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Comptroller General
of the United States

Washington, D.C. 20548

950238

Decision

Matter of: SSI Services, Incorporated

File: B-254269.2; B-254269.3

Date: September 2, 1994

Alan M. Grayson, Esq., and Hugh J. Hurwitz, Esq., for the protester.
Kathleen C. Little, Esq., and Nancy L. Boughton, Esq., Howrey & Simon, for Johnson Controls World Services Inc.; William A. Royal for Harbert Yeargin Inc., interested parties.
Riggs L. Wilks, Jr., Esq., and Gerald P. Kohns, Esq., Department of the Army, for the agency.
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency fulfilled its responsibility to conduct meaningful discussions concerning cost issues by advising protester that its proposal had not followed collective bargaining agreement or Department of Labor rates for all job classifications.

2. Protester asserting that award should be made on the basis of the low-cost, technically acceptable proposal is not an interested party to challenge the award to an offeror who submitted a technically superior, higher-cost proposal where another offeror with a technically acceptable proposal, and a lower cost than the protester, would be in line for award under the protester's rationale.

DECISION

SSI Services, Incorporated protests the award of a contract to Johnson Controls World Services Inc. under request for proposals (RFP) No. DABT02-92-R-0009, issued by the Department of the Army for operation and maintenance of housing services at Fort McClellan, Alabama. SSI argues that it was denied meaningful discussions and challenges both the cost evaluation and the award decision.

We deny the protest.

The RFP contemplated the award of a cost-plus-award-fee contract to provide all services, materials, labor, and equipment to operate, maintain, repair, and construct real property facilities and provide specified related services. The contract term encompassed a 15-month phase-in and base period with 5 option years. Offerors were required to submit technical, management, and cost proposals. The RFP stated that award could be made to other than the lowest-cost offeror and would be made to the offeror whose technically acceptable proposal was most advantageous (best overall) to the government, cost and other specified factors considered. The RFP also advised that award would be made to the technically acceptable offeror with "the most realistic, most probable cost estimate."

Proposals were to be evaluated in the areas of technical acceptability, cost, and management strength, with technical acceptability and cost of approximately equal importance and more important than managerial strength. The RFP provided that cost proposals would be subject to a cost realism evaluation in order for the government to determine each offeror's understanding of the requirement and its ability to organize and perform the contract. The most probable cost (MPC) for each proposal would be established and used in determining the best overall proposal. The cost factor was made up of seven subfactors, listed in descending order of relevance: cost realism, cost variance, cost control experience, fee structure, cost allocation, balance of proposed cost, and offeror's total estimated contract cost.

Nine offerors, including SSI and Johnson, submitted proposals by the July 30, 1993, closing date. After initial review of the proposals, a competitive range of four proposals was established. The agency then conducted oral and written discussions with offerors whose proposals were found to be in the competitive range. At the conclusion of discussions, each offeror submitted a best and final offer (BAFO). In evaluating the BAFOs, the agency calculated each offeror's MPC by adjusting the proposed costs to correct any existing cost deficiencies. The final evaluation resulted in the following scores and MPCs:

Offeror	Johnson	A	SSI	B
Technical	549	401	375	360
Cost	192	142	178	138
Managerial	327	308	282	295
	1068	851	835	793
MPC	$29.3M	$28.4M	$28.9M	$32.1M

All proposals were evaluated as technically acceptable and the evaluators recommended award to Johnson based on its technically superior proposal that showed a much better understanding of the requirements of the RFP. The evaluators also found that Johnson's management approach reflected the most appropriate staffing levels, labor mix, and staffing rationale. Johnson's proposed costs also were the most realistic, having the least variance between BAFO cost and MPC (0.39 percent).[1] SSI's MPC was lower than Johnson's by approximately $338,000, but its proposal received the lowest technical-management score, was ranked third in cost realism, and had the largest cost variance (3.97 percent). The source selection authority agreed with the evaluators' recommendation and found that Johnson offered the best overall proposal. The Army awarded the contract to Johnson on April 26, 1994. After receiving a debriefing, SSI filed this protest arguing that meaningful discussions were not conducted and challenging the cost evaluation and the award decision.

SSI first contends that the agency failed to conduct meaningful discussions with it regarding SSI's use of incorrect wage rates for various personnel categories. While SSI does not generally challenge the adjustments to its cost proposal, it maintains that it was prejudiced by the agency's making the adjustments without discussing the matter with SSI and allowing it to make the necessary changes, since as a result of the agency's approach, SSI's proposal received a reduced score under the cost variance subfactor.[2]

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[1]The ranking for the cost variance subfactor was based on the difference between the MPC and BAFO costs of each proposal. The proposal with the least variance received the highest ranking.

[2]SSI does challenge as improper a $40,000 upward adjustment to resolve cost deficiencies in its subcontract proposal. SSI also argues that even if an adjustment were proper, the agency improperly failed to discuss the issue. The Army advised SSI in discussions that its subcontract narrative was not complete. When SSI corrected the narrative in its BAFO, the Army discovered various discrepancies between the worksheets and narrative amounting to approximately $40,000. Where, as here, an offeror's proposal revisions result in deficiencies, the agency is not obligated to reopen negotiations to allow their correction. Cajar Defense Support Co., B-239297, July 24, 1990, 90-2 CPD ¶ 76. In any event, the adjustment in question was less than .15 percent of SSI's BAFO. As such, it had an insignificant effect on the protester's evaluation standing--if the adjustment were

(continued...)

Generally, the requirement for discussions with offerors is satisfied by advising them of weaknesses, excesses, or deficiencies in their proposals and by affording them the opportunity to satisfy the government's requirements through the submission of revised proposals. Federal Acquisition Regulation § 15.610(c)(2) and (5); Miller Bldg. Corp., B-245488, Jan. 3, 1992, 92-1 CPD ¶ 21. The degree of specificity required in conducting discussions is not constant and is primarily a matter for the procuring agency to determine. JCI Envtl. Servs., B-250752.3, Apr. 7, 1993, 93-1 CPD ¶ 299. Our Office will not question an agency's judgment in this area unless it lacks a reasonable basis.

Here, during discussions with SSI, the Army gave the protester 10 written deficiency reports and 47 items for negotiation (IFN) regarding its proposal and discussed each. Three IFNs concerning labor, subcontracts, and other direct costs pointed out that SSI had not followed "the collective bargaining agreement or the Department of Labor [DOL] rates for all job classifications." The Army explained that it had noted inconsistencies in the wage rates proposed and wanted to ensure that SSI's proposed rates were accurate. In response to SSI's request for specific examples, the Army advised that most of the areas were proposed job classes that did not appear on the DOL or bargaining agreement schedules.[3]

In its BAFO, SSI made numerous corrections, but did not use the correct rate for an appliance repairer and two classes of painters. While SSI argues that the agency should have been more specific about the affected classifications, the record shows that SSI was made aware during discussions of the need to conform its rates to the appropriate schedules and simply failed to do so in all cases. In short, the record establishes that the discussions reasonably led the protester into the areas in its cost proposal which the

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[2](...continued)
reversed, SSI's proposal cost variance score would not be changed and its MPC would remain the second lowest of all offerors.

[3]SSI erroneously argues that the Army misled it by identifying "warehouseman," "overhead positions," and "salary positions," none of which encompasses the appliance repairer and painters which were the subject of the cost adjustment. While the transcript of oral discussions does reflect these examples, they were provided for the IFNs concerning subcontract and other direct costs. The Army found that SSI's BAFO response in these areas was adequate and no adjustments were necessary.

agency viewed as weaknesses. Having failed to ensure that all its rates were correct, SSI bears the responsibility for an increased cost variance score attributable to the Army's cost adjustment for the affected job classifications.[4]

SSI next challenges various aspects of the cost evaluation. None provides a basis for sustaining the protest. For example, SSI argues that the agency report is "silent" with regard to how the agency ranked each cost proposal in accordance with the seven subfactors and did not consider low cost as a factor. On the contrary, the agency report explains the basis for evaluation under each subfactor, the individual weights attributable to each subfactor, how proposals were ranked under each, and the numerical scores for each proposal. While there was no subfactor entitled "low cost" and the agency report erroneously suggests that low cost was not a factor, the evaluation record is clear that proposed low cost was evaluated under the subfactor "total estimated cost." SSI, with the second-lowest estimated cost, received the second-highest score for this subfactor.

SSI also argues that the cost evaluation was "tainted" with technical considerations as evidenced by the evaluators' identification of higher costs attributable to Johnson's use of extra equipment not required by the RFP. In SSI's view, it was inappropriate to consider technical issues in the cost evaluation. We find nothing objectionable about this approach; the cost impact of an offeror's technical proposal is an appropriate aspect of the cost evaluation. It is plain from the provisions of section M of the RFP that proposed costs are directly related to an offeror's understanding of the requirement and that the evaluation would be conducted with that relationship in mind. Here, the cost evaluators merely recognized that one reason for Johnson's higher costs was its proposal of additional equipment and, finding a potential for higher quality performance, did not delete the equipment's cost in calculating Johnson's MPC. Johnson did not receive a higher cost evaluation score as a result; its higher costs resulted in a lower score on the relevant subfactor. The cost evaluation establishes that whether or not these equipment costs are included, Johnson proposed the second-highest costs and received a lower cost-estimate score than did SSI. SSI also contends that it was prejudiced because it too

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[4]In this regard, the record indicates that the amount of upward adjustment attributable to incorrect wage rates ($1.80 per hour upward for one class and $.90 per hour downward for two others) was far less than that attributable to SSI's understatement of staffing (costs of five additional full-time employees for 6-plus years).

could have proposed additional equipment. Nothing in the RFP precluded such an approach had SSI elected to run the risk of a lower cost score.

Finally, SSI contends that the RFP requires that award be made to the technically acceptable, low MPC offeror; thus, it was improper to award to Johnson based on its technically superior, higher-cost proposal. We need not consider this allegation since SSI would not be in line for award even if this argument had merit. If the award basis were as asserted by the protester, offeror A, not SSI, would be in line for award. Offeror A was evaluated as technically acceptable (and in fact technically superior to SSI), and proposed a lower BAFO cost, and was evaluated with a lower MPC, than SSI. Since SSI would not be in line for award even if this aspect of its protest were sustained, this argument is academic, and we will not consider it. See General Offshore Corp., B-251969.5; B-251969.6, Apr. 8, 1994, 94-1 CPD ¶ 248.

The protest is denied.

Ronald Berger

for Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Equa Industries, Inc.

File: B-257197

Date: September 6, 1994

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
Lynne Georges, Esq., Defense Logistics Agency, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly restricted urgent competition for parkas for use in severe cold, wet weather to two manufacturers that had timely delivered an earlier version of the parka under previous contracts, where the agency reasonably believed those offerors were the only manufacturers that would have a high probability of delivering quality parkas in a timely manner.

2. Contracting officer's decision to exclude the protester from a competition for parkas urgently needed for use in severe cold, wet weather was proper where the contracting officer reasonably concluded that the protester's performance under three prior contracts for items of apparel was delinquent and, therefore, the protester could not be relied upon to meet the compressed delivery schedule in the present exigent situation.

DECISION

Equa Industries, Inc. protests the Defense Personnel Support Center's (DPSC) decision to exclude it from the competition under request for proposals (RFP) No. SP0100-94-R-0134 for extended cold weather clothing system parkas for use by the United States Army. We deny the protest.

The subject parka initially was designed to protect military troops in extreme cold weather environments. The major using service, the Army, wanted to use the parka in severe cold, wet weather and also wanted to use it as an everyday field coat. However, the parka did not provide sufficient

protection in severe wet weather, and it could not be worn on a daily basis because repeated washing caused leaking and fading. Therefore, at the request of the Army, the parka was redesigned and extensive testing conducted. In December 1993, the specifications for the basic cloth and the end item parka were rewritten. The Army approved the new specifications within 2 months and, in February 1994, requested that DPSC purchase 94,417 parkas to support its cold, wet weather operations in the following winter.

The contracting officer determined that the requirement for this redesigned parka was urgent and that accelerated procurement procedures would be appropriate. The contracting officer further determined that the competition should be limited to two previously successful manufacturers of the old parkas. Thus, on March 10, the present RFP was issued to Tennier Industries, Inc. and Tennessee Apparel Corporation only.

Both firms submitted initial proposals by the March 24 closing date, and DPSC conducted negotiations with both offerors. Equa learned of the impending contract award before best and final offers were received and asked the contracting officer whether it also would be allowed to compete. Upon receiving a negative reply, Equa protested to our Office. Best and final offers were received on May 16, and a contract awarded to Tennier Industries on June 14.

Equa contends that the contracting officer incorrectly determined that the urgent need for the new parkas justified DPSC's using accelerated procurement procedures and soliciting offers from only two firms. Equa asserts that there was sufficient time to complete the acquisition on a full and open competitive basis and that the length of time the agency waited before making the award shows that the urgency representation was insincere.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2) (1988); Federal Acquisition Regulation (FAR) § 6.302-2(a)(2). This authority is limited by the CICA provisions at 10 U.S.C. § 2304(e), which require agencies to request offers from as many sources as practicable. See FAR § 6.302-2(c)(2). An agency using the urgency exception may restrict competition to the firms it reasonably believes can perform the work promptly and properly, and we will object to the agency's determination

only where the decision lacks a reasonable basis. See Jay Dee Militarywear, Inc., B-243437, July 31, 1991, 91-2 CPD ¶ 105; Servrite Int'l, Ltd., B-236606, Dec. 6, 1989, 89-2 CPD ¶ 520. In this regard, we have recognized that a military agency's assertion that there is a critical need which impacts military operations carries considerable weight. Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579.

We are persuaded that the contracting officer's decision that the urgent need for new parkas justified the use of an expedited acquisition process was reasonable.[1]

The basic, undisputed facts known to the contracting officer at the time she decided that an accelerated procurement would be necessary were: (1) the old parkas were not satisfactory for the Army's severe, wet weather operations; (2) the number of parkas requested for this purchase (94,417 units) represents the minimum quantity needed by the Army for the following winter's operations; (3) the new parkas are critical to the health and safety of soldiers operating in cold, wet weather[2]; (4) there were no existing stocks of the new parka; and (5) the normal manufacturing lead time (i.e., from contract award to delivery of the first production units) is approximately 8 months. In view of the fact that the parka is critical to successful military operations and the health of soldiers, and because it would take so long after awarding a contract to receive deliveries, we do not find unreasonable the contracting officer's determination that the requirement was urgent and that the procurement process must be expedited.

We also do not agree with the protester that the length of time the agency waited before making the award shows that the agency's urgency representation was unreasonable. Upon receipt of a request to procure the parkas on an exigency basis, the contracting officer immediately conducted a market survey of the six firms that had manufactured and delivered the old parkas to DPSC in the past 2 years to ascertain which firms would have a high probability of delivering quality parkas in a timely manner. The contracting officer eliminated four firms, including Equa,

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[1]The reasonableness of the contracting officer's judgments must be considered in the context of the time when it was made and the information that was available to her at that time. Jay Dee Militarywear, Inc., supra.

[2]The Chief of DPSC's Field Clothing & Equipment Branch stated: "Unavailability of the item could lead to frostbite, hypothermia, sickness, personnel downtime, and possible death."

from consideration based upon prior delinquent deliveries or lack of capacity, leaving only two manufacturers, Tennier and Tennessee Apparel, to compete for the present contract. On February 23, 1994, after completing the market survey, the contracting officer signed a justification and approval (J&A) supporting her decision to restrict competition under the urgency exception to full and open competition, 10 U.S.C. § 2304(c)(2), to the two firms she believed could deliver the parkas in a timely manner. On March 10, even before the J&A was finally approved,[3] the contracting officer issued the RFP to the two offerors.

Between issuance of the RFP and award of the contract to Tennier Industries on June 14, the following activities occurred: (1) receipt of initial offers (March 24), (2) negotiations with offerors, (3) issuance of two amendments changing the specifications and further accelerating the delivery schedule (initial delivery 120 days after contract award), (4) filing of Equa's protest (May 4), (5) receipt of best and final offers (May 16), and (6) authorization to award the contract (pursuant to FAR § 33.104(b)(1)(i)) in the face of Equa's protest on the basis of urgent and compelling circumstances (June 9).

All of the above activities were consistent with the contracting officer's determination of urgency and the necessity for an expedited procurement process. The agency also points out that it saved additional procurement time by: (1) not advertising the procurement,[4] (2) using a 15-day rather than the normal 30-day response time for proposals,[5] and (3) not having to evaluate a larger number of technical proposals and avoiding the possibility that it would have had to conduct pre-award surveys on offerors that had been delinquent on previous contracts. In all, only 2 months elapsed between approval of the J&A supporting a limited competition and receipt of best and final offers. We also note that the additional month's delay after receiving best and final offers was due at least in part to Equa's filing the pre-award protest and the requirement that the award be withheld until authorization was received from the head of the contract activity.[6] Thus, it appears that the procurement was handled with all due dispatch and, in these circumstances, we cannot conclude, as the protester

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[3]The sixth and final approval authority actually signed the J&A on March 15, 1994.

[4]See FAR § 5.203(a).

[5]Id.

[6]See FAR § 33.104(b).

urges, that the length of time before awarding the contract indicates that DPSC's determination that the exigent situation required the use of expedited procedures was unreasonable. See Essex Electro Engineers, Inc., B-250437, Jan. 28, 1993, 93-1 CPD ¶ 74.

Equa also argues that, even if an accelerated procurement was justified, DPSC improperly excluded Equa from the competition. As a previous supplier of the old parkas, as well as other items of military apparel, Equa contends that it could have supplied the new parkas in a timely manner. The protester further contends that the contracting officer incorrectly determined that Equa was late under three prior clothing contracts with the agency. Equa argues that it either delivered the goods on time or that any late deliveries it made were excusable. Equa also argues that the contracting officer failed to consider any mitigating circumstances with regard to late deliveries and schedule extensions.

The agency argues that Equa made late deliveries under three previously awarded contracts. The agency reports that the present contracting officer examined the contract files and spoke with the other contracting officers before determining that Equa's performance was poor under the three prior contracts and that Equa's late deliveries were inexcusable. Thus, the agency reports that the contracting officer decided not to allow Equa to compete for the present urgent requirement because she could not reasonably conclude that Equa would meet the present RFP's delivery schedule.

The question of whether Equa's late deliveries were excusable is a matter of contract administration and therefore is not for resolution under our Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(1) (1994); see E. Huttenbauer & Son, Inc., B-252320.2; B-252320.3, June 29, 1993, 93-1 CPD ¶ 499. Our review is limited to considering whether the contracting officer's determination not to solicit the firm was reasonable based on the information available at the time. Id. We believe the contracting officer's determination was reasonable.

Two of the contracts reviewed by the contracting officer were for coveralls. Under the more recent contract (No. DLA100-94-C-0406) the record shows that the contract was modified to extend the delivery schedule by 30 days on two occasions. Equa and the contracting officer appear to agree that a major cause of the performance delays was the failure of a sole source supplier to provide the fabric on schedule. Equa, therefore, asserts that the delay was not its fault and that its performance was on schedule once the two extensions were granted. However, the contracting officer contends that: (1) Equa was contractually

responsible for performance delays even if due to late deliveries by its fabric supplier; (2) Equa's performance delay and consequent delivery extensions were also due in part to Equa's transferring production operators from the coverall contract to another contract; and (3) Equa agreed in both contract modifications that the delays were not legally excusable.

The contracting officer also concluded that Equa's performance was inexcusably delinquent in delivering both basic and option quantities under an earlier coverall contract (No. DLA100-92-C-0352). For example, the present contracting officer's notes of her review of this contract show that Equa was more than 3 months late in delivering the last of the basic units. The present contracting officer's note of a conversation with the previous contracting officer indicates that the cause of the delay was that Equa again had problems obtaining the cloth to make the coveralls. However, the protester states that it was not delinquent; that the delivery delays were caused by late size changes ordered by the government; and that the contracting officer in that contract agreed to, but did not, extend the delivery schedule.

Regarding Equa's most recent contract (No. DLA100-92-C-4164) for the old version of the parka, the record again shows that Equa was late in making scheduled deliveries. The present contracting officer points out that the delivery schedule was extended twice, but that Equa's final delivery was still more than 4 months behind the revised schedule. The present contracting officer considered Equa's performance to be delinquent and the delays inexcusable. Equa argues that the delays were caused by the government in testing the parkas that were delivered. The contracting officer did consider the fact that some of the delays may have been caused by the government. However, the contracting officer points out that a large part of the late deliveries was due to Equa's problems with its fabric supplier and that two other parka manufacturers received their fabric from the same fabric supplier in a timely fashion. We note that Equa's own correspondence with DPSC regarding this contract shows that there was a leakage problem in one lot and that Equa was having a serious problem receiving fabric on time from its supplier.

We think the contracting officer's decision to not solicit Equa was reasonable in these circumstances. The record before the contracting officer showed that Equa had continual problems with its fabric supplier on three recent contracts. Regardless of whether the government extended the delivery schedule every time Equa requested an extension, Equa was unable to make deliveries in accord with the original--and in some cases with the revised--delivery

schedule. Whether the many delays experienced by Equa were excusable or not is not really relevant. What is relevant is the fact that Equa was late on all three contracts. In view of the Army's urgent need for parkas before winter, and the present procurement's compressed delivery schedule, we believe that the contracting officer's determination that Equa could not be relied upon to deliver the new parkas on time was rational. Based upon Equa's past performance problems, the contracting officer reasonably excluded Equa from the competition and decided to solicit the only two manufacturers that, based on their prior contract history of on-time delivery, could be expected to meet the exigent delivery schedule. See E. Huttenbauer & Son, Inc., supra; see also Hercules Aerospace Co., B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7.

The protest is denied.

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Mississippi State Department of Rehabilitation Services

File: B-250783.8

Date: September 7, 1994

Pamela J. Mazza, Esq., Piliero, Mazza & Pargament, for the protester.
Marcus A. Hart for Delta Food Service, an interested party.
Gregory H. Petkoff, Esq., Brenda Anna Juliette Paknik, Esq., and Wilbert Jones, Esq., Department of the Air Force, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by state licensing agency (SLA) for the blind alleging that agency has violated the terms of the Randolph-Sheppard Act in eliminating its proposal from the competitive range is dismissed; General Accounting Office will not consider protests from SLAs because arbitration procedures are provided for under the act, and decisions of the arbitration panel are binding on the parties involved.

DECISION

The Mississippi State Department of Rehabilitation Services (MSDRS) protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. F22600-92-R-0156, issued by the Department of the Air Force for full food services at Keesler Air Force Base. The protester argues that the elimination of its proposal contravened the Randolph-Sheppard Act (the act), 20 U.S.C. § 107 et seq. (1988).

We dismiss the protest.

The RFP, issued on an unrestricted basis, contemplated that award would be made to the firm submitting the lowest-priced, technically acceptable proposal, but also advised prospective offerors that the acquisition would be subject to the act, which provides a priority for blind vendors in the award of contracts for cafeteria operations; under the act's implementing regulations, 34 C.F.R. part 395 (1993),

if a designated state licensing agency (SLA)[1] submits an offer found to be within the competitive range for the acquisition, award must be made to the SLA.

In response to the solicitation, the Air Force received numerous offers, including one from MSDRS, an SLA. After an initial evaluation, the agency determined that 15 offerors, including MSDRS, had submitted proposals within the initial competitive range. The agency then engaged in discussions and made a second competitive range determination. MSDRS' offer was found to be outside the competitive range in this determination for two reasons: (1) the agency found that MSDRS had not included adequate information in its proposal to show that it would use sighted employees only where reasonably necessary (an RFP requirement for the SLA offeror)[2]; and (2) its price was so high compared to the other competitive range proposal prices that it had no reasonable chance for award. After making this final competitive range determination, the Air Force solicited best and final offers from the firms remaining in the competitive range.

MSDRS protests that both reasons for eliminating its proposal from the competitive range--and thereby denying it the award--were improper under the act. Specifically, MSDRS contends that it was improper to reject its proposal on the basis that it failed to adequately show how it would maximize the use of blind employees, and on the basis that its price was too high.

The statute was enacted to promote uniformity of treatment of blind vendors by all federal agencies, establish consistent guidelines for all SLAs, establish administrative and judicial procedures to ensure fair treatment of blind

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[1]Under the act, the Secretary of Education receives and approves the applications of entities in each state to become the SLA responsible for selecting blind vendors to operate cafeterias and vending facilities on federal property, and to ensure that the vendors comply with the requirements of the act. When the Secretary approves an applicant, the entity becomes the designated SLA for the state.

[2]The RFP provides that the SLA must "adequately explain in [its] proposal how [it] will ensure that sighted employees or assistants are utilized only to the extent reasonably necessary." This RFP clause derives from a provision of Department of Defense Directive No. 1125.3, which requires the head of the cognizant Defense Department component to ensure that any blind vendors use sighted employees only to the extent reasonably necessary.

vendors, federal agencies and SLAs, and create stronger administrative and oversight powers in the agency responsible for carrying out the program. Pub. L. No. 93-651, § 201, 89 Stat. 2-3, 2-7 (1974), 20 U.S.C. § 107 note (1988). The act vests authority for administering and overseeing its requirements solely with the Secretary of Education, 20 U.S.C. § 107 et seq. Pursuant to this authority, the Secretary has promulgated comprehensive regulations addressing all aspects of the act's requirements. Among the matters covered by these regulations are such things as rules governing the relationship between the SLAs and blind vendors in each state, rules for becoming a designated SLA within the meaning of the act, procedures for oversight of the SLAs by the Secretary, and rules governing the relationship between the SLAs and all federal government agencies. 34 C.F.R. part 395.

The Secretary's authority under the act also includes conducting arbitration proceedings. In this regard, the statute provides, in relevant part, as follows:

> "Whenever any [SLA] determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of [the Act] or any regulations issued thereunder . . . such [SLA] may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute . . . and the decision of the panel shall be final and binding on the parties except as otherwise provided in this chapter."

20 U.S.C. § 107d-1(b). The panel's decision is final and binding on the parties. 20 U.S.C. § 107d-2; 34 C.F.R. § 395.37(b).[3]

Where, as here, Congress has vested exclusive oversight and decision-making authority in a particular federal official or agency, our Office will not consider protests involving issues which are properly for review by that official or

[3]The arbitration panel was envisioned by Congress as a mechanism to "provide a means by which aggrieved vendors and state agencies may obtain a final and satisfactory resolution of disputes." S. Rep. No. 937, 93d Cong., 2d Sess. 20 (1974).

agency.[4] For example, we do not review determinations by the Committee for Purchase from People Who are Blind or Severely Disabled to place particular items for purchase by the federal government on its procurement list under the authority of the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 46-48c (1988 and Supp. IV 1992). ARA Environmental Servs., Inc., B-254321, Aug. 23, 1993, 93-2 CPD ¶ 113. Similarly, we do not review responsibility determinations made by the Small Business Administration under the certificate of competency program pursuant to 15 U.S.C. § 637(b)(7) (1986), since that agency is vested with conclusive authority over such determinations. S&F Indus.--Recon., B-255134.2, Dec. 13, 1993, 93-2 CPD ¶ 314. Since the Secretary's

[4]MSDRS argues that it should not be required to use the arbitration procedure because the remedy under the procedure is inadequate in that the Secretary does not have authority to stay the award or performance of the contract. While this may be so, it does not warrant our considering this type of dispute in view of Congress' clear intent to vest authority to resolve disputes of this nature with the Secretary. In any event, the Secretary's authority under the act includes broad remedial powers, and he may also provide for expedited consideration of the dispute, thereby minimizing the impact of not having a stay of award or performance. Randolph-Sheppard Vendors of Am., et al. v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986).

authority extends to complaints by SLAs concerning an agency's compliance with the act,[5] we will not review MSDRS' protest.[6]

The protest is dismissed.

for Robert P. Murphy
Acting General Counsel

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[5]This interpretation is consistent with the views of the Secretary. When promulgating the regulations governing the arbitration procedures, the Secretary commented:

> "it is expected that when [an SLA] is dissatisfied with an action resulting from its submittal of a proposal for the operation of a cafeteria, it will exercise its option to file a complaint with the Secretary. . . ."

42 Fed. Reg. 15,809 (1977).

[6]MSDRS contends that because we previously took jurisdiction over this matter in our decision Department of the Air Force--Recon., 72 Comp. Gen. 241 (1993), 93-1 CPD ¶ 431, aff'd, Triple P Services, Inc.--Recon., B-250465.8; B-250783.4, Dec. 30, 1993, 93-2 CPD ¶ 347, we should consider this protest. However, our decision there was in response to a request, not by an SLA, but by the Air Force, several 8(a) small business protesters (the acquisition had previously been set aside under the Small Business Act's section 8(a) program) and the Small Business Administration. Since the arbitration procedure is available only to SLAs, our review there was appropriate.

Comptroller General
of the United States

Washington, D.C. 20548

114899

Decision

Matter of: Haworth, Inc.; Knoll North America, Inc.

File: B-256702.2; B-256702.3

Date: September 9, 1994

Timothy McGee for Haworth, Inc., and Bay Chamberlain for Knoll North America, Inc., the protesters.
Matt Hinueber for Herman Miller, Inc., an interested party.
Alden F. Abbott, Esq., and Kenneth A. Lechter, Esq., Department of Commerce, for the agency.
Charles W. Morrow, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests are sustained where the agency overstates its actual requirements in a request for quotations (RFQ) issued to mandatory Federal Supply Schedule vendors and makes award to a vendor whose products do not comply with the RFQ's stated requirements.

DECISION

Haworth, Inc. and Knoll North America, Inc. protest the issuance of a purchase order to Herman Miller, Inc. under request for quotations (RFQ) No. EASC-94-076, issued by the National Oceanic and Atmospheric Administration, Department of Commerce, to General Services Administration (GSA) mandatory Federal Supply Schedule (FSS) contractors for single system furniture workstations. Both Haworth and Knoll contend that Commerce improperly waived certain mandatory technical specifications in determining that Herman Miller's quoted furniture satisfied the agency's minimum needs, and that they would have offered less expensive products had they known of the agency's actual requirements. Knoll also contends that Haworth is not eligible to receive an award.

We sustain the protests.

Commerce determined its need for the system furniture based upon the design and layout work performed by a Haworth dealer. On August 4, 1993, Commerce initially requested quotations from five vendors, including Haworth, Knoll, and Herman Miller, whose system furniture was listed on the FSS.

On September 23, Commerce issued a purchase order to Haworth.[1] Haworth declined the purchase order because it believed that acceptance of the order would violate FSS contract pricing requirements.

On December 16, Commerce issued the current RFQ for 154 workstations to four vendors, including Haworth, Knoll, and Herman Miller. The RFQ listed detailed specifications that vendors' workstations were required to meet in order to be considered technically acceptable, and informed vendors that the technical "evaluation [would] be based only on products proposed (bid). Enhancements or additional inventory, at an additional cost to the [g]overnment, to allow the proposed product to meet these specifications will not be considered in the technical evaluation." These specifications covered the workstations' required electrical system, panels, worksurfaces, pedestals, overhead storage/shelving, flexibility/reconfiguration/new technologies, tasklights/keyboard pads, trim/filler pieces/special keying, and warranty. With respect to the panels, the RFQ stated that the panels were required to be equipped with top, bottom and vertical raceways to allow for separation of communication and power lines, and that top and vertical raceways were to be located in the interior of the panel and not be visible on the exterior.[2] Further, the RFQ required that the panel side rails allow for connection at any angle using a built-in, top to bottom connector and that panels connecting only at various points along the panel spine would be considered unacceptable. The RFQ required vendors to provide narrative descriptions and specifications demonstrating the acceptability of their proposed products.

Commerce received quotes from Herman Miller, Knoll, and Haworth in response to the RFQ. The evaluated prices of these quotes were as follows:

Herman Miller	$456,627
Haworth	$494,179
Knoll	$568,899

The quotes were evaluated by a technical evaluation committee (TEC) that determined that only Haworth's and Knoll's quoted products satisfied the stated specifications.

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[1]Herman Miller's quote was rejected as late, and Knoll's quote was determined to be technically unacceptable.

[2]The raceways are channels through which communications and power lines run.

Herman Miller's quoted product was determined to be technically unacceptable because it did not satisfy the RFQ's specifications for the workstations' panels, worksurfaces, and flexibility/reconfiguration. Specifically, the TEC found that the panel-to-panel connection on Herman Miller's workstations utilized a draw-rod and connector system that, contrary to the RFQ's requirements, connected only at the top and bottom of the panels and which would require additional parts to allow the panels to connect at various angles. Also, Herman Miller's proposed panel system included only top and bottom raceways, and did not include the vertical raceway required by the RFQ. The TEC noted that a "vertical cable management panel (non-powered)" was available from Herman Miller but at a substantial additional cost.[3] The TEC also questioned the weight limitations of Herman Miller's proposed worksurfaces, and noted that reconfiguration of Herman Miller's workstations would require the purchase of additional parts that would have to be stored.

On March 3, Commerce issued a purchase order to Haworth, as the vendor with the lowest-priced, acceptable quote. On March 11, Herman Miller protested Commerce's evaluation of its workstation and the propriety of the issuance of a purchase order to Haworth.

In response to Herman Miller's protest, the contracting officer reviewed Herman Miller's proposed product and independently determined that the TEC's evaluation was flawed because it was based upon two criteria that the contracting officer asserted were either nonfunctional in nature or were not set forth in the RFQ. Specifically, the contracting officer disagreed with the TEC's assessment that Herman Miller's quote was unacceptable regarding its need for additional parts to allow the future reconfiguration of its system and regarding the weight bearing limits of its proposed panel worksurfaces; the contracting officer determined that storing additional parts was merely a matter of inconvenience and that the RFQ did not contain a weight load requirement.[4] Without considering any of the other

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[3]The TEC found that Herman Miller's optional vertical cable management panel would cost an additional $469 per 68-inch panel, $419 per 54-inch panel, and $378 per 40-inch panel.

[4]The technical specifications stated that "no additional inventory (parts, pieces, tools) are to be required during reconfiguration" and that "stability and connectability of different height panels without the need for additional inventory is required." With respect to the worksurfaces,

(continued...)

deficiencies the TEC identified in Herman Miller's quoted workstation, the contracting officer determined that Herman Miller's product was technically acceptable. On May 2, Commerce canceled the order with Haworth and issued a $439,488 purchase order to Herman Miller, as the vendor with the lowest-priced, acceptable quote.[5] These protests followed.

Both Haworth and Knoll assert that Herman Miller's workstation panels do not meet all of the RFQ's mandatory specifications.[6] Specifically, the protesters assert that Herman Miller's offered workstation panels lack an internal vertical cable raceway and have panel side rails that only connect at the top and bottom, which only allow for connection at fixed angles. The protesters assert that they have a variety of workstation systems, incorporating various features and functions, on their respective FSS contracts and would have quoted much less expensive systems if the agency's actual minimum requirements had been made known.[7]

As an initial matter, Commerce argues that Haworth's protest is untimely because Haworth knew at least as early as April 18, 1994, that the agency was considering, in response to Herman Miller's protest, the cancellation of Haworth's purchase order and issuance of an order to Herman Miller. Commerce asserts that Haworth thus knew the basis of its protest on April 18, and its May 3 protest to our Office is untimely. We disagree. A protester need not file a

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[4](...continued)
the specifications did not contain a minimum weight load restriction.

[5]The lower purchase order price reflects Commerce's reduction of Herman Miller's quoted price to account for the work already completed by Haworth under that firm's purchase order.

[6]Knoll also protests that Haworth is ineligible to receive the award because its dealer performed the original design and layout work. Commerce determined that Haworth was eligible to compete based on the GSA's advice that Haworth could compete if it did not use the services of the same dealer that performed the original design and layout work. Based on this record, we cannot find that this advice was erroneous.

[7]After the agency, in its report, asserted that Herman Miller's product did not have to adhere to the nonfunctional RFQ requirements, the protesters timely asserted that if this was the case the agency overstated its actual requirements to their prejudice.

"defensive protest" where an agency has not made a final determination since a protester may presume that the agency will act properly. See Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23. Since Haworth protested within 10 working days of the date it learned that Commerce had decided to cancel Haworth's purchase order and issue one to Herman Miller, its protest is timely. See 4 C.F.R. § 21.2(a)(2).

With regard to the merits of the protests, Commerce concedes that Herman Miller's workstations do not meet the specified internal vertical raceway requirement, but argues that the contracting officer reasonably determined that the internal vertical raceway requirement was "nonfunctional" in nature.[8] Commerce similarly contends that Herman Miller's panel system satisfies the panel-to-panel connection requirements, notwithstanding that additional parts are required to meet the requirement that the panels connect at various angles.[9] Commerce argues that in a mandatory FSS purchase the agency is required to evaluate quotes only using the functional specifications stated in the RFQ, and that other, nonfunctional specifications contained in the RFQ may not be enforced. Thus, the agency concludes that the contracting officer was reasonable in finding Herman Miller's workstation "technically compliant." The protesters assert in response, however, that they should have been given an opportunity to respond to the agency's actual minimum needs.

The determination of the agency's minimum needs and which products on the FSS meet those needs is properly the agency's responsibility, thus requiring that the agency need only have a reasonable basis in determining the technical acceptability of an FSS product. See American Body Armor & Equip., Inc., B-238860, July 3, 1990, 90-2 CPD ¶ 4. Nevertheless, where, as here, an agency's request for quotations invites competition, vendors must be given sufficient detail to allow them to compete intelligently and on a relatively equal basis; the agency's description of its needs must be free from ambiguity and describe the agency's minimum needs accurately. See Nautica Int'l, Inc., B-254428, Dec. 15, 1993, 93-2 CPD ¶ 321. This means that the agency has an obligation to describe its needs accurately, so that all vendors may compete on a common

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[8]Although Herman Miller's quote indicated that there was an optional vertical cable management panel on the FSS contract, its quote did not reflect this option.

[9]As noted above, according to the RFQ specifications, the panel-to-panel connections must connect at various angles without using additional parts or pieces.

basis, since the agency must treat vendors consistent with the concern for a fair and equitable competition that is inherent in any procurement, e.g., where an RFQ does not accurately reflect the agency's needs, it should be amended so that all offerors can compete on a fair and equal basis. Dictaphone Corp., B-254920.2, Feb. 7, 1994, 94-1 CPD ¶ 75.

We find from our review of the record that Herman Miller's quoted workstations do not satisfy the stated requirements of the RFQ for the provision of a vertical raceway and flexible panel connections. Although the agency now asserts that Herman Miller's workstations could be modified to satisfy these requirements through the availability of an optional vertical cable management panel[10] and of additional parts to allow for connection of its panels at fixed angles, Herman Miller's quote did not include these items, as required by the RFQ.

We also note that because Herman Miller's quoted workstations do not include the vertical cable management panel or the parts necessary to allow for all the required panel connections, Commerce would be required to purchase additional inventory if these stated requirements were to be met. The record shows that if Commerce had evaluated the price of these items in Herman Miller's quote, so as to make Herman Miller's workstation equivalent to that quoted by Haworth and Knoll, the evaluated price of Herman Miller's quote would have been higher than that of both Haworth and Knoll.

Notwithstanding the fact that Herman Miller's quoted product did not meet the stated RFQ specifications, the agency asserts that it could place the order with that firm, inasmuch as the vertical raceway and panel connection requirements were assertedly nonfunctional in nature and should not have been included in the RFQ. In this regard, Commerce states that generally only nonrestrictive specifications and requirements of a nonfunctional nature should be used in purchases from mandatory FSS contracts. We agree that agencies should state restrictive specifications only to the extent required to satisfy the agency's minimum needs. Nevertheless, as noted above, the agency is required to accurately describe its needs, so that all vendors may compete on a common basis in a fair and equitable competition. Dictaphone Corp., supra. This did not happen here. Rather, the agency's arguments concerning the waiver of these requirements for Herman Miller

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[10]We have found that an external vertical cable management panel is not technically equivalent to an internal vertical raceway. See The Knoll Group, B-252385, June 23, 1993, 93-1 CPD ¶ 485.

demonstrate that the RFQ overstated what the agency now asserts are its minimum needs. Thus, Commerce's failure to unambiguously state what it now asserts are its minimum needs prevented Haworth and Knoll from submitting competitive quotes for the agency's actual requirements[11] and we sustain their protests on this basis. See Nautica Int'l, Inc., supra.

Where, as here, an agency determines that it is in the best interest of the government to proceed with contract performance in the face of a protest in our Office, and we sustain the protest, we are required by the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(b)(2), to make our recommendation for corrective action without regard to any cost or disruption from termination, recompeting or reawarding the contract. Since the furniture has not been delivered, we recommend that Commerce revise the RFQ to set forth the agency's actual minimum needs and solicit new quotes to ensure that all firms are afforded an equal opportunity to compete based upon the same set of requirements. See Dictaphone Corp., supra. In addition, the protesters are entitled to recover the costs of filing and pursuing their protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d). The protesters should submit their detailed and certified claims for such costs directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f).

The protests are sustained.

James F. Hinchman

for Comptroller General
of the United States

[11]For example, Knoll states, without rebuttal, that its quoted workstation under the agency's initial request for quotations was found unacceptable in part because of these same requirements that Commerce has now waived for Herman Miller; this led Knoll to quote a more expensive furniture system in response to this RFQ.

Comptroller General
of the United States

Washington, D.C. 20548

1017229

Decision

Matter of: New Zealand Fence Systems; Department of the Interior--Request for Advance Decision

File: B-257460

Date: September 12, 1994

William F. McCamman for the protester.
Garrett R. Miller for ADPI Enterprises, Inc., an interested party.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under a total small business set-aside for supply items, bids must be rejected as nonresponsive where they fail to certify that all end items to be furnished will be manufactured or produced by small business concerns.

DECISION

New Zealand Fence Systems protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N651-IFB4-3021, issued as a total small business set-aside by the Bureau of Land Management, Department of the Interior, for two types of plastic fencing. The contracting officer rejected New Zealand's bid as nonresponsive because the firm failed to certify in its bid that all end items to be furnished would be manufactured or produced by a United States-based small business concern. In addition, the agency requests an advance decision concerning the responsiveness of the bid of ADPI Enterprises, Inc., the bidder next in line for award for one of the line items. Agency counsel believes that for the same reason the contracting officer rejected New Zealand's bid as nonresponsive, the contracting officer also should reject ADPI's bid as nonresponsive.[1]

We deny New Zealand's protest and recommend that the contracting officer reject ADPI's bid as nonresponsive.

[1]ADPI received a copy of the agency's administrative report and filed comments on the report.

The IFB was issued as a total small business set-aside on March 25, 1994. The IFB incorporated the clause at Federal Acquisition Regulation (FAR) § 52.219-6, captioned "Notice of Total Small Business Set-Aside," which provides that in performing the contract, a manufacturer or regular dealer submitting an offer for supplies in its own name agrees to furnish only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. Accordingly, pursuant to the small business concern representation at FAR § 52.219-1, the IFB required a bidder to certify that it was a small business concern and that "all end items to be furnished [would] be manufactured or produced by a small business concern in the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands." The IFB included two line items and authorized multiple awards to the low-priced, responsive, responsible bidders.

Nine firms, including New Zealand and ADPI, submitted bids by the bid opening time on April 26. New Zealand was the apparent low bidder for both line items. However, in its bid, while it certified that it was a small business concern, it also certified that "not all end items to be furnished [would] be manufactured or produced by a [United States-based] small business concern." In addition, immediately after its small business end item certification, New Zealand made the following notation: "Note: U.S./Canadian Free Trade Act of 1989."

On April 28, the contracting officer rejected New Zealand's bid under this total small business set-aside as nonresponsive since the firm failed to certify in its bid that all end items to be furnished would be manufactured or produced by a United States-based small business concern. By letter dated May 4, New Zealand filed an agency-level protest challenging the contracting officer's rejection of its bid and requesting an opportunity to correct its certification. By letter dated May 13, the contracting officer denied the agency-level protest, explaining that New Zealand's bid was rejected as nonresponsive because, based on its certification, the firm had not obligated itself to furnish end items of a United States-based small business concern. The contracting officer also declined New Zealand's request to correct its certification.

In its protest filed with our Office on May 27, New Zealand, which states that it will furnish end items manufactured by a small business concern in Canada, challenges the contracting officer's rejection of its bid as nonresponsive because of a defective small business end item certification. New Zealand basically contends that by its

reference in its certification to a trade agreement between the United States and Canada, it intended to show that it was seeking a waiver from the requirement under this total small business set-aside for end items from United States-based small business concerns. New Zealand believes that Canadian small business end items should satisfy the terms of the IFB.

A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. See FAR § 14.301; Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., B-233321; B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58. The certification concerning a bidder's obligation to furnish products manufactured or produced by a small business concern is a matter of bid responsiveness because it involves a performance commitment by the bidder.[2] Id. Where a bid on a total small business set-aside fails to establish the bidder's legal obligation to furnish end items manufactured or produced by a domestic small business concern, the bid is nonresponsive and must be rejected; otherwise, a small business contractor would be free to provide end items from either small, large, or foreign businesses as its own business interests might dictate, thus defeating the purpose of the set-aside program. See Rocco Indus., Inc., B-227636, July 24, 1987, 87-2 CPD ¶ 87.

Here, since New Zealand failed to certify that all end items to be furnished would be manufactured or produced by a small business concern, the contracting officer properly rejected the firm's bid as nonresponsive because acceptance of its bid would not legally obligate the firm to furnish small business end items. Thus, whatever meaning New Zealand intended to convey by the note made after its small business end item certification has no legal effect. In any case, as indicated by the IFB, the supply of Canadian end products--which New Zealand asserts it intended to supply--would not satisfy its obligation to supply the products of United

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[2]New Zealand argues that the small business end item certification is confusing because it combines a business size requirement and a country of origin requirement. However, its argument, based on an alleged solicitation impropriety apparent prior to bid opening, is untimely since it was not raised prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1994). Further, to the extent New Zealand believes that the contracting officer somehow orally misinformed the firm concerning completion of the certification, we point out that oral advice from a contracting officer does not bind the government and a bidder relies on such advice at its own risk. Cuernilargo Elec. Supply, B-240249, Nov. 2, 1990, 91-1 CPD ¶ 68.

States-based small businesses as required by the IFB. Thus, New Zealand's bid was properly rejected as nonresponsive.

The contracting officer also properly determined not to afford New Zealand an opportunity after bid opening to correct its small business end item certification or explain the meaning of the note in its bid. Since responsiveness is determined from the face of the bid itself at bid opening, to have allowed New Zealand to make its nonresponsive bid responsive after bid opening by correcting the certification would have been tantamount to permitting the firm to submit a new bid. Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., supra.

Concerning the agency's request for an advance decision on the responsiveness of ADPI's bid, the record shows that once New Zealand's bid is rejected, ADPI is the apparent low bidder for line item No. 0001. In its bid, ADPI certified that it was a small business concern, but that "not all end items to be furnished [would] be manufactured or produced by a [United States-based] small business concern." The contracting officer believed that despite ADPI's small business end item certification, ADPI intended to furnish an end item manufactured or produced by a United States-based small business concern for item No. 0001 because in its Buy American Act certification the bid with regard to line item No. 0001 was silent concerning the country of origin, while it stated for line item No. 0002 (for which its bid was not low) that the country of origin was France.[3] As part of the pre-award survey, the contracting officer afforded ADPI an opportunity to correct its certification for line item No. 0001 by recertifying that "all end items to be furnished [would] be manufactured or produced by a [United States-based] small business concern," which ADPI did.

ADPI contends that the contracting officer properly interpreted its bid for line item No. 0001 that it would furnish an end item from a United States-based small business concern. ADPI also believes that the contracting officer properly afforded it an opportunity after bid opening to correct its small business end item certification to reflect its intention.

On the other hand, the agency counsel maintains that for the same reason the contracting officer rejected New Zealand's bid as nonresponsive--because it failed to certify that all end items to be furnished would be manufactured or produced by a United States-based small business concern--ADPI's bid

[3]The Buy American Act certification requires a bidder to certify that each end item, except those listed, is a domestic end item.

also should be rejected as nonresponsive. Agency counsel asserts that the contracting officer should not have afforded ADPI with an opportunity after bid opening to correct its certification because this allowed the firm to make its nonresponsive bid responsive after bid opening.

We agree with agency counsel that for the same reason the contracting officer properly rejected New Zealand's bid as nonresponsive--the failure of the bidder to clearly obligate itself to furnish small business end items--ADPI's bid also should be rejected as nonresponsive, and that ADPI should not have been permitted to correct its certification after bid opening.

Accordingly, we recommend that the contracting officer reject ADPI's bid as nonresponsive on the basis of its defective certification and deny New Zealand's protest against the rejection of its bid.

For James A. Spangenberg

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

1052199

Decision

Matter of: Payment of Unpaid Treasury Checks More Than 6 Years Old

File: B-244431.2

Date: September 13, 1994

DIGEST

1. The Barring Act, 31 U.S.C. § 3702(b), applies to obligations underlying unpaid Treasury checks. Thus, the imposition by the Competitive Equality Banking Act of 1987 (CEBA) of a one year time limit on the negotiability of Treasury checks means that an individual who holds a Treasury check beyond the 1-year period must submit a claim within 6 years of the accrual of the claim on the underlying obligation or the claim is barred.

2. The Competitive Equality Banking Act of 1987 (CEBA), which imposes a 1-year time limitation on the negotiability of Treasury checks, contains savings clauses which provide that nothing in the Act "shall be construed to affect the underlying obligation" of a Treasury check. The effect of the savings clauses is to provide that CEBA does not affect the underlying obligation. The enforceability of the underlying obligation is controlled by whether a claim is received by the Comptroller General or the applicable agency within 6 years.

3. Competitive Equality Banking Act of 1987 (CEBA) did not amend 31 U.S.C. § 3328(c) which provides that a limitation on a claim imposed by 31 U.S.C. § 3702 does not apply to an unpaid Treasury check. Section 3328(c) only excepts unpaid Treasury checks from the limitation on claims against the United States contained in 31 U.S.C. § 3702. Although claims on unpaid checks are not subject to the 6-year limitation in section 3702, the obligation underlying an unpaid check is not affected by section 3328(c) and remains subject to the limitation on claims against the United States in section 3702.

DECISION

Arkansas Louisiana Gas Company ("ARKLA") and Motorola, Inc. have asked whether unpaid government checks issued more than 6 years prior to the receipt of a valid claim may be

reissued. This request seeks reconsideration of a conclusion reached in a 1991 decision of this Office that claims not received by an agency or the Comptroller General within 6 years are barred under 31 U.S.C. § 3702(b) (Barring Act) notwithstanding that a Treasury check was timely issued but not presented for payment within the 1-year period imposed by the Competitive Equality Banking Act of 1987 (CEBA), Pub. L. No. 100-86, tit. X, 101 Stat. 552, 657-660 (1987). B-244431, October 8, 1991.

We conclude that CEBA requires that a holder of a Treasury check present it within 1 year of issuance, that an obligation underlying an unpaid Treasury check is subject to the Barring Act or other applicable statute of limitations, and that a replacement check may be issued by the Secretary of the Treasury if the obligation underlying an unpaid check is not barred. Therefore, a claim on an obligation underlying an unpaid Treasury check is barred unless a valid claim is received within 6 years of the accrual of the claim.

BACKGROUND

This issue arises due to CEBA provisions which place a 12-month limit on the negotiability of a Treasury check and impose a 1-year time limit for submitting claims arising on account of a Treasury check. Previously, Treasury checks were negotiable in perpetuity, notwithstanding that a claim on the underlying obligation was barred unless a claim was received within 6 years of the accrual of the claim. 31 U.S.C. § 3328(a)(1) (1982); 31 U.S.C. § 3702(b) (1988). Prior to CEBA, the barring of a claim on the underlying obligation was of little importance since the payor or holder could negotiate the check at any time or obtain a replacement if the original check was lost or defaced. This was true even if the underlying obligation was no longer enforceable as having been barred by 31 U.S.C. § 3702(b). Currently, a Treasury check may only be negotiated within 1 year of issuance; thereafter a new check will be issued only if the underlying obligation remains valid, that is, if it is not barred. 31 U.S.C. §§ 3328(a) and 3702(c)(1988).

ARKLA and Motorola ask that we reconsider our prior position. Each company was issued a check, one dated February 7, 1984, and the other dated February 21, 1984. (It is not clear from the record which check was issued to which company.) For reasons not stated in the record, both Treasury checks remain unpaid. By letter of August 18, 1993, the Defense Finance and Accounting Service denied the companies' request for issuance of replacement checks on the basis that the checks were issued more than 6 years prior

to the receipt of a valid claim and were thus barred by 31 U.S.C. § 3702(b).

Requestors argue that CEBA merely places a 1-year limit on the negotiability of Treasury checks but does not affect the validity of obligations underlying unpaid Treasury checks. Their view is that prior to CEBA, the Barring Act did not apply to the obligation underlying an unpaid Treasury check because unpaid Treasury checks were specifically excepted from the Barring Act. See 31 U.S.C. § 3328(c) (1982). Requestors argue that this exception was carefully preserved by CEBA. They point to disclaimers contained in CEBA in three separate places that the underlying obligation for which a check was issued remains unaffected. See 31 U.S.C. §§ 3328(a)(3), 3334(c), and 3702(c)(2). Requestors also point out that CEBA did not amend subsection 3328(c). In their view, CEBA's only effect is to require that an owner or holder of a Treasury check present it for payment within 1 year or obtain, regardless of the passage of time, a replacement check.

Thus, in requestors view, the current law provides a "threefold limitations scheme." First, a claim must be received within 6 years by the Comptroller General or by the cognizant agency. Secondly, a claim on account of a Treasury check must be presented within 1 year of the issuance of the check or it is barred by section 3702(c). Finally, requestors argue that the obligation underlying a Treasury check is unaffected and is subject neither to the 6-year nor the 1-year limit.

ANALYSIS

In our view, the obligation underlying a Treasury check has always been subject to the Barring Act, and the disclaimers contained in CEBA make it clear that CEBA was not intended to change that result. Section 3328(c) does not provide otherwise. Each of these points is discussed in more detail below.

Application of the Barring Act to Obligations Underlying Unpaid Treasury Checks

Prior to CEBA, the statutory scheme distinguished claims arising on account of a Treasury check from claims on the underlying obligation. Treasury checks were payable in perpetuity, "a check drawn on the Treasury may be paid at any time." 31 U.S.C. § 3328(a) (1982). Claims relating to unpaid Treasury checks were specifically excepted from the Barring Act by section 3328(c). That section states that "[a] limitation imposed on a claim against the United States Government under section 3702 of this title does not apply

to an unpaid check drawn on the Treasury or a designated depositary."[1] Under this scheme an owner or holder could at any time obtain either payment or replacement of an unpaid Treasury check by virtue of section 3328(a) and (c). As a result, by 1989 there were approximately 10 million unpaid Treasury checks outstanding, some of which were issued during the 1940s.

The underlying obligation liquidated by a Treasury check has always been subject to the 6-year limitation imposed by the Barring Act. That Act clearly provides that claims not filed with the Comptroller General within 6 years are barred. Baker and Ford Co., B-173348, February 27, 1979. A claim will also be preserved if it was timely filed with the cognizant agency on or after June 15, 1983. 4 C.F.R. 31.5(a) (1993) and the Supplementary Information section of the final rule, 54 Fed. Reg. 51,868 (1989). Thus, unless an individual submitted a claim to this Office or to the appropriate agency before the 6-year period elapsed, the claim on the obligation would be barred.

Prior to CEBA, the effect of the Barring Act was masked because there was no need to make a claim on the obligation underlying an unpaid Treasury check since the check was payable in perpetuity. To illustrate the effect of the Barring Act prior to CEBA, assume an individual held a Treasury check for more than 6 years. While that individual could at any time negotiate the check or obtain a replacement therefor, a claim for an amount different than the face value of the check would be barred since it was not presented within 6 years of the date the claim accrued.

CEBA significantly changed this statutory scheme. CEBA imposed a time limit on claims "on account of a Treasury check" and on the payment of Treasury checks. CEBA changed the statutory scheme by limiting to 1 year the period during which a Treasury check may be paid. Section 3328(a) now states that "[T]he Secretary shall not be required to pay a Treasury check issued on or after the effective date of this section unless it is negotiated to a financial institution within 12 months after the date on which the check was issued."

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[1]Section 3328(c) specifically excepts from the Barring Act only those claims arising from an unpaid Treasury check. With respect to a Treasury check that Treasury records show as being paid, prior to CEBA, section 3702(c) had provided that a claim on such check must be presented within 6 years. 31 U.S.C. § 3702(c) (1982).

To parallel the 12-month period on payment of Treasury checks contained in section 3828(a), CEBA also amended section 3702(c)(1) of the Barring Act to bar claims arising from Treasury checks unless presented within 1 year of issuance. Section 3702(c)(1) now states that:

> "Any claim on account of a Treasury check shall be barred unless it is presented to the agency that authorized the issuance of such check within 1 year after the date of issuance of the check or the effective date of the subsection, whichever is later." (Emphasis added.)

The underscored language is very broad in scope, applying not only to the check itself but also to "any claim on account" of a check. In our view, section 3702(c)(1) clearly separates the two causes of action, one based on the Treasury check and one on the underlying obligation, and limits to 1 year the period for submitting any claim on account of a Treasury check. The Department of Treasury's view is the same. The Treasury responded to a comment questioning whether the limitation on negotiability of Treasury checks affected a person's entitlement to payment by stating that "A claim on account of a Treasury check is distinct from a claim on the underlying obligation. The language of 245.3(a) and 245.3(c) is consistent and accurately reflects the statutory language of CEBA." See Treasury's response to the comment submitted on section 245.3 of the final rule implementing CEBA, 54 Fed. Reg. 35,639 at 35,641 (1989).

Thus, the validity beyond 6 years of the obligation underlying a Treasury check does not depend on whether a Treasury check has been issued, as the requestors suggest. Rather it depends on whether a claim for the underlying obligation was timely received either by the Comptroller General or the appropriate agency. 31 U.S.C. § 3702(b) and 4 C.F.R. § 31.5(a).

Effect of Savings Clauses

Requestors rely on CEBA's three disclaimers, or savings clauses, to support their conclusion that the underlying obligation is not affected by the Barring Act. See 31 U.S.C. §§ 3328(a)(3), 3334(c), and 3702(c)(2). In order to preserve the status of the obligation underlying a Treasury check, CEBA added a savings clause at section 3702(c)(2) which states that "[n]othing in this subsection affects the underlying obligation of the United States, or any agency thereof, for which a Treasury check was issued." The same savings clause is used to limit the effect of two

other provisions.[2] We have previously concluded that the savings clause preserves a claim for payment but does not resurrect a claim that is otherwise unenforceable. 70 Comp. Gen. 416 (1991).

The language of the savings clause clearly provides that the applicable provisions of CEBA have no affect on the underlying obligation. (Nothing "shall be construed to affect the underlying obligation.") That is, CEBA does not terminate, preserve, or resurrect the obligation underlying a Treasury check, but leaves it as it found it. The preservation or termination of an underlying obligation subject to section 3702(b) continues to be controlled by whether a claim has been received by the Comptroller General or the appropriate agency within 6 years of the date of accrual of the claim. 31 U.S.C. § 3702(b) and 4 C.F.R. 31.5. We find nothing in CEBA that alters this scheme.

As noted above, since prior to CEBA Treasury checks were payable in perpetuity and replacement checks could be obtained for unpaid Treasury checks as a matter of course, the effect of the 6-year limitation on the obligation underlying a check was minimal. 31 U.S.C. § 3328(a) and (c) (1982). However, because CEBA made a significant change in the period of time that a Treasury check was payable, Congress included in CEBA a grace period before Treasury began the mass cancellation of Treasury checks older than 1 year.[3] See Pub. L. No. 100-86, section 1006, set out as a note under 31 U.S.C. § 3328. If, as the requestors suggest, an obligation remains valid and enforceable, notwithstanding the 6-year limitation on claims, the need for a grace period prior to check cancellation is greatly mitigated, if not eliminated.

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[2]Similar savings clauses limit the effect of subsection 3328(a) and section 3334, title 31, United States Code. Section 3328(a) limits the payability of Treasury checks to 1 year. Likewise, the savings clause in subsection 3334(c) is restricted in application to section 3334. Section 3334 directs the Secretary of the Treasury to cancel Treasury checks more than 12 months old and to redistribute the proceeds.

[3]After notice and an 18-month grace period, the Department of the Treasury canceled all unpaid checks issued prior to October 1, 1989. 31 U.S.C. § 3334(b)(1); 54 Fed. Reg. 35,639 (1989). Treasury applied the proceeds of the canceled checks to eliminate the balances in certain Treasury accounts. See 31 U.S.C. § 3334(b)(2).

Effect of 31 U.S.C. § 3328(c)

Requestors' final argument is based on the fact that CEBA did not amend section 3328(c). Section 3328(c) provides that "A limitation imposed on a claim against the United States Government under section 3702 of this title does not apply to an unpaid check drawn on the Treasury or a designated depositary." Requestor interprets section 3328(c) as preserving in perpetuity the enforceability of the obligation underlying a Treasury check. Accordingly, requestors maintain that once a Treasury check is issued, it may be reissued in perpetuity.

We do not agree with this reading. One of the purposes of section 3328(c) as originally enacted was to distinguish unpaid Treasury checks from Treasury checks that the records of GAO or Treasury showed as paid. 31 U.S.C. § 3702(c) (1982). In the latter case, any claim on such a check had to be presented within 6 years after the check was issued. Section 3328(c) thus made clear that unpaid checks were not subject to the 6-year period of limitation on checks shown as having been paid.

Section 3328(c) also served to make clear that the 6-year limitation on the payment of claims based on the underlying obligation does not apply to an unpaid check. As explained earlier, this is entirely consistent with the distinction between a claim on account of the Treasury check and a claim on the underlying obligation found in earlier law and preserved in CEBA. Section 3328(c) says only that a limitation imposed on a claim against the United States under section 3702 does not apply to an unpaid check. Section 3328(c) does not say that a limitation imposed on a claim against the United States does not apply to an unpaid check and its underlying obligation.

This is not to say that Congress's failure to address section 3328(c) is not problematic. As part of the prior statutory structure, section 3328(c) made clear that unpaid checks, payable in perpetuity by virtue of section 3328(a), were not subject to the 6-year limitation on checks shown as paid or to the 6-year limitation on claims on the underlying obligation. 31 U.S.C. §§ 3328(a) and (c), and 3702(b), and (c) (1982). When Congress in CEBA amended sections 3328(a) and 3702(c) to limit payments on account of a Treasury check to 1 year, but failed to amend section 3328(c), it permitted the argument that section 3328(c) was designed to free the obligation underlying the unpaid check from the 6-year time constraint found in section 3702(b) since obviously Congress did not intend to invalidate the 1-year period on the payment of all checks just added by CEBA to section 3702(c). Once again, we think it is important to note that section

3328(c) does not say that the limitation imposed on claims against the United States in section 3702 does not apply to the unpaid check and the obligation underlying it. Given the distinction maintained in sections 3328 and 3702 both before and after CEBA, had Congress intended this latter result we think it would have said so.

CONCLUSION

We affirm the legal conclusion reached in B-244431, October 8, 1991. The opinion stated that underlying obligations are preserved by the savings clauses, but that such clauses do not "resurrect claims that are otherwise unenforceable." That opinion involved claims included in the submission, but not otherwise described in the opinion. The claims on the obligations underlying those Treasury checks were clearly time barred. We have not considered whether the claims underlying the two Treasury checks at issue here are barred. The requestors may pursue this matter with the Defense Finance and Accounting Service to determine whether Motorola and ARKLA, Inc. have submitted timely claims for the obligations underlying the Treasury checks at issue.

for Comptroller General
of the United States

CORRECTED COPY

Comptroller General
of the United States
Washington, D.C. 20548

322229

Decision

Matter of: Adrian Supply Co.

File: B-257261

Date: September 15, 1994

Bob Stormberg for the protester.
Karen S. Davis, Esq., and George L. Thompson, Esq., Federal Aviation Administration, for the agency.
David R. Kohler, Esq., and Susan L. Sundberg, Esq., Small Business Administration, for the agency.
Adam Vodraska, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The elimination of the requirement in a total small business set-aside that the small business offer only end items manufactured by small business concerns, based upon a waiver by the Small Business Administration, was improper where the procuring agency conducted an incomplete investigation that failed to correctly identify a manufacturer as a small business.

DECISION

Adrian Supply Co. protests the terms of invitation for bids (IFB) No. DTFA11-94-B-01013, issued as a total small business set-aside, by the Federal Aviation Administration (FAA), Department of Transportation, for an automatic closed transition transfer switch and automatic closed transition transfer bypass/isolation switches to be installed in new radar sites in the states of Colorado and Washington. The protester complains that the requirement that small business concerns offer the products of small business concerns was improperly deleted from the IFB.

We sustain the protest.

The IFB, as issued on February 14, 1994, incorporated by reference Federal Acquisition Regulation (FAR) § 52.219-6, "Notice of Total Small Business Set-Aside," which requires a small business manufacturer or regular dealer submitting an offer in its own name to furnish only end items manufactured or produced by domestic small business concerns. In this regard, the FAR provides that a contracting officer should

only set a procurement aside for exclusive small business participation where there is a reasonable expectation that "offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns." FAR § 19.502-2(a). As applied to regular dealers, such as Adrian, the requirement that small business concerns offer only products of other small business concerns is known as the "nonmanufacturer rule." See FAR §§ 19.001, 19.102(f)(5)(iii). The IFB also contained a portion of the standard "Small Business Concern Representation," which requires a bidder to represent and certify whether it is a small business concern and will provide an end item manufactured by a small business concern. See FAR §§ 19.304(a), 52.219-1(a). However, the end item certification portion of the "Small Business Concern Representation" clause was not included in the IFB.

Adrian protested to the agency that the IFB improperly did not require bidders to certify their intent to furnish only end items manufactured by small business concerns; Adrian argued that without the required representation and certification a bidder could furnish supplies from a large business manufacturer and thus defeat the purpose of the set-aside. The contracting officer responded that the omission of the end item certification was "a clerical error" and on March 11 amended the solicitation to include the end item certification.

After amending the IFB to provide for the certification of small business end items, FAA informally contacted the Small Business Administration's (SBA) Denver regional office to ascertain whether that office was aware of any small business manufacturers of the switches. SBA's regional office informed FAA that it could not locate any small business manufacturers for the switches in its search of the Procurement Automated Source System (PASS).[1] Based upon this informal inquiry to the SBA regional office and FAA's own search in the Thomas Register[2] for manufacturers of the

[1]PASS is a SBA data base with descriptions of firms permitting the user to conduct market searches for firms possessing desired characteristics.

[2]The Thomas Register is a multivolume set that identifies suppliers of products and services, provides company profiles, and for some companies provides product catalogs. The information provided for listed companies includes an "estimate of the [company's] approximate minimum total tangible assets." The Thomas Register does not specifically identify whether listed companies are small or large business concerns.

switches, the contracting officer decided that there were no small business manufacturers for the switches.[3]

On March 18, the agency again amended the IFB and replaced the standard "Notice of Total Small Business Set-Aside" clause with the clause set forth at FAR § 52.219-6, Alternate I. This clause allows a regular dealer submitting an offer in its own name to furnish any end items manufactured or produced domestically, not just those manufactured by a small business concern. A procuring agency is authorized to use the clause set forth at FAR § 52.219-6, Alternate I: (1) when the acquisition is for a product in a class for which the SBA has determined that there are no small business manufacturers in the federal market, or (2) where, for a specific acquisition, the contracting officer determines that there are no known domestic small business manufacturers that can reasonably be expected to offer a product meeting the requirements of the solicitation, and the SBA in response to the contracting officer's request waives the requirement. See FAR §§ 19.102(f)(5), 19.502-2(b), 19.508(c).

Adrian filed a second agency-level protest, challenging the elimination of the small business end item certification requirement. Adrian stated that there were small business manufacturers that make the solicited switches and argued that the clause set forth at FAR § 52.219-6, Alternate I, could only be used where the SBA granted a waiver.[4]

In response to Adrian's second agency-level protest, FAA suspended bid opening until the protest could be resolved and requested that SBA waive the small business manufacturer requirement on an individual basis for this solicitation because "we have been unable to locate any small business manufacturers of this particular item."[5] The waiver request recounted the results of the agency's earlier Thomas Register and PASS searches and of the agency's prior

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[3]FAA identified Zenith Controls, Inc. as a manufacturer of the switches, but erroneously assumed that the firm was not a small business concern and made no further investigation of Zenith Controls's size status.

[4]Adrian did not identify the manufacturers it claimed to be small business concerns in its agency-level protest, nor did FAA request this information.

[5]The contracting officer reports that he did not realize until the agency-level protest was filed that FAR § 19.102(f)(5)(iv) required that requests to waive the nonmanufacturer rule be sent to SBA headquarters.

acquisitions of the switches.[6] FAA did not ask Adrian to identify the small business concerns that Adrian asserted manufactured the switch or inform Adrian that FAA was requesting a waiver of the nonmanufacturer rule from SBA.

SBA has issued proposed regulations to govern the processing of agency requests for individual waivers of the nonmanufacturer rule.[7] See 58 Fed. Reg. 48,981 et seq. (Sept. 21, 1993). In pertinent part, these rules, which are to be codified at 13 C.F.R. § 121.2204, provide:

> "(c) The SBA will examine the contracting officer's determination and any other information it deems necessary to make an informed decision on the waiver request. Potential sources of information may include, but are not limited to, SBA's Procurement Automated Source System (PASS), the Thomas Register and information from industry associations and organizations and procuring activities and agencies. If SBA's research verifies that no small business manufacturers or processors exist for the item, an individual, one-time waiver will be granted.
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> . . . . .
>
> "(e) If a small business manufacturer or processor is found for the product in question, the waiver request will be denied.
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> . . . . .
>
> "(h) The determination to grant or deny a waiver by the Associate Administrator for Procurement Assistance is the final administrative ruling by SBA."

58 Fed. Reg. 48,981-48,983.

SBA states that, pending issuance of its final regulations governing requests for waiver of the nonmanufacturer rule for a specific acquisition, it is following its proposed regulation.

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[6]The FAA's earlier acquisitions of the switches were all unrestricted procurements.

[7]The SBA has published final procedural regulations for processing nonmanufacturer rule waivers for classes of products at 13 C.F.R. § 121.2101 et seq.

In accordance with its proposed regulations, the SBA reviewed FAA's search for small business manufacturers of the switches and concluded that FAA's search was reasonably complete. SBA did not further investigate or search for small business manufacturers of the switches and granted FAA's request for a waiver based only upon FAA's investigation. SBA has informed us that it would not have granted a waiver from the nonmanufacturer rule had it been informed that there was any small business manufacturer for the switches and that it would withdraw a waiver if it were advised that the waiver had been based upon erroneous information. We have no basis on this record to conclude that SBA acted inappropriately.

Based on the waiver granted by the SBA, the contracting officer denied Adrian's agency-level protest, whereupon Adrian filed this pre-bid opening protest with this Office, arguing that the contracting officer had unreasonably determined that no small business manufacturers existed for the solicited switches. Adrian identified Zenith Controls as the small business manufacturer whose switches Adrian intended to offer. FAA now concedes that Zenith Controls is a small business manufacturer of the switches.

At bid opening FAA received 10 bids. The apparent low and second-low responsive bids of $50,228 and $50,886 offered end items manufactured by large businesses. Adrian's third-low responsive bid of $51,374 offered switches manufactured by Zenith Controls. Two other bidders also offered switches manufactured by Zenith Controls. Award of a contract has not been made pending our determination in this matter.

As noted above, the FAR requires a contracting officer to determine that there are "no known domestic small business manufacturers or processors [that] can reasonably be expected to offer a product meeting the requirements of the solicitation" before seeking a waiver of the nonmanufacturer rule. [Emphasis added.] See FAR § 19.102(f)(5)(iii). Here, we find that the contracting officer improperly determined, based upon an inadequate investigation, that there was no expectation of receiving a bid offering an end item manufactured by a small business concern.

Specifically, FAA searched the Thomas Register and had the SBA Denver regional office conduct a search of the PASS for small business manufacturers for the switches. Regarding the SBA's PASS search, the record shows that SBA's computerized search was conducted using incorrect search terms, which the protester asserts without rebuttal that FAA provided; that is, SBA searched for small business manufacturers of the switches under the terms "isolation and switch" and "automatic and isolation and switch." The protester states that when the correct search terms

"automatic and transfer and switch" and "transfer and switch" were used by SBA's Dallas regional office in that office's PASS search, 22 firms, including Zenith Controls, were identified. FAA does not dispute this.

The Thomas Register lists more than 50 firms under the category "SWITCHES: TRANSFER," the category which the agency apparently searched. Of this number, the agency, in its waiver request, identified six firms that it contacted as small businesses, all of which either indicated that they could not make the switches or did not respond to FAA's inquiry. The agency also listed seven firms as large manufacturers, although it is not clear from the record how many of these were actually contacted (Zenith Controls is listed here erroneously by FAA as a large manufacturer). Dozens of firms were listed under "SWITCHES: TRANSFER," as having assets of more or less than $1 million or as being not rated. FAA offers no explanation, except as to Zenith Controls, as to why no effort was made to determine whether any of these firms were small business manufacturers for the required switches.

The record shows that FAA failed to identify Zenith Controls as a small business manufacturer for the switch because the agency erroneously assumed that Zenith Controls was the large business manufacturer of electronic equipment of similar name.[8] A review of the Thomas Register would have clarified for the agency that Zenith Controls has no relationship with the large business, given that the two companies have different addresses and the large business has estimated tangible assets in excess of $250 million while the value of Zenith Controls's tangible assets was listed as not rated.[9] We conclude that FAA's incomplete Thomas Register search was an inadequate basis for its determination that there were no small business manufacturers for the switches, as the agency represented to the SBA.

The protest is sustained.

We recommend that the FAA request that the SBA reconsider its waiver of the nonmanufacturer rule for this procurement. If the SBA declines to waive the nonmanufacturer rule and

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[8]The large business electronics manufacturer is Zenith Electronics Corp.

[9]We note that the Thomas Register lists more than 20 companies with the name "Zenith." Affiliates are indicated in the Thomas Register, and Zenith Controls is not identified by the Thomas Register as being affiliated with Zenith Electronics.

the agency is authorized to proceed with a small business set-aside under FAR § 19.502-2(a) (i.e., if there is more than one small business manufacturer of the end product), then the agency should amend the IFB to again include the nonmanufacturer rule and resolicit bids on that basis. We find that Adrian is entitled to its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). Adrian shall file its certified claim for its costs with the procuring agency within 60 working days of receipt of the decision. 4 C.F.R. § 21.6(f)(1).

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

452279

Decision

Matter of: Cleveland Telecommunications Corp.

File: B-257294

Date: September 19, 1994

Carl E. Anderson, Esq., Walter & Haverfield, for the protester.
Kenneth M. Bruntel, Esq., Paul Shnitzer, Esq., and Heidi J. Stock, Esq., Crowell & Moring, for Gilcrest Electric and Supply Company, an interested party.
Deidre A. Lee and Walker L. Evey, National Aeronautics and Space Administration, for the agency.
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The agency properly downgraded the protester's "very good" technical proposal for lack of detail in its description of certain tasks.

2. Protest that two agency employees disclosed proprietary information of the incumbent contractor (protester's proposed subcontractor) to the awardee is denied where record shows that, although they had signed letters of intent to work for the awardee, the agency employees were still working for the government when best and final offers were submitted, and there is no evidence that they participated in the preparation of the awardee's proposal.

DECISION

Cleveland Telecommunications Corp. protests the award of a contract to Gilcrest Electric and Supply Company under request for proposals (RFP) No. 3-508206, issued by the National Aeronautics and Space Administration (NASA) for technical and fabrication support services at Lewis Research Center, Cleveland, Ohio. The protester contends that the agency improperly evaluated its proposal, that NASA employees disclosed proprietary information about its proposed subcontractor to the awardee, and that the agency was biased against it or otherwise favored Gilcrest.

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

The RFP, issued as a competitive set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 & Supp. V 1993), contemplated the award of a cost-plus-award-fee task order contract with a 2-year base period and three 1-year options.[1] Proposals were to be evaluated based on the following four factors: (1) mission suitability, (2) cost, (3) relevant experience and past performance, and (4) other considerations. The RFP provided that mission suitability and cost were the most important factors and were approximately equal in importance, while the other considerations factor was of considerably less importance than the relevant experience and past performance factor. The mission suitability factor was divided into four subfactors to be point scored as follows:

(1)	Understanding of the statement of work	275
(2)	Management plan	475
(3)	Key personnel and key positions	150
(4)	Corporate and/or company resources	100
	TOTAL	1,000

Each of the foregoing subfactors identified additional sub-subfactors. With respect to cost, the RFP provided that the agency would "evaluate what the offeror's proposal will probably cost the Government."

NASA received six proposals by the closing date; only the proposals submitted by the protester and Gilcrest were included in the competitive range. Following discussions with these firms, the agency requested and received best and final offers (BAFO).

Both the protester's and the awardee's proposals were rated "very good" under the mission suitability factor, with Cleveland's proposal receiving 809 points and Gilcrest's receiving 841 points. Concerning cost, NASA determined that $70.3 million would be the probable cost to the government of an award based on Gilcrest's proposal. Cleveland's proposed cost was $71.2 million with a probable cost of $71.7 million; much of the projected increase in Cleveland's

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[1]Section 8(a) of the Small Business Act authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.805 and 13 C.F.R. § 124.311 (1994). We review competitive 8(a) procurements to ensure that they conform to applicable federal procurement regulations. See Communication Network Sys., Inc., B-255158.2, Feb. 8, 1994, 94-1 CPD ¶ 88.

cost was based on NASA's concern that Cleveland had not adequately capped its reimbursable general and administrative (G&A) costs.

Both offerors were considered to have "very good" relevant experience and past performance. Concerning the "other considerations" factor, NASA rated Gilcrest "very good" and the protester "good," based on their respective award fee plans and their records and experience in labor relations. While noting that both Cleveland and Gilcrest had submitted viable proposals, the source selection official (SSO) concluded that Gilcrest's proposal had a slight technical and management advantage as well as a cost advantage. Accordingly, the agency awarded the contract to Gilcrest.

The protester argues principally that the agency failed to follow the RFP's evaluation criteria by downgrading its proposal under the mission suitability factor for lack of detail. The protester states that while the agency downgraded its proposal for failing to address in sufficient detail its proposed support of the "wood model and thermocouple shops," it specifically discussed its support of these shops in its proposal; that it provided the same detail in these areas as in the other aspects of its proposal.

In reviewing an agency's technical evaluation, we will not reevaluate the technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated criteria. MAR Inc., B-246889, Apr. 14, 1992, 92-1 CPD ¶ 367. The offeror has the burden of submitting an adequately written proposal, and an offeror's mere disagreement with the agency's judgment concerning the adequacy of the proposal is not sufficient to establish that the agency acted unreasonably. Lucas Aerospace Communications & Elecs., Inc., B-255186, Feb. 10, 1994, 94-1 CPD ¶ 106.

We point out initially that Cleveland's proposal was rated "very good" under the mission suitability factor; that the SSO recognized that "[a]ll of the weaknesses were correctable and significantly overshadowed by areas of the proposal which exceeded the requirements of the RFP." Nonetheless, the record shows that the evaluators thought that in Cleveland's proposal "[t]ypical tasks and function areas are not described in sufficient detail." While during the debriefing, the agency noted the wood model shop and thermocouple shop as examples of proposal areas that were not described in sufficient detail, contrary to the protester's contentions, the record shows that the evaluators did not single out the proposal's treatment of these areas or evaluate these areas "using a different set of criteria." Based on our review, we have no basis to

question the evaluators' judgment that the proposal lacked an optimum description of tasks or the "very good" rating assigned to Cleveland's proposal. In this regard, the record supports NASA's position that Cleveland's proposal basically addressed work items through diagrams without supporting narrative.

The protester argues for the first time in its comments on the agency report that the agency improperly failed to discuss with Cleveland NASA's concerns about Cleveland's failure to address statement of work items. We dismiss this issue as untimely. Under our Bid Protest Regulations, a protest not based on an apparent solicitation impropriety must be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1994). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the new allegations must independently satisfy our timeliness requirements; our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. Palomar Grading and Paving, Inc., B-255382, Feb. 7, 1994, 94-1 CPD ¶ 85. Cleveland first became aware that the agency determined that its proposal "failed to address other potential statement of work items" on May 16 at its debriefing. If Cleveland believed that this weakness should have been the subject of discussions, it had until May 31--10 working days later--to raise this protest issue. Its protest on this basis, raised for the first time in its July 5 comments on the agency report, is untimely and will not be considered. Id.

The protester also argues that its proposal was improperly downgraded under the mission suitability factor for not meeting certain cultural diversity goals since, according to the protester, such "goals" were not defined either in the RFP or during discussions. The RFP provided that the plan would be evaluated based upon "how well the goals represent the cultural demographics of the greater Cleveland area and how quickly those goals would likely be achieved." During discussions, NASA specifically requested from Cleveland "additional details regarding your plans to achieve demographically appropriate cultural diversity throughout your entire staff." In our view, the agency's desired end for cultural diversity was sufficiently clear; namely, it sought a contractor with a culturally diverse staff which reflected the demographics of the greater Cleveland area.

The protester also contends that the agency acted improperly by including in its past performance evaluation of Cleveland an assessment of the capabilities of its proposed subcontractor rather than limiting the evaluation to Cleveland. In addition, Cleveland argues that the agency should not have considered the labor relations history of

its proposed subcontractor under the "other considerations" factor. We see nothing improper in NASA's approach here. Contrary to the protester's assertion, an agency may consider an offeror's subcontractor's capabilities and experience under relevant evaluation factors where, as here, the RFP allows for the use of subcontractors and does not prohibit the consideration of a subcontractor's experience in the evaluation of proposals.[2] FMC Corp., B-252941, July 29, 1993, 93-2 CPD ¶ 71.

The protester also complains that the agency should not have considered the awardee's award fee plan to be superior to its own under the "other considerations" factor based on the fact that the awardee proposed to share a higher percentage of its award fee with its employees than that proposed by Cleveland. Cleveland asserts the evaluation was improper because the RFP did not specifically state that the amount of the fee to be shared with employees would be evaluated; rather, the RFP provided that the plan would be evaluated based upon the proposed effort to maximize award fee earnings through efficient and effective technical performance and cost management. We think that the agency's evaluation was consistent with the RFP; the agency viewed Gilcrest's plan to be stronger than Cleveland's because it was more likely to motivate employees to improve performance.

Cleveland also argues that NASA's cost evaluation, which found that the protester had not capped its G&A costs, was unreasonable. The agency states that while Cleveland's BAFO stated that its "G&A billings will not exceed" a specified amount, it was unclear whether the protester was agreeing to cap all G&A expenses under the contract. The protester asserts that the agency misinterpreted its proposal and that, in fact, the proposal established a cost ceiling concerning all G&A expenses for the life of the contract.

We need not resolve the dispute concerning the proper interpretation of the protester's proposal that assertedly caps its G&A billings since even if we were to accept the protester's position concerning the cap, its probable cost would still be higher than the awardee's, and, as discussed above, there is no basis to question the agency's judgment

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[2]Cleveland also argues that NASA's consideration of the capabilities of Cleveland's subcontractor in the evaluation of Cleveland's proposal violated provisions of FAR subpart 9.1, "Responsible Prospective Contractors." There is no merit to this allegation. FAR subpart 9.1 prescribes policies, standards, and procedures for determining prospective contractor and subcontractor responsibility. FAR § 9.100. Cleveland was not found to be nonresponsible.

that Gilcrest's proposal was slightly superior to Cleveland's in the non-cost factors. Under the circumstances, we fail to see, nor has the protester shown, how NASA's adjustment of its cost prejudicially impacted Cleveland.

Cleveland next alleges that two former NASA employees who had signed letters of intent to work for Gilcrest, if that firm was awarded the contract, violated a prohibition on personal conflicts of interest by conducting employment discussions with Gilcrest while they had access to proprietary information of the incumbent contractor, Calspan--a firm which Cleveland proposed as a subcontractor. The interpretation and enforcement of post-employment conflict of interest restrictions are primarily matters for the procuring agency and the Department of Justice. Our general interest, within the confines of a bid protest, is to determine whether any action of the former government employees may have resulted in prejudice for, or on behalf of the awardee during the award selection process. Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132.

We find nothing per se improper in the NASA employees' conditional acceptance of employment while still agency employees. Although procurement officials are prohibited from engaging in employment negotiations during the conduct of a procurement, FAR § 3.104-3(b), the NASA employees concerned here were not procurement officials: they had no involvement with drafting, reviewing, or approving the RFP specifications; evaluating proposals; selecting sources; conducting negotiations; or approving the award to Gilcrest. FAR § 3.104-4(h). Further, while any government employee is prohibited from "participating personally and substantially" in any matter that would "affect the financial interests of any person with whom the employee is negotiating for employment," 18 U.S.C. § 208 (1988); FAR § 3.104-1(b)(2), there is no evidence that either of these NASA employees participated in any way in the procurement on behalf of NASA or Gilcrest. See RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213.

The protester asserts that these employees exploited their positions by obtaining confidential and proprietary information of Cleveland's proposed subcontractor for the "sole purpose of utilizing such information to the competitive advantage of Gilcrest." Contrary to the protester's assertions, there is no evidence that anyone at Gilcrest was provided impermissible access to procurement sensitive information. While the two former NASA employees were involved with administering the prior contract, the record shows that they were promptly recused from this procurement, as well as the incumbent Calspan contract, when

they were approached concerning employment by Gilcrest. Also, while these employees accepted conditional offers of employment with Gilcrest, there is no evidence that they had any involvement in the preparation of the awardee's proposal--indeed, the record shows that at the time of submission of BAFOs, both of these individuals were still employed by NASA. We therefore have no basis to conclude that they provided the awardee with an unfair competitive advantage. In any case, we note that while an agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, such a determination must be based on facts and not mere innuendo or suspicion. Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ ___; RAMCOR Servs. Group, Inc., supra.

Finally, there is no evidence to substantiate Cleveland's allegation that the contracting officer or agency evaluators were biased against Cleveland or unfairly favored Gilcrest. Cleveland has not furnished any evidence to support this allegation and we will not attribute bias in the evaluation of proposals on the basis of inference or supposition. See TLC Sys., B-243220, July 9, 1991, 91-2 CPD ¶ 37. The protester's speculation notwithstanding, the record contains no evidence of bias in the evaluation of its proposal; instead, the record shows that NASA conducted its evaluation reasonably and in accordance with the evaluation criteria and concluded that Cleveland's proposal was "very good."

In sum, the record shows that NASA's selection of the technical superior, low cost offeror was proper.[3]

The protest is denied and dismissed in part.

for Robert P. Murphy
Acting General Counsel

[3]While our decision does not specifically discuss each and every argument or subargument raised by the protester challenging NASA's conduct, each has been considered.

Comptroller General
of the United States

Washington, D.C. 20548

656209

Decision

Matter of: Corliss Neuber - Temporary Quarters Subsistence Expenses

File: B-257380

Date: September 20, 1994

DIGEST

An employee delayed moving out of her old residence and into temporary quarters incident to a permanent change-of-station because of problems related to the sale of her old residence and the purchase of a new residence. To be eligible for temporary quarters subsistence expenses, the Federal Travel Regulation requires that an employee begin occupying temporary quarters within 30 days of the employee's reporting date at the new duty station. Because the employee did not meet this requirement, her claims for TQSE may not be paid.

DECISION

The Social Security Administration requests a decision on whether Ms. Corliss Neuber's claims for temporary quarters subsistence expenses (TQSE) may be paid. We hold that the claims may not be paid.

BACKGROUND

The agency issued Ms. Neuber, an agency employee, permanent change-of-station orders transferring her from Murray, Utah, to Ogden, Utah, a distance of about 34 miles, with a reporting date at the new duty station of May 17, 1993. Although she reported to her new duty station as scheduled, she continued to reside at her old residence with her adult daughter pending the sale of her old residence. The residence was eventually sold, and Ms. Neuber planned to move into her new residence on August 3. However, because the residence at her new duty station was not available for occupancy on time, she arranged to stay at a motel until the residence could be occupied, for which she claimed TQSE for the periods of August 3-7 and 9-20, 1993. The agency initially denied the claims on the basis that she had not begun occupancy of temporary quarters within 30 days of her date of reporting at the new duty station, as required by applicable regulations. Subsequently, at Ms. Neuber's request, the agency submitted the matter to us for decision.

Ms. Neuber argues that the agency should have taken into account the difficulties she encountered in both the sale of her old residence and the purchase of a new residence. Furthermore, she asserts, the application of the regulation appears to be discriminatory to her as a single person because she does not have a "family" within the meaning of the regulation, although her grown daughter was living with her at the time of the transfer and did not vacate the residence until July 11.

OPINION

To be eligible for TQSE, the Federal Travel Regulation (FTR) requires that an employee must begin occupying temporary quarters not later than 30 days from the date the employee reported to the new duty station or, if not begun during this period, not later than 30 days from the date the employee's family vacates the residence at the old official station. 41 C.F.R. § 302-5.2(e) (1993). It was on this basis that the agency's Travel Management Branch denied Ms. Neuber's claims for TQSE, because, although her daughter may have remained in the residence until July 11, her daughter is not considered a family member, as that term is defined in the FTR. Thus, to be eligible for TQSE, Ms. Neuber had to begin occupying temporary quarters no later June 15, 30 days after she reported to her new duty station, which she did not do.

Regarding the definition of a family member, the FTR states that an employee's child may be considered part of the employee's immediate family only if the child is unmarried and under 21 years of age or, regardless of age, is physically or mentally incapable of self-support. FTR § 302-1.4(f)(ii). Because Ms. Neuber's daughter does not qualify as a family member under this definition, the agency properly determined that the 30-day period in which Ms. Neuber had to begin occupying temporary quarters began on her reporting date, rather than the date her daughter moved out of the old residence.[1]

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[1]The FTR also prohibits the payment of TQSE when the distance between the new official station and the old residence is not more than 40 miles greater than the distance between the old residence and the old official station, except in limited circumstances not applicable here. FTR § 302-5.2(h). Although the two duty stations in this case are only about 34 miles apart, the record does not disclose sufficient information regarding the locations of the old and new residences to determine whether this provision might also bar payment on Ms. Neuber's claims. However, because we are denying Ms. Neuber's claims on other grounds, further inquiry in this regard is not being made.

In view of the above, we agree with the agency's Travel Management Branch that Ms. Neuber's claims for TQSE may not be paid. The applicable regulation, which is cited above, is clearly stated and does not allow for an exception in her case. This allowance, like other allowances provided for in the FTR, may be paid only as authorized by law and regulation. Mark W. Spaulding, B-214757, Sept. 5, 1984. See also, Albert J. Ferraro, B-227497, Oct. 30, 1987. Accordingly, the claims are denied.

for Seymour Efros
Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

442309

Decision

Matter of: Scheduled Airlines Traffic Offices, Inc.

File: B-257310; B-257292.5; B-256863.3

Date: September 21, 1994

Kenneth S. Kramer, P.C., and James S. Kennell, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
Ronald M. Pettit, Esq., and Matthew O. Geary, Esq., Defense Logistics Agency, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of solicitation's terms providing for payment of required concession fees to contracting agency for distribution to the U.S. Treasury (for fees related to official travel) or to a non-appropriated fund instrumentality (NAFI) (for fees related to unofficial travel) as violating laws governing the expenditure of appropriated funds and collection of public moneys is denied where the solicitation requires strict accounting by the contractor and provides adequate safeguards to keep official and unofficial travel funds separate, and where the required payment of concession fees to the NAFI for unofficial travel sales is derived solely from receipts from travel paid for with travelers' personal funds, not government funds.

2. Solicitation terms providing for the evaluation of proposed unofficial (leisure) travel services for the award of travel service contract for official and unofficial travel services is reasonable where bona fide agency-related benefits are derived from the provision of the unofficial travel services.

3. Mandatory minimum concession fee requirement is reasonable where it is based on competitive procurement history, is reasonably reflective of the market value of the contract, and does not exceed the agency's minimum needs.

DECISION

Scheduled Airlines Traffic Offices, Inc. (SatoTravel) protests the terms of request for proposals (RFP) No. SP0710-94-R-0014, issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency, for commercial travel management services. SatoTravel contends that the solicitation improperly includes both official and unofficial (leisure) travel services and provides for the contractor to pay certain fees allegedly in violation of the laws governing the expenditure of appropriated funds; that is, SatoTravel contends that the RFP will allow for appropriated funds to be diverted to non-appropriated fund instrumentalities (NAFI). SatoTravel also challenges the RFP's consideration of leisure travel in the evaluation of proposals for award on the basis that the agency will receive no direct benefit from the provision of leisure travel services. The protester further contends that the RFP's requirement for offerors to propose a mandatory minimum concession fee on the gross sales of both official and unofficial travel is restrictive of competition and exceeds the agency's minimum needs. Finally, the protester requests reconsideration of our dismissals of two previous post-award protests filed by SatoTravel that challenged similar solicitation provisions to those protested here as untimely.

We deny the protest and affirm the dismissals.

The RFP, issued on April 4, 1994, contemplates the award of a single contract for both official travel and unofficial travel services at no cost to the government. Under the RFP, the government is to furnish to the contractor office and storage space, utilities, telephone lines, and on-base mail service, while the contractor is required to staff and operate a full travel office at DCSC for both official and unofficial travel. Official travel is defined as travel performed under valid orders at government expense. Unofficial travel is defined as leave, furlough, vacation, and leisure travel paid for from personal funds for personal use.

The successful contractor under the RFP is to be compensated through commissions it receives from industry travel providers (e.g., airlines, hotels, and transportation providers). The RFP requires the contractor to pay a minimum 3-percent concession fee on the gross sales of both official and unofficial travel--for official travel, the proposed concession fee is to be deposited in the U.S. Treasury; for unofficial travel, the proposed concession fee will be directed to the local Morale, Welfare and Recreation

(MWR) account, a NAFI.[1] The RFP requires the successful contractor to keep an accurate accounting of all official and unofficial travel and related fees.

Section M of the RFP provides that award will be made based on the best overall proposal (i.e., that proposal determined to provide the best overall benefit to the government). Section M of the RFP sets forth the following evaluation factors (which are listed in descending order of importance) and evaluation subfactors (which are of equal importance): technical (including program management, equipment capability and staffing, and personnel qualifications); business management (including offeror qualifications, financial capability, and business affiliation); and concession fee (including amount of concession fee, method for computation of the concession fee, and adequacy of internal controls).

SatoTravel filed its protest of the terms of the RFP with our Office on May 13, prior to the scheduled closing time for the receipt of initial proposals. The protester protests the procurement of both official and unofficial travel services under the RFP as violative of the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (1988), which provides:

> "except as provided by section 3718(b) . . . an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

SatoTravel contends that, due to the combination of services in a single contract, moneys used by the contractor to pay the proposed official and unofficial travel concession fees will necessarily be commingled so that appropriated funds (in the form of public moneys due the government) may be improperly diverted to a NAFI; in this regard, the protester contends that payment through the proposed concession fee for unofficial travel to the MWR fund would be unlawful since public moneys received by the government from the contractor must be deposited into the U.S Treasury, not a NAFI. SatoTravel states that this combination of unofficial and official travel services will result in a "clear

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[1]Amendment No. 3 to the RFP requires that the concession fee percentage offered for official travel be greater than or equal to the minimum concession fee of 3 percent offered for unofficial travel services.

disadvantage [to] the federal taxpayer" and allow "the potential for an unlawful subsidy," such that a contract under the RFP would be void as a matter of law.

In support of its position, SatoTravel cites Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992), in which the United States District Court found a travel service contract null and void for providing for the payment of concession fees by the successful contractor to the local MWR fund in violation of 31 U.S.C. § 3302(b). The court found that the concession fees to be paid to the MWR were public moneys paid by the contractor to purchase the exclusive use of government property and were funds "derived directly from public sources" since the fares paid were for air travel "almost exclusively by military personnel, their dependents and government contractor employees--all of which were purchased, or for whom the purchases were reimbursed, by the United States." Id. at 421. Based upon those facts, the court found that the laws governing the expenditure of appropriated funds and the collection of public moneys had been violated.

We do not find the court's holding in Reeve controlling here since, as the agency points out, the facts in that case are materially different than those before us. Specifically, the contract in Reeve involved the contractor's payment of concession fees to the MWR fund derived from the contractor's total travel sales, which involved official travel which was almost exclusively paid for by the government; the concession fees, a return of government funds in that case, were therefore considered public moneys. Here, however, according to the agency, the 3-percent minimum concession fee for official travel adequately reimburses the government for the facilities being provided the contractor. The 3-percent minimum concession fee for unofficial travel relates to privately funded travel only and is therefore not governed by the appropriation laws cited by the protester. See 64 Comp. Gen. 217 (1985).

In light of the RFP's requirements for strict accounting by the contractor to keep official and unofficial travel transactions and fees separate as well as the explicit safeguards imposed, the record does not support the protester's contention that award of a contract for a combination of official and unofficial travel, as provided for under the RFP, will violate appropriations law or that the MWR fund will receive an "unlawful subsidy" from the payment of public moneys. To the extent SatoTravel contends that the contractor will nonetheless commingle funds and divert moneys related to official travel sales toward the payment of its unofficial travel concession fee, or lower its proposed concession fee for official travel in order to increase its proposed concession fee for unofficial travel,

and thus not provide the best benefit to the government, the firm's allegations are speculative at best, and the reasonableness of such allegations is not supported by the record before us. Accordingly, we deny the protest of the alleged statutory violations.

SatoTravel next states that since the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(B) (Supp. V 1993), and the terms of the RFP require award to be made to the offeror offering the proposal providing the best overall benefit to the government, the RFP improperly permits evaluation of proposals on the basis of unofficial travel services proposed in addition to the official travel services proposed. SatoTravel contends that the leisure travel services solicited by the RFP provide no direct benefit to the government, but instead only serve DCSC personnel's private interests, and should not have been considered in the evaluation for award.

The agency points out that the Secretary of the Army is responsible for conducting all affairs of the Department of the Army, including meeting the morale and welfare needs of its personnel. 10 U.S.C. § 3013(b)(9) (1988). Army Regulations (AR) implementing this statutory mandate state that the MWR program is "a quality of life program linked directly to readiness of the force"; the regulations also state that MWR activities are supported by available appropriated funds and generated non-appropriated funds. Morale, Welfare and Recreation Update, Issue No. 16, Oct. 10, 1990, AR 215-2, para. 2-1. Specifically, Army Regulations set forth the following objectives of the agency's MWR program:

> "a. Support combat readiness and effectiveness.
>
> "b. Support recruitment and retention of quality personnel.
>
> "c. Provide a quality of living comparable to that which our soldiers and civilians are pledged to defend.
>
> "d. Promote and maintain the mental and physical fitness and well-being of personnel, primarily active duty military personnel.
>
> "e. Foster a sense of community, soldier morale, and family wellness, and promote esprit de corps among individual units.
>
> "f. Ease the transition of individuals into military life and the relocation of personnel and accompanying family members.

> "g. Provide facilities and programs that meet the assessed needs of today's soldier, family and community."

Id. at para. 2-3. These agency regulations require the provision of unofficial travel services to Army personnel to meet the stated MWR program objectives. Id. at para. 6-63.[2] The agency states that it is appropriate to evaluate proposals for the travel services considering both official and unofficial travel since both areas relate to the mission of the agency and provide direct benefits to the agency.

We believe the agency has reasonably determined that the provision of unofficial travel services promotes the morale, welfare, and recreation of its personnel; and thus does provide a benefit to the agency in fulfilling its mission. The agency states, among other benefits, that unofficial travel benefits "esprit de corps and mental and physical fitness" to promote and maintain soldier readiness, and that the on-base provision of such services helps to provide a working and living environment conducive to attracting and retaining quality personnel. Having a direct impact on morale, performance of official duties and retention of trained and qualified personnel, the provision of leisure travel services at DCSC does have a direct correlation to the interests of the government. Thus, although unofficial travel services are arranged and paid for by agency personnel in their personal capacity, the record shows that bona fide agency-related benefits are realized by the provision of the services under the contract.

Further, evaluation of the combination of services is reasonable since combining the two types of services provides a convenient approach for personnel to obtain both types of services--especially in scheduling family travel and when leisure travel coincides with official travel. The record shows that by including the unofficial travel services, increased volume of services may lead to lower rates charged by the transportation industry to the government for official travel and, while leisure travel demands may, at times, not justify a separate travel office on the base, combination of the services with official travel in one contract ensures the availability and

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[2]Paragraph 6-64 of AR 215-2 also provides that "[o]fficial and unofficial travel requirements will be combined within a single contract administered by geographic region" to help minimize duplication, expand available services and maximize profit, and further provides for the payment of a concession fee on all unofficial travel revenue paid to or received by the commercial travel service contractor.

convenience of the services for DCSC personnel on the base. Since bona fide benefits to the government are realized through the procurement of official and unofficial travel services in a single procurement, we see no basis to question the reasonableness of the RFP's provision for evaluation of both types of services in determining which proposal offers the best overall benefit to the government.

SatoTravel next protests the RFP's mandatory minimum concession fee of 3 percent of the gross receipts of both official and unofficial travel sales. The protester contends that this mandatory minimum fee amount is unreasonable because it restricts competition and exceeds the agency's minimum needs. SatoTravel also contends this concession fee requirement improperly subverts the evaluation scheme since "concession fee" is listed in the RFP as the least important evaluation factor for award, yet it is a requirement that must be met in order to be considered for award.

The agency's rationale for the mandatory minimum concession fees is that, based upon past competitive procurement history for similar services, 3 percent of the gross sales for both official and unofficial travel represents a reasonable estimate of the fair market value of the service contract and ensures receipt of reasonable prices. In this regard, the agency points out that the successful contractor will be the only travel service provider on the base and will receive the benefits of DCSC's substantial official and unofficial travel business.

Given the benefits received by the contractor under the "no cost" contract contemplated under the solicitation, we do not find unreasonable the agency's imposition of a minimum concession fee requirement to ensure that it receives a fair monetary return in the form of a discount for the value of the contract. SatoTravel has not persuasively rebutted the agency's reasonable support for its determination that 3 percent of the gross sales of both official and unofficial travel is a reasonable representation of the contract's fair market value. In this regard, the record shows that this minimum concession fee amount is based upon competitive procurement history and is in line with concession fee amounts paid under several other similar travel services contracts. The agency's need to ensure fair and reasonable concession fees for services under the contract--as well as to offset the cost of government-furnished space, supplies and services and to provide funding to its MWR account out of unofficial travel sales fees--provides adequate support

for the reasonableness of the minimum fee requirement.[3] Although SatoTravel argues that travel industry price fluctuations over the period of the contract may cause the contractor's payment of these minimum (or higher) proposed fees to render the contract unprofitable, we believe such industry price fluctuation over the contract period, if any, was reasonably taken into account by the agency through its consideration of past contracts providing substantially similar services in determining its estimate of the current contract's fair market value. Thus, the 3-percent minimum concession fee is a reasonable requirement and there is no evidence that it is unduly restrictive of competition.

Nor does the minimum concession fee requirement subvert the RFP's stated evaluation scheme. Under the RFP, proposals of concession fees in excess of 3 percent will be evaluated as the least important of the evaluation factors for award, where quality of services will be evaluated as more important than the actual fee proposed; thus, we do not view the evaluation criteria, when read in conjunction with the complete solicitation, to be inconsistent with the RFP's requirements. Accordingly, we deny the protest of the evaluation terms and concession fee requirements.

Finally, SatoTravel requests reconsideration of our June 2 dismissal of its protest of RFP No. DAHC22-94-R-0002, issued by the Department of the Army, and our July 5 dismissal of its protest of RFP No. M67001-93-R-0033, issued by the Marine Corps, both for commercial travel management services. We dismissed these post-award protests of similar solicitation terms to those protested here as untimely filed because the allegations of apparent solicitation improprieties were not filed prior to the closing time for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1994). In its reconsideration requests, the protester contends that our Office should nonetheless review the merits of those protests, even if untimely, since the issues presented are significant to the procurement

[3]The record shows that the minimum official travel concession amount is sufficient to reimburse the government for the government-furnished space, supplies, and services.

community. In light of our denial herein of SatoTravel's protest of these same matters, we see no reason to invoke the significant issue exception.

The protest is denied and the dismissals are affirmed.

for James A. Spangenberg
Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

315219

Decision

Matter of: Captain Gordon L. Chapell, USAF - Claim for Reinstatement of Consecutive Overseas Tour Leave

File: B-256711

Date: September 22, 1994

DIGEST

An Air Force member being transferred from Germany to Hawaii obtained permission to defer his consecutive overseas tour (COT) leave entitlement, which authorizes payment of travel and transportation allowances for a member and his family while in a leave status. However, when he and his dependents traversed the United States during his permanent change of station move, they visited both his family and his wife's family and used 11 days of leave. Although the member intended to defer his COT leave, finance officers computed his travel and transportation allowances to reflect his having taken COT leave when he took leave for those visits. Since the member complied with the Joint Federal Travel Regulations, his claim for reinstatement of his COT leave may be allowed.

DECISION

This is in response to an appeal of a Claims Group settlement which denied the claim of Captain Gordon L. Chapell, USAF, for reinstatement of his Consecutive Overseas Tour (COT) leave entitlement incident to a permanent change of station (PCS) move in January 1993. This entitlement authorizes paying travel and transportation allowances for a member and his family's travel while in a leave status in connection with consecutive tours of overseas duty. His claim is allowed.

Captain Chapell was transferred from Geilenkirchen Air Base, Germany, to Wheeler Air Force Base, Hawaii. Captain Chapell's orders authorized deferral of his COT leave. He and his family left Germany on December 31, 1992. They flew to Memphis, Tennessee, Captain Chapell's home of record, and remained there for 6 days. From Memphis they drove to Dallas, Texas, Captain Chapell's wife's home of record, and remained there 5 days. They arrived in Hawaii on January 15, 1993. He was charged leave for his excess travel time.

Air Force finance officers contend that since he used a substantial amount of leave and deviated from the normal travel route for crossing the United States, he used his deferred COT leave entitlement. Hence, they computed Captain Chapell's travel and transportation allowances as if he and his family had taken COT leave before he reported to his new duty station in Hawaii. Our Claims Group agreed with this disposition.

Captain Chapell states that he did not intend the leave he used at that time be COT leave. He therefore claims reinstatement of his to COT leave entitlement. In support of his position, he cites a June 1992 Air Force message which states that when a member who has been authorized deferred COT leave takes leave of less than 14 days en route for rest and respite he will not lose his deferred COT leave entitlement.

Section 411b of title 37, United States Code, provides that under regulations prescribed by the Secretaries concerned a member who is ordered to perform consecutive overseas tours of duty may be paid travel and transportation allowances for himself and his dependents in connection with authorized leave from his last duty station to his home of record or to another approved location and from there to his new duty station. The statute also authorizes, under the regulations, deferral of this entitlement for up to one year.

The above statute is implemented by volume 1 of the Joint Federal Travel Regulations (JFTR), paragraph U7200. The regulations specify that COT leave is intended to be performed between the consecutive tours, but may be deferred. However, a distinction is made between a member who must traverse the United States to complete his PCS and one who does not. If the member must traverse the United States, COT leave can be deferred only with prior authorization or approval.

In August 1992 Captain Chapell obtained the approval of his commander to defer his COT leave. While he and his family spent time at both his home of record and his wife's home of record, he believed that this leave did not constitute COT leave because his COT leave had been deferred and because the Air Force message cited above indicated that a member with deferred COT leave could take 13 days leave for rest and respite without losing his entitlement to deferred COT leave.

We have been informally advised that the Air Force message, indicating that almost 2 weeks of leave maybe used without affecting the member's COT leave entitlement, differs from the practices of the other services. It is our view that a

uniform policy concerning leave usage in these situations should be established which implements the purpose of the law and provides a reasonable accommodation for the member while performing change-of-station travel. In this case, Captain Chapell visited his and his wife's home of record (the purpose for which COT leave was intended) while traveling to his new duty station and still has COT leave entitlement for a subsequent trip.

Notwithstanding the above, it is our view that Captain Chapell is entitled to reinstatement of his COT leave entitlement because his travel was fully in accordance with JFTR in effect at the time; that is, he secured approval to defer the entitlement, and the regulations are silent regarding a situation where a member uses leave while traveling to his new duty station. However, as the record indicates his change-of-station travel allowances from Germany to Hawaii should be recalculated based on direct travel to Hawaii and the difference should be recouped from the member.

Accordingly, the claim may be allowed.

for Seymour Efros

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

738229

Decision

Matter of: Robert B. Tombs

File: B-256927

Date: September 22, 1994

DIGEST

The claim of a British citizen employed as a forest firefighter, under emergency circumstances, by the Forest Service comes within the statutory exceptions to the prohibition against payment of compensation to certain aliens, and neither 8 U.S.C. § 1324a nor 8 U.S.C. § 1342b (1988 and Supp. IV 1992) bars payment. Thus, he may be paid for emergency services rendered to the Forest Service.

DECISION

The Forest Service, U.S. Department of Agriculture, requests an advance decision as to whether the claim of a British citizen who was hired by the Forest Service as a firefighter under emergency circumstances may be paid for the firefighting work he actually performed.[1] Under the authority of § 607 of the Treasury, Postal Service, and General Government Appropriations Act, 1993, we conclude that he may be paid.

The record in this matter shows that Mr. Robert B. Tombs, a British citizen and a trained firefighter, was temporarily in the United States under a B-1 visa in 1993. On September 29, 1993, the Forest Service office in Darrington, Washington, hired him as a forest firefighter. As ordered by the Forest Service, Mr. Tombs competently performed emergency firefighting duties at the Meadow Creek fire in the Wenatchee National Forest, Wenatchee, Washington, from September 29 through October 5, 1993. The Forest Service's Emergency Firefighter Time Report shows that Mr. Tombs is due a gross amount of $886.44 for his services.

On October 5, 1993, the Forest Service, although it was very satisfied with Mr. Tombs's services, dismissed him because the Forest Service believed that it was not authorized to

[1]This matter was submitted to our Office by Mr. Darold D. Foxworthy, Director, Fiscal and Accounting Services, U.S. Forest Service, Washington, D.C. Reference: 6500.

hire Mr. Tombs, even under emergency circumstances, since he was a British citizen and the Forest Service was thus unable to make the certifications of work authorization required by the Immigration and Naturalization Service (INS) Form I-9.[2] Moreover, Mr. Tombs has not been paid for the emergency services that he rendered. The record also shows that Mr. Tombs never misrepresented his citizenship status to the Forest Service and acted at all times in good faith.

The relevant statutory authority to pay Mr. Tombs is found in § 607 of the Treasury, Postal Service, and General Government Appropriations Act, 1993, Public Law 102-393, 106 Stat. 1729, 1766-1767 (Oct. 6, 1992), which provides, in relevant part, that:

> "[t]his section [generally barring certain aliens from employment and payment of compensation by the United States] shall not apply . . . to nationals of those countries allied with the United States in the current defense effort, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies."

Essentially the same statutory language, which has been repeated annually in the Treasury, Postal Service and General Government Appropriations Acts for some years, was involved in Clarence D. Swanson, B-188852, July 19, 1977, in which we permitted payment of compensation to a Canadian citizen.

Furthermore, while current law also generally requires, inter alia, that for each employee hired after November 6, 1986, both the employer (including the federal government) and the employee must complete an INS Form I-9, there is nothing in the relevant statutes which prohibits the payment of compensation for work actually performed.[3] Rather, they only require that the employer examine an employee's or a potential employee's documentation of the right to work in

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[2]See text and footnote 3, infra.

[3]See §§ 101(a)(1) and 102(a) of the Immigration Reform and Control Act of 1986, as amended by 8 U.S.C. §§ 1324a(a) and (b), and 1324b (1988 and Supp. IV 1992). For purposes of our decision here, we will assume, as the Forest Service concluded, that Mr. Tombs was not authorized to work in the United States under a B-1 visa. See 8 C.F.R. Part 274a (1994). It does not appear that any of the exceptions for classes of aliens authorized to accept employment under 8 C.F.R. § 274a.12 (1994) is applicable to Mr. Tombs's circumstances.

the United States and keep a record of the employee's identity and work authorization for a specific period of time. In this regard, see Patel v. Quality Inn South, 846 F.2d 700, 705-706 (11th Cir. 1988) (illegal alien entitled to recover unpaid minimum wages under Fair Labor Standards Act), cert. denied, 489 U.S. 1011 (1989); and Barros v. E.W. Bliss Company, Civil Action No. 91-12633-Z (D. Mass. March 25, 1993) (discussing Circuit Court decisions allowing illegal aliens to recover backpay).[4]

Since Mr. Tombs is a citizen of the United Kingdom of Great Britain and Northern Ireland, which is allied with the United States in the current defense effort, and since he was hired as a firefighter, under emergency circumstances, in the field service of the Forest Service, Department of Agriculture, the statutory prohibition cited above, is not applicable in the circumstances of his case, and neither 8 U.S.C. § 1324a nor 8 U.S.C. § 1324b (1988 and Supp. IV 1992) bars payment. Thus, Mr. Tombs's claim may be paid.

for Seymour Efros

Robert P. Murphy
Acting General Counsel

[4]Not reported in F. Supp. Also cited as 1993 WL 99930 (D. Mass.).

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Recovery by the Administrative Office of the United States Courts of Offsetting Receipts Transferred to Fiscal Year 1989 Appropriation in Excess of the Amount Needed

File: B-257579

Date: September 22, 1994

DIGEST

The Administrative Office of the United States Courts (AOUSC) may recover the amount of offsetting receipts transferred from a special fund receipt account established pursuant to 28 U.S.C. § 1931 that exceeded the amount needed for purposes of the transferee fiscal year 1989 appropriation.

DECISION

The Administrative Office of the United States Courts (AOUSC) asks whether offsetting receipts initially deposited in a special fund receipt account (special fund) and then transferred to the credit of a fiscal year 1989 appropriation may now be recovered and redeposited in the special fund, the balances of which are available until expended. The AOUSC's question arises because obligations against the fiscal year 1989 appropriation have been adjusted downward and therefore the amount of offsetting receipts previously credited to the fiscal year 1989 appropriation exceeded the amount needed. We conclude that the offsetting receipts transferred but not needed for purposes of the fiscal year 1989 appropriation may be recovered and redeposited in the special fund.

Background

Section 407(c) of the Judiciary Appropriation Act,[1] 1987, Pub. L. No. 99-591, 100 Stat. 3341-61, 3341-63, allows the judiciary to retain civil filing fees as offsetting collections, but makes their availability for obligation and disbursement conditional on annual appropriations. Section 407(c) of that Act amended Chapter 123 of title 28, United States Code, by adding:

[1] The Judiciary Appropriation Act is the name of Title IV of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act.

> "§ 1931. Disposition of filing fees. The following portion of monies paid to the clerk of court as filing fees under this chapter shall be deposited into a special fund of the Treasury to be available to offset funds appropriated for the operation and maintenance of the courts of the United States as provided in annual appropriations Acts . . . ."

The Judiciary Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2211, included the following provision for the Salaries and Expenses of the Courts of Appeals, District Courts, and other Judicial Services (S&E):

> "Provided further, That such sums as may be available in the fund established pursuant to 28 U.S.C. § 1931 may be credited to this appropriation as authorized by section 407(c) of the Judiciary Appropriation Act, 1987 (Public Law 99-591, 100 Stat. 3341-64)."

In fiscal year 1989, $5,500,000 from the special fund was transferred and credited to the S&E appropriation of the Courts of Appeals, District Courts, and other Judicial Services. Subsequent downward adjustments of obligations recorded against the fiscal year 1989 S&E appropriation have been made in the amount of $3.9 million, resulting in an unobligated balance in the appropriation.

In fiscal year 1990, the Judiciary Appropriation Act, 1990, Pub. L. No. 101-162, 103 Stat. 1016, amended 28 U.S.C. § 1931 by striking out the language "as provided in annual appropriation Acts". This had the effect of converting the special fund into a permanent, indefinite, no year appropriation in which the fees accumulating in the fund would be available for reimbursing certain appropriation accounts until expended.[2]

Because the special fund balances are continuously available, AOUSC asks whether the judiciary may recover the deobligated amount representing an excess of fees transferred to the S&E appropriation in fiscal year 1989 and redeposit the excess to the special fund established by 28 U.S.C. § 1931, which is currently available to offset funds appropriated for the operations and maintenance of the courts of the United States.

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[2]Section 1931 was further amended by Pub. L. No. 102-572, 106 Stat. 4511 (1992), in a manner not germane to the matter before us.

ANALYSIS

A special fund receipt account is defined as a receipt account credited with collections that are earmarked by law for a specific purpose. Terms Used in the Federal Budget Process, GAO/AFMD-2.1.1, 1993, p. 5. Monies deposited into these funds are classified as "offsetting receipts." These are defined as collections which arise as a result of the government's business-type or market-oriented activities. Id, p. 29. As originally enacted by section 407(c) of the Judiciary Appropriation Act, 1987, 28 U.S.C. § 1931 created a special fund receipt account to retain filing fees collected to be available for the operation and maintenance of the courts of the United States. It did not, however, establish a permanent indefinite appropriation, since the fund could be used to reimburse the S&E appropriation only to the extent provided in annual appropriation acts.

For fiscal year 1989, Public Law 100-459 provided that amounts in the special fund, may be credited to the S&E appropriation for the Courts of Appeal, District Courts, and Other Judicial Services. As authorized, $5.5 million was transferred from the special fund based on total obligations recorded against the fiscal year 1989 S&E appropriation. Due to subsequent downward adjustments of obligations recorded against the fiscal year 1989 S&E appropriation, there is an unobligated balance of $3.9 million in that appropriation.

The transfer from the special fund to the credit of the transferee appropriations was authorized but not required by the statutory language. Having made a discretionary transfer in response to and in anticipation of obligations against the fiscal year 1989 S&E appropriations, we do not find a reason in the statutory language or its purpose for depriving the special fund (and by extension post-1989 appropriations) of the use of the transferred funds that ultimately went unused.[3] Therefore, we conclude that the fiscal year 1989 appropriation's unobligated balance of $3.9 million may transfer back to the special fund receipt account.[4] The special fund's

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[3] The apparent purpose of section 407(c) of the Judiciary Appropriation Act, 1987, was to provide a funding source for certain purposes of the S&E appropriation. The AOUSC has informally advised us that the special fund has been so used. In addition, the amendment made to section 407 by section 406 of the Judiciary Appropriation Act, 1990, Pub. L. No. 101-162, 103 Stat. 1016, discussed below, further supports the view that the Fund was established to supplement amounts appropriated to the courts for operation and maintainance.

[4] This treatment of transferred amounts unneeded due to reductions in the transferee account's obligations is similar to that employed in other situations

(continued...)

authority to subsequently expend the recovered $3.9 million is governed by its authorizing statute.

Section 406 of the Judiciary Appropriation Act, 1990, Pub. L. No. 101-162, 103 Stat. 1016, changed the special fund from a receipt account to a revolving account and authorized a permanent, no-year, indefinite appropriation. In other words, the fees deposited in the special fund became available until expended without needing further congressional action to obligate or expend. Any statute which authorizes the deposits of receipts in a specific fund, and which makes the fund available for carrying out specific purposes, without the need for further congressional action, constitutes a continuing or permanent appropriation. E.g., 60 Comp. Gen. 323, 325 (1981); B-193573, Dec. 19, 1979; 57 Comp. Gen. 311, 313 (1978).

The 1990 amendment to 28 U.S.C. § 1931 did not rescind, terminate, or abolish the special fund, its authorization, or the assets of the fund. The amendment merely removed the need for further congressional action of an annual appropriation to obligate or expend. Consequently, the assets of the fund in 1989 remain a part of the corpus of the fund to be included in the assets of the successor fund of 1990.

CONCLUSION

The $3.9 million transferred from the special fund to the credit of the fiscal year 1989 S&E appropriation in excess of the amount actually needed in 1989 for purposes of the appropriation may be properly credited back to the special fund. The 1989 balance would then carry over as part of the assets of the fund, which in 1990 became available until expended. Since the fund remains available until

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4(...continued)
that share some of the characteristics present here. For example, refunds include returns of advances and adjustments for previous amounts disbursed that are directly related to, and are reductions of, previously recorded payments from the accounts. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 5.4 (TS 7-43, May 18, 1993). Refunds are not required to be deposited to the credit of miscellaneous receipts but are to be deposited to the credit of the appropriation or fund charged with the original expenditure. Id.

expended, there is no distinction between a credit to 1989 or 1994. Therefore, the judiciary may recover the deobligated amount and redeposit it to the current special fund to be used for currently authorized purposes.

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

1230299

Decision

Matter of: Defense Group Incorporated

File: B-257366; B-257366.2

Date: September 26, 1994

David R. Hazelton, Esq., and Tina E. Sciocchetti, Esq., Latham & Watkins, for the protester.
Paul F. Khoury, Esq., and James J. Gildea, Esq., Wiley, Rein & Fielding, for Advanced Resource Technologies, Inc., an interested party.
John R. Burns, Esq., On-Site Inspection Agency, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably interpreted proposal, which raised the possibility of using a second individual as an alternative program manager, as not rendering the proposal unacceptable, but only of greater risk.

2. Awardee's cost proposal's use of different start dates for the option periods from those in the solicitation, did not require the rejection of its proposal because it committed the offeror to provide the same number of hours of service over the same period of time as required by the solicitation and included all the information that the agency reasonably found necessary for evaluation purposes.

DECISION

Defense Group Incorporated (DGI) protests the award of a contract to Advanced Resource Technologies, Inc. (ARTI) under request for proposals (RFP) No. OSIA01-93-R-0006, issued by the Department of Defense's On-Site Inspection Agency (OSIA). DGI challenges various aspects of the source selection process as unreasonable and inconsistent with the solicitation evaluation criteria.

We deny the protest.

OSIA issued the RFP on August 18, 1993, seeking proposals for systems engineering and technical analysis support services for a base period with five option periods. As the RFP was initially issued, the base period was to run from the award of the contract through September 30, 1994; each of the first four options would cover a 1-year period, and the fifth option would run from October 1, 1998, through January 31, 1999. The agency's intent was that the contract period, including all options, would cover no more than 5 years.

The RFP included two statements of work (SOW). The first covered mission support for the agency's work in planning and implementing requirements arising from arms-control treaties and related agreements to which the United States is a party. The second SOW covered organizational support for the agency's overall operational, managerial, and administrative requirements. The RFP stated that two separate cost-plus-fixed-fee contracts might be issued, one for mission support and the other for organizational support. The competition for the mission support contract was unrestricted, while the competition for the organizational support contract was restricted to small business concerns.[1]

Section L of the RFP, after advising offerors that two separate contracts might be awarded, stated:

> "Large business concerns are prohibited from submitting a proposal as the prime contractor for 'Organizational Support'. Small businesses are encouraged to submit proposals for both efforts however, proposals for both efforts are not required."

Among the clauses in section I of the RFP was Federal Acquisition Regulation (FAR) § 52.219-7(b)(4)(i), Notice of Partial Small Business Set-Aside, which provides that "[t]he contractor(s) for the set-aside portion will be selected from among the small business concerns that submitted responsive offers on the non-set-aside portion." The agency advises that this clause was inserted in the RFP by error.

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[1]Because DGI is challenging only the contract awarded under the set-aside portion (for organizational support), we do not discuss the unrestricted contract (for mission support), except as it relates to the protest.

The RFP also incorporated by reference Department of Defense Federal Acquisition Regulation Supplement § 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns.

Section M of the RFP provided that the evaluation criteria, in descending order of importance, were: technical, program management, past performance, and cost. Section M stated that technical was more important than the next two criteria combined. For the technical criterion, the subcriteria, in descending order of importance, were: program manager, personnel, and understanding of the problem. Section M stated that OSIA would evaluate each proposal's proposed cost "to determine if the estimate is reasonable, realistic, cost effective, affordable, and to determine the offeror's understanding of the effort." Section M also provided that "proposals which do not contain the information required for the evaluation or [in which the information] is not provided in sufficient detail for evaluation purposes will be considered unacceptable."

Section M also contained a breakdown of the labor mix by labor category and year of performance, with the explanation that the breakdown would be utilized for evaluation purposes in estimating the cost of the contract. That table showed a total of 3,000 hours in "Year 1," which would run from the award date through September 30, 1994 (which the agency expected to total approximately 8 months); 5,000 hours in each of Years 2, 3, 4, and 5 (corresponding to fiscal years 1995, 1996, 1997, and 1998); and 2,000 hours in "Year 6," which covered the first 4 months of fiscal year 1999.

Section H of the RFP explained the delivery order procedures that would govern contract performance. That section stated that the contracting officer would issue technical instructions, which would contain descriptions of the required effort, and that the contractor would respond with a proposal, including the labor categories and number of hours to complete the effort. The RFP stated that the "labor rates and categories proposed [in response to individual technical instructions] must be in accordance with the categories and rates defined in Paragraph [H.20]."[2] Upon approval of the contractor's proposal, the government would issue a delivery order covering the specific task. Paragraph H.20 stated that "[t]he following labor rates shall be utilized in establishing the cost and fixed fee for efforts completed under this contract," and

[2]The RFP referred to paragraph H.25, but no such paragraph exists, and it is clear from the context (and not in dispute in the protest) that the reference intended was paragraph H.20.

included a table in which the base rates for each labor category in each fiscal year were to be inserted; a legend at the bottom of the table reads: "TO BE COMPLETED AT TIME OF AWARD."

Several proposals, including those of DGI and ARTI, were received by the September 20, 1993, due date; DGI also submitted a proposal for the non-set-aside contract, while ARTI did not. The agency's source selection evaluation board (SSEB) evaluated the technical proposals and concluded that several, including ARTI's and DGI's, merited a "good" rating. A cost evaluation was conducted with the assistance of the Defense Contract Audit Agency (DCAA). On the basis of these evaluations, the contracting officer determined that all of the proposals received were in the competitive range.

On March 11, 1994, the agency sent letters to the offerors requesting clarification in various areas and inviting offerors to submit best and final offers (BAFO) by March 25. In a March 15 letter, the agency advised offerors that, for purposes of preparing their BAFOs, they should assume that the performance period for the line item covering the base period would begin on April 25, 1994 (instead of simply the undefined date of award, as in the RFP); and the period for the line item for the fifth option would end on April 25, 1999 (instead of January 31, 1999). The letter did not explicitly amend section F of the RFP, which identified the periods of performance, or section B, which contained the description of the line items, including the maximum quantity of hours that could be ordered in each period of performance (3,000 hours for the initial period, 5,000 hours for each full option year, and 2,000 hours for the final-option period).

All offerors, including DGI and ARTI, submitted BAFOs on March 25. The SSEB that had reviewed initial proposals also evaluated BAFOs, except for one member, who was unable to participate in the BAFO evaluation because he was on a temporary duty assignment elsewhere. The remaining members rated both DGI's and ARTI's technical BAFOs as "good." In the cost evaluation, the agency again received assistance from DCAA.

The technical scores assigned to most of the BAFOs were quite close (all but one much lower-scored proposal received technical scores between 82 and 87 out of 100 possible points). Among those closely ranked proposals, DGI's technical proposal was second high, while ARTI's was low. The evaluated costs (essentially, the agency's estimate of probable cost) of DGI's and ARTI's proposals were also relatively close; DGI's evaluated cost was not quite 10 percent higher than ARTI's. Unlike DGI's, ARTI's

evaluated cost was considerably higher than its proposed cost, due to various adjustments upward that the agency applied (as discussed below). Among the BAFOs with the closely grouped technical scores, ARTI's evaluated cost was low and DGI's was next low.

Upon review of the BAFO evaluation, the source selection authority determined that none of the higher-rated proposals contained technical differences which justified paying more than ARTI's low evaluated cost. On the basis of that determination, award was made to ARTI on May 10. This protest followed. DGI challenges various aspects of the technical and cost evaluation of its and the awardee's proposals, as well as DGI's eligibility for award. We address each protest ground in turn.

First, DGI contends that ARTI's proposal was ineligible for award because it failed to satisfy the RFP requirement that offerors propose a single program manager. DGI points out that the SOW states that "[t]he contractor shall designate an individual to serve as the Program Manager for this contract" and that the offeror "shall submit by name the proposed program manager." According to DGI, ARTI's BAFO should have been rejected for failure to designate one individual as program manager.

In reviewing a protest against the propriety of an evaluation, it is not our function to independently evaluate proposals and substitute our judgment for that of the contracting activity. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. Rather, we will review an evaluation only to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation. Id. The fact that a protester disagrees with the contracting activity's judgment does not establish that the evaluation was unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

Here, ARTI proposed one named individual as program manager in its initial proposal. That proposal advised OSIA that this individual would continue to fill an additional function within the company. In the March 11 letter to ARTI, the agency set out its understanding of this situation, and asked whether its understanding was accurate. In response, ARTI stated that the individual no longer held the same additional position, but that he was fulfilling other duties which nonetheless allowed him to work on this procurement on a part-time basis. ARTI added that another individual, who was already proposed for this procurement in a different position, was available to serve as "alternative" or "optional" program manager.

OSIA downgraded ARTI's BAFO as a result of this response, despite the evaluators' agreement with ARTI's assumption that only a part-time program manager was needed (in fact, the RFP estimated that the position would require 427 hours of work each year, that is, less than one-quarter of full time). The evaluators also continued to view the same person as ARTI's proposed program manager, and they therefore left the rating under the "program manager" subcriterion unchanged. Nonetheless, the SSEB was concerned that ARTI's response had "raised the concept of a dual Program Manager function." The SSEB viewed the "concept of two [program managers]" as unacceptable because of the risk of confusion regarding responsibility and responsiveness in supporting OSIA's needs. For that reason, the SSEB lowered ARTI's BAFO score to a number corresponding to an "unacceptable" rating for the "program structure" and "corporate commitment" subcriteria, two of the components of the "management" criterion.

Despite these lowered ratings, the SSEB did not treat ARTI's proposal as unacceptable overall or as having failed to satisfy an RFP requirement. The SSEB simply incorporated the lower scores for the two subfactors into the overall score, which remained high enough to merit a "good" rating.

DGI argues that ARTI's BAFO failed to satisfy what DGI claims was a solicitation requirement that offerors designate a single individual as program manager. We disagree. While ARTI's BAFO may, as the SSEB noted, have "raised the concept" of dual program managers, ARTI's statement that a second person would be available as backup or alternative did not vitiate the company's designation of one person as the program manager. Accordingly, even if we assume, arguendo, that the RFP required rejection of a proposal which designated multiple program managers, the agency's acceptance of ARTI's BAFO was reasonable and consistent with the RFP evaluation criteria.[3] The lowering of ARTI's evaluation rating demonstrates that the agency was cognizant of, and reasonably accounted for, the risks associated with ARTI's statement regarding the proposed program manager.

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[3]DGI contends that, even if offerors were permitted to propose dual program managers, the agency failed to follow the evaluation criteria because it did not evaluate ARTI's second, "optional" person under the criteria that applied to the program manager position. We do not reach this alternative contention because, in our view, the agency reasonably interpreted ARTI's BAFO language as offering a single program manager.

Second, DGI argues that ARTI was ineligible for award because its BAFO did not offer the fifth option period required by the solicitation. This issue relates to the March 15 letter altering the start and end dates of performance. As noted above, that letter did not formally amend the solicitation, and even if the letter is viewed as an amendment, it left the RFP internally inconsistent. The result was a patent defect in the solicitation, since it continued to state that 3,000 hours were expected to be performed in the base period, which had been shortened from approximately 8 months to approximately 5 months; and that 2,000 hours was the maximum number of hours that could be ordered in the final period, which had now been extended from 4 months to approximately 7 months.

DGI and ARTI reacted differently to this inconsistency in submitting their BAFOs. DGI simply ignored it and calculated its proposed costs based on the RFP's estimated number of hours in each period (that is, it used the 3,000-hour figure for the shortened base period and the 2,000-hour figure for the lengthened last option), thus covering a total of 25,000 hours. The result was that DGI's proposal appeared to be based on a ceiling of 2,000 hours for the lengthened (7-month) final option. However, while one RFP provision still imposed a 2,000-hour maximum on the final-option period (due to the agency's failure to revise the RFP in accordance with the new start and end dates), it was plainly less than the agency intended, just as, after the shortening of the base period, the 3,000 hours listed in the RFP and used by DGI clearly overstated the agency's probable needs for that period.

ARTI reacted to the new start and end dates--which established an overall period of performance of precisely 5 years, beginning and ending on April 25--by dividing those 5 years into five periods of 1 year each (a base year and 4 option years), with each period beginning on April 25. Each period was assumed to include 5,000 hours, leading to the required total of 25,000 hours. DGI points out, correctly, that the result of ARTI's consolidation was to change the start and/or end dates of every period of performance and to omit the fifth option entirely; in other words, ARTI's BAFO consolidated the 5 years into five 1-year periods, rather than six unequal periods, four 1-year periods in the middle with shorter initial and final periods covering the remaining 12 months.

Faced with what it termed an "irregularity" in ARTI's BAFO, the evaluators decided to treat ARTI's five sets of rates as covering the first five periods of performance (that is, the first, shortened period and the 4 full-year options). For

the final, 7-month option, the evaluators assumed that ARTI was offering the final-option rates that the company had identified in its initial proposal. In this regard, the record shows that the rates proposed by ARTI in its initial proposal were virtually identical to those proposed in its BAFO. Similarly, at the time of award, the agency entered those rates, fully burdened with the indirect costs and escalated at the rate proposed by ARTI, in the table in paragraph H.20 in the contract.

In explaining its actions, the agency argues that all that the RFP required was that the offerors commit to provide a maximum of 25,000 hours in the period between April 25, 1994, and April 25, 1999, and that ARTI's BAFO, while dividing up that period differently from what the agency expected, provided that commitment. The agency contends that the evaluators' acceptance of ARTI's BAFO and their use of the final-option estimated rates from the initial proposal were reasonable, particularly in light of the limited role of offerors' cost estimates both in the evaluation of proposals and in the actual performance of the contract. The agency also argues that DGI could not have been prejudiced by the way ARTI's BAFO was handled, since OSIA's reliance on the final-option rates from ARTI's initial proposal, in fact, raised ARTI's evaluated cost substantially above its proposed cost.

With regard to evaluating proposed costs, the guiding principle is set forth in FAR § 15.605(d), which states that, in awarding a cost reimbursement contract, "the [offeror's] cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs." Much of DGI's protest is founded on the incorrect assumption that ARTI's cost estimates were controlling and that, without cost estimates broken down into the same time periods as were used in the solicitation and a cost estimate for the final-option period, the agency could not perform a meaningful evaluation of the probable cost of ARTI's proposal.

The only item of cost at issue here is ARTI's labor rates. In calculating each proposal's probable labor costs, OSIA began with the offeror's proposed base-period labor rates and adjusted them in accordance with information received from DCAA. That approach, however, was only used for the base-period labor rates; for the option periods, the agency ignored all offerors' labor rates entirely and instead simply escalated the offerors' base-period rates from year to year by identical percentages. The use of the agency's predetermined year-to-year escalation rates thus rendered irrelevant, for the purpose of the calculation of probable cost, the offerors' proposed labor rates for the option years.

We find OSIA's methodology reasonable and consistent with FAR § 15.605(d), since the actual amount of escalation that will eventually be permitted will largely depend on external factors such as inflation, not on the escalation rate assumed in the offeror's BAFO. Normalization of escalation rates is proper where, as here, the actual rate is reasonably not expected to vary by offeror. See Sabre Sys., Inc., B-255311, Feb. 22, 1994, 94-1 CPD ¶ 129. In the context of this methodology, the fact that ARTI's BAFO suggested that rates would be escalated on April 25 of each year, rather than at the end of the fiscal year, was not controlling. The agency reasonably used its own escalation structure, rather than ARTI's, just as it ignored the escalation rate for ARTI and all other offerors in calculating each proposal's probable cost. Similarly, the fact that ARTI's BAFO did not identify an escalation rate from option 4 to option 5 was not significant, since the agency would not have relied on it, if it had been identified. We therefore conclude that, for purposes of calculating the probable cost of ARTI's BAFO and assessing the realism of ARTI's costs, there was nothing improper in the agency's methodology.

We also do not agree with DGI's assertion that the agency was required to reject ARTI's BAFO due to the way it presented the options. ARTI's consolidation of the periods of performance appears to have been nothing more than a reaction to the patent inconsistency between the unchanged division of schedule of hours in the RFP, and the March 15 letter changing the length of the initial and final periods of performance. Nothing in ARTI's BAFO alters the times at which the agency may exercise the options. For the same reason, we do not accept DGI's argument that OSIA was required to reject ARTI's BAFO as unacceptable on its face for failure to offer coverage for the fifth option period. ARTI's BAFO plainly offered the same 25,000 hours of labor over precisely the same 5 years as DGI's BAFO, despite its dividing up that time differently.[4] Similarly, the agency's incorporation, in the table in paragraph H.20, of the final-option labor rates from ARTI's initial proposal represented no more than a reasonable extrapolation of the offeror's estimated rates for that final period, given that

[4]We also disagree with DGI's assertion that OSIA was required by the language of section M to reject ARTI's BAFO for failure to include "the information required for the evaluation." While that clause could have permitted OSIA to reject ARTI's BAFO, if the agency found that it lacked the information needed to evaluate the proposal, the agency had the discretion to determine, as it did, that the information included in ARTI's BAFO was enough to permit an adequate evaluation of the offeror's proposed costs.

the BAFO rates were virtually identical to the rates proposed in ARTI's initial proposal.[5] Thus, we think that ARTI's failure to submit its cost information in the format requested, including not providing express rates for the final option, is immaterial, particularly given that ARTI submitted rates for, and thereby committed itself to, the entire 5-year contract period.

Third, DGI asserts that the agency downgraded the protester's technical evaluation without basis. The score for DGI's BAFO was lower than the score for its initial proposal, even though the evaluators specifically noted that the BAFO contained nothing to cause them to change their assessment. The explanation for the lower BAFO score was that the SSEB deleted the point scores assigned by the SSEB member who had reviewed the initial proposal but did not take part in BAFO evaluations. That evaluator apparently rated DGI's initial proposal very highly, and omitting his score from the calculation of the overall rating for DGI's BAFO caused the score to drop. We see nothing unreasonable in the agency's decision not to include in the BAFO evaluation the rating made by a person who did not participate in that evaluation.

Next, DGI contends that the cost/technical tradeoff that the agency performed here was improper because, contrary to the RFP's preference for technical over cost factors, the source selection official selected ARTI on the basis of cost.

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[5]In any event, the estimated labor rates appearing in the section H.20 table, which reflected ARTI's estimation of the appropriate escalation rate for the option periods, have only limited contractual significance, given that this is a cost reimbursement contract, not one with fixed rates or a fixed price, and the omitted rates affect only the final option. The agency is not contractually bound to reimburse ARTI at these rates. Instead, the rates are to be used only in negotiating the estimated costs and fee of individual task orders for the final option.

We also find no support for the assertion in DGI's comments that an offeror's entries in section B, the list of contract line items, would bind the agency when the options are exercised. DGI cites standard language incorporated in the RFP to the effect that options exercised will be at "the price established" in the line items in section B. In this procurement, section B contained only the offeror's estimate of the total cost for all services for each entire period of performance. Nothing in the solicitation suggests that those entries could serve as either a minimum or a maximum cost, nor could they, in the context of a cost reimbursement contract, represent fixed prices.

Agencies may perform cost/technical tradeoffs--that is, determine whether a proposal's higher rating or point score is worth its higher cost--and the extent to which evaluated technical superiority may be sacrificed to cost concerns is governed only by the test of rationality and consistency with the solicitation's evaluation criteria. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. On the record here, we find that it was reasonable and consistent with the RFP award criteria for the source selection official to determine that the minor difference in technical scores assigned to DGI's and ARTI's BAFOs was not evidence of technical superiority justifying the payment of a higher cost.

DGI also alleges that ARTI was ineligible for award of the set-aside contract because it did not submit a proposal for the non-set-aside contract. DGI points to the solicitation clause stating that the contractor for the set-aside portion would be selected from among the small business concerns that submitted responsive offers on the non-set-aside portion. Because ARTI did not submit a proposal for the unrestricted portion of the procurement, DGI contends that ARTI's proposal for the set-aside portion could not be selected for award.

The RFP provision at issue was patently inconsistent with the clause in section L, which, as noted above, indicated that small businesses, while encouraged to submit proposals for both efforts, were not required to do so. The solicitation's order of precedence clause provided that, in the event of an inconsistency between the instructions and a contract clause, the instructions were to take precedence. Since the provision stating that small businesses were not required to submit proposals for both efforts was part of the instructions in section L, while the requirement that the small business concern selected for award of the set-aside portion have submitted an offer on the non-set-aside portion was contained in a clause in section I, we conclude that the former takes precedence. In any case, it is apparent from reading the RFP as a whole that the submission of a proposal for the non-set-aside portion was not a necessary prerequisite to offering on the set-aside work,

but that the standard clause indicating otherwise was erroneously included. Accordingly, small businesses were not required to submit proposals for both efforts.[6]

The protest is denied.

for James A. Spangenberg
Robert P. Murphy
Acting General Counsel

[6]Finally, DGI argues that ARTI was not eligible for award because, contrary to the certification in its proposal, it was no longer a small disadvantaged business (SDB) concern at the time of award. We need not address this contention or the factual and jurisdictional questions that it raises, because the agency did not assign an SDB preference to ARTI during proposal evaluation or source selection, and the question of whether ARTI was entitled to such a preference is thus of no consequence.

Comptroller General
of the United States

Washington, D.C. 20548

558309

Decision

Matter of: Intermagnetics General Corporation--
Reconsideration

File: B-255741.4

Date: September 27, 1994

Marcia G. Madsen, Esq., and Brian W. Craver, Esq., Morgan, Lewis & Bockius, for the protester.
Alan C. Rither, Esq., for Battelle Pacific Northwest Laboratories; and James Tower and Paul R. Davis, Esq., Department of Energy, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prior decision that agency was permitted to consider evidence outside the awardee's written proposal in determining the acceptability of that proposal, is affirmed as consistent with General Accounting Office precedent.

DECISION

Intermagnetics General Corporation (IGC) requests reconsideration of our decision denying its protest of the award of a contract to Oxford Instruments, Inc. under request for proposals (RFP) No. 199308, issued by Battelle Pacific Northwest Laboratories, a management and operating contractor, for the Department of Energy. Intermagnetics Gen. Corp., B-255741.2; B-255741.3, May 10, 1994, 94-1 CPD ¶ 302. IGC contends that our decision was based on an erroneous conclusion of law.

We affirm our decision.

As explained in detail in our initial decision, the RFP sought proposals for the design and fabrication of an ultrahigh field nuclear magnetic resonance (NMR) magnet system, that is expected to advance the state-of-the-art in

this area. In the instructions for proposal preparation, the RFP stated that offerors "shall provide a detailed analysis of the magnetic field parameters, field uniformity, and field stability" and various other technical analyses and calculations.[1]

After evaluation of initial proposals, site visits and discussions, and evaluation of best and final offers (BAFO), the source selection official determined that Oxford's lower-priced BAFO was technically superior to IGC's by a significant margin and represented the best overall value. Based on that determination, award was made to Oxford.

Although IGC's protest challenged various aspects of the source selection decision, the request for reconsideration raises only one: the propriety of the agency's consideration of certain technical analyses which Oxford presented during site visits, but did not reproduce in its proposal.[2] IGC contends that this aspect of our decision is inconsistent with established case law. Because we find that contention erroneous, we affirm our decision.

An agency may properly limit its evaluation to information contained in the four corners of a proposal, and IGC cites decisions in which we have denied protests alleging that the contracting agency should have used information from other sources, such as a pre-award survey, as a substitute for

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[1]For the sake of brevity, we refer to those analyses and calculations collectively in this decision as the "technical analyses."

[2]Although there was some requested information that Oxford did not provide in any form, whether during the site visits or in its proposal, Battelle concluded that Oxford had substantially complied with the data submission requirement. We found that IGC was not prejudiced by Battelle's flexibility in this regard, since IGC's proposal was also not in complete compliance with the RFP requirements. IGC concedes this latter point, and agrees that, if the data that Oxford conveyed during the site visits could properly be considered, the two proposals were comparable in the degree of compliance with the data submission requirement. The only issue presented by the reconsideration request, therefore, is whether the information provided during the site visits could properly be considered.

information that the solicitation directed offerors to include in their proposal. See, e.g., Numax Elecs. Inc., B-210266, May 3, 1983, 83-1 CPD ¶ 470. IGC is also correct in noting that we have denied protests where the protester complained that the agency erred in not considering orally discussed changes to the protester's proposal, where the protester did not confirm the changes by incorporating them in its BAFO. See, e.g., Recon Optical, Inc., B-232125, Dec. 1, 1988, 88-2 CPD ¶ 544.

These decisions are not inconsistent with our denial of IGC's protest; they stand for the proposition that offerors act at their peril when they fail to include within the four corners of their proposals information required by the solicitation or requested by the agency during discussions, and that such proposals may properly be rejected.[3] See Abacus Enters., B-248969, Oct. 13, 1992, 92-2 CPD ¶ 242. However, we have also consistently held that, in evaluating proposals, contracting agencies may consider any evidence, even if that evidence is entirely outside the proposal (and, indeed, even if it contradicts statements in the proposal), so long as the use of the extrinsic evidence is consistent

[3]Along the same lines, we have consistently held that agencies have the discretion to eliminate from the competitive range proposals which do not include information required by the solicitation. IGC cites decisions of our Office that stand for this proposition, including SRI Int'l, Inc., B-250327.4, Apr. 27, 1993, 93-1 CPD ¶ 344, and appears to suggest that these decisions mean that agencies are required to eliminate such proposals from the competitive range. We disagree. The fact that an agency reasonably may eliminate a proposal from the competitive range for failure to include, within the four corners of the written proposal, information required by the solicitation does not mean that the agency would be acting improperly if it included that proposal in the competitive range.

with established procurement practice.[4] See, e.g., Western Medical Personnel, Inc., 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310; AAA Eng'g & Drafting, Inc., B-250323, Jan. 26, 1993, 93-1 CPD ¶ 287.

Our initial decision is consistent with this precedent in finding that Battelle could properly consider the technical analyses that Oxford presented during the site visits in determining that Oxford's proposal was acceptable, so long as doing so was not unreasonable or inconsistent with the solicitation evaluation criteria.[5] Other than arguing that such consideration was per se improper, IGC has not demonstrated that Battelle acted unreasonably or in any way inconsistent with the RFP evaluation criteria in considering the technical analyses presented during the site visits.[6]

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[4]A similar approach applies in other contexts as well. Thus, in the context of a brand name or equal solicitation, a bid for an allegedly equal product must generally show conformance to the brand name product's salient characteristics through descriptive literature submitted with the bid. See Federal Acquisition Regulation (FAR) § 52.214-21. Yet, our Office has long held that, where the descriptive literature submitted with the bid does not show conformance, the contracting agency may base a determination of conformance on "any other information available to the contracting agency," even if that information was not included in the bid. See Barnard & Assocs., B-253367, Sept. 13, 1993, 93-2 CPD ¶ 157. While permitted to consider such information, the agency is not required to go back to the offeror to request it. Envtl. Conditioners, Inc., B-188633, Aug. 31, 1977, 77-2 CPD ¶ 166.

[5]As an example of the ways in which established procurement practice might limit the use of extrinsic evidence, we have held that, where extrinsic evidence is relied upon to find a proposal technically unacceptable due to a correctable deficiency, the offeror must generally be given the opportunity, if discussions are held, to explain or correct the deficiency. See, e.g., Univox California, Inc., B-210941, Sept. 30, 1983, 83-2 CPD ¶ 395. Because consideration of Oxford's oral presentations helped the offeror, that constraint is not relevant here; accordingly, as discussed in the text, the agency was free to consider the information gleaned during the site visits subject to the general constraint that its evaluation be reasonable and consistent with the solicitation evaluation criteria.

[6]As pointed out in our initial decision, the technical analyses provided during the site visits played only a limited role in this procurement. The RFP evaluation

(continued...)

IGC further argues that it was prejudiced by the agency's consideration of information presented during site visits to Oxford. We agree that prejudice to a competitor could render unreasonable the consideration of information outside the written text of a proposal.[7] We reject IGC's claim, however, that such prejudice arose here.

IGC's claim of prejudice is based on the expense that Oxford was allegedly spared through Battelle's "waiver," for Oxford only, of the RFP requirement for written submission of the technical analyses. IGC argues that Oxford's savings were demonstrated by its being allowed to present "a slide show, a far less costly proposition" than written submissions, and that Battelle "failed to inform IGC of this cost saving option." Yet, as noted above, IGC concedes that what it refers to as Oxford's "slide show," if included in Oxford's proposal, would have rendered that proposal as fully compliant as IGC's proposal; IGC does not argue that Oxford's site visit presentations were based on less research, less detailed calculations, or less exhaustive analyses than those performed by IGC. What Oxford "saved," then, was the cost of printing a series of overhead projector images and including them in its proposal. Even

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[6](...continued)
criteria did not address the technical analyses at all, and they were not evaluated, nor does IGC argue that they should have been. It was the offeror's technical approach for the NMR magnet system, not the technical analyses, which was rated under the RFP evaluation scheme. The technical analyses were apparently treated more as indicators of the offeror's general competence and capabilities, effectively a matter of responsibility, and it is plainly proper to consider information outside an offeror's proposal in reaching a determination about an offeror's responsibility. See FAR §§ 9.104, 9.105-1.

[7]IGC argues that consideration of Oxford's technical analyses was also improper because only one member of the source evaluation board attended one of the site visits, some of the information was presented only orally, and the evaluation was performed several months after the site visits. Particularly in view of the marginal role played by the technical analyses in proposal evaluation, we do not view these matters as bearing on the reasonableness of the evaluation.

if such savings did occur, the obviously minimal cost involved provides no basis to suggest that IGC was placed at a competitive advantage or otherwise prejudiced.[8]

The decision is affirmed.

for Robert P. Murphy
Acting General Counsel

[8]IGC requests that it be awarded its proposal preparation costs even if the protest is not sustained because it was unfairly induced to incur the substantial costs of preparing a detailed proposal. We deny this request, both because of our finding that IGC was not treated unfairly and because we are not authorized to find a protester entitled to such costs unless we find a protest meritorious, which is not the case here. See 31 U.S.C. § 3554(c) (1988).

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Payment for Consulting Services for Child Care Facility

File: B-256158

Date: September 27, 1994

DIGEST

The Forest Service (FS) may use appropriated funds to pay a consultant for services rendered to a FS-supported child care center operated by a parent organization on FS premises so long as the FS determines that the consulting services were necessary to help maintain a viable child care facility.

DECISION

A certifying officer for the United States Department of Agriculture asks whether he may certify a voucher for consulting services obtained in connection with a child care center operated on Forest Service (FS) premises at Payette National Forest in McCall, Idaho.[1] For the reasons discussed below, we would not object to certifying such voucher for payment so long as the FS determines that the consulting services were needed to help maintain a viable child care center.

A parent organization is operating a child care facility on Forest Service premises primarily for children of Forest Service employees. According to the Forest Service, the center was having difficulties with its program and the Forest Service acquired the consulting services of an individual who owns and operates several day care centers in Vancouver, Washington, to "help organize the day care" and to "act as a consultant on financing and organization of the FS child care facility." At the completion of her work, the consultant submitted an invoice for $2,244.77. Of that amount $118.77 was for lodging, and $526 was for airline tickets. The remaining $1,600 consisted of per hour charges ($50 per hour) for services rendered, e.g., attending meetings, reviewing the Center's operations, and advising the FS and the facility.

As a general matter, if an agency determines that the establishment of an employee operated child care center is necessary for employee welfare, any expenses

[1]A certifying officer, under 31 U.S.C. § 3529(a)(2), may request a decision from the Comptroller General on questions raised by vouchers presented to the certifying officer for certification.

associated with the establishment of a day care center could be viewed as a necessary expense of the agency's appropriation. B-39772-O.M., July 30, 1976. In 1985, Congress passed the Trible Amendment, 40 U.S.C. § 490b, authorizing Federal agencies to provide space and related services, such as utilities, without charge to child care centers benefitting Federal employees. More recently, Congress enacted legislation[2] making agency appropriations available to cover "travel, transportation, and subsistence expenses incurred [by 'any person'] for training classes, conferences, or other meetings in connection with the provision of [child care] services." Pub. L. 102-393, § 604, 106 Stat. 1766 (1992).

The Forest Service concludes that its appropriations are available to support child care centers. The Forest Service generally distinguishes "start-up/support costs", that may be paid from appropriated Funds, from "operating costs", that may not be paid from appropriated funds. Forest Service Manual, sections 6444.14a and .14b, effective October 18, 1991. The FS Manual defines "start-up/support costs" as those "costs necessary to bring the child care facility into a state of readiness and to provide basic support." Id. On the other hand, "operating costs" are defined as those "costs necessary to run the child care facility." Id.

Although the FS manual does not identify consulting services specifically as a "start-up/support cost", we think such services can reasonably fit within the general definition of such costs. We would not object to an agency use of appropriated funds to obtain consulting services to assess in the first instance the viability of supporting or sponsoring a child care center in its facilities. Similarly, we think an agency's appropriation would be available to obtain consulting services to help assess and/or maintain an existing center's viability. The FS presumably has invested considerably in space and other services at the Payette Facility and the acquisition of expert advice to help ensure the continuation of a viable facility, and thereby protect that investment, appears reasonable.

The certifying officer for the Department suggests that 40 U.S.C. § 490b and section 604 of Public Law 102-393 specifically authorize the payment of the expenses in question. While neither of those laws specifically addresses this type of expense, section 604 of Public Law 102-393 authorizes the use of appropriated funds to pay the travel expenses of Federal and non-Federal child care center employees to attend training classes, conferences or other meetings involving the provision of child care services. Here, the Forest Service elected to bring the expertise on-site rather than send the employees to obtain training, information and advice off-site.

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[2]Section 1345, of title 31, United States Code, prohibits, except as specifically provided by law, the use of appropriated funds for travel, transporation, and subsistence expenses of meetings other than for federal officers and employees carrying out official duties.

Thus, the expenditure in question here is certainly consistent with the explicit authority contained in section 604.

Accordingly, so long as the FS determines that the consulting services were necessary to assess and maintain the continuing viability of the child care center, we would not object to the certification of the voucher in question. We would suggest that the FS update its manual to reflect the authority contained in section 604 of Public Law 102-393 and this decision.

for Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Adjustment of Expired and Closed Accounts

File: B-253623

Date: September 28, 1994

DIGEST

1. The United States Arms Control and Disarmament Agency may not avoid adjusting an appropriation account and reporting any resulting Antideficiency Act violation on the basis that (1) the account has expired, (2) adjusting the account will result in overobligations, or (3) the overobligations were unintentional.

2. Under the circumstances presented, GAO will not object should the United States Arms Control and Disarmament Agency (ACDA) reasonably determine not to adjust the accounting records for a closed "M" account comprised of salary and expense funds. To the extent that Antideficiency Act violations may have occurred in years covered by the closed account, ACDA should so report.

3. The authority to initiate disciplinary actions for Antideficiency Act violations is vested in the agency and is not within GAO's jurisdiction under 31 U.S.C. § 3528(b).

DECISION

The General Counsel, United States Arms Control and Disarmament Agency (ACDA), asks whether ACDA must adjust its accounts for fiscal years 1990 and earlier to charge certain personnel expenses to representation funds, when such adjustments will disclose unintentional violations of the Antideficiency Act. For the reasons discussed below, we conclude that ACDA must adjust expired accounts for fiscal years 1989 and 1990 and report the applicable Antideficiency Act violations. ACDA need not adjust the accounting records for its closed "M" accounts for fiscal years prior to 1989. ACDA should nevertheless disclose the likelihood that Antideficiency Act violations occurred before fiscal year 1989 in its Antideficiency Act report on violations for fiscal years 1989 and 1990.

ACDA also asks us to exempt it from disciplining any responsible employees pursuant to 31 U.S.C. § 3528(b) (1988). The authority to initiate disciplinary actions for Antideficiency Act violations is vested in the agency and is not a matter within the jurisdiction of this Office under 31 U.S.C. § 3528(b).

Background

ACDA receives an annual appropriation for necessary expenses "[f]or arms control and disarmament activities." See, e.g., Pub. L. No. 102-395, 106 Stat. 1869 (1992). Beginning with fiscal year 1976, this appropriation has authorized an amount for official reception and representation (R&R) expenses.

The Department of State, Office of Inspector General (IG), conducted an audit of ACDA operations in Geneva, Switzerland, where ACDA conducts a number of arms control negotiations. ACDA employs in Geneva a number of Foreign Service nationals as maids and drivers, who on occasion are paid overtime to serve as waiters, waitresses, bartenders, and cooks during R&R events. In reviewing accounting records during the audit, the IG found that ACDA charged overtime for R&R functions to salary and expense funds, causing the cost of R&R functions to be understated.

The IG found that ACDA did not, but should have, charged the cost of employee overtime that occurred solely for R&R events to R&R funds.[1] Accordingly, the IG recommended that ACDA adjust its fiscal year 1990 records by deobligating an estimated $35,000 in overtime charged to salary and expense funds and obligating it against R&R funds and that ACDA report a violation of the Antideficiency Act if the limit on R&R expenses contained in its fiscal year 1990 appropriation was exceeded.

The General Counsel states that the long-standing ACDA policy was to charge overtime paid to the maids and drivers for R&R functions to salary and expense funds, rather than to R&R funds. ACDA suspended this policy on April 30, 1991, and revised it on June 14, 1991, following review of a draft of the IG's report. In this regard, ACDA has directed its administrative staff to charge labor costs for future R&R functions to R&R funds.

ACDA does not take issue with the IG's substantive conclusion. Rather, ACDA questions whether it must adjust accounts for fiscal years prior to fiscal year 1991 (the first year that ACDA could timely correct the problem identified in the IG report). Such adjustments to salary and expense funds and R&R funds would disclose an overobligation of R&R funds for fiscal year 1990 (and presumably prior years) and a reportable violation under the Antideficiency Act.[2] ACDA asserts that

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[1]Inspector General Department of State, Overseas Resource Management, Rep. No. ACDA-2-FM-001, December 1991.

[2]The Antideficiency Act precludes an officer or employee of the government from making or authorizing an expenditure or obligation in excess of the amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A). The head of an

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it based its actions in prior years on well-established agency policy and any overobligation of R&R funds provided in its annual appropriations acts was purely unintentional. Further, ACDA, by letter dated June 3, 1991, asked the House Appropriations Committee to increase the appropriation limitation on official R&R expenses beginning in fiscal year 1992, explaining that its request resulted from its compliance with the IG's recommendation regarding labor cost allocations. The Congress acted favorably on ACDA's request.

As noted above, ACDA does not dispute the substantive proposition underlying the IG's conclusion and recommendation.[3] The IG's Report relied on the applicable State Department Standardized Regulations that provide that allowable items of expenditure from representation allowances included expenditures for "hiring extra waiters, busboys or other temporary help to serve at official functions" (§ 320f (TL-SR-396, November 10, 1985)).[4]

In our opinion, ACDA has not provided a sufficient basis to support only a prospective implementation of the accounting change necessary to properly charge the accounts in question, i.e., to adjust its accounts only from the time it agreed to change its practice in response to the IG's report. As the IG report concludes, ACDA's practice was inconsistent with the requirements of the Standardized Regulations,[5] and this is not a case where ACDA was following an existing State

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[2](...continued)
agency must report all relevant facts and actions taken to the President and the Congress. 31 U.S.C. § 1351.

[3]See 64 Comp. Gen. 138 (1964), where we held that the State Depatment's "Administration of Foreign Affairs - Representation Allowances" appropriation (and not State's "Administration of Foreign Affairs - Salaries and Expenses" (AFA-S&E) appropriation) should cover the costs of hiring extra waiters and busboys to serve at representational functions. In addition, we determined that under State's Standardized Regulations, funds administratively allotted for official residence expenses from the AFA-S&E appropriation were not available for such purpose. Standardized Regulations § 454a (TL:SR-374 March 4, 1984).

[4]State subsequently amended section 454a of the Standardized Regulations to prohibit the use of official residence expense funds for "expenditures which are properly borne by representation allowance funds (such as extra waiters for official functions or other allowable items under Section 320)" (TL:SR-465 February 24, 1991)).

[5]ACDA has not presented a reasonable basis for distinguishing between payments to extra waiters, busboys, or other temporary help hired to furnish meals at a representation function which are required to be charged to representation funds
(continued...)

Department practice. Neither the submission nor our informal inquiry of the State Department OIG supports a conclusion that the State Department in similar circumstances was allocating overtime which was paid maids or drivers when working as waiters, waitresses, bartenders, or cooks during R&R functions, to the "Administration of Foreign Affairs-Salaries and Expenses" (AFA-S&E) appropriations rather than to "Administration of Foreign Affairs-Representation Allowances" appropriations. State's OIG has advised us that "principal representatives" designated by the Secretary of State may defray unusual expenses incident to the operation of the official residence from official residence expense funds (administratively alloted from the AFA-S&E appropriation), including the wages of household servants who may furnish services at representation functions hosted by the "principal representative." However, ACDA's Geneva Mission employees were not designated "principal representatives" authorized to use official residence expense funds. Thus, the issue is whether or to what extent ACDA must adjust expired and closed "M" accounts.[6]

Account Closing Law

The 1990 amendments to the account closing law make clear that current accounts and expired accounts are subject to the same legal requirements and should be given the same agency oversight. 71 Comp. Gen. 502, 506 (1992) (quoting H.R. Rep. No. 101-898, 7-8 (1990)). Under the former account closing law, Antideficiency Act violations could be avoided altogether by delaying recognition of the overobligation until the obligation had reached the "M" accounts where it could be obligated against the merged surplus authority. 71 Comp. Gen. at 510.[7]

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[5](...continued)
under the Standardized Regulations, and overtime payments to employees providing the same services. For purposes of this decision, given ACDA's concession with respect to this point, we need not consider it further.

[6]The question presented does not raise the issue of whether the agency should adjust an expired account based on a retroactive application of a law enacted, or regulation adopted, subsequent to the initial otherwise proper recordation of an obligation. Nor does it involve the question of whether an opinion of this Office establishing a new position or departing from established precedent should be retroactively applied.

[7]Prior to the 1990 amendments, appropriation accounts were closed 2 years after their period of availability for incurring new obligations expired. Obligated balances were transferred to what was commonly referred to as "M" accounts, which were merged balances of previously transferred obligated balances of closed accounts available for the same purpose. "M" accounts were not subject to fiscal year limitations on amounts available for obligation. Unobligated balances of

(continued...)

Section 1405(a) of Pub. L. No. 101-510, 104 Stat. 1675 (1990), 31 U.S.C. §§ 1551-1558 (Supp. IV 1992), revised the procedure for closing accounts that had not closed prior to Nov. 5, 1990.[8] Under the revised procedure, an appropriation account available for obligation for a fixed period of time (e.g., 1 fiscal year) is closed 5 years after the expiration of availability for incurring new obligations and any remaining balance in the account (whether obligated or unobligated) is canceled. 31 U.S.C. § 1552(a) (Supp. IV 1992). Finally, 31 U.S.C. § 1553(b) (Supp. IV 1992) authorizes payment of valid obligations properly chargeable to closed accounts from current appropriations subject to certain limitations.

During the 5 years between account expiration and closing, the account retains its fiscal year identity and is available for recording, adjusting, and liquidating obligations properly chargeable to that account. 31 U.S.C. § 1553(a) (Supp. IV 1992). In addition, 31 U.S.C. § 1554(a) (Supp. IV 1992) provides that any audit requirement, limitation on obligations, or reporting requirement that is applicable to an appropriation account shall remain applicable to that account during the 5-year expired period.

The 1990 amendments revitalized the application of a number of laws, including the Antideficiency Act, to the expired accounts. Thus, agencies are required to record obligations previously incurred that were not properly recorded in the expired account when the obligation was incurred and to adjust amounts obligated in expired accounts to reflect the amount properly chargeable to the accounts. 71 Comp. Gen. at 505-507. The agencies must report an overobligation of an expired account resulting from such adjustments to the President and Congress and when necessary request additional funding to cover the overobligation or obtain authority to charge the overobligation to the agency's current appropriation. Id.

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[7](...continued)
closed accounts available for the same purpose (commonly referred to as the merged surplus authority) were available for restoration to adjust "M" account obligations. 31 U.S.C. §§ 1552, 1554 (1988).

[8]Under section 1405(b)(1) of the 1990 amendments, 31 U.S.C. § 1551 note (Supp. III 1991), section 1405(a) applies to fiscal year appropriations expiring September 30, 1989, and thereafter.

Adjustment of Accounting Records for Closed Accounts

An account maintained by the Treasury ceases to exist once it is closed under the 1990 amendments.[9] Therefore, any needed adjustments are not to the amount of obligations recorded against an appropriation account, but rather to the agency's accounting records that relate to the closed account. These records are used to determine the propriety of paying from current appropriations obligations that would have been properly chargeable to the closed account both as to purpose and amount. See 31 U.S.C. § 1553(b) (Supp. IV 1992). Agencies may not pay from current appropriations obligations that exceed amounts that were available for that purpose in closed accounts. With respect to accounts that expired on September 30, 1989, or thereafter (and therefore close on September 30, 1994, or thereafter), agencies must adjust their accounting records in order to properly apply the limitation. Further, any violation of the Antideficiency Act caused by such adjustments after the accounts are closed should be reported.

It may be more difficult for agencies to make accounting changes to records relating to closed "M" accounts (containing the balances of closed fixed period appropriation accounts) since once an appropriation account merged, it lost its fiscal year identity for accounting purposes. Further, there is little practical value in requiring agencies to adjust records relating to some closed "M" accounts, such as annual salary and expense appropriations, where given the age and nature of transactions typically covered by such accounts, it is highly unlikely that obligations chargeable to such accounts will remain unpaid after the accounts were closed.[10] For these reasons, and because no actual payments are involved in this case, ACDA need not adjust accounting records related to their closed "M" account so long as ACDA reasonably determines that there will be no need to know the precise balance of the "M" account for purposes of the 1990 amendments. Should ACDA, consistent with this decision, decide not to adjust its accounting records for fiscal years before fiscal year 1989, ACDA should nevertheless disclose, to the extent

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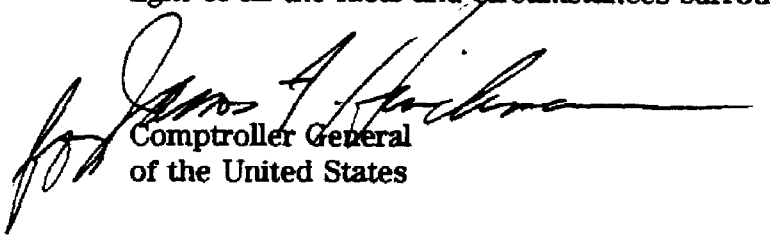
[9]Section 1405(b)(4) of the 1990 amendments, 31 U.S.C. § 1551 note (Supp. III 1991) canceled the "M" account balances on September 30, 1993. Section 1405(b)(3) of the 1990 amendments canceled the merged surplus accounts on December 5, 1990. Appropriations that expired on September 30, 1989, will be the first appropriations closed under 31 U.S.C. § 1552(a).

[10]Of course, to the extent that it is a practical possibility for an agency to make adjustments to the accounting records relating to a "M" account and doing so is necessary in order to determine the propriety of charging a payment to current appropriations that relates to an obligation properly chargeable against a closed "M" account, any resulting adjustment of records that indicates a previous Antideficiency Act violation should be reported.

applicable, the likelihood that violations may have occurred before 1989 in its Antideficiency Act report on violations fiscal years 1989 and 1990.

Waiver of Antideficiency Act

ACDA asks that we exempt it from imposing disciplinary actions authorized by the Antideficiency Act against any officers or employees who complied with ACDA's policy on charging overtime payments to its salary and expense funds pursuant to our authority under 31 U.S.C. § 3528(b)(1)(1988). Our authority under 31 U.S.C. § 3528(b)(1)(1988) extends to the relief of certifying officers but does not extend to determinations whether administrative discipline should be imposed for violations of the Antideficiency Act. The question whether administrative discipline should be imposed is in any given case a matter for consideration of the employing agency in light of all the facts and circumstances surrounding the alleged violation.



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