United States General Accounting Office

GAO

Office of the General Counsel

November 1994

Advance Sheets Volume 74

Decisions of the Comptroller General of the United States

GAO/OGC-95-4

Comptroller General
of the United States

Washington, D.C. 20548

432711

Decision

Matter of: Legare Construction Company

File: B-257735

Date: November 4, 1994

J. Hatcher Graham, Esq., for the protester.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where although protester's item price exceeded by a small amount the price limitation set forth in the solicitation for that item, its bid should not have been rejected since no showing has been made that the resulting bid was materially unbalanced or that either the government or the other bidders were prejudiced by the de minimus nature of the bidder's failure to price its bid in the manner required.

DECISION

Legare Construction Company protests the rejection of its bid under invitation for bids (IFB) No. 1443IB970094903, issued by the National Park Service (NPS) for the construction of employee housing at the Katmai National Park and Preserve, Bristol Bay Borough, Alaska. Legare's bid was rejected because the price it submitted on one item of its total base bid was greater than the amount permitted under the terms of the IFB. Legare maintains that either the limitation cannot be enforced or the amount by which the limit was exceeded cannot serve as a basis for the rejection due to its de minimus amount. In either case, Legare contends that it should receive the award under the IFB.

We sustain the protest.

The IFB required bidders to submit prices on a base bid and on two bid additives. They were advised that a failure to submit prices for all the items could result in the rejection of a bid as non-responsive. The base bid consisted of three separately priced items: site and utility work, fourplex (housing unit), and stabilization rock. Under the place on the pricing page where a bidder

was to insert a lump-sum price for the site and utility work was the notation "(NOT TO EXCEED 20% OF TOTAL BASE BID)." Award was to be made to "the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government, considering only price and price-related factors . . . ." The additives were not included in the award and are not an issue in this protest.

Eight bids were received. The three low bids on the base bid were submitted by Gilco Construction, Inc. ($1,157,502); Legare ($1,336,000); and DAR-CON Corporation ($1,363,000). The low bid of Gilco was rejected after the agency determined that Gilco's bid bond was unacceptable. Legare's bid was rejected for failure to meet the IFB's price limitation because its $280,500 price for the site and utility work item of the base bid item exceeded 20 percent of its total base bid by $13,300. Award was made to DAR-CON. Performance has been suspended pending resolution of the protest.

The agency explains that it established the 20-percent limitation for the site and utility work item (by rounding upward the government estimate that the cost of this item should represent 17 percent of the total base bid) to preclude the potential for a front-loaded bid based on an inflated price for the site and utility work. The agency contends its rejection of Legare's bid was proper because all bidders must compete on an equal basis, only Legare ignored the 20-percent limitation, and other bidders would be prejudiced if Legare's bid were considered for award because Legare would be paid an amount in excess of 20 percent of the base bid earlier than would other bidders. The agency further explains that in order for Legare to bid its price of $280,500 for the site and utility item and comply with the IFB's price limitation, it would have had to submit a total base bid of $1,402,500, which would have been higher than the awardee's price. Accordingly, the agency does not believe that Legare's failure to comply with the limitation is de minimus or waivable.

To be responsive, the bid as submitted must represent an unequivocal offer to comply with the IFB's material terms. Federal Acquisition Regulation (FAR) § 14.404-2. However, where a discrepancy between what is required by a material requirement in a solicitation and what is promised is de minimus, it may be waived under FAR § 14.405 as a minor informality where acceptance of a deviating bid would result in a contract which would satisfy the government's actual

needs and would not prejudice any other bidder. George Hyman Constr. Co.; Blake Constr. Co., Inc., B-188603, June 15, 1977, 77-1 CPD ¶ 429; Arch Assocs., Inc., B-183364, Aug. 13, 1975, 75-2 CPD ¶ 106; see also Marco Equip., Inc.; Scientific Supply Co., 70 Comp. Gen. 219 (1991), 91-1 CPD ¶ 107.

Here, the agency does not state that acceptance of Legare's bid, as submitted, would not satisfy its actual requirements, and has made no attempt to show that the Legare bid was front-loaded to any degree that would require its rejection. See, e.g., ACC Constr. Co., Inc., B-250688, Feb. 16, 1993, 93-1 CPD ¶ 142. In other words, the agency has not shown, and indeed the record does not suggest, that Legare's bid for the site and utility work does not reasonably represent its costs for the work, or that the price is too high for the work. Moreover, any cost to the government of having to pay Legare $13,300 earlier than it otherwise would, could not in any conceivable manner approach the additional $27,000 that it would have to pay under an award to DAR-CON. Thus, it is clear on this record that the government's needs will be met and that it will suffer no material adverse effect by acceptance of Legare's bid.

Similarly, acceptance of the protester's bid would not prejudice any other bidder. The $13,300 deviation gave Legare no advantage over other bidders since any interest Legare would earn on that sum (or save by not having to borrow it) would not provide a basis for its being able to submit a bid $27,000 lower than DAR-CON's.

Further, we do not find reasonable the agency's argument that had Legare complied with the 20-percent limitation, it would have bid a total price of $1,402,500 in order to receive the additional $13,300 (a total bid price which would have been higher than DAR-CON's). The agency assumes that Legare would add an additional $66,500 to its total bid price simply to receive the additional $13,300 for the site and utility work item. However, the agency does not challenge Legare's item prices or its total bid price as not reasonably reflecting the actual work requirements. Thus, under the circumstances, we consider it entirely unreasonable that Legare would have structured its bid as the agency assumes; rather, it is far more likely that Legare, had the firm realized that its item price for the site and utility work slightly exceeded the 20-percent price limitation, would have recalculated its individual item prices to comply with the 20-percent limitation without raising its total bid price.

Accordingly, the rejection of the firm's bid was improper. Therefore, we are recommending that the DAR-CON contract be terminated for convenience and that award be made to Legare.

Moretrench Envtl. Servs., Inc., B-248326.2, Sept. 10, 1992, 92-2 CPD ¶ 162. We also find that Legare should be awarded the expenses it incurred in pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d).

The protest is sustained.

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Captain Raymond F. Heath, USAF - Request for Review of Indebtedness

File: B-256663

Date: November 9, 1994

DIGEST

A member was ordered to perform temporary duty (TDY) away from his permanent duty station. Initially, he travelled under blanket TDY orders which provided for payment of per diem. While the member was on TDY, court-martial charges were preferred against him. He continued to perform military duties except on days when he attended the court-martial. Six months after the blanket TDY orders expired, but while the member was still on TDY, retroactive orders were issued altering the stated purpose of the member's travel to indicate that the travel was to attend his court-martial. The contention that his travel under the revised travel order was "disciplinary travel" for which payment of per diem would be prohibited is incorrect for two reasons. First, the member continued to performed military duty during the period in question. Second, retroactive travel orders cannot operate to decrease a member's entitlements because the entitlements vest when the travel is performed. In this case, payment of per diem for meals and incidental expenses is proper for periods during which the member performed military duties away from his permanent duty station. Payment is not proper for days on which he attended his court-martial.

DECISION

We have been asked to review the debt assessed against Captain Raymond F. Heath, USAF. The debt was assessed to recover advance payments of per diem made to Captain Heath while an investigation into alleged misconduct on his part was underway. Captain Heath was paid per diem under temporary duty (TDY) orders in effect for a portion of the period in question. He continued to be paid per diem under a revised order which extended his temporary duty through the conclusion of his court-martial. Because the record indicates that (a) Captain Heath was in a TDY status away from his permanent station for the entire period involved, and (b) he was performing military duty except for days when he returned to his permanent station and days when he participated in the court-martial proceeding, he should be allowed per diem for the entire period. This amount should be

reduced by any per diem he received while he was either at his permanent duty station or attending the court-martial. Accordingly, his debt is limited to any per diem paid to him during periods when he was at his permanent duty station or attending court-martial.

Captain Heath was commander of the Contingency Hospital at Donaueschingen, Germany. He was assigned to new duties at Ramstein, Germany, in February 1990 on TDY with the 377th Services Squadron when an investigation of his conduct at Donaueschingen was initiated. Captain Heath travelled to Ramstein on blanket TDY orders that had been issued in October 1989. At Ramstein he performed his assigned duties and received high performance ratings. In April 1990 Captain Heath was relieved of command at Donaueschingen. His duties at Ramstein continued unchanged.

Following his refusal to accept a non-judicial punishment proceeding, court-martial charges were preferred against Captain Heath in June 1990 and were referred to a general court-martial in August 1990. Trial proceedings began in October 1990 and were completed in February 1991. Captain Heath was found guilty of one of the charges, and the findings were approved July 11, 1991. He continued to perform his assigned duties at Ramstein throughout the period of the court-martial except for days when his attendance was required for the court-martial. Captain Heath states that he returned to Donaueschingen on July 29, 1991. He departed Germany under permanent change of station orders to Sheppard Air Force Base, Texas, in August 1991.

The blanket TDY orders under which Captain Heath travelled to Ramstein in February 1990 expired September 30, 1990. Air Force messages regarding his situation indicate that Air Force personnel in authority were aware that he continued on TDY at Ramstein after that date. While confirmatory orders to extend his TDY should have been issued by October 1, 1990, no such orders were issued until March 21, 1991. On that date retroactive orders were issued initially to cover the period from October 1990 through March 28, 1991, but later extended until the conclusion of the court-martial. Those orders stated that the purpose of Captain Heath's TDY was to attend his court-martial. The revised order did not specify that Captain Heath was not entitled to per diem.

Captain Heath's family was living in Ramstein at the time he was ordered there for TDY. He lived with his family while on TDY and therefore claimed per diem only for meals and incidental expenses, with the exception of periods of duty away from Ramstein. He received payments of per diem and travel allowances periodically while on TDY, including one payment of $7,950 in May 1991. The Air Force computed the total he received as $10,723.42.

The Air Force administrative report on this matter, dated February 23, 1993, recommends denial of Captain Heath's request to be relieved of the debt, citing JFTR Vol 1 U7450, which states, "when a member is ordered to perform travel for the purpose of disciplinary action...payment of...per diem allowances is not authorized." The report references the travel order "dated March 22, 1991, with an effective date of October 1, 1990, to attend court-martial proceedings." It acknowledges that neither this travel order nor others for Captain Heath listed in the report stated that per diem should not be paid, and notes that the Air Force proceeded to make per diem payments to Captain Heath as claimed.

It is a long-standing rule that travel orders cannot be amended retroactively to increase or decrease a member's entitlement to travel and transportation allowances because his entitlements under the orders vest at the time of travel. See Warrant Officer John W. Snapp, USMC, 63 Comp. Gen. 4 (1983).

If a member's travel is "disciplinary," the JFTR cited by the report applies. Paragraph U7450 of Volume 1 of the Joint Federal Travel Regulations (JFTR) indicates that a member on "disciplinary travel" is entitled only to limited reimbursement for travel. Per diem is not payable. If the member travels by privately owned conveyance, he is entitled to reimbursement only for oil and gas. If meals are not provided to him, he is entitled to reimbursement for them, but only up to a limited amount. Our decisions B-170827, Oct. 12, 1970, and B-176654, Apr. 11, 1973, dealt with members who were called to attend their courts-martial. We treated their travel as disciplinary travel and therefore allowed reimbursement only as set out in the 1 JFTR para. U7450.

However, the record in this case presents a distinct set of facts. Here, the member was granted TDY status for the purpose of performing an ongoing set of military duties. The record indicates he continued to perform those duties during the period his conduct was being investigated and through the subsequent stages of the proceedings against him. The record does not suggest he was relieved of these duties except for temporary periods to attend a court-martial and to return to his permanent duty station. These facts are not altered by the Air Force's attempt to re-characterize them retroactively.

The February 1990 letter Captain Heath received assigning him to Ramstein for TDY did not make reference to travel orders. Captain Heath states that he was instructed to travel under his pre-existing blanket TDY orders. This is in accord with the record before us, because other travel orders were not issued at that time and because subsequent Air Force messages refer to the need to issue confirmatory orders when his blanket TDY orders expired on September 30, 1990. Captain Heath performed military duties and conducted public business for the duration of his stay in Ramstein except for the days of his court-martial.

Captain Heath's situation is different from that of the member in our decision B-170827, supra. In that decision we denied payment of per diem because the member travelled to attend his court-martial and not to perform public business. In contrast, Captain Heath was in travel status to perform public business and is therefore entitled to per diem except while actually attending his court-martial.

Captain Heath's entitlement to per diem initially vested when he travelled to Ramstein. The TDY orders under which he travelled were general in nature and authorized per diem. This status was not changed by the confirmatory travel orders issued on March 21, 1991. These orders did not specify that Captain Heath was not entitled to per diem, and while the orders referred to court-martial proceedings, we must presume that there was also intent to continue his original status--that is, performing public business at Ramstein. The record indicates that he indeed continued to perform military duties at Ramstein until July 1991.

Furthermore his relief from command in April 1990 did not change his entitlement since he continued to perform military duties at Ramstein and his permanent station was not changed.

Accordingly Captain Heath is entitled to per diem for meals and incidental expenses for the time he spent in Ramstein performing military duties. He is not entitled to per diem for the days he spent at his court-martial or for brief periods when he returned to his permanent duty station. His entitlement should be calculated on this basis.

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

406411

Decision

Matter of: Deborah Bass Associates

File: B-257958

Date: November 9, 1994

Deborah Bass for the protester.
Terrence J. Tychan, Department of Health and Human Services, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against agency decision to reject proposal is denied where record shows that agency reasonably evaluated protester's proposal in accordance with the evaluation criteria set forth in the solicitation.

2. Contracting agency's decision not to hold discussions or request best and final offers under solicitation issued pursuant to Small Business Innovation Research (SBIR) Program is unobjectionable since the Small Business Administration--the agency charged with implementing the SBIR Program--recognizes broad discretion of procuring agencies to promote small business participation in the program by streamlining procurement procedures, simplifying the operation of their SBIR Programs, and minimizing the regulatory and administrative burdens on offerors; and the procuring agency's decision constitutes a reasonable exercise of that discretion.

DECISION

Deborah Bass Associates (DBA) protests the award of a contract to Technical Assistance and Training Corporation (TATC) under solicitation No. ACF-94-1, issued by the Department of Health and Human Services (HHS) for research into several topics, including Topic ACYF 94-02, to design strategies to improve relationships between state and county child protective services (CPS) officials and the news media. The protester contends that the agency's evaluation of DBA's proposal was flawed and that the agency improperly failed to conduct discussions with DBA.

We deny the protest.

The solicitation was issued under the Small Business Innovation Research (SBIR) Program. The SBIR Program was established under the Small Business Innovation Development Act (Innovation Act), 15 U.S.C. § 638 (1988 and Supp. V 1993), which requires federal agencies to reserve a portion of their research efforts in order to award "funding agreements," in the form of contracts, grants, or cooperative agreements, to small businesses based upon the evaluation of proposals submitted in response to solicitations issued pursuant to the Innovation Act.

Under Topic ACYF 94-02, the solicitation requested proposals for phase I of a two-phase project for the research and development of materials to assist representatives of state and county CPS agencies build better relationships with their local media. In preparing proposals, offerors were required to follow a specific format outlined in the solicitation. The outline consisted of 10 main elements under which offerors were to discuss various topics related to the proposed research. The solicitation explained that 9 of the 10 main elements would be divided into 4 groups and each group would be rated under the evaluation criteria listed in the solicitation, as follows: soundness and technical merit of the proposed research (35 points); qualifications of proposed principal investigator/project director, supporting staff, and consultants (30 points); potential of the proposed research for technological innovation and commercialization (25 points); and adequacy and suitability of the facilities and research environment (10 points). The tenth element would be considered but not numerically rated; costs would be evaluated for realism.

Technical proposals were to be evaluated by a panel of experts selected for their competence in their fields. The panel would evaluate proposals for technical merit; provide ratings in accordance with the evaluation criteria announced in the solicitation; make specific recommendations related to the scope, direction, and/or conduct of the proposed research; and recommend the award of a contract to the offeror whose proposal demonstrated the most promising technical and scientific approach. The solicitation contemplated the award of a fixed-price, 6-month contract.

Of the 250 firms solicited, 11, including the protester and the awardee, submitted proposals addressing Topic ACYF 94-02. The panel evaluated proposals by assigning numerical scores under each of the four evaluation criteria announced in the solicitation and calculating a total average score for each proposal. Final average scores ranged from 12.25 to 89.75 points (out of a maximum possible score of 100 points); DBA's proposal earned 84 points, while TATC's proposal earned the highest score of 89.75 points. DBA's total price was $99,849; TATC's price was $99,961. Based on

these results, the evaluation panel unanimously recommended award to TATC without conducting discussions with any offeror. Agreeing with that recommendation, the agency awarded a contract to TATC on June 23, 1994. Following a debriefing by HHS, DBA filed this protest in our Office.

Since agencies have broad discretion to determine which proposals will be funded under the SBIR Program, our review in these cases is limited to determining whether the agency violated any applicable regulations or solicitation provisions and whether the agency acted fraudulently or in bad faith. Noise Cancellation Technologies, Inc., B-246476; B-246476.2, Mar. 9, 1992, 92-1 CPD ¶ 269. Here, the protester does not allege that the agency acted fraudulently or in bad faith. Rather, DBA argues that its proposal should have received a higher rating because the agency failed to properly apply the evaluation criteria, and that the agency should have held discussions before making a final selection.

Evaluation of DBA's Proposal

The solicitation contemplated that at the completion of phase I, the contractor would deliver a product consisting of a comprehensive training and technical assistance package, including materials and models, targeted at state or county CPS directors and their staff. The solicitation specifically required that the deliverables have the effect of promoting dialogue at the local, state, and county levels between CPS officials and the local media, to "educate one another and open lines of communications," and that operational models be transferable to address different state and county situations.

DBA did not propose to deliver the contemplated product at the completion of phase I. Rather, during phase I of the project DBA proposed to only "gather information to recommend content and format for comprehensive training and technical assistance products that will be produced in phase II" of the project. DBA also represented in its proposal that a final report at the completion of phase I would include "options." The evaluation panel concluded that DBA apparently considered the deliverable products required at the completion of phase I to consist of "options," with actual delivery to be at a later time. The evaluators concluded that DBA either had misunderstood the requirements and goals of phase I, or that the firm could not deliver the required product within the contract period.

In addition, the panel found that DBA's research design was inconsistent with the goals of the project because it did not include a close working relationship with state and local CPS officials. In view of the solicitation

requirements, we believe that the evaluators reasonably downgraded DBA's proposal under the most important evaluation criterion, soundness and technical merit of the proposed research (worth a total of 35 points), awarding the protester's proposal an average score of 28.5 points under that criterion.

The evaluation panel also found DBA's marketing experience--an area related to the firm's ability to distribute critical information to the targeted CPS populations--weak, and found that DBA had no firm commitment from one of several consultants DBA proposed to work on the project. These weaknesses reasonably led the panel to downgrade DBA's score under "qualifications of proposed principal investigator/project director, supporting staff, and consultants" (worth a maximum of 30 points). DBA's proposal earned an average score of 28.5 points in this area.

While the protester disagrees with the evaluators' conclusions regarding its proposal and asserts that its proposal should have received a higher score, DBA has not provided any basis to establish that its proposal evaluation was unreasonable or inconsistent with the solicitation's evaluation criteria.

Discussions

DBA argues that since there were fewer than six technical points separating its proposal and the awardee's, the agency should have established a competitive range; conducted discussions with offerors whose proposals were included within the competitive range; and requested best and final offers (BAFO), before making a final selection decision. We disagree.

The protester incorrectly assumes that the closeness in final scores indicates that the agency considered DBA's proposal essentially equal to the awardee's proposal. When technical proposals are point-scored, the closeness of the scores does not necessarily indicate that the proposals are essentially equal. See Training and Management Resources, Inc., B-220965, Mar. 12, 1986, 86-1 CPD ¶ 244; Moorman's Travel Serv., Inc.--Recon., B-219728.2, Dec. 10, 1985, 85-2 CPD ¶ 643 (proposals were not considered equal despite difference of only .5 points on a 100-point scale). In other words, we do not rely on a mechanistic view of the numbers themselves. See JJH, Inc., B-247535.2, Sept. 17, 1992, 92-2 CPD ¶ 185. Rather, point scores are only guides to intelligent decision-making by source selection officials. What matters is the actual significance of the scores, i.e., the actual differences between the proposals. The significance of the difference in the technical merit of proposals is essentially a matter for the judgment of the

agency evaluators to which we will object only if it is without reasonable basis. See Systran Corp., B-228562; B-228562.2, Feb. 29, 1988, 88-1 CPD ¶ 206.

Here, the record shows that the evaluation panel considered the weaknesses in DBA's proposal rendered its research design inferior to the awardee's. In exercising its technical judgment, the evaluation panel concluded that because of these weaknesses, the protester's approach had less potential and offered lower expectation of promising results than the awardee's proposal. As a result, the panel unanimously concluded that DBA's proposed research was not worth funding. Notwithstanding the closeness of final average scores, the record establishes that the evaluation panel reasonably found DBA's proposal inferior to the awardee's.

DBA also contends that the agency was required to establish a competitive range, hold discussions, and request BAFOs. In 1982, Congress enacted the Innovation Act, amending the Small Business Act, to stimulate technological innovation by encouraging increased participation of small businesses in federal research and development efforts. 15 U.S.C. § 638. Recognizing that promoting participation of small business concerns in federal research and development programs would require a unique program especially designed to accommodate the particular needs of highly qualified, small businesses, Congress required that

> "[t]he Small Business Administration, after consultation with the Administrator of the Office of Federal Procurement Policy, the Director of the Office of Science and Technology Policy, and the Intergovernmental Affairs Division of the Office of Management and Budget, shall . . . issue policy directives for the general conduct of the SBIR programs within the [f]ederal [g]overnment, including providing for--
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> "(1) simplified, standardized, and timely SBIR solicitations;
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> . . . . .
>
> (4) minimizing [the] regulatory burden associated with participation in the SBIR program for the small business concern which will stimulate the cost-effective conduct of [f]ederal research and development and the likelihood of commercialization of the results of research and development conducted under the SBIR program . . . ." (15 U.S.C. § 638(j)).

Under this mandate, the Small Business Administration (SBA) issued a policy directive which provides guidance to participating agencies for conducting their respective SBIR Programs.[1] As explained in that directive, SBA interprets the statutory requirements concerning the SBIR Program as being aimed at assisting small business concerns by establishing a uniform, simplified process for the operation of SBIR Programs, while allowing participating agencies flexibility in the content and operation of their individual SBIR Programs.[2]

One of the main objectives of SBA's policy directive is to "simplify and standardize application of existing regulations related to the program." SBA states in the directive that "[t]he explicit nature of the SBIR legislation concerning certain recognized acquisition procedures provides a strong base of authority for streamlining the process for obtaining [research and development] from small highly innovative business concerns." While the directive encourages agencies to use a standard review process in evaluating and selecting proposals to be funded through the Program, the directive also allows agencies to use simplified procedures, and invites them to minimize the regulatory and administrative burdens of participating in the SBIR Program. SBA thus recognizes broad discretion in agencies in operating their SBIR Programs, with a view towards making participation by small business concerns a streamlined, economically feasible process.

We think that the agency's decision here to not establish a competitive range or conduct discussions before selecting TATC's proposal for funding constitutes a reasonable exercise of that discretion. In view of SBA's encouragement to use simplified evaluation and selection procedures, and to minimize the administrative and regulatory burdens of

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[1]U.S. Small Business Administration, Office of Innovation Research and Technology, Policy Directive, Small Business Innovation Research (SBIR) Program (1993).

[2]Since SBA is charged with effectuating the congressional policies expressed in the Small Business Act, its interpretation and implementation of that law, including the amendments resulting from the Innovation Act, are accorded significant weight. See CADCOM, Inc., 57 Comp. Gen. 290 (1978), 78-1 CPD ¶ 137. Accordingly, SBA's SBIR Program policy directive carries significant weight with respect to the governance of SBIR Programs. See Department of Health & Human Servs. payment of profits to small businesses awarded grants under the Small Business Innovation Development Act, 71 Comp. Gen. 310 (1992).

participating in the SBIR Program, HHS reasonably considered that because of the significant differences between DBA's and TATC's proposed approaches, establishing a competitive range, holding discussions, and requesting BAFOs was not necessary.[3] In our view, to accept DBA's argument that agencies are required, in every case where they seek proposals under the SBIR Program, to convene a panel of experts to evaluate the merits of proposed research designs and technical solutions; establish a competitive range; conduct discussions; request BAFOs; and reevaluate proposals based on BAFOs in order to select a research project worth funding would impose administrative and regulatory burdens on participating agencies and small businesses that are inconsistent with the stated goals and objectives of the SBIR Program.[4]

The protest is denied.

Paul Lieberman
for Robert P. Murphy
Acting General Counsel

[3]Although the panel recommended that before awarding a contract, the agency should discuss certain points in TATC's proposal, the agency reports that it did not hold such discussions with TATC, or with any other offeror.

[4]SBA agrees with our conclusion. Specifically, SBA agrees that the SBIR Program policy directive does not require agencies to conduct discussions prior to selecting a proposal under the Program, and has informed us that to require agencies to conduct discussions in these cases would "probably exceed [SBA's] authority" under the statutes authorizing the Program.

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Panama Canal Commission - Frequent Flyer Benefits - Commingling of Accounts

File: B-257525

Date: November 30, 1994

DIGEST

1. Self-sustaining status of Panama Canal Commission does not provide basis for exception to long-standing rule that a federal employee is required to account for any gift, gratuity, or benefit received from a private source incident to the performance of official duty. Therefore, any payments or benefits tendered to the Commission's employees are viewed as having been received on behalf of the government. Bonus coupons, tickets, and credits received by Commission's employees as a result of travel paid for by the Commission from its revolving fund are the property of the government and must be turned in to the appropriate agency official.

2. Employees who participate in a frequent flyer program should maintain separate accounts for personal travel and official travel if permitted by the airline. If, however, the airline permits only one account per customer, the employee does not forfeit the right to use personal credits for personal travel, provided that the employee keeps adequate records which clearly separate personal travel from official travel so that the employee can clearly document that the credits used for personal travel were earned on personal travel and not on official travel.

DECISION

This decision is in response to a request from the Administrator, Panama Canal Commission, concerning the use of frequent flyer program credits by employees of the Panama Canal Commission. The issue presented is whether the total mileage credits in the mixed frequent flyer accounts[1] of employees of the Panama Canal Commission become the sole property of the Commission. For the reasons that follow, Commission employees who use mileage credits obtained through official

[1]Mixed frequent flyer accounts consist of bonus mileage points or credits earned through both personal and official government travel.

travel for their personal travel are liable for the full value of the benefits used. Employees can maintain a mixed account for mileage credits without forfeiting thei right to use their personal credits, provided adequate records are kept clearly differentiating between credits earned on personal travel and credits earned on official travel.

BACKGROUND

The questions we are considering arose because of a report issued by the Commission's Inspector General which determined that a number of current and former Commission employees used bonus credits that were earned through both personal and official government travel for their personal use. The Administrator states that he is aware of the well-settled rule that a federal employee is required to account for any gift, gratuity, or benefit received from a private source incident to the performance of official duty, and that any payments tendered to the employee are viewed as having been received on behalf of the government. The Administrator cites John D. McLaurin, 63 Comp. Gen. 233 (1984), holding that promotional gifts received pursuant to official travel are the property of the government, and that, if an employee uses mileage credits earned through both personal and official travel, he or she is liable for their full value. See, also, Discount Coupons, 63 Comp. Gen. 229 (1984); Federal Travel Regulation (FTR), 41 C.F.R. § 301-1.103(f)(1) (1993).

The Administrator requests that, at least as to the Panama Canal Commission, the McLaurin rule be reexamined in view of the fiscal structure of the Commission and its traditional policy of encouraging employees based in Panama to plan their leave in the United States to coincide with official travel there.

In particular, the Administrator states that the Canal enterprise is wholly self-sustaining, i.e., it must operate entirely from revenues which it generates and at no cost to the American taxpayer. The Panama Canal Act was amended in 1988 to convert the Commission from an appropriated fund agency to one which operates from a revolving fund, but the Administrator states that the self-sustaining concept remains in effect. See, 22 U.S.C. § 3712 (1988). Because of its self-sustaining status, the Administrator believes that the general rules pertaining to the prohibition against personal use of bonus mileage credits should have no application to the Commission.

Coupled with the foregoing, the Administrator also refers to the Commission's long-standing policy of encouraging its employees to schedule leave in the United States in conjunction with official travel. He explains that fewer than 700 of the Commission's 7400 permanent employees have rights to home leave travel every year or every 2 years. In order to keep the cost of home leave travel as low as possible, eligible U.S. citizens are encouraged to schedule their home leave in

conjunction with training or other official travel to the United States. While they are on home leave or other official travel, many employees travel by air at their own expense to various locations within the United States. Consequently, virtually all of those employees who participate in frequent flyer programs have mixed accounts, i.e., accounts in which personal miles and official miles are commingled. The Administrator has furnished us with several examples of mixed accounts and their personal use as follows:

Examples of Personal Use of Frequent-Flyer Mileage Points in Mixed Accounts

EXAM-PLES	DATE	PERSONAL MILES	GOVERN-MENT MILES	WITHDRAWAL FOR PERSONAL USE	USE
A	February 1986	29,502	165,815	15,000	Marriott Hotel Vacation Plan
B	February 1988	34,752	271,948	25,000	1 Coach Class ticket: U.S.-Central America
C	July 1989	20,758	351,793	35,000	1 Coach Class ticket: U.S.-Central America
D	January 1991	102,080	77,289	170,000	2 First Class tickets: U.S.-South Pacific

The Administrator is concerned that under the McLaurin rule all of the mileage accumulated in those mixed accounts may be considered government property. He submits that such a result would be unwarranted and that the application of the rule to Commission employees is unduly harsh and counterproductive to U.S. interests.

OPINION

While the Commission is financially self-sustaining, the rules governing expenditures of appropriated funds generally apply to the Commission. The Commission's receipts are paid into a revolving fund in accordance with 22 U.S.C. § 3712 (1988). Revolving funds, including that of the Panama Canal Commission, are appropriated funds and the legal principles governing appropriations also apply to revolving

funds. Edgar T. Callahan, 63 Comp. Gen. 31 (1983); 35 Comp. Gen. 436 (1956); B-204078.2, May 6, 1988. Thus, bonus coupons, tickets, and credits received by a Commission employee as a result of trips paid for, in whole or in part, by Commission funds are the property of the Commission. Michael Farbman, et al., 67 Comp. Gen. 79 (1987); Department of Energy, B-233388, Mar. 23, 1990; Presidential Exchange Executives, B-238759, Apr. 13, 1990.

Moreover, in our view, the need for Commission employees to return periodically to the United States for business and leave does not provide a reasonable basis for an exception to the basic rule. There are many similarly situated agencies whose employees travel frequently both inside and outside the continental United States. Since the official travel expenses of the Panama Canal Commission's employees are paid for out of appropriated funds, these employees may not personally retain and use the frequent flyer mileage credits received as a result of official travel.

We recognize that many airlines permit their customers to maintain only one frequent flyer account[2] and that employees are concerned that they may lose the benefit of credits earned from personal travel once those credits are commingled with those earned from official travel. If adequate records clearly distinguish mileage credits earned on personal travel from those obtained through official travel, we know of no reason why employees are not free to make use of those personal mileage credits.[3] Of course, employees who participate in a frequent flyer program should maintain separate accounts for personal travel and official travel if permitted by the airline.[4] If, however, the airline permits only one account per customer, the employee does not forfeit the right to use personal credits, provided that the employee retains account records and supporting documentation which establish the credits attributable to personal travel and official travel, respectively. The burden of proof is on the employee to show that credits used for personal reasons do not exceed those earned through personal travel. The employees in

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[2]Our most recent information is that only four airlines allow members to have separate accounts, namely Alaska Airlines, Northwest, TWA, and USAIR. Also, Continental Airlines allows only one account, but permits business and personal travel to be separately recorded.

[3]We also recognize that employees may earn mileage credits by using certain credit cards for personal purchases or by other means. The same rule applies to these credits, i.e., the employee may keep those credits for personal use if he or she has adequate records to show that they were derived from personal funds.

[4]The provision in the FTR, 41 C.F.R. § 301-1.103(f)(1) (1993), which provides that employees should maintain separate frequent traveler accounts, is not applicable where the airline does not permit separate accounts.

Examples A and B above[5] who used only personal mileage credits for personal travel would not be liable to the Commission if they can produce records which establish that they earned those credits on personal trips.

This decision does not change the basic principle that official mileage credits may only be used for official business, as established by our prior decisions in Michael Farbman, et al.; John D. McLaurin; Department of Energy, supra; and similar decisions. Therefore, the employees in Examples C and D, who used government credits for their personal travel, are liable for the full value of the benefits used.

Comptroller General
of the United States

[5]See chart, above.

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