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Notice

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

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Preface

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

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

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

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

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General which do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B–230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974, and Civilian Personnel Law decisions whether or not included in these pamphlets, are also available in published form from commercial sources. The decisions 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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October 1987

B-228144.2, October 1, 1987

Procurement

Bid Protests

GAO Procedures

Protest Timeliness

Apparent Solicitation Improprieties

Protest alleging solicitation improprieties is untimely when filed after time set for receipt of proposals. Protester's contention that it attempted to protest by sending TWX to the General Accounting Office (GAO) prior to the closing time but that the GAO TWX terminal was not working properly is denied where GAO's records show that GAO's records show that GAO's TWX terminal was neither shut off nor malfunctioning at the times pertinent to the protest.

Procurement

Bid Protests

GAO Procedures

Protest Timeliness

Apparent Solicitation Improprieties

Protest alleging solicitation improprieties is untimely when received in the General Accounting Office (GAO) after the time set for submission of initial proposals, even though a copy of the protest addressed to the GAO was timely received by the contracting agency.

Procurement

Bid Protests

GAO Procedures

Protest Timeliness

Significant Issue Exemptions

Applicability

Untimely protest that does not raise issues of widespread interest to the procurement community will not be considered under the exception to the General Accounting Office timeliness requirements for significant issues.

Matter of: AAR Brooks & Perkins, Advanced Structures Division—Reconsideration

AAR Brooks & Perkins, Advanced Structures Division, (AAR Brooks) requests that we reconsider our decision, *AAR Brooks & Perkins, Advanced Structures Division,* B-228144, Sept. 17, 1987, 87-2 CPD ¶ 270, in which we dismissed the firm's protest under request for proposals (RFP) No. DAJA37-87-R-0639, issued

by the United States Army Contracting Command, Frankfurt, Germany. We held that AAR Brooks' protest was untimely because it alleged deficiencies in the RFP which should have been apparent to AAR Brooks prior to the closing date, 2 p.m., Central European Time, September 10, 1987, for receipt of initial proposals, but it was not filed in our Office until after the time set for receipt (*see* 4 C.F.R. § 21.2(a)(1) (1987)).

We affirm the decision.

AAR Brooks contends that it did, in fact, attempt to file its protest in our Office before the time set for closing but was unable to do so because the TWX terminal in the General Accounting Office (GAO) was not working. The protester states that it actually sent a TWX from its office to the GAO shortly after 4 p.m. on September 9, 1987, the day before proposals were due, but the GAO TWX machine would not respond. Two other unsuccessful attempts to connect with the GAO TWX machine were made a short time later. The protester then sent a copy of the TWX it had attempted to send to our Office to the contracting activity in Germany. The following day, the protester states, it again attempted unsuccessfully to transmit its protest by TWX to our Office at about 8 a.m. (eastern daylight time), the exact time set for closing in Germany. Ultimately, AAR Brooks' protest was received in our Office at 1:53 p.m., or 5 hours and 53 minutes after the closing in Europe.

AAR Brooks advances several arguments in support of its request that we consider its protest on its merits. First, AAR Brooks contends that the protest should be considered timely because AAR Brooks attempted several times before the closing to file the protest in our Office, but the GAO TWX terminal was obviously not working properly. Our investigation, however, reveals no malfunction or shutdown of our TWX terminal at any time during the period in question. In fact, our Office successfully received TWX's from other parties both shortly before and shortly after AAR Brooks attempted to transmit its protest via TWX. Moreover, the protester acknowledges that it had some problems with its own TWX machine when it attempted again to send our Office a TWX on the morning of September 10. In the absence of any indication, other than the protester's assertions, that our TWX machine was not working properly, we assume that the transmission problem was somewhere in Western Union's system, and we, therefore, consider the protest received by our Office after the time set for closing to be untimely. *See All-Bann Enterprises, Inc.*, B-221935, Apr. 2, 1986, 86-1 CPD ¶ 315; *see also John Wile Construction Co., Inc.*, B-195717, Nov. 16, 1979, 79-2 CPD ¶ 358.

AAR Brooks next argues that we should consider the protest to be timely because a copy of the initial protest, while addressed to the GAO, was received at the contracting office before the closing time. However, the term "filed" regarding protests means receipt of the protest submission in the GAO. 4 C.F.R. § 21.2(b). The timely receipt of a copy of a protest addressed to our Office by the contracting agency does not satisfy the requirement to file a timely protest with this Office. *GTE Telecom Inc.—Reconsideration*, B-222459.4, May 14, 1987, 87-1 CPD ¶ 505.

Finally, AAR Brooks argues that our Office should consider its protest under section 21.2(c) of our Bid Protest Regulations, which sets out an exception to our timeliness rules for issues that are significant to the procurement system. We do not agree. In order to prevent the timeliness requirements from becoming meaningless, the significant issue exception is strictly construed and seldom used. The exception is limited to considering untimely protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision. *Emerson Electric Co.—Reconsideration,* B-220517.2, Nov. 26, 1985, 85-2 CPD ¶ 607. Here, AAR Brooks has alleged that the RFP contained a number of improprieties, including a short time to prepare proposals, that unfairly restricted competition. We do not view the issues AAR Brooks raises as having the widespread interest necessary to invoke the exception to our timeliness rules for significant issues.

Our September 17, 1987, decision is affirmed.

B-227909, October 2, 1987

Procurement

Specifications
■ Minimum Needs Standards
■■ Determination
■■■ Administrative Discretion

Protest that specifications are not economically sound and are not in the best interest of the government will not be considered where the protester does not show that these specifications adversely affect it in some way, since the method an agency chooses to accomplish its needs raises an issue of policy, and is a matter for the agency to decide.

Procurement

Specifications
■ Minimum Needs Standards
■■ Risk Allocation
■■■ Performance Specifications

Protest challenging requirements that contractor furnish various supplies for which the solicitation does not provide specific compensation is without merit where the protester does not show that the risks imposed are unreasonable. The mere presence of risk in a solicitation does not render it inappropriate, and offerors are expected to consider the degree of risk in calculating their prices.

Matter of: American Maid Maintenance

American Maid Maintenance protests the terms of request for proposals (RFP) No. F34650-87-R-0569, issued by the Air Force for custodial services at Tinker Air Force Base. At a preproposal conference, American Maid, the incumbent contractor, raised 25 concerns regarding the statement of work to the effect that certain of the specifications were neither economically sound nor in the best interest of the government; that others were so indefinite that they place an

undue risk on prospective contractors and thereby also prevent those contractors from competing on an equal basis; and that still others lacked sufficient detail. Some of the allegations have since been resolved to the satisfaction of American Maid. Those remaining unresolved form the basis of this protest.

We deny the protest.

The statement of work contains detailed instructions concerning the care and maintenance of floors. The RFP provides that on a periodic basis, stripping solutions are to be applied with scrubbing machines equipped with stripping pads; the floors then are to be rinsed twice with a mop and clear cold water to ensure removal of this solution, and then a new coat of wax is to be applied with a product containing at least 30 percent wax solids. American Maid contends that these procedures are neither the most effective nor cost efficient methods for maintaining floors. Referencing the Floor Care Manual of the Building Services Contract Association, American Maid states that the use of floor stripping solutions on hard surface floors on a monthly basis is not in accordance with industry standards, is not the proper way to maintain floors, causes damage to floors, and is otherwise inappropriate. American Maid also states that the contractor should be allowed to use the same FloPac type nylo grit stripping brush it used in performance of the predecessor contract, as this device, unlike the type prescribed, facilitates cleaning in the spaces between floor tiles, that the contractor be allowed to use no-rinse strippers; and that the contractor should not be required to use wax comprised of 30 percent wax solids as these products are sticky and difficult to apply.

In raising these concerns, American Maid does not argue that it cannot comply with the requirements for cleaning and maintaining floors specified in the solicitation, nor does it allege that it is economically affected or somehow placed at a competitive disadvantage by these aspects of the specifications. Instead, American Maid seemingly only is arguing that the agency should allow alternative methods of operation which in its view will better serve the needs of the government.

The method an agency chooses to accomplish its needs raises an issue of policy which we generally do not consider. *See Mid-Atlantic Service & Supply Corp.*, B-218416, July 25, 1985, 85-2 CPD ¶ 86. It is the agency that must determine its needs, and we will not consider a complaint such as the protester's unless there is a showing of possible fraud or willful misconduct, neither of which is alleged here. *See Security Assistance Forces & Equipment oHG,* B-209555, Nov. 16, 1982, 82-2 CPD ¶ 449. To the contrary, the record reflects that this section of the performance work statement parallels the step-by-step instructions for floor care set forth in the General Services Administration's Custodial Handbook. This handbook specifies that stripping solutions are to be used and applied with machines equipped with stripping pads, and that the solutions are to be removed by rinsing. Additionally, while the contracting activity did allow American Maid, during performance of the predecessor contract, to deviate from the direction pertaining to the application of stripping solutions, the record shows that

the activity decided to adhere to the Handbook's guidelines for this contract as it found that the use of the nylo grit brush damaged the corners of floor tile.

In a similar vein, American Maid challenges the rigid time schedules for cleaning facilities set forth in the RFP. As was allowed during performance of the predecessor contract, American Maid states, the performance work statement should permit a certain amount of leeway for performing custodial services. Again, however, American Maid does not argue that it cannot comply with the prescribed time schedules or that it is somehow disadvantaged by the schedule; American Maid simply states that this rigid requirement will significantly increase the cost to the government. Accordingly, American Maid has not presented any basis upon which we can object to this requirement.

American Maid next alleges that several requirements set forth in connection with the furnishing of supplies are defective. Specifically, the contractor is responsible for furnishing, installing and maintaining 106 room deodorizers, including the replacement of those stolen or damaged during the term of the contract, and also must furnish incidental bathroom supplies such as paper towels and toilet tissue. These provisions, American Maid maintains, do not identify or estimate the amount of supplies that must be furnished by the contractor. American Maid concludes that offerors therefore must speculate on the level of work required when preparing their proposals, thereby precluding the submission of offers on a common basis. American Maid suggests that the RFP be amended in one of three ways: the RFP should provide that these items will be supplied by the government as government furnished property; that they be supplied by the contractor on a cost-reimbursement basis; or, that the offeror be required to submit separate unit prices for each of the items.

American Maid essentially seeks to have the solicitation restructured to eliminate any risk that the contractor will be required to furnish supplies without specific compensation. The presence of risk to the contractor, however, does not render a solicitation improper; some risk is inherent in most types of contracts, and offerors are expected, when computing their prices, to account for such risk. *See Triple P Services, Inc.*, B-220437.3, Apr. 3, 1986, 86-1 CPD ¶ 318. Here, American Maid has not demonstrated that the solicitation places an unreasonable risk on the contractor. Offerors were allowed to inspect the work site before submission of proposals, and the potential cost of the task challenged by the protester appears to be minimal in relation to the cost of the entire contract. *See Bru Construction, Co. Inc.*, B-223463, Sept. 18, 1986, 86-2 CPD ¶ 318. Furthermore, the provisions contested here affect all offerors equally, and the fact that offerors may respond differently in calculating their prices is a matter of business judgment and does not preclude a fair competition. *See American Contract Services, Inc.*, B-219852, *et al.*, Oct. 30, 1985, 85-2 CPD ¶ 492. In this regard, we note that 11 other offerors responded to the RFP without taking exception to these requirements. *See Triple P Services, Inc.*, B-220437.3, *supra*.

Finally, American Maid contends that the requirements for certain supply items lacked sufficient specificity, for example, that the solicitation is unclear as to whether one- or two-ply toilet tissue is required. We note, however, that

the solicitation in fact does specify that two-ply tissue is required and, in our view, also specifies adequate requirements for the other various items (such as wax and soil retardants), to be supplied.

The protest is denied.

B-214372, October 5, 1987

Appropriations/Financial Management

Accountable Officers

Relief

Account Deficiency

CIA accountable officer denied relief where shortage appeared in his account during a long period when he was isolated from his supervisors and required to devote long hours in a sensitive overseas post doing logistics, administrative and finance work. A heavy workload is not a basis for relief.

Matter of: General Counsel, Central Intelligence Agency

This responds to your request of June 5, 1986, that we relieve an accountable officer under 31 U.S.C. § 3527(a) from liability for a shortage of $820.43 in public funds. For the following reasons, we deny relief.

This case was originally referred to our Office on February 9, 1984 and returned to the agency for administrative action as being under $750. However, a subsequent currency conversion error was discovered and with the recalculation the loss was determined to exceed $750. Thus, the case is now properly before us.

You have requested relief for a GS-10 employee who was assigned to an overseas position requiring the employee to assume three roles—logistics, administrative and finance officer. The employee satisfactorily completed a training course that would enable him to perform these functions at a small post with normal financial activity and average administrative complexity. By the time the employee arrived at the post in June 1982, however, he was faced with a large increase in workload in each function over that which was anticipated. You state that the employee worked 12-14-hour days, 7 days a week in an effort to gain control over his workload that continued to increase in amount and complexity.

In February 1983, a shortage in the post's accounts for December 1982 was discovered. The employee has stated that he counted funds approximately every 10 days in lieu of the weekly cash counts required by agency regulations. He says his workload was a chronic hindrance to his ability to fully perform his finance function and his isolation, due to the sensitive nature of his post, made it nearly impossible to seek help. Subsequent to discovery of . shortage, a senior finance officer was sent to do the finance job and the post was converted to a Class A finance records classification because of the volume and complexity of activity.

This case was reviewed by your agency's Board of Review for Shortages and Losses which determined that the employee did the best a reasonable person could have done under the circumstances, and in the alternative, if he were held negligent, his negligence was not the proximate cause of the loss. You cite two factors that led to the loss. The employee was placed in a position no single person could perform over a sustained period of time; and due to security procedures that require stringent controls on communications, he was not given appropriate assistance until he had already become liable for the shortage. You have concluded that there is no evidence of fraud or deception on the part of the employee and that agency action or inaction was the proximate cause of the loss. Accordingly, you have requested that we grant relief.

Under 31 U.S.C. § 3527(a), we may relieve an accountable officer for a loss of funds when the head of the agency or his designee decides, and we concur, that the loss occurred while the employee was carrying out official duties and was not the result of fault or negligence on the part of the employee.

Government officials charged with the custody of public money are expected to exercise the highest degree of care and any unexplained loss of money automatically raises a rebuttable presumption of negligence. 48 Comp. Gen. 566 (1969). The mere fact that the employee had a heavy workload at the time of the shortage does not rebut the presumption of negligence. *See* B-213427, December 13, 1983.

Although we are given fewer details because of security reasons, this case has a great similarity to B-213427, cited above. In that case, as here, the employee was given a job that had extreme time pressures, inadequate facilities and no relief. The only basis for distinguishing these two cases is that in B-213427 the conditions prevailed during the course of an auction, while in the case before us the loss is attributed to the presence of the conditions over a long period of time during which the accountable officer was unable to communicate his problems to his supervisors. We do not think we can distinguish these cases solely on the basis of the duration of the arduous conditions.

In B-213427, we concluded that a heavy workload is not a basis for relief. The loss in this case is also basically explained as a result of a heavy workload. Based on our earlier decision, we are compelled to deny relief in this case as well.

As we do so, we would like to note that the record in this case is very limited. We have often in the past granted relief to accountable officers based on our examination of the record even where we disagree with an agency's reasons for recommending relief. It is difficult in this instance for us to know if there are any circumstances not presented to us that would support your recommendation.

Procurement

Bid Protests
■ Federal Procurement Regulations/Laws
■■ Applicability
■■■ GAO Authority

Procurement

Contracting Power Authority
■ Federal Procurement Regulations/Laws
■■ Applicability

Bonneville Power Administration is subject to the bid protest jurisdiction of the General Accounting Office under the Competition in Contracting Act of 1984 (CICA), since Bonneville comes within the statutory definition of a federal agency subject to CICA.

Procurement

Contractor Qualification
■ Pre-Qualification
■■ Justification

The Bonneville Acquisition Guide (BAG), a comprehensive set of procurement guidelines, implements the Bonneville Power Administration's special contracting authority under the Bonneville Project Act of 1937, and vests broad discretion in Bonneville contracting officials to limit competition as necessary. Protest of Bonneville's decision not to include the protester in a limited competition based on a review of the firm's experience and capabilities is denied where the decision is reasonable and within the scope of the contracting officer's authority under the BAG.

Matter of: International Line Builders

International Line Builders protests the Bonneville Power Administration's use of allegedly improper prequalification procedures under invitation for bids (IFB) No. DE-FB79-87BP34684 for the construction of two high voltage transmission lines. International contends that Bonneville's prequalification procedures unduly restrict competition by not providing all responsible sources a reasonable opportunity to qualify, and deny International its right to protection as a small business concern, against a negative capability decision by a procuring activity.

Bonneville challenges both our jurisdiction to resolve International's protest under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 *et seq.* (Supp. III 1985), and the application of the Federal Acquisition Regulation (FAR) competition requirements to its procurements. Bonneville's arguments do not persuade us that we lack authority to decide the protest. We deny the protest on the merits, however.

Bid Protest Jurisdiction

Bonneville contends that we lack jurisdiction over International's June 3, 1987 protest[1] because Bonneville has plenary statutory authority regarding all aspects of its procurements, including the exclusive, non-judicial resolution of bid protests under the Bonneville Project Act of 1937 (Bonneville Act) §§ 2(f) and 8(a), 16 U.S.C. § 832a(f) and 832g (1982).[2] The Bonneville Act contains Bonneville's principal contracting authority. Section 2(f) provides in part:

> Subject only to the provisions of this chapter, the administrator [of the Bonneville Project] is authorized to enter into such contracts . . . and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary.

Section 8(a) provides in part:

> Notwithstanding any other provision of law, all . . . contracts . . . shall be made after advertising, in such manner and at such times, sufficiently in advance of opening bids, as the administrator . . . shall determine to be adequate to insure notice and opportunity for competition [although advertising is not required for emergency contracts, follow-on contracts and small purchases].

The enactment of CICA has rendered Bonneville's position regarding its exclusive bid protest jurisdiction untenable. Under the provisions of 31 U.S.C. § 3551(3), our bid protest authority extends to federal agencies as that term is defined in section 3 of the Federal Property and Administrative Services Act of 1949 (Property Act), 40 U.S.C. § 472 (1982). The Property Act defines a federal agency as "any executive agency," and, in turn, defines an executive agency as "any executive department or independent establishment in the executive branch of the government, including any wholly owned government corporation." 40 U.S.C. § 472(a). The office of the Administrator of the Bonneville project is an office in the Department of Energy, 16 U.S.C. § 832a, and the Department of Energy is an executive department. 42 U.S.C. § 7131 (1982). Therefore, since Bonneville is under the jurisdiction and control of the Secretary of Energy, 16 U.S.C. § 832a, it follows that Bonneville, albeit a separate and distinct organizational entity within the department, 42 U.S.C. § 7152(a)(2), falls within the above definition. Consequently, our Office has jurisdiction to decide bid protests involving Bonneville procurements.

Applicable Law

Bonneville contends that it is not subject to the FAR competition requirements because it is bound instead by its own organic legislation as interpreted in the

[1] We note that on June 23 Bonneville advised us of its decision to award the contract notwithstanding International's protest, and later declined to attend a July 16 bid protest conference in our Office on the ground the conference was inappropriate.

[2] Bonneville also cites two other statutes as relevant to its contracting authority: the Federal Columbia River Transmission System Act, section 11(b), 16 U.S.C. § 838i(b); and the Pacific Northwest Electric Power Planning and Conservation Act, sections 9(a) and 9(b), 16 U.S.C. §§ 839f(a) and 839f(b) . The former establishes the Bonneville Power Administration fund authorizing the Administrator to make expenditures without further appropriation and without fiscal year limitation for any necessary purpose including construction of the transmission system; the latter basically authorizes the Administrator to contract in accordance with section 2(f) of the Bonneville Act and otherwise to discharge his administrative and executive functions pursuant to the policy stated in the Bonneville Act.

Bonneville Acquisition Guide (BAG). The BAG relies on two decisions of our Office, 46 Comp. Gen. 349 (1966) (opportunity for competition can be limited as deemed necessary by the Administrator) and *Bonneville Power Administration,* B-114858, July 13, 1976, 76-2 CPD ¶ 36 (discontinuing General Accounting Office review of Bonneville bid protests[3], as authority for the proposition that Bonneville's procurements are not subject to procurement rules and regulations normally applicable to federal agencies because Congress intended that Bonneville operate like a business and not like a government regulatory body. BAG § 1.170. Specifically, Bonneville claims exemption from the competition requirements of the FAR on two grounds: (1) the FAR only applies to acquisitions that use appropriated funds, and (2) FAR competition requirements have their basis in CICA amendments to the Property Act; Bonneville, however, is exempt from the Property Act's coverage because of a pre-CICA amendment to the Property Act, 40 U.S.C. § 474(20).

We find no merit in Bonneville's argument that it is not using appropriated funds to finance its construction program. While Bonneville's funds appear to be generated by rate-payers rather than the result of an annual appropriation by Congress, we do not consider them to be nonappropriated. Where Congress has authorized the collection or receipt of certain funds by an agency and has specified or limited the purposes of those funds, the authorization is a "continuing appropriation" regardless of the fund's private origin. *Monarch Water Systems, Inc.*, 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146. Since the Bonneville Act both authorizes the collection and specifies the application of such funds, we find there are enough parameters limiting Bonneville's collection and use of construction funds so that the act constitutes a continuing appropriation.

As to Bonneville's other point, we agree the CICA competition requirements of the Property Act are not applicable to Bonneville's program operation procurements. The Bonneville Act provides that the Administrator's contracting authority is subject only to the provisions of that statute, 16 U.S.C. § 832a(f), and the Property Act defers to the Bonneville Act by providing that nothing in the Property Act shall impair or affect Bonneville's authority with respect to procurement for program operations under the Bonneville Act. 40 U.S.C. § 474(20).

We also agree with Bonneville that it otherwise is not constrained by the FAR's own competition requirements and instead can use its own BAG. The FAR was issued pursuant to the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. § 401 *et seq.* (Supp. III 1985), which authorizes the Office of Federal Procurement Policy to prescribe government-wide policies to be implemented in a single system of federal procurement regulations. 41 U.S.C. § 405. We find nothing in the OFPP Act, its legislative history, or the FAR, to suggest that the statute and regulations were intended to deny the pre-existing exemption in the Property Act for Bonneville's purchases for its program operations.

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[3] This decision was issued when our bid protest jurisdiction, now founded in CICA, was based on our authority to take exception to items in the accounts of certifying and disbursing officers, and recognized that BPA has authority to settle its own claims with finality.

In sum, we think that Bonneville can continue to exercise its broad authority through the BAG.

Prequalification

International contends that Bonneville's prequalification procedures (1) unduly restrict competition by not providing all responsible sources a reasonable opportunity to qualify, and (2) deny International its right to protection as a small business concern.

The protested procurement involves a project for the exchange of electric power between two regions of the United States in order to take advantage of the regions' differing seasonal peak loads (*i.e.*, when one region has high demand the other region has low demand). Bonneville advises that any delay in the construction could result in revenue losses of about $1 million per day, and that the proposed design involves extraordinary technical difficulties.[4] Bonneville reports that the construction calls for a mix of specialized equipment and skills not widely available in the marketplace.

Bonneville decided that it could best protect its interest by limiting competition pursuant to BAG § 6.270. That provision permits restricting a procurement to specific sources with appropriate capabilities if needed to ensure timely delivery of essential materials or equipment. Bonneville selected potential contractors from a pool of contractors known to Bonneville to have the necessary capabilities. The written determination to limit competition states that use of a limited bidders list will minimize the risk of obtaining "a possibly noncapable contractor."

International objects to Bonneville's determination of contractors' qualifications without affording potential contractors any opportunity to qualify against an announced competitive standard, without any notice to contractors other than those with experience on Bonneville 500 kilovolt projects within the past 5 years, and without any consideration of work done for organizations other than Bonneville. International notes that the record is devoid of any indication that Bonneville tried to determine whether the selected contractors retained the same capabilities that they had when they previously worked for Bonneville.

The record shows that Bonneville evaluated ten contractors, not including International, that had a specified type of experience, and found that three met all of Bonneville's qualification requirements. After the solicitation was issued to the three selected firms, however, International contacted the contracting officer to assert that it also had the desired capability. The contracting officer then had the same panel that had performed the other review evaluate International, but the panel recommended against adding the firm to the list of competitors. The panel decided that neither International nor its predecessor corporation, Power

[4] The difficulties include a crowded corridor, 180 foot "dead-end" towers requiring aerial dead-ending and crossing over existing high voltage lines, danger from induced voltages and high winds, and a complex series of outages which are scheduled with other utilities 2 years in advance.

City Construction, had the necessary design experience, or certain other specified experience, and noted that Bonneville had experienced a performance problem in connection with the one contract International held as a prime contractor with Bonneville.

Following International's protest, Bonneville evaluated International again, but refused to impute whatever acceptable experience Power City had to International. Also, after International's July 23, 1987, submission of comments on the bid protest conference, Bonneville sent a letter dated July 28 to International stating in part that Bonneville's preprotest review of Power City's qualifications had found Power City deficient in three areas of 500 kilovolt experience:

(1) work in close proximity to adjacent or crossed lines in excess of 230-kv, (2) aerial deadending of bundled conductors (there are no records or recollections to support your claim of experience during the Townsend-Garrison Schedule II project), and (3) crossing of an energized transmission line of 115-kv or greater.

Our review of the record thus shows that Bonneville has reviewed International's qualifications and found them unacceptable and properly has followed the procedures set out in the BAG Subpart 6.2, expressly authorizing the limiting of competition by exclusion of sources. Since we find nothing arbitrary or unreasonable in Bonneville's actions, our Office will not object to the rejection of International as a source. International's disagreement with Bonneville's judgment as to the firm's capabilities does not invalidate it.

We also find no merit in International's contention that Bonneville's procedures improperly deny International its rights to protection under the Small Business Act against negative capability decisions by contracting activities. The BAG only requires referral to the Small Business Administration of the matter of a small business offeror's responsibility if the offeror otherwise would be in line for the contract award. The BAG authority to limit competition is not directed at precluding any particular firm from an award for responsibility related matters, but is a special method of defining, at the outset of a planned procurement, what the field of competition ought to be.

While we have held that some prequalification approaches do touch on responsibility, and thus necessitate referral to the SBA, *see, e.g., Office of Federal Procurement Policy's films production contracting system; John Bransby Productions, Ltd.*, 60 Comp. Gen. 104 (1980), 80-2 CPD ¶ 419, we find the current situation distinguishable as it involves an agency specifically authorized to conduct commercial-type transactions under a broad statutory grant of authority. Consistent with this authority, BAG § 19.602-70 permits Bonneville's contracting officers, with the concurrence of the Contracts Manager, to forego referring even the usual nonresponsibility determination to the SBA where the critical nature of the acquisition is such that Bonneville cannot relinquish its authority to make responsibility determinations under the Bonneville Act. Since Bonneville has determined this to be a critical procurement, and the protester has not established that Bonneville has acted improperly in doing so, we have no reason to question Bonneville's decision not to refer its determination to exclude International from the procurement to the SBA.

The protest is denied.

B-227084.5, October 15, 1987

Appropriations/Financial Management

Federal Assistance
■ Grants
■■ Cooperative Agreements
■■■ Use
■■■■ Criteria

Maritime Administration (MARAD) awarded cooperative agreement for the operation of its Computer Aided Operations Research Facility (CAORF). The CAORF will be operated for MARAD to principally serve its needs and other government agencies. Accordingly, under the Federal Grant and Cooperative Agreement Act, the proper instrument for this type of relationship is a contract and not a cooperative agreement. See cited cases.

Matter of: The Honorable Jack Brooks, House of Representatives

This is in partial response to your May 11, 1987 letter concerning the award of a cooperative agreement by the Maritime Administration (MARAD) of the Department of Transportation for the privatization of a ship simulator facility, the Computer Aided Operations Research Facility (CAORF), located at the U.S. Merchant Marine Academy, Kings Point, New York. You are concerned that the award to Marine Safety International (MSI) may have violated the provisions of the Federal Grant and Cooperative Agreement Act of 1977, and that MARAD's actions may have circumvented Federal Acquisition Regulation (FAR) competition requirements during the evaluation process.

As explained below, it is our opinion that MARAD should have used a procurement contract and not a cooperative agreement for the operation of the CAORF. In response to our request for the views of the Secretary of Transportation, we received a reply from the Maritime Administrator. A copy is enclosed. Our Resources, Community, and Economic Development Division is dealing with your questions about the evaluation process.

Background

The CAORF is a government facility located on the grounds of the U.S. Merchant Marine Academy. It is funded through MARAD's research and development (R&D) appropriations. The facility is used for research and training. The research includes simulated ship maneuvering and navigation as well as waterway and harbor design.

On August 8, 1986, MARAD issued Solicitation Number MA-11973 requesting proposals for the operation of the CAORF under a cooperative agreement. MARAD explained to prospective proposers that, in keeping with the Administration policy to transfer the operation of government facilities to the private

sector, it would competitively select a qualified organization to enter into a 5-year renewable assistance arrangement for the continued operation of a program of maritime research and training at the facility. The stated purpose of the agreement was to assist the recipient in utilizing and further developing the facility as a national resource to accomplish maritime research goals and objectives. Prior to the decision to privatize the CAORF, two requests for proposals had been prepared for the competitive procurement of research and maintenance contractor support.

MARAD noted that major current users of the facility included the U.S. Army Corps of Engineers, U.S. Naval Training Systems Center, Strategic Systems Programs Office of the Navy, the Panama Canal Commission, MARAD, port authorities and private vessel operating companies. The continuity of operations was to be maintained and services would continue to be provided to the same government users. The training of Maritime Academy cadets and the emergency preparedness training of master mariners was likely to continue under separate contracts. The successful proposer was to obtain funds to operate the simulator through reimbursements from its various clients, both government and non-government, but with no direct MARAD support provided. Also, capital improvement funds would be partially generated through a user charge assessed each funded project.

Title to the facilities would remain with MARAD, including capital improvements made by the operator (including the simulator system, computer equipment, and computer programs). However, to the maximum extent possible, freedom and operational flexibility would be provided to the "privatized operator" in the use of the facility for commercial business activities. The operator would plan, design, and implement capital improvements, subject to MARAD approval, and would contribute a minimum percentage of revenues to a capital improvement fund. Also, the operator would maintain the facilities and equipment in a neat, clean and working condition and observe the requirements of OMB property management standards. MARAD would retain the right to inspect any CAORF equipment and facilities. A quarterly report on operations also was required.

An amendment to the solicitation was issued on September 15, 1986. It included a draft cooperative agreement and, for information purposes, a previously developed marketing plan which had assumed continued MARAD operation of the CAORF. Later, in January 1987 the contending offerors were informed that MARAD could provide $1.7 million in "seed money" for the capital investment program.

The Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6301-08 (1982), established the criteria which agencies must follow in deciding which legal instrument to use when entering into a funding relationship with a state, locality, or other recipient for an authorized purpose. Under these criteria, a contract is the proper funding vehicle when the services being acquired are for "the direct benefit or use of the United States." 31 U.S.C. § 6303.

On the other hand, a grant or cooperative agreement reflects a relationship between the United States Government and a state, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government. 31 U.S.C. §§ 6304(1) and 6305(1).

If there is no substantial agency involvement, a grant is the proper form of assistance arrangement. If substantial involvement is expected, a cooperative agreement is to be used. 31 U.S.C. §§ 6304(2) and 6305(2).

As indicated above, the Act directs agencies to choose among three kinds of instruments when entering into a transaction covered by it, assuming that the agency has independent statutory authority to enter into an assistance relationship. For the purpose of this opinion, we are assuming that there is specific statutory authority for the use of a grant or cooperative agreement, if otherwise appropriate.

Discussion

The decision as to the instrument to be selected turns on the primary purpose of the transaction. The key question is this: Is the principal purpose to serve the immediate needs of the federal government, or is it to provide assistance to a non-federal entity in serving a public purpose? *See* 61 Comp. Gen. 637, 640 (1982).

The solicitation for the cooperative agreement issued August 8, 1986, contemplates continuing management services for the CAORF and the principal users of these services would continue to be government agencies, including MARAD itself. According to MARAD, it anticipates that eventually, there will be a substantial increase in facility use by the non-government entities as a result of the winner's marketing efforts. This is consistent with the Administration policy of transferring federal facilities to the private sector, and MSI's activities appear to be a first step towards privatization. However, there is no indication of when this process will be completed. For present purposes, the fundamental nature of the relationship between MARAD and MSI is that the facility will be operated for MARAD by the company to principally serve the needs of MARAD and other government agencies. The Grant and Cooperative Agreement Act states that the proper instrument for this type of relationship is a contract and not a grant or cooperative agreement.

Conclusion

We conclude that MARAD used an inappropriate funding mechanism for operation of the CAORF. Instead, the solicitation should have been for a contract. We reached a similar conclusion in B-218816, June 2, 1986, 65 Comp. Gen. 605, where we held that a contract was the proper funding vehicle for a proposed

study, the results of which were intended primarily for the direct benefit of the Environmental Protection Agency as well as other regulatory agencies.

We recognize that it is often difficult to draw fine lines between the available funding vehicles in a particular factual situation. Nevertheless, on the record before us, we conclude that MARAD's use of the cooperative agreement is not in accord with the Federal Grant and Cooperative Agreement Act.

B-227055.2, October 16, 1987

Procurement

Competitive Negotiation
■ Use
■■ Criteria

Procurement

Sealed Bidding
■ Use
■■ Criteria

General Accounting Office affirms prior decision in which it reviewed, and sustained, a challenge to a contracting agency's decision to solicit competitive proposals instead of sealed bids. The Competition in Contracting Act of 1984 (CICA) did not leave to the complete discretion of the contracting officer which competitive procedure to use, but provides in determining which procedure is appropriate under the circumstances that sealed bids "shall" be solicited where four criteria are met, all of which were present here.

Procurement

Bid Protests
■ GAO Procedures
■■ Preparation Costs

Procurement

Competitive Negotiation
■ Offers
■■ Preparation Costs

General Accounting Office affirms a prior decision awarding protester costs of filing and pursuing its protest, which successfully challenged the use of competitive negotiations versus sealed bids, since such award is consistent with the broad purpose of CICA to increase and enhance competition on federal procurements.

Matter of: The Defense Logistics Agency—Request for Reconsideration

The Defense Logistics Agency (DLA) requests reconsideration of our decision sustaining the protest of ARO Corporation, *ARO Corporation*, B-227055, Aug. 17, 1987, 87-2 CPD ¶ 165. We found that DLA's method of acquiring hand operated

grease lubricating bucket pumps, under request for proposals (RFP) No. DLA700-87-R-1609, was improper. We ruled that DLA's decision to negotiate, requesting competitive proposals instead of sealed bids, was not proper when based solely on the agency's alleged need for price discussions, where the record did not show such discussions were necessary. We also found that ARO was entitled to the costs of filing and pursuing its protest.

DLA argues that our Office erred in its application of the requirements of the Competition in Contracting Act of 1984 (CICA) concerning the determination of whether competitive proposals, rather than sealed bids, should be solicited. DLA also argues that the award of protest costs was in error.

We affirm our prior decision.

In sustaining the protest, we noted that the pumps were being procured through a Commercial Item Description and were identified by a national stock number. Technical proposals were not required and relative technical merit was not a consideration in proposal evaluation, which was limited to price. We found that even though there was a wide range in prices on the 1985 procurement, DLA had made the award, without discussions, at a price that DLA apparently considered fair and reasonable. We concluded that this prior experience under the 1985 RFP was not indicative of the need to conduct price discussions under the current procurement in order to assure a fair and reasonable price. We therefore found that DLA's stated need to conduct price discussions lacked a reasonable basis and recommended that DLA cancel the RFP and resolicit through sealed bidding, as required by CICA, since all four of the conditions requiring sealed bidding were present.

DLA contends that we erred in applying the requirements of CICA, and the provisions of the Federal Acquisition Regulation (FAR) which implement it, in that in our decision we attempted to reimpose the pre-CICA determinations and findings procedures which were a prerequisite to the use of competitive proposals. To the contrary, the agency maintains, in removing the restriction from, and the written justification required for, competitive proposals, Congress intended to leave to the complete discretion of the contracting officer the question of which competitive procedure, sealed bidding or competitive proposals, is appropriate under the circumstances.

We think DLA's position is untenable. It is true, as DLA points out, that CICA eliminates the specific preference for formally advertised procurements ("sealed bids") and directs an agency to use the competitive procedures, or combination of procedures, that is best suited under the circumstances of the procurement. However, CICA, 10 U.S.C. § 2304(a)(2) (Supp. III 1985), does provide, in determining which competitive procedure is appropriate under the circumstances, that an agency "shall solicit sealed bids if": (1) time permits, (2) award will be based on price, (3) discussions are not necessary, and (4) more than one bid is expected to be submitted. As is evident, the plain language of the CICA provision is man-

datory in nature.[1] When the enumerated statutory conditions are present, the solicitation of sealed bids is, therefore, required, leaving no room for the exercise of discretion by the contracting officer in determining which competitive procedure to use. Contrary to DLA's suggestion that the contracting officer's determination, if documented, is not reviewable by our Office, we consider it to be no different from any other determination the reasonableness of which we review pursuant to the exercise of our bid protest authority to assure that contracting agencies' actions are consistent with CICA and the FAR. *See* 31 U.S.C. § 3554(b)(1) (Supp. III 1985).

DLA also argues that we erred in awarding ARO its costs of filing and pursuing its protest since we recommended that the RFP be canceled and that DLA resolicit requesting sealed bids. Our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1987), limit the recovery of protest costs to situations where the contracting agency has unreasonably excluded the protester from the procurement, unless we recommend that the contract be awarded to the protester and the protester actually receives the award. We have interpreted this to allow recovery of the costs of protesting solicitation defects, such as restrictive specifications and improper sole source awards, even when we also recommend that a new procurement be conducted under which the protester will have the opportunity to compete. *See AT&T Information Systems, Inc.*, B-223914, Oct. 23, 1986, 66 Comp. Gen. 58, (1985), 85-2 CPD ¶ 35; *Southern Technologies, Inc.*, B-224328, Jan. 9, 1987, 66 Comp. Gen. 208, 87-1 CPD ¶ 42. The rationale for the award of protest costs here is similar. We consider the incentive of recovering the costs of protesting an improper use of competitive proposal procedures, when the conditions requiring sealed bid procedures are present, to be consistent with the broad purpose of CICA to increase and enhance competition on federal procurements.

Our prior decision is affirmed.

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[1] The legislative history of CICA also indicates the mandatory nature of the requirement to use sealed bidding when the statutory conditions are present. Senate Report No. 98-50, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin News 2191, states, in pertinent part:

While competitive negotiation is recognized in S. 338 as a bona fide competitive procedure, the Committee emphasizes that traditional formal advertising procedures are by no means cast aside. In fact, agencies are *required* . . . to solicit sealed bids [when the enumerated conditions are present] . . . . [Italic supplied.]

House Conference Report No. 98-861, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2110, states:

In effect, the substitute, like the Senate amendment, removes the restriction from—and written justification required for—competitive proposal procedures and places them on a par with sealed bid procedures. *The substitute maintains minimum criteria for sealed bid procedures to ensure their use when appropriate.* [Italic supplied.]

B-221421, October 21, 1987

Miscellaneous Topics

Environment/Energy/Natural Resources
■ Environmental Protection
■■ Air Quality
■■■ Standards
■■■■ Review Procedures

EPA may send draft rules to OMB for review under Executive Order 12291 at the same time it begins final internal review of proposed rules. Clean Air Act provisions that require creating a formal record and docketing drafts circulated for interagency review do not prohibit concurrent EPA/OMB review. Neither the applicable statute nor its legislative history dictates that only final products be circulated, or that all input to the rules, including verbal input from OMB, be identifiable from the public record, although any EPA actions to modify draft rules based on verbal input must also be fully supported by the public record. Courts that have considered similar issues have held that it is not necessary to create a public record of verbal input from OMB and have not disapproved of concurrent review.

Matter of: The Honorable John D. Dingell, House of Representatives

Your letter of July 13, 1987 asked for our views on the Environmental Protection Agency's (EPA) practice of conducting concurrent review of proposed regulations both within EPA (the so-called "Red Border" review) and at the Office of Management and Budget (OMB) in fulfillment of Executive Order 12291. Your concern is that concurrent review may violate the requirements of section 307 (d)(4)(B)(ii) of the Clean Air Act, 42 U.S.C. § 7607(d)(4)(B)(ii). Section 307 requires that any draft submitted for interagency review be placed in the public docket. As we see it, whether a particular draft is sufficiently complete to be given external circulation is an agency decision which is not governed by section 307. Accordingly, we conclude that the section does not prohibit concurrent review, provided that a copy of the Red Border draft is placed in the docket. We understand that the concurrent review may make it more difficult to trace the origin of revisions made as a result of interagency review before the rule is published, but we do not think this practice is prohibited by section 307.

Section 307 and Its Legislative History

The pertinent paragraph of section 307 discusses the written materials which must promptly be placed in the public docket for certain proposed or final rules. It provides in subparagraph (d)(4)(B)(ii) as follows:

> The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal for any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of the proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

The plain language of the statute calls for inclusion in the docket of the "drafts . . . submitted . . . to the Office of Management and Budget for any interagency review . . . ." The statute does not specify the particular stage of internal review at which it is appropriate to circulate a draft to OMB. As such, it does not prohibit concurrent review.

Moreover, the legislative history of section 307 does not provide a basis for assuming that a broader intent underlies the law. Congress added section 307 when it overhauled the Clean Air Act in 1977. The original Clean Air Act provided for EPA to conduct its administrative business using informal rulemaking procedures. By 1977, Congress had become aware that, absent standardized recordkeeping requirements, informal rulemaking resulted in written records being compiled principally for defense purposes only. Such *ad hoc* compilations were often inconsistent, and at times were either overbroad or incomplete or both.

In the legislative history, the House explained its intention to adopt the suggestions put forth in a law review article by William Pedersen, Jr., entitled "Formal Records and Informal Rulemaking," (85 Yale L.J. 38 (1975)). The article advocated the contemporaneous assembly of a "procedural record," consisting of standard documentation that would fully justify agency action as well as simplify discovery and expedite judicial review. H.R. Rep. No. 450, 95th Cong., 1st Sess. 319 (1977).

We understand the concern that under the authority of Executive Order 12291, OMB may be exercising undue influence over major policy decisions and substantive or technical issues related to specific rules. We also know that, in practice, most of OMB's comments are oral and as a result, the docket may not show which of many revisions in published rules are actually attributable to OMB review.[1]

We realize that it would perhaps be easier to deduce which changes were OMB-inspired if the draft sent to OMB were the final EPA product, rather than the Red Border draft. However, the legislative history of section 307 does not evidence an intent to enable any interested person to dissect a published rule so as to reconstruct the origin of each and every change made to the final draft.

Since the principal purpose behind section 307 is facilitation of judicial review, we think it is also important that the Court of Appeals for the D.C. Circuit held in *Sierra Club v. Costle,* that section 307 does not require reducing OMB's verbal input to writing and entering it in the docket. In that case, the court held:

> The purposes of full record review which underlie the need for disclosing *ex parte* conversations in some settings do not require that the courts know the details of every White House contact, including a Presidential one, in this informal rulemaking setting.

[1] *See, e.g.,* Staff of Senate Comm. on Environment and Pub. Works, Office of Management and Budget Influence on Agency Regulations, S.Prt. 99-156, 99th Cong., 2d Sess., *passim.* (1986); Olson, The Quiet Shift of Power, Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291, 4 Va. J. Nat. Res. L. 1 (1986). *See also,* Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 Harv. L. Rev. 1059 (1986).

657 F.2d 298, 407 (D.C. Cir. 1981). This is consistent with our view that section 307 was not intended to ensure that the exact source of each change in a final rule could be identified.

EPA's Use of Concurrent Review

In the course of our work, we found that EPA has used concurrent review of selected regulations since 1981, when Executive Order 12291 was first implemented. 46 Fed. Reg. 13193. EPA typically uses concurrent review for rules that are not expected to undergo major changes during the Red Border process. Alternatively, the process may be used if necessary to meet either a court-imposed or a statutory deadline. If concurrent review were to proceed on the optimum schedule, its use would save approximately 30 days. The Assistant Administrator of the Office of Policy Planning and Evaluation decides whether to send a regulation to OMB for concurrent review, based on whatever early comments are received in that Office concerning the Red Border package.

Our study of regulations issued under the Clean Air Act indicates that concurrent review has been used often in the last several years to process a variety of regulations. In addition, the process has been used to review regulations issued under other laws the EPA is responsible for administering.

The only court that has thus far considered the practice of concurrent EPA Red Border/OMB review expressed doubt whether the process would in fact expedite issuance of a long-delayed regulation, but it did not disapprove concurrent review in principle. *Environmental Defense Fund v. Thomas,* 627 F. Supp. 566, 571 (D.D.C. 1986). Although the regulation in question there was a waste disposal rule, not a Clean Air Act rule, we think the court's holding can fairly be applied to other rulemaking settings where concurrent review is used. *See also, Public Citizen Health Research Group v. Tyson,* 796 F.2d 1479, 1507 (D.C. Cir. 1986).

We hope the foregoing is of assistance to you. In accordance with our usual procedures, this opinion will be released 30 days from its date.

B-227471, October 21, 1987

Procurement

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

Procurement

Sealed Bidding
■ Bids
■■ Submission Methods
■■■ Telegrams

Bid sent by the protester's own telex equipment and containing a bid price in the form of garbled letters properly is rejected, notwithstanding that the numbers on the same keys as the garbled letters allegedly represent the intended price, where there is no showing that confirming bid was mailed and was outside of the bidder's control prior to bid opening, and there is no other evidence of intended bid that was outside bidder's control prior to bid opening.

Matter of: The Jewett-Cameron Lumber Corporation

The Jewett-Cameron Lumber Corporation protests the rejection of its telegraphic bid as nonresponsive under invitation for bids (IFB) No. DLA720-87-B-0338, issued by the Defense Construction Supply Center, Defense Logistics Agency (DLA), for 4,000 sheets of treated plywood. DLA rejected the bid because it did not contain a firm, fixed price; where the protester intended to indicate its item price, the telex read, "ITEM PQ WTMYE." The protester points out that the garbled letters are on the same keys of a telex machine as the numbers "01 25.63," allegedly intended by the protester. The protester contends that it properly transmitted the intended message on its equipment and that the problem of printing letters instead of numbers was caused by the failure of DLA to maintain its telex equipment. The protester argues that its bid should be accepted based on its intended bid of "ITEM 01 25.63."

We deny the protest.

The IFB incorporated the standard "Telegraphic Bids" clause, Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-13 (1986), which expressly authorizes the submission of telegraphic bids. At a unit price of $25.63 per sheet, Jewett-Cameron's telegraphic bid would be low. The agency rejected the bid, however, because there was no price, and there was no indication of any malfunctions by DLA's telex equipment immediately before or after the transmission of the telex.

Where the protester alleges an error in the transmission of a telegraphic bid sent, as here, by equipment, personnel, or facilities under the bidder's control, the record must establish by independent evidence (outside the bidder's control) that the error occurred after the message was sent, *see* 49 Comp. Gen. 417 (1970), or that there was government mishandling in the process of receipt. *See*

Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD ¶ 331. Otherwise, the bidder must bear the responsibility for the accuracy of its bid as actually received by the contracting agency, since the bidder selected the medium for submitting the bid. *Hygrade Food Products Corp.*, B-183432, June 10, 1975, 75-1 CPD ¶ 355.

While the protester alleges that the error was caused by a malfunction of DLA's equipment resulting from DLA's failure to maintain the equipment, the protester also states that it was advised by Western Union that an electrical storm or power surge could have caused the receiving telex machine not to switch from typing letters to typing numbers. Based on this and the agency's reporting that no such errors occurred in other messages during the same general period, we believe that the record fails to show any fault of the government or its equipment in the process of receipt. The protester has presented a copy of the telex containing the correct price which allegedly was printed on its machine from the same tape used to transmit the message to DLA. Since the tape was in the protester's control after bid opening, however, and, as we recognized in a prior case, such a tape can be altered to support a protester's contentions, *Hygrade Food Products Corp.*, B-183432, *supra*, we do not regard the protester's copy of the telex to be independent evidence of the message sent, or that the error in transmission of the bid occurred after the message was sent.

The question remains whether Jewett-Cameron's intended bid can be said to be apparent on the bid's face such that the award of a contract would obligate Jewett-Cameron to perform at a firm, fixed price. Jewett-Cameron argues that its intended price essentially was included in a code that could be resolved by reference to any telex machine keyboard. The bid abstract shows, moreover, that the allegedly intended price is consistent with the prices of the other bidders (ranging from $25.64 to $26.94). While DLA concedes both that the garbled letters in the telex correspond to the numbers "01 25.63" on a telex machine's keyboard, and that an electrical storm or a power surge could have caused the receiving machine not to switch from typing letters to typing numbers, the agency points out that the telex it received also contained random typographical errors involving different keys (as opposed to an error of a different case of the same key); DLA maintains that there thus is no assurance that the letters representing the allegedly intended numbers in the bid price do not incorporate a similar random error.

While the explanation offered by Jewett-Cameron is feasible, we nonetheless must agree with DLA that, under these circumstances, Jewett-Cameron's intended price cannot be considered sufficiently definite to warrant accepting the bid. An explanation that is merely feasible does not go the necessary further step of assuring that a bidder did not have an improper opportunity to establish its bid price after other bids were exposed. This possibility can be discounted only where there is some evidence of the allegedly intended bid that was outside the bidder's control prior to bid opening. No such evidence has been presented here.

We note that the protester did mail a confirming written bid, as required by the Telegraphic Bids clause, which contained a unit price of $25.63, but the protester's own submissions indicate that the confirming bid could have been mailed any time on the day of bid opening, which occurred at 10:30 a.m. Eastern Standard Time (EST), or 7:30 a.m. in the protester's time zone (Oregon). While the confirming bid's envelope bore a postage meter stamp dated the day before bid opening (the telex was sent at 7:27 p.m. EST), the postage meter was in the protester's control, and thus does not independently show the date of mailing. Since the record lacks evidence establishing that the confirming bid was mailed and outside of the protester's control prior to bid opening, it is not sufficient to establish the allegedly intended bid.

We conclude that Jewett-Cameron's bid lacks a definite price and properly was rejected. *See Harris Construction Company, Inc.*, 64 Comp. Gen. 628 (1985), 85-1 CPD ¶ 710, *aff'd, Harris Construction Company, Inc.—Request for Reconsideration*, 64 Comp. Gen. 702 (1985), 85-2 CPD ¶ 92.

The protest is denied.

B-222944, October 23, 1987

Procurement

Payment/Discharge
■ Payment Time Periods
■■ Government Delays
■■■ Interest

Payments on invoices by the National Park Service, Department of the Interior, submitted by an unregulated private electric utility company which is not governed by tariff approved by a state commission may be covered by the shorter payment term established by company policy rather than the longer payment term set forth in provision of the Prompt Payment Act, 31 U.S.C. § 3903(1)(B), where elements of implied contract, *i.e.*, acceptance of electrical service with notice of company's policy are present.

Matter of: National Park Service—Late Payment Charges for Utility Services

The Regional Finance Officer (a certifying officer) of the National Park Service, Department of the Interior, Pacific Northwest Region requested our decision on whether he may certify for payment invoices for finance charges assessed by the Lincoln Electric Cooperative, Inc. (Cooperative), Davenport, Washington, a nonregulated utility, for late payments of monthly electric bills. For the reasons stated below, we hold that he should certify the finance charges for payment.

Background

This case arises because the Service is generally unable to pay Lincoln Electric's invoices within the time period the Cooperative's policy prescribes. The Cooper-

ative provides electricity to National Park Service installations in the Coulee Dam National Recreation Area. Invoices are sent to Coulee Dam near the first of each month. Its policy is that payment is delinquent if not received by the 15th of the month. The Cooperative assesses a 1-1/2 percent penalty per month on a delinquent payment until paid with a $1 minimum.

The Service usually cannot make payment by the 15th of the month because of the time it needs to complete administrative approval and payment procedures. Upon receiving an invoice, the park verifies that the services were received and checks the account to be charged. The invoice is then sent to the Regional Finance Office in Seattle where the expense is recorded and payment is made from the San Francisco Disbursing Center. Generally the Cooperative receives the payment during the first week of the month following the month in which the Service received the invoice.

Since the Cooperative has been receiving payments after the 15th of the month, it has been assessing finance charges against the Service pursuant to its policy. Along with its submission the Service enclosed 21 invoices which it has paid except for the finance charges.

Discussion

This case presents the question of which of two provisions of the Prompt Payment Act, 31 U.S.C. § 3903(1)(A) or 31 U.S.C. § 3903 (1)(B), applies to the Service's invoice payments. With exceptions not here applicable, 31 U.S.C. § 3902 requires agencies to pay an interest penalty to business concerns if they do not pay for delivered items of property or services within 15 days after the "required due date" as that term is defined by regulations prescribed pursuant to 31 U.S.C. § 3903. Section 3903 directs the Office of Management and Budget to prescribe regulations to carry out section 3902. It states that those regulations must provide that the required payment date is "the date payment is due under the contract for the item of property or service provided" (Subparagraph (1)(A)) or if a specific payment date is not established by contract, then the required payment date is 30 days after a proper invoice for the amount due is received (Subparagraph (1)(B)).

The submission raises the question of whether the Cooperative's declared payment date of the 15th of the month has been "established by contract" for purposes of 31 U.S.C. § 3903(1). If it has, then the Service's payments are delinquent and it owes the Cooperative an interest penalty. Conversely, if there is no contract between the parties establishing a payment date, then the Service's payments are due as prescribed by the Prompt Payment Act—(30 days after an invoice is received)—with an additional 15-day grace period before interest may be assessed. If this is the case, then the Service has complied with the terms of the Prompt Payment Act.

The finance officer informs us that electricity to most of the National Park Service installations within his area has been provided by this Cooperative for

many years. In preparation for his submission to this Office, the finance officer requested copies from the Cooperative of any contracts or "tariffs" supporting the late payment charges appearing on the invoices. The Cooperative's office manager responded on March 18, 1986 with a copy of its formal policy document for small commercial service customers, effective October 20, 1983, which, on the second page, states the late payment charges as described before. He also points out that on the back of each monthly statement, the same late payment terms are set forth. Finally, we note that the same late payment terms also appear on three old "agreements for purchase of power," the latest of which is dated April 1, 1971, which were included in the submission. We do not suggest that any of these last three documents themselves constitute the requisite "contract" which supersedes the terms of the Prompt Payment Act. We mention them only because they are additional evidence that the Service has long had notice of the Cooperative's late payment policy.

As the finance officer notes, we considered a similar question in 63 Comp. Gen. 517 (1984). In that case we were called upon to decide whether the Social Security Administration's (SSA) Texas field offices were liable for late payment charges assessed by the General Telephone Company of the Southwest (GTE) on its bills for telephone services, in the absence of a formal agreement between SSA and GTE. GTE assessed the late payment charges under the terms of the Texas General Exchange Tariff approved by the Texas Public Utility Commission. SSA was able to make its payments within the more liberal "no contract" period of 31 U.S.C. § 3903(1)(B), but not within the period designated by the tariff. We found that for Prompt Payment Act purposes, the terms of the Texas General Exchange Tariff must be regarded as being incorporated into the contract for telephone services between SSA and GTE. Consequently, the payment period was governed by the tariff's terms pursuant to 31 U.S.C. § 3903(1)(A), rather than the more liberal terms of 31 U.S.C. § 3903(1)(B). We then held that since SSA had not paid GTE's invoices within the period the tariff specified, it owed the late payment charges GTE assessed.

Also, after receiving the Park Service's submission, we issued our decision, 65 Comp. Gen. 842 (1986). In that case, the approved tariff did not provide for a late payment charge. In holding that the government was liable for Prompt Payment Act late payment penalties, we applied the "no contract" required payment date specified in 31 U.S.C. § 3903(1)(B).

The finance officer questions whether our holding in 63 Comp. Gen. 517 is applicable in the present case. As distinguished from that case (and 65 Comp. Gen. 842), the utility services in question here are provided by private companies and cooperatives that are not regulated by state commissions. The question is whether, in the absence of a state-approved tariff, the payment terms enunciated in an unregulated company's policy statements can, for purposes of the Prompt Payment Act, be regarded as part of a binding utility services contract between the government and the utility company.

We think that it can, under traditional principles of contract law. A "contract implied in fact" arises even in the absence of a formal written contract where

the actions of the parties, according to the ordinary course of dealing and common understanding, show a mutual intent to be bound by certain terms. In other words, any conduct of one party from which the other party may reasonably draw the inference of a promise is effective in law as such, and the conduct of the parties is to be viewed as reasonable men would view it, to determine the existence of a promise.

Under these principles, there is an implied acceptance by the Park Service of the Cooperative's payment terms. Lincoln Electric's payment policy is clearly printed on the back of the invoices for which finance charges are being claimed. Printed on the front is "SEE REVERSE SIDE FOR PAYMENT TERMS" in capital letters. Following the invoices, Lincoln sent the finance office a copy of its formal late payment policy statement, which, as mentioned earlier, indicates that the policy was effective on October 20, 1983. Thus, the Service has been using the Cooperative's electrical service with full knowledge of its payment policy. Applying the standard of "the ordinary course of dealing and common understanding," by such conduct the Service is presumed to accept the terms stated on the invoice. Accordingly, we find that a specific payment date has been "established by contract" for purposes of determining the required payment date under 31 U.S.C. § 3903.

Unless the Service is able to negotiate modified payment terms with the Cooperative, which takes into account the Service's difficulties in complying with the invoice terms as written, it must continue to pay late payment charges to the Cooperative or attempt to find a new supplier.

B-219742, October 26, 1987

Appropriations/Financial Management

Appropriation Availability

■ **Purpose Availability**

■■ **Specific Purpose Restrictions**

■■■ **Federal Executive Boards**

■■■■ **Financing**

A government-wide restriction against using appropriated funds from more than one agency to finance boards or commissions applies to Federal Executive Boards (FEBs), which do not have specific authority that would overcome the restrictions. However, one agency may lawfully pay the Board's expenses in a particular region if that agency has a substantial stake in the outcome of the interagency venture and the success of the interagency undertaking furthers the agency's own mission, programs, or functions. The Office of Personnel Management, which has oversight responsibility for the establishment and guidance of FEBs, would not usually be the appropriate agency to assume the financing burden since its role may not involve any direct participation in FEB activities, once a particular Board is established.

Appropriation Availability
■ Purpose Availability
■■ Specific Purpose Restrictions
■■■ Federal Executive Boards
■■■■ Financing

A government-wide restriction against using appropriated funds from more than one agency to finance boards or commissions, such as Federal Executive Boards, prohibits both cash and in-kind financial support such as contributions of supplies or staff support, but agency participation at Board meetings does not constitute financial support of the Board as a separate entity.

Matter of: Veterans Administration Funding of Federal Executive Boards

The Administrator of the Veterans Administration (VA) has requested clarification of our July 1, 1986 decision, 65 Comp. Gen 689 (1986), on Federal Executive Boards. In that decision, we agreed with the VA legal analysis that a general government-wide appropriation act restriction[1] on the use of appropriated funds for interagency financing of boards or commissions applies to the Federal Executive Boards. The restriction covers boards and commissions "which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality." The Boards do not have statutory approval for interagency financing. However, we also stated that the interagency funding restriction did not "prevent a single entity with a primary interest in the success of the interagency venture from picking up the entire cost." 65 Comp. Gen. 689, 692 (1986). In this respect, we disagreed with the VA legal advice to "immediately discontinue" all VA financial support to the Board operating in the Dallas-Fort Worth, Texas area to the extent that it was based on the belief that such financial support would be illegal. We left open the possibility that VA could elect to fully fund the Board's activities.

The Administrator is unclear whether an entity with a "primary interest in the success of the interagency venture" would only describe the Office of Personnel Management (OPM), the agency charged with the oversight responsibility for the Boards, or could describe some other federal agency that normally would be only one of several participants in a particular Board's activities. The Administrator also asked for clarification on whether the interagency funding restriction would prohibit in-kind (non-cash) Board support rendered by agencies in the form of supplies, support staff and the time of executive participation.

[1] The restriction was contained in section 608 of the Treasury, Postal Service, and General Government Appropriations Act for fiscal year 1986, H.R. 3036. For fiscal year 1987, the restriction is provided by section 608 of the Treasury, Postal Service and Federal Government Appropriations Act for fiscal year 1987, H.R. 5294 (incorporated by reference into Pub. L. No. 99-500, October 18, 1986, 100 Stat. 1783; Pub. L. No. 99-591, October 30, 1986, 100 Stat. 3341).

Discussion

Single Agency Funding

As we stated in 65 Comp. Gen. 689 (1986), financial support of the Boards is lawful as long as only one agency pays the costs involved. However, in order to justify an expenditure of appropriated funds for an interagency venture, an agency must have a substantial stake in the outcome of the interagency endeavor and the success of the interagency venture must further the agency's own mission, programs or functions. This is what we meant when we stated that an agency financially supporting an interagency undertaking must have a "primary interest in the success of the interagency venture" for such funding to be authorized. Of course, if more than one agency has an equal stake in the success of the venture, an agreement must be reached as to which one will assume the total burden. If this is not feasible, a legislative designation of appropriate funding sources should be obtained.

With respect to Federal Executive Boards, we do not think that funding is limited to OPM or even that OPM is the most appropriate agency to assume the single funding source responsibility.[2] As we understand the Presidential memorandum establishing FEBs, the role of the oversight agency [3] was to "facilitate" and encourage the establishment of FEBs and provide "guides and objectives" for their activities. Once established, OPM itself may have no particular interest in participating in FEB activities.

Non-cash Support

The Administrator interpreted our decision as indicating that the restriction against interagency funding would apply only to cash support. This is not the case. Our decision clearly stated that interagency financing of Federal Executive Boards was prohibited under fiscal year 1986 appropriations (and now under fiscal year 1987 appropriations). This restriction prohibits the use of any appropriated funds to support interagency financing of a Board. Therefore, both cash and in-kind (non-cash) financial support would be prohibited. In other words, any interagency contribution in direct support of a Board, such as office supplies or staff support, would not be authorized.

However, we want to make it clear that agency participation on the Board such as attendance at Board meetings and functions does not constitute financial support of the Board as a separate entity or organization. Agency participation is a direct benefit to the participating agency and Board attendance at meetings by agency representatives normally involves no additional expense to the agency. The 1961 Presidential memorandum creating the Boards provided that:

[2] OPM has determined that the funding of the Boards by member federal agencies promotes a feeling of responsibility and commitment and thereby increases the effectiveness of the Board. 49 Fed. Reg. 34193 (1984).
[3] Originally, the responsibility was assigned to the Office of Management and Budget. In June of 1982, it was transferred to OPM.

Each Executive department and agency is directed to arrange for personal participation by the heads of its field offices and installations in the work of these Federal Executive Boards. Memorandum on the Need for Greater Coordination of Regional and Field Activities of the Government, 1961 PUB. PAPERS 717, 718 (Nov. 14, 1961).

We can see no restriction on agencies receiving the benefits of attending Federal Executive Board meetings and sharing information at these meetings. This is distinguishable from those efforts and expenditures that go toward supporting a Federal Executive Board function or which provide administrative assistance to the Board itself.

B-227755, October 26, 1987

Procurement

Competitive Negotiation
■ Offers
■■ Competitive Ranges
■■■ Exclusion
■■■■ Administrative Discretion

An initial proposal was properly excluded from the competitive range, leaving a competitive range of only one offeror, where the proposal reasonably was found to be so deficient in its technical adequacy that major revisions would have been required to make it acceptable.

Matter of: Optical Data Systems-Texas, Inc.

Optical Data Systems-Texas, Inc. (Optical), protests the Department of the Navy's exclusion of Optical's proposal from the competitive range under request for proposals (RFP) No. N61339-86-R-0073, a small business set-aside issued by the Naval Training Systems Center for two digital voice communications systems (one for the Atlantic Fleet and the other for the Pacific Fleet). The systems will replace existing communications facilities used to simulate inter-ship and intra-ship communications during training exercises. Optical is one of two small business firms that responded to the RFP.

Optical contends that its exclusion from the competitive range, without discussions, was improper because Optical has greater experience than the remaining firm and offered to perform at a price ($2,381,994) substantially lower than the government estimate ($6,694,000). Optical argues that its proposal shows its intent to provide a proven system, previously accepted by other government agencies, built around standard telephone company equipment. Optical urges that the Navy is obligated to include Optical's offer in the competitive range for purposes of discussions, because otherwise there is only one firm in the competition.

We deny the protest.

The RFP required three proposal volumes, covering technical approach (Volume I, consisting of 9 chapters, of which 6 are critical), logistics support (Volume II,

consisting of 9 chapters, of which are 3 critical) and cost (Volume III). The Navy found Optical's technical proposal (Volumes I and II) unacceptable because it contained general promises of compliance instead of the detailed explanations called for by the RFP, it did not include required technical information concerning the proposed system and its operation, and it made repeated references to undefined commercial standards in the face of the RFP's requirement for adherence to specified government standards. Optical was found unacceptable in three critical chapters of Volume I (system initialization and operation, electromagnetic compatibility, and supportability) and two critical chapters of Volume II (maintenance planning and technical data support package).

Optical's letter of protest questions the merit of the Navy's concerns by citing sections of the proposal that, in its opinion, prove the proposal adequately addressed the required technical areas. However, the agency report in response to the protest rebuts Optical's contentions and further delineates the Navy's technical objections to Optical's proposal. Since Optical's comments on the report do not respond to or take issue with the Navy's critical technical assessment of the proposal, we read this as an admission by Optical that its proposal was deficient in the listed areas for the reasons stated. *See Midland Brake, Inc.*, B-225682, June 3, 1987, 87-1 CPD ¶ 566.

There remains the question of whether, given the scope and nature of the admitted technical deficiencies, it was reasonable to exclude the proposal, without discussions, from a competitive range encompassing only one other offeror. In view of the importance of achieving full and open competition in government procurement, we closely scrutinize an agency decision which results, as here, in a competitive range of one. *Coopers & Lybrand,* B-224213, Jan. 30, 1987, 66 Comp. Gen. 216, 87-1 CPD ¶ 100; *The Associated Corporation,* B-225562, Apr. 24, 1987, 87-1 CPD ¶ 436. Nevertheless, we will not disturb such a decision absent a clear showing that it was unreasonable, because an agency is not required to permit an offeror to revise an unacceptable initial proposal when the revisions required are of such a magnitude as to be tantamount to the submission of a new proposal. *Falcon Systems, Inc.*, B-213661, June 22, 1984, 84-1 CPD ¶ 658. In examining agency determinations that restrict the competitive range to a single offeror, we look for (1) close questions of acceptability, (2) significant cost savings, (3) inadequacies in the RFP that may have caused the poor showing in the technical proposal, and (4) whether the problems with the offer were informational deficiencies that easily could have been corrected by relatively limited discussions. *Audio Technical Services, Ltd.*, B-192155, Apr. 2, 1979, 79-1 CPD ¶ 223.

Our review provides no basis to conclude that there is a close question of Optical's technical acceptability, or that the firm's proposal would have required other than major revisions to be made technically acceptable. Optical's technical proposal received 41.1 percent of the maximum possible technical score, while the other firm's technical proposal received 72.6 percent of the maximum possible score. It appears from the record that Optical viewed the procurement as requiring only the integration of existing off-the-shelf digital switch hard-

ware and software into a standard communications network. We read the RFP, however, as reflecting the Navy's intent to procure a customized communications facility that the Navy could readily expand, up-grade and maintain for the next 10 years on the basis of technical information furnished by the awardee. Thus, the RFP required each offeror to furnish a design disclosure showing system initialization, operation, hardware design, computer system and software design, configuration management (a tracking system for components), electromagnetic compatibility (necessary because of the system's close proximity to other electronic equipment), reliability, maintainability, quality assurance, compliance demonstration and testing. Optical's required design disclosure in these and other areas was either deficient or totally lacking.

Further, because of the extent of the technical deficiencies in Optical's proposal, we cannot conclude that Optical's quoted price is for a system that meets the RFP's technical requirements, so that the fact that the price offered may be low essentially is irrelevant. *Emprise Corp.*, B-225385, Feb. 26, 1987, 87-1 CPD ¶ 223; *aff'd, Emprise Corp.—Request for Reconsideration*, B-225385.2, July 23, 1987, 87-2 CPD ¶ 75. Therefore, there is no reason to think that further consideration of Optical's proposal might offer significant cost savings.

In sum, we see no reason to object to the Navy's determination to exclude Optical from the competitive range. The protest is denied.

B-227930, October 26, 1987

Procurement

Competitive Negotiation
■ Technical Transfusion/Leveling
■■ Allegation Substantiation
■■■ Evidence Sufficiency

No technical transfusion occurred during discussions where the agency did not discuss the technical or management approach of the respective offerors.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Cost Estimates

Evaluated cost may become the award determinative factor where proposals are found technically equal, notwithstanding that the solicitation evaluation criteria assigned cost less importance than technical considerations.

Procurement

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

Even where the protester demonstrated superior understanding in technical approach and is appropriately credited for it under the pertinent part of the solicitation evaluation scheme, the agency may reasonably find the protester's proposal technically equal to another proposal, which offered a lesser rated, but "good," technical approach, where the evaluators determine the particular technical approach is not sufficiently significant to be award determinative and the protester does not otherwise contest the technical evaluation.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation Errors
■■■ Non-Prejudicial Allegation

Procurement

Specifications
■ Performance Specifications
■■ Modification
■■■ Contractors
■■■■ Notification

An agency which relaxes a material solicitation requirement at one offeror's request is required to issue a written amendment to all offerors. However, even where the protester is not apprised of the material change, its protest is denied, where cost is the award determinative factor and the potential cost impact on the protester's proposal is $90,000 and the awardee's cost is $262,000 less than the protester's cost.

Matter of: Applied Mathematics, Inc.

Applied Mathematics, Inc. (AMI), protests the award of a contract to Analysis & Technology, Inc. (A&T), under request for proposals (RFP) No. N66604-87-R-1016, issued by the United States Naval Underwater Systems Center, Newport, Rhode Island. The solicitation is for the acquisition of engineering services in support of Fleet Exercise Reconstruction Programs. AMI contends that the Navy engaged in technical transfusion during discussions; that the evaluation was not conducted in accordance with the RFP evaluation criteria; and that the Navy improperly relaxed certain requirements in the RFP without issuing a written amendment.

We deny the protest.

The RFP, issued on December 16, 1986, requested the submission of technical and price proposals and contemplated the award of an indefinite delivery, indefinite quantity, cost-plus-fixed-fee contract. Section "M" of the RFP provided

that technical proposals would be evaluated on the basis of six evaluation factors which, in descending order of importance, are:

Personnel Resources

Technical Approach

Corporate Experience

Management Approach

Facilities

Cost

Section "M" also provided that cost, although the least important evaluation factor, was still an important factor and should not be ignored; and that the degree of its importance would increase with the degree of technical equality of submitted proposals. Cost was to be evaluated on the basis of cost realism, fairness and reasonableness.

The Navy received five offers by the January 20, 1987, closing date. The contracting officer determined that only the proposals submitted by A&T and AMI were in the competitive range. AMI's proposal was rated "marginal" while A&T's proposal was "unacceptable" but capable of being made acceptable through discussions.

A&T's proposed cost plus fee was $726,598 and AMI's proposed cost plus fee was $1,058,024. Both offerors' cost proposals were evaluated for cost realism and A&T's proposed cost was found realistic. AMI's proposed cost, which included $75,000 for 3,000 hours of computer time, was adjusted in the cost evaluation downward $23,675, since, as discussed below, the Navy intended to allow the successful offeror to use the government computer for 945 hours.

The contracting officer notified both firms that they were included in the competitive range and asked each of the two firms to address certain deficiencies noted in their proposals. The Navy further claims that during negotiations each offeror was verbally informed of its decision to provide access to the government's computers for a total of 945 hours. In an amendment to the solicitation dated June 5,[1] the Navy requested best and final offers (BAFOs).

Upon receipt and evaluation of the BAFO's, both firms received an overall final rating of good and were deemed to be technically equal. Consequently, the technical evaluation panel recommended to the contracting officer that award be made to the offeror proposing the lowest cost.

A&T revised its BAFO costs plus fee to $776,011 to reflect an increase in its direct labor costs. In its BAFO, AMI only revised its proposed profit and overhead allocation resulting in proposed total costs plus fee of $1,038,787. The Navy conducted a post-negotiation cost analysis and concluded that both firms had

[1] The amendment also made changes to certain provisions in the RFP; these changes however, are not germane to the resolution of this protest.

submitted cost realistic BAFOs. On the basis of the foregoing, the Navy made the award to A&T, because it had the lower cost and the two proposals were considered technically equal.

AMI's contention that technical transfusion[2] may have occurred during discussions is not supported by the record. The record shows that the only subjects of the Navy discussions with A&T concerned its proposed personnel, a minor matter in its management approach, its proposed use of the government computer, certain exceptions taken by A&T to contract provisions, and its proposed fee. The discussions did not communicate AMI's or any other competitor's management or technical approach. Therefore, no technical transfusion occurred.

AMI's protest that the Navy failed to comply to the evaluation criteria in making the award selection is also not supported by the record. Where, as here, proposals are found technically equal, cost or price may become the determinative factor in making the award, notwithstanding that the evaluation criteria assigned cost or price less importance than technical considerations. *Ship Analytics, Inc.*, B-225798, June 23, 1987, 87-1 CPD ¶ 621; *PRC Kentron*, B-225677, Apr. 14, 1987, 87-1 CPD ¶ 405. The judgment of the procuring agency concerning the significance of the difference in technical merit of the proposals and whether or not offers are technically equal is afforded great weight by this Office. *PRC Kentron*, B-225677, *supra* at 4.

AMI argues that its technical proposal showed that it already had over 50,000 lines of computer code necessary to more expeditiously fulfill contract requirements. AMI claims that other offerors would have to spend an estimated $250,000 to duplicate this data, even assuming those offerors had the necessary high-level mathematical expertise. AMI argues that its technical approach would provide the Navy with the greatest value and its technical proposal should have been rated technically superior to A&T's proposal.

However, the Navy notes, and the record confirms, that AMI received appropriate credit in the technical evaluation for already having the lines of code; AMI's technical approach was rated "excellent" while A&T's technical approach was rated "good." The Navy further states: "the technical evaluation team did not find the presence or absence of a computer code an issue significant enough to warrant award of the contract to the offeror who had the code in hand, since the lines of code, while reflecting an approach and understanding of the problems involved in the contract, are not directly applicable to the tasks without adaptation." In this regard, although A&T did not have a code in hand, it showed in its proposal a clear understanding of the tasks involved in the contract and described an appropriate means of arriving at the contract goals.

As noted by the Navy each offeror proposed a different technical approach and both offerors received an overall "good" rating and were considered technically equal. In these circumstances, since AMI does not dispute the remainder of the

[2] "Technical transfusion" is the government disclosure of technical information pertaining to a proposal that results in the improvement of a competitive proposal. Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d)(2) (1986); *Loral Terracom; Marconi Italiana*, B-224908, B-224908.2, Feb. 18, 1987, 66 Comp. Gen. 272, 87-1 CPD ¶ 182.

technical evaluation, we do not conclude the agency's determination that the proposals were technically equal is unreasonable.

To the extent that AMI is actually protesting that it should have been given credit in the cost evaluation for the lines of code it had already developed, this protest basis is untimely and not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987), since the RFP did not provide for any such credit to be given and AMI did not timely protest the RFP evaluation criteria.

AMI finally contends that the Navy improperly relaxed the requirements of the solicitation by deciding to provide the successful offeror with a total of 945 hours of government computer time at no cost although the solicitation required offerors to perform all categories of labor only on contractor facilities. AMI states that it was never informed of this change and that the Navy should have issued a written amendment to reflect its relaxed requirements as required by the FAR, 48 C.F.R. § 15.606(a).

The record confirms that at A&T's request, A&T was permitted to utilize 945 hours of government computer time. Although the Navy claims it also verbally advised the protester of this relaxation of the specification requirements, AMI denies this claim. Moreover, in the written amendment to the RFP issued subsequent to this alleged advice, no mention was made of this material change.

It is a fundamental principle of competitive procurement that offerors be provided a common basis for submission of proposals. *W.D.C. Realty Corp.*, B-225468, Mar. 4, 1987, 66 Comp. Gen. 302, 87-1 CPD ¶ 248 at 5. As the protester points out, it is equally fundamental that when, either before or after receipt of proposals, the government changes or relaxes its requirements, it must issue a written amendment to notify all offerors of the changed requirements and to afford them an opportunity to respond to the revised requirements. *Id.*; FAR, 48 C.F.R. §§ 15.606(a) and (b). We have sustained protests, where, as here, protesters deny that they were verbally advised of material changes in the solicitations. *CoMont, Inc.*, 65 Comp. Gen. 66 (1985), 85-2 CPD ¶ 555; *I.E. Lovick & Associates*, B-214648, Dec. 26, 1984, 84-2 CPD ¶ 695. However, we will only sustain a protest that the agency failed to issue a written amendment for a relaxation of a specification requirement for one or more offerors, if the protester was, or may have been, prejudiced by this failure. *AT&T Communications Corp.*, 65 Comp. Gen. 412 (1986), 86-1 CPD ¶ 247; *Data Vault Corp.*, B-223937, B-223937.2, Nov. 20, 1986, 86-2 CPD ¶ 594.

In this case, even if AMI was not advised that 945 hours of government computer time was available, *see CoMont, Inc.*, 65 Comp. Gen. *supra*, the record shows that AMI was not prejudiced by the failure to receive a written amendment.

The cost impact on AMI's proposal for its proposed use of 3,000 hours of its own computer time was only $90,720 by AMI's own calculations. Since evaluated cost was the award determinative factor and AMI's BAFO costs and fee was $262,776 higher than A&T's cost and fee, AMI would not have been the successful offeror even if all its 3,000 hours of proposed computer time were supplied by the gov-

ernment. In any case, AMI does not contend that it would change its technical approach to take advantage of the offered government computer time.

The protest is denied.

B-229052, October 28, 1987

Appropriations/Financial Management

Appropriation Availability
■ Purpose Availability
■ ■ Attorney Fees

Department of Interior employee was charged with prohibited personnel practices by Merit Systems Protection Board. Agency, upon determining that employee's conduct was within the scope of her employment, may use appropriated funds to pay reasonable costs of employee's legal representation in the administrative proceedings.

Matter of: Jeannette E. Nichols

The Minerals Management Service (MMS), Department of the Interior, seeks our opinion on whether it may use its appropriated funds to pay attorney fees incurred by Ms. Jeannette E. Nichols, an MMS employee, in connection with administrative proceedings before the Merit Systems Protection Board (MSPB). The answer is yes.

In June 1986, the MSPB Office of Special Counsel filed a complaint against Ms. Nichols, alleging prohibited personnel practices in connection with the recruitment and selection of a subordinate position. Ms. Nichols retained private counsel and incurred substantial legal fees in defending herself against the charges. Both MMS and counsel for Ms. Nichols suggest that MMS may pay the legal fees, on the basis of our decision at 61 Comp. Gen. 515 (1982). We agree.

In the cited decision, we were asked whether the International Trade Commission could use appropriated funds to provide legal representation for employees brought before the MSPB by the Special Counsel. We concluded that an agency's appropriations "are available to provide a supervisor with representation in an administrative hearing if he performed the conduct in issue within the scope of his employment," that is, if the conduct was "in furtherance of, or incident to his carrying out his official duties." 61 Comp. Gen. at 516. In addition, the agency must determine that providing representation would be in the government's interest. *Id.;* 53 Comp. Gen. 301 (1973). In such a case, the cost of legal representation may be considered a "necessary expense" of the agency or function. We have also pointed out that an agency has a legitimate interest in furnishing legal representation in such cases, in that failure to do so might deter employees from the rigorous performance of their duties. 61 Comp. Gen. at 516-17. Surely federal employees must be answerable for illegal conduct. Yet it can be in the interest of neither the government as a whole nor the taxpayers we

serve to have employees afraid to function out of fear of being bankrupted by a lawsuit arising out of the good faith performance of their jobs.

Ms. Nichols' immediate supervisor has certified that her actions out of which the charges arose "were logical management decisions inherent in her position as a manager," and were "proper, within regulations, and within the scope of authority of her position." The Chief of the MMS Financial Management Division endorses this view and urges that payment would be in the best interest of the government. Under these circumstances, the proposed payment follows logically and directly from 61 Comp. Gen. 515.

As a final note, it should be understood that payment in this type of case is not a legal liability on the part of the agency, but is essentially a discretionary payment. As such, an agency is not required to pay the entire amount of the fees actually charged in any given case. The controlling concept under fee-shifting statutes is a "reasonable" attorney's fee,[1] and there is a vast body of judicial precedent applying this concept under statutes such as the Back Pay Act and Title VII of the Civil Rights Act. This body of precedent is available to provide guidance to agencies in evaluating the reasonableness of claims. Also, since payment is discretionary, an agency is free to formulate administrative policies with respect to treatment of claims of this type. Of course, any such policies should be applied fairly and consistently.

[1] We are in no way implying that the fees charged in this case were not reasonable. We are saying merely that agencies should review the actual billing and are not legally required to pay or reimburse the entire amount. The determination of what is or is not reasonable in a given case is up to the agency, and is a matter we would consider it inappropriate to review.

Appropriations/Financial Management

Accountable Officers
■ Relief
■■ Account Deficiency

CIA accountable officer denied relief where shortage appeared in his account during a long period when he was isolated from his supervisors and required to devote long hours in a sensitive overseas post doing logistics, administrative and finance work. A heavy workload is not a basis for relief.

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Appropriation Availability
■ Purpose Availability
■■ Attorney Fees

Department of Interior employee was charged with prohibited personnel practices by Merit Systems Protection Board. Agency, upon determining that employee's conduct was within the scope of her employment, may use appropriated funds to pay reasonable costs of employee's legal representation in the administrative proceedings.

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■ Purpose Availability
■■ Specific Purpose Restrictions
■■■ Federal Executive Boards
■■■■ Financing

A government-wide restriction against using appropriated funds from more than one agency to finance boards or commissions, such as Federal Executive Boards, prohibits both cash and in-kind financial support such as contributions of supplies or staff support, but agency participation at Board meetings does not constitute financial support of the Board as a separate entity.

27

■ Purpose Availability
■■ Specific Purpose Restrictions
■■■ Federal Executive Boards
■■■■ Financing

A government-wide restriction against using appropriated funds from more than one agency to finance boards or commissions applies to Federal Executive Boards (FEBs), which do not have specific authority that would overcome the restrictions. However, one agency may lawfully pay the Board's expenses in a particular region if that agency has a substantial stake in the outcome of the interagency venture and the success of the interagency undertaking furthers the agency's own mission, programs, or functions. The Office of Personnel Management, which has oversight responsibility for the establishment and guidance of FEBs, would not usually be the appropriate agency to assume the financing burden since its role may not involve any direct participation in FEB activities, once a particular Board is established.

27

Federal Assistance
■ Grants
■■ Cooperative Agreements
■■■ Use
■■■■ Criteria

Maritime Administration (MARAD) awarded cooperative agreement for the operation of its Computer Aided Operations Research Facility (CAORF). The CAORF will be operated for MARAD to principally serve its needs and other government agencies. Accordingly, under the Federal Grant and Cooperative Agreement Act, the proper instrument for this type of relationship is a contract and not a cooperative agreement. See cited cases.

13

Miscellaneous Topics

Environment/Energy/Natural Resources
■ Environmental Protection
■■ Air Quality
■■■ Standards
■■■■ Review Procedures

EPA may send draft rules to OMB for review under Executive Order 12291 at the same time it begins final internal review of proposed rules. Clean Air Act provisions that require creating a formal record and docketing drafts circulated for interagency review do not prohibit concurrent EPA/OMB review. Neither the applicable statute nor its legislative history dictates that only final products be circulated, or that all input to the rules, including verbal input from OMB, be identifiable from the public record, although any EPA actions to modify draft rules based on verbal input must also be fully supported by the public record. Courts that have considered similar issues have held that it is not necessary to create a public record of verbal input from OMB and have not disapproved of concurrent review.

19

Procurement

tion in Contracting Act of 1984 (CICA) did not leave to the complete discretion of the contracting officer which competitive procedure to use, but provides in determining which procedure is appropriate under the circumstances that sealed bids "shall" be solicited where four criteria are met, all of which were present here.

16

Specifications

■ Minimum Needs Standards

■■ Determination

■■■ Administrative Discretion

Protest that specifications are not economically sound and are not in the best interest of the government will not be considered where the protester does not show that these specifications adversely affect it in some way, since the method an agency chooses to accomplish its needs raises an issue of policy, and is a matter for the agency to decide.

3

■ Minimum Needs Standards

■■ Risk Allocation

■■■ Performance Specifications

Protest challenging requirements that contractor furnish various supplies for which the solicitation does not provide specific compensation is without merit where the protester does not show that the risks imposed are unreasonable. The mere presence of risk in a solicitation does not render it inappropriate, and offerors are expected to consider the degree of risk in calculating their prices.

3

■ Performance Specifications
■■ Modification
■■■ Contractors
■■■■ Notification

An agency which relaxes a material solicitation requirement at one offeror's request is required to issue a written amendment to all offerors. However, even where the protester is not apprised of the material change, its protest is denied, where cost is the award determinative factor and the potential cost impact on the protester's proposal is $90,000 and the awardee's cost is $262,000 less than the protester's cost.

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

END