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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-204672 DATE: March 9, 1982

MATTER OF: System Development Corporation and International Business Machines

DIGEST:

1. Protest that request for proposals should have included software conversion costs and present value of money as evaluation factors is untimely because filed after date set for receipt of initial proposals and request for proposals set forth in great detail all evaluation factors but made no mention of software conversion costs or present value of money in evaluation scheme. However, protesters have also filed suit in court on same matters, and court has requested our opinion. Therefore, as matter of policy, untimely protest issues will be considered on merits.

2. Contrary to protester's contentions that request for proposals called for evaluation of software conversion costs and present value of money, it was apparent from request for proposals that these items were not going to be evaluated by agency. Since proposals must be evaluated in accord with factors stated in request for proposals and this request for proposals did not include either software conversion costs or present value of money in its rather detailed enumeration of evaluation factors, contracting agency properly evaluated proposals without considering software conversion costs or discounting price to present values.

3. Where contrary assertions by protesters and agency (regarding charge that contracting officer misled protester as to evaluation of software license fees) constitute only evidence of what was said during telephone conversation, protesters have not met burden of affirmatively proving their case.

4. Protest that contracting agency should not have considered protester's software license fees after fiscal year 1985 in evaluating proposals is denied where an amendment to the request for proposals stated that software license cost would be evaluated. Charge that contracting agency should not have considered software license fees since agency did not evaluate awardee's software maintenance charges and protester's software license fees include cost of software maintenance charges is not persuasive. Agency did not intend to use software maintenance services after fiscal year 1985 and, therefore, did not consider such costs in evaluation. However, protester's proposal required agency to pay software license fees even if agency did not use protester's software maintenance services. Therefore, we cannot fault agency's consideration of software license fees in evaluation of proposals.

5. Evaluation of proposals is primarily the function of the procuring agency, and our Office will only question technical evaluation if shown to lack a reasonable basis. Our review of technical evaluations shows that they were conducted in strict conformity with solicitation's stated evaluation criteria. Therefore, we find no merit to protest against contracting agency's determination that technical proposals were essentially technically equal.

6. Request for second round of best and final offers did not constitute a prohibited auction technique. Agency determined that it could not make award to either of only two offerors which submitted proposals based on first best and final offers. Moreover, agency issued two amendments and held discussions after first best and final offers were received in order to clarify certain evaluation criteria. Thus, second round of best and final offers was mandated. Furthermore, record contains no evidence to show that agency either told awardee that its first offered price was too high or that its price was higher than protester's price.

7. Allegation that agency call for second round of best and final offers resulted in technical leveling whereby awardee's technically deficient proposal was brought up to level of protester's proposal is without merit. Record reveals that both protester's and awardee's proposals were deficient after first best and final offers were submitted. Further, there is no evidence that agency improperly coached awardee in effort to remove awardee's proposal deficiencies.

8. Allegation that awardee was not required to pass benchmark tests required by request for proposals is without merit. Protesters have not alleged specific deficiencies, and our examination of test results affords no basis to dispute agency's assessment of the benchmark tests.

9. Protest that agency should not have evaluated purchase option is untimely under section 21.2(b)(1) of the Bid Protest Procedures, 4 C.F.R. part 21 (1981). Amendment indicating that purchase option would be evaluated was issued on July 1, 1981. Protest should have been filed before next closing date for receipt of proposals but was not filed until well after award.

10. Agency properly considered awardee's offered purchase option discount where amendment to solicitation clearly indicated that purchase option would be evaluated and agency contemplated possibility of exercising purchase option throughout course of procurement. Fact that agency does not currently have funds available for purchase of computer system is not a bar to considering purchase option to be exercised at the end of fiscal year 1985, since there would appear to be a reasonable certainty that funds will be available given importance of the system to the agency mission.

11. Protest alleging that contracting agency improperly changed evaluation criteria after receiving General Services Administration (GSA) delegation of procurement authority for acquisition of computer system is denied. Even though record shows that contracting agency did change criteria, record also reveals that contracting agency submitted solicitation containing final version of evaluation criteria to GSA as required under delegation of procurement authority and regulations.

System Development Corporation (SDC) and its principal subcontractor, International Business Machines (IBM), jointly protest against award of a contract to Control Data Corporation (CDC) by the Department of the Air Force pursuant to solicitation No. F04703-81-R-0002. The contract was awarded to CDC on July 31, 1981, on a fixed-price basis, and calls for the delivery, installation, test, lease (with an option to purchase), and maintenance of automatic data processing equipment and operating system software for use at Vandenberg Air Force Base, California, as part of the Air Force's metric data processing system.

Concurrent with its protest to our Office, SDC filed suit against the Air Force in the United States District Court for the District of Columbia seeking to enjoin the Air Force from taking further action with respect to the contract awarded to CDC. System Development Corporation v. Verne Orr, Secretary of the United States Air Force, et al., Civil Action No. 81-2630. CDC intervened in the action, and at a hearing on October 30, 1981, the court denied SDC's motion for a temporary restraining order. By letter dated December 9, 1981, the court requested that our Office render a decision on the SDC/IBM protest. This decision is in response to that request.

The SDC/IBM protest alleges that there were a number of irregularities in the procurement process which render the CDC contract "improper and void." Essentially, the protesters contend that the award to CDC was made in contravention of the evaluation scheme set forth in the request for proposals,

applicable regulations governing the procurement of automatic data processing equipment, and the terms of the delegation of procurement authority issued to the Air Force by GSA.

Specifically, SDC and IBM allege that the award to CDC was improper because,

1. The Air Force did not consider software conversion costs as a life cycle evaluation factor in determining which proposal represented the lowest cost to the Government.

2. The Air Force did not use a present value discount factor when it calculated life cycle costs.

3. The Air Force included IBM license fees for the years beyond 1985 in calculating SDC's price but did not include CDC's charges for central maintenance services for the same time period when it evaluated CDC's price to the competitive prejudice of SDC/IBM since IBM's license fees include charges for central maintenance services.

4. The evaluation of proposals was not conducted in accord with the evaluation scheme set forth in the solicitation.

5. The Air Force requested and rescored a second round of best and final offers in what amounted to a prohibited auction technique and technical leveling of proposals to the benefit of CDC.

6. The configuration of hardware and system software components offered by CDC may not have passed the benchmark tests required in the solicitation.

7. The purchase option offered by CDC should not have been considered by the Air Force because it was, in effect, a "one-day special discount that resulted in an unrealistically low evaluated price" and was improperly added as an evaluation factor for the sole benefit of CDC by amendment 0005.

8. The Air Force submitted its proposed evaluation factors to GSA in order to obtain a

delegation of procurement authority but issued the solicitation using a different set of evaluation factors without notifying GSA of the change.

We deny the protest.

Background

The metric data processing system consists of computer hardware, executive software, application software and data bases integrated as a system for accepting, processing, and promulgating data relating to position, velocity, and acceleration of missiles, boosters, aircraft and other objects being evaluated at the Air Force's Western Test Range. The calculations are presently done on a variety of computer systems; however, the greatest amount of metric data processing is accomplished on an IBM 360-65 computer using IBM-compatible software.

In order to acquire a more modern computer system with greater capabilities for this type of work, Headquarters, Western Space and Missile Center, Vandenberg Air Force Base, issued request for proposals No. F04703-81-R-0002 to 75 potential offerors on November 21, 1980. This procurement was conducted pursuant to authority granted to the Air Force by GSA on September 24, 1980. The solicitation indicated that award on a firm-fixed-price basis was contemplated and stated that award would be made to the offeror determined to be "most advantageous to the Government, price and other factors considered." Four general evaluation factors were to be evaluated with each receiving equal weight. These factors were: technical, management, price, and past performance. The basic contract was to be for the period from April 1 through September 30, 1981. Four 1-year option periods for lease and maintenance were also contemplated. Prices for the basic contract plus options through fiscal year 1985 were to be evaluated by the Air Force for award purposes. Since the system life was expected to be about 11 years, provisions for an additional 6 option years (through fiscal year 1991) were to be included in the contract awarded.

A preproposal conference was held on December 17, 1980, and 21 potential offerors, including both SDC and IBM, were represented. Questions were invited and written answers supplied to all offerors. This

exchange resulted in four amendments to the solicitation. On March 2, 1981, initial proposals were submitted by only two firms, CDC and SDC. Both proposals were evaluated and found to be deficient in several respects, but both were considered to be within the competitive range. Negotiations were conducted during May 1981 with both firms. A request for best and final offers was issued on May 29, and each offeror was required to submit a model contract affirming its best and final offer. Upon receipt of best and final offers and model contracts, the contracting activity determined that there were "open items/impediments existing within offers" which prevented making award to either offeror. Therefore, the Air Force decided to reopen negotiations with SDC and CDC. On July 1, the agency issued amendment 0005 which, among other things, requested submission of a second best and final offer and attempted to clarify several areas of the solicitation. Further discussions were held with CDC and SDC in early July, during which time the Air Force sensed that there was confusion regarding certain terms and conditions of the request for proposals. Accordingly, amendment 0006 was issued on July 10 to clarify the areas of concern and to set July 22 as the date for submission of second best and final offers.

After evaluating the set of second best and final offers, the contracting activity determined that both offers were acceptable. The contracting officer awarded the contract to CDC on July 31 and notified SDC by letter of same date.

At SDC's request, a debriefing conference was held on August 11. Among the areas discussed were: evaluation of conversion costs, evaluation of software license fees and maintenance costs for the period from fiscal year 1985 to 1989, alleged auction techniques, evaluation of proposals, and award based on price alone. On August 14, 1981, SDC filed a protest with the contracting officer contending that:

"I. The Evaluation of Non-Cost Primary Factors Did Not Conform to Solicitation Criteria.

"II. The Evaluation of Significant Cost Factors Did Not Conform to Solicitation Criteria and Applicable Procurement Regulations.

"III. The Conduct of the Evaluation Process Resulted in an Invalid Contract Award Situation."

The contracting officer denied the protest on August 26.

By letter dated September 8, SDC/IBM filed their initial protest with our Office in which they raised the first six bases for protest. There were several other submissions from SDC/IBM including a letter dated October 20 (filed in our Office on October 22) which raised the seventh basis for protest. We had a conference on this matter with all interested parties on November 24 and SDC/IBM raised the eighth protest issue at that conference.

Software Conversion Costs (Issue 1)

SDC/IBM contend that the Air Force erred in computing proposal life cycle costs because the Air Force did not include the costs associated with converting from software which is compatible with the present system to software which would be compatible with each offeror's proposed system. The protesters allege that the cost of converting the present software to software compatible with the CDC-proposed system will be $5 million more than the cost of converting the present software to software compatible with the SDC-proposed system. The protesters cite a report of the United States House of Representatives entitled Department of Defense Appropriations for 1981 Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, Ninety-sixth Congress, Second Session, in support of their estimate of the substantial software conversion costs involved in this procurement. The Air Force contends that software conversion costs resulting from the installation of the CDC system will be approximately $332,000 based upon a software conversion study done by the Air Force after this protest was filed. Each party disputes the validity of the opposing side's figures. The protesters also rely on a report issued by our Office (Conversion: A Costly Disruptive Process That Must Be Considered When Buying Computers, FGMSD-80-35, June 3, 1980) in support of the proposition that conversion costs should be considered by contracting agencies when purchasing automatic data processing systems and that consideration of such costs will not necessarily eliminate competition.

SDC/IBM believe that consideration of software conversion costs was mandatory: (1) under the terms of the delegation of procurement authority issued to the Air Force by GSA which directed that the Air Force "should insure that the resultant contract represents the lowest overall cost to the government;" (2) under applicable GSA regulations which were incorporated by reference into the delegation of procurement authority as "limitations" thereto; and (3) under the terms of the solicitation which incorporated certain Air Force regulations which in turn direct that "lowest total overall cost," including conversion costs, is a major factor to be considered in the selection of automatic data processing resources.

The Air Force readily admits that software conversion costs were not considered in determining which proposal represented the lowest total overall cost to the Government. The Air Force and CDC believe that the issue of whether conversion costs should have been considered in calculating system life cycle costs was raised in an untimely manner. They argue that, since the request for proposals listed in great detail all factors to be applied in the evaluation process but did not even mention conversion costs, the protesters should have been aware that consideration of conversion costs was not contemplated. Thus, they believe that this protest issue is really a charge that the solicitation was defective because it did not list conversion costs as an evaluation factor. The Air Force also points out that both SDC and IBM are well established in the computer field and have competed for prior Air Force contracts for automatic data processing equipment. Accordingly, the Air Force contends that, based on prior Air Force practice, the protesters should have known that, if conversion costs were going to be considered, the request for proposals would have clearly stated that to be the case. The Air Force also points out that IBM wrote two letters to Air Force officials during this procurement indicating that IBM felt conversion costs should be considered in this procurement and pointing out that GSA had issued new regulations relating to consideration of conversion costs as part of the overall cost of a computer system. The Air Force believes these letters show that IBM knew without doubt of the contracting activity's determination not to consider conversion costs for this procurement. Accordingly, the Air Force and CDC argue that, under section 21.2(b)(1) of our Bid Protest Procedures (4 C.F.R. part 21 (1981)), the

protesters had to protest this alleged solicitation defect prior to the closing date for receipt of initial proposals (March 2, 1981) or at the latest by the date set for receipt of the second best and final offers (July 22, 1981) in order to have this issue considered on its merits.

The protesters argue that this issue was timely filed since they did not become aware that conversion costs were not considered until August 26, 1981, when the contracting officer denied their protest. Since SDC/IBM filed their protest with our Office within 10 working days of that denial, the protesters believe this issue was timely filed in accord with section 21.2(b)(2) of our Procedures. 4 C.F.R § 21.2(b)(2). The protesters contend that, under the terms of the request for proposals as it was written and under applicable regulations, they had every reason to believe that the Air Force would properly consider conversion costs. Moreover, SDC/IBM believe the letters cited by the Air Force from IBM to Air Force officials concerning conversion costs show clearly that IBM was merely pointing out GSA's new regulations to the Air Force and that these letters support SDC and IBM in their argument that they truly believed that conversion costs were going to be considered in the evaluation of proposals.

Even though we do not generally consider protests on issues which are untimely filed, we will consider a protest whether or not it is timely if the issues are before a court of competent jurisdiction and that court requests our opinion. Dr. Edward Weiner, B-190730, September 26, 1978, 78-2 CPD 230. Such is the case here. The Air Force and CDC have requested that we provide the court with our opinion as to the timeliness of the SDC/IBM protest issues. We have provided courts with our views concerning timeliness, id., and we will do so here, since the court has indicated its interest in our opinion regarding timeliness.

In our opinion, the first issue of protest was not filed in a timely manner. The solicitation clearly delineated all factors which the Air Force intended to consider in section "M," entitled "Evaluation Factors for Award." This section stated the four general areas which would be evaluated--technical, management, past performance, price--and enumerated in great detail the subfactors which would be evaluated in each area. In fact, the evaluation factors comprised seven full pages.

Nowhere in this detailed description was there any indication that software conversion costs, or any other conversion costs for that matter, were intended to be evaluated for award purposes. In view of this fact, we think it should have been obvious to SDC and IBM that the Air Force did not intend to consider software conversion costs as a life cycle factor. Moreover, the record shows that after this solicitation was issued, but before the due date for submission of initial proposals (by letter dated February 26, 1981), IBM contacted an Air Force official and pointed out the "major significance" of GSA's January 15, 1981, revisions to its regulations concerning acquisition of automatic data processing equipment and, in particular, those portions of the new regulations which dealt with conversion costs as an evaluation factor. This IBM letter also discussed the magnitude of conversion costs if a noncompatible computer system were chosen for the metric data processing system. This letter shows that IBM was aware of the importance it attached to the evaluation of conversion costs for this procurement prior to the closing date for submission of initial proposals.

Furthermore, the Air Force has argued that, when conversion costs are to be considered, it will inform offerors that either they are to include the price for completing the conversion or that the Air Force will add a specific dollar amount to all proposal prices for proposals which offer noncompatible equipment. SDC and IBM are experienced offerors which have had prior dealings concerning Government--apparently, including the Air Force--purchases of computer systems. This prior experience should have alerted these protesters that, in the absence of some specific affirmative statement in the solicitation, conversion costs would not be included in the evaluation. This is especially so here where the solicitation was so detailed as to the evaluation factors. See Ensign Bickford Company, B-180844, August 14, 1974, 74-2 CPD 97.

The request for proposals specifically delineated factors the Air Force would include in its evaluation, and no mention was made of conversion costs. Therefore, SDC/IBM's protest concerning what they thought would be taken into consideration is in reality a charge that a certain factor had been improperly omitted from the evaluation factors section and should have been raised before the date for submission of initial proposals.

See General Telephone Company of California, 57 Comp. Gen. 89 (1977), 77-2 CPD 376; Dunham-Bush, Inc., B-184537, January 14, 1976, 76-1 CPD 25. The protesters, who were familiar with this type of Air Force evaluation formula for award of computer systems, should have been prepared to file a timely protest against the alleged omission of an important evaluation factor before the closing date for submission of initial proposals. Instead, SDC submitted its proposal and waited until after it had lost the competition to file a protest. Accordingly, this issue of the protest is untimely under section 21.2(b)(1) of our Bid Protest Procedures (4 C.F.R. § 21.2(b)(1)) which requires that protests based upon alleged improprieties which are apparent prior to the closing date for receipt of initial proposals be filed prior to the closing date for receipt of initial proposals. See Fairchild Industries, Inc., B-184655, September 8, 1975, 75-2 CPD 140.

The purpose of our timeliness limitations is to enable the contracting agency, or our Office, to decide an issue while it is still practicable to take effective corrective action where the circumstances warrant. For example, if SDC had raised the issue of conversion costs with either the contracting agency or our Office prior to the closing date for receipt of initial proposals, then the protest could have been reviewed and, if found to have merit, the request for proposals could have been amended to reflect this new evaluation factor so that all potential offerors would be on notice of the manner in which award would be made before they had decided on the approach to take in their proposals. As it stands, CDC would very possibly be prejudiced if the evaluation factors were now changed since it is entirely possible that CDC might have offered a different price or configuration of hardware and system software if it were on notice that conversion costs would be an evaluation factor. See, for example, Page Airways, Incorporated and Omni Coast International, Inc., B-197896, B-197896.2, June 5, 1980, 80-1 CPD 391.

In accord with the court's request we will now discuss the merits of this protest issue.

The Brooks Act, 40 U.S.C. § 759 (1976), gives GSA exclusive Federal purchasing authority for all commercially available general purpose automatic data processing equipment, which authority GSA may delegate to the Federal agencies. 47 Comp. Gen. 275 (1967).

Pursuant to this authority, GSA has issued implementing regulations found in the Federal Property Management Regulations (FPMR) subpart 101-35.2 and the Federal Procurement Regulations (FPR) subpart 1-4.11. These regulations govern the procurement of automatic data processing equipment and are binding on all Federal agencies. Federal Judicial Center, B-193861, March 27, 1979, 79-1 CPD 206. GSA granted a delegation of procurement authority to the Air Force for the metric data processing system procurement on September 24, 1980. This delegation of procurement authority was conditioned upon the Air Force following the above-cited GSA regulations and stated that failure to operate within these limitations would render the delegation of procurement authority voidable. Furthermore, as the protesters note, this delegation of procurement authority directed the Air Force to make sure that the contract awarded represented the "lowest overall cost to the government."

Because GSA promulgated the regulations governing automatic data processing procurements and delegated its authority to procure the subject automatic data processing equipment to the Air Force, we asked GSA to give us a report on the issues raised by this protest. We then gave all parties to this protest an opportunity to review GSA's report and to comment on it. The views of GSA are entitled to significant weight because it promulgated the regulations and because of its statutory responsibility for Government procurement of automatic data processing equipment. Xerox Corporation, B-193565, July 27, 1979, 79-2 CPD 57. The GSA report on this protest issue provided no definitive answer other than the conclusion that "under certain conditions, conversion costs were required to be evaluated in life cycle costing."

In order to determine whether the conditions mandating evaluation of software conversion costs existed, we must examine the pertinent GSA regulations. Furthermore, as previously indicated, "price" was only one of four major factors upon which the award was to be based, but the award was based primarily on price since CDC and SDC were determined to be essentially equal in the areas of technical, management, and past performance. Accordingly, the determination as to which proposal represented the lowest overall cost in this procurement is critical.

At the time this request for proposals was issued, FPMR § 101-35.206(c) provided:

> "(2) Two prime factors shall be considered in the selection of equipment.
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> "(i) Its capability to fulfill the system specifications; and
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> "(ii) Its overall costs, in terms of acquisition, preparation for use, and operation.
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> "The term 'overall costs' as used in this subparagraph, shall be interpreted to include but not limited to such cost elements as personnel, purchase price or rental, maintenance of purchased equipment, site preparation and installation, programing, training, and conversion costs. In considering conversion costs, care must be taken to avoid undue biases or predispositions which are prejudicial to free and open competition. Conversion costs may be considered only to the extent that such costs can be shown to be clearly essential to continuing agency needs taking into account the probable economic life of the resources to be converted; that due consideration has been given to the possibility of redesigning current systems and software to take advantage of enhanced system capabilities or eliminating obsolete or nonstandard software in conflict with applicable Federal Information Processing Standards; and that the bases for such conversion costs are clearly delineated in the solicitation documentation." [Emphasis added.]

Also, at the time this solicitation was issued, FPR § 1-4.1102-14 further defined the term "overall costs" as follows:

> "'Lowest overall cost' means the least expenditure of funds over the systems or items life, price and other

> factors considered. Lowest overall costs shall include, but shall not be limited to such elements as personnel, purchase price or rentals, maintenance, site preparation and installation, programming, training, and telecommunications as applicable."

The protesters cite our June 3, 1980, report, entitled Conversion: A Costly, Disruptive Process That Must Be Considered When Buying Computers, as stating our view that contracting agencies should take into consideration the expense of converting software when leasing/purchasing automatic data processing equipment. We also recognized the apparent conflict between the Government's goals of achieving full and free competition and obtaining computer systems at the lowest overall cost.

Partly as a result of our criticism, the Administrator of GSA revised FPMR subpart 101-35.2 and FPR subpart 1-4.11 and published the revised regulations in the Federal Register on January 5, 1981. The protesters contend that these revisions removed any doubt that software conversion costs should be considered as a factor in determining the lowest overall cost to the Government.

In our opinion, the January 15, 1981, revisions are not applicable to this procurement and, therefore, need not be considered. The delegation of procurement authority (in dealing with the fixed-price option clause to be used in the solicitation) pointed out, in pertinent part, that the regulations governing the procurement were going to be revised and stated:

> "Upon issuance of this FPR amendment in the Federal Register, it is anticipated that the following conditions will prevail:
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> * * * * *
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> "(2) Solicitations dated prior to the effective date of the FPR amendment and the time for submission of offers has not expired shall be amended, if practicable, to reflect the provisions of the FPR amendment."

Thus, the language of the delegation of procurement authority shows that the revisions were not to be automatically applicable to this procurement. Since the delegation of procurement authority stated that the solicitation would be amended to include the regulation changes to the fixed-price option clause "if practicable," we think that the delegation of procurement authority did not require the Air Force to consider the other regulation changes.

Air Force personnel had considered whether to include software conversion costs as an evaluation factor prior to issuance of the request for proposals and decided they could not develop software conversion cost evaluation criteria which would yield credible comparisons between offerors. Therefore, the Air Force decided initially not to evaluate software conversion as a life cycle cost factor in this procurement. When the new regulations were issued, the Air Force apparently used the same reasoning in deciding that it was not practicable to amend the solicitation to add software conversion costs as an evaluation factor.

The Air Force submitted its proposed solicitation to GSA 8 days prior to issuance, and GSA did not object to the fact the software conversion costs were not included in the evaluation factors. Moreover, GSA has subsequently had an opportunity to report to our Office on this matter and has not concluded that the Air Force went beyond the intent of the delegation of procurement authority in this regard. Accordingly, we do not find the Air Force's determination not to amend the solicitation to be unreasonable, especially in view of the fact that GSA was fully cognizant of the evaluation criteria set forth in the solicitation, and because GSA had ample opportunity to object to the Air Force's actions but never did so.

Dealing then with the FPR and FPMR provisions in effect on the date this solicitation was issued (quoted above), we find no specific reference to software conversion costs in the FPR definition of "lowest overall cost." We note that even though the FPR definition did

not specifically refer to software conversion costs, it did enumerate such cost elements as site preparation, installation, programming and training, which are some of the major cost elements of converting from one vendor's product line to that of another. On the other hand, the FPMR definition of "overall costs" specifically included conversion costs. However, the FPMR provision cautioned that, "In considering conversion costs, care must be taken to avoid undue biases which are prejudicial to free and open competition." This provision gave the procuring agency discretion to consider/not consider conversion costs, and as we stated in our June 3, 1981, report, this regulation was "both unclear and subject to misinterpretation."

Thus, we cannot find that the Air Force decision not to include software conversion costs as an evaluation factor was unreasonable, especially since the proposed solicitation was submitted to GSA prior to issuance, and GSA voiced no objection at that time nor at any subsequent time.

As indicated above, SDC/IBM was untimely to the extent that its protest was viewed as a charge that software conversion costs were omitted from the evaluation factors. Further, to the extent that SDC/IBM contends that the provision for award on the basis of the lowest overall cost contemplated the evaluation of those costs, it was clear from the regulation (as underscored above) that conversion costs could not be considered unless clearly delineated in the solicitation. FPMR § 101-35.206(c)(2)(ii). Moreover, we have consistently held that it is a fundamental principle of Federal procurement law that the solicitation must be drafted in such a manner that it informs all offerors of the evaluation factors to be used so that all offerors are treated equally and are provided a common basis for submission of proposals. Data 100 Corporation, B-194924, December 19, 1979, 79-2 CPD 416. Thus, it would have been improper for the Air Force to have considered the cost of converting software in this procurement since nothing to that effect was stated in the request for proposals. In Data 100 Corporation, supra, we sustained a protest because the contracting agency considered software conversion costs without listing it as an evaluation factor. Furthermore, in Xerox Corporation, B-180341, May 10, 1974, 74-1 CPD 242, we ruled that a contracting agency properly did not

consider costs associated with program conversion where that agency determined that it could not determine conversion costs with reasonable certainty and, consequently, did not include conversion costs in the solicitation as an evaluation factor. In that case, we held that the proposals were properly evaluated in accord with the stated criteria in spite of the protester's contention, much like SDC/IBM's contention here, that software conversion was required to be considered as a cost in any automatic data processing equipment procurement under provisions of the FPMR. Finally, we recognized in our decision in Burroughs Corporation, 57 Comp. Gen. 109 (1977), 77-2 CPD 421, that an agency could properly exclude certain conversion costs from consideration even though the resultant contract might not result in the "lowest overall cost to the Government" since the agency had done so in an attempt to increase competition under the procurement.

Accordingly, we deny the protest on this issue.

Present Value Discounting (Issue 2)

SDC/IBM contend that the Air Force improperly computed proposal life cycle costs since it did not calculate the present value of money when evaluating each offeror's proposal. The protesters argue that, if proposals were discounted to present values, CDC's price would have been evaluated as being significantly higher and SDC's price significantly lower relative to each other, since CDC proposed that the Air Force pay much of the costs for CDC's computer system in the early stages of the contract while SDC proposed payment at a low rate in the early stages. The protesters charge that the Air Force only used a present value discount factor prior to issuing the request for proposals when deciding what acquisition method to use to fulfill its automatic data processing requirements. The Air Force admits that the present value of money was only taken into account prior to issuance of the request for proposals. However, the Air Force contends that it was not required under the FPR and FPMR to use a present value discount factor in the evaluation of proposals. The Air Force contends that, since the request for proposals failed to list present value as one of the evaluation factors, consideration of present value would have been improper. Furthermore, both the Air Force and CDC believe that

this protest issue was required to be filed before the closing date for receipt of initial proposals and, therefore, is untimely under our Bid Protest Procedures.

We agree with the Air Force and CDC that this issue was untimely filed. In general, this conclusion is based upon the same reasoning we used to conclude that the issue of consideration of software conversion costs was untimely. See our discussion above. We view this issue as a charge that present value discounting should have been listed as an evaluation factor. Since present value was not mentioned at all in the "Evaluation Factors for Award" section of the solicitation, which gave a detailed listing of all factors to be considered, it should have been obvious to SDC and IBM that the Air Force had no intention of calculating costs on a present value basis. SDC/IBM's protest against this omission of what they considered to be a crucial factor should have been filed before the due date for submission of initial proposals in accord with 4 C.F.R. § 21.2(b)(1), when corrective action would have still been practicable, if warranted. Furthermore, any attempt to reevaluate proposals now by taking into account a present value discount factor would prejudice CDC since it might very well have submitted a significantly different proposal had it been informed that present value was a consideration.

At this point, we will discuss the substance of this protest issue since the court has requested our opinion on its merits.

At the time this solicitation was issued, until January 15, 1981, FPMR § 101-35.206(d) provided in pertinent part:

> "(d) Determinations of least cost alternative.
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> * * * * *
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> "(3) Also to be considered as a factor in the comparative cost analysis is the present value of money to be used in the acquisition of the equipment. The
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> present value computation is applicable to all expenses over the system's life. * * *"

Basically, the Air Force argues that, since it conducted a comparative cost analysis which included consideration of the present value of money prior to issuing this solicitation when it was determining what form of acquisition to use (for example, lease versus outright purchase), it had fulfilled the above-quoted FPMR requirement. The Air Force believes that this FPMR provision imposes no requirement for considering the present value of money when evaluating proposals. The Air Force also believes it received an exemption from GSA so that it would not have to discount for present value in evaluating proposals. This exemption came about, in the Air Force's opinion, when the GSA issued the delegation of procurement authority to the Air Force and granted a deviation from the standard fixed-price option clause required under FPR § 1-4.1108-4. The standard fixed-price option clause stated, in pertinent part:

> "(2) Offers will be evaluated for purposes of award by adding the total price of all optional periods and, if applicable, all stated optional quantities to the total price for the initial contract period, covering the initial systems or items. These prices will be adjusted by the appropriate discount factors. * * *" (Emphasis added.)

GSA granted the Air Force's request and allowed the solicitation to be issued using the standard clause language but without the underscored sentence. Thus, the Air Force concluded that it need not adjust proposal evaluations by "appropriate discount factors," including any present value discount factor.

GSA reported to our Office on this issue. In view of the fact that GSA promulgated the governing regulations, issued the delegation of procurement authority to the Air Force, and granted the fixed-price option clause deviation, and in view of its statutory responsibility for governing Government procurement of computer equipment, we give great weight to GSA's opinion on this issue. Xerox Corporation, B-193565, July 27, 1979, 79-2 CPD 57. After reviewing the above regulations, GSA concluded that "The requirement to use the present value of money factor in the evaluation

process was present in the regulations both before and after January 15, 1981." Regarding the deviation to the fixed-price option clause, GSA pointed out that the delegation of procurement authority allowed the requested deviation but cautioned the Air Force that the regulations were being revised, that a new fixed-price option clause was being drafted, and that this new clause would have to be included in the solicitation by amendment "if practicable." Apparently, though not stated in its report, GSA did not view the granting of a deviation to the fixed-price option clause as an exemption to the FPMR requirement for a comparative cost analysis taking into account the present value of money.

We agree with GSA that under FPMR § 101-35.206(d), quoted above, there was a requirement to take into account the present value of money in the evaluation of proposals received as well as in the early stages of the procurement before the request for proposals was issued. The Air Force's argument that it fulfilled the requirement before issuance of the solicitation ignores the fact that the major purpose of the regulation was to assure that the Government received the "lowest overall cost." This objective could not be attained by merely comparing alternative methods of acquisition before issuing the request for proposals without comparing alternative approaches actually received in response to the request for proposals.

However, there is merit to the Air Force's argument that GSA granted the Air Force a waiver of this requirement when GSA authorized deletion of that part of the standard fixed-price option clause which stated, "These prices will be adjusted by the appropriate discount factors." Even though GSA may not have intended this deviation to allow the Air Force to ignore present value discounting, and even though GSA may have expected the Air Force to incorporate the revised fixed-price option clause into the request for proposals, we can understand that the Air Force may have believed it was exempted from the present value discounting requirement. Moreover, as previously discussed, in accord with the delegation of procurement authority, the new clause was to be incorporated "if practicable." This gave the Air Force discretion in deciding whether to include the new provision. We cannot find unreasonable the Air Force's

determination that, since GSA waived the requirement initially, the revised regulation would not affect GSA's waiver of this provision. This is especially so since the requirement for present value discounting was the same under both the original and revised regulations.

Accordingly, we deny the protest on this issue.

Software License Fees (Issue 3)

SDC/IBM contend that the Air Force should not have included the cost of IBM's software license fees for option years from October 1, 1986 to September 30, 1989, in its evaluation of proposals.

First, SDC/IBM charge that during a telephone conversation the contracting officer misled them into believing that these fees would not be included in the evaluation of price. The contracting officer disputes SDC/IBM's version of this telephone conversation and reports: "It is true that the telephone conversation took place, but I told SDC in several different ways that the license fees would be evaluated." Where, as here, the conflicting statements of the protesters and the contracting officer constitute the only available evidence as to the substance of the telephone conversation, the protesters have not carried the burden of affirmatively proving the allegation. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337; Del Rio Flying Service, Inc., B-197448, August 6, 1980, 80-2 CPD 92. Consequently, we are unable to conclude that the contracting officer misled SDC or IBM regarding this issue.

Second, SDC/IBM contend that, if the costs of IBM's software license fees were included in the evaluation of the SDC price, then the costs of CDC's software maintenance should also have been included for this period. SDC/IBM believe this should have been done in order to evaluate proposals on an equal basis since IBM's software license fees included charges for software maintenance.

The contracting officer responds that software maintenance after 1985 was not a firm requirement because "It has been [the contracting activity's] practice to 'freeze' the software configuration at some point in time to assure greater system reliability. This makes

software maintenance by the contractor unnecessary after freezing the configuration." Thus, the Air Force did not believe that it would need software maintenance by the contractor after fiscal year 1985 and, therefore, chose not to evaluate it. The Air Force also reports that, if software maintenance were found to be necessary after 1985, this would be the subject of a separate contractual action.

Amendment 0006 to the solicitation issued July 10, 1981, stated:

> "Pursuant to Section M of the RFP, total life cycle cost will be considered in evaluation of the price. In addition to the purchase conversion costs at end of FY 85, software license cost for the period through FY 89 will also be evaluated as part of the total Government costs."

Therefore, SDC/IBM were clearly on notice that the software license fees for the years after 1985 would be considered in the evaluation of price. However, it is IBM's practice to "bundle" its software maintenance fees as part of its software license fees. Thus, it is mandatory that an agency pay software maintenance charges when it pays software license fees--even if, as here, the agency believes it will not need to use the software maintenance services. On the other hand, CDC separated its software license fees from its software maintenance charges for the years after 1985. Therefore, the Air Force would not be required to pay for software maintenance it did not intend to use. In these circumstances, and especially since SDC/IBM were put on notice by amendment 0006 that these software license fees would be considered, we cannot fault the manner in which the Air Force evaluated the proposals in this regard.

Therefore, we deny this third protest issue.

Evaluation of Proposals (Issue 4)

SDC/IBM contend that the evaluation of proposals was not conducted in conformity with the evaluation scheme set forth in the request for proposals. The protesters have not alleged any specific faults in

the evaluation other than to request our review of the Air Force determination that both proposals were scored essentially equal in the evaluation areas of technical, management, and past performance.

At the outset, we point out that it is neither our function nor practice to conduct a de novo review of technical proposals and make an independent determination of their acceptability or relative merit. The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment and discretion. Our review is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. We will question contracting officials' determinations concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. KET, Inc., B-190983, December 21, 1979, 79-2 CPP 429.

As previously noted, the request for proposals set forth four basic areas in which proposals would be evaluated: technical, management, past performance, and price. In section "M," "Evaluation Factors for Award," each factor was broken down into subfactors which would be evaluated. Since this listing of factors and subfactors was very detailed and extended for eight pages of the solicitation, we will not reprint it here. However, we have carefully reviewed the technical proposals and the evaluation reports thereon in view of the solicitation's stated criteria. Our review reveals that the Air Force evaluated the proposals thoroughly in each area represented in the evaluation criteria. Although initial proposals from both offerors had numerous deficiencies, the technical evaluation conducted after discussions concluded that both proposals were "acceptable." We find no bases to question this qualitative appraisal of proposals.

We conclude that the evaluations were conducted in a fair and reasonable manner, in strict conformity with the evaluation factors and subfactors, and that the Air Force had a rational basis to conclude that proposals were essentially technically equal. Accordingly, we will not object to the Air Force's technical evaluations. Since proposals were correctly viewed by the Air Force as essentially technically equal, we find no impropriety in the award to CDC being

based primarily upon its lower evaluated best and final price in accord with the fourth major evaluation criterion of the solicitation. Alcoa Marine Corporation, B-196721, May 9, 1980, 80-1 CPD 335.

Therefore, we deny the protest with regard to the fourth issue.

Request for Second Best and Final Offers (Issue 5)

SDC/IBM object to the fact that the Air Force asked for a second round of best and final offers. The protesters allege that this amounted to an auction technique which allowed CDC an opportunity to significantly lower its evaluated price. Furthermore, the protesters allege that, after the first round of best and final offers, SDC was the only technically acceptable offeror and was, therefore, entitled to award. SDC/IBM contend that, by allowing offerors to submit a second best and final offer, the Air Force engaged in technical leveling which brought CDC's technically deficient proposal up to SDC's technically acceptable level.

The Air Force reports that, when it received the first best and final offers and accompanying model contracts, it determined it could not make award to either offeror because both proposals still contained some unacceptable technical deficiencies. The Air Force decided to reopen negotiations to clarify/correct these deficiencies. The contracting officer also determined, after examining the best and final offers and model contracts, that certain changes had to be incorporated into the request for proposals. Accordingly, on July 1, 1981, amendment 0005 was issued. Amendment 0005 was issued to clarify certain elements of the evaluation criteria with regard to the price factor and also to change the evaluation criteria to include evaluation of purchase option credits and hardware purchase costs as of a specified date which the original solicitation had not provided. Discussions were held with both offerors and the contracting officer determined that parts of the request for proposals needed further clarification. As a result, on July 10, amendment 0006 was issued which, among other things, stated that software license fees for the option years after fiscal year 1985 would be evaluated as part of the total Government cost. The record reveals no protest against these actions on the part of SDC at that time.

We will first consider SDC/IBM's charge that the Air Force conducted an auction in this procurement. The Defense Acquisition Regulation (DAR) states that:

> "Auction techniques are strictly prohibited; an example would be indicating to an offeror a price which must be met to obtain further consideration, or informing him that his price is not low in relation to another offeror." DAR § 3-805.3(c) (1976 ed.).

The question of whether an auction has been conducted through the reopening of negotiations and the submission of new best and final offers must be determined in the light of the particular circumstances of each case. The fact that best and final offers are requested more than once by the contracting agency does not automatically establish the creation of an auction. See Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168.

We see no evidence which would indicate that the Air Force either told CDC that its price was too high to be considered further or that its price was higher than the price offered by SDC. In fact, the record reveals that CDC's evaluated price was lower than SDC's evaluated price after the first best and final offers were submitted. Moreover, the record shows that, while CDC's first best and final offer was deficient in several respects, the Air Force also believed that SDC's first best and final offer and model contract might be unacceptable because SDC wanted the Air Force to give it a power of attorney so that it could order from IBM on behalf of the Government at a reduced rate. Apparently, the Air Force had not contemplated giving any contractor such a power of attorney when it issued this solicitation or during negotiations. Since there was concern within the Air Force as to the ramifications of giving SDC a power of attorney, the contracting officer decided to reopen negotiations with both offerors. We conclude that the Air Force correctly reopened negotiations. We also conclude that the negotiations of July 6, 7, and 8 and the issuance of amendments 0005 and 0006 to change and/or clarify the request for proposals were necessary and mandated a request for a second best and final offer. In fact, we have even held that a contracting agency may properly

reopen negotiations and receive a second round of best and final offers on the sole basis that price had become the determinative factor since proposals were essentially technically equal. Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-1 CPD 427. The present case with its technical equality of proposals and numerous areas of the request for proposals in need of clarification is a stronger case for reopening negotiations. Accordingly, we conclude that an improper auction was not conducted by the Air Force in this procurement.

We next turn to SDC/IBM's charge that the Air Force's actions here caused technical leveling of the SDC and CDC proposals. Leveling refers to the unfair practice of helping an offeror "through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal." 51 Comp. Gen. 621, 622 (1972). Certainly, that did not happen in the present case. The record indicates that both the SDC and CDC proposals were considered generally acceptable, but with deficiencies which prevented award to either, throughout the first round of dicussions and up until the first best and final offers were submitted. Elimination of confusion regarding evaluation criteria and other clarifications were the intent of the second round of discussions. The second request for best and finals was necessitated by the deficiencies still remaining in the first best and final offers submitted by both offerors which prevented award to either. The Air Force properly decided to reopen discussions with both offerors in the competitive range and had to allow them to submit revised proposals based upon those discussions and amendments to the solicitation. Urban Transportation Development Corporation, Ltd., B-201939, August 7, 1981, 81-2 CPD 107; University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201. In the absence of any evidence showing improper coaching by the Air Force to help CDC bring its proposal up to SDC's level, we conclude that no technical leveling occurred in this procurement.

Accordingly, we deny the protest on this issue.

Benchmark Tests (Issue 6)

SDC/IBM question whether the CDC proposed system hardware and software components passed the benchmark

tests required in order to be considered technically acceptable for award under paragraph L.38 of the request for proposals and attachment 7 thereto. The protesters want us to verify that CDC actually was required to pass the solicitation's benchmark tests.

The Air Force's position is, simply enough, that the system proposed by CDC passed the benchmark tests and that it will be rebenchmarked before acceptance in order to assure compliance with the paragraph L.38 requirement.

In light of this allegation, a General Accounting Office technician reviewed the benchmark requirements and test results. The conclusion is that both CDC and SDC were required to pass all benchmark tests. We, of course, have no knowledge as to the manner in which the tests were administered since we were not present at the testing. SDC/IBM has not, however, pointed out any specific testing deficiencies. In the absence of such allegations, the record affords us no basis to dispute the Air Force's assessment of the benchmark tests.

We deny the protest on this point.

Evaluation of Purchase Option (Issue 7)

SDC/IBM have characterized the purchase option offered by CDC as a "one-day special discount" and argue that it should not have been considered by the Air Force in evaluating CDC's price. The protesters believe that this item was improperly added as an evaluation factor by amendment 0005 for the sole benefit of CDC. They also contend that, since the option is unlikely to be exercised by the Air Force, consideration of it in the evaluation was improper.

We find this issue to be untimely under our Bid Protest Procedures. The Air Force issued amendment 0005 on July 1, 1981. Amendment 0005 clearly indicated that purchase option credits and hardware purchase costs would be considered in the evaluation. Amendment 0005 stated, in pertinent part, that:

> "b. The purchase option credits and the hardware purchase costs, as specified

> in the RFP, Section M, will be included as evaluation factors in the award of a contract. For evaluation purposes only, the purchase price, as affected by the purchase option credits, will be based on a purchase date of 30 Sep 1985."

Therefore, all offerors were on notice and, if SDC/IBM wished to protest, they were required to do so at the latest by the closing date for submission of second best and final offers in accord with section 21.2(b)(1) of our Procedures, 4 C.F.R. § 21.2(b)(1). Since the protest of this issue was not filed until October 22, 1981, this issue is untimely.

Next, we will discuss the substance of this protest issue as requested by the court.

We are not persuaded by the protesters' arguments. The protesters argue that this amendment was issued for the benefit of CDC and that it could not benefit SDC/IBM in any way. Further, the protesters allege that, as a result of this amendment, CDC offered the Air Force a 28-percent discount on the purchase of the computer system, and this caused CDC's evaluated price to be lower by approximately $2.7 million. According to the protesters, "This swung the balance in favor of CDC."

We fail to see how amendment 0005 worked only to the benefit of CDC and not SDC. First, SDC took no exception to the amendment immediately after it was issued. Second, SDC could have offered the Air Force a significant purchase discount and would thereby have lowered its own evaluated price, but it did not. In our opinion, the protesters' allegation that SDC offered a 28-percent discount as a result of this amendment only serves to show that the true beneficiary of this amendment was the Air Force which received a great price reduction.

The "one-day special discount" idea raised by the protesters is based on the contention that the Air Force may not have the funds available to purchase the CDC system on September 30, 1985. The record shows that the Air Force was contemplating a possible purchase before the solicitation was issued, and the solicitation itself clearly specified that purchase was a possibility. Even though there may not currently be funds available

to the Air Force for this purpose, the October 26, 1981, letter from the Commander, Headquarters Space and Missile Test Organization, Vandenberg Air Force Base, indicates that the metric data processing system is critical to the Western Testing Range (WTR) mission including programs of the highest national priority. Thus, while the Air Force has expressed "hope" that purchase funds will be available, given the importance of the system to the WTR mission, there would appear to be a reasonable certainty that funds will be available.

The protesters' reliance upon on our decision in Interscience Systems, Inc., B-199918.2, March 25, 1981, 81-1 CPD 222, as prohibiting evaluation of the purchase option in this situation is misplaced. In that case, the contracting officer had checked with agency budget representatives after solicitation issuance and found that no budget funds were available for purchase nor were any likely to become available. We held that the contracting officer acted properly in not considering a lease with option to purchase proposal in part because the solicitation had warned that evaluation and award were to be based upon availability of funds. We did not hold, as the protesters suggest, that purchase options can never be evaluated unless purchase funds are presently available.

The protesters have also cited our decision in Burroughs Corp., 56 Comp. Gen. 142 (1976), 76-2 CPD 472, for the proposition that an unreasonably restricted option may not be considered by an agency. We think the protesters have misconstrued the Burroughs case. In that case, the proposal would have subjected the Government to penalty charges if it did not exercise all options and use the offeror's equipment for the system's full life. We held that these penalties would subject the Government to an indeterminate liability and, therefore, the Government's option rights under the proposal were "illusory" and in violation of provisions of the Anti-Deficiency Act. 31 U.S.C. § 665 (1970). That is clearly not the case here.

Accordingly, we deny the protest on this point.

Change in Evaluation Factors (Issue 8)

At a conference held on this protest, SDC/IBM charged that the Air Force had improperly changed the evaluation criteria after getting a delegation of procurement authority from GSA. The clear implication is that the Air Force deceived GSA by showing it one set of proposed evaluation factors before the delegation of procurement authority was issued and issuing the solicitation with different evaluation factors. The protesters believe this was a violation of the conditions under which the delegation of procurement authority was issued.

The record shows that the Air Force had revised its proposed evaluation factors several times before submitting them to GSA for approval of a delegation of procurement authority. The Air Force revised its evaluation criteria again after receiving the delegation of procurement authority. However, in accord with the delegation of procurement authority's directions and the provisions of section 1-4.1103(b) of the FPR, the Air Force provided copies of the final version of the solicitation to GSA 8 days before issuance. Since GSA did not object to or comment upon the final version of the request for proposals, we think that the Air Force had a right to rely on the delegation of procurement authority issued by GSA on September 24, 1980, and properly accepted GSA's silence upon review of the final solicitation as approval. See PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. Any impropriety in the evaluation factors was, in effect, cured by submitting the final version to GSA as mandated. In our opinion, the Air Force did not act improperly in this regard nor is there any evidence of deceit by Air Force personnel. Furthermore, GSA was represented at the conference in which this issue was first raised and did not object to the Air Force's actions at that time nor did GSA comment upon this point in written comments on that conference.

Therefore, we deny the protest on this last issue.

Milton J. Socolar

for Comptroller General
of the United States