year and each of the option years. Offerors responding to the RFP were directed to submit their technical and price proposals separately, with the price proposals showing "all elements of cost and such other cost data as . . . considered appropriate to support your [technical] proposal." Each offeror was also required to submit cost and pricing data with its proposal on a standard form (SF) 1411, "Contract Pricing Proposal Cover Sheet."

Three offerors responded to the RFP: Commercial Building Services, Inc. (CBS), Sharp and RMC. The Navy initially found only RMC's proposal technically acceptable, but concluded that the proposals submitted by Sharp and CBS could be made acceptable after discussions. Thus, the Navy held written and oral dis-

cussions only with CBS and Sharp, since there were no technical issues requiring discussions with RMC. After discussions, all three offerors were found technically acceptable and remained in the competitive range.

By letters dated October 18, the contracting officer requested best and final offers (BAFOs) from all three offerors. Each offeror was directed to review all aspects of its price proposal, including profit, in light of the competitive nature of the acquisition. Each offeror was also reminded that award would be made to the lowest priced, technically acceptable offeror, as explained in the RFP. The contracting officer also directed offerors to potentially questionable costs in their initial price proposals, and advised each of possible pricing mistakes.

BAFOs were received on October 25. Sharp's final price was \$28,150,377, while CBS's was \$28,943,218 and RMC's was \$30,765,426. After receiving notification from the Navy advising that Sharp was the apparent successful offeror, RMC protested to this Office.¹

RMC protests that the Navy improperly failed to perform a cost analysis of all offers before awarding a contract, in violation of the RFP and applicable regulations. According to RMC, since the RFP required submission of cost and pricing data; contemplated award of a time and materials type contract; and required that proposed costs be consistent with the offeror's proposed technical approach, the Navy was required to conduct a cost analysis. RMC argues that as a result of the Navy's failure to conduct a cost analysis, the Navy did not realize that RMC had submitted the lowest realistic price.

The Navy responds that while the RFP required the submission of cost and pricing data, a cost analysis was not required because the range of offered prices comprised adequate price competition within the meaning of FAR § 15.804-3(b). The Navy also argues that, contrary to the protester's characterization of the solicitation, the time and materials contract contemplated by the RFP is a fixed-price contract rather than a cost reimbursement type contract because offerors were required to commit to firm labor, overhead and profit rates, and, as a result, the contractor bore the risk of increases in labor or overhead costs. Further, the Navy argues that nothing in the solicitation advised offerors that proposals would be subjected to a cost analysis.

As noted above, the RFP required offerors to submit cost and pricing data on SF 1411, "Contract Pricing Proposal Cover Sheet." Submission of such cost data is mandated by the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988), for all negotiated contracts in excess of \$100,000, except in certain circumstances. The Act specifically exempts contracts awarded with "adequate price competition"

¹ The Navy informed our Office on December 28, 1989, that it would proceed with award to Sharp, notwithstanding the protest, pursuant to Federal Acquisition Regulation (FAR) § 33.104(b). RMC objects to the Navy's determination and finding of urgent and compelling circumstances. However, where an agency makes a determination to award a contract while a protest is pending, the agency's only obligation is to inform our Office of that decision, as the Navy has done here. See 31 U.S.C. § 3553(d)(2) (Supp. V 1987); FAR § 33.104(b). There is no requirement that a protester be allowed to rebut the agency's finding nor do we review such a determination. See, e.g., *The Taylor Group*, B-234294, May 9, 1989, 89-1 CPD ¶ 436.

from the requirement to submit such data. See 10 U.S.C. § 2306a(b)(1)(A); FAR § 15.804-3(b).

RMC correctly asserts that a contracting officer must perform a cost analysis when cost or pricing data are required under the Act. FAR § 15.805-1(b). When cost or pricing data are not required, the contracting officer must perform a price analysis to ensure that the overall price offered is fair and reasonable. *Id.* Guidelines for performing a price analysis are set forth at FAR § 15.805-2, although the FAR permits a contracting officer to use whatever price analysis he deems appropriate to ensure fair and reasonable prices.

As a preliminary matter, we note that the contracting officer conducted a price analysis in this procurement, consisting of comparing each offeror's price with current and historical cost data.² These cost data included information found in recent audit reports prepared by the Defense Contract Audit Agency (DCAA), the cost and pricing information submitted by each offeror, and historical data available to the Navy from previous contracts. Using this information, the contracting officer developed estimated prices for each offeror, and compared the estimate to the offeror's price to confirm that each offeror fully understood the RFP's requirements. The contracting officer also evaluated the proposals for pricing mistakes. Further, despite RMC's assertions to the contrary, the contracting officer performed a price analysis both before and after submission of BAFOs. Based on these price analyses and a comparison of the offerors' prices, the contracting officer determined that the prices offered were reasonable, and that Sharp was the lowest-priced offeror. See FAR § 15.805-2.

With respect to RMC's assertion that the contracting officer was required to perform a more detailed cost analysis because the RFP required submission of cost or pricing data, there is simply no requirement that a cost analysis be performed in every instance where an RFP requires offerors to submit cost data. See *Contract Servs., Inc.*, B-232689, Jan. 23, 1989, 89-1 CPD ¶ 54. As explained above, the Truth in Negotiations Act does not require submission of cost or pricing data where adequate price competition is achieved, and, when cost or pricing data are not required by the Act, there is no requirement for a cost analysis. FAR §§ 15.804-3(a), 15.805-1(b). Thus, we agree that since three offerors submitted proposals in response to this solicitation, which provided for award "to the low priced responsible offeror whose offer has been deemed technically acceptable," adequate price competition was obtained and the agency was not obligated to perform a cost analysis.

RMC next asserts that the Navy was required to perform a cost analysis because the RFP contemplated award of a time and materials contract. According to RMC, a cost analysis is required because a time and materials contract is a

² Each cost proposal listed the offeror's fully burdened, fixed hourly labor rates for estimated levels of effort for each of seven labor categories. Also, each proposal provided any burden rates to be applied to fixed annual amounts for travel/subsistence (\$1 million) and special materials (\$75,000), furnished in the RFP for evaluation purposes. These fully-burdened fixed hourly rates multiplied by the estimated level of effort for each labor category, combined with the offeror's burdened travel/subsistence and special materials costs, provided the basis for determining the price of each proposal.

cost-type contract providing the government little protection from contractor cost overruns. RMC also argues that a time and materials contract is more like a cost-type contract than a fixed-price contract because the government is generally obligated to reimburse the contractor for all direct labor hours expended in the performance of the contract.

The time and materials contract here has elements of both fixed-price and cost-type contracts. The contract price is fixed to the extent that offerors were required to propose fixed labor and burden rates for each of the seven labor categories involved in performance; on the other hand, the number of hours each offeror will require to perform the necessary services may vary depending on the tasks involved in each work order and the contractor's efficiency at performing that task. Thus, while we do not agree that a full-blown cost analysis is required whenever an agency uses a time and materials contract, in our view, contracting agencies should conduct a review of the proposals adequate to ensure that the proposed prices are reasonable and that the government will obtain the lowest overall cost.³

Here, we find that the price analysis performed by the Navy addressed the fixed-price portions of the contract, and that sufficient additional analysis was performed to protect the government's interest with respect to the one uncertain area of the contract price that could vary from one offeror to another—*i.e.*, the capabilities, and hence efficiency, of the personnel proposed by the contractor for performance. Specifically, the Navy's independent Technical Evaluation Committee (TEC) reviewed the qualifications and work experience of each offeror's proposed personnel according to the criteria in the solicitation to ensure that they were acceptable. In addition, the contract provides for notification and prior approval by the Navy of any key personnel proposed to be substituted during the performance of the contract. In our view, the TEC evaluation and the contract provisions regarding substitution of key personnel, together with the fixed-price rates for all labor, provide the government with the protection necessary to ensure that the contract price will not be unreasonable.⁴

Finally, we do not agree with RMC's assertion that the RFP itself anticipates that all offers will be subject to a cost analysis. Paragraph M31 of the RFP states, in relevant part:

³ In support of its position, RMC cites our decision in *Cerberonics, Inc.*, B-199924, B-199925, May 6, 1981, 81-1 CPD ¶ 351. In *Cerberonics*, we upheld an agency's decision to exercise options in both a cost-type contract and an indefinite quantity time and materials contract, even though the protester offered to perform the work at a lower cost. We observed that Cerberonics' promise to provide the agency a minimal savings—\$35,000 on a contract estimated to cost more than \$1 million—did not require the contracting officer to refrain from exercising a valid option because time and materials type contracts do not encourage effective cost control and require constant government surveillance. Our description of time and materials contracts in that decision simply does not create a requirement that contracting officers perform a full-blown cost analysis whenever an agency uses such a contract.

⁴ RMC also argues that a cost analysis should have been performed because paragraph L23 of the RFP incorporates the entire FAR and DFARS as if listed in their entirety in the contract, including DFARS § 215.805-70(a), which states that a cost realism analysis may be appropriate in certain circumstances even when adequate price competition exists. The provision cited by RMC, on its face, makes such analysis a matter of discretion.

Costs which are supported in the price proposal must be reconcilable to the personnel and methodology defined in the technical proposal or the overall proposal may be removed from the competitive range.

This provision, putting offerors on notice that proposed costs must be linked to performance, does not state that a cost analysis will be performed and does not create a requirement in addition to the requirement for a price analysis found in the regulations and performed by the contracting officer. Thus, none of RMC's arguments shows that the Navy erred in not performing a cost analysis on offers submitted in response to this solicitation.

RMC also protests that the contracting officer failed to evaluate each offeror's proposed compensation of professional employees consistent with the requirements of the solicitation and applicable regulations. RMC correctly notes that the RFP incorporates FAR § 52.222-46, "Evaluation of Compensation for Professional Employees." RMC argues that both the program manager and the assistant program manager positions required by the RFP must be filled by professional employees, and that RMC relied to its detriment on that RFP provision by proposing significantly higher hourly labor rates than did Sharp. RMC also implies that Sharp's lower hourly labor rates for these positions reflect its misunderstanding of the requirements of the RFP, and its failure to appreciate the importance of employing qualified personnel to fill these key positions.

The Navy responds that even though the RFP included the FAR clause regarding professional employee compensation, no professional employees were required to perform the work under this RFP, and hence the clause was inapplicable. The Navy argues that amendment No. 0004 to the RFP removed the solicitation's college education requirement for the two highest-ranking employees under this RFP—the program manager and the assistant program manager. Thus, according to the Navy, after release of amendment No. 0004 none of the labor categories in this procurement required a degree above a high school diploma, and no professional employees were required within the meaning of the professional employee clause.

Contracting officers are required to include the clause at FAR § 52.222-46, "Evaluation of Compensation for Professional Employees," in "solicitations for negotiated service contracts when the contract amount is expected to exceed \$250,000 and the service to be provided *will require meaningful numbers of professional employees.*" FAR § 22.1103 [Italic added]. The FAR defines a "professional employee" as ". . . any person meeting the definition of 'employee employed in a bona fide . . . professional capacity' given in 29 CFR 541." FAR § 22.1102. The FAR further explains that professional employees are those "having a recognized status based upon acquiring professional knowledge through prolonged study," and cites several examples of such professions. *Id.* The purpose of a review of compensation for professional employees under FAR § 52.222-46 is to evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether offerors understand the nature of the work to be performed. *See MAR, Inc.*, B-215798, Jan. 30, 1985, 85-1 CPD ¶ 121.

Based on the facts here, we concur with the Navy's assessment that none of the employees required to perform the work at issue were professional employees for purposes of the evaluation of professional compensation clause. RMC fails to explain convincingly why these employees fall within the scope of a clause written to apply to persons who have completed a period of prolonged study, when there is no requirement that these employees have a college education provided they have significant work experience. Further, RMC fails to show that the two program manager positions fit within the other definitions found in the FAR, or the additional guidance set forth at 29 C.F.R. § 541.3 (1989).

In addition, even assuming that the personnel required under the RFP, as amended, are "professional employees," as RMC argues, we find no support in the record for RMC's bare assertion that Sharp's lower compensation rates will not provide the Navy with the quality of personnel required under the RFP, or that Sharp did not fully understand the nature of the work to be performed.

Finally, RMC also questions whether Sharp can or will devote the resources necessary to successful performance of the contract. These allegations relate to the contracting officer's affirmative determination of Sharp's responsibility, which our Office will not review absent a showing that the determination may have been made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5). No such showing has been made here. Further, whether Sharp will comply with its contractual obligations is a matter of contract administration that is not reviewable under our bid protest function. 4 C.F.R. § 21.3(m)(1).

The protest is denied.

B-237965, April 3, 1990

Procurement

Socio-Economic Policies

■ **Small business set-asides**

■ ■ **Use**

■ ■ ■ **Procedural defects**

Agency decision not to set aside procurement for small disadvantaged business (SDB) concerns is unreasonable where agency made no effort to ascertain SDB interest and capabilities and it appears that the agency reasonably should have expected to obtain offers from at least two responsible SDBs and make award at a price not exceeding the fair market price by more than 10 percent.

Matter of: Kato Corporation

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.

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

Kato Corporation protests the Department of the Air Force's decision to issue invitation for bids (IFB) No. F32604-89-B-0038, for maintenance of family housing at Minot Air Force Base in North Dakota, on an unrestricted basis. Kato contends that under Department of Defense (DOD) Federal Acquisition Regulation Supplement (DFARS) § 219.502-72(a), the agency was required to issue the solicitation as a small disadvantaged business (SDB) set-aside.

We sustain the protest.

SDB set-asides serve a purpose similar to small business set-asides by ensuring equitable opportunities for SDB participation in government acquisitions. This special category of small business set-asides was established to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986), which also established a goal of awarding SDBs five percent of the dollar value of DOD contracts, beginning in fiscal year 1987. *Commercial Energies, Inc.*, B-237879, July 12, 1989, 89-2 CPD ¶ 40.

Family housing maintenance services at Minot Air Force Base have previously been procured by means of small business set-asides. The most recent contract, for a base period of December 30, 1988 to September 30, 1989, plus option years, was awarded to Kato, which had represented itself to be an SDB. However, on April 27, 1989, the Small Business Administration (SBA) determined Kato to be other than small due to its affiliation with Emerald Maintenance, Inc., and DESCO, Inc., with which it had entered into a joint venture to compete for the family housing maintenance contract at Grand Forks Air Force Base in North Dakota. The Air Force reports that this determination was a factor in the agency's subsequent decision not to exercise the options under Kato's contract. Accordingly, in a June 6 synopsis in the *Commerce Business Daily*, the agency publicized a small business set-aside procurement for the Minot Air Force Base services in issue.

Subsequently, on August 28, the SBA determined that Kato was not affiliated with Emerald or DESCO, and therefore recertified Kato as a small business.¹ According to Kato, it furnished this information to the contracting office at Minot Air Force Base in an August 31 letter requesting that its option be exercised.

However, as a result of the Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, 102 Stat. 3889, 3892 (1988), contracting officials determined that family housing maintenance services, including those

¹ Notwithstanding the recertification, the SBA ultimately ruled on Kato's previously filed appeal of the April 27 determination, holding on September 21 that Kato had not shown that the SBA was in error in finding Kato to have been other than small as of April 27. Again, however, at this juncture the SBA had recertified Kato as small (as of August 28), so this decision on appeal really had no practical effect.

at Minot, should not be set aside for small business, but instead should be procured on an unrestricted basis. In this regard, the Act designates four industry groups, including construction (which encompasses base housing maintenance), for which acquisitions are not to be considered for small business set-asides unless otherwise required. *Id.* §§ 713 and 717; Federal Acquisition Regulation § 19.102; DFARS § 219.1070-1; see *W.M. Marable, Inc., B-234987 et al.*, May 3, 1989, 89-1 CPD ¶ 425. Since the Act now precluded the setting aside of the Minot procurement for small businesses, the Air Force synopsis the procurement anew, on September 8, advising offerors that the procurement would be conducted on an unrestricted basis. On September 26, the agency issued the solicitation. Kato filed this protest prior to the bid opening, contending that the procurement should have been included under the DOD SDB set-aside program.

The regulations implementing the DOD SDB program, set forth in the DFARS, part 219, provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-72(a). The regulations also provide that the contracting officer should presume that these requirements are met if the acquisition history shows that: (1) within the past 12-month period a responsive offer from at least one responsible SDB concern was within 10 percent of the award price on a previous procurement of similar supplies or services, and (2) the contracting officer has reason to know (from the activity's relevant solicitation mailing list, response to presolicitation notices, or other sufficient factual information) that there is at least one other responsible SDB source of similar supplies or services. DFARS § 219.502-72(c).

Kato contends that, under the DFARS, the contracting officer was required to set aside this procurement for SDBs because there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns. In this regard, Kato points to the August 28 SBA determination that Kato was not affiliated with Emerald or DESCO and the subsequent recertification of Kato as a small business, and also notes that the agency's bidders mailing list for this solicitation includes approximately 24 firms, not including Kato, which were designated "SD" for small disadvantaged business.

The Air Force concedes in its report that the Small Business Competitiveness Demonstration Program Act does not preclude the use of SDB set-asides when the designated industries are involved, as the contracting officer initially determined.² The Air Force seems to argue preliminarily, however, that regulations

² We agree with the Air Force's position. The Small Business Competitiveness Demonstration Program Act expressly provides that the requirement for unrestricted competition does not apply to procurements "set-aside pursuant to . . . section 1207 of the National Defense Authorization Act for Fiscal Year 1987," section 713(a), while DOD's implementing regulations provide that acquisitions in the designated industry groups "shall continue to be considered . . . for small disadvantaged business set-asides." DFARS § 219.1070-1(a). It follows from these provisions that the Small Business Competitiveness Demonstration Program Act did not relieve the agency of the obligation to procure services or supplies by means of an SDB set-aside where otherwise required by statute or regulation.

implementing the Act—stating that acquisitions shall be “considered . . . for” SDB set-asides (see footnote 2, above)—confer discretion upon the agency in this regard. Thus, it apparently is the agency’s position that there is never a requirement to set aside a particular procurement for SDBs; the contracting officer need only “consider” the possibility of an SDB set-aside where the conditions specified in the DFARS exist.

We do not agree. The language in question appears only in regulations implementing the Small Business Competitiveness Demonstration Program Act. DFARS § 219.1079-1(a). This provision in no way purports to reduce the requirement for SDB set-asides under the circumstances specified under DFARS § 219.502-72(a), *i.e.*, where offers from two responsible SDB concerns are expected and the agency expects a contract within 10 percent of the fair market price. Indeed, the Air Force’s view would seem to be inconsistent with section 601 of Public Law 100-656 (the statute which includes the Small Business Competitiveness Demonstration Program Act), which amended the Small Business Act to require contracting officials to “increase, insofar as possible, the number” of procurements under the SDB set-aside program. We therefore think it is clear that this provision was intended merely to clarify that the prohibition on the use of small business set-asides in the designated industry groups did not also amount to a prohibition on the use of SDB set-asides; it was not intended to alter the SDB program.

The Air Force primarily argues that the circumstances specified in DFARS § 219.502-72(a) as warranting an SDB set-aside did not exist here, since the contracting officer was unaware of any SDBs “with the necessary experience to handle a contract of this magnitude.” The agency does not dispute Kato’s ability to perform, but points to the April 27 SBA determination, upheld on appeal on September 21, that Kato was other than small, and concludes that Kato was not an eligible SDB. The Air Force further notes that only one of the 13 bids received under the fiscal year 1989 solicitation was submitted by an SDB (we presume the agency is referring to a firm other than Kato).

Applying the DFARS standard, we find that contracting officials should reasonably have expected that offers would be obtained from at least two responsible SDB concerns, and that award would be made at a price not exceeding the fair market price by more than 10 percent. First, we think it is clear that contracting officials should have been aware that Kato, the incumbent contractor, was a potential SDB source for this procurement. In this regard, we note that the Air Force (1) has not disputed Kato’s assertion that it informed contracting officials at Minot of the August SBA recertification of Kato as a small business; (2) has not questioned Kato’s self-certification in its prior bid that Kato itself, in the absence of affiliation, is an SDB; and (3) has not argued that Kato, the incumbent contractor, was other than a responsible concern.

Second, we find that contracting officials reasonably should have expected to obtain additional offers from other responsible SDB concerns. Although the Air Force claims it was unaware of any additional potential SDB sources, it has failed to explain why it did not consider the numerous SDB concerns on its own

mailing list to be qualified potential sources. (Indeed, the agency does not even address this point.) In fact, the record contains no evidence that contracting officials even attempted to contact any of the approximately 24 SDBs on the mailing list to ascertain their interest in, and qualifications for, this procurement. Nor is there any indication that contracting officials had otherwise concluded all of the listed SDBs were uninterested in competing. Five of the listed small SDB concerns have submitted affidavits to us stating they were interested in competing if the procurement were set aside for SDBs; four of these firms state that they have satisfactorily performed housing maintenance services similar in scope to those solicited here. We conclude from these affidavits that a number of SDB firms may have been both interested and responsible sources.

In the analogous situation of determining whether a small business set-aside is required (FAR § 19.502-2 requires such set-asides where the agency determines that offers will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price), a contracting office must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small business concerns with the capability to perform the work. It therefore is unreasonable for an agency to issue a solicitation on an unrestricted basis where the determination not to set the procurement aside was based on outdated or incomplete information. See *The Taylor Group, Inc.*, B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129.

We believe the same rule should apply under the SDB program regulations. Certainly, having reason to know that the incumbent contractor was an SDB concern, which had received award for the same services in the last year, the agency could not, as it apparently did here, simply dismiss the possibility of obtaining at least one additional offer from a responsible bidder among the 24 SDBs on its mailing list without undertaking some investigation of the potential sources. See generally DFARS § 219.502-72(c).

We conclude that the Air Force failed to consider the apparent potential for SDB participation in the procurement. As the agency also never determined, and has presented no evidence suggesting, that acceptable prices would not be received if the procurement were set aside, we find unreasonable the determination to issue the solicitation on an unrestricted basis.³

The protest is sustained.

By separate letter to the Secretary, we are recommending that the procurement be set aside for SDB concerns unless adequate investigation clearly demonstrates that no responsible, potential source in addition to Kato is likely to

³ We recognize that DFARS § 219.502-72(b)(1) provides that a total SDB set-aside shall not be conducted where, as here, the product or service has been previously acquired successfully on the basis of a small business set-aside. However, in the Small Business Competitiveness Demonstration Program Act of 1988, Congress determined that small business concerns in the industry group at issue do not need special protection; furthermore it indicated that the consequent mandate for unrestricted competition remains subject to the implementation of the policy in favor of SDB set-asides. Sections 713 and 717. Since a small business set-aside is no longer appropriate, we do not believe the fact that the base housing maintenance services had previously been procured on the basis of a small business set-aside invokes the subsection (b)(1) exception to the general requirement for the contracting officer to consider an SDB set-aside here.

submit an offer that would result in award at a price not exceeding the fair market price by more than 10 percent. In addition, we find that Kato is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1989); see *Falcon Carriers, Inc.*, 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

B-237987, April 3, 1990

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Options
- ■ ■ ■ Prices

Where solicitation provided that offers would be evaluated for award "by adding the total price for all options to the total price for the basic requirement," contracting agency reasonably included in the evaluation the prices for option quantities of artillery fuzes that were not included in the basic requirement.

Procurement

Competitive Negotiation

- Offers
- ■ Prices
- ■ ■ Rent
- ■ ■ ■ Government property

In calculating imputed rental evaluation factor to be added to offeror's price to account for rent-free use of government-furnished property, agency reasonably relied upon period of use entered by offeror in evaluation clause, rather than authorized period of use on delivery schedule, where solicitation provided for evaluation based on period entered by offeror and where offeror would be required to pay rent if its use exceeded entered period.

Procurement

Competitive Negotiation

- Offers
- ■ Evaluation
- ■ ■ Technical acceptability

Where evaluation under technical evaluation criteria for proposed facilities and production approach was based on detailed information in proposal and in-plant survey, protester's disagreement with agency determination that awardee's approach was acceptable does not establish that the determination was unreasonable.

Procurement

Competitive Negotiation

- Unbalanced offers
- ■ Materiality
- ■ ■ Determination
- ■ ■ ■ Criteria

Awardee's offer of base and option quantities is not subject to rejection as materially unbalanced where there is no showing that the offer is unbalanced or that the award will not result in lowest ultimate cost to government.

Matter of: Accudyne Corporation

Lanny J. Davis, Esq., and Joseph S. Mahaley, Esq., Patton, Boggs, & Blow, for the protester.

Steven S. Diamond, Esq., and Justin M. Dempsey, Esq., Arnold & Porter, for the interested party, Bulova Systems & Instruments Corporation.

Jerry L. Dodd, Esq., for the interested party, Honeywell, Inc.

Judith A. Sukol, Esq., and Robert J. Panise, Esq., Department of the Army, for the agency.

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

Accudyne Corporation protests the U.S. Army Materiel Command's (AMC's) award of contracts to Honeywell, Inc., and Bulova Systems & Instruments Corporation, under request for proposals (RFP) No. DAAA21-89-R-0014, for M762 and M767 artillery electronic time fuzes. Accudyne contends that it would be the low offeror in line for award had proposal prices been properly evaluated.

We deny the protest.

The solicitation advised that the agency intended to award two fixed-price, incentive-type contracts to the two lowest-priced, technically-acceptable offerors in order to establish a competitive mobilization base for production of the fuzes. In addition to basic quantities of 76,000 and 85,000 M762 fuzes, Option II under the solicitation provided for purchase of additional, optional stepladder quantities of 100,000-150,000 M762 fuzes, 150,001-200,000 M762 fuzes, 200,001-250,000 M762 fuzes, 250,001-317,000 M762 fuzes, 10,000-40,000 M767 fuzes, and 40,001-61,000 M767 fuzes. The solicitation incorporated by reference Federal Acquisition Regulation (FAR) § 52.217-5, which provides that offers will be evaluated for purposes of award "by adding the total price for all options to the total price for the basic requirement"; as amended, the solicitation further specified that the agency would determine the low price by evaluating the extended prices for the basic requirements "plus that combination of Option II prices that result in the lowest prices to the U.S. Government." In addition, for purposes of equalizing the competitive advantage resulting from rent-free use of government-furnished

property (GFP), proposed rent-free use of GFP would be evaluated by adding to the offer an imputed rental factor, calculated pursuant to FAR § 52.245-9.

Eleven proposals were received in response to the solicitation; AMC found eight of the proposals technically acceptable and requested the submission of best and final offers (BAFOs). After examining the prices for various combinations of the basic and option quantities, the contracting officer determined that the lowest cost to the government would result from awarding Honeywell a contract for the basic requirement of 85,000 M762 fuzes (plus options for a possible additional 317,000 M762 fuzes and 61,000 M767 fuzes), and awarding Bulova a contract for the basic requirement of 76,000 M762 fuzes (plus options for a possible additional 317,000 M762 fuzes and 61,000 M767 fuzes). Honeywell's price for the basic requirement and option quantities included in its contract totaled \$34,804,308; the agency determined that \$19,369 should be added to this total, for evaluation purposes, as an imputed rental factor accounting for Honeywell's proposed use of GFP. Honeywell's resulting evaluated price of \$34,823,677 was \$1,778,435 lower than Accudyne's price of \$36,602,112. Bulova's price for the basic requirement of 76,000 M762 fuzes plus the option quantities included in its contract totaled \$34,794,409; the agency determined that \$22,115 should be added to this total for evaluation purposes as the imputed GFP rental factor. Bulova's resulting evaluated price of \$34,816,524 was \$1,128,946 lower than Accudyne's price of \$35,945,470.

Accudyne first contends that AMC improperly included the prices for the M767 option quantities in the evaluation. Accudyne interprets the language of the incorporated FAR § 52.217-5 clause, that prices would be evaluated "by adding the total price for all options to the total price for the basic requirement," as limiting the evaluation to the price for all options *for the basic requirement*. In other words, since the basic requirement here consisted only of M762 fuzes, Accudyne maintains that only the option quantities of the M762 fuze should be considered in the evaluation.

We disagree. When a dispute exists as to the actual meaning of a solicitation provision, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation; to be reasonable, an interpretation must be consistent with such a reading. See *Aerojet Ordnance Co.*, B-235178, July 19, 1989, 89-2 CPD ¶ 62. As discussed above, the solicitation here provided that the agency would award contracts for both the basic and the Option II quantities, the latter of which included option quantities of the M767 fuze, and that it would determine the low price by evaluating the price for the basic requirement and the most favorable "combination of Option II prices," that is, prices for the M762 and M767 option quantities. Likewise, the incorporated FAR § 52.217-5 clause by its terms mandates considering in the evaluation the "total price for *all* options." (*Italic added.*) We conclude that the RFP clearly provided for evaluation of the M767 option quantities; Accudyne's contrary interpretation is inconsistent with the RFP and therefore is unreasonable.

Accudyne next challenges the calculation of the imputed rental factor to be added to Honeywell's and Bulova's proposals to account for their proposed use of GFP. Accudyne notes that under one combination of basic and option quantities—the 76,000 unit basic requirement for M762 fuzes and the 10,000–40,000 unit M767 option—Bulova's price exclusive of the imputed rental factor was only \$85,557 lower than Accudyne's price for an equivalent quantity, while under another combination of basic and option quantities—the 85,000 unit basic requirement for M762 fuzes, the 250,001–317,000 unit M762 option and the 10,000–40,000 unit M767 option—Honeywell's price was only \$1,562,081 lower than Accudyne's for a similar quantity. Accudyne argues that, properly calculated, the imputed rental factor could total in excess of \$100,000 for Bulova and \$1.7 million for Honeywell, and therefore exceed the price differences between those proposals and Accudyne's proposal.

We find no merit to Accudyne's position. The solicitation generally provided for the imputed rental factor to be computed as follows: (acquisition cost) multiplied by (monthly rental rate) multiplied by (production period in months) multiplied by (pro rata share of the GFE allocable to this contract), divided by (the quantity of units to be procured), so as to yield a constant per unit evaluation factor. Accudyne's calculations resulting in a higher rental factor are incorrect in two respects. First, its formula uses a production period based on the maximum delivery schedule permitted under the contract, 38 months, rather than the 13 month period used by the agency; Accudyne's calculation increases the numerator and thus results in a higher evaluation factor.

However, the 38 month figure used by Accudyne is inconsistent with the solicitation. Clause M3(b) of the RFP provided that "the months that will be used for the purpose of this evaluation [of the imputed rental factor] will be the period computed in months set forth by the offeror: ——— Months," with the contractor liable to pay rent for any use exceeding this period. Honeywell and Bulova entered 13 months in the space provided, and AMC evaluated their proposal on this basis. As this evaluation approach was consistent with the RFP, it was proper; by the same token, using 38 months as the production period would have been improper, since it would be contrary to the specific RFP terms. See *NI Indus., Inc.*, B-218019, Apr. 2, 1985, 85-1 CPD ¶ 383.

Accudyne argues that the 13 month entries should not have been used in the evaluation because they were inconsistent with Honeywell's request elsewhere for permission to use the GFP for 25 months and Bulova's request elsewhere to use the GFP for 38 months. Honeywell and Bulova, however, explain that a longer period of authorization was required to assure that the period of actual use would fall within the period of authorized use. In any case, even where a proposal requests a different period of authorization for use of GFP, the time period actually set forth by offerors in the relevant clause (here, M3(b)) is controlling where the solicitation indicates the evaluation will be based on that entry. *NI Indus., Inc.*, B-218019, *supra*.

Accudyne's higher rental factor also is improperly inflated by the fact that the firm calculates the per unit factor by dividing the numerator by the basic re-

quirement quantity but then, in determining the total evaluation factor, multiplies the per unit factor by the basic quantity *plus* all option quantities. We find no basis for using two different quantities in calculating the total rental factor. Under the formula set forth in the RFP, the numerator essentially represents the total rental factor. To obtain a per unit factor, the RFP provides for dividing the numerator by the quantity being procured; it follows that, to change the resulting per unit factor back into a total evaluation factor, the per unit factor should simply be multiplied by the *same* quantity previously divided into the numerator. By instead using a higher number in this second operation, Accudyne's approach results in a total factor greater than the product of the per unit factor multiplied by the total quantity, and therefore is incorrect.

Accudyne challenges the agency's calculation of the rental factor on other grounds but, in view of our findings above, we need not address these remaining objections; even if Accudyne were correct, the magnitude of the resulting corrections would not be sufficient to displace Honeywell or Bulova.

Accudyne also questions the evaluation of technical proposals and other aspects of the cost proposals. First, Accudyne maintains that the agency failed to consider Honeywell's proposed facility and approach to production, and the credibility of its proposed costs, which the RFP stated would be evaluated in determining acceptability. According to Accudyne, Honeywell significantly underestimated and misrepresented the amount of government-furnished factory space it would need in production and that the agency improperly relied on Honeywell's estimate.

An agency's technical proposal evaluation and cost realism analysis will be deemed proper unless shown to be unreasonable or inconsistent with the solicitation's evaluation scheme. See *Bellsouth Gov't Sys. Inc.*, B-231822.3, Mar. 28, 1989, 89-1 CPD ¶ 313; *Science Applications Int'l Corp.*, B-232548, B-232548.2, Jan. 23, 1989, 89-1 CPD ¶ 52. Accudyne has not made this showing.

Honeywell described in detail in its proposal the layout and organization of its proposed production line. The government's preaward survey team examined the government-owned facility Honeywell proposed to use and specifically found "all aspects of the plant facilities . . . adequate"; further, after reviewing Honeywell's proposed plan to modify the space, the team found that Honeywell possessed the technical capability to perform. Based on Honeywell's proposal and the in-plant survey, the contracting officer determined that Honeywell had proposed adequate production facilities and an acceptable technical approach. Although Accudyne and Bulova appear to have proposed more space for their production facilities, the agency maintains that each production line is unique and must, as was done here, be evaluated on the basis of its particular characteristics. We find this explanation rational, and conclude that the agency adequately reviewed Honeywell's proposed production line (the details of which are unknown to Accudyne), and thus properly found it to be acceptable. Accudyne's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable. See *Unisys Corp.*, B-232634, Jan. 25, 1989, 89-1 CPD ¶ 75.

Accudyne alleges that AMC's evaluation of Bulova's proposal failed to take into consideration Bulova's probable place of performance. The protester speculates that Bulova, which acquired ownership of Hamilton Technology, Inc., another offeror, after submission of initial offers and prior to submission of BAFOs, in fact intends to perform at Hamilton facilities rather than at the Bulova plant listed in its proposal. According to the agency, however, Bulova has reaffirmed its intention to perform at the Bulova facility specified in its proposal and Bulova's proposal therefore was properly evaluated on this basis. Accudyne has furnished no evidence in support of its allegation, and its speculation provides no basis for questioning the evaluation in this regard. See *Creative Sys. Electronics, Inc.*, B-235388.2, Aug. 24, 1989, 89-2 CPD ¶ 175.

Accudyne further alleges that Bulova's proposal should have been rejected for unbalanced pricing. The solicitation incorporated by reference FAR § 52.217-5(b), which provides that the government may reject an offer if it is materially unbalanced as to prices for the basic requirement and the option quantities. Accudyne maintains that unbalancing is demonstrated by the fact that Bulova offered the same unit price for the 10,000-40,000 unit option quantity of M767 fuzes as it did for the 200,001-250,000 unit quantity of M762 fuzes. According to the protester, this demonstrates that Bulova must have failed to include in its M767 price testing and other developmental costs for the M767 fuze, and instead may have "front loaded" its offer by building these costs into its price for the basic (M762) requirement.

Bulova's proposal is not unbalanced. First, nothing in the record supports the premise of Accudyne's that the prices of the two quantities of fuzes should be markedly different. AMC reports that, in fact, no additional testing and development costs should be necessary for the M767 fuze; both fuzes "are nearly identical" with respect to work required of the contractor, both fuzes can be made on the same production line at the same time, and the costs for each should be "about the same." Furthermore, Bulova's pricing is similar to both Honeywell's and Accudyne's pricing; all three offerors appear to have included costs of initial production in their prices for the basic requirement and to have taken advantage of economies of scale in pricing the option quantities. Accudyne's unit price for the maximum stepladder option quantity of M762 fuzes is 64 percent of its price for the basic 85,000 unit quantity, while Honeywell's unit price for the higher option quantity is 59 percent and Bulova's unit price is 57 percent of their respective unit prices for the basic requirement.

An offer is materially unbalanced only where there is a reasonable doubt that award to the offeror will result in the lowest ultimate cost to the government. See *Paccar Defense Sys.*, B-232530.2, Jan. 3, 1989, 89-1 CPD ¶ 1. No such doubt has been shown here. Although Bulova's and Honeywell's evaluated prices become low only upon exercise of the first option quantity, AMC reports that it expects to exercise the options. Accudyne has not alleged or shown otherwise. *Robertson & Penn, Inc.*, B-234082, Apr. 10, 1989, 89-1 CPD ¶ 365.

The protest is denied.

Civilian Personnel

Compensation

■ **Overtime**

■ ■ **Eligibility**

■ ■ ■ **Travel time**

Two Navy employees are not entitled to overtime or compensatory time for time spent in travel outside normal work hours to ships in response to messages requesting technical assistance to correct equipment breakdowns. The employees have not presented sufficient evidence or documentation which would indicate that travel was of an immediate official necessity and to an event that was unscheduled and administratively uncontrollable so as to permit payment under 5 U.S.C. § 5542 (1988). The burden of proof is upon the claimants to establish the liability of the United States and the claimant's right to payment.

Matter of: Benjamin Brown and John R. Schacht—Claim for Overtime Travel during Nonduty Hours

This decision is in response to a request from the Commander, Navy Regional Finance Center, Washington, D.C.¹ The issue presented is whether two Navy employees are entitled to overtime compensation or compensatory time for time spent in travel outside of normal work hours. We hold that the two employees may not be paid overtime or compensatory time for time spent in travel outside of normal work hours since they have not presented sufficient evidence to show that the conditions which would warrant payment have been met.

Background

Mr. Benjamin Brown and Mr. John R. Schacht are both employed as Electronic Technicians with the U.S. Atlantic Fleet in Norfolk, Virginia. Their claims arose as the result of travel they performed to various ships in response to casualty report messages which the employees have characterized as urgent requests for technical assistance to correct equipment breakdowns.

Mr. Brown's claim involves five temporary duty assignments he performed between April 1981 and March 1984. Mr. Schacht's claim involves one trip he took in May 1984. Both employees claim that the emergency nature of their work required them to travel at once outside of their normal duty hours, and equipment failure is an example of an administratively uncontrollable event which would permit payment of overtime compensation for travel under the provisions of 5 U.S.C. § 5542 (1988).

With the exception of one trip taken by Mr. Brown to Holy Loch, Scotland, on June 25, 1982, neither the employee or the Navy have furnished any information as to when the message request for assistance was first received so that a correlation between the date of the request and the employee's actual travel

¹ Navy References: Code 431(YHW), 7240(B)(S). Cl. Vou. 189308, 3 July 84; 189310m 24 Aug. 84.

time can be made. Further, outside of the employees' statement that the travel was of an emergency nature, there is no documentation or other evidence to this effect, such as statements from supervisors directing the employees to leave at once. The Navy has not commented on whether or not the travel could have been scheduled during the employees' work hours.

Opinion

Time spent in a travel status is not hours of employment unless it occurs within regularly scheduled work hours or, if outside those hours, unless it meets the requirements of 5 U.S.C. § 5542(b)(2)(B) (1988). The statutory provision in question here is the one which permits overtime if the travel results from an event which could not be scheduled or controlled administratively.

This statutory authority has been interpreted to require the satisfaction of two conditions. First, the event requiring off-duty travel must be administratively uncontrollable, *Dr. L. Friedman*, 65 Comp. Gen. 772 (1986). Secondly, there must exist an immediate official necessity occasioned by the unscheduled and administratively uncontrollable event. *John B. Schepman, et al.*, 60 Comp. Gen. 681 (1981). Thus, in 49 Comp. Gen. 209 (1969), we held that travel on a nonworkday to repair gun mounts on a ship was not due to a sudden emergency and scheduling was under administrative control where the damage occurred over a period of time. See also *Aimee A. Stover*, B-229067, Nov. 29, 1988, where her travel to a port prior to a ship's arrival was held not compensable as overtime since adequate notice of the arrival was available. Cf. *Gary A. Pace*, 68 Comp. Gen. 229 (1989).

In the present case, neither Mr. Brown nor Mr. Schacht has presented sufficient documentation or evidence which would indicate that there was an immediate official necessity for the travel occasioned by an administratively uncontrollable event. In fact, Mr. Brown's itinerary for his trip to Holy Loch, Scotland, in 1982 is the only example of his travel which shows the date of a message request for equipment assistance and the corresponding date of his travel, and it indicates a 9-day delay in travel. These facts do not support a finding of an immediate official necessity since there was ample time to administratively schedule the travel.

We also note that Mr. Brown seems to be claiming travel overtime for August 12, 1981, on the basis that a military flight was not available, he had to take a commercial flight, and such event could not be administratively controlled. This is an erroneous interpretation of the basis for travel overtime since the "event" is the original cause of the overtime and not events occurring in the course of travel such as an unavailable flight. *Eunita Davis*, B-231800, Feb. 3, 1989.

Claims presented to this Office are settled based on the written record, with the burden placed on the claimant to establish the liability of the United States and the claimant's right to payment. 4 C.F.R. § 31.7 (1989). Accordingly, in the absence of further documentation in support of Mr. Brown's and Mr. Schacht's

claims showing their entitlement to travel overtime, their claims are denied. *Christopher Hahn*, B-233389, June 23, 1989; *Louis R. Crooke*, B-229193, Dec. 11, 1987.

Mr. Brown was covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1982), for a brief period of time, and we have held that where FLSA provides an employee with a greater pay benefit than that to which he is entitled under 5 U.S.C. § 5542, the employee is entitled to the FLSA benefit. *Dian Estrada*, 60 Comp. Gen. 434 (1981). Generally, a nonexempt employee is entitled to FLSA overtime under the circumstances presented when an employee travels as a passenger on nonworkdays outside of the workweek during hours which correspond to his/her regular working hours. *Mary Joyce Lynch and Darlene I. Drozd*, 61 Comp. Gen. 115 (1981); 5 C.F.R. § 551.422(a)(4) (1988). Hence, Mr. Brown is entitled to FLSA overtime pay if his travel complies with that standard.

The Navy also reports that Mr. Brown was paid overtime for time traveled on his return trip home and that this payment may have been in error. The Navy is correct in its view since prior to an amendment to the statutory authority in 5 U.S.C. § 5542 in 1984 the employee's return travel also had to be to an event that was administratively uncontrollable. *Daniel L. Hubbel, et al.*, 68 Comp. Gen. 29 (1988). If the amount of the erroneous overpayment is less than \$500 it may be considered for waiver by the head of the agency or his designee in accordance with 5 U.S.C. § 5584(a)(2)(A). If the overpayment is more than \$500 it may be forwarded to this Office in accordance with our standard procedures, 4 C.F.R. part 92 (1989).

B-238010.2, April 5, 1990

Procurement

Contractor Qualification

- Responsibility
- ■ Contracting officer findings
- ■ ■ Negative determination
- ■ ■ ■ GAO review

Protester properly was found nonresponsible where it failed to provide sufficient information to permit finding that individual sureties on its bid bond were acceptable and the record shows the contracting officer's nonresponsibility determination was reasonable.

Procurement

Sealed Bidding

- Bid guarantees
- ■ Sureties
- ■ ■ Acceptability

Even though an individual surety may have been accepted by a contracting agency, another agency is not required to accept the surety where it reasonably finds the surety to be unacceptable based on information submitted to it.

Matter of: Southern California Engineering Co., Inc.

Phillip W. Akwa, for the protester.

Vasio Gianulias, Esq., Office of the General Counsel, Department of the Navy, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Southern California Engineering Co., Inc., protests the rejection of its bid under invitation for bids (IFB) No. N62474-88-B-4268, issued by the Department of the Navy for a no break power system at the Pacific Missile Test Center, Point Mugu, California. The Navy rejected Southern's bid because its individual bid bond sureties were found nonresponsible.

We deny the protest.

The IFB required bidders to submit a bid bond in an amount equal to 20 percent of the bid price. In the event the required bid bond named individuals as sureties rather than a corporation, two or more responsible sureties were required to execute the bid bond, and the bidder was required to provide a completed standard form (SF) 28, Affidavit of Individual Surety, setting forth financial information for each individual. The SF 28 includes a Certificate of Sufficiency that must be executed by specified bank officers or government officials.

Six bids were received by bid opening on August 17, 1989. Southern submitted the apparent low bid of \$2,826,000. In response to the requirements of the IFB, Southern submitted a bid bond guaranteed by two individual sureties, Virginia Rachal and Forrest E. Watson, whose fully-executed Certificates of Sufficiency accompanied each SF 28.

On her SF 28, Rachal indicated her net worth as \$39,019,800; her primary asset consisted of \$54,295,600 in securities in Amistad, Inc., a closely-held corporation. Watson indicated his net worth as \$17,156,830, and listed \$20,504,594 in an oil and gas lease as his primary asset. Watson also listed \$120,214 in current assets; \$458,333 in corporate stock; \$250,000 for a gemstone collection; \$107,165 in marketable securities; \$255,000 in personal property; \$88,000 in an annuity; and \$647,000 in real estate. Each individual surety's Certificate of Sufficiency was

signed by Jerry Leahy, Vice-President of the Metropolitan Security Bank, Ltd. The SF 28s stated that Metropolitan is domiciled in the British West Indies.

Each surety also provided a document identified as an unaudited "Accountant's Review Report," prepared by certified public accountants in Dallas, Texas. The reports noted that "[a]ll information included in this report is the representation of [the surety]," and that the review was "substantially less in scope than an examination in accordance with generally accepted auditing standards." Rachal's report was missing at least one page which was never produced, despite repeated requests from the contracting officer. Attached to Rachal's report was an unaudited balance sheet of Amistad stating that the company is engaged in "the ownership and development to the highest and best use," of an 8,690 acre ranch in Texas. Amistad's balance sheet listed total assets as \$950,100, primarily consisting of land allegedly valued at \$947,000.

Because Southern provided insufficient documentation supporting the value of the assets claimed, and the contracting officer had questions concerning the value of the land and its ownership by Amistad, the contracting officer requested further evidence of the sureties' net worths. By telecopier letter the agency requested acceptable supporting documentation, including (1) a complete description of real property offered, supported by proof of title, and a certified appraisal or tax assessment; (2) certified balance sheets and income statements with signed opinions for each individual surety; (3) independent certified appraisal of the net value of property offered; (4) a copy of the latest federal and state income tax returns for each surety; and (5) signed balance sheets or income statements with an opinion for each individual surety signed by a certified public accountant. The contracting officer specifically requested Southern to provide evidence of the value of the stocks claimed by the individual sureties.

In response to the contracting officer's request, Southern provided: (1) copies of the sureties' 1988 federal income tax returns, reporting joint incomes with their respective spouses; (2) unexercised, expired, private party agreements to purchase some of the stock held by the sureties; (3) an unsigned letter from the sureties' broker; (4) copies of stock certificates showing ownership of one half of Aquila, Inc., by Rachal; (5) a deed dated 1971 conveying land to Aquila, Inc.; (6) a title opinion dated 1971 concerning this land; (7) receipts for property taxes for Amistad, which presumably reflected the taxable value, not the appraised value, of the land; (8) articles of amendment dated 1975 changing Aquila's name to Amistad; and (9) minutes of a special meeting of the board of directors of Metropolitan, allegedly held at its offices in Caracas, Venezuela, on April 1, 1988, where Jeremiah "Jerry" Leahy was appointed vice president of Metropolitan.

A subsequent investigation revealed that the telephone number listed for Metropolitan had been disconnected and the local telephone directory had no listing for Leahy or Metropolitan. The Texas Department of Banking informed the contracting officer that Metropolitan was not registered to do business in Texas. Accordingly, the contracting officer determined that Leahy was unqualified to

sign the certificates of sufficiency and that Metropolitan was an unacceptable financial institution.

As proof of the value of Amistad's land, Southern submitted unidentified, unsigned, hand-written tables which purport to record water elevation, reservoir elevation, and well depth, from various bodies of water with monthly readings from 1968 to 1985, presumably demonstrating the amount of water located under and near Amistad's land. Despite repeated requests by the contracting officer, Southern provided no verifiable evidence of the market value of Amistad stock. Rather, Southern submitted, without any substantive explanation, copies of the Texas Code Annotated, apparently to substantiate its position that Amistad had legal rights to the underground water.

After reviewing the additional information Southern provided, the contracting officer determined that Southern had provided insufficient and unverifiable evidence of the market value of Amistad's stock, and unsubstantiated proof of the value of the land Amistad listed in its balance sheet as its primary asset. Further, the contracting officer determined that Southern provided no credible evidence that Rachal's ownership interest in Amistad was valued at even \$475,050, or that Rachal owned other assets or securities valued at the \$54,295,600 she claimed on her SF 28. Without further documentation of the value of the claimed assets, the contracting officer concluded that Rachal had an insufficient net worth to cover the penal amount of the bond and, therefore, rejected Southern's bid for lack of an adequate bid guarantee.

Southern challenges the rejection of its bid, contending that its individual sureties showed net worths far in excess of the penal amounts of the bonds; that the Navy failed to adequately investigate the sureties' net worth; that its sureties have been accepted by other government agencies; and that the contracting officer ignored Southern's successful performance on prior government contracts and the cost savings to the government from accepting its bid.

The question of the acceptability of a surety is a factor in determining the responsibility of the bidder and may be established at any time prior to contract award. *Labco Constr., Inc.*, B-232986 *et al.*, Feb. 9, 1989, 89-1 CPD ¶ 135. In reviewing a bidder's responsibility, the contracting officer has broad discretion and absent bad faith or the lack of any reasonable basis for his determination, the contracting officer may decide what specific financial qualifications to consider in determining responsibility. *Id.* It is the sureties' obligation to provide the contracting officer with sufficient information to clearly establish their responsibility; that is, that they have sufficient financial resources to meet their bond obligations. *Hirt Co.*, B-230864, June 23, 1988, 88-1 CPD ¶ 605.

As a preliminary matter, the issues raised in this protest concerning Rachal, Amistad, Leahy, and Metropolitan are identical to those recently resolved in *Southern California Eng'g Co., Inc.*, B-234515.2, Aug. 21, 1989, 89-2 CPD ¶ 156, which also involved the reasonableness of a contracting officer's rejection of Southern as nonresponsible based on the unacceptability of Rachal as one of its individual sureties. Here, Southern submitted virtually identical documents in

support of Rachal's claimed assets, and relies upon the same arguments considered in the previous decision, in which we found that the agency reasonably determined that the protester failed to provide sufficient information to permit a finding that its individual sureties were acceptable. Since the issues raised in this protest arise from identical factual circumstances, and involve essentially the same parties, we see no basis for reaching a different result here.

As for Watson, Southern's other surety, the contracting officer determined that based on the documents provided the value of the "energy lease" listed as Watson's principal asset could not be determined and was highly speculative. In support of Watson's energy lease, Southern submitted three assignments of oil and gas leases for which Watson paid \$21. Two of the assignments were for only part of the net revenue interest in the lease, and the third lease assignment transferred title without warranty, for \$1. There was no evidence of the current market value of the third lease. The only evidence of the value of the leases was an uncertified feasibility report dated February 1982, indicating that the gross value was only \$2,280,000, not the \$20,504,594 Watson claimed, and cautioned that further study was needed. There was no independent certified appraisal of the current net value of the claimed leases as the contracting officer requested, and no evidence that any oil or gas was currently produced, so the liquidity of the assets in the event of default was questionable.

With regard to the second largest asset listed, real property valued at \$647,000, Watson failed to provide proof of ownership or a certified appraisal of the property as requested. Watson also listed \$458,333 in corporate stock and \$107,165 in "marketable securities." The stock was not publicly traded, however, and Watson provided no evidence of its fair market value. The "securities" were not identified, and Watson provided no evidence of their existence, ownership or market value. Further, Watson provided no credible evidence of the ownership or value of the gemstone collection; failed to provide evidence of the existence, ownership or value of the unidentified "current assets"; and failed to offer proof of the annuity. Consequently, the contracting officer had ample reason to question the accuracy and validity of the representations Watson made on his SF 28.

Once the accuracy of the sureties' representations reasonably has been called into question, the agency is justified in rejecting the sureties, notwithstanding the adequacy of other assets. *Hughes & Hughes*, B-235723, Sept. 6, 1989, 89-2 CPD ¶ 218. This reflects the great reliance an agency is entitled to place on the accuracy, thoroughness, and verity of surety financial information provided for government procurements. See *Farinha Enters., Inc.*, 68 Comp. Gen. 666 (1989), 90-1 CPD ¶ 262.

In our view, the contracting officer reasonably determined that unexplained inconsistencies in the supportable values between the assets listed and claimed net worths, and questions regarding the ownership and existence of the assets claimed, called into question the sureties' integrity and the credibility of their representations, thereby diminishing the likelihood that the sureties' financial guarantee would be enforceable. This determination provided a proper basis for rejecting both individual sureties. *Id.* In this regard, Southern's unsupported as-

sertion that "six contracting officers" have accepted bids guaranteed by Southern's two sureties does not show that the Navy's action in this case was unreasonable, particularly in light of the substantial evidence in the record supporting the contracting officer's determination that the sureties were unacceptable. See *Southern California Eng'g Co., Inc.*, B-234515.2, *supra*.

With regard to Southern's assertion that the Navy rejected its sureties without adequate investigation, we have held that a contracting officer may rely on the initial and subsequently furnished information regarding net worth submitted by a surety, without further conducting an independent investigation. See *KASDT Corp.*, B-235620, Aug. 21, 1989, 89-2 CPD ¶ 162. Nevertheless, in this case the contracting officer went well beyond the documents submitted in attempting to determine the responsibility of each surety. In addition to examining the unaudited financial reports and balance sheets, the contracting officer requested specific documentary evidence in support of the claimed assets, which Southern failed to produce. Additionally, the contracting officer contacted the Texas Department of Banking to verify the legal status of Metropolitan, and to confirm Leahy's position as an officer qualified to sign the certificates of sufficiency.

Finally, Southern argues that in deciding to reject its bid, the Navy ignored Southern's successful performance on prior contracts and the fact that its bid was \$614,000 less than the next low bid. To be accepted, a bid must include acceptable sureties; once the sureties properly are found unacceptable, the bid must be rejected. See Federal Acquisition Regulation §§ 28.101-4, 28.203(c). Thus, Southern's prior performance and any potential cost savings provide no basis for accepting Southern's otherwise unacceptable bid.

The protest is denied.

B-238027, April 5, 1990

Procurement

Contract Management

- Contract administration
- ■ Convenience termination
- ■ ■ Competitive system integrity

Where timely size protest is filed after small business-small purchase set-aside award and awardee does not contest Small Business Administration finding that it is other than a small business, intent of Small Business Act and integrity of competitive system is served by terminating the contract and, if otherwise appropriate, making award to only small business quoter.

Matter of: American Mobilphone Paging, Inc.

Eileen R. Picture, for the protester.

Craig R. Schmauder, Esq., Army Corps of Engineers, for the agency.

James Vickers, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

American Mobilphone Paging, Inc., protests the award of a purchase order to MobileComm by the United States Army Corps of Engineers, Mobile District, for the rental of 30 Motorola BPR 2,000 Display Pagers. American asserts that MobileComm is not a small business and therefore is not eligible for award.

We sustain the protest.

Request for quotations No. DACW01-90-T-0033, a small business-small purchase set-aside, was issued on October 23, 1989. The low quotation was received from MobileComm at \$14.75 per month per pager. American and A-Plus Communications, Inc., each quoted \$15.50 per pager per month. While American certified itself as a small business, both MobileComm and A-Plus failed to complete the certification in their quotes. The contracting officer contacted both firms concerning their status and both firms responded by letters stating that they had less than \$3.5 million in annual average receipts. Based on these letters, the contracting officer determined they qualified as small businesses. On November 16, MobileComm lowered its quote to \$13.75 per month. The Corps awarded it the purchase order on November 16. Notice of the award was given to the other firms on November 20.

On November 22, American protested the size status of MobileComm to the contracting officer, who forwarded the matter to the Small Business Administration (SBA) on November 29. On January 4, 1990, SBA found MobileComm to be other than a small business.

The Corps did not disturb the award to MobileComm because the size protest was filed after the award had been made. According to the Corps, under Federal Acquisition Regulation (FAR) § 19.302(j) SBA's size determination has prospective application but does not affect the award.

American argues that while it did not file its written protest prior to award it did speak with the agency contract specialist before the closing date and advised her that MobileComm had improperly certified itself as a small business previously and if it did so again American would challenge the certification. American contends that this, along with the awardee's failure to initially certify its small business status, should have alerted the contracting officer to question MobileComm's size and to have filed his own size protest as permitted by FAR § 19.302(b).¹

A contracting officer may rely on an offeror's self-certification that it is a small business unless he has information prior to award that would reasonably im-

¹ In its protest to our Office, dated December 11, American also protested the size status of A-Plus. The contracting officer forwarded this protest to the SBA. On February 2, 1990, the SBA also found A-Plus to be other than a small business.

peach the certificate. American's statement that it would challenge MobileComm's status if that firm submitted an offer, without any evidence supporting its position that MobileComm was not a small business, did not constitute such information. As we said in *Robertson and Penn, Inc., d/b/a National Serv. Co.*, 65 Comp. Gen. 874 (1986), 86-2 CPD ¶ 350, a contracting officer is not required to question an offeror's size status solely on the basis of a competitor's bare assertion. Moreover, the fact that the certification in question was not completed did not impose such an obligation on the contracting officer since a failure to complete the small business size status certification is regarded as only a minor informality that can be corrected even under the strict rules governing sealed bidding. See, e.g., *Gracon Corp.*, B-224344, July 7, 1986, 86-2 CPD ¶ 41.

Nonetheless, we do not think the award made to MobileComm should be allowed to stand. We recognize that FAR § 19.302(j) treats size status protests received after award of a contract as having no applicability to that contract. We have pointed out, however, that an agency should consider terminating an award for convenience if, pursuant to a timely size protest, the contractor is found to be a large business, see *Conversational Voice Technologies Corp.*, B-224255, Feb. 17, 1987, 87-1 CPD ¶ 169; *Solon Automated Servs., Inc.*, B-198670, Nov. 18, 1980, 80-2 CPD ¶ 365, and in certain cases we have found termination to be appropriate. See *R.E. Brown Co., Inc.*, B-193672, Aug. 29, 1979, 79-2 CPD ¶ 164; see also *Superior Asphalt Concrete Co.*, B-184337, Dec. 5, 1975, 75-2 CPD ¶ 372.

We think this is such a case. First, although American filed its size status protest after award, it could not have done otherwise because under the small purchase procedures which govern this procurement there is no requirement that the agency issue a preaward notice to unsuccessful vendors and none was issued here.² See FAR §§ 13.106(b)(9) and 15.1001(b). Because the size protest was filed within 5 days of American's receiving notice from the Corps of the award to MobileComm, it was timely under SBA's size status regulations. 13 C.F.R. § 121.9(a) (1989); see also FAR § 19.302(d). SBA's regulations, specifying that a protest received "after the time limits set forth herein shall not apply to the procurement . . . in question," envision that the results of a timely size status protest will apply to the procurement in question. *Id.* Second, in the size status proceeding before SBA, MobileComm chose not to defend its status but, according to the SBA, simply informed SBA that it "would not qualify as a small business concern."

Under the circumstances, we think that it would be inconsistent with the integrity of the competitive procurement system and the intent of the Small Business Act, which requires small purchases to be awarded in most cases to a small business, to permit MobileComm, which under the terms of the RFQ was ineligible for award, to continue to perform. We therefore are recommending that MobileComm's contract be terminated for convenience and the award for the re-

² American asserts that its size status protest was filed prior to the actual award of the purchase order and should have been considered a pre-award protest. However, MobileComm signed and accepted the order on November 16. The protest was filed on November 22. We therefore find no merit to this assertion.

mainder of the requirement be made to American if that firm is otherwise eligible. American is also entitled to its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.

B-238090, April 5, 1990

Procurement

Sealed Bidding

- Bids
 - ■ Acceptance time periods
 - ■ ■ Expiration
-

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification

Where contracting officer deliberately allowed bid acceptance period to expire without making award in order to effect cancellation of solicitation which she had determined was warranted, General Accounting Office will review propriety of the decision to cancel.

Procurement

Sealed Bidding

- Invitations for bids
- ■ Cancellation
- ■ ■ Justification

Contracting agency lacked compelling reason to cancel invitation for bids (IFB) for rental of construction equipment where apparent inconsistency between IFB provisions—which described certain requirements in terms of hourly and daily rates, but called for pricing on the basis of daily and weekly unit rates—did not prejudice any bidder, all bidders understood that daily and weekly unit pricing was required, they provided such pricing which was evaluated on a common basis, and an award under the IFB would meet the agency's actual needs.

Matter of: US Rentals

Harlen Owens, and Robert L. Leslie, Esq., McInerney & Dillon, for the protester.

Vasio Gianulias, Esq., Department of the Navy, for the agency.

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

US Rentals protests the cancellation of invitation for bids (IFB) No. N62474-89-B-6189, issued by the Department of the Navy for the rental of various items of construction equipment. The protester contends that the Navy lacked a compelling reason to cancel the IFB.

We sustain the protest.

The solicitation, issued July 5, 1989, identified 29 contract line items (CLINs) for various pieces of construction equipment. Bidders were to enter their prices for each CLIN on a schedule which was printed on a standard continuation sheet form. The typical bidding format appeared as follows, as exemplified by the CLINs relating to dump trucks:

ITEM NO.	(DESCRIPTION OF) SUPPLIES/SERVICES	ESTIMATED QUANTITY	UNIT	UNIT PRICE	AMOUNT
0010	TRUCK, DUMP 5 YD UP TO 7 YD				
0010AA	DAILY RATE	15	DY	\$ \$	
0010AB	WEEKLY RATE	3	WK	\$ \$	
0010AC	MONTHLY RATE	2	MO	\$ \$	

Under this format, the rate units in the item description—"daily," "weekly," and "monthly"—parallel those further to the right and in the pricing schedule—"DY," "WK," and "MO". CLIN Nos. 13 through 15, however, for three different sizes of pavement-cutting saws, had a different format, as exemplified by CLIN No. 13:

ITEM NO.	(DESCRIPTION OF) SUPPLIES/SERVICES	ESTIMATED QUANTITY	UNIT	UNIT PRICE	AMOUNT
0013	WALK BEHIND CONCRETE/ASPHALT SAW				
0013AA	HOURLY RATE	20	DY	\$ \$	
0013AB	DAILY RATE	3	WK	\$ \$	

Here, the rate units in the item description did not parallel those to their right in the pricing schedule.

Three bids were received by the amended bid opening date of September 21. US Rentals was the apparent low bidder. After bids were opened, the second low bidder, Big 4 Rents Inc. complained to the agency about the discrepancy in CLIN Nos. 13 through 15 between the item description of hourly and daily rates and the request for prices in units of daily and weekly rates. In a letter dated October 10, Big 4 contended that the bids of US Rentals and DTR Rentals, the third low bidder, should be rejected as nonresponsive as they did not include hourly rates in addition to the daily and weekly rates. As a result of Big 4's letter, the contracting officer reviewed the bids and in a letter dated November 14, requested approval from the Commander, Western Division, Naval Facilities

Engineering Command, to reject all bids and cancel the solicitation. No action on the request was taken. The protester, after numerous inquiries to the contracting officer and other agency officials, commencing on October 20, 1989, was notified on December 5 that the agency was not going to award a contract under this solicitation, but rather, the requirement would probably be filled under another solicitation. On December 19, US Rentals filed this protest in our Office.

The agency argues that we should dismiss this protest on the grounds that the bids expired on November 20, and US Rentals' protest filed more than 10 working days after that date is untimely. The agency points out that the contracting officer did not request an extension because she intended to cancel the solicitation, and contends that US Rentals was either obligated to extend its bid acceptance period prior to November 20, or to protest within 10 days after that date had passed without a contract award, since the basis for protest was then known to US Rentals.

We do not believe that dismissal is warranted in these circumstances. US Rentals filed its protest in our Office 10 working days after it was initially notified that the agency was not going to award the contract, which is the actual basis of its protest. The record clearly demonstrates that US Rentals had previously diligently pursued this matter not only with the contracting officer but also with her superiors, and states that it was told that extenuating circumstances, namely an earthquake in the San Francisco area, had delayed matters. We also note that the protester states, and the agency does not deny, that agency contracting officials instructed US Rentals that it could not protest until after the bid acceptance period had expired, and after that time led the protester to believe that the agency was considering requesting an extension. Moreover, the agency concedes that the contracting officer's failure to request extensions of the bid acceptance period from the bidders was the deliberate result of her decision, 4 working days prior to the expiration of bids, to cancel the solicitation. Under these circumstances, the agency used the bid acceptance period expiration as a vehicle for cancellation, and we will view the matter as a cancellation, despite the lack of a finally ratified formal determination to cancel.

While the Navy argues that since bids have expired there is no possibility of award, we disagree. A bidder may extend its acceptance period, and thus revive its bid, where it offered the acceptance period required by the IFB, and has not expressly or impliedly declined a request to extend its bid, and revival of the bid would not compromise the integrity of the competitive bidding process. *V&Z Heating Corp.*, B-224725, Oct. 20, 1986, 86-2 CPD ¶ 472; *TCA Reservations, Inc.*, B-218615, Aug. 31, 1985, 85-2 CPD ¶ 163. Further, the reinstatement of an improperly canceled procurement and the revival of bids which expired after cancellation is an appropriate method of avoiding an unfair bidding situation since bids have been made public. *ADAK Communications Sys., Inc.*, B-222546, July 24, 1986, 86-2 CPD ¶ 103. Since nothing in the record indicates that revival of US Rentals' bid would be improper under this standard, we will consider the protest on its merits.

Although a contracting officer has broad discretion to cancel an IFB, there must be a compelling reason to do so after bid opening, because of the potential adverse impact of cancellation on the competitive bidding system after prices have been exposed. See Federal Acquisition Regulation (FAR) § 14.404-1(a)(1); *Pacific Coast Utilities Serv., Inc.*, B-220394, Feb. 11, 1986, 86-1 CPD ¶ 150. The fact that a solicitation is defective in some way does not justify cancellation after bid opening if award under the IFB would meet the government's actual needs and there is no showing of prejudice to other bidders. *Id.*

The Navy contends that its examination of the bids and the solicitation demonstrate that there was some confusion as to what rates were to be bid for CLIN Nos. 0013, 0014, and 0015. Specifically, the protester ignored mention of a hourly rate description under CLIN No. 0013, and inserted "none" next to the hourly rate description for CLIN Nos. 0014 and 0015. Big 4 entered hourly rates for each item but also entered much lower daily and weekly unit rates, which formed the basis for the agency's evaluation of its price. DTR corrected the terms "hourly" to "daily" and "daily" to "weekly" and stated that there was a 1 day minimum. Despite the "hourly" and "daily" notations in the item description column, each offeror correctly filled in all of the price information that the IFB required and which the agency needed to evaluate its bid on a common basis. Essentially, the only effect of the possible ambiguity was that one bidder inserted certain higher hourly prices that were not necessary, and these prices were properly disregarded by the agency. There is no question that the agency can satisfy its actual needs under this IFB, and no bidder was prejudiced by the solicitation language. Accordingly, we find that the agency did not have a compelling reason to cancel the solicitation.

The protest is sustained.

By separate letter of today, to the Secretary of the Navy, we are recommending that the IFB be reinstated and the award be made to US Rentals as the low bidder, if that firm's bid is otherwise responsive and the firm is determined responsible. US Rentals is also entitled to its costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1989).

B-238216, April 5, 1990

Procurement

Socio-Economic Policies

■ Preferred products/services

■ ■ American Indians

Determination of Bureau of Indian Affairs that joint venture comprised of Indian-owned concern and concern not Indian-owned does not qualify as a 51 percent Buy Indian Act concern, as required by the solicitation, is not unreasonable where, although the Indian firm controls 51 percent of the joint venture, only 55 percent of the Indian firm is owned by Indians and the aggregate total of Indian ownership of the joint venture therefore amounts to only 28 percent.

Procurement

Bid Protests

- Agency-level protests
- ■ Information adequacy

The fact that, under an agency's protest regulations, an agency-level protest may be untimely or the protester may lack interested party status, does not provide a basis for questioning the agency's subsequent determination to undertake corrective action based on information presented in connection with the protest.

Matter of: Technical Management Services Company

Karl Johnson, Esq., for the protester.

Daniel S. Press, Esq., Van Ness, Feldman & Curtis, for the interested party, American Indian Council of Architects and Engineers.

Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.

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

Technical Management Services Company (TMS), protests the decision of the Bureau of Indian Affairs (BIA), Department of the Interior, not to negotiate an architect-engineer (A-E) contract with a joint venture comprised of TMS and Burns, Peters, Long and Waters, Inc. (BPLW), under solicitation No. BIA-89-06, for design and engineering services for the Pine Ridge High School, on the Pine Ridge Reservation in South Dakota. TMS challenges the agency's determination that TMS does not qualify as a 51 percent "Buy Indian" concern as required by the solicitation, which was set aside for such concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1982).

We deny the protest.

The solicitation was synopsized in the *Commerce Business Daily* (CBD) on April 12, 1989, pursuant to the selection procedures set forth in the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which governs the procurement of A-E services, and in the implementing regulations at Federal Acquisition Regulation (FAR) §§ 36.00-36.09. Generally, under these procedures, an A-E evaluation board set up by the agency evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the required public announcement of the particular project, and selects at least three firms for discussions. The board recommends to the selection official no fewer than the three firms deemed most highly qualified. Negotiations then are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable fee, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee, and so on. See generally FAR subpart 36.6.

Twenty firms responded to the CBD announcement for the proposed project, the qualifications of the firms were evaluated pursuant to the A-E procedures, and by June 19 BIA had selected three firms as most qualified, with the TMS/BPLW joint venture ranked first. BIA commenced negotiations with the joint venture to determine a reasonable fee, and the joint venture met twice with the Pine Ridge School Board concerning the project. On October 30, however, the American Indian Council of Architects and Engineers (AICAE) filed a protest with the contracting officer challenging the joint venture's eligibility as a Buy Indian concern.

In its protest, AICAE pointed out that while the joint venture agreement allocated TMS 51 percent of the management of the joint venture, TMS was only 55 percent Indian-owned and there was no indication of any Indian ownership of BPLW. AICAE questioned whether this satisfied the eligibility requirement set forth in the solicitation and in the BIA Manual (incorporated by reference into the solicitation), that the A-E concern be "51 percent Indian-owned." On December 18, the contracting officer determined that the TMS/BPLW joint venture did not qualify as a 51 percent Indian-owned firm and therefore was ineligible for award.

TMS challenges BIA's interpretation of what constitutes an eligible Buy Indian concern. BIA has explained that, with respect to joint ventures, it considers the ownership of the enterprise as a whole, and not merely the ownership of the individual parties to the concern. Since TMS is only 55 percent Indian-owned and holds only a 51 percent interest in the joint venture, the agency views the total Indian ownership of the joint venture as a whole as amounting to only 28 percent, that is, 55 percent of TMS' 51 percent share in the joint venture.

TMS, on the other hand, argues that since TMS controls 51 percent of the joint venture and TMS itself is Indian-owned—in that its majority owner is an Indian—the joint venture should be considered Indian-owned. In other words, TMS' position, in effect, is that Indian-managed and -controlled firms automatically should qualify as eligible Buy Indian Act concerns. TMS maintains that this interpretation of the Buy Indian Act requirement is consistent with the interpretation of other agencies, which have awarded contracts to the TMS/BPLW joint venture.

We find nothing improper in BIA's approach to implementing the Act. While management and control are proper considerations in determining a firm's eligibility to participate in Buy Indian Act procurements, nothing in the Act precludes the agency from considering other, additional criteria in determining eligibility.¹ BIA's more restrictive Indian ownership definition assures that the economic opportunities and benefits available under the Act will accrue principally to those firms with the greatest Indian involvement, both with respect to management and profits. Consequently, while the Indian participants in the

¹ In this regard, BIA's proposed regulations for implementing the Buy Indian Act, 53 Fed. Reg. 24,738-24,747 (1988) (to be codified at 48 C.F.R. §§ 1452 and 1480), require not only that one or more of the Indian owners be involved in the daily business management of the enterprise, but also that a majority of earnings accrue to the Indians owning 51 percent of the enterprise. 53 Fed. Reg. 24,741.

TMS/BPLW joint venture may be precluded from benefitting under the set-aside here due to BIA's policy, this result flows from a policy aimed at benefitting Indians to the maximum extent possible through the limited number of contract awards available. By making benefits available to firms with much less Indian ownership, TMS' less restrictive interpretation could facilitate the use of "front" companies and, thus, the award of contracts under Indian set-asides that would principally benefit non-Indian firms or individuals. BIA's policy tending to avoid this result is reasonable. This being the case, it is irrelevant that other agencies may have used different methods of calculating the percentage of Indian ownership for purposes of determining Indian set-aside eligibility. See *Northwest Piping, Inc.*, B-232644, Jan. 23, 1989, 89-1 CPD ¶ 53.

TMS asserts that under the draft agency protest regulations proposed but not yet adopted by BIA: (1) AICAE's agency-level protest was untimely; (2) AICAE lacked interested party status to file a protest; (3) the contracting officer improperly failed to refer the protest to higher-level officials; and (4) the contracting officer failed to provide TMS with proper notice of the basis for sustaining the agency-level protest. TMS argues that these purported deficiencies in the protest and in the agency's handling of the protest requires our Office to reverse the determination of ineligibility.

This argument is without merit. Our review of a protest is directed solely towards consideration of whether the complained of agency action was reasonable; where we find the agency acted properly, the event that prompted the agency's action is irrelevant. We already have found that BIA properly determined the TMS/BPLW joint venture to be other than a Buy Indian firm and thus ineligible for award. It is of no import that this determination followed AICAE's allegedly unacceptable agency protest. See *generally Amarillo Aircraft Sales & Servs., Inc.*, B-214225, Sept. 10, 1984, 84-2 CPD ¶ 269.

The protest is denied.

B-237567, April 13, 1990

Civilian Personnel

Travel

- Temporary duty
- ■ Return travel
- ■ ■ Administrative discretion

A construction employee who is required to perform long periods of temporary duty away from his official station and does not maintain a permanent residence at his official station may be reimbursed for the expenses of periodic, authorized return travel for nonworkdays to his permanent residence, not to exceed the constructive cost of travel to his official station.

Matter of: Alpheus L. Bonde—Extended Temporary Duty—Authorized Return Travel

A decision is requested on the propriety of paying a claim for authorized return travel during extended temporary duty to a "voting/family" residence which is not within commuting distance of the employee's official station.¹ We conclude that the claim may be paid on a constructive cost basis.

Background

A division of the Federal Highway Administration has a number of engineering employees who are on extended temporary duty on a continuing basis for most of the year. Since they rarely report for duty at their official station in Vancouver, Washington, most of them do not maintain a residence within the commuting distance of Vancouver. Instead, these employees maintain their residences throughout the region, in Oregon, Washington, Idaho, Montana, or Alaska. One of these employees, Mr. Alpheus L. Bonde, while on extended temporary duty in Alaska, traveled to visit his family at the family residence in Calder, Idaho, and claimed reimbursement for per diem en route and travel expenses.

We are urged to authorize payment, generally, on the basis of our decision, 55 Comp. Gen. 1291 (1976) (B-130082), where we held that it would be proper, under prescribed circumstances, to pay for authorized or required return travel to an official station or place of abode for weekends and other nonworkdays. *Diana J. Bell*, B-200856, Aug. 13, 1981.

Opinion

We have held in a line of cases that it would be improper to pay for travel on weekends and other nonworkdays to places other than the employee's official station or place of abode.² Under the Federal Travel Regulations, Calder, Idaho, was not Mr. Bonde's "place of abode," that is, "the place from which the employee commutes daily to the official station."³ Mr. Bonde's case however, is materially different from most employees in that he is an itinerant employee on substantial and continuous temporary duty, and he does not have a need to commute daily to his official station. Mr. Bonde's circumstances, therefore, are analogous to those in *John D. Rotz*, B-186266, Aug. 10, 1976, where we construed "place of abode" as including an itinerant employee's residence even though it was not located within normal commuting distance of the official station.

¹ The request was made by the certifying officer, Federal Highway Administration, U.S. Department of Transportation, Western Direct Federal Division, Vancouver, Washington, reference HAD-17.42; File: 100 #5145L.

² See e.g. *Michael K. Vessey*, B-214886, July 3, 1984; *James R. Curry*, B-208791, Jan. 24, 1983; *Jeffrey Israel*, B-209763, Mar. 21, 1983; *Sara S. Ivey*, B-200262, Jan. 6, 1982; *Diana J. Bell*, B-200856, Aug. 3, 1981.

³ Federal Travel Regulations, para. 1-711, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1988).

In *Rotz*, the employee performed travel away from his official station on a substantial and continuous basis and routinely returned to spend nonworkdays with his family, located at his permanent residence roughly 200 miles from his official station. In that case, we authorized reimbursement of transportation and en route per diem expenses, not to exceed the expenses of remaining at the temporary duty station, under the "voluntary" return regulation, now Federal Travel Regulations, para. 1-7.11b(4). Although that regulation is controlled by the restrictive definition of place of abode, we concluded, based on a consideration of the regulation's development and our decisions, 53 Comp. Gen. 313 (1973) and 29 Comp. Gen. 533 (1950), that the definition could be construed as including an itinerant employee's residence, even though it was not located within normal commuting distance of the official station. We reasoned that the principal consideration for authorizing voluntary return travel at no additional cost to the government was the objective of minimizing disruption of the employee's family life, under circumstances where the employee, from a practical standpoint, did not have an opportunity to establish a residence within commuting distance of the official station.

The same objective clearly would be served by reimbursing Mr. Bonde's travel expenses to the extent of the constructive cost of returning to his official station. Such reimbursement would not result in any additional cost to the government since the agency may authorize return travel to the official station.

Under the circumstances and conditions described by the agency here, we will not object to the payment of Mr. Bonde's claim or similar claims, if otherwise proper, for a temporary period, provided the agency conducts a cost analysis complying with FTR, para. 1-7.11(b)(3) and 55 Comp. Gen. 1291, *supra*. See *Thomas Anderson*, B-200601, July 31, 1981, and *Federal Home Loan Bank Board*, B-202544, Aug. 31, 1981.

B-238162, April 13, 1990

Procurement

Competitive Negotiation

- Offers
- ■ Competitive ranges
- ■ ■ Exclusion
- ■ ■ ■ Evaluation errors

Under request for proposals calling for award to low technically acceptable offerors, agency determination that protester's proposal was outside of the competitive range was improper where agency determination was based on proposal's relative technical ranking, without consideration of price, and consequently agency violated Federal Acquisition Regulation § 15.609(a) (FAC 84-16) in establishing the competitive range.

Matter of: Bay Tankers, Inc.

William A. Shook, Esq., Preston, Gates, Ellis, Rouvelas & Meeds, for the protester.

Charles E. Purcell for P&C Marine Engineering, Inc.; Paul Sa for S&S Shipping, Inc.; and Richard F. Smith for Marine Carriers (USA), Inc., interested parties.

Ernest Hawkins, Maritime Administration, for the agency.

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

Bay Tankers, Inc., protests the exclusion of its technical proposal from the competitive range under request for proposals (RFP) No. DTMA91-89-R-90016, issued by the Maritime Administration, for services of ship managers for elements of the Ready Reserve Fleet, to insure their activation within assigned readiness periods. The protester contends that the agency improperly determined that its proposal was unacceptable.

We sustain the protest.

The agency issued the solicitation on April 12, 1989, for services of ship managers to operate and maintain 20 ships, in 7 groups, for 5 years; the solicitation provided for multiple awards by vessel groups, up to a maximum of 12 ships per awardee, with 1 group of 2 ships reserved for the Small Business Administration's 8(a) program. The solicitation requested a per diem rate for each vessel for full operational status, maintenance status and activation, and provided for award to the lowest priced offerors judged technically and managerially acceptable.

The solicitation provided further that the agency would evaluate and assign numerical scores to technical and management proposals, with technical factors worth one-third more than management factors. Although the RFP essentially provided for award on the basis of price to the low technically acceptable offerors, it stated that to be eligible for award the combined point scores for technical and management proposals must be equal to or greater than the point score set as minimally technically acceptable by the agency (without consideration of price).¹

Offerors submitted proposals on May 31, and a team of four evaluators assigned point scores to the proposals, in accordance with information requested in section L of the RFP. The evaluation team added the point scores and divided them by four to produce an average technical score and provided a list of average technical scores to the contracting officer. The list ranked 21 offerors in order of technical merit based on their technical scores without regard to price.

The contracting officer reviewed the average technical scores, which ranged from a low of 280 points (out of 760 possible) to a high of 699 points. She found that there was a gap of 13 technical points between the average scores of the

¹ The RFP did not include any numerical technical weights and did not contain any minimally technically acceptable point score.

thirteenth-ranked offer (461 points) and the protester's fourteenth-ranked offer (448 points). The contracting officer found that this gap between 461 and 448 points was the lowest naturally occurring cutoff that would retain enough offerors to allow competition, since 13 offerors received scores of 461 points or higher, and eight received scores of 448 points or lower. Although the agency had received price proposals, it did not consider them in making its determination of competitive range, since it determined that proposals that had received a score of less than 461 points were technically unacceptable.²

At the end of August, the contracting officer sent letters to all offerors determined to be technically unacceptable, advising them of her determination that their proposals were outside the competitive range. During October and November, the agency conducted negotiations with offerors in the competitive range, and the agency requested offerors to submit best and final offers (BAFO) by December 29.

On December 14, the protester contacted the agency to inquire about the status of its proposal; on that date the agency advised the protester that its proposal had been eliminated from the competitive range as technically unacceptable.³ This protest followed.

The protester contends that the agency evaluated its offer in a manner that was unreasonable and inconsistent with the solicitation's requirements. The protester argues essentially that the statement of work in the instant solicitation is nearly identical to that in an earlier solicitation, RFP No. DTMA98-87-R-70001, and that the protester's technical proposal found unacceptable is also nearly identical to that submitted in response to the earlier proposal which was found acceptable. The protester states that any deficiencies noted by the agency in the protester's current proposal also appeared in the proposal that was earlier found to be acceptable. The protester believes that this constitutes evidence that the agency's determination, that its proposal was unacceptable and outside of the competitive range, was arbitrary and unreasonable.

The agency acknowledges that in 1986, it found the protester technically acceptable, but explains that the higher scores received by other proposals meant that although the protester received substantially the same score as in 1986, its relative ranking fell below the competitive range for the instant procurement. The agency argues that its increased experience in ship management contracts has prompted it to look for more depth and range in proposals, to assure itself of a contractor's understanding of requirements before making an award. The agency believes that the higher score received by other offerors reflects their

² The agency notes, for example, that the protester's offer "was weak in comparison with the approach taken by other, higher rated offerors." These other offerors, according to the agency, "demonstrated more awareness of the range and depth of the requirements."

³ The agency sent the protester a letter dated August 29, advising Bay Tankers of its elimination from the competitive range. The protester denies receiving the letter, which was not sent to its current address, notes that lengthy evaluation periods are common in ship management solicitations, and states that until the agency requested BAFOs from the other offerors on December 11, it had no reason to believe that its proposal was not in the competitive range. Under these circumstances, we find that the protest was timely filed.

greater awareness of the range and depth of requirements, while the lower score received by the protester indicates its lack of understanding of the requirements and the effort needed for performance.

Federal Acquisition Regulation (FAR) § 15.609(a) requires that the competitive range be determined on the basis of cost or price and other factors that were stated in the solicitation and consist of all proposals that have a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through discussions. See *Hummer Assocs.*, B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. In reviewing a competitive range determination, we do not reevaluate technical proposals; instead, we examine the agency's evaluation to ensure that it was reasonable and in accord with the evaluation criteria. *Rainbow Tech., Inc.*, B-232589, Jan. 24, 1989, 89-1 CPD ¶ 66. Here, we think that the agency's competitive range determination was seriously flawed.

First, despite the fact that price was the ultimate determining factor for award and that FAR § 15.609(a) (FAC 84-16) requires the consideration of price in the determination of the competitive range for proposals that have a reasonable chance of being selected for award, the agency ignored price in its determination of the competitive range. The record shows that while the protester's proposal was ranked fourteenth technically, it was the low offeror for at least four vessel groups by a substantial margin. Thus, in establishing the cutoff of 461 technical points (a score approximately 2 percent greater than the protester's), the agency ignored the fact that many of the 13 higher technically rated firms had prices 50 percent higher than the protester's price and that the protester, on the basis of price, was potentially in line for award at substantial savings to the government.

Second, while the agency ostensibly eliminated the protester because it was "technically unacceptable," the record shows that by "unacceptable," the agency meant no more than that the protester received a technical score that was low relative to other offerors. For example, the contracting officer terms a "flagrant mistake" the protester's plan to drydock vessels during activation, which, she argues, creates a high risk of not meeting the 5-day activation schedule. The agency also contends that the protester's proposal for sea trials did not meet the minimum requirements of the solicitation.

Our review of the evaluators' score sheets shows, however, that these deficiencies contributed very little to the rejection of the protester's proposal. Some evaluators disliked the protester's plan to place vessels in drydock, but none of them rated the proposal less than "good" with respect to that aspect of the proposal. Furthermore, the agency now concedes that the protester's proposed plan for sea trials represented a "positive approach."

The record also shows that three of four evaluators gave the protester a score above the cutoff, and two of them rated the protester higher overall than the lowest scored proposal included in the negotiations. Of the total scores awarded by the four evaluators for all technical and management criteria, the protester

received 81 percent "good" or "very good" scores, and 95 percent "fair," "good," or "very good" scores. Indeed, our review of the competitive range determination shows that an offeror who received a uniform rating of "good" would score 456 points, below the cutoff for technical acceptability. We therefore find that the cutoff was based on an impermissible comparative evaluation of proposals in contravention of the solicitation terms which specifically called for award to the low technically acceptable offerors without a relative evaluation of proposals. In this regard, it is improper, in a negotiated procurement, to exclude an offeror from the competitive range solely on the basis of technical considerations (without considering price) where the proposal is merely technically inferior in relation to other proposals, though not unacceptable by itself. See *HCA Gov't Servs., Inc.*, B-224434, Nov. 25, 1986, 86-2 CPD ¶ 611.

In short, in making its competitive range determination, the contracting officer essentially determined that proposals with technical scores less than 2 percent greater than the protester's had a better chance for award although their prices were more than 50 percent higher. The record before us demonstrates that with a slight improvement through discussions in its technical score, the protester would in fact have been in line for several of the awards contemplated. We therefore find that the exclusion of Bay Tankers' proposal from the competitive range without consideration of its price proposal was improper. See *Howard Finley Corp.*, 66 Comp. Gen. 545 (1987), 87-2 CPD ¶ 4.

We are therefore recommending by letter of today to the Secretary of Transportation that the agency reopen discussions with the protester, for the purpose of resolving any uncertainties or weaknesses in the proposal of Bay Tankers that preclude that proposal from being found acceptable for award, and request another round of BAFOs all competitive range offerors. We award the protester its costs of pursuing this protest including attorneys' fees; the protester should submit its claim for costs directly to the Maritime Administration. 4 C.F.R. § 21.6(d) (1989).

The protest is sustained.

B-230318, April 18, 1990

Military Personnel

Pay

- Variable housing allowances
- ■ Amount determination

A member who is entitled to Basic Allowance for Quarters (BAQ) at the with-dependent rate, based on his payment of child support, and who is also entitled to a Variable Housing Allowance (VHA), may not receive VHA at the higher with-dependent rate solely by reason of a separation agreement that also awards "primary custody" of dependent children to the former spouse, but with "temporary" and "physical" "secondary custody" to the member at other times. However, the member is entitled to VHA at the with-dependent rate where he can demonstrate that he had actual physical custody of the children for periods in excess of 3 months. The computation of such VHA should take

into consideration only the member's direct housing costs and not the costs incurred by the former spouse.

Matter of: Major Norris G. Cotton—Variable Housing Allowance

A United States Marine Corps Disbursing Officer requests an advance decision on whether a member otherwise eligible to receive Variable Housing Allowance (VHA) may receive it at the with-dependent rate (VHA-W) based on his children who for most of the year are in his former wife's custody.¹

As explained below, the member cannot receive VHA-W for the entire year; however, he may receive it for all periods in which he has actual physical custody for continuous periods in excess of 3 months.

Background

On February 5, 1986, Major Cotton and his wife entered into a personal separation agreement which states that his wife has "primary custody" of the couple's three children and Major Cotton has "liberal visitation," as well as "temporary" and "physical" "secondary custody" for all nonschool periods, plus at least 3 days a month during the school year. The agreement also provides that Major Cotton is required to pay \$300 child support per month per child, which he indicates he pays 12 months per year. A decree of divorce was entered on May 18, 1987, but the court did not modify any of the provisions of the separation agreement relating to custody. Major Cotton is not assigned government quarters and is entitled to basic allowance for quarters (BAQ) and VHA.

The Disbursing Officer raises questions concerning Major Cotton's entitlement to VHA-W under the circumstances described above subsequent to his May 18, 1987 divorce, and the housing costs to be considered in computing such entitlement, if any.

A member entitled to BAQ is also entitled to VHA whenever permanently assigned to duty in an area of the United States which is a high housing cost area with respect to the member. 37 U.S.C. § 403a(a)(1), and the Joint Federal Travel Regulations (JFTR), para. U8000-1. However, such a member with a permanent duty station in the United States, who is not assigned government quarters and who is authorized BAQ at the with-dependent rate solely because he or she is paying child support, is entitled to VHA only at the without-dependent rate. 37 U.S.C. § 403a(a)(4),² and JFTR para. U8011-B. We are called upon here to de-

¹ This request was submitted by L. T. Mullin, Head, Disbursing Division, Comptroller Department, Marine Corps Development and Education Center, Quantico, Virginia, through the Per Diem, Travel and Transportation Allowance Committee which assigned it Control No. 88-5.

² The Defense Authorization Act, 1985, Pub. L. No. 98-525, § 602(d)(1), 98 Stat. 2492, 2534 (1984), added 37 U.S.C. § 403a as a separate codification of the VHA. This section also added limitations on receiving VHA when a member's entitlement is based on BAQ at the with-dependent rate solely due to court ordered dependent support. This limitation was amended by the Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 602(a), 99 Stat. 583, 636 (1985), to provide that a member may be paid VHA only at the without-dependent rate whenever

Continued

termine whether Major Cotton's entitlement to BAQ at the with-dependent rate is based "solely" on his payment of child support which would preclude him from receiving VHA at the with-dependent rate.

Major Cotton argues that his entitlement to BAQ at the with-dependent rate is not based solely on payment of child support. Instead, he indicates, he shares physical and financial custody of his children with his former wife and maintains a residence sufficient to accommodate them when they stay with him.

Analysis

In *Major Garry R. Scott and Captain Christopher Bonwich*, 64 Comp. Gen. 224 (1985), circumstances somewhat similar to those in the present case were discussed. In that decision, one member (Bonwich) claimed BAQ at the with-dependent rate and VHA-W on the basis that he had extended visitation rights (4 months a year) with his natural child. He resided in private quarters, and during the periods when he exercised extended visitation, he did not pay child support to the former spouse who had custody of the child during the rest of the year. We held that, while the member could not receive BAQ at the with-dependent rate during the period of time that the child's mother had actual custody, since the child lived with her in government quarters, he was entitled to both BAQ and VHA at with-dependent rates when the child actually resided with him for more than a short visit. We further held that more than a short visit was a period in excess of 3 months, absent any regulation to the contrary.³ Accordingly, VHA-W entitlement exists when a dependent child resides in the private quarters of a member otherwise entitled to VHA at the without-dependent rate for periods in excess of 3 months.

In our opinion the same rationale applied in 64 Comp. Gen. 224, *supra*, ought to be applied to Major Cotton's case. On that basis he would be entitled to VHA-W upon a demonstration that his child or children actually lived with him in a nontemporary status, that is, for a continuous period in excess of 3 months. For other time periods his entitlement to BAQ at the with-dependent rate must be considered as based solely on his payment of child support. See Department of Defense Military Pay and Allowances Entitlements Manual, para. 30236d; and 42 Comp. Gen. 642 (1963), and cases cited therein. The fact that he maintains a residence sufficient to accommodate his children would not entitle him to VHA-W when the children are in the custody of his former wife or visiting him for short periods.

We do not have sufficient information available to determine how long the children actually reside with Major Cotton; however, it appears that generally they do not remain with him for periods in excess of 3 months except possibly during the school recess in the summer months. The Disbursing Officer should obtain

entitlement is premised solely on the payment of any child support, not just court ordered child support. See also H.R. Rep. No. 81, 99th Cong., 1st Sess. 217 (1985).

³ The fact that in that case the member paid child support pursuant to court decree and Major Cotton is paying it pursuant to an agreement, makes no difference. See, footnote 2.

further information from Major Cotton in that regard and determine his entitlement accordingly.

The Disbursing Officer also asks whether the former wife's housing costs should be taken into consideration in computing Major Cotton's VHA-W. In this regard computation of his VHA-W entitlement, if any, should be based only on the costs for his own residence, not costs related to his former wife's residence. Although a substantial portion of the child support payments presumably are used by her to cover housing costs for the children, those are her direct costs and not direct costs of housing to Major Cotton for which VHA is intended to reimburse him. See JFTR para. U8002-F.

B-238290, April 20, 1990

Procurement

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Terms
- ■ ■ ■ Deviation

Protester's bid for printing paper was properly rejected as nonresponsive where solicitation as a whole required bidders to agree to furnish paper with 50 percent waste paper content, and protester's bid offered zero percent content.

Miscellaneous Topics

Environment/Energy/Natural Resources

- Environmental protection
 - ■ Recycled materials
 - ■ ■ Use
 - ■ ■ ■ Cost increase
-

Procurement

Sealed Bidding

- Contract awards
- ■ Propriety
- ■ ■ Recycled materials
- ■ ■ ■ Cost increase

Award to lowest bidder offering to comply with mandatory solicitation requirement for 50 percent waste paper content, even though there was lower bid not meeting requirement, is consistent with Resource Conservation and Recovery Act of 1976 and Environmental Protection Agency implementing Guideline; although narrative accompanying Guideline indicates EPA's view that higher price for paper meeting minimum waste paper content requirement is unreasonable, neither statute nor Guideline prohibits paying such a premium.

Matter of: Victor Graphics, Inc.

Paul G. Dembling, Esq., and Dennis A. Adelson, Esq., Schnader, Harrison, Segal & Lewis, for the protester.

Stuart M. Foss, Esq., Office of the General Counsel, U.S. Government Printing Office, for the agency.

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

Victor Graphics, Inc., protests the award of a contract to United Book Press, Inc., under invitation for bids (IFB) No. C264-S, issued by the United States Government Printing Office (GPO) for the printing of the "Index Medicus," a publication of the National Institutes of Health. Victor challenges the rejection of its bid as nonresponsive to a solicitation requirement that the paper products to be furnished contain a minimum of 50 percent waste paper (i.e., recovered/recycled materials).

We deny the protest.

The solicitation, issued on October 17, 1989, included a clause in the bid schedule that required bidders to "certify that the paper supplied under any contract resulting from this solicitation, will meet or exceed the minimum percentage of recovered materials below"; the clause went on to specify a minimum 50 percent waste paper content and provided a space for the offeror to indicate its proposed percentage. Elsewhere, the bid schedule advised that offerors "failing to certify to the minimum percentage content shall be determined nonresponsive." At bid opening on November 14, two of the three bidders certified compliance with the waste paper requirement by entering a figure of 50 percent on their bid schedules; Victor, on the other hand, specified in its bid schedule a figure of zero percent waste paper content. Accordingly, although Victor's bid was low, it was rejected as nonresponsive. Upon learning of the ensuing award to United, Victor filed an agency-level protest. When that protest was denied, Victor filed this protest with our Office.

While acknowledging that the awardee was able to obtain paper with 50 percent waste paper content, Victor maintains it was advised by several suppliers that such paper was not readily available within the specified delivery schedule. Victor argues that its bid nevertheless was responsive to the solicitation based on the following provision from section 1 of the solicitation:

WASTE PAPER CONTENT: In the performance of any contract resulting from this solicitation, the use of waste paper to the maximum extent possible is required, provided that such waste paper content meets the performance standards (contracting officer to state standards or delete the proviso). Offerors who can not certify to the minimum content standards are requested to provide, for information purposes, the percentage of waste paper content that is available to them.

Victor interprets this provision as permitting bidders to offer paper with less than 50 percent waste paper content where paper with a higher content is not readily available. Victor also contends that GPO's insistence on 50 percent waste paper here is a departure from its past practice of awarding to firms cer-

tifying less than the minimum specified waste paper content; Victor states that it has been the contractor for this project for 6 years, notwithstanding that it has always certified that it will provide paper with a zero percent waste paper content.

Victor's interpretation of the waste paper content requirement, and its conclusion that its bid was responsive, are untenable. When a dispute exists as to the actual meaning of a solicitation provision, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation; to be reasonable an interpretation must be consistent with such a reading. *See Aerojet Ordnance Co.*, B-235718, July 19, 1989, 89-2 CPD ¶ 62.

Although, we agree that section 1, when read by itself, did not establish a firm 50 percent waste paper content requirement, the solicitation read as a whole, giving effect to all provisions, did establish such a firm requirement. The bid schedule itself expressly required offerors to certify to a minimum 50 percent waste paper content, and explicitly warned that bids failing to certify to the minimum would be determined nonresponsive. Reading section 1 in light of this mandatory language, we think the only reasonable reading of section 1 is that bidders were required to use waste paper "to the maximum extent possible," with a minimum of 50 percent waste paper. Section 1 did not state that firms unable to meet the requirement would be deemed responsive, which would have been inconsistent with the express language to the contrary in the bid schedule; rather, section 1 merely "requested" noncompliant firms to indicate the percentage waste paper content they could offer "for information purposes." Presumably, GPO would use this information in determining to what extent the 50 percent requirement should be used in the future.

As for the agency's alleged past practices, the first page of the solicitation instructed bidders to pay special attention to areas which differed from the predecessor contract, and specifically referred to the provisions governing the use of recovered materials. (In any case, an agency's past practice is not a basis for questioning its application of otherwise correct procurement procedures. *General Elec. Co.*, B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585.)

Victor also contends that the agency's enforcement of the 50 percent minimum waste paper content requirement violates procurement provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6962 (1982), and the Environmental Protection Agency's (EPA) implementing regulations, "Guideline for Federal Procurement of Paper and Paper Products Containing Recovered Materials," 40 C.F.R. part 250 (1989). As Victor notes, the RCRA requires agencies to procure paper with the "highest percentage of recovered materials practicable," 42 U.S.C. § 6962(c)(1), but excepts from this requirement items "only available at an unreasonable price," 42 U.S.C. § 6962(c)(1)(C). The Guideline recommends a minimum 50 percent recovered materials content for most paper, but conditions this recommendation upon availability at a reasonable price. 40 C.F.R. § 250.21(b)(4). In the explanation published in the *Federal Register* along with the EPA Guideline, the EPA indicates that it believes the price of an item containing recovered materials is unreasonable if it is greater

than the price of a competing product made of virgin material. 53 Fed. Reg. 23,559 (1988). Victor argues that because United's price for a 50 percent waste paper product was 11.5 percent higher than Victor's price for 100 percent virgin paper, it was unreasonable and should have led to rejection of the bid and award to Victor based on its low price.

GPO was not required to reject United's bid as unreasonably priced. First, once an agency has reasonably determined to include a minimum waste paper content requirement in a solicitation, the RCRA does not preclude the agency from accepting a bid responsive to the waste paper requirement merely because a bid nonresponsive to the content requirement may be priced lower. The section of the RCRA cited by Victor concerning unreasonable price (42 U.S.C. § 6962(c)) establishes only a permissive exception to the general requirement for items composed of the highest percentage of recovered materials practicable; it does not prohibit award at a higher price to a firm agreeing to meet the waste paper requirement.

Further, EPA itself recognizes in the implementing Guideline that the Guideline is "only advisory in nature," and is intended "to assist procuring agencies in complying with the requirements of . . . the RCRA." 40 C.F.R. § 250.1(a). According to the agency, "each procuring agency may decide whether a 'reasonable price' includes a price preference." 53 Fed. Reg. 23,559. EPA recognized that the relative prices of paper products made with virgin or recovered fibers would probably fluctuate in both directions, and concluded that the reasonable price provision of the RCRA, 42 U.S.C. § 6962(c)(1)(C), means that "there is no projected or observed *long-term or average increase* over the price of comparable items that do not contain recovered materials." (Italic added.) *Id.* In other words, as interpreted by the EPA itself, the RCRA provisions concerning availability at a reasonable price do not preclude award to a bidder offering to meet the content requirement at a price higher than the price for paper not meeting the requirement.¹

Although Federal Acquisition Regulation § 14.407-2 requires a contracting officer to make a determination of price reasonableness before awarding a contract, in view of the solicitation requirement for immediate delivery and the statutory policy in favor of procuring products with recovered materials (42 U.S.C. § 6962), we find no basis for objecting to payment of an 11.5 percent premium for paper with recovered materials as unreasonable. See generally *Picker Int'l, Inc.*, B-232430, Dec. 12, 1988, 88-2 CPD ¶ 583.

¹ Victor cites the decision in *National Recycling Coalition, Inc. v. Reilly*, 884 F.2d 1431 (D.C. Cir. 1989), as holding that EPA's interpretation of the unreasonable price provision in the RCRA is binding on GPO here. That decision is consistent with our conclusions here. The court found that it was unclear what Congress intended by the phrase "unreasonable price," and that EPA's interpretation expressed in the narrative accompanying its Guidelines—that a price is unreasonable if it exceeds the price of a competing product made of virgin material—was "permissible" and "consistent with the [RCRA's] overall purpose." *Id.* at 1437. The court did not hold that agencies are precluded by the RCRA from paying a premium for products with recovered materials; rather, it described the requirements of the statute in permissive terms, stating that the RCRA "provides that a procuring agency is *not required* to purchase products containing reclaimed materials if *it determines* that such items are only available at an unreasonable price." (Italic added.) *Id.* at 1434. Indeed, the court noted that the EPA itself had argued that its Guideline consists merely of recommendations that "the procuring agencies are free to accept or disregard."

Victor also asserts that because the EPA Guideline merely recommends, but does not require, a minimum 50 percent waste paper content standard, the agency's decision to enforce the requirement improperly restricts competition, as evidenced by the fact that only three firms submitted bids. As the solicitation clearly required a 50 percent minimum waste paper content, Victor's argument essentially challenges the terms of the solicitation, and as such is untimely. 4 C.F.R. § 21.1(a)(1) (1989). In any case, agencies may require a specific wastepaper content as a means of implementing the recommendation of the EPA Guideline. See *American Management Enters., Inc.*, B-238134, *supra*.

The protest is denied.

B-234476, April 23, 1990

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

Employee was transferred from Columbus to Dayton and then back to Columbus within 1 year. She sold her Columbus residence within 1 year from effective date of first transfer and prior to official notice of retransfer. Subsequent transfer does not extinguish the right to reimbursement created by the initial transfer. Employee is entitled to reimbursement of residence sale expenses incident to initial transfer to Dayton. Further, employee is entitled to residence purchase expenses incident to the retransfer to Columbus.

Civilian Personnel

Relocation

- Temporary quarters
- ■ Actual subsistence expenses
- ■ ■ Reimbursement
- ■ ■ ■ Eligibility

A transferred employee claimed temporary quarters subsistence expenses for herself for 4 days when inclement weather prevented her from returning to her residence at old duty station which she had not vacated in order to allow daughter to complete school session. Her claim is disallowed since she had not vacated her old residence as required by the Federal Travel Regulations before temporary quarters expenses may be reimbursed.

Civilian Personnel

Relocation

- Temporary quarters
- ■ Determination
- ■ ■ Criteria

Employee whose old and new residences were in Columbus occupied temporary quarters for 30 days in connection with successive transfers. She acquired a new permanent residence but was unable to occupy new residence immediately because of a holdover provision allowing the sellers to remain in

possession. Paragraph C13006 of the Joint Travel Regulations, volume 2 (FTR para. 2-5.2h), which generally prohibits payment of TQSE for short distance transfers, is not a bar to payment since this provision was not intended to apply to situations where the old residence sale is under one transfer order and the new residence purchase is under another order as the timing of the sale and purchase are no longer within the employee's control.

Matter of: Ida Faye Robinson—Relocation Expenses—Retransfer to Former Duty Station Within One Year

The Acting Chief, Accounting and Finance Division, Office of Comptroller, Defense Logistics Agency (DLA), forwards a request for advance decision, concerning the claim of Ms. Ida Faye Robinson for relocation expenses incurred incident to two permanent changes of station. As stated below, we hold that the employee may be reimbursed for certain of these expenses.

Background

Ms. Robinson, an employee of the Defense Logistics Agency Finance Center, Columbus, Ohio, was authorized a permanent change of station (PCS) from Columbus to the Defense Electronics Supply Center, Dayton, Ohio, with a reporting date of January 24, 1988. Ms. Robinson commuted from her Columbus area residence to Dayton in order to facilitate her daughter's completion of the school session. However, Ms. Robinson had to use temporary housing on 4 days during her commuting period because of inclement weather. On June 5, 1988, Ms. Robinson entered into a sales contract on her Columbus residence. The sale was closed on July 8, 1988, and she vacated the premises on July 23, 1988.

In the meantime, by letter dated June 16, 1988, the Director, DLA notified all employees of DLA's intention to consolidate central payment operations in Columbus over the next 3 years. This letter advised affected employees that they would have the opportunity to transfer to the central site, but it was not a specific notice for any employee. In consideration of this notice and other informal information concerning a possible reassignment back to Columbus, Ms. Robinson signed an agreement on July 13 to purchase a new house in Columbus contingent upon her receiving written notification of her reassignment back to Columbus.

On July 22, 1988, Ms. Robinson was formally notified that she had been selected for a position in Columbus, with a reporting date of August 8, 1988. She accepted the position and on July 25, 1988, a PCS order was issued transferring Ms. Robinson back to Columbus and authorizing real estate expenses, 60 days temporary quarters subsistence expenses (TQSE), and shipment and 90 days temporary storage of household goods. On July 25, 1988, Ms. Robinson finalized the contract for the purchase of a house in Columbus with a closing date of August 11, 1988. However, due to a holdover provision in the contract of sale allowing the sellers to remain in possession until August 22, 1988, the new residence was not available for occupancy until that time. Ms. Robinson moved out of her old

residence and placed her household goods in storage on July 23, 1988. She stayed in temporary quarters from July 23 to August 22, 1988, when she moved into her new residence.

Because the two sets of orders were issued within 1 year and because of the close proximity of the two duty stations, DLA has requested clarification as to what expenses are allowable.

Opinion

Authorization of Relocation Expenses

The DLA notes that paragraph C4100-3 of volume 2 of the Joint Travel Regulations (May 1, 1988), implementing 5 U.S.C. § 5724a, states that a transfer at government expense is not authorized within 12 months of the employee's most recent PCS unless the order-issuing official certifies that the proposed transfer is in the interest of the government, an equally qualified employee is not available within the commuting area of the component concerned, and the losing component agrees to the transfer. The record shows that these regulatory requirements were met and that the proper certifications were made. Therefore, payment of allowable relocation expenses for Ms. Robinson's transfer from Dayton back to Columbus is authorized.

Real Estate Expenses

The statutory provisions governing reimbursement of residence transaction expenses of transferred employees are contained in 5 U.S.C. § 5724a (1982). The DLA refers to our decision in *Warren L. Shipp*, 59 Comp. Gen. 502 (1980), as a basis for questioning payment of real estate expenses. The *Shipp* case held that once an employee is notified of a transfer back to a former duty station, the government's obligation to reimburse real estate expenses is limited to those already incurred or those which cannot be avoided. We do not perceive any conflict between the reimbursement to Ms. Robinson for her real estate expenses and the holding in *Shipp*. As indicated above, Ms. Robinson entered into a contract to sell her house in Columbus on June 5, 1988, and settled on July 8. She did not receive any official notice upon which she could rely of a transfer back to Columbus until July 22, 2 weeks later. Thus, the rule in *Shipp* does not limit the government's obligation to reimburse real estate expenses to Ms. Robinson.

TQSE During January and February 1988

The regulations pertaining to temporary quarters subsistence expenses are contained in chapter 2, part 5 of the Federal Travel Regulations (FTR) (Supp. 10, March 13, 1984), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1984). "Temporary quarters" is defined in FTR, para. 2-5.2c as "Lodging obtained from private or commercial sources for the purpose of temporary occupancy after *vacating* the residence occupied when the transfer was authorized." (Italic added.)

Ms. Robinson has claimed temporary quarters subsistence expenses for herself for 4 days in January and February 1988 when inclement weather prevented her from returning to her residence in Columbus. Since Ms. Robinson continued to reside in the former residence during the period for which she claims TQSE, she had not vacated the former residence as required by FTR, para. 2-5.2c, quoted above. Therefore, reimbursement is denied for the 4 days in January/February 1988. See *Edward Carlin*, 67 Comp. Gen. 544 (1988).

TQSE from July 23 to August 22, 1988

Ms. Robinson has also submitted a claim for the temporary quarters subsistence expenses she incurred from July 23 to August 22, 1988, i.e., from the time she was obligated to vacate her former residence until she had a legal right to possession of her new residence.

The agency questions whether payment can be made for that period in light of 2 JTR para. C13006 (Sept. 1, 1986), which prohibits the payment of TQSE for short distance transfers. Short distance transfers are those where the distance between the new residence and the old duty station is not more than 40 miles greater than the distance between the old residence and the old duty station. We do not believe that the cited JTR provision, which is based on FTR, para. 2-5.2h, was intended to apply to situations where the sale is under one PCS order and the purchase is under another order. In those situations the timing of the sale and purchase are no longer within the employee's control.

Here, Ms. Robinson contracted to sell her prior residence in Columbus under the first PCS order transferring her to Dayton before she received the second PCS order transferring her back to Columbus. The purchase of her new residence was then made pursuant to the second order. Therefore, we would not object to payment of Ms. Robinson's claim for TQSE from July 23 to August 22, 1988.

Movement and Storage of Household Goods

We have not objected to the reimbursement of employees' moving expenses in a number of cases involving relatively short distance transfers. For example, we have held that the fact that an employee's new residence is located near the former residence would not in itself preclude reimbursement of relocation expenses, so long as the employee commutes daily to his new duty station from the new residence. B-175822, June 14, 1972. Also, the fact that commuting time or distance was not decreased would not necessarily prevent reimbursement of expenses, if it could be otherwise determined that the employee's move was incident to his transfer. *Gary A. Ward*, 54 Comp. Gen. 751 (1975). In each particular case, the agency involved is required to consider a variety of factors surrounding the relocation, and on the basis of all such information, determine whether the relocation was truly incident to the employee's transfer. See *Harvey Knowles*, 58 Comp. Gen. 319 (1979). The facts in this case support a finding that the move was incident to Ms. Robinson's transfers.

Conclusion

Accordingly, Ms. Robinson's real estate expenses and household goods expenses may be reimbursed along with her temporary quarters subsistence expenses to the extent outlined above.

B-237955.2, April 24, 1990

Procurement

Specifications

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Justification
- ■ ■ ■ Sufficiency

Solicitation requirement that offerors complete original equipment manufacturer's (OEM's) maintenance training prior to preaward survey is unobjectionable where OEM, the only source of acceptable spare parts, will make parts available only to firms with training and there would be risk of delay in contract performance if training was not completed prior to award.

Procurement

Competitive Negotiation

- Offers
- ■ Risks
- ■ ■ Pricing

Fact that original equipment manufacturer (OEM), the only source of necessary spare parts, is in position to influence competition by imposing restrictions upon spare parts availability does not render procurement defective where (1) the restrictions appear reasonable and have not been applied to prevent any particular firm from purchasing the parts and (2) the only alternative procurement method would be a sole-source award to the OEM, but record does not support conclusion that OEM is only acceptable source. Ability to obtain parts is matter of firm's ability to develop business relationship with OEM, a matter outside the General Accounting Office's purview.

Matter of: Starr Systems

Thomas F. Richardson, Esq., Chambless, Higdon & Carson, for the protester.

Millard F. Pippin, Office of the Assistant Secretary of the Air Force, for the agency.

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

Starr Systems protests a training requirement in request for proposals (RFP) No. F09650-89-R-0196, issued by the Department of the Air Force for maintenance of TEMPEST-certified microcomputers and peripheral equipment. Starr complains that the provision is restrictive of competition.

We deny the protest.

Zenith Data Systems manufactured the TEMPEST equipment (which is designed to meet certain security standards for processing classified information) and had been providing maintenance as well. In order to enhance competition, the Air Force decided to allow entities other than Zenith to provide the maintenance, which also encompasses acquisition of Zenith-approved spare parts. As originally issued, the RFP required that the successful contractor be trained in TEMPEST equipment repair and have 1 year of repair experience with the equipment. However, following release of the solicitation, Zenith indicated that its equipment training was a prerequisite for authorization to purchase its spare parts. The Air Force then amended the solicitation to require that the successful contractor, either directly or through a subcontractor, be Zenith-certified to maintain TEMPEST equipment, prior to the preaward survey.

It is undisputed that Zenith spare parts are necessary to meet the agency's maintenance needs, i.e., to assure that the equipment operates in a safe, effective, and dependable manner without compromising security standards critical to processing classified information. The Air Force explains that because Zenith is the original equipment manufacturer and the agency does not have any manufacturing data, data rights to replacement parts, or access to maintenance manuals, Zenith is the only source for spare parts and maintenance training for the equipment here. Further, the Air Force determined that it would not be feasible for it to buy repair parts directly from Zenith and provide them as government-furnished material, because of a lack of sufficient TEMPEST-trained government personnel and storage facilities. It apparently was in light of this need for Zenith parts that led the Air Force to agree to include the training requirement in the RFP.

Starr nevertheless contends that it already has sufficient experience with the repair of TEMPEST equipment to qualify for award, and that the training requirement therefore is unnecessary and restrictive of competition, and serves only to allow Zenith to control the competition. Starr complains in this regard that Zenith has shown an unwillingness to negotiate in good faith by refusing to specify the exact terms and conditions it will impose as a prerequisite to agreeing to make the necessary spare parts available for purchase by the successful contractor.

We find the training requirement legally unobjectionable. The training requirement was included in the RFP, not because the Air Force considered Zenith training the only acceptable means of assuring proper performance but, as indicated above, because Zenith considered its own training necessary to the proper servicing of Zenith equipment and would not make its spare parts available for purchase to firms without it. The requirement was included in the RFP only to put prospective offerors on notice of a Zenith requirement that would have to be met in order for a firm to obtain the parts necessary to perform. The Air Force's legitimate requirement for Zenith spare parts is not rendered improper by the fact that Starr and other firms may not be able to obtain them. See generally *Target Financial Corp.*, B-228131, Nov. 23, 1987, 87-2 CPD ¶ 506.

While Zenith does appear to be in a position to impose conditions on offerors, and thereby to affect the competition, its position results solely from its status as the sole available source of the spare parts, and not from any favoritism or other improper action by the agency. As the government has no contractual relationship with Zenith under which it can compel the firm to make its spare parts available, the only alternative to conducting this procurement competitively, subject to conditions insisted upon by Zenith, would be to make a sole-source award to Zenith on the basis that it is the only firm capable of furnishing the necessary parts. Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(1) (1988). Starr does not advocate this alternative and, moreover, there is no basis for concluding that only Zenith is a viable source. While offerors will be required to comply with the training requirement and other conditions, Zenith has not indiscriminately refused to make parts available to any particular firm, and there is no indication that any conditions imposed are unreasonable. For example, the training requirement appears to reflect Zenith's legitimate interest in assuring that its equipment is maintained properly, in accordance with its standards, and Zenith has made the training available on an ongoing basis since 1986. In addition, the Air Force has sought and received assurances from Zenith that it will negotiate with prospective offerors in good faith over spare parts availability.

Essentially, we think the situation here relates to Starr's and other firms' abilities to develop a business relationship with a supplier; that is, it is Starr's responsibility to negotiate a parts purchase agreement with Zenith, the success of which effort the government cannot guarantee. This generally is a matter between private parties and is not for consideration under our bid protest function. See *Electro-Methods, Inc.*, B-215841, Mar. 11, 1985, 85-1 CPD ¶ 293; *C3, Inc.*, B-211900, Dec. 30, 1983, 83-2 CPD ¶ 44. Any uncertainty as to the ultimate availability of spare parts amounts to a business risk that, under the circumstances here, all offerors must accept. See *Sentinel Electronics, Inc.*, B-221914.2 *et al.*, Aug. 7, 1986, 86-2 CPD ¶ 166.

Starr argues that the Zenith training should not be required until after award, so that only the successful offeror will have to incur the expense of the training. However, the solicitation contemplated that performance would begin immediately after award, and an unacceptable risk of delay in performance could result if the contractor lacked the necessary training at the time of award.

Procurement

Special Procurement Methods/Categories

- Federal supply schedule
- ■ Multiple/aggregate awards
- ■ ■ Price reasonableness

Finding of price unreasonableness under multiple-award Federal Supply Schedule solicitation was reasonable where proposal did not offer either most favored customer pricing—prices equal to or lower than lowest commercial prices—when evaluated on a product-by-product basis or lowest net price available to the government.

Matter of: Baxter Healthcare Corporation

Justin D. Simon, Esq., Dickstein, Shapiro & Morin, for the protester.

E. L. Harper, Office of Acquisition and Materiel Management, Department of Veterans Affairs, for the agency.

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

Baxter Healthcare Corporation protests the Department of Veterans Affairs' (VA) rejection of its proposal under request for proposals No. M2-Q1-88, a multiple award Federal Supply Schedule (FSS) solicitation for medical supplies. Baxter challenges VA's determination that Baxter did not offer prices equal to or lower than those offered its most favored customer (MFC), and the resulting rejection of its proposal due to unreasonable pricing.

We deny the protest.

Under multiple award schedules, contracts are negotiated with more than one supplier for delivery of commercial supplies and services that are comparable and of the same generic type, at prices based on discounts from commercial price lists. Federal Acquisition Regulation (FAR) § 38.102-2(a). Contracts are awarded only after the contracting officer determines that the prices, terms and conditions offered are fair and reasonable. FAR § 38.102-2(c). Generally, the determination of price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer; we will question such a determination only where it is clearly unreasonable or there is a showing of bad faith or fraud. See *Sal Esparza, Inc.*, B-231097, Aug. 22, 1988, 88-2 CPD ¶ 168.

Although VA is authorized to award schedule contracts for certain medical items, the FSS program is directed and managed by the General Services Administration (GSA). FAR §§ 38.000 and 38.101(e). We thus consider an agency's determination of price reasonableness to be proper when it meets the standards established in GSA's Policy Statement on Multiple Award Schedule Procure-

ment (Policy Statement), 47 Fed. Reg. 50,242 (1982), which established a goal of obtaining discounts from offerors' established catalog or commercial prices that are equal to or better than discounts the offerors extend to their MFC. 47 Fed. Reg. 50,244; see *Credit Bureau Inc. of Georgia*, B-220890, Feb. 27, 1986, 86-1 CPD ¶ 202. The Policy Statement does provide for awarding FSS contracts even where the discount offered the government is not equal to or greater than the MFC's discount, but only where the government's terms and conditions differ from those given to the MFC, for instance, "where the Government's overall volume of purchases does not warrant the best price." 47 Fed. Reg. 50,244.

The solicitation requested proposals for a 3-year contract to furnish medical equipment and supplies in 57 categories, or special item numbers (SIN), with each SIN category encompassing a number of separate but related individual items. Baxter, an incumbent FSS contractor, and two other firms submitted offers; Baxter's offer covered only SINs D-19 (physiological monitors) and D-26 (cardiac output apparatus). After extended negotiations, including an audit of Baxter's sales and pricing data conducted by the Defense Contract Audit Agency (DCAA), and the receipt of best and final offers (BAFOs), VA made award to Baxter for three items under SIN D-19.

With respect to the items Baxter offered under SIN D-26, the agency and DCAA were unable to discern a consistent policy by Baxter of granting discounts from published price lists; they determined that high quantity customers did not always receive the highest discounts, which often were granted to customers purchasing lesser quantities than the government. For example, for one type of catheter proposed under SIN D-26, Baxter offered VA (which previously had purchased 14,483 units) only a 40 percent discount from the list price, even though it had granted one commercial customer purchasing only 4,900 units a 47.5 percent discount and another customer purchasing only 30 units a 50 percent discount. VA concluded that Baxter was not offering discounts equal to or greater than the discounts offered its MFCs. VA did reopen negotiations in response to a subsequent agency-level protest from Baxter, but these proved fruitless. The agency subsequently advised Baxter that no award would be made for any of the seven items it offered under SIN D-26 because its offered discounts were not advantageous to the government. Baxter thereupon filed this protest with our Office.

Baxter primarily objects that VA improperly evaluated its MFC pricing by considering MFC status on a product-by-product basis, rather than on the basis of a single MFC for an entire SIN. According to the protester, requiring an MFC price for each item is inconsistent with the Policy Statement goal of obtaining discounts equal to or greater than the discount offered the offeror's most favored "customer;" Baxter argues that this reference to a singular "customer" indicates that GSA intended to require only a single MFC for each SIN, not one for each item under a SIN. Baxter states that no commercial customer receives the lowest price on every item, and that its commercial sales to any one customer are negotiated on the basis of a total package of products, not on a product-by-product basis. Baxter maintains that when prices are evaluated on the basis

of SIN-26 as a whole, it is clear that VA will receive favorable prices relative to Baxter's commercial customers.

We find Baxter's position untenable. The Policy Statement does not mandate evaluation of MFC pricing only on a SIN basis or preclude determination on a product-by-product basis. In this regard, GSA's own interpretation and implementation of its Policy Statement, as set forth in its Federal Supply Service Multiple Award Schedules Desk Guide, defines an MFC as "that customer or class of customers which receives the best discount and/or price arrangement *on a given item* from a supplier." (Italic added.) Desk Guide, section AA. The Guide makes clear elsewhere that "item" refers to an individual product and not to a SIN or category of products; the Guide states that "identical items are those that are the same in all respects, including brand name, model number, and technical characteristics." Desk Guide, section M.

Furthermore, as Baxter itself acknowledges, the solicitation provided that the award decision may be made on a product-by-product basis, not a SIN basis. The RFP (1) required the submission of catalogs or price lists and the listing of sales and commercial discounts for specific, proposed products; (2) established a minimum level of anticipated purchases as a precondition to award for any particular product; and (3) provided that the agency may make multiple awards for the listed articles or services, but cautioned that it would award "only one contract for each specific product" in the event of multiple offers of identical products. In these circumstances, the agency properly based its determination of reasonable pricing on a product-by-product review.

Moreover, even when evaluated on a SIN basis—that is, on the basis of the combined price Baxter charges a particular commercial customer for all seven products it offered under SIN D-26—as Baxter asserts should have been done, it appears that Baxter was not consistently offering MFC pricing to the agency. For example, Baxter offered one chain of hospitals a combined price lower than the price it offered VA, even though the volume of sales to the chain (in number of units) was lower than Baxter's volume of prior sales to VA for each of the seven products. Specifically, for one product, Baxter charged the chain 47 percent less than the prices it offered VA, even though prior sales of the product to VA (in units) were 417 percent higher.

Baxter explains that apparent discrepancies in the prices it offered VA relative to the prices offered its commercial customers merely reflect differing terms and conditions; while a number of Baxter's commercial contracts include commitments to purchase specified minimum quantities or a variety of products, the VA solicitation provides that "no guarantee is given that any quantities will be purchased under a contract." Given, however, that nothing in the record suggests that the prior high level of VA sales will diminish, or that the solicitation estimates of future sales are overstated, we think the agency reasonably determined that there were no materially different terms or conditions under Baxter's commercial contract that warranted the significantly lower prices offered some of those commercial customers, notwithstanding VA's significantly larger

volume purchases. Thus, even if MFC pricing is considered on a SIN-basis, the agency reasonably concluded that the pricing offered VA was unreasonable.

Baxter claims VA improperly failed to determine whether, notwithstanding its failure to offer MFC pricing, Baxter was offering the net low price to the government and therefore should have been placed on the schedule pursuant to an instruction in the Policy Statement that "every effort should be made to include products with the lowest net price on the schedule." 47 Fed. Reg. 50,248. However, other offerors quoted lower prices for products comparable to six of the seven products proposed by Baxter under SIN D-26. The agency therefore properly concluded that there were lower prices available in the competitive open market, and properly excluded Baxter from the schedule.

Baxter also questions whether VA satisfied another Policy Statement provision requiring that the contracting officer weigh the effect that the rejection of an offer will have on meeting the government's needs. 47 Fed. Reg. 50,244. However, it is clear from the foregoing that VA believes its needs will be met under SIN-26 at prices lower than Baxter's.

The protest is denied.

B-233397, April 27, 1990

Civilian Personnel

Relocation

- Travel expenses
 - ■ Privately-owned vehicles
 - ■ ■ Mileage
-

Civilian Personnel

Relocation

- Travel expenses
- ■ Reimbursement
- ■ ■ Eligibility

An employee, permanently transferred to the place where he was on a temporary duty assignment, returned to his old duty station by privately owned vehicle to retrieve stored household goods. The employee is entitled to en route per diem and mileage expenses for the round-trip since relocation travel by privately owned vehicle is deemed advantageous to the government under the Federal Travel Regulations, para. 2-2.3a.

Matter of: James R. Stockbridge

Mr. Roy E. Morris, Certifying Officer, Office of Surface Mining (OSM), Department of the Interior, requests a decision concerning the claim of Mr. James R. Stockbridge, an OSM employee, for expenses incurred during a trip to his old official duty station to make moving arrangements. For the following reasons we hold that the employee is entitled to payment of mileage and per diem ex-

penses for the actual round-trip travel en route between the new and old duty stations by privately owned vehicle without regard to the cost of travel by common carrier.

Background

In late summer of 1988, Mr. Stockbridge was transferred from Redding, California to Washington, D.C. At the time of his transfer, Mr. Stockbridge was already in Washington on a temporary training detail with the Bureau of Indian Affairs. Upon notice of his temporary duty assignment, Mr. Stockbridge stated that he sold his residence in California, placed part of his household goods in storage, and transferred his family to Washington, all at his own expense. After arriving in Washington he then flew back to Redding at his own expense to retrieve his personal vehicle, the use of which the agency had approved at his temporary duty station. Mr. Stockbridge's travel authorization for his temporary duty assignment included approval for round-trip travel via privately owned vehicle. Accordingly, Mr. Stockbridge received payment for mileage and per diem for his return trip to Washington.

After Mr. Stockbridge had been permanently assigned to Washington, the agency issued a travel authorization to Mr. Stockbridge to allow him to return to Redding to make final moving arrangements for his stored household goods. The travel authorization did not indicate mode of travel, but included an estimate for travel by common carrier and per diem expenses. Mr. Stockbridge traveled by privately owned vehicle to Redding, retrieved his household goods in storage, and returned to Washington.

On his travel voucher he claimed mileage and per diem costs for the trip. However, the agency certified payment only of the cost of round-trip common carrier from Washington to Redding and taxi expenses. Mr. Stockbridge, on his reclaim voucher, is claiming reimbursement for the difference between the mileage and per diem costs he originally claimed and the amount certified for payment by the agency.

Opinion

We have previously held that employees on temporary duty at a place which has become their permanent duty station are entitled to the relocation expenses authorized by 5 U.S.C. §§ 5724 and 5724a (1988). Further, such employees may be reimbursed for round-trip travel expenses from the new permanent station to the old permanent station for purposes of relocating their family or transporting their household effects to the new duty station. See *Dr. Tommie Cooper*, B-213742, Aug. 5, 1985; *Steven F. Kinsler*, B-169392, Oct. 28, 1976; *NOAA Ship DISCOVERER*, B-167022, July 12, 1976. The question we are presented with here is whether an agency may restrict reimbursement for mileage and per diem to the cost of travel by common carrier when an employee uses a privately owned vehicle for such relocation travel.

Paragraph 2-2.3a of the Federal Travel Regulations (FTR)¹ provides in pertinent part:

a. When an employee, with or without an immediate family, who is eligible for travel allowances under 2-1.2 and 2-1.5, uses a privately owned automobile for permanent change of station travel, that use is deemed to be advantageous to the government. . . .

In *Dominic D. D'Abate*, 63 Comp. Gen. 2 (1983), we held that where the applicable regulations prescribe that travel by a privately owned vehicle is deemed advantageous to the government, the employee is entitled to be reimbursed on that basis despite a clause in his travel orders purporting to limit his reimbursement to the cost of travel by common carrier. Therefore, FTR, para. 2-2.3a clearly establishes use of a privately owned vehicle for permanent change of station travel as being advantageous to the government and allows no discretion by agency officials to conclude otherwise. See also *Paul S. Begnaud*, B-214610, Feb. 19, 1985.

In this case, Mr. Stockbridge's round-trip travel from Washington to Redding for purposes of transporting his household effects constituted relocation travel by privately owned vehicle. Thus, FTR, para. 2-2.3a governs reimbursement for Mr. Stockbridge's use of his privately owned vehicle for that travel. Accordingly, Mr. Stockbridge's method of travel must be considered as advantageous to the government, and the common carrier estimates on his travel order purporting to limit his reimbursement are not controlling. See *Dominic D. D'Abate*, 63 Comp. Gen. at 3.

Mr. Stockbridge's reclaim voucher should be processed in accordance with the above.

B-238106, B-238257, April 27, 1990

Procurement

Noncompetitive Negotiation

- Use
- ■ Justification
- ■ ■ Urgent needs

Protest is sustained where the agency, using noncompetitive procedures to award contract extension on a sole-source basis, fails to establish that the time constraints imposed by urgency prevented the agency from soliciting offers from other potential sources including the protester.

¹ (Supp. 1, Sept. 28, 1981), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1988).

Procurement

Competitive Negotiation

■ Offers

■ ■ Submission time periods

■ ■ ■ Time restrictions

■ ■ ■ ■ Propriety

Where the protester effectively was permitted 2 hours to submit an offer due to the agency's unjustified failure to provide reasonable time to solicit offers, the protester was improperly deprived of an opportunity to compete.

Matter of: Sanchez Porter's Company

Anthony L. Sanchez, for the protester.

Gary E. Wint, Esq., General Services Administration, for the agency.

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

Sanchez Porter's Company, the incumbent contractor, protests that the General Services Administration (GSA) improperly awarded two interim contracts and a contract modification for janitorial and maintenance services at the United States Customs House, a federal office facility in Denver, Colorado. Sanchez generally alleges that GSA improperly excluded it from competing, and improperly justified the award of these contracts on the basis of urgency.

As discussed in detail below, we agree with GSA that urgency justified excluding Sanchez from the competition for the first interim contract due to dissatisfaction with the firm's recent performance. In the absence of exigent circumstances, however, agencies may not exclude a potential contractor because of unsatisfactory prior performance unless the firm is found to be nonresponsible under applicable regulations. Regarding the follow-on awards (a sole-source contract extension and a second interim contract), the record does not support the urgency determinations to exclude Sanchez. GSA had time available to solicit offers and did not find the firm to be nonresponsible. Therefore, we sustain Sanchez's protests against the interim contract modification and the second interim contract.

Pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), the Small Business Administration (SBA) entered into a contract with GSA to provide custodial services at the Customs House and arranged for the performance of this contract by letting a subcontract to Sanchez, a socially and economically disadvantaged business. Sanchez provided these custodial services to GSA under contract No. GS-07P-87-HTC-0074 (0074) for a basic term of 1 year, from July 1, 1988, to June 30, 1989. The contract provided for two 1-year options to be exercised at GSA's discretion. On April 7, 1989, GSA notified SBA that due to un-

satisfactory performance by Sanchez, GSA did not intend to exercise an option to extend Sanchez's contract beyond the June 30 basic term expiration date. At GSA's request, SBA recommended E.C. Professional (ECP) as another qualified 8(a) contractor to provide the custodial services.

In April, GSA began negotiations with ECP under the 8(a) program for a 1-year contract with options. By the time Sanchez's contract expired on June 30, GSA and ECP had not reached an agreement under the 8(a) program because ECP had not yet submitted a price for the basic requirement that GSA considered reasonable. In order to prevent a lapse in the performance of services, which could jeopardize the health, safety, and welfare of those using the facility and possibly cause physical damage to the structure itself, GSA made an urgency determination and requested ECP (because ECP was expected to become the new 8(a) contractor in the immediate future) and Metropolitan Building Maintenance (because Metropolitan was providing custodial services at two facilities across the street from the Customs House facility) to submit prices for a 3-month interim contract. GSA did not request Sanchez, the incumbent 8(a) contractor, to submit prices for this interim contract due to its poor performance during the preceding 12 months. Because ECP offered the lowest prices, on July 3, GSA entered into a 3-month interim contract with ECP, contract No. GS-07P-89-JWC-0091 (-0091), for the period of July 3 through September 30.¹

In August, negotiations between GSA and ECP under the 8(a) program were terminated because agreement could not be reached on price. On September 4, GSA withdrew the requirement from the 8(a) program after SBA failed to propose another qualified 8(a) contractor to provide the custodial services. In order to continue receiving custodial services at the Customs House, on September 28, 1 working day before ECP's initial interim contract expired, GSA issued a modification, No. PS01, to ECP's interim contract based on urgency. This modification extended ECP's contract term for another 3 months for the period of October 1 through December 31.

In October, pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 46-48(c) (1982), GSA began negotiations with the National Industries for the Severely Handicapped (NISH), a nonprofit agency. On November 28, GSA and NISH reached an agreement for NISH to provide the custodial services beginning March 1, 1990. Because NISH was not to begin performance until March 1, GSA again needed to procure short-term custodial services for the period of January 1 through February 28. On December 28, 1 working day before the extension of ECP's interim contract expired, GSA solicited offers from four firms, including Sanchez. The deadline for receipt of offers was 12:00 noon, local time, on December 29. Three of the firms received the solicitation package on December 28 (and submitted timely offers). Sanchez, because it had no telefacsimile machine, did not receive its solicitation package, sent by overnight mail, until 2 hours before the closing time on December 29. By a letter sent by commercial telefacsimile machine, Sanchez notified GSA just before the closing time that basically, due

¹ This interim contract was not under the 8(a) program as the contract was directly between GSA and ECP, rather than between SBA and GSA with a subcontract to ECP.

to a lack of time to prepare its price, it was not submitting an offer. Instead, Sanchez again requested that GSA exercise the option under its initial 8(a) contract. On December 29, GSA awarded contract No. GS-07P-90-JWC-0026 (-0026) to Metropolitan Building Maintenance, the lowest priced offeror.

As a general rule, procurements must be conducted using competitive procedures. 41 U.S.C. § 253(a) (Supp. IV 1986). An agency may use other than competitive procedures where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency did not limit the number of sources from which bids or proposals are solicited. 41 U.S.C. § 253(c)(2). When using other than competitive procedures based on unusual and compelling urgency, the agency is required to request offers from as many potential sources as is practicable under the circumstances. 41 U.S.C. § 253(e). We will object to the agency's determination to limit competition based on unusual and compelling urgency where we find that the agency's decision lacks a reasonable basis. *Colbar, Inc.*, B-230754, June 13, 1988, 88-1 CPD ¶ 562.

Interim Contract -0091

With respect to the award of the interim contract (-0091) to ECP for custodial services for the period of July through September, Sanchez alleges that as the incumbent 8(a) contractor, GSA improperly excluded it from the competition based on an urgency determination.² Under 41 U.S.C. § 253(c)(2), an agency, in urgent circumstances, may limit the competition to firms with satisfactory work experience which it believes can promptly and properly perform the services. See *Industrial Refrigeration Serv. Corp.*, B-220091, Jan. 22, 1986, 86-1 CPD ¶ 67. The agency is not required to solicit the incumbent if, in the agency's judgment, there is doubt based on the incumbent's prior record of performance that the firm can perform the services. *Id.* This is true whether or not the agency has formally found the incumbent to be nonresponsible under FAR § 9.103(b) (FAC 84-18). *Atlanta Investigations*, B-227980; B-227981, July 30, 1987, 87-2 CPD ¶ 121.

GSA reasonably limited competition for the interim contract in April 1989 because of its urgent need to obtain a contractor for the services. GSA knew that it would not be exercising an option to extend Sanchez's 8(a) contract. GSA, however, planned to maintain this requirement under the 8(a) program, and requested SBA to recommend another qualified 8(a) contractor to provide the necessary custodial services. Upon SBA's recommendation in April, GSA com-

² Sanchez challenges the decision of GSA not to extend the term of its 8(a) contract by exercising an option under this contract, which Sanchez alleges could have saved the government more than \$40,000 during the period from July to December when ECP was providing the services under the interim contract and modification which extended the interim contract. The contracting agency's decision not to exercise an option is a matter of contract administration. There is no obligation for the contracting agency to justify a decision not to exercise an option on the basis of a cost comparison. The regulations only provide that the agency cannot exercise an option without first determining that it is the most advantageous method of fulfilling the agency's needs, price and other factors considered. Federal Acquisition Regulation (FAR) § 17.207(c)(3) (FAC 84-49). Those who bid or offer on contracts containing option provisions assume the risk that the agency might not exercise the option. *Western States Management Servs., Inc.*, B-233576, Dec. 8, 1988, 88-2 CPD ¶ 575; *Arlington Public Schools*, B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16.

menced negotiations with ECP under the 8(a) program with the apparent belief that by the end of June, GSA and ECP would have reached an agreement under the 8(a) program for ECP to begin providing custodial services. By the end of June, when Sanchez's 8(a) contract expired, GSA and ECP had not reached an agreement under the 8(a) program. At this point, GSA reasonably determined that the operation of the government offices at the Customs House would be jeopardized (specifically the health, safety, and welfare of those using the facility and the possibility of physical damage to the structure itself) if janitorial and maintenance services were not performed. For this reason, we find GSA properly determined that exigent circumstances existed justifying other than competitive procedures to procure the custodial services. 41 U.S.C. § 253(c)(2), *supra*.

We cannot object to GSA's decision not to solicit an offer from Sanchez. GSA determined that Sanchez's performance during the previous 12-month period was unsatisfactory, as reflected by a number of contract administration problems and monthly payment deductions (which the record reveals were particularly high during the last quarter of Sanchez's performance under its 8(a) contract). Based on Sanchez's prior record of performance under its 8(a) contract, GSA states it had no reason to believe that Sanchez could provide interim custodial services which would be any better than the services it provided under its 8(a) contract. GSA limited the competition to ECP, with which it expected to shortly complete negotiations for an 8(a) contract, and Metropolitan, the contractor providing custodial services in two nearby buildings. Both of these firms were prepared to immediately begin performance upon award of the interim contract. Under these circumstances, we think GSA's decision to limit the competition to two firms which could promptly and properly perform the work was not objectionable. *Industrial Refrigeration Serv. Corp. B-220091, supra*.

Interim Contract Modification PS01

Sanchez challenges GSA's urgency determination as a basis for using other than competitive procedures in issuing a modification to the interim contract, thereby extending the period of ECP's performance for another 3 months from October to December. We conclude that this modification was improper.

The record indicates that, in August, negotiations between GSA and ECP for an 8(a) contract ended, and on September 4, when SBA failed to recommend another 8(a) contractor, GSA withdrew the requirement from the 8(a) program. Although too late to issue a fully competitive solicitation, GSA knew at this time that it had approximately 1 month before ECP's interim contract expired to solicit at least some sources for the follow-on contract for custodial services.³ On September 28 (1 working day before ECP's interim contract expired), in order to continue receiving the necessary janitorial and maintenance services after Sep-

³ An argument can be made that GSA knew in April, when it informed SBA that it did not intend to extend Sanchez's 8(a) contract by exercising an option and, in any event, no later than June, when Sanchez's 8(a) contract expired, that it would need to issue a solicitation for long-term custodial services. We believe that GSA, in good faith, intended to keep this requirement under the 8(a) program by negotiating another 8(a) contract, and, for this reason, believe GSA was justified in not conducting a competitive procurement at these particular times.

tember 30, GSA, on the basis of urgency, issued a modification to ECP's interim contract, extending it for another 3 months from October to December. We find that GSA's explanation for the extension—that its leasing branch was understaffed—is not a reasonable basis for the extension without soliciting any other sources. The record shows that approximately 1 month prior to the extension, GSA was aware it would have a continued need for these services. While GSA's use of the urgency exception to full and open competition to solicit these services appears justified, we see no reason in the record for not requesting offers from as many potential sources as was practicable given the time available to solicit offers. See 41 U.S.C. § 253(e); *AT&T Information Serv. Inc.*, 66 Comp. Gen. 58 (1986), 86-2 CPD ¶ 447. Unless GSA found Sanchez nonresponsible and thus ineligible for award under FAR § 9.103(b), the firm was a potential source entitled to the opportunity to compete. See, e.g., *Saxon Corp.*, B-237629, Feb. 26, 1990, 69 Comp. Gen. 303, 90-1 CPD ¶ 230. We thus sustain this ground of protest.

Interim Contract -0026

Sanchez also challenges GSA's award of the last short-term interim contract (-0026) to Metropolitan for 2 months from January to February until NISH would begin to provide custodial services in March. Sanchez basically argues that it had insufficient time to prepare its offer and that the award violated statutory requirements for full and open competition.⁴

With respect to the award to Metropolitan, we find that GSA's award was improper. The record indicates that GSA knew in October that it needed to have a contractor in place to provide custodial services beginning in January. In October, GSA began negotiations with NISH and on November 28, GSA reached an agreement with NISH to provide custodial services beginning March 1. Therefore, on November 28, GSA knew it still had 1 month before the extension of ECP's interim contract expired to award a short-term interim contract to a firm to provide custodial services for the months of January and February. However, GSA waited until December 28 (1 working day before the extension to ECP's interim contract expired) to solicit offers from four firms, including Sanchez.

On December 29, GSA awarded a contract to Metropolitan, the lowest priced offeror, so that custodial services would continue in January and February (again, apparently based on urgency). However, the record reveals no reason, other than staffing problems, for why GSA waited until 1 working day before the extension of ECP's interim contract expired to solicit offers. While GSA appears to have had a legitimate urgency basis precluding full and open competition, the law, as stated previously, requires that the agency request offers from

⁴ GSA argues that this protest is untimely because it concerns improprieties apparent in the solicitation which should have been filed prior to the closing date under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). However, we think the letter of December 29, 1989, from Sanchez filed prior to the closing time with GSA which complains of the insufficient time allotted to prepare an offer and requests a "fair advantage to obtain this contract" was intended as a protest. Although Sanchez states that the letter should be considered as its "formal bid," the letter contains no offer and GSA did not consider this letter as containing an offer.

as many potential sources as is practicable under the circumstances. GSA's unexplained, and we think unjustified, decision to wait until the day before ECP's extension was to expire to solicit offers deprived Sanchez, a firm GSA apparently now believed could perform the contract, of a reasonable opportunity to compete. The record shows that Sanchez did not receive its solicitation package until 2 hours before the deadline for receipt of offers. As a result of GSA's late issuance of the solicitation, Sanchez did not have reasonable time to submit an offer. We therefore sustain this ground of protest.

Because the latter two interim contracts have already been performed, termination of these contracts and resolicitation of these requirements is not an appropriate remedy. Accordingly, we find that Sanchez is entitled to recover its protest costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1).