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Preface

This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States.* The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions on the validity of contract awards, pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985)), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector, whether the decision modifies, clarifies, or overrules the findings of prior published decisions, and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 67 Comp. Gen. 10 (1987). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974 and Civilian Personnel Law decisions, whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

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Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs
■■■ Attorney fees
■■■■ Amount determination

Agency's general objections to the allegedly "excessive" number of hours claimed by the protester as spent by its attorneys and employees in pursuit of its protest provide an insufficient basis for concluding that the attendant costs are not reasonable where the hours are properly documented and certified.

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs

Claim for bid protest costs incurred for working on a companion protest and in pursuit of a cost claim, and for contacting a congressional representative, are disallowed since they are unrelated to the pursuit of the protest.

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs
■■■ Profits

Claim for profits on protester's labor costs is disallowed since there is no statutory basis to award profits as part of the costs for pursuing a bid protest.

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs

Claim for a general and administrative expense factor to be applied to protester's direct expenses is disallowed in the absence of a sufficient explanation of the basis for that factor.

Matter of: Omni Analysis—Claim for Bid Protest Costs

Gail Kezer Lowe, Esq., Kutak Rock & Campbell, for the protester.

Eloisa Regalado, Esq., Naval Supply Systems Command, Department of the Navy, for the agency.

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

Omni Analysis requests that our Office determine the amount it is entitled to recover from the Department of the Navy for the costs of filing and pursuing its protest in *Omni Analysis,* 68 Comp. Gen. 300 (1989), 89-1 CPD ¶ 239, *aff'd Omni Analysis; Department of Navy—Requests for Recon.* 68 Comp. Gen. 559 (1989), 89-2 CPD ¶ 73. We determine, as discussed below, that Omni is entitled to recover $66,956.40 as the costs of filing and pursuing its protest.

Omni filed its original protest on October 27, 1988, against the award of a contract to Advanced Technology, Inc. (ATI), for training support services. On March 6, 1989, we sustained that protest on the basis that ATI had misrepresented the availability of its personnel in its best and final offer and had, thereby, compromised the integrity of the procurement process. We recommended that the Navy not exercise the options under the contract. Both the Navy and Omni filed requests for reconsideration. The Navy's request for reconsideration alleged that Omni had not been prejudiced by ATI's actions, and otherwise challenged the recommended remedies including the award of protest costs. Omni's request sought termination of basic contract and recompetition. On July 24, 1989, we affirmed our previous decision.

The protester claims a total of $73,174.40, consisting of $35,210.40 in attorneys' fees and $37,964 for time charged to company personnel in pursuing the protest, as well as for certain company expenses. Because the parties have been unable to reach an agreement concerning the amount to which Omni is entitled, we have been requested to make that determination pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1989).

Attorneys' Fees

Of the total amount claimed, Omni requests reimbursement for $35,210.40 for 339.25 hours of attorneys' time plus related expenses. The hours claimed are primarily for the work of two principal attorneys and their support staff, as well as for certain word processing and proofreading services. Omni's attorneys have certified that the hours billed were actually spent on filing and pursuing the protest and that the hourly rates are those customary for the law firm. The Navy does not challenge the reasonableness of the rates. Rather, the agency challenges the number of hours billed as excessive, especially in light of the allegedly "simple" nature of the protest and the fact that Omni only prevailed on one of the issues raised in its protest. The Navy criticizes the bill as excessive for such matters as an alleged overexpenditure of time on basic research, too many trips to law libraries, too many telephone conferences with the client, and

oversupervision of the lead attorney. The agency also questions certain expenditures as not directly related to the protest and argues that the protester should not be reimbursed for costs pertaining to issues raised but not sustained. In addition, the Navy asserts that Omni is not entitled to be reimbursed for costs incurred after it received the initial March 6 decision.

We generally accept the number of attorney hours claimed, if properly documented, unless specific hours deemed to be excessive can be identified and a reasonable analysis for their rejection articulated. *Princeton Gamma-Tech, Inc.—Claim for Costs,* 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401. Simply concluding that the hours are excessive is inadequate, and generalized characterizations of a protest as being "simple" are not probative evidence that the number of attorney hours claimed is excessive. *See Data Based Decisions, Inc.—Claim for Costs,* 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538. Moreover, contrary to the Navy's continuing argument, we specifically indicated in our reconsideration decision that Omni's entitlement to protest costs was not limited solely to those incurred in relation to the one issue upon which it prevailed. *Omni Analysis et al.—Request for Recon.,* 68 Comp. Gen. 559, *supra.*

We have reviewed the certified bill from counsel and find that the Navy's general observations about the allegedly excessive number of hours spent by Omni's counsel in pursuing the protest provide an insufficient basis for rejecting the protester's claim. *Princeton Gamma-Tech, Inc.—Claim for Costs,* 68 Comp. Gen. 400, *supra.* With regard to specific matters raised by the agency, or disclosed by our own review, however, we disallow certain portions of the claim for attorneys' fees.

Specifically, we disallow a total of $600 as follows as unrelated to the pursuit of Omni's protest: $262.50 for 1.75 hours of attorney's time on November 16, 1988, which in part was spent drafting correspondence relating to an unidentified "companion protest," of which this Office has no record; $75.00 for .50 hours of attorney's time on March 13, 1989, which in part was spent conferring about "certification procedures for attorneys' fees," presumably in pursuit of Omni's claim for bid protest costs; $187.50 for 1.25 hours of attorney's time on March 24, 1989, which in part was spent preparing a "bid costs letter," presumably in pursuit of Omni's claim for its bid protest costs; and, $75.00 for .50 hours of attorney's time on April 4, 1989, which was spent working on a letter to a congressional representative.

As indicated, we have no record of a "companion protest" filed with this Office. Moreover, expenses for efforts to pursue claims for costs before this Office and expenses for contacting a congressional representative are not allowable since they are, in our view, unrelated to the pursuit of a protest. *See Ultraviolet Purification Sys., Inc.—Claim for Bid Protest Costs,* B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376. While some of the disallowed billings indicate that a portion of the time charged may have been spent on protest-related work, since they have been billed in an aggregated manner, we are unable to discern what portion of the charges actually constitutes allowable costs and, therefore, we have disallowed the charges in full.

As indicated above, the Navy has also challenged Omni's claim for attorney expenses incurred after our first decision was issued on March 7, 1989. Omni's position is that it is entitled to these expenses because they were necessary to respond to the Navy's request for reconsideration.[1] $1,080 of the claim is for reconsideration costs. It is comprised primarily of charges for telephone conferences with the client. Since no written response to the Navy's motion for reconsideration was ever requested by this Office, and none was ever filed by Omni, we find no basis for allowing these claimed costs. *Cf. Pacific Northwest Bell Tel. Co. et al.—Claim for Bid Protest Costs,* 67 Comp. Gen. 442 (1988), 88-1 CPD ¶ 527 (allowing costs attendant to a protester's *response* to an agency motion for reconsideration as necessary to further defend a successful challenge to improper procurement practices).

Thus, we disallow a total of $1,680 from Omni's claim for attorney expenses.

Company Costs

Omni seeks $32,828 for 538 hours of time for three of its corporate officers, a senior analyst, and an administrative assistant at burdened rates, inclusive of General and Administrative (G&A) costs and other overhead, ranging from $21.31 per hour to $74.34 per hour. In addition, Omni seeks a 9 percent "profit fee" of $2,954 on these labor costs. Omni also claims $598 in direct expenses for telephone charges and the fee of an expert witness. Finally, Omni separately claims $1,584 for "G&A on expenses," *i.e.,* "G&A" for its telephone and witness bills as well as its $35,210 attorneys' bill.

The company president has certified that the hours claimed were spent in pursuit of the protest, and has certified the hourly labor rates. In addition, Omni has included a narrative which describes what each person did during the hours claimed in connection with the protest from the date of contract award during various stages of the protest process through February 21, 1989, when the final protest submission was filed.

Again, the Navy generally challenges the number of hours as excessive. The agency also questions how the hourly labor rates were computed and suggests that lack of any fractional hours in the billing of the time spent by company personnel is an improper accounting of time actually spent on the protest. The Navy criticizes the company's practice of charging for each participant's time at various meetings, and asserts that there was a duplication of effort between the company and its attorneys because Omni's description of its labor costs includes a charge for assisting in the preparation of a reply memorandum filed with this Office. Overall, the Navy concludes that Omni's labor description lacks sufficient detail to enable it to distinguish which costs were associated with the issue upon which the protester prevailed. Finally, the Navy asserts that Omni is not entitled to profit on its labor costs and a factor for G&A on its direct expenses as claimed.

[1] Omni does not argue that expenses during this period related to the filing of its own request for reconsideration.

As to the agency's generalized conclusions that the total number of hours claimed by Omni is *per se* excessive, we reiterate that such statements do not relieve the agency of its burden to identify specific hours as excessive and to articulate reasons for their rejection. *Princeton Gamma-Tech, Inc.—Claim for Costs,* 68 Comp. Gen. 400, *supra.* Likewise, we find unpersuasive the agency's questioning of burdened hourly labor rates which have been certified by the company's president, and which do not otherwise appear, in our view, to be unreasonable. *Id.* As to the agency's suggestion that the company's estimates of the time spent by its personnel in pursuit of the protest are unreliable, there is nothing in the record which indicates that the estimates do not reasonably represent the amount of time spent on the protest by the individuals involved. *See Ultraviolet Purification Sys., Inc.—Claim for Bid Protest Costs,* B-226941.3, *supra.*

Further, we find nothing inherently unreasonable in charging for the time of each participant in meetings they attended which were related to pursuing the protest. There has been no allegation that the meetings did not occur or that they not include the persons described by Omni as attending. As to the Navy's allegation that Omni somehow duplicated the efforts of its attorneys by assisting in the preparation of a reply memorandum, we see nothing wrong with clients providing nonlegal assistance in the preparation and review of filings and factual exhibits, which Omni states was the case here, and such assistance does not, in our view, compel a conclusion that efforts were needlessly duplicated, as the Navy argues. Moreover, we note that Omni's submissions in this matter involved a rather extensive investigation of ATI's proposed personnel by the protester which resulted in the preparation of numerous exhibits and affidavits. In this regard, it is important to note that the results of the investigation conducted by Omni provided a factual predicate for our conclusion that ATI had misrepresented the availability of its personnel.

With regard to the Navy's overall concern that Omni's labor bill lacks sufficient detail to determine the amount of time spent on the issue on which the firm prevailed, we again note that the protester's entitlement to its costs is not limited in this manner. *Omni Analysis et al.—Request for Recon.,* 68 Comp. Gen. 559, *supra.*

We do, however, agree with the Navy's position that Omni is not entitled to a "profit fee" on its labor costs as claimed in the amount of $2,954. There is no statutory basis for permitting the recovery of profit as part of protest costs and we disallow this portion of the claim. *See The Howard Finley Corp.,* B-226984.2, Nov. 21, 1988, 88-2 CPD ¶ 492.

As stated above, Omni has also separately claimed a total of $1,584 for "G&A" on its direct expenses—expressed as a percentage of its attorneys' bill and its telephone and witness bills. The Navy questions these charges and notes that Omni has not provided a basis for determining what factors are included in its "G&A" calculations as applied to its direct expenses. In response, Omni has stated only that use of the "G&A" rate in this manner is part of its "normal billing practices."

While we have not objected to Omni's claim for "G&A" and other overhead expenses as they comprise part of the protester's certified burdened labor rates, we believe that Omni has failed to explain what the claimed "G&A" as a percentage of its attorneys' bill, phone and witness bills is intended to cover. In the absence such an explanation of this portion of the claim, we are unable to conclude that it accurately reflects costs attendant to pursuing Omni's protest and we, therefore, disallow it. *See Locom Corp.,* GSBCA No. 9101-C (8951-P), 88-3 BCA ¶ 20,902, 1988 BPD ¶ 120.

Thus, we disallow a total of $4,538 from Omni's claim for company expenses.

Conclusion

The total amount disallowed from Omni's claim of $73,174.40 is $6,218 ($1,680 in attorneys' expenses and $4,538 in company expenses). We, therefore, find that Omni is entitled to reimbursement in the amount of $66,956.40 for the reasonable costs of filing and pursuing its protest.

B-237557.2, May 4, 1990

Procurement

Special Procurement Methods/Categories
■ Federal supply schedule
■■ Terms
■■■ Purchase orders
■■■■ Quantity restrictions

Only reasonable reading of a Federal Supply Schedule contract is that an overall maximum order limitation (MOL) on any order is to apply to all the items listed on that contract, including those which do not have specific MOLs. Since the order for the lease of equipment exceeded the overall MOL, the General Accounting Office recommends that it be terminated.

Matter of: Dictaphone Corporation

Chris E. Hagberg, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.

David S. Cohen, Esq., Cohen & White, for Lanier Business Products, Inc., an interested party.

E.L. Harper, Department of Veterans Affairs, for the agency.

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

Dictaphone Corporation protests the issuance of purchase order No. 317J95103 by the Department of Veterans Affairs (VA) to Lanier Business Systems, Inc., for the 1-year lease with the option to purchase of a dictation system, including

maintenance and installation, for VA's Bay Pines, Florida, Medical Center. The purchase order was placed under Lanier's General Services Administration (GSA) Federal Supply Schedule (FSS) contract No. GS-COF-85661 for FSC Group 74, which among other items includes dictation equipment. Dictaphone contends that the award price of $167,940 is in violation of the $160,000 maximum order limitation (MOL) in Lanier's FSS contract and argues that the order should be terminated and the VA's needs procured competitively.

We agree with the protester and sustain the protest.

Lanier's FSS contract for the dictation system ordered by VA contains the following terms:

TABLE OF AWARDS:

Special Item No.	Description
47-345-1	System Equipment
47-360	Supplies and Accessories
47-320	Maintenance Services
47-300	FLTOP

MAXIMUM ORDER LIMITATION:

The total dollar value of any order placed under this contract shall not exceed $160,000.

Special Item No.	Description	M.O.L.
47-345-1	Systems Equipment	$100,000
47-360	Accessories	$ 60,000

FLTOP refers to leasing of the system equipment rather than its outright purchase.

The agency argues that the $160,000 overall MOL was only to apply to special item No. 47-345-1, purchase of the system equipment, and special item No. 47-360, supplies and accessories. It was not, according to VA, to apply to special item Nos. 47-320 and 47-300, maintenance services and leasing of the equipment. In support of its position, the agency points to the solicitation that resulted in Lanier's FSS contract and to the face pages on the original contract, which the agency argues show that GSA and Lanier both intended that the MOL not apply to leasing or maintenance services. In addition, the agency cites a GSA memorandum prepared in response to the protest which states that ". . . it is the policy of FSS not to include MOLs for lease items in the negotiation of multiple award schedule contracts," and an internal GSA "Recommendation For Award" prepared at the time Lanier's FSS contract was awarded which contains the notation "No MOLs are established for services."

While it may well have been GSA's intention at the time of award of the FSS contract to exclude the maintenance services and lease portions of the schedule from the $160,000 MOL, we do not believe that the contract itself can be reasonably read that way. In this regard, the portions of the RFP and the award documents cited by the agency set forth the same scheme as set forth above. In each

of the cited documents there is an overall MOL listed as applicable to a "total order" and specific smaller MOLs listed for special item Nos. 47-345-1 and 47-360. Further, in each there is no MOL listed as specifically applicable to special item Nos. 47-320 or 47-300.

In our view, the only reasonable reading of the language in Lanier's schedule stating that "the total dollar value of any order placed under this contract shall not exceed $160,000" is that the $160,000 limit is to apply to all four special items listed in the schedule. VA does not argue that special item Nos. 47-320 and 47-300 are not purchased via "orders" nor, in our view, is there anything on the face of the schedule which would limit the application of the $160,000 overall limit to the two special items that are subject to specific MOLs of $100,000 and $60,000, respectively. In fact, since any order involving both of these two items would be limited by the specific MOLs to a total of $160,000, the overall limit of $160,000 makes little sense except in the context of orders for maintenance service or leasing which have no individual limits.[1] A contract must be interpreted so as to give meaning to all its provisions, *Ebasco Constructors Inc.*, B-231967, Nov. 16, 1988, 88-2 CPD ¶ 480, and here, for the $160,000 MOL provision to be at all meaningful, it must also be applicable to maintenance and leasing.

An order under an FSS contract may not exceed the established MOL covering the subject matter of that order. *Precision Mfg., Inc.*, B-224565, Jan. 12, 1987, 87-1 CPD ¶ 49. Since the purchase order covering the lease of the Lanier equipment exceeds the $160,000 MOL which, in our view, applies to all of the items listed in Lanier's FSS contract, we sustain Dictaphone's protest on that basis.

Moreover, our review of the record shows that while VA was under the impression that as a mandatory user of this particular FSS it was required to place the order for the lease and maintenance services with Lanier, the agency's understanding was, in our view, incorrect. The instructions for the use of the FSC Group 74 schedule provide as follows:

6. EXEMPTIONS TO MANDATORY USE

* * * * *

c. Except 47-145: Typewriters Electronic and 47-150: Attachment, Features and Accessories, except GSA which will be MANDATORY SOURCES.

Exemptions from Mandatory Use (unless otherwise required by regulations of the ordering equipment):

a. Rental, Repair and Maintenance of equipment; and

b. Purchases in Alaska, Hawaii and Puerto Rico.

[1] Lanier cites *Copylease Corp. of America*, B-205231, June 15, 1982, 82-1 CPD ¶ 583, as standing for the proposition that an overall MOL like the $160,000 listed in Lanier's contract is to be applied only to items which are subject to a specific MOL. In *Copylease*, we held that a similar overall MOL was not applicable to items listed under it which had the word "none" written next to them under a heading "Maximum Order Limitation." We think that the contract's use of the word "none" next to the excluded items distinguishes *Copylease* from this case which lacks any such specific indicator that the MOL is not to apply.

While VA argues that these items were not clearly listed as non-mandatory, we disagree and conclude that under these instructions the lease[2] of equipment and the purchase of maintenance services are non-mandatory items. In this regard, when a non-mandatory item is ordered, the agency must conduct the procurement on a competitive basis if it has actual knowledge that it can procure the item from elsewhere than off the FSS at a price more advantageous to the government—after allowing for the burden and cost of a new procurement. Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-26.401-5 (1986); *Precise Copier Servs.*, B-232660, Jan. 10, 1989, 89-1 CPD ¶ 25. VA made its determination to issue the purchase order to Lanier on the basis that the items being procured were mandatory under Lanier's FSS contract. That determination did not include the required finding regarding the existence of another source despite the fact that the record shows that VA was aware that Dictaphone maintained that it could offer similar equipment at a lower price.

The protest is sustained because the purchase order issued to Lanier exceeded the applicable MOL. We, therefore, recommend that the purchase order be terminated and the requirement be solicited on a competitive basis assuming that the agency requirements cannot be met at a price below the MOL. Should the agency decide that its needs may be met consistent with the MOL, it may order its requirements from the FSS with due consideration to all the terms of the schedule and, if applicable, FPMR 41 C.F.R. § 101-26.401-5 concerning non-mandatory items.

We also find the protester is entitled to the costs of filing and pursuing its protest, including attorneys' fees.[3] Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989). The protester should submit its claim for these costs directly to the contracting agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

B-236929.2, May 11, 1990

Procurement

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Price omission
■■■■ *Line items*

The protester's deletion of one subline item in its low bid on a sealed-bid procurement should be waived as a minor informality where the deleted bid requirement was not material or an essential

[2] All parties agree that the term "Rental" used in the schedule refers to the type of lease which was the subject of the VA's purchase order.

[3] The protester also claims that it is entitled to the cost of contesting a Lanier protest concerning the same procurement before the General Services Administration Board of Contract Appeals. We have no authority to award protest costs incurred before another forum.

or integral part of the overall contract work and where the waiver of the requirement would not affect the relative competitive standing of the bidders.

Matter of: TECOM, Inc.

Ronald H. Uscher, Esq., Dempsey, Bastianelli, Brown & Touhey, for the protester.

Joel S. Rubinstein, Esq., Sadur, Pelland & Rubinstein, for Northeast Construction Co., an interested party.

David La Croix, Esq., and Vasio Gianulias, Esq., Office of the General Counsel, Department of the Navy, for the agency.

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

TECOM, Inc., protests the rejection of its bid and award of a contract to Northeast Construction Co., under invitation for bids (IFB) No. N62467-89-B-0350, issued by the Department of the Navy for the renovation and repair of family housing at Shaw Air Force Base, Sumter, South Carolina. TECOM contends that the Navy erred in rejecting TECOM's low bid as nonresponsive and that the awardee's bid is itself nonresponsive.

We sustain the protest since TECOM's bid is responsive.

The IFB as originally issued contained a bidding schedule that required bidders to submit a base bid, line item No. 0001, to renovate and repair 124 family housing units and 6 officers quarters in accordance with project plans, specifications, and contract documents. Bidders were also required to submit unit prices and a total price under line item No. 0002, for 20 subitems of indefinite quantity work of varying estimated maximum quantities, and a total price for an additive item No. 0003 to build fences and posts around trash pads as shown on the project plans.

The Navy subsequently issued six amendments to the IFB. Amendment No. 3 expressly deleted subitem "AS" of line item No. 0002, indefinite quantity work, to install a maximum estimated quantity of 250 downspouts. Amendment No. 5 replaced the original additive bid item No. 0003 with a new additive item, which required bidders to submit a total price to remove existing fences and build fences and posts as shown on the plans. Amendment No. 6 added a new additive bid item No. 0004, for a residential range top extinguishing system, and required bidders to use an attached revised bid schedule in submitting their bid. The revised bid schedule again contained subitem AS of line item No. 0002 for downspouts and the original language of additive item No. 0003.[1]

[1] The contracting officer states that the agency did not intend to reinstate the downspout requirement or the original language of additive bid item No. 0003. In this regard, the drawing clearly shows the deletion of downspouts from the plans. On the other hand, in response to our inquiry concerning the agency's need for the downspouts, the agency submitted the affidavit of the Chief of Engineering and Environmental Planning at Shaw Air Force Base, who states that the agency had and will have a continuing need for downspouts.

The Navy received eight bids. TECOM submitted the low bid of $2,992,118, and Northeast was second low at $3,249,319. The Navy's bid estimate was $4,314,300.

TECOM acknowledged all six amendments and, as instructed by amendment No. 6, submitted its bid on the revised bid schedule. TECOM, however, crossed out subitem AS for the downspouts with the notation "see amendment #0003" and altered the language of additive item No. 0003 to conform to the revised language added by amendment No. 5. The Navy rejected TECOM's bid as nonresponsive because TECOM had taken exception to the IFB requirements for the downspouts and additive item No. 0003.

The Navy awarded a $3,171,484 contract to Northeast on January 9, 1990.[2] TECOM protested on January 18.[3] Contract performance has been suspended pending our decision on the protest. 31 U.S.C. § 3553(d) (1988); 4 C.F.R. § 21.4(b) (1989).

In its report, the Navy now concedes that TECOM's bid was responsive with regard to additive item No. 3. The Navy, however, contends that TECOM's bid must still be rejected as nonresponsive because of TECOM's deletion of the bid requirement for installation of the downspouts. In this regard, the Navy contends that the affirmative deletion of a contract requirement, as opposed to mere omission of a bid price, cannot be waived as immaterial.

To be considered for award, a bid must offer unequivocally to comply with all of the IFB's material terms at the offered price. Federal Acquisition Regulation (FAR) § 14.301(a) (FAC 84-53); *Main Elec. Ltd.,* B-224026, Nov. 3, 1986, 86-2 CPD ¶ 511. However, a contracting officer should waive a defect in a bid as a minor informality if the defect is immaterial and if waiver will not be prejudicial to other bidders. *Leslie & Elliott Co.,* 64 Comp. Gen. 279 (1985), 85-1 CPD ¶ 212. A defect is immaterial if the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the services being acquired. FAR § 14.405. In this regard, the omission of a bid price may be waived where the item for which the price is omitted (1) is divisible from the solicitation's overall requirements,[4] (2) is *de minimis* as to the total cost, and (3) would not affect the competitive standing of bidders. *Leslie & Elliott Co.,* 64 Comp. Gen. 279, *supra; Custom Envtl. Serv., Inc.,* B-234774, May 24, 1989, 89-1 CPD ¶ 501.

Here, we conclude from our review of the record that TECOM's deletion of the downspout requirement from the revised bid schedule was an immaterial defect which would not require the rejection of its low bid. In this regard, the government's estimate for this subline item is $15,000. This represents only 0.5 percent

[2] The Navy did not obligate funds for item No. 0002, the schedule of indefinite quantity work, at the time of contract award. The $77,835 difference between Northeast's bid price and the contract award amount reflects the price bid by Northeast for item No. 0002.

[3] On September 14, 1989, Northeast protested to our Office (B-236929) that TECOM's bid was not responsive. We dismissed Northeast's protest on September 28 as premature after the Navy informed us that they had not yet made a decision regarding the responsiveness of TECOM's bid.

[4] If an item is divisible, this indicates that it may have a negligible impact on the quality of the job contract work. *See Leslie & Elliott Co.,* 64 Comp. Gen. 279, *supra.*

of TECOM's total bid price of $2,992,118. Northeast's bid was $3,249,319, of which $250 was for the downspouts.[5] We find that the cost to install the downspouts is *de minimis* in comparison to the costs of the overall contract requirements. Furthermore, since TECOM's bid is $257,201 lower than Northeast's bid, and the downspout subitem represents, at most $15,000 based on the government estimate, or only 5.8 percent of the difference between TECOM's and Northeast's bid, the waiver of the failure to offer the downspouts will not adversely affect the relative competitive standing of the bidders.

Moreover, we find no requirement that the installation of the downspout be performed as a part of the overall contract requirements. The IFB sought, as the basic bid, the general repair and renovation of family housing. The installation of the downspouts was 1 of 20 subline items of indefinite quantity work, which included such items as replacement of light switch cover plates, garbage disposals, and bathroom light fixtures. The IFB provided that the government was not obligated to order any of the indefinite quantity work. Thus, the installation of the downspouts is not an essential or integral part of the overall contract performance, such that the quality of the contract performance would be effected. *See Leslie & Elliott,* 64 Comp. Gen. 279, *supra.*

Further, we do not agree with the Navy that TECOM intended to take exception to the solicitation requirements. Rather, the record shows that TECOM believed that it was promising to comply with all of the material terms of the IFB, as amended. In this regard, the record indicates that the inclusion of the downspout line item in the IFB was inadvertent. *See* footnote No. 1, *infra.* While the Navy in its post-conference comments has provided an affidavit from an engineer which states there is a continuing need for the downspouts, this affidavit provides no explanation as to why this line item was deleted from the IFB in amendment No. 3 and does not refute the contracting officer's statement that the inclusion of this line item in amendment No. 6 was inadvertent or explain why the drawings show the deletion of the downspouts. Thus, while amendment No. 6 unequivocally included the downspout line item, TECOM's confusion on this point was understandable, given amendment No. 3's express deletion of this requirement.

Under the circumstances, the Navy should waive TECOM's bid defect as a minor informality since the defect is *de minimis* and divisible, and since the waiver would not be prejudicial to other bidders.

Accordingly, we sustain the protest. We recommend that the Navy terminate Northeast's contract for the convenience of the government and make award to TECOM, if otherwise proper. TECOM is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d). TECOM should submit its claim for its costs directly to the agency. 4 C.F.R. § 21.6(e).

[5] The determination of the impact of the cost of an omitted bid item is based on the government estimate, if possible. *Custom Envtl. Serv., Inc.,* B-234774, *supra.* However, using Northeast's $250 bid price for the installation of the downspouts, the evaluated price to install the downspouts represents only 0.008 percent of TECOM's total bid price.

Procurement

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

Decision finding that awardee's proposal was noncompliant with solicitation requirements, and recommending that negotiations be reopened under revised specifications, is affirmed where reconsideration request is based on mere disagreement with prior decision or arguments that could have been, but were not, raised during consideration of protest, and record does not otherwise show error of fact or law warranting reversal or modification of decision.

Procurement

Bid Protests
■ GAO decisions
■■ Recommendation affirmation

Recommendation to reopen negotiations under revised specifications is affirmed notwithstanding potential for additional cost to the government where any such cost would be due in large measure to the agency having placed a substantial order under the contract after the protest conference, at which the awardee's compliance with the specifications was in issue, and only 1 month prior to the due date for the General Accounting Office's decision.

Matter of: Honeywell Federal Systems, Inc.; Martin Marietta Corporation; Department of the Air Force—Request for Reconsideration

Thomas Madden, Esq., and Bill Walsh, Esq., Venable, Baetjer, Howard & Civiletti, for the protester.

William W. Goodrich, Jr., Esq., Arent, Fox, Kintner, Plotkin & Kahn, for the interested party, Martin Marietta Corporation.

John P. Janeck, Esq., Office of the General Counsel, Department of the Air Force, for the agency.

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

Honeywell Federal Systems, Inc., Martin Marietta Corporation and the Department of the Air Force request reconsideration of our decision in *Martin Marietta Corp.*, 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132. In that decision, we sustained Martin Marietta's protest against the Air Force's award of a contract to Honeywell under request for proposals (RFP) No. F19628-88-R-0038, for microcomputer workstations for the World-Wide Military Command and Control System's Information System (WIS). We sustained the protest on the basis that Honeywell failed to satisfy the RFP requirement for a multi-tasking capability.

We affirm the decision.

The WIS specification generally required that the workstations "be capable of executing correctly a multi-tasking operating system that meets the requirements of 3.1.4.2.1" of the specification. That paragraph defined the required multi-tasking capability as the ability to support the concurrent execution of a minimum of 10 "tasks," and specifically stated that the multi-tasking operating system must be capable of providing at least 10 windows on the computer screen. Honeywell offered an Apple Corporation Macintosh IIx computer with an A/UX operating system, Apple's implementation of the UNIX operating system. It proposed to meet the specification requirements in the user support services area (one of the four broad classes of required application software) for wordprocessing, spreadsheet and graphics capabilities with Macintosh operating system (MAC/OS) applications running under the A/UX operating system. Although multiple, non-MAC/OS applications could be executed simultaneously on this system, only one MAC/OS software application could be run at a time in the required secure operating mode; multiple MAC/OS applications could not be launched. (Honeywell proposed to supply after award an upgrade which would enable the operating system to launch multiple MAC/OS applications.)

In its protest of the subsequent award to Honeywell, Martin Marietta contended that Honeywell's proposed workstation failed to comply with the solicitation requirement for a multi-tasking operating system because it lacked the current capability to initiate and simultaneously execute multiple user support services applications. The Air Force and Honeywell, on the other hand, argued that since the detailed definition of the required multi-tasking capability was found only in a subsection of the specification section describing one of the other broad classes of required application software, that is, the system and applications development support services, the multi-tasking requirement only applied to that class of software applications.

We disagreed with Honeywell and the agency. We found that their interpretation ignored the general provisions of the specification requiring "a multi-tasking operating system that meets the requirements of 3.1.4.2.1" and those providing that the required user support services software shall execute "within, and under the control of the native environment supplied by the Target [Required] Workstation multi-tasking operating system." In our view, the specification, when read as a whole, generally required the operating system offered for the initial deliveries to be capable of initiating and simultaneously executing up to 10 of the proposed software tasks or applications; the specification did not envision that the overall requirement for multi-tasking could be frustrated by allowing an offeror to propose a class of software that does not permit multi-tasking. Accordingly, we concluded that Honeywell's proposed system was noncompliant with the multi-tasking requirement. We sustained the protest on this ground and recommended that the agency reopen negotiations with the offerors in the competitive range, clarify its actual minimum needs with respect to multi-tasking, and then request a new round of best and final offers (BAFOs).

Multi-Tasking

Honeywell contends, and the Air Force concurs, that our prior decision erroneously failed to take into consideration the fact that the specification defined the required multi-tasking capability in terms of the concurrent execution of a minimum of 10 "tasks," that is, units of work to be accomplished *within* a particular software application, rather than in terms of software applications or programs themselves, which may consist of one or more tasks. Honeywell concludes that since its system is capable of executing 10 tasks under one application, it met the multi-tasking requirement. In addition, Honeywell contends that our decision failed to distinguish between the operating system and the software applications. According to Honeywell, since the specification by its terms required a "multi-tasking operating system" and Honeywell proposed an operating system capable of multi-tasking given appropriate software, the fact that multiple MAC/OS applications could not be simultaneously executed on the operating system at time of award due to the lack of appropriate software at that time is irrelevant; in Honeywell's view, the multi-tasking requirement extended only to the operating system, and not to the software.

Under our Bid Protest Regulations, a party requesting reconsideration must show that our decision was founded on an error of either fact or law, or specify information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). Our Regulations do not permit a piecemeal presentation of evidence, information or analyses, since a piecemeal presentation could disrupt the procurement process indefinitely; accordingly, where a party raises in its reconsideration request an argument that it could have, but did not raise at the time of the protest, the argument does not provide a basis for reconsideration. *See FAA Seattle Venture, Ltd.—Request for Reconsideration,* B-234998.4, Oct. 12, 1989, 89-2 CPD ¶ 342; *Daylight Plastics, Inc.—Request for Recon.,* B-225057.2, Apr. 28, 1987, 87-1 CPD ¶ 440.

Honeywell clearly could have argued at the time of the protest that the task/application distinction was significant for purposes of defining the multi-tasking requirement; neither it nor the agency did so, and the issue thus was never presented for our consideration. Indeed, during the protest conference, a technical expert called by Honeywell described the multi-tasking requirement as a requirement for "system multi-tasking with 10 active tasks or applications. And that is the key word, applications." Conference Transcript 335. When asked by our Office whether he was distinguishing between tasks and applications, the Honeywell technical expert replied "No." *Id.* This argument therefore is not now a basis for reconsidering our decision.

In any case, we find Honeywell's task/application argument unpersuasive. The specification defined the required multi-tasking capability in broad terms; no solicitation provision restricted the requirement to providing only for the simultaneous execution of tasks running under a single application. In the absence of a specific exclusion from the broad sweep of the language regarding multi-tasking, we think the only reasonable interpretation of the requirement is that the

proposed operating system must be capable of supporting the simultaneous execution of *any* reasonable combination of up to 10 tasks, including those combinations of tasks running under more than one application.

Regarding Honeywell's second argument, as noted above, we specifically rejected in our prior decision the position that the RFP created a distinction between the operating system and the proposed applications for purposes of defining the extent of the multi-tasking requirement. Again, given the broad, unrestricted definition of the requirement for a multi-tasking operating system, it is our view that the specification did not envision that the overall requirement for multi-tasking could be frustrated by allowing an offeror to propose a class of software that does not permit multi-tasking. Honeywell's mere disagreement with our decision in this regard does not serve as a basis for us to reconsider the decision. *Id.*

Honeywell maintains that the solicitation is subject to more than one reasonable interpretation; according to Honeywell, "reasonable minds can certainly differ over exactly what [the specification] requires in terms of multi-tasking." We disagree. As stated above and in our original decision, we read the multi-tasking provision as applicable to tasks from different applications. In any case, even if we shared the view now advanced by Honeywell (the same view as adopted by the agency's evaluators), our decision would be the same. Specifications must be free from ambiguities and must describe the minimum needs of the procuring activity accurately. *See T&A Painting, Inc.,* B-229655.2, May 4, 1988, 88-1 CPD ¶ 435. Where it is clear that offerors have responded to a solicitation requirement based upon different reasonable assumptions as to what the requirement was, the competition was conducted on an unequal basis and the requirement generally must be resolicited. *See Reflect-A-Life, Inc.,* B-232108.2, Sept. 29, 1989, 89-2 CPD ¶ 295. Thus, since Honeywell's reading of the multi-tasking requirement, as experienced here, is different than Martin Marietta's, the competition should be reopened.

Reopening Negotiations

In their requests for reconsideration, Martin Marietta and the Air Force question our recommended remedy. In our prior decision, we recommended that the agency reopen negotiations with the offerors in the competitive range, clearly state what capabilities are necessary to satisfy its actual minimum needs with respect to multi-tasking (and any other provisions that should be clarified to assure that offerors are provided with an opportunity to compete on a common basis), and then request a new round of BAFOs. (In addition, we found Martin Marietta to be entitled to recover protest costs.)

Both Martin Marietta and the Air Force assert that it would not be in the best interest of the government to reopen negotiations. The Air Force contends that our recommendation would result in substantial cost to the government, and a significant delay in fielding new WIS workstations and developing specialized software for them, in the event reopening negotiations ultimately resulted in ac-

quisition of a workstation that was not 100 percent compatible with the Honeywell workstations already purchased. According to the agency, it has placed orders with Honeywell for hardware, software and services totaling $19,270,000; the equipment reportedly would have a residual, resale value of between only $6,343,000 and $9,684,000. In addition, the agency estimates that award to another offeror would result in the loss of $1,873,000 already expended by the agency for contract administration, $2,570,000 expended for software development, and $100,000 expended for training, and would require the expenditure of $2,000,000 to reopen the source selection process. In sum, as detailed by the agency, the costs of acquiring an incompatible workstation could total between $16,129,000 and $19,470,000.[1] The Air Force also is concerned that there would be a lengthy delay in fielding an improved communications network in the event that implementation of our recommendation resulted in award for an incompatible WIS workstation. The agency concludes that it would be more appropriate to limit the remedy here to a finding that Martin Marietta is entitled to recover the cost of preparing its proposal (in addition to its protest cost).

Martin Marietta, on the other hand, reiterates its previous request, which we denied in our prior decision, that we recommend the immediate termination of Honeywell's contract, and direct that award be made to Martin Marietta. Martin Marietta argues that it would be prejudiced by a reopening of negotiations because information concerning its proposed approach and prices has been revealed during the course of the protest, and Honeywell has gained additional time in which to remedy its system's multi-tasking deficiencies and other alleged deficiencies with respect to the specification requirements (concerning a database management system and access to the mainframe computers which form the core of the WIS network). In addition, Martin Marietta questions the reported impact on the agency of terminating Honeywell's contract, asserting that: (1) the agency's estimate of the cost of terminating Honeywell's contract is overstated; (2) award to Martin Marietta would save the government money because of its lower stated BAFO price, notwithstanding any termination and transition costs; (3) software developed pursuant to the "open" software standards in the specification should be fully portable—transferable—to Martin Marietta's workstation; and (4) that it can immediately supply a large number of workstations, thus minimizing any delay in fielding new WIS workstations.

We are not persuaded that the circumstances here warrant modifying our recommendation. First, a directed award 3to Martin Marietta would not be appropriate. We sustained Martin Marietta's protest because Honeywell's proposal failed to conform to the material requirement for a multi-tasking capability and thus could not form the basis for award. *See Consulting and Program Management,* 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229. It appeared that the specification was in fact defective; based on its initial determination that Honeywell's proposed system would satisfy its minimum needs and its arguments in re-

[1] At one point in its request for reconsideration, the Air Force refers to a potential cost impact of $25,333,000. This figure, however, apparently does not account for the residual, resale value of the ordered equipment as estimated by the agency.

sponse to the protest, the Air Force essentially has found that the specification overstated its minimum needs. *Tektronix, Inc.,* B-225769, June 8, 1987, 87-1 CPD ¶ 590, *aff'd, Biddle Instruments; Tektronix, Inc.—Recon.,* B-225769.9, B-225769.3, Sept. 15, 1987, 87-2 CPD ¶ 251. While the appropriate remedy of course depends upon all the circumstances surrounding the procurement, *United States Coast Guard—Request for Advance Decision,* 69 Comp. Gen. 30 (1989), 89-2 CPD ¶ 366, the proper remedy in these circumstances generally is revision of the specification to reflect the agency's actual minimum needs, affording offerors an opportunity to respond to the revised specification and, if appropriate based on the recompetition, terminating the improperly awarded contract. *See generally id.; Consulting and Program Management,* 66 Comp. Gen. 289, *supra* (recommendation to resolicit under revised specifications).

There is no evidence that Martin Marietta will be placed at a competitive disadvantage by the reopening of negotiations; Martin Marietta has had the same opportunity as Honeywell to further develop or modify its system and to remedy the evaluated deficiencies. In any case, the risk of an auction or the possibility of other prejudice to Martin Marietta resulting from reopening is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action. *See generally Power Dynatec Corp.,* B-236896, Dec. 6, 1989, 89-2 CPD ¶ 522.

The Air Force's estimate of the extent of the potential increased cost to the government also does not persuade us that Honeywell's contract should be allowed to stand without reopening the competition. In this regard, the Air Force's estimates are based on the possibility of an award for an incompatible system, but the agency has not documented the extent and effect of any likely incompatibility; we note for instance that, as indicated above, Martin Marietta maintains that software developed in accordance with the specification should be fully compatible with any compliant system. The agency's estimate of the residual value of equipment already ordered also is unsupported and thus is only speculative. The Air Force's position also ignores the potential cost savings that may be realized from reopening the competition; Martin Marietta offered a lower fixed price than Honeywell in its BAFO for the evaluated quantity (which was approximately 25 percent of the maximum quantity), and relaxation of the specifications to reflect the agency's actual minimum needs may result in lower prices.

To the extent that implementation of our recommendation may result in a net cost increase to the government, we point out that this is due in large measure to the agency having placed an order under the contract for supplies in the amount of $15,300,000--81 percent of all hardware, software and services ordered—on December 29, 1989; this was after the protest conference, and only 1 month before the due date for our decision. Although we recognize that the protest was not filed soon enough after award to bring into effect the stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553 (Supp. V 1987), nevertheless, in our view, the agency assumed the risk that by issuing a substantial delivery order after the conference and 1 month prior to the due

date for our decision, its actions would result in additional cost to the government. We are not inclined to alter our otherwise appropriate recommendation based on costs incurred by the Air Force at that juncture in the protest process. Finally, the potential for delay appears to be mitigated by the fact that Martin Marietta states it has a significant number of workstations available for delivery to the agency should it receive an award.

The decision is affirmed.

B-238306, May 14, 1990

Procurement

Special Procurement Methods/Categories
■ Federal supply schedule
■■ Offers
■■■ Rejection
■■■■ Propriety

Under multiple-award Federal Supply Schedule (FSS) solicitation, where agency determined that protester offered required most favored customer pricing—prices equal to or lower than offeror's lowest commercial prices—for certain percentage of large number of items and solicitation provided for possible award on a product-by-product basis, outright rejection of proposal for unreasonable pricing was improper; agency should have given protester opportunity through discussions to establish which items were priced acceptably, requested best and final offer, and included protester on FSS for all properly priced items.

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 the 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 (RFP) No. M3-Q1-89, a multiple-award Federal Supply Schedule (FSS) solicitation for medical supplies. Baxter challenges VA's determination that it could not find Baxter's offered prices equal to or better than those offered its most favored customer (MFC), and its resultant rejection of Baxter's entire proposal as unreasonably priced.

We sustain the protest.

Background

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; therefore, 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). An agency's determination of price reasonableness therefore is proper when it meets the standards in GSA's Policy Statement on Multiple Award Schedule Procurement, 47 Fed. Reg. 50,242 (1982), which establishes a goal of obtaining discounts from an offeror's established catalog or commercial prices that are equal to or better than discounts the offeror extends to its 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 when the discount offered the government is not equal to or greater than the MFC's discount, 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 RFP solicited offers for a 3-year FSS contract to supply 37 categories, or special item numbers (SINs), of surgical and medical equipment and supplies. For each SIN under which offerors were proposing products, the solicitation requested the offerors to furnish pricing and sales data for the 5 products with the largest dollar sales volume. Three different divisions of Baxter submitted offers for over 8,400 products under approximately 17 of the SINs. After reviewing the pricing and sales data furnished with Baxter's offers, and additional information furnished at VA's request, the contracting officer, on January 31, 1989, requested an audit by the Defense Contract Audit Agency (DCAA). The audit examined data for 188 products, chosen by the government to include the SINs accounting for the highest volume of government sales and those products comprising a significant percentage of government sales in each SIN.

Although the audit showed that Baxter was offering MFC pricing for approximately 12 of the 188 products, for nearly all (over 85 percent) of the remaining products, Baxter was offering a price higher than or equal to its highest commercial price among the sales surveyed. Furthermore, according to DCAA, Baxter's commercial prices, which varied widely, bore no relation to the volume of sales to a particular customer, so that some customers purchasing large vol-

umes of products paid more per unit than customers purchasing in smaller volume. As a result, DCAA found that Baxter did not have an MFC, but instead sold its products "at whatever the market will bear." The contracting officer accepted DCAA's finding and concluded that there thus was no basis for determining Baxter's prices fair and reasonable. VA considered asking Baxter for cost or pricing data, "which would have been the only other basis for award," but decided against it, concluding on the basis of past experience with Baxter that the firm would refuse to supply such data. Accordingly, the contracting officer rejected Baxter's proposal without requesting a best and final offer.

Baxter challenges VA's determination that it has no MFC, arguing that an MFC in fact was readily ascertainable by means of a simple arithmetical comparison of the prices Baxter charges its commercial customers with Baxter's proposed prices on this RFP. Baxter maintains that its proposal should not have been rejected for inability to determine reasonableness of its prices.

Analysis

VA's determination of price unreasonableness as it related to Baxter's prices for the products in the sample for which it was not offering its lowest prices was unobjectionable. Notwithstanding the likelihood of approximately $65 million in sales to the government for the products it proposed, Baxter offered its highest commercial price (among the sales surveyed) for nearly all of the sampled products other than the 12 for which it was offering MFC pricing, and the firm has failed to demonstrate that any difference in terms and conditions adequately explains the relatively higher prices offered the government. *See* Policy Statement, 47 Fed. Reg. 50,244 (burden is on offeror to identify differing terms and conditions which explain price differential); *Baxter Healthcare Corp.,* B-230580.5, Apr. 26, 1990, 69 Comp. Gen. 421, 90-1 CPD ¶ 429. The Policy Statement permits inclusion of products with the lowest net price on the schedule even where they are not MFC prices. However, VA's review of nearly 50 products selected by Baxter did not show the lowest net prices. Although the agency found that inadequate product descriptions from two of the divisions precluded determination of comparable products, none of Baxter's prices for the products from the third division were lower than the prices offered by competitors (as selected by Baxter) for comparable products. We note that an agency properly may perform a price evaluation based on a sampling of item prices. 47 Fed. Reg. 50,248; *Carrier Joint Venture,* B-233702, Mar. 13, 1989, 89-1 CPD ¶ 268.

While we find VA properly rejected Baxter's proposal as to products for which the firm did not offer MFC pricing, we also find that VA improperly rejected the proposal as to the MFC-priced items revealed in the sampling. As VA itself acknowledges, the solicitation provided that award may be made on a product-by-product basis.[1] Indeed, according to the agency, not only can "a contract be

[1] The solicitation indicated that the award decision may be made on a product-by-product basis when it (1) required the submission of catalogs or price lists and the listing of sales and commercial discounts for specific, pro-
Continued

awarded for a single item under a SIN just as easily as for many items under that SIN," it may even be to the disadvantage of the government under the circumstances not to evaluate on a product-by-product basis.

Where offered products are priced equal to or lower than the offeror's lowest commercial prices for the products and, as was the case here, are not otherwise determined to be out of line with government estimates and the prices proposed by other offerors, there is no basis for rejecting the products as unreasonably priced due to the lack of MFC pricing on other items. Thus, since data available to and considered by the agency indicated that Baxter's offered prices for 12 products were equal to or lower than Baxter's lowest commercial prices, these products should have been included on the schedule.

In addition, once the audit sampling showed MFC pricing for a percentage of the items, VA should have taken further steps to identify which of Baxter's other products were properly priced. The results of the sampling—MFC pricing for approximately 12 of 188 products—suggested statistically that Baxter may have been offering MFC pricing for over 500 (i.e., approximately 6 percent) of the 8,400 products it offered. The solicitation specifically provided that a BAFO would be requested at the conclusion of negotiations. In our view, instead of rejecting Baxter's proposal outright without requesting a BAFO, the agency should have afforded Baxter the opportunity to indicate (and furnish substantiating sales data for) the remaining products for which it was offering MFC pricing. Of course, VA then would have been permitted to sample the products identified to determine whether they all in fact satisfied the MFC pricing criterion—that is, whether Baxter was offering the government its lowest prices—and warranted inclusion on the schedule.

The protest is sustained.

By separate letter of today to the Secretary of Veterans Affairs, we are recommending that VA reopen negotiations and afford Baxter the opportunity to submit a BAFO certifying and documenting for which products it is offering MFC pricing. In addition, we find that Baxter 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.

posed 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 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. *See Baxter Healthcare Corp.,* B-230580.5, *supra.*

B-216640.8, May 16, 1990

Civilian Personnel

Compensation

■ Overtime

■■ Claims

■■■ Statutes of limitation

On reconsideration, our prior decision denying additional overtime compensation to individual members of the International Association of Firefighters, Local F-100, is affirmed. An initial request for a decision was not accompanied by a signed representation authorization or claim over the signature of the individual claimants so as to toll the 6-year Barring Act, 31 U.S.C. § 3702(b) (1982). The 6-year period of limitation in 31 U.S.C. § 3702(b) is a condition precedent to the right to have a claim considered by our Office, and our Office has no authority to waive or modify its application. 68 Comp. Gen. 681 (1989), affirmed.

Matter of: Federal Firefighters—Overtime Pay—Application of Barring Act—Reconsideration

Frederick Evans, Jr., President, International Association of Firefighters, Local F-100, through counsel, requests reconsideration of our decision *Federal Firefighters,* 68 Comp. Gen. 681 (1989). The decision, among other things, denied a request for additional Fair Labor Standards Act compensation because an initial letter request from Mr. Evans was not accompanied by a signed representation authorization or claim over the signature of the individual claimants so as to toll the 6-year Barring Act, 31 U.S.C. § 3702(b) (1982).

Mr. Evans contends that a claim was accepted by this Office on behalf of all of its union members in accordance with our regulations. Therefore, the Barring Act was tolled for purposes of retroactive payment of overtime compensation for each union-represented employee.

It is true as Mr. Evans contends that this Office accepted his initial request for a decision under our procedures in 4 C.F.R. part 22 (1989), which sets forth the procedures governing requests for decisions concerning the legality of appropriated fund expenditures on matters of mutual concern to federal agencies and labor organizations. The regulations provide that a decision may be granted to the head of a labor organization representing federal employees. 4 C.F.R. § 22.2. However, these regulations clearly require a power of attorney in cases where payment on a claim is to be made. 4 C.F.R. §§ 11.3 and 22.3(e). This is because our authority to issue a decision is distinct from the statutory and regulatory requirements governing our consideration of a claim since the 6-year period of limitation in 31 U.S.C. § 3702(b) is not a mere statute of limitations, but is a condition precedent to the right to have a claim considered by our Office. *Hai Tha Truong,* 64 Comp. Gen. 155, 160 (1984).

Mr. Evans contends that our requirement that a claim must be presented in writing over the signature and address of the claimant is a mere "technical" requirement. However, this requirement corresponds to the statutory language

in 31 U.S.C. § 3702(b)(1) which states that "a claim against the government presented under this section must contain the signature and address of the claimant or an authorized representative."[1] Thus, our regulations implement the statute and have the full force and effect of law. A claimant's compliance with the regulations has long been considered a necessary prerequisite to our consideration of a claim. 5 Comp. Gen. 1058 (1926); 18 Comp. Gen. 84, 89 (1938); 24 Comp. Gen. 9, 10 (1944); 25 Comp. Gen. 670, 673 (1946). *See also, James W. Gregory,* B-201936, Apr. 21, 1981, where we applied the Barring Act and refused to consider an employee's claim which had previously been presented by a certifying officer whose request for an advance decision was not accompanied by a signed claim or voucher.

We would also point out that numerous members of Local F-100 were aware of the procedural requirement to file a claim in their individual capacity in order to toll the Barring Act, and did so in this case. *Firefighters,* B-216640.7, *supra,* at 3.

Also, we have consistently held that we are without authority to waive or modify the application of 31 U.S.C. § 3702(b). *Carmine A. Barone,* 67 Comp. Gen. 467 (1988); *Frederick C. Welch,* 62 Comp. Gen. 80 (1982).

Accordingly, upon reconsideration, Mr. Evans's claim for additional overtime compensation on behalf of Local F-100 members is denied.

B-238682, B-238682.2, May 16, 1990

Procurement

Special Procurement Methods/Categories

■ **Federal supply schedule**

■■ **Use**

■■■ **Propriety**

Contracting agency may acquire items under a Federal Supply Schedule (FSS) contract where incidental, non-FSS items are also being acquired in the same procurement so long as the acquisition is made at the lowest aggregate price and the cost of the non-FSS items is insignificant compared to the total cost of the procurement. Where agency solicits a fully integrated system, a significant portion of which is not available under FSS, agency cannot reasonably conclude that items to be acquired are FSS items and, therefore, agency is required to procure entire system on open market.

Matter of: Amray, Inc.

Virginia D. Green, Esq., Reed, Smith, Shaw and McClay, for the protester.

Stephen B. Hamilton for JEOL USA, Inc., an interested party.

Arthur I. Rettinger, Esq., Office of the Chief Counsel, U.S. Customs Service, for the agency.

[1] Recodification of the language substituted "representative" for "agent or attorney." 31 U.S.C. § 71a(1) (1976).

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

Amray, Inc., protests the award of delivery order No. CS-H-90-00016-7 to JEOL USA, Inc., under request for quotations (RFQ) No. 89-200, issued by the Customs Service for a quantity of scanning electron microscopes (SEM). Amray argues that the agency improperly made award to JEOL under the Federal Supply Schedule (FSS).

We sustain the protest.

The RFQ was issued on August 8, 1989, to all three FSS vendors listed under Federal Supply Classification group 66, part II, section C, category 603-24(b) of the General Services Administration's (GSA) multiple-award FSS for clinical and biological equipment.[1] This RFQ was issued to determine if FSS contractors could meet the agency's specific needs. Firms were requested to provide quotes for a quantity of three fully integrated SEMs which met the various mechanical, dimensional, and performance characteristics specified in the RFQ. In response, all three firms submitted quotations for various configurations of their respective equipment to meet the requirements specified in the RFQ. In this regard, Amray submitted three alternate quotations which varied in terms of the configuration of the firm's equipment and also varied in terms of price. JEOL submitted a quotation which offered to supply its FSS-listed model 820 SEM and which included, among other accessories, a Princeton Gama-Tech (PGT) IMIX x-ray with imaging which was an item not listed in the firm's FSS schedule.[2]

After receipt of the quotations, the agency's technical representatives conducted an evaluation of the various configurations offered and concluded that systems which featured the PGT-IMIX were the only systems which would meet the agency's requirements. It specifically concluded that this feature was mandatory to meet its needs. The agency therefore awarded a delivery order to JEOL on the grounds that the firm had offered the lowest overall evaluated price for the desired systems. The agency discussed with JEOL its price on certain open market items, items not on JEOL's FSS, which resulted in a price reduction. Apparently, the Customs Service also discovered that it had a requirement for one additional SEM. The Customs Service subsequently awarded a delivery order to JEOL for four JEOL model 820 SEMs with related accessories for a total amount of $975,666. Of that amount, almost half represents non-FSS accessories available only in the open market, the most significant of which is the PGT-IMIX which was offered by JEOL at a price of $67,900 per unit.[3]

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[1] The Customs Service is a mandatory user of the FSS.

[2] Amray's second quotation included the PGT-IMIX system which was also not listed on its FSS. The agency reports that this system helps the agency in analyzing commodity samples for subsequent tariff classification.

[3] The record indicates that JEOL intends to furnish its model 6100 instead of its model 820 which is allegedly a "replacement" model for the 820, offering various technological upgrades. The JEOL model 6100 is not currently listed in the firm's FSS catalogue, the substitution apparently not having yet been approved by GSA.

Based on our *in camera* review of the award documents, we conclude that the Customs Service has improperly placed a delivery order against JEOL's FSS contract for items not included under that firm's contract. Consequently, we need not specifically address the various allegations raised by Amray.

As a general rule, agencies which are mandatory FSS buyers must acquire items exclusively from FSS vendors when the required items or similar items are available under the FSS. *See* Federal Acquisition Regulation § 8.404 (FAC 84-49); Federal Property Management Regulations, 41 C.F.R. § 101-26.401 (1989). Our Office has permitted agencies to acquire items under an FSS contract where incidental, non-FSS items are also being acquired in the same procurement so long as the acquisition is made at the lowest aggregate price and the cost of the non-FSS items is small compared to the total cost of the procurement. *See Synergetics Int'l, Inc.,* B-213018, Feb. 23, 1984, 84-1 CPD ¶ 232. In *Synergetics,* for example, we found unobjectionable an agency's acquisition of satellite data collection platforms from an FSS vendor which did not have certain minor components of the overall system available under its FSS contract. In that case we noted that the acquisition of the nonschedule items was reasonable because the agency required that the items in question be compatible with the schedule items and the cost of the non-FSS items was small in comparison to the overall cost of the procurement.

Under the Competition in Contracting Act of 1984 (CICA) agencies are required, when procuring property or services, to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (1988). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." *Id;* 41 U.S.C. §§ 259(c) and 403(7). CICA further defines the term "competitive procedures" to include GSA multiple award schedule program procedures, if program participation has been open to all responsible sources, and orders and contracts under such procedures result in the lowest overall cost meeting government needs. 41 U.S.C. § 259(b)(3). Under CICA, where the items contained in the FSS contracts have been subject to competitive procedures to ensure that any order placed under the FSS will result in the lowest overall cost to the government, CICA permits agencies to purchase from FSS contracts. However, it follows that items not listed on the schedule (such as open market items) have not been subjected to the competitive procedures (full and open competition) that CICA requires.

Here, the Customs Service solicited a fully integrated SEM system configured to meet its particular requirements and placed a delivery order with JEOL for such a system, almost half the value of which is represented by non-FSS items. Also, the most significant open market item was the PGT-IMIX x-ray which was a mandatory item needed to meet agency needs. Under these circumstances we think that the agency erred in regarding the SEM system in question as an FSS item. Consistent with this position, we have held that where a predominant portion of an agency's requirement is comprised of non-FSS items, the agency has acted properly in conducting its procurement outside of the FSS. *Professional Carpet Serv.,* B-222986, July 24, 1986, 86-2 CPD ¶ 108. In our view, where an

agency seeks to acquire a system which is comprised of both FSS and non-FSS items, and the non-FSS items of the system represent a significant portion of the acquisition and cannot be easily or reasonably separated from the FSS items, the system may not be acquired under the FSS. In this regard, we note that there is no way that the agency could be assured that the acquisition was made at the lowest overall cost since roughly half of the acquisition's value was awarded without the benefit of CICA's competitive procedures. Specifically, all potential vendors, other than FSS vendors, were excluded from filling the agency's requirements. We therefore conclude that the agency erred in placing the delivery order with JEOL and believe that the acquisition should instead have been conducted by issuing an unrestricted formal solicitation open to all firms.

The protest is sustained.

We are recommending by separate letter of today to the Secretary of the Treasury that the contract awarded to JEOL be terminated for the convenience of the government. In addition, we are recommending that the Customs Service resolicit its requirements competitively. Finally, we find the protester is entitled to the costs of filing and pursuing its bid protest including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1989).

B-238403, May 17, 1990

Procurement

Competitive Negotiation
■ Offers
■ ■ Cost realism
■ ■ ■ Evaluation
■ ■ ■ ■ Administrative discretion

Agency may rely on the recommendations of the Defense Contract Audit Agency concerning direct labor and indirect cost rates in analyzing cost proposals.

Procurement

Competitive Negotiation
■ Offers
■ ■ Evaluation
■ ■ ■ Personnel

Agency does not have a duty to verify the availability of prospective employees proposed by an offeror for whom offeror has submitted letters of commitment.

Matter of: SRS Technologies

Lawrence M. Farrell, Esq., McKenna, Conner & Cuneo, for the protester.

Joseph D. West, Esq., Ronald A. Schechter, Esq., and Jeffrey M. Villet, Esq., Jones, Day, Reavis & Pogue, for Engineering & Economic Research, Inc., and Walter R. Andrews, for RMS Technologies, Inc., the interested parties.

Craig E. Hodge, Esq., and Peggie L. Roberson, Esq., Office of Command Counsel, Department of the Army, for the agency.

Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

SRS Technologies protests the U.S. Army Missile Command's (MICOM) award of a contract for software engineering support services to Engineering & Economics Research, Inc. (EER), under request for proposals (RFP) No. DAAH01-89-R-0007. SRS contends that MICOM failed to make certain adjustments required by the solicitation to offerors' cost proposals and that it failed to perform an adequate cost realism analysis. The protester also argues that EER submitted misleading documentation of its ability to secure qualified personnel to work on the contract.

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

The RFP, which was set aside for small disadvantaged businesses, anticipated the award of a cost-plus-award-fee contract for basic and option performance periods extending through September 1993. Offerors were advised that in the evaluation of proposals, technical factors would be significantly more important than cost, which would in turn be significantly more important than management. As part of their technical proposals, offerors were required to define the technical personnel mix that they would use to perform the contract tasks and to identify the particular individuals that they would employ. For individuals not currently in their employ, offerors were required to submit letters affirming the individual's intent to accept full-time employment with the offeror if it were awarded the contract. The RFP also provided that for purposes of evaluating cost, the agency would develop a most probable cost assessment for each proposal based on the offeror's technical and management approach.

Four proposals were submitted in response to the RFP. The agency determined that EER's proposal, which was second low in evaluated cost, represented the best value to the government and selected it for award. SRS' protest to our Office followed.

SRS argues first that the agency failed to adjust offerors' cost proposals to standardize evaluation on a 40-hour workweek or to reflect government-provided space, as required by the solicitation.

The RFP provided that in determining most probable cost, offers would be evaluated on the basis of a 40-hour workweek standard regardless of whether or not the offeror had proposed to use uncompensated overtime. The RFP also provided that cost proposals would be adjusted, as appropriate, for government-furnished property, transportation, rent-free use of government property and other such factors.

The agency denies the protester's first allegation, explaining (with supporting documentation) that although the labor rates that EER offered included uncompensated overtime, it had based its assessment of the most probable rates on a 40-hour workweek standard. SRS, in commenting on the agency report, did not take exception to the agency's response; we therefore consider it to have abandoned this issue and will not consider it further. *Vista Scientific Corp.*, B-231966.2, Dec. 27, 1988, 88-2 CPD ¶ 625.

In response to the protester's second allegation, MICOM contends that it was not required to adjust offerors' cost proposals for government-furnished office space since all offerors would have use of the same government-provided space.

The RFP, as amended, provided under section H-10 that the government would furnish a total of 2,400 square feet of office space at Redstone Arsenal, Alabama, for use by the contractor in the performance of the proposed contract. The solicitation also provided, under section M, a formula to be used to adjust proposals to eliminate any competitive advantage that might accrue to a contractor possessing government production and research property other than that listed in section H of the RFP. In response to an offeror's request for clarification of the difference between the government-furnished property referenced in section H-10 and the government-owned production and research property referenced in sections M-2 and M-3, the agency explained in amendment 2 to the RFP that:

> The Government Furnished Property (GFP) set out in Paragraph H-10 is that property which will be used in performance of the effort described in the Statement of Work, and is available to all offerors with no adjustment to the most probable cost. Under Paragraphs M-2 and M-3, any offeror can request additional Government-owned production and research property for which an evaluation to determine most probable cost will be made in accordance [with] Section M.

Thus, contrary to the protester's contention, the solicitation did not require that proposals be adjusted to take into account the government-furnished office space provided in section H-10; rather, it clearly informed offerors that cost proposals would not be adjusted on that basis since the same office space would be available to all offerors.

In commenting on the agency report, the protester argues that despite the fact that the same office space would be available to all offerors, proposals should have been adjusted to take into account the government-furnished space since not all offerors may have made the same assumptions regarding its use in determining their overhead rates. SRS contends that it bid its full overhead rate, which assumes performance in its own, as opposed to government-furnished, offices for all personnel to be provided under the contract since it was unsure whether the government-furnished office space would be available for permanent (as opposed to transitory) location of employees. The protester maintains that if it had reflected the use of government-furnished office space in its overhead rate, that rate would have been reduced by approximately 37 percent for those employees who could be located in the government-furnished offices, and that this reduction in overhead could have had an overall impact on its price of between 7 and 10 percent. SRS asserts that if EER assumed that the govern-

ment-furnished space would be available for permanent location of employees, the two proposals could not have been evaluated on an equal basis without adjustment.

The protester is now arguing in essence that the RFP was ambiguous as to whether the government-furnished office space would be available for permanent location of the contractor's employees. This ground of protest is untimely, since any such ambiguity was apparent prior to the closing date for receipt of initial proposal, and should therefore have been protested prior to that date. 4 C.F.R. § 21.2(a)(1) (1989). In any event, EER denies that its overhead rate reflected the use of government-furnished office space, and thus SRS' premise that the two offerors based their proposals on differing assumptions regarding the use of government-furnished space is without foundation.

The protester next argues that MICOM failed to conduct an adequate cost realism analysis of offerors' proposals. SRS contends that the contracting officer had a duty to conduct her own analysis of the direct labor and indirect cost rates proposed in determining the most probable cost of offerors' proposals and that she instead relied entirely on the computations of the Defense Contract Audit Agency (DCAA). The protester also argues that in determining most probable cost, the agency should have formulated its own estimate as to the number of hours in each labor category that would be required to perform the contract tasks and then compared this estimate with the breakdown of hours by labor category proposed by each offeror.[1]

With regard to the protester's first contention, we see nothing inappropriate in the agency's having relied on the rate recommendations of the DCAA in performing its cost analysis of proposals. *See NKF Eng'g, Inc., et al.,* B-232143, B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497; *Allied Maritime Management Organization, Inc.,* B-222918, B-222918.2, Aug. 26, 1986, 86-2 CPD ¶ 227. As far as SRS' second argument is concerned, we think that it reflects a misunderstanding of the purpose of cost realism/most probable cost analysis. The protester's argument, as we understand it, is that to assess most probable cost the agency should have determined the appropriate labor mix for performing the contract tasks and then applied the labor and indirect cost rates proposed by each offeror to this labor mix. The purpose of cost realism analysis is not to determine what an offeror price's would be using a technical approach prescribed by the agency; rather, it is to determine what, in the government's view, it would realistically cost the offeror to perform given the offeror's own technical approach.[2] *Gary Bailey Eng'g Consultants,* B-233438, Mar. 10, 1989, 89-1 CPD ¶ 263.

[1] The protester also alleged in its initial protest that the agency had failed to perform an adequate cost realism analysis by failing to consider all of the elements set forth in Federal Acquisition Regulation (FAR) § 15.805-3(a). In its report, the agency pointed out that the FAR did not require consideration of all of the elements set forth in that section, but rather provided that the agency should consider the elements, "as appropriate," in performing cost analysis. The agency further noted that it had, in any event, taken all of the elements into consideration. Since the protester did not attempt to rebut the agency's response in commenting on the report, we consider it to have abandoned this issue.

[2] This is not to say that labor mix was an irrelevant consideration in the evaluation of proposals of course. The adequacy of the labor mix proposed was considered in the technical evaluation of proposals.

SRS finally argues that EER submitted misleading documentation of its ability to secure qualified personnel to work on the contract. According to the protester, EER could not have obtained commitments from certain individuals currently employed by Teledyne-Brown whom it proposed to employ since all Teledyne-Brown employees had committed either to retain their positions with Teledyne-Brown, with whom SRS proposed to subcontract, or to work for the protester if it received the award. The protester also argues that the agency had a duty to verify that the employees whom EER indicated it would hire were in fact available.

We question the foundation of the protester's first argument, which appears to be that any employee who had committed to work for it (either directly or as an employee of a subcontractor) if it received the award could not also have entered into a commitment to work for EER in the event that that firm received the award. We know of nothing that would prevent an individual from entering into a contingent commitment for employment with more than one offeror under a solicitation provided that each commitment was made conditional upon the offeror receiving award of the contract. We therefore see no reason to assume, as SRS suggests we should, that because certain Teledyne-Brown employees had committed to work for SRS if it received the award that they could not also have entered into a contingent commitment to work for EER if it were selected for award. We are furthermore aware of no authority—and SRS has cited none—that would support the protester's assertion that the agency had a duty to verify independently the availability of individuals not currently in EER's employ for whom EER had submitted letters of commitment.

The protest is dismissed in part and denied in part.

B-238371, May 18, 1990

Procurement

Competitive Negotiation
■ Offers
■ ■ Evaluation
■ ■ ■ Personnel experience

Protest that awardee's proposed labor mix does not meet solicitation personnel education and experience requirements, and therefore agency's evaluation of awardee's proposal was unreasonable, is denied where record shows that proposed labor mix met the solicitation staff requirements.

Procurement

Competitive Negotiation
■ Competitive advantage
■■ Conflicts of interest
■■■ Allegation substantiation
■■■■ Lacking

Protest that awardee is ineligible for a contract because of a conflict of interest arising from its relationship with a company which could possibly be subject to audit services required under present contract is denied where agency reasonably determines that no actual conflict exists and where agency's proper administration of task orders issued under contract would provide adequate safeguards to prevent the contractor from possibly conducting a biased audit.

Matter of: Deloitte & Touche

Donald D. Harmata, Esq., for the protester.

William A. Roberts III, Esq., Howrey & Simon, for KPMG Peat Marwick, an interested party.

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

Susan K. McAuliffe, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Deloitte & Touche protests the award of a contract to KPMG Peat Marwick under request for proposals (RFP) No. F33600-89-R-0281. The solicitation, issued by the Department of the Air Force, is for professional, multidisciplined, management audit and evaluation services to study the ongoing modernization programs of the Air Force Logistics Command, the Air Force Accounting and Finance Center, the Defense Logistics Agency, and the United States Army Reserve. Deloitte primarily alleges that Peat's proposed labor mix and low price indicate that the individual staff members proposed by Peat do not satisfy the experience and qualification requirements set forth in the solicitation for each required labor category. In addition to challenging the agency's evaluation of its own technical proposal, the protester also contends that Peat is ineligible for award because of an alleged organizational conflict of interest.

We deny the protest.

The RFP, issued August 13, 1989, and subsequently amended five times, solicited technical and cost proposals for an indefinite quantity, task order contract for 1 basic year of audit and evaluation services, with 4 option years. Offerors were required to propose fixed hourly rates, including profit, overhead and administrative costs for five specified labor categories of individuals, with each labor category having to meet certain minimum personnel qualifications. The RFP's statement of work and level of effort also provided, as a guide, for each labor category, the approximate percentage of the total estimated number of person hours required for each of the basic and option years.

A summary of the RFP's five labor categories, corresponding hourly percentages, and minimum personnel qualifications follows:

Labor Classification	Percent of Total Hours	Personnel Qualifications*
Project Leader	10	graduate; 10 years
Assistant Project Leader	15	undergraduate; 7 years
Senior Analyst	40	undergraduate; 2 years
Analyst	25	1undergraduate; 2 years
Administrator	10	undergraduate; 1 year

*Educational degree or equivalent training; related work experience

The RFP advised offerors that award would be made in accordance with a "lowest evaluated price technique" to the offeror with the highest total weighted score considering the following evaluation factors, listed in descending order of importance: (1) technical merit (35 percent); (2) price (30 percent); (3) task order responses (25 percent); and (4) management capability (10 percent).

For the purpose of cost proposal evaluation, the lowest total proposed price to the government would receive the highest score, and price would be determined by multiplying the offeror's proposed hourly rate for each labor category times the estimated hours per category provided in the RFP.

Only Deloitte and Peat submitted proposals by the October 13, 1989, closing date. A clarification request regarding pricing was issued to Deloitte, and best and final offers were received from the two firms by November 21. Both firms' technical proposals were found acceptable and received similar scores. Peat's cost proposal of $25,132,602.18 (for the basic year and 4 option years) received a substantially higher weighted score under the RFP's lowest evaluated price technique than Deloitte's cost proposal of $31,064,589. Peat's proposal, considering technical and price scores, received a higher overall score than Deloitte's proposal. The Air Force reports that Peat's price was considered reasonable and realistic by the agency, and Peat was awarded the contract on January 4, 1990. Deloitte filed its protest with our Office on January 23, based upon information it acquired at a January 11 debriefing with the agency.

The protester first contends that Peat offered an artificially low contract price by proposing a labor mix that uses mostly lower hourly-rate personnel, and possibly outside personnel, who apparently do not meet the RFP's education and related experience requirements for the five labor categories. Deloitte specifically challenges the awardee's proposed labor mix of Peat partners (20 percent), senior managers (20 percent), and managers (60 percent), for the estimated project leader hours called for in the RFP. The protester proposed only its partners, at a substantially higher hourly rate, to meet the same requirement for

project leader hours. Deloitte asserts that all "Big 6" accounting firms (including Deloitte and Peat) follow the same personnel promotion scheme under which partnership is granted to personnel with 10 years experience. Accordingly, Deloitte contends that Peat's proposed labor mix does not meet the RFP's 10-year experience requirement for project leader hours since Peat proposes to use some of its senior managers and managers for these hours instead of using only partners. Similarly, Deloitte alleges that the awardee's proposed use of consultants (who Deloitte claims would generally only have between 0 and 5 years experience under the typical "Big 6" accounting firm hierarchy) as assistant project managers indicates that these individuals do not have the RFP's requisite 7 years experience for that labor category. The protester essentially challenges the agency's evaluation and asks our Office to review the awardee's proposal (including each resume) to determine whether or not Peat's proposed staff meets the RFP's requirements.

The Air Force found that the awardee's technical proposal properly used the multi-disciplined skills of Peat personnel under each of the five labor categories. The agency emphasizes that the RFP did not require that firms propose only their partners as project leaders, as Deloitte chose to do, but rather that all project leader hours, as well as the hours to be filled by the other labor categories, be performed by individuals possessing the requisite education or equivalent training and the required experience. Air Force evaluators found that Peat's proposed staff met the RFP's requirements and, in most instances, exceeded the minimum personnel qualifications required, regardless of each individual's in-house Peat title.

Since Deloitte questions the Air Force's evaluation of Peat's proposal for technical merit and personnel capability, namely the qualifications and experience of its proposed staff, the question for our Office is whether the agency's assessment and scoring of these factors was reasonable, in accord with stated criteria, and complied with applicable statutes and regulations. *See, e.g., Consulting and Program Management,* 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229. Based upon our review of the awardee's proposal, we find that the Air Force's evaluation of Peat's proposal meets these standards and thus find no reason to question either the evaluation or the award.

As noted above, the RFP listed technical merit and management capability as technical evaluation factors. In other sections of the solicitation, offerors were instructed to submit personnel resumes to ensure that its proposed staff met the specific experience requirements for each labor category, which we regard as material to the technical evaluation. Our review of Peat's proposal, its personnel qualification matrix, and all resumes it submitted for its proposed "core teams" indicates that, regardless of in-house Peat title, each individual specifically proposed by Peat for each labor category meets the education (or equivalent training) and related experience requirements for that category. The RFP specifically allowed offerors to propose a labor mix using multi-disciplined skills for each labor category and advised offerors to submit a composite labor rate for each of the five labor categories that reflected the proposed labor mix. Thus, we

find Peat's approach in proposing a labor mix to be in accordance with the RFP's instructions and, further, find that Peat's proposed labor mix meets the requisite minimum personnel qualifications. We also note that the RFP provides that the contractor must furnish a resume for approval by the contracting officer for each employee within 1 week of that employee's performance under the contract. Thus, through the RFP's terms and the agency's administration of the contract, there will be consistent review of Peat staff qualifications throughout the term of the contract. We find no reason to question the reasonableness of the agency's evaluation of Peat's proposal.

Deloitte additionally contends that the awardee's alleged use of less experienced staff also indicates that Peat's proposal fails to satisfy the requirement for proper supervision of audits which is set forth in the *Government Auditing Standards,* 1988 edition, issued by the General Accounting Office and referenced in the RFP. The protester, in questioning Peat's use of its program analysts at a "very low hourly rate of $16.46" without charging overhead or administrative fees, also claims that Peat may be proposing to use an excessive number of untrained outside personnel in violation of the *Government Auditing Standards.*

The agency claims Deloitte's concerns regarding the awardee's compliance with the *Government Auditing Standards* are unfounded because Peat's proposal indicates that all auditing services will be properly supervised by qualified personnel and that Peat, which documented its past compliance with the standards through submission of a required peer review by an independent certified public accountant, also certified compliance with the standards in its proposal. As for Deloitte's suggestion that the low hourly rate proposed for Peat program analysts indicates excessive use of outside untrained personnel, the agency states that Deloitte is factually incorrect because Peat has not proposed the use of any outside personnel, and each of Peat's proposed in-house program analysts, for which Peat will absorb overhead and administrative fees, meets the RFP's required personnel qualifications.

We find reasonable the Air Force's determination of Peat's compliance with the *Government Auditing Standards* since Peat's proposal not only certifies compliance, but also shows appropriate personnel qualifications to ensure proper supervision and performance of the audit services. Further, Peat's proposal documents, through a certified peer review by Arthur Young and Company, the firm's general practice of compliance, and exhibits substantial previous experience conducting audits of federal agencies in accordance with the referenced standards. Additionally, the proposal indicates that one member of Peat's proposed staff participated on the Auditing Standards Advisory Council which developed the 1988 *Government Auditing Standards,* while another member is the chairperson of the American Institute of Certified Public Accountants. We find no reason to question that the Air Force's determination of Peat's compliance with the referenced *Government Auditing Standards* was other than reasonable.

The protester also contends that the agency failed to evaluate its proposal in accordance with the terms of the RFP and improperly downgraded its proposal on technical merit and task order responses for what the evaluators found to be

overstaffing and front-loading of manhours. Deloitte basically contends that since the *Government Auditing Standards* emphasize the need for adequate planning of audit work, the evaluators improperly penalized Deloitte for providing conscientious up-front planning of its task responses. Deloitte also states that it is the incumbent of these services, and that its prior proposal and performance have never been questioned about overloading manhours, and thus, the present evaluators must have erred in their determination. We note, however, that since Deloitte's proposed price of $31,064,589 received an evaluation score of only 24.27 points, (where Peat's proposed price of $25,132,602.18 received the full 30 points available), and since there is nothing in the record that calls into question the agency's determination that Peat's price was realistic and reasonable, even if Deloitte received perfect scores under each of the remaining three technical evaluation factors, its total weighted score still would not displace Peat as the apparent awardee under the RFP's lowest evaluated price plan. Since Deloitte would not be in line for award even if it succeeded on this protest basis, we do not see how the protester was prejudiced by the technical evaluation of its proposal. *See Employment Perspective,* B-218338, June 24, 1985, 85-1 CPD ¶ 715; *Lingtec, Inc.,* B-208777, Aug. 30, 1983, 83-2 CPD ¶ 279.

Finally, Deloitte argues that Peat is ineligible for award because of a conflict of interest arising from Peat's alleged business relationship with Integrated Microcomputer Services, Inc. (IMS), which apparently provided computer software systems to the Air Force Logistics Command. Deloitte suggests that since IMS was earlier named by Peat as a possible source for certain time sharing services required under an unrelated contract held by Peat with the General Services Administration for software re-engineering services, an impermissible organizational conflict of interest is present, since IMS could possibly be subject to the audit and evaluation services procured by the Air Force under the present contract with Peat. Deloitte suggests that such a business relationship may prevent Peat from objectively and independently auditing the four modernization programs, at least to the extent that IMS might be involved in such an audit, and that Peat should have been precluded from competing for the award. Deloitte specifically references clause H-902 of the RFP which excludes the successful contractor from participating as a future contractor or subcontractor in the procurement of any phase of the four named modernization programs. Deloitte also points out that the RFP's cover letter warned that "contractors with past or present acquisition, development, or installation involvement in the above named programs will be eliminated due to conflict of interest." Deloitte intimates that Peat's prior relationship with IMS, although unrelated to the four modernization programs, gives Peat an impermissible interest in work that may have to be evaluated.

The Air Force reports that no conflict of interest exists because the prohibition here only precludes the contractor from participating in any contracts relating to the programs to be audited under this contract and no one has alleged that Peat has or will be involved in such a prohibited contract. As to the relationship between IMS and Peat under the GSA contract, Peat asserts that not a single task order has been issued by GSA to Peat and that Peat has not ordered any

services from IMS. Peat certified in its proposal that it did not have any conflict of interest related to the work to be performed under the RFP and further states that it has no vested interest in IMS that could impede its objectivity.

The responsibility for determining whether an actual or apparent conflict of interest will arise if a firm is awarded a particular contract, and to what extent the firm should be excluded from the competition, rests with the contracting agency. We will not overturn the agency's determination in this regard except where it is shown to be unreasonable. *D. K. Shifflet & Assocs., Ltd.,* B-234251, May 2, 1989, 89-1 CPD ¶ 419.

Here, we find that the agency reasonably determined the award to Peat was proper, and we do not find that the tenuous nature of the alleged business relationship between Peat and IMS constitutes an impermissible organizational conflict of interest to warrant upsetting the present award. The RFP only prohibited the contractor from business relationships in the four named programs subject to the contract. Peat certified its independence from any conflict and no evidence presented shows otherwise. Further, performance under the audit and evaluation contract is on a task order basis, and as a result, the agency can exercise care and directly control the scope of Peat's work through proper contract administration which we believe would provide adequate safeguards to prevent Peat from possibly conducting a biased evaluation, even if IMS is subjected to an audit under the contract. In our view, the remote relationship between these firms and our expectations of close and proper contract administration of any task order issued, especially one that involves IMS, will adequately prevent Peat's objectivity from being impaired, and are sufficient to confirm that, despite the claim of a conflict of interest with IMS, the agency's determination to award to Peat was reasonable and proper.

The protest is denied.

B-235902, May 22, 1990

Civilian Personnel

Compensation

■ Retroactive compensation

■■ Adverse personnel actions

■■■ Attorney fees

■■■■ Eligibility

Although there is no authority to pay attorney fees in connection with an administrative settlement of a complaint of age discrimination, a federal agency may pay the full claim for attorney fees related to settlement of an employee's age and sex discrimination complaints where the agency concedes that the employee would have prevailed in the same manner on just the sex discrimination complaint.

Matter of: Violet M. Dawes—Attorney fees in settlement of sex and age discrimination complaints

The issue in this decision concerns a claim for attorney fees incident to settlement of an employee's complaints of discrimination based on age and sex. For the reasons set forth below, we hold that the agency may pay the entire claim for attorney fees where the agency concedes that if the employee had pursued only the sex discrimination complaint, the agency would have settled the case in the same manner.

Background

The Goddard Space Flight Center, National Aeronautics and Space Administration (NASA), questions whether it may pay the remaining one-half of a claim for attorney fees in an informal settlement of sex and age discrimination complaints filed by Ms. Violet M. Dawes, a NASA employee.[1]

In October 1985, Ms. Dawes filed complaints of discrimination against NASA based on age under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a (1982), and sex under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (1982). In April 1989, the agency, following negotiations with Ms. Dawes's attorney, entered into a settlement agreement which involved retroactive promotions for Ms. Dawes and backpay plus interest.[2]

The parties also stated in the settlement agreement that there was "no objective manner" in which to allocate attorney fees to either ground of the complaints (age and sex discrimination) and that of the total attorney fees claimed in connection with these complaints, $4,511.57, the agency would pay one-half and submit the question to our Office whether the remaining fees may be paid.[3]

Ms. Dawes's attorney argues that since her claims of age and sex discrimination arose out of a "common core of facts," she is entitled to payment of the full amount of her attorney fees. Her attorney distinguishes our decision in *Albert D. Parker,* 64 Comp. Gen. 349 (1985), denying attorney fees in an informal settlement of an age discrimination complaint on the basis that the claim in *Parker* related solely to age discrimination.

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[1] This request for an advance decision was submitted by Charles Tulip, Jr., Comptroller, Goddard Space Flight Center, National Aeronautics and Space Administration. Comments were submitted by Ms. Dawes's attorney, Edward H. Passman.

[2] There is no authority for the payment of interest in this case. There has been no finding of an "unjustified or unwarranted" personnel action under the Back Pay Act, 5 U.S.C. § 5596 (1982), and the Equal Opportunity Employment Commission (EEOC) has stated there is no authority for the payment of interest on backpay to federal employees who prevail in discrimination claims. 54 Fed. Reg. 45,747, 45,751 (to be codified at 29 C.F.R. § 1614.501(e)) (1989).

[3] Discrimination based on sex is one ground of the complaint for which attorney's fees are authorized under Title VII. 29 C.F.R. § 1613.271(d) (1988).

Opinion

In view of the statutory authority granted to the Equal Employment Opportunity Commission (EEOC), our Office does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the government. *See* 29 U.S.C. § 633a (1982); 62 Comp. Gen. 239 (1983). However, based upon our authority to determine the legality of expenditures of appropriated funds, we may determine the legality of awards agreed to by agencies in informal settlements of discrimination complaints. 62 Comp. Gen. 239, *supra.*

With regard to the payment of attorney fees in connection with age discrimination cases, we note that the courts have specifically held that attorney fees are not payable in the administrative settlement of such cases. *See Kennedy v. Whitehurst,* 690 F.2d 951 (D.C. Cir. 1982); *Palmer v. General Services Administration,* 787 F.2d 300 (8th Cir. 1986). The court in *Kennedy* reviewed the legislative history of the Age Discrimination in Employment Act and explained that the differences in enforcement schemes between Title VII of the Civil Rights Act and the Age Discrimination Act make clear that only Title VII permits award of attorney fees at the administrative level. As noted above, we held in *Albert D. Parker, supra,* that attorney fees could not be paid in age discrimination cases which were settled administratively.

Ms. Dawes's attorney argues that *Parker, supra,* is distinguishable from this case because that decision addressed a settlement of a claim based entirely on age discrimination, whereas this case involves mixed allegations of discrimination based on sex and age. Citing to an EEOC decision involving allegations of discrimination based on sex and age, the attorney argues for payment of the full amount of attorney fees in this case.[4]

We agree that the entire claim for attorney fees may be paid in this case, if otherwise allowable. We have been informally advised by an agency official that if Ms. Dawes had pursued only the sex discrimination charge, she would have prevailed in the same manner as agreed to by the agency in administrative settlement of her complaint. We also note that the courts have not denied payment of attorney fees for time spent on other unsuccessful claims or legal theories if the claims or theories were intertwined and not "truly fractionable." [5] Accordingly, the agency may pay the remaining one-half of the attorney fees claimed.

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[4] *Beatrice Haddock v. Department of the Air Force,* EEOC No. 01830822, June 30, 1983.

[5] *Hensley v. Eckerhart,* 461 U.S. 424 (1983); *Copeland v. Marshall,* 641 F.2d 880, 891-92 n.18 (D.C. Cir. 1980) (*en banc*).

B-238354, May 22, 1990

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation errors
■■■ Personnel experience
■■■■ Point ratings

Agency's use of a rating plan that resulted in the assignment of zero points for a labor category in the evaluation of protester's best and final offer, on the ground that 3 of 11 resumes submitted for the category were unacceptable, was an improper material departure from the evaluation plan set forth in the solicitation; the plan stated there, and used by the agency in evaluating initial proposals provided for a composite score based on the scores of all resumes submitted, regardless of whether any particular resume was found unacceptable.

Matter of: Frank E. Basil, Inc.

Fred G. Rockwell, Esq., for the protester.

Donald A. Tobin, Esq., Dempsey, Bastianelli, Brown & Touhey, for C.F.S. Air Cargo, an interested party.

Peter D. Butt, Esq., and Geoffrey D. Chun, Esq., Department of the Navy, for the agency.

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

Frank E. Basil, Inc., protests the Department of the Navy's award of a contract to C.F.S. Air Cargo (CFS), under request for proposals (RFP) No. N00600-89-R-2509, for terminal services to support the operation of an expedited shipment system. The protester asserts that the Navy improperly departed from the RFP's stated evaluation plan in evaluating its best and final offer (BAFO), and thereby deprived Basil of the award.

We sustain the protest.

The solicitation requested proposals for a 5-year contract to provide terminal management and cargo handling services at 11 sites. The RFP provided for award to be made to the offeror whose proposal offered the greatest value to the government from a technical and cost standpoint; it stated that technical factors would carry a weight 1.5 times than that of cost. The solicitation listed, in descending order of importance, three technical evaluation factors, including management plan (with an undisclosed weight of 27.6 of 60 "greatest value" points available under the technical factors), personnel staffing plan (25.2 points), and business resources (7.2 points). With respect to the factor for personnel staffing, the solicitation required offerors to provide with their technical proposal resumes (and letters of commitment for personnel not yet employed) for 25 key personnel in 5 categories, listed in descending order of importance as

(1) one system manager (with an undisclosed weight of 6 points); (2) one special handling/expediting manager (5.4 points); (3) one quality control manager (4.8 points); (4) eleven terminal managers (4.8 points); and (5) eleven terminal hazardous material specialists (THMS) (4.2 points).

Five offerors submitted proposals in response to the solicitation; all were included in the competitive range and, after written and oral discussions, were requested to submit BAFOs. Based upon its evaluation of BAFOs, the Navy determined that the proposal submitted by CFS, the incumbent contractor for most of the services, offered the greatest value to the government. CFS' price of $65,366,210 and its technical score of 42.9 points resulted in that firm's receiving 79.13 out of 100 available greatest value points, and thus the highest greatest value score. Another offeror, Global Associates, received 77.93 points, the second highest score, while Basil, with a price of $65,501,224 and a technical score of 40.9 points, received 77.1 points, the third highest score. Upon learning of the resulting award to CFS, Basil filed this protest with our Office.

Basil questions the Navy's evaluation of the resumes for individuals it proposed under the THMS labor category. The RFP specified that the 11 resumes to be submitted for this category must each demonstrate a minimum of 5 years experience in handling hazardous material. In evaluating Basil's initial proposal, the Navy found that 8 of the 11 resumes submitted for THMS were unacceptable, based on their failure to show that the proposed individuals possessed the required minimum hazardous materials experience; as a result, Basil received the equivalent of 1.068 of a possible 4.2 points. After being advised by the Navy of this deficiency in its proposal, Basil submitted new resumes in its BAFO. However, although the Navy now found that 8 of the 11 resumes submitted showed acceptable experience and only 3 were unacceptable, the agency gave Basil a score of zero for the entire category. The Navy explains that the panel applied a "more effective" scoring technique to the evaluation of BAFOs; if a labor category contained any unacceptable resumes, the entire category was given a score of zero.[1]

Basil objects that assigning zero points for the entire category was a departure from the RFP's stated evaluation scheme, which provided that "where multiple resumes are required for a labor category, the *rating shall be a composite of resumes submitted* for that category." (Italic added.) Basil contends that under the stated evaluation plan, even if the Navy were correct that 3 of the 11 individuals lacked the required experience and were therefore unacceptable, it was entitled to partial credit for the category, based on an averaging of the scores for acceptable and unacceptable resumes, just as it received partial credit in its initial proposal, where a much smaller percentage of resumes was found acceptable.

Our review of a technical evaluation is limited to a determination of whether the evaluation was fair and reasonable and consistent with the stated evalua-

[1] The record does not include documentation of the final proposal evaluation methodology; according to the agency, "after the final evaluation, the . . . spreadsheets were discarded as a matter of routine."

tion criteria. *See Space Applications Corp.,* B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255. Procuring agencies do not have the discretion to announce in a solicitation that one evaluation plan will be used and then follow another in the actual evaluation; consequently, it is improper for an agency to depart in a material way from the evaluation plan prescribed in the RFP without informing the offerors and giving them an opportunity to structure their proposals with the new evaluation scheme in mind. *See National Capital Medical Found., Inc.,* B-215303.5, June 4, 1985, 85-1 CPD ¶ 637.

We find that the Navy's evaluation of Basil's BAFO materially departed from the solicitation's stated evaluation criteria. The RFP gave no indication that an offeror would receive zero points for an entire labor category if any one of the resumes was rated less than acceptable. On the contrary, the RFP provision regarding composite scoring, in our view, clearly indicated to offerors that a labor category would be scored by taking into account the individual scores of all of the resumes. This interpretation is consistent with the manner in which the Navy itself evaluated initial proposals, that is, by calculating the composite score for the THMS category based on all of the individual resumes submitted. Further, although the Navy advised Basil during discussions that a number of the individuals it initially proposed failed to meet the experience requirements, the agency did not advise it that the failure of any one of the individuals to meet those requirements in the final evaluation would result in a zero score for the entire category. Absent notice of the agency's intended approach, its departure from the stated evaluation criteria rendered the evaluation of the THMS labor category improper. *See generally National Capital Medical Found., Inc.,* B-215303.5, *supra* (agency improperly departed from evaluation criteria when it awarded zero of 310 possible points if any one of multiple admission/quality control objectives for medical peer review plan was less than acceptable).

The Navy asserts that even if the THMS category had been scored in the manner urged by Basil, the agency still would have made the award to CFS, based on the best value to the government, and that Basil therefore was not prejudiced by the allegedly improper scoring. According to the Navy, if the scores of Basil's acceptable THMS resumes were averaged with the scores of the unacceptable resumes, which each received a score of zero, the revised score for the THMS category would be approximately 2.4 greatest value points out of a possible 4.2 points, instead of zero; as a result, the protester's new technical score (43.3 points) would be higher than CFS' technical score (42.9 points), and Basil's overall revised score (79.5 points) also would be higher than the awardee's (79.1 points). The Navy maintains, however, that Basil's proposal still would be considered technically inferior because the small difference in technical point scores would be more than offset by the significance of the three unacceptable resumes for THMS positions; these positions are so critical, according to the Navy, that the failure to meet minimum experience requirements would have warranted outright rejection of the proposal. At best, according to the agency, the revised technical scores would have been so close as to represent no significant technical difference, and CFS' lower proposed price ($65,366,210),

which was $135,014, or 0.2 percent, less than Basil's ($65,501,224), would have been the determinative factor.[2]

We are not persuaded by the Navy's assertion that Basil was not prejudiced by the agency's departure from the evaluation criteria. First, although the agency asserts that the THMS labor category was so important that deficiencies in some of the resumes would have warranted outright rejection of the proposal, we find more credible the agency's characterization elsewhere in its report of the deficiencies as minor in the context of the overall evaluation scheme. Specifically, in explaining its evaluation of Basil's BAFO, the Navy itself states that it gave Basil a score of zero for the THMS category, instead of rejecting the proposal outright, only because it considered the category minor and the deficiency not sufficiently important to warrant rejection of the entire proposal. Further, we note that the RFP listed the THMS labor category as the least important of the five labor categories, with the least number of possible points.

Likewise, in its contemporaneous evaluation of Basil's proposal, the agency evaluation panel concluded that, although the three individuals proposed for THMS positions lacked the minimum required experience, they

> do, however, each have several years [experience] actually packing and certifying [hazardous material]. This hands on experience (while less than 5 full years) could be nearly as valuable as the 5 years of general (handling) experience required. The individuals proposed could be accepted for the following reasons: (a) The positions are not at the critical terminals . . . (c) Redundancy within the system represented by the Special Handling/Expediting Manager and the Terminal Managers all having [hazardous materials] handling and certification experience.

In this regard, we note that 1 of the 3 individuals in question had 53 of the required 60 months of hazardous materials experience and another may have had as much as 57 months of relevant experience. In our view, the evaluation panel's conclusions confirm that the deficiencies in the proposals were not critical to the overall contract, and therefore would not have warranted rejection of the proposal.

As for the agency's assertion that award would have been made to CFS in any case, on the basis of its lower priced purportedly technically superior offer, we find the technical scores and proposed prices too close to draw any meaningful conclusions as to what the outcome of the cost/technical tradeoff would have been had Basil's proposal been properly evaluated. In this regard, we consider it significant that technical factors were 1.5 times more important than cost and, although the composite technical scores were close, Basil scored higher than CFS under 8 of the 14 technical subcriteria.

Also casting doubt on the evaluation is the protester's assertion that the Navy improperly downgraded its proposal, based on the three deficient resumes, under factors unrelated to the THMS category. The Navy specifically denies this, but Basil's argument is supported by the final evaluation summary; for ex-

[2] *In this regard, the Navy notes that the RFP reserved to the contracting officer "the discretion to examine the technical point scores to determine whether a point differential between offerors represents any significant difference in technical merit. Award may be made to the lowest cost proposal even though its Greatest Value Score is not the highest."*

ample, the summary for the organizational structure and resources subcriterion specifically notes the three proposed individuals' lack of experience. It thus is unclear precisely how much impact these experience deficiencies had on the evaluation as a whole. *See generally Falcon Carriers, Inc.,* 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96 (protest sustained where record establishes possibility of competitive prejudice from improper agency action). In these circumstances, the only appropriate remedy is to resubmit Basil's proposal to the evaluation panel for reevaluation in accordance with the evaluation scheme set forth in the solicitation.

By separate letter to the Secretary of the Navy, we are recommending that Basil's proposal be resubmitted to the evaluation panel for evaluation on the basis of the evaluation scheme set forth in the solicitation, with the results of the evaluation properly documented as provided for in Federal Acquisition Regulation § 15.608(a). Following evaluation, the Navy should terminate its contract with CFS if appropriate. In addition, we find that Basil 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, *supra.*

The protest is sustained.

B-239330, May 22, 1990

Procurement

Socio-Economic Policies
■ Small businesses
■■ Contract award notification
■■■ Notification procedures
■■■■ Pre-award periods

Procurement

Socio-Economic Policies
■ Small businesses
■■ Contract awards
■■■ Size status
■■■■ Misrepresentation

Protest is sustained where agency, without notice to unsuccessful offerors, awarded a contract under a small business set-aside to a firm ultimately determined by the Small Business Administration to be other than small, based on agency's desire to make immediate award in order to avoid the administrative inconvenience of applying for an exception from a rumored funding freeze.

Procurement

Socio-Economic Policies
■ Small business set-asides
■■ Contract awards
■■■ Price reasonableness

Contracting officer may not ignore prior procurement history, government estimate, and other relevant evidence in determining whether small business price received was in fact fair and reasonable.

Matter of: United Power Corporation

Wayne A. Keup, Esq., Dyer, Ellis, Joseph & Mills, for the protester.

Edward J. Obloy, Esq., and Andrew H. Deranger, Esq., Office of the General Counsel, Defense Mapping Agency, 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.

United Power Corporation protests the award of a contract to EPE Technologies, Inc., under request for proposals (RFP) No. DMA600-90-R-0032, issued as a total small business set-aside by the Defense Mapping Agency for power conditioning systems to be used in computer rooms. The protester contends that the agency improperly awarded a contract to a large business without providing the notice required by Federal Acquisition Regulation (FAR) § 15.1001(b)(2) (FAC 84-13). The protester has also filed suit in the United States District Court for the District of Columbia, *United Power Corp. v. United States,* Civil Action No. 90-0931, seeking injunctive relief. The court has stayed performance of the contract pending our decision. We have invoked the express option provided for in our Bid Protest Regulations. 4 C.F.R. § 21.8 (1989).

We sustain the protest.

On February 13, 1990, the agency issued the solicitation for a firm, fixed-price contract for a base requirement of 39 75-kVA power conditioning and distribution systems, plus related start-up services, training and data, with an option for an additional 26 systems to be provided as government-furnished equipment to contractors conducting site preparation for a portion of the agency's digital production system which is under construction at the aerospace center complex in St. Louis, Missouri.

The power systems will protect equipment and data from power anomalies, both by controlling the flow of current and by providing power in the event of temporary outages in the special electrical feeder lines that are to service the facility. The digital production system is an integral part of the agency's modernization effort which will allow the agency to move from a predominantly manual effort to a system which will produce maps, charts, and geodetic products using computer-assisted and digital production techniques.

The solicitation provided for evaluation of option prices and for award to that offeror which, as the result of price and technical evaluations, obtained the highest total weighted score, termed the "greatest value score" (GVS). The solicitation set forth six technical evaluation factors and provided that for the purposes of award, the total value of the technical factors would be significantly more important than price.

The agency received six proposals from five contractors on March 12 and completed its technical evaluation on March 15. As a result of this evaluation, the agency found that only two offerors, the awardee and the protester, were in the competitive range. Although the protester received a higher technical score, the awardee's price was substantially lower, resulting in a slightly higher total GVS score.[1]

Although at the time the RFP was issued the agency did not contemplate awarding a contract until on or about May 1, 1990, the contracting officer, on March 15, "was informed by senior management that it appeared all [Department of Defense] funds for obligation under contract would be frozen on or about Monday, 19 March 1990." She was requested by senior management "to make every effort to award [the] contract prior to imposition of the freeze." The agency thereupon decided that award on the basis of initial proposals would be advantageous to the government. Prior to such an award, the protester orally advised the agency that the proposed awardee had merged with a large, foreign-owned business and was no longer a small business. However, the agency states that its quick check of various electronic commercial databases indicated that the awardee met the 500-employee size requirement.[2] The agency awarded the contract to EPE Technologies on March 16, without written notice to unsuccessful offerors, based on the contracting officer's unwritten determination that the urgency of the procurement necessitated award without delay.[3]

On March 20, the protester submitted a protest of the awardee's size status. The protester submitted evidence that in February the awardee had entered into a merger agreement with a large, foreign-owned business. (The awardee had submitted its proposal, in which it had certified itself as a small business, on March 8, 4 days prior to the date set for receipt of initial proposals and 1 day prior to the final transfer of stock.) The protester produced a copy of an internal memorandum dated February 8 advising EPE Technologies' employees of the impending merger, a February 12 news story concerning the merger, and a Dun & Bradstreet report dated March 16, which contained details of the new owner-

[1] The awardee's evaluated GVS score was 92.4 points, while the protester's was 89 points. The awardee's price for the base requirement was $906,438, and the protester's was $1,213,697. The awardee's total evaluated price, including options, was $1,510,730, and the protester's was $2,061,248. The independent government estimate, including options, was $2,232,672.

[2] The protester has presented evidence to refute this finding by the agency. Further, the parties stipulated in court that the agency representative participating in the search was under the belief that the acquisition of a small business by a large business "did not necessarily mean that [the small business] would no longer be small," if it retained a separate board of trustees with no direct control by the parent company.

[3] On March 19, the contracting officer states that she completed a written draft of a memorandum detailing the rationale for waiving the pre-award notice based on urgency. Our copy of this draft memorandum in the record is undated and unsigned. The final version was executed on April 13, 1990.

ship arrangement. On March 23, the contracting officer sent the size protest to the Small Business Administration (SBA).

On April 5, the SBA issued a determination in response to the protester's "timely size protest" that the awardee was other than small for the purposes of the procurement.[4] The SBA noted that its regulations clearly provide that for the purpose of determining size status, merger agreements and other arrangements affecting a concern's affiliation with another firm or a change of control are considered executed as of the date upon which the firm certifies its status. 54 Fed. Reg. 52,634 (1989) (to be codified at 13 C.F.R. § 121.904). On April 13, the agency advised the protester that despite the SBA decision, it would not terminate the contract. This protest followed on April 17.[5]

Under FAR § 15.1001(b)(2), the contracting agency is required to inform unsuccessful offerors in writing, prior to award, of the name and location of the apparent successful offeror, in order to permit challenges to the successful offeror's small business size status. Generally, after receiving a timely size protest, the contracting officer must withhold award of the contract until the SBA has made a size determination, or until 10 business days have elapsed since the SBA's receipt of the size protest, whichever occurs first. FAR § 19.302(h)(1) (FAC 84-56). The award of a contract without notice to unsuccessful offerors is subject to a timely size protest in the absence of a valid urgency determination. *Superior Eng'g and Elecs. Co., Inc.,* B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698. The contracting officer need not provide notice where she determines in writing that the urgency of the procurement necessitates award without delay. Where the agency awards a contract pursuant to a proper urgency determination, the notice requirements concerning size status are waived and a subsequent SBA determination that the awardee is other than small is prospective and termination of the contract is not required. *Id.* We review such determinations for reasonableness, and where they are executed after award, we will consider whether the determination suggests deliberation at the time of award. *See Science Sys. and Applications, Inc.,* B-236477, Dec. 15, 1989, 89-2 CPD ¶ 558. We conclude that, in the instant case, the determination was unreasonable and that there was more than sufficient time to complete the size protest prior to any award.[6]

[4] Under new SBA regulations, a size protest received within 5 days after receipt from the contracting officer of notification of the identity of the awardee is timely and applies to the procurement in question even though the contracting officer may have awarded the contract prior to receipt of the protest. *See* 54 Fed. Reg. 52,634 (1989) (to be codified at 13 C.F.R. § 121.1603).

[5] The agency argues that the protest is untimely since continued performance of EPE Technologies' contract served as constructive notice that the agency had denied United Power's agency-level size protest of March 20. A size protest, however, is different from a bid protest. Further, we find that the protest is timely since it was not until the SBA determined that EPE Technologies was other than small and that the protester was advised that the agency would ignore the SBA determination that the protest ground arose, that is, on April 13. The agency also argues that our Office should dismiss the protest because the protester failed to deliver a copy of the protest to the offices that the RFP designated for service of protests. The agency had been previously aware of the protester's principal allegations, and our Office provided the agency with a copy of the protest within 2 days of the filing. Our Bid Protest Regulations, 4 C.F.R. § 21.1(f), state that our Office will not dismiss a protest where no prejudice has been shown, and we find none here.

[6] We also find that EPE Technologies failed to self-certify its small business status in good faith. The standard of good faith when applied to a certification as a small business is not limited to an incident of intentional misrepre-

Continued

The final written determination executed by the contracting officer on April 13 concerns the role of the digital production system to the agency's mission. The contracting officer notes that the RFP delivery schedule is extremely optimistic, based on the delivery schedule supplied by the awardee, that any slippage of the delivery schedule "could" result in day-to-day slippage of the digital production system's full operational capability, and that such slippage could expose the agency to large delay claims by construction contractors.

We note, however, that in arguing the importance of the agency's mission and the importance of the digital production system to that mission, the contracting officer presents no basis for concluding that a delay in award would have delayed construction of the digital production system. As noted by the District Court in the protester's suit (order granting preliminary injunction), the contracting officer's determination contains no basis for presuming that a delay in award, to allow the protester to pursue its size status protest, would have prevented timely delivery of the power systems to the construction contractors.

While the determination states that the awardee considered the schedule optimistic, the record shows that the awardee had already offered to make early deliveries in return for an increase in the contract price. The protester, for its part, avers that it could make timely deliveries if a contract were awarded as late as May. Indeed, the record contains an affidavit from the agency's technical representative, expressing his opinion that award by mid-May probably would not have delayed delivery of the power systems. We conclude that at the time the notice was waived (mid-March), the agency had ample time to refer the size status protest to SBA and to process an award without delaying delivery of the power systems.

The only other factor that could have delayed delivery would have been the necessity of obtaining an exemption if the rumored funding freeze had become reality. The agency's senior procurement executive confirms that several sources had reported the pending freeze and that, in a telephone call, the Office of the Secretary of Defense refused to confirm or deny that it planned to impose such a freeze. He therefore directed contracting personnel to expedite awards and to take every action to award certain procurements. A request for exemption from an earlier freeze had taken 2 months to process, and the contracting officer was directed by senior management at the agency to expedite the procurement. The contracting officer's determination must be read in this context, and we find that neither the funding freeze nor the agency's desire to avoid the inconvenience and delay attendant to seeking an exemption from the funding freeze,

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sentation; since self-certifications are usually not questioned, offerors must be held to a higher than usual degree of care in determining whether they are or are not a small business. 51 Comp. Gen. 595 (1972). The record here discloses that on February 9, 5 weeks prior to award, the awardee widely circulated among its employees and the media the news of its acquisition; the awardee sponsored meetings for its sales representatives to discuss the details and implications of the acquisition. During the period preceding the submission of offers for the current solicitation, the finalization of the acquisition awaited only the approval of the Secretary of State of California for the formal transfer of stock, which was placed in a trusteeship controlled by the purchaser. The awardee executed the self-certification 1 day prior to the formal transfer. We believe that a reasonably prudent offeror would therefore have been on notice that there was a serious question as to its size status. *See Bancroft Cap Co., Inc. et al.*, 55 Comp. Gen. 469 (1975), 75-2 CPD ¶ 321.

under guidelines duly promulgated by the Secretary of Defense, provided a valid basis for a finding of urgency. *Cf. Maximus, Inc.,* 68 Comp. Gen. 69 (1988), 88-2 CPD ¶ 467.

In sum, we find that the agency's primary motive for waiving the pre-award notice was its fear that funds might be frozen and its desire to avoid the inconvenience of applying for an exemption from the rumored funding freeze that never materialized. We find that the contracting officer's determination was unreasonable and the written determination of urgency prepared after award does not reflect a product of reasoned deliberation; the SBA's determination that EPE Technologies is other than small is therefore applicable to the current procurement and its contract must be terminated.

The agency also argues that the protester is not an interested party for the purposes of filing a protest under our Bid Protest Regulations, 4 C.F.R. § 21.0(a), since it would not receive award even if its protest were sustained. In support of this assertion, the agency notes that the protester's proposal did not comply with the RFP requirements, since the protester did not provide a firm price for the evaluated option quantities.[7] The contracting officer also argues that if EPE Technologies is eliminated from the competition, she cannot make award to the protester, because, based on EPE Technologies' price, she has in fact determined that the protester's price is not fair and reasonable. She advises our Office that in such circumstances, she will therefore simply dissolve the small business set-aside.

A determination of price reasonableness for a small business set-aside is within the discretion of the procuring agency, and we will not disturb such a determination unless it is clearly unreasonable. *Flagg Integrated Sys. Technology,* B-214153, Aug. 24, 1984, 84-2 CPD ¶ 221. We believe that the contracting officer's determination in this case is clearly unreasonable.

According to FAR § 19.501(j) (FAC 84-48), a contract may not be awarded under a small business set-aside if the cost to the agency exceeds the item's fair market price. FAR § 19.001 (FAC 84-56) defines fair market price as a price based on reasonable costs under normal competitive conditions, and not on the lowest possible cost. FAR § 19.202-6 (FAC 84-56) directs agencies to determine fair market price in accordance with FAR § 15.805-2 (FAC 84-51), which permits a contracting officer to use the price analysis techniques that will ensure a fair and reasonable price, including a comparison of proposed prices received in response to the solicitation, a comparison of prior proposed or contract prices with current proposed prices, and a comparison with independent government cost estimates.

Here, the parties stipulated in the court proceedings that the contracting officer relied solely on the large business price in determining that the protester's

[7] The protester's cost proposal noted the possibility of a price increase for option units shipped after March 31, 1991. However, the protester states that it is willing to provide all the option quantities at the firm, fixed-price contained in its proposal. We merely note that the protester's proposal would easily be susceptible to correction through discussions. *See Cajar Defense Support Co.,* B-237522, Feb. 23, 1990, 90-1 CPD ¶ 213.

price was not fair and reasonable, ignoring all other evidence. We believe that it is unreasonable to rely solely on the large business price, where all other evidence indicates that the price submitted by the small business was in fact fair and reasonable. *See Victronics, Inc.,* 69 Comp. Gen. 170 (1990), 90-1 CPD ¶ 57.

We find no basis whatsoever for finding the protester's price to be unreasonable. The record shows that the price submitted by the protester is entirely in line with the prior procurement history for the item and is below the government estimate. Indeed, shortly before this protest was filed, the agency approved a contract modification for the construction contractor to procure the item at a price 25 percent higher than that here offered by the protester; furthermore, the price offered by the protester is less than that appearing on the General Services Administration schedule price lists of both the protester and EPE Technologies. The record also suggests that the awardee's price may have been below-cost since the price was two-thirds that which it had previously offered for similar systems and two-thirds of the government estimate. Moreover, we believe that having given primacy to technical factors and thereby inducing the protester to submit a higher price, higher quality proposal, the agency cannot, under the circumstances here, declare that price to be other than fair and reasonable. To do otherwise would be contrary to the congressional policy favoring small businesses, which allows awards to small businesses at premium prices, so long as those prices are not unreasonable. *See APAC-Tenn., Inc.,* B-229710 *et al.,* Feb. 8, 1988, 88-1 CPD ¶ 124.

We therefore conclude that the agency has not justified the need to waive notice of award to unsuccessful offerors, that the contracting officer abused her discretion, and that the protester was prejudiced thereby. As we have stated, the SBA determination that EPE Technologies is other than small therefore applies to the current procurement, and we are therefore by letter of today to the Director, Defense Mapping Agency, recommending that the agency terminate EPE Technologies' contract for the convenience of the government and award the contract under the solicitation to the protester after affording the protester an opportunity to cure the reference in its cost proposal to a possible price increase for the option quantities. We award the protester its costs of pursuing this protest, including attorneys' fees; the protester should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(d).

The protest is sustained.

B-227353, May 23, 1990

Appropriations/Financial Management

Budget Process

■ Funds transfer

■ ■ General/administrative costs

■ ■ ■ Cost allocation

Section 7(c)(2) of the Railroad Retirement Act of 1974, 45 U.S.C. § 231f(c)(2) (1982), provides for transferring funds between the Social Security trust funds and the Railroad Retirement Account. When computing costs for this purpose, either full costing or incremental costing may be used since administrative cost determinations are left to the discretion of Railroad Retirement Board and Secretary of Health and Human Services.

Matter of: Determining costs for transfers between the Social Security trust funds and the Railroad Retirement Account

This responds to a request from Dorcas Hardy, former Commissioner of the Social Security Administration (SSA), Department of Health and Human Services (HHS), for a decision concerning the proper method for computing costs in connection with the transfer of funds (financial interchange) between the Social Security trust funds[1] and the Railroad Retirement Account authorized by section 7(c)(2) of the Railroad Retirement Act of 1974 (1974 Act), 45 U.S.C. § 231f(c)(2) (1982). Section 7(c)(2) authorizes transfers of those amounts which, when added to or subtracted from the Social Security trust funds, "would place each such trust fund in the same position in which it would have been" if railroad employees had been covered by the social security program and the railroad retirement program had never been enacted into law.

SSA fully allocates all administrative costs, including staff overhead, when determining the Social Security trust funds' administrative expenses for the purposes of computing the financial interchange. However, the Office of the Inspector General, HHS (OIG), maintains that using full cost allocation results in an administrative cost determination greater than permitted by section 7(c)(2), thereby placing the trust funds in a financial position other than that required by section 7(c)(2). Accordingly, the report recommends that SSA use only incremental costs to determine administrative expenses for the purpose of computing the amount of the financial interchange.[2]

For the reasons discussed below, we believe that it is within the discretion vested in the Railroad Retirement Board and the Secretary of Health and Human Services by section 7(c)(2) of the 1974 Act to use full costing to deter-

[1] "Social Security trust funds" means the Federal Old-Age and Survivors Insurance Trust Fund, the Federal Disability Insurance Trust Fund, and the Federal Hospital Insurance Trust Fund.

[2] U.S. Department of Health and Human Services, Office of Inspector General, Office of Audit: "Review of Selected Aspects of the Financial Interchange Behavior, the Social Security Administration and the Railroad Retirement Board Social Security Administration" (Audit Control No. 113-62671, August 13, 1985) [hereafter cited as OIG Report].

mine administrative costs for the purpose of the financial interchange between the Social Security trust funds and the Railroad Retirement Account.

Background

In the 1930s, many private pension plans established by the railroads encountered financial difficulties. This led to legislation which created a federal railroad retirement program and established a Railroad Retirement Board (Board) to administer the program.[3] The legislation provides benefits to retired and disabled railroad workers and their dependents in a manner similar to the benefits that social security provides to other retired and disabled workers.

Initially, employers and employees financed the railroad retirement program from their contributions. During the 1940s, railroad retirees received benefits much higher than those paid by social security. In 1950, the Congress increased social security benefits and liberalized the social security eligibility requirements to enable millions of beneficiaries to receive immediate benefits. These increases in social security benefits substantially narrowed the difference in benefits between the two systems, but not in contributions.

Consequently, Congress in 1951 amended the Railroad Retirement Act of 1937 to increase railroad retirement benefits and the number of eligible beneficiaries without substantially increasing contributions. However, because of potential funding problems, the legislation provided for an annual transfer of funds—the financial interchange—between the Social Security trust funds and the Railroad Retirement Account. Act of October 30, 1951, ch. 621, sec. 22(b), 65 Stat. 687, 45 U.S.C. § 228e(k)(2) (1952) (1951 Act). The financial interchange was intended to compensate for the exclusion of railroad employees from social security coverage. It was felt that this exclusion benefited the social security program because the railroad retirement program had a high rate of beneficiaries to tax-contributing workers. *See* S. Rep. No. 890, 82d Cong., 1st Sess. 14-16, 27 (1951). The legislation also placed railroad employees with less than ten years of employment at the time of their retirement or disability under the social security program. Sec. 22(a) of the 1951 Act, 45 U.S.C. § 231q (1982). The financial interchange also compensates for these costs.[4] The Railroad Retirement Act of 1937 was amended in its entirety and completely revised by the 1974 Act. The 1974 Act restructured the railroad retirement program but retained the provision for the financial interchange. S. Rep. No. 93-1163, 93d Cong., 2d Sess. 49 (1974).

[3] Act of August 29, 1935, ch. 812, 49 Stat. 967, 45 U.S.C. §§ 215-228 (1940). The 1935 act was amended in its entirety and completely revised by act of June 24, 1937, ch. 382, 50 Stat. 307, 45 U.S.C. §§ 228a-228z-1 (1940) (known as the Railroad Retirement Act of 1937). Current authority for the railroad retirement program is provided by the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231u (1982).

[4] For further information concerning the evolution and operation of the financial interchange, *see* GAO, Railroad Retirement, Federal Financial Involvement at 12-16 (GAO/HRD-86-88, B-222204, May 9, 1986) and GAO, Inaccurate Fund Transfers Between Social Security Administration and Railroad Retirement Board at 1-2 (GAO/HRD-83-2, B-210707, April 4, 1983).

The Matter In Dispute

Section 7(c)(2) of the 1974 Act requires the Board and the Secretary of HHS, at the close of each fiscal year, to determine the amounts which, if added to or subtracted from the Social Security trust funds, "would place each such Trust Fund in the same position in which it would have been" if railroad employees had been covered by the social security program after December 31, 1936 and the railroad retirement program had never been enacted into law. Once the amount of the transfer is determined by the Board and the Secretary of HHS, the Secretary of the Treasury is required to transfer the amount certified by the Board or the Secretary of HHS between the Railroad Retirement Account and the trust funds. 45 U.S.C. § 231f(c)(2) (1982).

The actual computation of the amount is done by the Board. The Board estimates (1) the benefits that would have been paid to railroad employees if they had been covered by the social security program, (2) the social security taxes that would have been collected, and (3) the administrative expenses SSA would have incurred if railroad retirement beneficiaries had been covered under the social security program. GAO/HRD-83-2 at 2. For the third item, the Board bases its estimate on unit cost factors developed by SSA. *Id.* at 18.

Once these amounts are determined for each of the Social Security trust funds, the benefit payments and administrative costs are added together and compared to the taxes that would have been collected. If the combined costs are greater than the taxes that would have been collected, the difference plus interest is transferred from the particular Social Security trust fund to the Railroad Retirement Account. If the amount of taxes that would have been collected exceeds the costs that would have been incurred, the difference plus interest is transferred from the Railroad Retirement Account to the particular Social Security trust fund. For each year since 1957, net transfers have been out of the social security system and into the railroad retirement system. *Id.* at 4.

The unit cost factor reflects SSA's estimated cost in administering each of its programs. SSA estimates the cost for initial enrollment, eligibility determinations and benefits computations, maintaining benefit rolls, and handling compensation reports for each of its programs. In developing the unit costs, SSA includes staff overhead as part of its full cost calculation. According to the OIG's Report, about 15 percent of the total administrative expense is attributed to staff overhead functions. OIG Report at 6. The OIG concluded that including staff overhead in the unit cost computation of administrative expense results in administrative expenses greater than permitted by section 7(c)(2) of the 1974 Act and does not result in fund transfers that would place each of the Social Security trust funds in the same position it would have been in if railroad employees had been covered by the social security program. The OIG therefore recommended that only incremental costs be included, and the Board concurred. *Id.* at 6-7. However, the Commissioner of Social Security, who certifies the amount of the transfer on behalf of the Secretary of HHS, disagrees. Therefore, the Commissioner requested our independent views on this matter.

HHS OIG Position

The OIG believes that SSA's staff overhead cost would not increase with the addition of the railroad retirement program caseload. Therefore, all of the staff overhead costs should not be included in the administrative expense determination.[5] The OIG states that:

> To place the trust funds in the same position they would have been in had railroad employment been covered by the Social Security Act, a careful analysis is needed to determine only those additional administrative costs SSA would incur if they were to process the RRB caseload.

The OIG reasons that some of the overhead staff costs are not dependent on the rise and fall of workload production; that these staff overhead functions are already in place within the SSA organization and would exist regardless of the additional workload from Railroad Retirement Board cases.

SSA Position

According to the OIG Report, SSA disagrees with the OIG's conclusion that full cost treatment, including staff overhead costs, was inappropriate. SSA also argues that the concept of full cost accounting requires that both direct and indirect costs be included in the determination of administrative costs for purposes of the financial interchange, and to do otherwise would be inconsistent with the methods for determining administrative costs for other purposes. OIG Report at 6-8.

In various submissions provided to this Office, SSA points out that the concept of full costing is a standard principle throughout government accounting that has been recognized by the decisions of this Office. SSA also states that full costing was incorporated in the administrative accounting system formally approved by the General Accounting Office on September 30, 1980. SSA notes that while our 1983 audit report on the financial interchange recommended a number of changes in the methods SSA used to calculate administrative costs, we did not recommend that SSA exclude staff overhead costs that are allocated in accordance with SSA's cost accounting system.

Finally, there are several other cases where the calculation of benefits and associated administrative costs are used to determine transfers into the trust funds. These are payments for military service credits, special age-72 benefits, and pension reform. In each of these cases, the administrative costs used are based on direct and indirect costs. SSA argues that using an incremental cost methodology in computing SSA's administrative unit costs for the financial interchange might require for purposes of consistency changes in other computations affecting benefit transfers from the general fund to the trust funds.

[5] OIG Report at 6-7. The OIG report identifies charges for the following staff overhead functions as being improper: Central office administration, program policy, research, statistics, actuarial, legislative liaison, planning, program information/public affairs, and management information. The OIG characterizes direct and indirect personnel costs including training, operations management and supervision related to the processing of the workload, as proper charges.

Discussion

We agree with SSA that the concept of full costing is an accepted accounting principle throughout government accounting.[6] As such, we would not lightly hold that its use is prohibited unless the law expressly, or by necessary implication requires such.[7] Thus, the question is whether section 7(c)(2) of the 1974 Act expressly or by necessary implication precludes the use of full costing when determining administrative costs for the purpose of computing the amount of the financial interchange.

Section 7(c)(2) of the 1974 Act makes no mention of cost recovery. It merely requires the Board and the Secretary to "determine the amounts, if any, which if added to or subtracted from" the Social Security trust funds that "would place each such Trust Fund in the same position in which it would have been" if railroad employees had been covered by the social security program after December 31, 1936, and the railroad retirement program had never been enacted into law.

We are unable to glean from the language of the law a prohibition on the use of an otherwise generally accepted method of administrative cost determination such as full costing. The law does not prescribe the method for placing the funds in the same position they otherwise would have been in had the railroad retirees only been covered by social security system, or for making related administrative cost determinations.

Section 7(c)(2) of the 1974 Act leaves to the discretion of the Board and the Secretary the methodology for determining the amount of the financial interchange and whether the respective funds are in fact being maintained in the same position they would have been if there had been no separate railroad retirement system. The full cost method for determining administrative costs has been in effect since at least 1976 (when the SSA's Cost Analysis System for identifying costs took effect) and SSA indicates that it was probably in effect earlier. A contemporaneous construction put on a statute by an agency charged with its administration is entitled to deference and is generally affirmed by courts if reasonable, *Udall v. Tallman,* 380 U.S. 1, 16 (1965); *Investment Co. Institute v. Camp,* 401 U.S. 617, 626-627 (1971). Thus, the prior determination by the Board and the Secretary to use full costing when computing administrative costs for the purpose of determining the amount of the financial interchange is entitled to some deference as a proper interpretation of their authority under section 7(c)(2) of the 1974 Act.

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[6] *See, e.g.,* GAO, Policy and Procedures Manual for Guidance of Federal Agencies, tit. 2, appendix I, pages 10-11 (TS 2-24, October 31, 1984), recognizing that full costs may be appropriate for financial reporting purposes.

[7] We note that 57 Comp. Gen. 675 (1978) concluded that the "actual cost" recovery required by the Economy Act of 1932 should be based upon a full cost methodology to the extent described in the decision. Our decision was based on our construction of the Economy Act in light of legislative history clearly reflecting Congress's rejection of the incremental cost recovery requirement imposed by earlier decisions of this Office for interagency reimbursable work performed prior to enactment of the Economy Act. *See* 57 Comp. Gen. at 678-679. Although, the cost recovery methodology required by the Economy Act does not control the determination of costs for purposes of the financial interchange required by section 7(c)(2) of the 1974 Act, it does support the conclusion that the full cost method is, at a minimum, a reasonable method, if not the preferred or required method, to be used when determining costs in other situations, absent a clear legal requirement to the contrary.

Additionally, as noted in the OIG's Report, the amount in dispute represents roughly 15 percent of the administrative expense cost figure applicable to the computation of the total amount transferred for each year. The administrative expense figure itself represents a small proportion of the total amounts involved in computing the financial interchange. It is unclear whether the cost and burden entailed in SSA singling out the financial interchange for a different accounting treatment than that which SSA applies when computing reimbursement involving the Social Security trust funds under other provisions of law warrant the imposition of the incremental costing method in the absence of a clear legislative requirement that it do so.

Consequently, in view of the discretion vested in the Board and the Secretary, we cannot conclude that their decision to use full costing to determine administrative costs for the purpose of the financial interchange violates section 7(c)(2) of the 1974 Act.

B-237005.2, May 31, 1990

Procurement

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

Procurement

Competitive Negotiation
■ Contract awards
■■ Propriety

General Accounting Office denies request for reconsideration of previous decision which upheld award to low evaluated offeror, in absence of evidence that low evaluated offer would result in other than the lowest ultimate cost to the government.

Matter of: Unisys Corporation—Reconsideration

Bernard Fried, Esq., for the protester.

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.

Unisys Corporation requests reconsideration of our decision, *Unisys Corp.*, B-237005, Jan. 5, 1990, 90-1 CPD ¶ 24, denying its protest against the award of a contract to Raytheon Company under request for proposals (RFP) No. F04606-89-R-0104, issued by the Air Force for spare parts for microwave radio terminal sets. We denied the protest because, based on an implicit representation by the agency that it did not intend to order substantial quantities of addi-

ional spare parts under the contract at higher prices from Raytheon, we found no evidence that acceptance of the low offeror's proposal would result in other than the lowest ultimate cost to the government.

We deny the request for reconsideration.

The agency issued the solicitation on January 10, 1989, for a firm, fixed-price indefinite quantity contract for 23 line items of spare parts for a period of 3 years. On June 30, the agency combined the solicitation with two other solicitations for similar spare parts, for a total of 48 line items. Each line item contained a minimum initial quantity, to be ordered upon award, and a maximum order quantity that the agency could purchase over the 3-year period of the contract.

The amended solicitation required potential offerors to submit prices for the minimum initial quantity of each line item; each offeror also submitted prices in four quantity ranges for each line item for each of the 3 years of the contract period; these 576 prices, applicable only if the agency should order parts in addition to the minimum initial quantity, were termed the "pricing matrix." The solicitation advised offerors that the agency would evaluate prices by adding the unit costs in the pricing matrix (quantity of 1 each) to the total cost of the minimum initial quantity (price multiplied by minimum initial quantity) and provided for award to the responsive, responsible offeror submitting the lowest evaluated offer. This scheme gave primary emphasis to the minimum initial quantity, which represented the agency's only firm requirement. The solicitation further provided that the government could reject any offer that was materially unbalanced as to prices for the minimum initial quantity and the matrix quantity ranges, defining unbalanced offers as any that were "based on prices significantly less than cost for some work and prices which are significantly overstated for other work."

The agency received two offers on July 20, 1989. Although the prices in the pricing matrix that the awardee submitted were generally higher than the prices in the matrix that the protester submitted, the awardee's prices for the minimum initial quantity were so low that when the agency applied the price evaluation criteria, Raytheon's evaluated price was low.[1] In its proposal, the awardee provided a justification for offering a lower price for the initial quantity, explaining in essence that it was passing along the advantage of a reduction in material and labor costs due to a concurrent "production buy" of the radio terminals by the Air Force in a separate procurement. The agency favorably considered this explanation and awarded a contract to Raytheon on August 16; it issued a delivery order for the minimum initial quantity on August 29. Unisys filed its initial protest after receiving written notification of the award.

[1] For example, the awardee offered a higher price for line item 1 than did the protester in each quantity range (15–29, 30–64, 65–139 and 140–275), for each of 3 contract years; nevertheless, its price for the minimum initial quantity of 85, $631 each, was considerably lower than the protester's price of $746, so that its evaluated price for line item 1 (the 12 quantity range prices added to the price of the minimum initial quantity) was approximately $8,000 less than the protester's.

In its initial protest, Unisys argued that the awardee's offer was mathematically and materially unbalanced, and that the maximum order quantities stated in the solicitation represented a valid estimate of the agency's probable needs over the 3-year contract period. The protester pointed out that any purchase in excess of 18 percent of the quantity remaining under the contract (that is, in excess of the minimum initial quantity already ordered) would result in the protester, and not the awardee, offering the lowest ultimate cost to the government, even considering the awardee's low cost for the minimum initial order quantity.

In response, we noted that consistent with Federal Acquisition Regulation § 16.504, which states that indefinite quantity contracts are for the specific situation where the agency is unable to determine its precise requirements during the contract period and it is inadvisable to commit the government to order more than a minimum quantity, the record did not support a conclusion that the maximum order quantity set forth in the solicitation was intended to be an accurate estimate of the agency's requirements.

The agency pointed out that having purchased the minimum initial quantity, it had no obligation to purchase additional quantities from the awardee. Further, the agency stated that the contracting officer had directed agency buyers, prior to issuing any further delivery orders under the contract, to review the abstract of offers to determine whether the contract offered the best price to the government or whether any new requirement should be recompeted to obtain a better price.

Absent any evidence that the agency intended to order any additional substantial quantities of spare parts from the awardee, we concluded in our prior decision that award to Raytheon was not likely to result in other than the lowest overall cost to the government. Since the price evaluation was consistent with the solicitation's heavy emphasis on the minimum initial quantity and since the agency was not obligated to order and apparently would not in fact order substantial additional quantities at the higher prices from the awardee, we denied the protest.

In requesting reconsideration of this decision, the protester contends that the record in the original protest contained evidence that the agency intends to order additional quantities from Raytheon. The protester restates its belief that the maximum order quantity contained in the solicitation represented a valid estimate of the agency's requirements for the 3-year contract period. The protester points out that regardless of the review procedure instituted to ensure that buyers consider whether lower prices are available elsewhere, the agency offers no assurance that it will not order additional requirements in an amount that would negate its savings under the initial order.[2]

The record in the initial protest established that Raytheon submitted the low offer for the initial order quantity, but its offer was not low if the agency or-

[2] The protester also alleges that the agency has funded the contract far beyond the initial order price. Our review of the contract shows, however, that funds will only be made available for each delivery order when placed.

ered any portion beyond 18 percent of the remaining quantity. Nevertheless, we denied the protest on the basis of the agency's implicit representation that it had no intention of awarding additional substantial quantities beyond the initial order quantity. In response to the reconsideration request, we have again contacted the agency to verify that it does not intend to order substantial additional quantities under the contract. The agency advises us that currently it has no requirements for the items, that budgetary reductions have reduced requirements in general and that it does not anticipate that its customers will generate new requirements for 6 months. The agency reiterates its intention to review any orders that may be received to ascertain whether placing orders at the price available under the Raytheon pricing matrix offers the best price to government or whether any new requirement should be recompeted to obtain a better price.

While the protester disagrees with our finding that the award to Raytheon as the low evaluated offer is proper, such disagreement or reiteration of arguments previously made provide no basis for reconsideration. *See Tecom Indus., Inc.—Request for Recon.,* B-236371.2, Feb. 13, 1990, 90-1 CPD ¶ 185. We find no evidence that the agency intends to order additional substantial quantities under the contract which would warrant reconsideration of our decision not to disturb the award to Raytheon.

Appropriations/Financial Management

Budget Process

■ Funds transfer

■■ General/administrative costs

■■■ Cost allocation

Section 7(c)(2) of the Railroad Retirement Act of 1974, 45 U.S.C. § 231f(c)(2) (1982), provides for transferring funds between the Social Security trust funds and the Railroad Retirement Account. When computing costs for this purpose, either full costing or incremental costing may be used since administrative cost determinations are left to the discretion of Railroad Retirement Board and Secretary of Health and Human Services.

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Civilian Personnel

Procurement

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