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

Decision

Matter of: Charles R. Cox

File: B-252773

Date: December 16, 1993

DIGEST

An employee failed to use 140 hours of restored annual leave within the 2-year period permitted by the Office of Personnel Management regulation at 5 C.F.R. § 630.306 (1993), thus resulting in its forfeiture a second time. The agency's failure to plan and schedule the employee's leave to avoid forfeiture, as required by the agency's nondiscretionary policy, constituted administrative error. The error may be corrected by substituting the restored leave for annual leave the employee took during the period. The resulting forfeited annual leave may be restored under 5 U.S.C. § 6304(d)(1)(A) (1988). Robert D. McFarren, 56 Comp. Gen. 1014 (1977).

DECISION

Mr. Charles R. Cox, an employee of the Federal Aviation Administration (FAA), requests restoration of 140 hours of restored annual leave.[1] Mr. Cox had not used the restored annual leave at the expiration of the 2-year period prescribed by the Office of Personnel Management (OPM),[2] causing it to be deducted from his account.

Mr. Cox had 140 hours of annual leave restored as the result of an exigency of the public business ending in 1989. 5 U.S.C. § 6304(d)(1)(B) (1988). By the end of the 1991 leave year, Mr. Cox had not used the restored annual leave and it was forfeited a second time. Mr. Cox states that he thought that he had until 1998 to use these 140 hours of restored annual leave since he has until then to use other restored leave that he had accumulated following the Professional Air Traffic Controllers Organization strike. Mr. Cox

[1]The request was submitted by the Assistant Administrator for Human Resource Management, Federal Aviation Administration.

[2]5 C.F.R. § 630.306 (1993).

was unaware of the existence of a different time frame by which the restored leave from the exigency, which ended in 1989, had to be used.

The FAA states that it is aware of two decisions of this Office which denied an employee's request for further restoration of annual leave beyond 2 years in which the employees alleged that their employing agency had given them erroneous advice regarding the rules for using their restored leave.[3]

The FAA points out that, unlike the agencies involved in those decisions, it has a nondiscretionary agency policy that requires management to take deliberate steps to insure that the annual leave of employees is not lost.[4] The policy vests management with final responsibility for the planning and scheduling of the annual leave of employees for use throughout the leave year and applies to both unrestored and restored annual leave. Thus, the FAA believes that its failure to plan and schedule Mr. Cox's leave and to counsel him as to a potential loss of leave provides a basis for restoring his annual leave for a second time.

We agree. Section 6304(d)(2), title 5, United States Code, provides that restored annual leave in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management (OPM). An OPM regulation provides in 5 C.F.R. § 630.306 (1993) that leave restored under the provisions of 5 U.S.C. § 6304(d) must be used within 2 years. As a general rule, this 2-year requirement may not be waived or modified. Edmund Godfrey, 62 Comp. Gen. 253 (1983); Dr. James A. Majeski, supra, footnote 3; Patrick J. Quinlan, B-188993, Dec. 12, 1977.

However, in Robert D. McFarren, 56 Comp. Gen. 1014 (1977), we allowed the substitution of restored leave for annual leave to prevent its forfeiture due to administrative error. There, the employee had requested that his absence be charged to restored leave, but the agency erred and charged the leave instead to the employee's regular annual leave account, with the result that the restored leave was forfeited. We held that the employee's leave account should be corrected by substituting restored leave for annual

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[3]Dr. James A. Majeski, B-247196, Apr. 13, 1992; William Corcoran, B-213380, Aug. 20, 1984.

[4]FAA Personnel and Pay Policy § 3600.4g (change 17, Aug. 18, 1980).

leave, and that the annual leave that was then forfeited was subject to restoration.[5]

Here, the administrative error was not of a clerical nature but was due to the agency's failure to follow its own nondiscretionary policy. Its failure to do so caused the employee to forfeit his restored leave.

Accordingly, in order to correct its error in not scheduling Mr. Cox's restored leave to avoid its loss, the agency should substitute restored leave for the regular annual leave that it charged to Mr. Cox's leave account. Mr. Cox would then have forfeited regular annual leave for leave year 1991 which, under the provisions of section 6304(d)(1)(A), would be subject to restoration because of administrative error.

James F. Hinchman
General Counsel

[5]The exigencies of public business exception in 5 U.S.C. § 6304(d)(1)(B) was cited as authority since the employee had requested and been denied annual leave that year due to the exigencies of public business.

Comptroller General
of the United States

Washington, D.C. 20548

157112

Decision

Matter of: Continental Maritime of San Diego, Inc.--
Claim for Cost

File: B-249858.5

Date: December 17, 1993

Lee E. Wilson, Esq., for the protester.
Robert C. Arsenoff, Esq., and Mary G. Curcio, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Claim for protester's proposal preparation and bid protest costs is untimely since it was not filed with the agency within 60-day timeframe established by General Accounting Office Bid Protest Regulations.

DECISION

Continental Maritime of San Diego, Inc. (CMSD) requests that we determine the amount that it is entitled to recover from the Department of the Navy for the costs it incurred in preparing its proposal in response to request for proposals (RFP) No. 00024-92-R-8501 and the costs of filing and pursuing its protest in Continental Maritime of San Diego, Inc., B-249858.2; B-249858.3, Feb. 11, 1993, 93-1 CPD ¶ 230; aff'd on recon., B-249858.4, Mar. 10, 1993. In that decision, we sustained Continental's protest against the award of a contract to National Steel and Shipbuilding Company because we found that the Navy improperly evaluated National's technical proposal.

We conclude that the protester's claim is untimely filed.

We issued our decision sustaining CMSD's protest on February 11, 1993, and found that the agency should reimburse the protester for its proposal preparation and bid protest costs because no other remedy was feasible; that decision, which contained information subject to a protective order issued by this Office, was distributed at that time to CMSD's outside counsel who had been admitted to the protective order. On March 3, CMSD's outside counsel filed a request in which counsel asked that we modify our remedy to recommend termination of the contract awarded to National and award to CMSD; that request was denied on March 10.

On March 18, we distributed a redacted version of our initial decision deleting only information which was subject to the protective order to CMSD's outside counsel. On July 6, CMSD filed a claim with the Navy in the amount of $272,636.82 for "costs regarding [its] protest" before this Office. On July 8, CMSD received the Navy's response denying its claim as untimely. This claim, which was filed in our Office on July 19, is essentially an appeal of the Navy's decision.

The Navy's position that CMSD's claim was not timely filed is based on our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(1) (1993), which provides in pertinent part that:

> "The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 [working] days after receipt of the decision or the declaration of entitlement to costs. Failure to file the claim within such time shall result in forfeiture of the protester's right to recover its costs. The General Accounting Office may consider an untimely claim for good cause shown."

In its letter denying CMSD's claim, the Navy submits that the 60-day filing period ended on May 7 if measured from the February 11 date of our initial decision and, in the alternative, on June 3, if measured from the March 10 date of our decision denying CMSD's request for reconsideration. In either event, as the Navy views the matter, CMSD's claim to the agency filed on July 6 was untimely.

CMSD disputes the Navy's position, essentially arguing that it was unable to begin to prepare a detailed and certified claim until the protester received a copy of the redacted version of the initial decision sustaining its protest--a date which CMSD states that it cannot fix, but estimates to be "[q]uite sometime" after the time it received a copy of our March 10 reconsideration decision. CMSD also requests that if we find that its claim was not timely filed we still consider it under the "good cause" exception.

We need not resolve the issue of when the timeframe for filing a claim should commence in this case since even using the latest date CMSD argues should be used for beginning the 60-day filing period--the date the redacted version was received--CMSD's claim was untimely filed. If CMSD is correct in its assertion that timeliness should be measured from its receipt of a redacted version of our initial decision, such a version was distributed to the protester's outside counsel on March 18. While CMSD apparently believes that the timeliness of its claim should be measured from the time when it received the redacted version of the decision

as opposed to when its attorney received the redacted version of the decision, we measure compliance with our general timeliness requirements from the time the protester's attorney receives notice of a protestable issue. See Columbia Research Corp., B-247073.4, Sept. 17, 1992, 92-2 CPD ¶ 184. We see no reason to apply a different rule here. In the absence of any evidence to the contrary, we presume that counsel received its copy of the redacted version no later than 1 calendar week after we distributed it on March 18--i.e., March 25. Test Sys. Assocs., Inc.--Claim for Costs, 72 Comp. Gen. ___, B-244007.7, May 3, 1993, 93-1 CPD ¶ 351. Thus, even under the protester's theory, its claim filed with the Navy on July 6 was late since the 60-day timeframe would have ended on June 18 if measured from March 25.

CMSD requests in the alternative that we consider its claim under the "good cause" exception set forth in 4 C.F.R. § 21.6(f)(1). In this regard, CMSD argues that our decision awarding it costs presented the small business with "an unparalleled and complex task" for which it had to retain outside professional services to assist in claim preparation regarding allocation of costs and proper certification of its claim. Continental further argues that when bidding the contract, the firm "never imagined" that it would be required to detail and certify the time incurred by its employees and consultants. According to Continental, its small in-house staff was thus required to reconstruct the time spent on proposal preparation during an extremely busy time when it was preparing bids for a number of contracts to make up for the revenue it lost when the Navy improperly awarded a contract to National. Moreover, CMSD submits that it had to await the end of its fiscal year on May 31 in order to accurately determine its claimed costs on the basis of a year-end audit.

Our Regulations are clear--a protester that fails to comply with the 60-day claim filing requirement "shall" forfeit its right to reimbursement. Test Sys. Assocs., Inc.--Claim for Costs, supra. That timeframe was specifically designed to have claims efficiently resolved and affords protesters ample opportunity to submit adequately certified claims. Id. While there is a "good cause" exception to the filing requirement, we have construed the term to mean that some compelling reason beyond the control of the protester prevented the protester from timely filing the claim. See All Am. Moving and Storage--Recon., B-243630.2, Aug. 21, 1991, 91-2 CPD ¶ 184.

In our view, CMSD knew or should have known that it might be called upon to account for its costs as soon as its protest was filed because it was then reasonably foreseeable that we might, if CMSD were successful in its protest efforts, award costs. Accordingly, we are unpersuaded by the suggestion

that the firm was "caught off guard" by our decision awarding costs. CMSD should have begun its effort to substantiate its costs much earlier than it purportedly did so that final preparation of a certified claim could have been easily accomplished within the 60-day timeframe from receipt of our decision--notwithstanding the press of other business the firm encountered during that time period and notwithstanding the alleged need to wait until the end of its fiscal year to complete the effort.[1] CMSD's arguments thus do not constitute a compelling reason beyond the protester's control preventing a timely filing of the claim.

Robert P. Murphy

for James F. Hinchman
General Counsel

[1]We further note that if every claimant were permitted to await the end of its fiscal year to file a claim for costs, the timeframe would be rendered meaningless.

Comptroller General
of the United States

Washington, D.C. 20548

10571712

Decision

Matter of: DGS Contract Services

File: B-254512

Date: December 17, 1993

Richard D. Lieberman, Esq., Sullivan & Worcester, for the protester.
John Jordan, Jr., for Diamond Detective Agency, Inc., an interested party.
Amy J. Brown, Esq., General Services Administration, for the agency.
Paula A. Williams, Esq., and Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although the apparent low bid on a contract for armed guard services was mathematically unbalanced where bidder front-loaded all equipment and start-up costs in its base year price and these costs were not for unique or specialized equipment, it was not materially unbalanced, where the bid becomes low in the first month of the third option period of the contract which included 4 option periods, and where agency reasonably intends to exercise all options.

DECISION

DGS Contract Services protests the award of a contract to Diamond Detective Agency, Inc. under invitation for bids (IFB) No. GS-08P-93-JWC-0101, issued by the General Services Administration (GSA), for armed guard services at six locations in Utah. DGS alleges that Diamond's bid was mathematically and materially unbalanced and should have been rejected.

We deny the protest.

The IFB was issued on July 1, 1993, and contemplated award of a contract, wherein the standard services provided would be on a fixed-price per month basis, and the additional or emergency services provided would be on a per hour basis. The solicitation sought a contractor to provide armed guard services at various locations in Utah for a base year contract term of 12 months and four additional 12-month periods. The IFB included the standard "Evaluation of

Options" clause, set out at Federal Acquisition Regulation (FAR) § 52.217-5, which advises bidders that the government will evaluate bids on the total price for the base year and all options; the IFB also provided a formula to be used to determine the lowest total evaluated bid. The IFB included the standard sealed bidding award clause set out at FAR § 52.214-10, that in pertinent part cautions that a bid that is materially unbalanced may be rejected as nonresponsive.

On August 3, GSA received bids from two bidders: DGS and Diamond. The bids were priced as follows:

	DGS	Diamond
Base Year	$336,000	$398,940
1st Option	330,000	299,880
2nd Option	330,000	298,464
3rd Option	330,000	299,088
4th Option	330,000	299,340
Total	$1,656,000	$1,595,712

In a letter dated August 4, DGS filed an agency-level protest alleging that Diamond's bid was mathematically and materially unbalanced and should be rejected. The contracting officer asked Diamond to verify its bid and to submit information regarding the calculation of its bid prices. In response, Diamond explained that its base year price was front-loaded in order to allow the firm to recoup its capital investment for equipment, uniforms, training, and other start-up costs during the initial contract period. Diamond further explained that its option year prices contained only the cost of wages, administration, and any related cost/expenses.

Upon review of Diamond's worksheets and other supporting data, the contracting officer found that although the firm's prices were related to its actual costs, Diamond had included all its start-up costs in its base year price. As the agency notes, by pricing its bid in this manner, Diamond shifted from itself to the government the risk that contract performance might not extend to 5 years. In addition, Diamond had not shown that the equipment required to perform the contract was of a unique or specialized nature which would permit the firm to front-load its start-up costs in the base year. The contracting officer therefore determined that Diamond's bid was mathematically unbalanced. However, the contracting officer concluded that Diamond's bid was not materially unbalanced since the agency intended to exercise all the option years under the contract and there was no doubt that award to Diamond would result in the lowest overall cost to the government. The agency made award to Diamond on August 13. This protest followed.

DGS protests that Diamond's bid should be rejected as mathematically and materially unbalanced. A bid is mathematically unbalanced if each item of work does not carry its share of the cost of the work plus overhead and profit, or the bid is based on nominal prices for some work and enhanced prices for other work. Residential Refuse Removal, Inc., 72 Comp. Gen. 68 (1992), 92-2 CPD ¶ 444; Omega One Co., B-251316.2; B-251316.3, Mar. 22, 1993, 93-1 CPD ¶ 254. Where there is reasonable doubt that acceptance of a mathematically unbalanced bid will result in the lowest overall cost to the government, the bid is materially unbalanced and cannot be accepted. FAR §§ 14.404-2(g), 52.214-10(e); Mitco Water Lab., Inc., B-249269, Nov. 2, 1992, 92-2 CPD ¶ 301; Earth Eng'g and Sciences, Inc., B-248219, July 30, 1992, 92-2 CPD ¶ 72.

Here, as stated previously, GSA concedes and the record establishes, that Diamond's bid is mathematically unbalanced. Thus, the issue before us is whether acceptance of Diamond's mathematically unbalanced bid will result in the lowest overall cost to the government. G.L. Cornell Co., B-236930, Jan. 19, 1990, 90-1 CPD ¶ 74. We conclude that Diamond's bid is not materially unbalanced. Our material unbalancing analysis focuses on various factors, including whether the government reasonably expects to exercise the options, id., and whether the bid is so extremely front-loaded that it does not become low until late in the contract term, including option years. See Residential Refuse Removal, Inc., supra.

Diamond's bid becomes low, vis-a-vis DGS' bid, in the first month of the third option year. GSA asserts in its protest report that due to the nature and necessity of the service to be provided, the number of years that the awardee has been in the security guard business and the excellent performance and business reputation of the awardee, it is highly unlikely that the government would not exercise the options. Specifically, GSA explains that the Social Security Administration (SSA) has a nationwide requirement for armed guard services at SSA's offices, including its two locations in Utah, to protect employees and customers of the SSA. The Internal Revenue Service (IRS) requires armed guard services to protect its employees and to secure access to IRS records both in Ogden and Clearfield, Utah; and the Defense Logistics Agency has a requirement to safeguard strategic materials located at the GSA building in Clearfield, Utah. The agency further explains that the security guard services are essential at the Frank E. Moss Courthouse in Salt Lake City, Utah and the Federal Depot in Clearfield, Utah because the local police departments do not have jurisdiction and would not be able to exercise their police authority at these locations.

DGS has offered no specific rebuttal to the agency's position; instead, the protester responds to the agency report with one argument. DGS alleges that the Vice President's National Performance Review (NPR) recommendations, as they are implemented, will likely result in a significant restructuring of GSA during the next 2 years. The protester speculates that the implementation of the NPR recommendations will affect GSA's ability to operate in a "business as usual" manner and that GSA therefore will likely be precluded from exercising the third and fourth option periods in Diamond's contract. The record shows the need for these security services is not likely to change during the 5-year contract period since the security services are essential to the sites under the contract and the sites are expected to remain open for the contract's duration. The protester does not explain how the NPR implementation affects operations at these sites. Since there is no reasonable doubt that Diamond's bid will result in the lowest overall cost to the government, Diamond's bid is not materially unbalanced. Cf. Residential Refuse Removal, Inc., supra.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Simpson Contracting Corporation

File: B-254663

Date: December 17, 1993

Mike Simpson for the protester.
Col. Riggs L. Wilks, Jr., and Maj. Wendy A. Polk, Department of the Army, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency decision to conduct a procurement for paving maintenance services on an unrestricted basis and not as a small disadvantaged business (SDB) set-aside was reasonable where the agency concluded, based on the lack of responses from SDB concerns to a Commerce Business Daily advertisement and the procurement history, that it could not reasonably expect to receive bids from at least two responsible SDB concerns at prices not exceeding the fair market price by more than 10 percent.

DECISION

Simpson Contracting Corporation protests that invitation for bids (IFB) No. DABT63-93-B-0017, issued by the Department of the Army for paving maintenance at Fort Huachuca, Arizona, should be set aside for small disadvantaged business (SDB) concerns.

We deny the protest.

The Army published a synopsis in the Commerce Business Daily (CBD) on July 2, 1993, announcing that the procurement of all labor, equipment, and material necessary to perform paving maintenance at Fort Huachuca was being considered for an SDB set-aside. The advertisement stated that the award of a requirements contract for a base year with four 1-year options was contemplated, and that the estimated total cost of the project was between $5 and $10 million. The advertisement instructed interested SDB concerns to provide the contracting officer with a statement of their technical capabilities and financial status. The synopsis also

advised that if adequate interest was not received from SDB concerns, the RFP would be issued on an unrestricted basis.

The contracting officer received correspondence from nine firms regarding this procurement. The contracting officer determined, upon reviewing the correspondence submitted, that only three of the nine firms even claimed to be SDB concerns. Further, only one of the firms submitted any information concerning its technical capability and financial status, and this firm subsequently contacted the Army to advise that it was no longer interested in the project. The protester did not respond to the CBD advertisement.

Based on the responses to the CBD advertisement and procurement history, the contracting officer determined, with the concurrence of the Fort Huachuca Small and Disadvantaged Business Utilization Specialist and the Small Business Administration's Procurement Center Representative, that the IFB should be issued on an unrestricted basis and not as a total set-aside for SDB concerns. On August 13, the agency issued the IFB on an unrestricted basis.[1]

The regulations implementing the Department of Defense SDB program, set forth at DFARS part 219, provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns; (2) award will be made at a price not exceeding the fair market price by more than 10 percent; and (3) scientific and/or technical talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70(a); All Star Maintenance, Inc., B-249810.3, Nov. 24, 1992, 92-2 CPD ¶ 374. We generally view this determination as a business judgment within the contracting officer's discretion, and we will not disturb a contracting officer's set-aside determination unless it is unreasonable. McGhee Constr., Inc., B-249235, Nov. 3, 1992, 92-2 CPD ¶ 318. However, a contracting officer must undertake reasonable efforts to ascertain whether it is likely to receive offers that would support a decision to set aside a procurement for SDB concerns, and we will review a protest to determine whether a contracting officer has done so. See Neil R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269.

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[1]The IFB does provide that an evaluation preference will be accorded to SDB concerns by adding a factor of 10 percent to the offers of non-SDB concerns for evaluation purposes. See Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.7000-7003; 252.219-7006.

The record here shows that the contracting officer undertook reasonable efforts to ascertain whether there would be two or more responsible SDB concerns that could submit bids that would result in contracts at reasonable prices in deciding not to set aside the procurement. First, as noted above, the Army advertised the procurement in the CBD to ascertain whether there was sufficient interest from qualified SDB concerns to set aside the IFB for only SDB firms, and received only three responses from firms claiming to be SDB concerns.[2] Only one firm provided any of the requested information concerning management capabilities and financial status, and this firm subsequently advised the agency that it was no longer interested in competing for the requirement. Also, as noted above, Simpson did not respond to the CBD advertisement.

Second, the Army considered its procurement history for similar services, and found that there has been little competition for the paving maintenance requirement in the past, even though the predecessor contract was awarded under a solicitation issued on an unrestricted basis, and that these services have never been acquired from an SDB concern. The agency also explains that the work generally appeals only to local firms because the asphaltic materials required must be used at precise temperatures and cannot be hauled long distances without several problems, including the possibility of expensive loss due to crusting of the materials during transport and the danger of fire from maintaining the materials during transport at the necessary temperatures. The agency further notes that the equipment required to perform the work is extremely expensive, and that it is simply unaware of any interested SDB concerns capable of performing the work required.

Based on this record, we conclude that the contracting officer's determination to issue the IFB on an unrestricted basis was reasonable. That is, the contracting officer made a reasonable effort to ascertain the interest of SDB concerns in competing for the contract work and reasonably determined from the information available that there was not

[2]Also, contrary to Simpson's allegation, this solicitation was posted on the Fort Huachuca contracting officer's bulletin board.

a reasonable expectation of receiving offers from at least two responsible SDB concerns at a price not exceeding the fair market price by 10 percent. McGhee Constr., Inc., supra.

The protest is denied.

for James F. Hinchman
General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

3052722

Decision

Matter of: Pipeliner Systems, Inc.

File: B-254481

Date: December 21, 1993

Kathleen W. Hammer for the protester.
Robert W. Affholder for Insituform Missouri, Inc., an interested party.
Craig S. Schmauder, Esq., Department of the Army, for the agency.
Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation is unduly restrictive because it requires the rehabilitation of sanitary sewers with a cured-in-place pipe method without permitting the use of the protester's pipe lining method is sustained where the record fails to show that the agency has a reasonable basis for this requirement.

DECISION

Pipeliner Systems, Inc. protests the terms of invitation for bids (IFB) No. DACA27-93-B-0053, issued by the United States Army Corps of Engineers for replacing and rehabilitating sanitary sewers at Scott Air Force Base, Illinois. Pipeliner argues that the solicitation is unduly restrictive of competition since it prohibits the protester's method of lining sewer pipes.

We sustain the protest.

The contractor is to furnish all labor and materials to repair sewers at Scott Air Force Base including, among other things, replacing some existing sanitary sewer lines and inserting liners into other existing sewers. For those sewers which require lining, the IFB specified that:

> "Existing sanitary sewer rehab[ilitation] shall be accomplished by installing a cured-in-place pipe (CIPP) lining on the inside of the section of sewer mains indicated. The CIPP shall consist of a resin impregnated flexible tube, formed to the

> interior of the existing sewer pipe, by use of a hydrostatic head, and cured by injection of hot water within the tube. The lining shall extend from manhole to manhole and shall be installed through the existing manholes with[out] performing any excavation, except for lateral connections indicated. The lining and lining process shall be as per Insituform of North America, or InLiner U.S.A."

Pipeliner protests that the requirement of the CIPP lining method is unduly restrictive and improperly excludes the protester from competing.[1] As an alternative to the CIPP method, Pipeliner argues that the agency should permit its sewer lining method, referred to as "U-Liner," which, according to the protester, meets or exceeds properties of the CIPP liner process at a lower price. In the U-Liner method, a deformed, or "U" shaped, polyethylene plastic liner is rolled on a spool, inserted into a manhole and then pulled through to the next manhole. Once it is in place, heat is applied to the inside of the U-Liner and, once it is heated to a specified temperature, pressure is applied to reshape the U-Liner to fit snugly inside the host pipe, repairing structural defects.

The agency argues that its decision to exclude the U-Liner and other lining methods was based on "sound engineering principles and represents the agency's minimum needs." The Army reports that two architect-engineer (A-E) firms assisted in preparing the specifications. One firm, Sverdrup, Inc., conducted a study of the sewer system at Scott Air Force Base and prepared a written report (the Sverdrup report). The agency explains that a second A-E firm used this study to design the project and select the lining method required in the IFB.

The Sverdrup report describes methods of sewer rehabilitation, including a number of lining methods such as the CIPP process required by the IFB. The report explains that in the CIPP process, which is also referred to as "inversion lining," a flexible polyester liner is inverted into a pipe through the use of hot water; this method imitates the physical process by which a sock is turned inside out. Once installed, the liner is then inflated and cured by the injection of heated water until the liner becomes sealed to the walls of the pipe, thereby repairing cracks or other structural defects.

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[1]The agency proceeded with bid opening after Pipeliner protested to our Office. One bid was received from Insituform Missouri, Inc. The agency has withheld award pending resolution of this protest.

The Sverdrup report also describes "traditional slip-lining," in which a nonflexible pipe, generally made of fusion-bonded high density polyethylene (HDPE), is pulled into the existing pipe. Because an HDPE liner is inflexible, installation requires excavation of the sewer. The Sverdrup report states that slip-lining results in a reduced hydraulic capacity of the sewer because the liner does not fit snugly against the existing pipe, resulting in a smaller inside diameter, and that slip-lining is not appropriate for misaligned sewers or those which have serious structural damage. The study also describes "[r]ecent developments in the slip-lining process" which eliminate the need for excavation with slip-lining techniques. According to the Sverdrup report, these "[n]ewer methods employ the insertion of a deformed (folded) polyethylene pipe which has been rolled on a spool." Once the liner is in place, "heat and a rounding device are used to reform the pipe into a round cross section." Current trade names for this type of sewer rehabilitation are U-Liner and NuPipe.

The Army argues that it considered "the various lining procedures" and selected CIPP lining as the only method meeting its needs. Specifically, the contracting officer states that the protester's method is unacceptable because "the slip-lining method proposed by Pipeliner results in reduced hydraulic capacity of the sewer because of the smaller inside diameter." The contracting officer also states that the pipes at the base are in poor structural condition and that "[s]lip-lining is not appropriate for misaligned sewers or those which have serious structural deficiencies." The agency also notes that the CIPP product is more "adaptable to variable field conditions" because it is flexible at installation, "unlike the slip-lining product."

Pipeliner responds that the Army misunderstands its product and explains that its U-Liner process is not slip-lining, in which an inflexible tube is inserted into the existing pipe after excavation. Rather, according to the protester, the U-Liner process is similar to the CIPP process since in both a flexible liner is inserted into the existing sewer pipe and is expanded to fit snugly against the walls of the pipe. In addition, the protester rebuts the agency's criticisms of its product, arguing, for example, that the U-Liner does not reduce the hydraulic capacity of the sewer since it fits "tightly against the host pipe," and "is capable of reconstructing offset joints due to its independent structural integrity." Also, the protester states that, contrary to the agency's assertion, the U-Liner is flexible so that excavation is not required for installation.

Agencies are required to specify their needs in a manner designed to promote full and open competition, and may only include restrictive provisions in a solicitation to the extent that they are necessary to meet the agency's minimum needs. Federal Acquisition Regulation (FAR) § 10.0002; Shred Pax Corp., B-253729, Oct. 19, 1993, 93-2 CPD ¶ 237; Moore Heating and Plumbing, Inc., B-247417, June 2, 1992, 92-1 CPD ¶ 483, aff'd, The Dep't of the Air Force--Recon., B-247417.2, Oct. 6, 1992, 92-2 CPD ¶ 227. Where a protester challenges a specification as unduly restrictive of competition, it is the procuring agency's responsibility to establish that the specification is reasonably necessary to meet its minimum needs. American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183; Embraer Aircraft Corp., B-240602, B-240602.2, Nov. 28, 1990, 90-2 CPD ¶ 438.

The exclusion of the U-Liner method under the IFB here is not supported by the record. Specifically, although the agency relied on the Sverdrup report to justify restricting the lining specifications, that report supports the protester's assertion that allowing only the CIPP process is unduly restrictive.

The Sverdrup report includes a table which lists 50 sewer lines on the base and recommends various methods of rehabilitation, including sewer replacement, "lining," and "inversion lining" for the listed sewer lines. For the 50 sewer lines listed, under the heading "General Repair and Rehabilitation Recommendations," the table calls for "Lining of entire line" for 29 sewer lines and, for 1 additional line, for "Inversion lining of entire line."

Referring to the table, the report states:

> "Where lining has been identified as repair, it is recommended that during the design phase consideration be given to the various lining methods to determine the most economical for each particular repair. Where inversion lining has been identified as a repair, it is recommended that this procedure be used in lieu of the other lining techniques."

Thus, although the agency relies on the Sverdrup report to support its decision to exclude the U-Liner process, that report specifically recommends inversion lining, or the CIPP process, for only a single sewer line on the base.[2] With

[2]The single line for which inversion lining is recommended is 321 feet in length while the remaining 29 lines for which lining was generally recommended included an approximate total of 7,800 feet of pipe.

respect to the other 29 sewers which require lining, in spite of the recommendation that "consideration be given to the various lining methods to determine the most economical for each particular repair," there is no indication in the record that either the A-E design consultant or the contracting agency considered this recommendation. Rather, as we explain below, the A-E design consultant appears to have recommended inversion lining for all sewers that need lining based on his belief that that process is superior to all others and the agency appears simply to have accepted that recommendation. In this latter respect, although we specifically asked the agency for its analysis of the Sverdrup report recommendations, no such analysis was provided.

We also agree with the protester that the Army has confused the protester's U-Liner process with the process which the Sverdrup report refers to as "traditional" slip-lining. For example, the contracting officer states that the "slip-lining method proposed by Pipeliner" is unacceptable because it "results in reduced hydraulic capacity of the sewer because of the smaller inside diameter." This concern is based on the contracting officer's apparent belief that a U-Liner, like a "traditional" slip-liner, is an inflexible pipe that is inserted into the existing sewer, leaving a space between the existing sewer pipe and the liner. As explained above, however, the U-Liner, once it is inserted and expanded, fits snugly against the inside walls of the existing pipe. In this respect, U-Liner is similar to the CIPP process. While the U-Liner product would result in a reduction of the inside diameter of the existing pipe because of the thickness of the liner, a CIPP liner also would reduce the inside diameter of an existing sewer for the same reason, and nothing in the record indicates that one would reduce the diameter more than the other. Under the circumstances, the record does not support the conclusion that the U-Liner process would result in "reduced hydraulic capacity" any more than would the CIPP process.

The contracting officer also confuses the protester's product with slip-lining when he concludes that the CIPP product is more "adaptable to variable field conditions" than the protester's product because the CIPP lining system is "completely flexible at installation, unlike the slip-lining product." As the protester explains, and the record shows, the U-Liner process uses a flexible liner and no excavation is needed for installation.[3] The slip-lining

[3]The protester's product literature shows that the U-Liner, in its "U" shape, is coiled on reels in continuous lengths of up to 5,000 feet and transported to the job site for

(continued...)

product, on the other hand, uses an inflexible pipe that is pulled in its fully rounded form through the existing sewer after excavation. Thus, the contracting officer's conclusion that the U-Liner product lacks flexibility and adaptability appears to be based on his erroneous belief that the U-Liner product is indistinguishable from "traditional" slip-lining.

As an additional reason to reject the protester's process, the contracting officer quotes the Sverdrup report: "Slip-lining is not appropriate for misaligned sewers or those which have serious structural deficiencies." Here again, the contracting officer appears to have confused the two processes. The protester states that the U-Liner product can be used in sewers with serious structural deficiencies because it is capable of reconstructing offset joints, or gaps between existing sewer pipes, due to its independent structural integrity and, in many cases, can expand to fill voids where offset joints are severe. The protester states that specifications, test results, and other information which it has submitted show the flexibility and strength of its product and show that U-Liner can be used to rehabilitate badly deteriorated pipes.[4]

Although we specifically asked the agency to address Pipeliner's assertion that the contracting officer has confused its product with slip-lining and that the U-Liner product is capable of repairing severely damaged sewers, the agency failed to address these contentions. In response to our request for additional information, the agency submitted a letter from the A-E firm that designed the project and

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[3](...continued)
installation. The liner is then attached to a cable and, without excavation of the site, is pulled by a winch through the sewer from one manhole to the next.

[4]While the contracting officer also asserts that the inversion lining process can "replace severely cracked sewers and even span sections where pieces of pipe are missing," the contracting officer does not assert that the U-Liner process cannot also be used to repair severely cracked sewers, or that it is not capable of repairing the sewers at the base. Moreover, the protester responds that the U-Liner process has been widely used to rehabilitate badly deteriorated pipes and, as explained above, the Sverdrup report, which was based on a study of the sewer system at the base, recommended inversion lining for only 1 sewer line out of 30 at the base. Under the circumstances, the record does not support the conclusion that the U-Liner process is unacceptable for the base because it cannot repair severely cracked sewers.

prepared the specifications. That response does not demonstrate that the U-Liner process would not meet the agency's needs.

For instance, although the A-E consultant states that CIPP "is available in the full range of pipe sizes (8" through 18") requiring rehabilitation," the protester's sales literature shows that its U-Liner is available in 4" to 18" diameters. In addition, although the consultant states that the CIPP process has been time tested, with American Society for Testing and Materials (ASTM) specifications having been developed for the rehabilitation process, Pipeliner's literature states that the U-Liner process has been in use since 1988 and that the U-Liner product meets "all appropriate" ASTM specifications. The agency's consultant also states that the "CIPP process provides maximum flexibility in dealing with host pipe offsets during the installation process," and that "offsets do occur in the existing piping to be rehabilitated." As we explained, however, the protester has provided test results and other information which purportedly show that the U-liner is capable of reconstructing offset joints and filling voids where offset joints are severe. While it is clear that the consultant believes that the CIPP process is superior to all other liner processes, the consultant's response to the protest does not dispute what the test results show and otherwise does not demonstrate that the U-Liner process does not meet the agency's minimum needs.[5] Raymond Corp.--Recon., B-251405.2, Aug. 26, 1993, 93-2 CPD ¶ 124.

Based on the record before us, we agree with the protester that the specification is unduly restrictive. It appears that the agency may not fully understand the U-Liner product and how it differs from slip-lining, and that the U-Liner

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[5]The A-E consultant also states that the U-Liner process requires temperature control equipment at the insertion point to maintain quality control and that "[m]inimal disruption during installation was considered an important factor in our design." The protester's literature, however, states that it "can rehabilitate damaged and leaking pipelines in a matter of hours without digging" and that "[w]ith the compact installation equipment and the small number of crew members needed to install the liner . . . there is no interruption of traffic or services at the rehabilitation site." Additionally, according to the IFB, the CIPP liner is "formed to the interior of the existing sewer pipe, by use of a hydrostatic head, and cured by injection of hot water within the tube." Thus, the CIPP process also requires equipment for installation and nothing in the record demonstrates that installation of a U-Liner is any more disruptive than installation of a CIPP liner.

product may well meet the agency's needs. See Shred Pax Corp., supra; Bardex Corp., B-252208, June 14, 1993, 93-1 CPD ¶ 461. In view of the foregoing, we sustain Pipeliner's protest. Accordingly, by separate letter of today to the Secretary of the Army, we are recommending that the agency reevaluate whether the U-Liner method and similar pipe lining methods meet its actual minimal needs and, if so, issue a revised IFB to permit offers of such other methods. We also find Pipeliner entitled to the costs of filing and pursuing its bid protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f)(1), Pipeliner's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted to the Army within 60 days after receipt of this decision.

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: PLAN-Industriefahrzeug GmbH & Co. KG

File: B-254517

Date: December 23, 1993

G.H. Rebmann for the protester.
Riggs L. Wilks, Jr., Esq., and Wendy A. Polk, Esq., Department of the Army, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where, due to administrative oversight, agency failed to follow its established procedures for receipt of registered mail, and this mishandling during the process of receipt improperly precluded consideration of protester's bid.

2. Where, as a result of agency's mishandling in receipt, bid was returned to protester and not considered for award, General Accounting Office recommends that bid be resubmitted to agency and that the agency make a determination whether or not the bid envelope has been opened or tampered with, if it has not, the bid should be considered for award.

DECISION

PLAN-Industriefahrzeug GmbH & Co. KG (PLAN) protests the Department of the Army's rejection of its bid as late under invitation for bids (IFB) No. DAJA37-93-B-0039, for a heavy duty yard tractor.

We sustain the protest.

The solicitation was issued on June 21, 1993, with a bid opening date of July 19. Although PLAN had submitted its bid, postmarked July 9, by registered German mail properly addressed to the location stated in the IFB, only one bid, submitted by MV Maschinen-vertriebsgesellschaft mbH was received by the bid opening date.

On July 22, PLAN received from the German Post Office its unopened bid. The envelope containing its bid bore the following two official mail stamps of the German Post Office (translated from German): "Delivery not possible during normal business hours. Left notice-of-arrival slip. (12.07.93)," and "Not picked up. Holding period expired. Return. (20.07.93)."

On the same day, PLAN contacted the Army to find out why its bid had been returned unopened. Upon investigation, the contracting officer discovered that the German Post Office attempted to deliver PLAN's bid during normal business hours on July 12 at the reception area of the Contracting Center Support Division (CCSD) (the office that receives and processes all incoming U.S. and German Post Office mail for the contracting activity), but that no one was present to accept PLAN's bid. The postal employee thus left a notice-of-arrival slip indicating that the German Post Office attempted delivery of registered mail on that date and requested that it be picked up at the German Post Office within 7 working days. While under CCSD's established procedures a mail clerk is sent to the German Post Office 1 working day after receipt of a notice-of-arrival slip, due to an administrative oversight the notice slip was never given to the mail clerk; as a result, PLAN's bid was never picked up. Upon expiration of the 7-day holding period, the bid was returned to PLAN unopened.

Based on this explanation by the contracting officer of the events surrounding PLAN's bid, the firm requested by letter of July 22 to the contracting officer that he either accept PLAN's bid as timely received or, alternatively, accept its bid as a late bid. By letter dated August 3, the Army denied this request, stating that PLAN's bid could not be considered since it could have been altered after being returned to PLAN from the German Post Office. Award has been delayed pending our decision here.

PLAN maintains that its bid would have been the low bid received, was sent in time to be considered, and was not considered for award due to mishandling by the Army. PLAN states that it has not opened or tampered with the bid, and requests that the Army now consider the bid for award.

Where it is shown that a bid was not received prior to bid opening due primarily to the agency's failure to establish or adhere to reasonable procedures for receiving bids, the agency's actions constitute mishandling during the receipt

of the bid and may warrant considering the bid. See Veterans Admin.--Request for Advance Decision, B-212800, Oct. 25, 1983, 83-2 CPD ¶ 498; Sun Int'l, B-208146, Jan. 24, 1983, 83-1 CPD ¶ 78.

It is clear that the Army mishandled PLAN's bid during receipt and that this mishandling was the sole reason why the bid was not received prior to bid opening. In this regard, the agency itself concedes that procedures for receiving bids sent by registered mail were in place but were not followed; there was no one available to receive PLAN's bid when delivery was attempted, and the agency failed to send the clerk to the post office to pick up the bid, despite the notice left at the time of the attempted delivery. Therefore, PLAN's bid would have been received and considered but for the Army's actions.

The agency's refusal to consider PLAN's bid at this juncture rests solely on the proposition that considering a bid after it has been returned to the bidder will harm the integrity of the bidding process and therefore cannot be permitted. An important concern in matters such as this is the preservation of the integrity of the competitive bidding system. Veterans Admin.--Request for Advance Decision, supra. This goal is not compromised by consideration of a returned bid resubmitted after bid opening where it can be established through an examination that the sealed bid envelope has not been opened. See 50 Comp. Gen. 325 (1970); Veterans Admin.--Request for Advance Decision, supra; Metalsco, Inc., B-187882, Mar. 9, 1977, 77-1 CPD ¶ 175. Since award has not been made and PLAN has represented that its bid would be the low bid received, this approach is appropriate in this case.

By letter of today to the Secretary of the Army, we are recommending that PLAN be permitted to promptly resubmit its bid to the Army, and that the Army then have suitable experts analyze the envelope to determine whether or not the envelope has been opened or otherwise tampered with; the envelope itself should be identifiable by the German postal markings discussed above. In the event, the Army determines that the envelope is authentic and has not been opened, the Army should consider PLAN's bid for award. We also find that the protester is entitled to reimbursement of the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d) (1993). In accordance with 4 C.F.R. § 21.6(f)(1), PLAN's

certified claim for costs, detailing the time expended and the costs incurred, must be submitted to the Army within 60 days after receipt of this decision.

The protest is sustained.

for Comptroller General
of the United States

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