United States General Accounting Office

152484

GAO

Office of the General Counsel

June 1994

Advance Sheets Volume 73

Decisions of the Comptroller General of the United States

GAO/OGC-94-28

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of Energy--Payment of Registration Fees for Competitive Fitness and Sports Activities

File: B-256194

Date: June 1, 1994

DIGEST

The Department of Energy may not use appropriated funds to pay the registration fees of employees participating in competitive fitness promotions, team activities and sporting events. Although the Department may include physical fitness activities in the health service program it provides employees under 5 U.S.C. § 7901, participation in competitive fitness or sporting events are personal activities of the employees involved, the costs of which should be borne by the employees.

DECISION

The Director, Financial Management Division, Department of Energy, Albuquerque Operations Office, has requested our decision on whether appropriated funds may be used to pay registration fees of employees participating in area competitive fitness promotions, team activities, and sporting events. The Director's letter indicates that it has been determined that participation in these events promotes and maintains the physical and mental fitness of Office employees. As indicated below, we conclude that appropriated funds may not be used to pay these registration fees.

BACKGROUND

According to the Director, the Albuquerque Operations Office provides a health and fitness program for its employees. This program includes such activities as fitness and exercise programs, medical services, an employee assistance program, and a drug-free workplace. As part of the fitness and exercise programs, the Albuquerque Operations Office operates an on-site fitness center consisting of an exercise area, shower-locker rooms, and various free weights, weight training machines, free weight and aerobics exercise equipment. To encourage fitness, the Albuquerque Office sponsors fitness testing, aerobic classes during lunch and after work as well as competitive fitness promotions, team activities and sporting events.

In the past, the Office as part of its external activities has paid registration fees for its employees to participate in a local annual fitness event and a "Corporate Challenge" event. In fiscal year 1992, the Albuquerque Operations Office paid a total of $3,450 for 225 employees to participate in the local event and another $1,569 for approximately 125 employees to participate in the Corporate Track and Field event. In fiscal year 1993, $1,700 was paid for approximately 135 employees to participate in the Corporate Track and Field Event. The Director stresses that these fitness events "are considered important to our overall program."

DISCUSSION

Section 7901 of Title 5, United States Code, authorizes heads of departments or agencies to establish health service programs to promote and maintain the physical and mental health of employees. Health service programs may contain "preventive programs relating to health." 5 U.S.C. § 7901(c)(4). This language permits physical fitness and exercise activities as part of health service programs. 64 Comp. Gen. 835, 838 (1985).

The Office of Personnel Management (OPM) includes the establishment and operation of "physical fitness programs and facilities designed to promote and maintain employee health" in its list of appropriate preventive health programs. See Federal Personnel Manual (FPM), ch.792 (Inst. 261, December 31, 1980), as amended by FPM Letter 792-15 (April 14, 1986).[1] Therefore, an agency may provide employees with a physical exercise program "as part of a bona fide preventive program relating to health." See 70 Comp. Gen 190, 193 (1991).

The authority provided by 5 U.S.C. § 7901(c)(4), as interpreted by OPM, however, does not provide agencies with authority to pay for any employee sport and recreational activities. The competitive events described in the Director's letter are not an essential part of a "physical fitness program" as that term is commonly used to justify the expenditures of taxpayer funds under 5 U.S.C. § 7901. Although the external competitive opportunities may well promote physical fitness and well-being, so would any number of other competitive recreational activities. In our opinion, these activities are generally personal, rather

[1]Although FPM Chapter 792 has been abolished, FPM letter 792-15 has been provisionally retained through December 31, 1994. FPM Sunset Document, OPM Doc. 157-53-8, p. 91, 12/31/93.

than official, and their costs should be borne by the participating employees, not by the taxpayers.

Absent some other specific authority or unusual factual circumstances, 42 Comp. Gen. 233 (1962); 54 Comp. Gen. 1075 (1975), appropriated funds may not be used to pay registration fees for employees participating in competitive fitness or sporting events.

for James F. Hinchman
Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Air Force--Appropriations--Reimbursement for Costs of Licenses or Certificates

File: B-252467

Date: June 3, 1994

DIGEST

The Air Force, in its discretion, may expend appropriated funds to reimburse its members for licensing or certification fees required to perform their assigned duties whenever federal law compels the members to comply with state regulations requiring the license or certificate.

DECISION

The Principal Deputy Assistant Secretary of the Air Force for Financial Management asks whether the Air Force may use appropriated funds to reimburse Air Force members for the cost of licenses or certificates required to perform the members' assigned duties. We do not object to such use of Air Force appropriated funds in instances where federal law compels Air Force members to comply with state and local regulations requiring the licenses or certificates.

According to the Air Force, the number of job categories which require its members to obtain a license or certificate issued by a state regulatory agency has increased dramatically in recent years. Most of these new job categories have been created in response to the several federal laws which require federal agencies to comply with state-established environmental standards. See, e.g., 42 U.S.C. § 7418 (Clean Air Act); 42 U.S.C. § 6961 (Solid Waste Disposal Act); 42 U.S.C. § 300j-6 (Public Health Service Act); 33 U.S.C. § 1323 (Federal Water Pollution Control Act); 7 U.S.C. §§ 136(e)(1), 136i(a), (b) (Federal Insecticide, Fungicide, and Rodenticide Act). For example, South Carolina, pursuant to the Clean Air Act, requires an Asbestos Abatement License that costs $350 per year; Texas, pursuant to the Public Health Service Act, requires a Water Treatment Foreman's License at $80 every 3 years; and, North Carolina, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, requires a Pesticide and Herbicide Application License that costs $523 every 3 years.

As a general matter, agencies may not use appropriated funds except for purposes for which the appropriation was made. See 31 U.S.C. § 1301(a). The Air Force "operation and

maintenance" appropriation provides that amounts will be available "[f]or expenses, not otherwise provided for, necessary for the operation and maintenance of the Air Force, as authorized by law." Pub. L. No. 103-139, 107 Stat. 1418, 1421 (1993). The concept of "necessary expenses" is a relative one, defined in any given circumstance by the relationship of a particular proposed expenditure to the specific appropriation to be charged. For this reason, it is in the first instance up to the agency to determine that a given expenditure is reasonably necessary to accomplishing the purpose of the appropriation. B-247563.2, May 12, 1993. An agency's discretion in this regard, however, is not unfettered; the agency makes its determination by applying the various laws that impose restrictions on appropriations generally and restrictions specific to the appropriation at issue, as well as by reference to the decisions and guidance of the accounting officers of the United States. As a general rule, once the agency has made its determination, we will afford it considerable deference. In this instance, we believe that the Air Force has a reasonable basis for using its "operation and maintenance" appropriation for the licenses or permits at issue here.

Fees incident to obtaining licenses or certificates necessary to qualify a federal employee to perform the duties of his position are considered, generally, to be personal expenses not properly chargeable to agency appropriations. 6 Comp. Gen. 432, 433 (1926); 3 Comp. Gen. 663, 665 (1924); 66 MS. Comp. Dec. 247, 248, July 22, 1913, cited in 23 Comp. Dec. 386 (1917):

> "[A]n employee of the government has upon his own shoulders the duty of presenting himself as competent in every way for the duties of his employment. If a personal license is necessary to render him competent to discharge the duties of his employment, . . . he should fit himself for the discharge of those duties at his own expense."

However, appropriations are available for such expenditures, regardless of their personal nature, if the expenditure primarily benefits the government. See 68 Comp. Gen. 502, 505 (1989). For example, it was reasonable for the Department of Interior to use its appropriations to cover the cost of exercise equipment for Bureau of Reclamations fire fighters because the equipment was necessary for a mandatory conditioning program which would enable the employees to perform their duties more effectively. 63 Comp. Gen. 296 (1984).

Over the past several years, federal law has increasingly subjected the federal government to state environmental

regulations. Section 118 of the Clean Air Act, section 6001 of the Solid Waste Disposal Act, section 1447 of the Public Health Service Act, and section 313 of the Federal Water Pollution Control Act now require that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements" imposed under the authority of these laws.[1] 42 U.S.C. § 7418(a); 42 U.S.C. § 6961; 42 U.S.C. § 300j-6(a);[2] 33 U.S.C. § 1323(a). As a result, agency appropriations are available in instances where their use was previously prohibited. See, e.g., 72 Comp. Gen. 225 (1993) (Treasury appropriations available to comply with state regulations requiring employers to provide incentives to encourage employee use of car pools and public transportation in Los Angeles); 58 Comp. Gen. 244 (1979) (Air Force appropriations available for costs of obtaining permits required under state air pollution regulations).

Thus, if South Carolina, for example, requires an asbestos removal license and members of the Air Force assigned to remove asbestos must have a license, it is within the Air Force's discretion to pay the licensing fees for its members in South Carolina. The Air Force would be unable to carry out an asbestos removal project in South Carolina except by employing licensed workers; Air Force activities must conform to the legally applicable regulatory requirements of the state. While the license or permit is often obtained in the name of the member,[3] the primary interest in obtaining the license lies with the Air Force, which designated the task as a new assignment of the member, not with the member. Any personal benefit that Air Force members receive from the acquisition of the licenses is nominal and incidental to the performance of their official duties. See, e.g., 64 Comp. Gen. 789 (1985) (appropriated funds available to purchase "smokeeaters" to place on the desks of smokers in an open

---

[1]Additionally, the Federal Insecticide, Fungicide, and Rodenticide Act permits the Administrator of the Environmental Protection Agency to delegate to states the authority to certify pesticide applicators and "prescribe qualifications for Federally-employed pesticide applicators performing their duties on Federal facilities." B-186512, Jan. 17, 1977. See 7 U.S.C. §§ 136(e)(1), 136i(a), (b).

[2]The word "interstate" does not appear in the Public Health Service Act.

[3]Where state regulations allow, federal agencies should obtain the license or certificate in the name of the agency.

work area where the benefit accrued not to individual employees but to a group of employees in the work area).

We note, however, that appropriated funds are not available to meet the licensing requirements of professional personnel such as teachers, accountants, engineers, lawyers, doctors and nurses. E.g., B-248955, July 24, 1992 (professional engineer certification); B-204215, Dec. 28, 1981 (bar membership). These individuals are fully aware of the licensing requirements of their professions from the time they begin their professional education, and of the fact that society expects them to fully qualify themselves for the performance of their chosen professions. In that sense, the licensing requirements are considered to be more for the personal benefit of the individuals than for their employers. Similarly, the cost of driver's licenses are considered for the personal benefit of federal employees. 23 Comp. Gen. 386 (1917).

In conclusion, when Air Force members are required by federal law to comply with state and local regulations, the Air Force, in its discretion, may use its appropriations to cover the cost of obtaining licenses or certificates necessary to perform the regulated activities.

James F. Hinchman

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

45486

Decision

Matter of: EER Systems Corporation

File: B-256383; B-256383.2; B-256383.3

Date: June 7, 1994

David R. Hazelton, Esq., and Minh N. Vu, Esq., Latham & Watkins, for the protester.
Arthur I. Leaderman, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for Swales & Associates, Inc., an interested party.
Walker L. Evey, Esq., National Aeronautics and Space Administration, for the agency.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office (GAO) denies access to protective order to three experts, even though it is not clear that granting these experts access would pose a major risk of inadvertent disclosure of protected material, where the protected material is undeniably very valuable, such that any inadvertent disclosure might cause competitive harm to the awardee, and where GAO can fairly and reasonably resolve the specific protest issues without the need for the protester's experts.

2. An agency reasonably established a competitive range of one proposal where the excluded proposal was substantially inferior in demonstrating an understanding of the solicitation's technical requirements and where there was no appreciable cost difference between the two proposals to justify the inclusion of the technically inferior proposal in the competitive range.

3. There is no obligation to conduct discussions with an offeror whose proposal was reasonably eliminated from the competitive range.

DECISION

EER Systems Corporation protests the proposed award of a contract to Swales & Associates, Inc. under request for proposals (RFP) No. 5-33386/229, issued by the National Aeronautics and Space Administration (NASA), for mechanical

systems engineering support services for the Mechanical Systems Division of the Goddard Space Flight Center. EER contends that its proposal was improperly eliminated from the competitive range.

We deny the protest.

I. BACKGROUND

The RFP, which was set aside for small business concerns, contemplated the award of a cost-plus-award fee, level-of-effort contract for a 5-year base period, plus two 1-year options. The RFP basically required mechanical engineering systems services for the simulation, research, and development of spacecraft mechanical systems. The types of tasks encompassed by this effort were defined with particularity in the RFP statement of work (SOW) in 13 separate job categories. These job categories were: (1) Structural Design and Analysis; (2) Thermal and Contamination Control Engineering; (3) Optical Design and Analysis; (4) Attitude and Control Design and Analyses; (5) Electrical Engineering; (6) Systems Analyses; (7) System Safety Analyses; (8) Documentation and Configuration Control; (9) Training; (10) Hardware Fabrication and Testing, Inspection, Assembly and Integration; (11) Parts Program; (12) Performance Assurance Requirements; and (13) Communications. Each of the systems engineering job categories contained several subcategories, and the SOW described in detail the analytical, research, or development endeavors required by each. The SOW emphasized that the performance of all tasks depended upon a complete knowledge and understanding of spacecraft systems.

The RFP established a best value evaluation scheme based upon the application of four evaluation criteria: Mission Suitability, Cost/Price, Relevant Experience and Past Performance,[1] and Other Considerations.[2] Under the

---

[1]The Relevant Experience and Past Performance factor included four subfactors: Experience, Technical Performance, Schedule Performance, and Cost Performance. The evaluation was based upon relevant prior contract information furnished by the offeror, and any other information that might be available within NASA, other governmental agencies and non-governmental organizations.

[2]The Other Considerations factor was a residual category for concerns not encompassed by the other evaluation factors. There were 9 "Other Considerations" stated in the RFP: (1) Financial Condition and Capability, (2) Business Systems, (3) Scope and Impact of Deviations and Exceptions

(continued...)

evaluation scheme, Mission Suitability and Cost/Price were of essentially equal importance and were more important than the other two criteria, which were also of essentially equal importance.

The Mission Suitability factor measured the offeror's technical ability and management resources, and was to be addressed in a 150-page technical proposal. The RFP provided for a 1000-point proposal evaluation under the Mission Suitability factor, as divided between the following subfactors and elements:

Mission Suitability			Points
Subfactor A) Understanding the Requirements			500
Element A-1	Overall Understanding	(150)	
Element A-2	Sample Problems/ Demonstration Tasks	(250)	
Element A-3	Professional Compensation	(100)	
Subfactor B) Project Management & Resources			500
Element B-1	Overall Capability	(150)	
Element B-2	Personnel	(350)	
			1,000

Two Mission Suitability elements--Overall Understanding and Sample Problems--tested the offeror's comprehension of the RFP technical requirements. The Overall Understanding element required the offeror to demonstrate its comprehension of each discipline described in the SOW job categories and subcategories, and to discuss its proposed approach to performing the tasks encompassed by each. The Sample Problems element required the offeror to respond to each of four demonstration tasks described in Section L of the RFP. The demonstration tasks were designed around a particular astronautics problem to gauge the offeror's comprehension of thermal and contamination engineering, mechanical/structural analysis, systems analysis of a scientific instrument, and mechanism control and electronics development. The RFP advised that the demonstration tasks were hypothetical in nature, but typical of what the offeror might expect under this contract. A demonstration of the offeror's ability to perform such typical tasks was "mandatory" under the terms of the RFP. The required

---

[2](...continued)
to Contract Terms, (4) Compliance with RFP, (5) Incentive Approach to Award Fee, (6) Phase-In Plan, (7) Labor Management Relations, (8) Stability of Work Force, and (9) Pension Program Requirements.

response was to include a detailed work plan that stated all the necessary engineering activities, analyses, and technical descriptions, and was to clearly convey the offeror's ability to understand the problem and to perform the task.

The remaining Mission Suitability elements probed the offeror's ability to obtain and retain qualified personnel (Element A-3, Professional Compensation), the offeror's ability to manage the contract (Element B-1, Overall Capability), and the qualifications and experience of the offeror's proposed personnel (Element B-2, Personnel). With respect to the personnel evaluation, the RFP asked the offeror to identify the employees it was proposing to fill the positions required under 21 personnel categories, and to furnish those employees' resumes. The agency would determine whether the proposed employees were qualified to perform by comparing their resumes against the applicable position qualifications set forth in the RFP.

The RFP advised that point scores would not apply to the remaining evaluation criteria. Specifically, the agency used an adjectival rating scheme to evaluate offerors' Business Management proposals under the Relevant Experience and Past Performance and Other Considerations factors. For the Cost/Price evaluation, the RFP required the agency to evaluate cost proposals to determine the realism of the proposed costs and to determine the probable cost to the government.

The RFP requested proposals by September 13, 1993, and stated that the government intended to conduct discussions with all offerors submitting proposals within the competitive range. Two offerors, EER and Swales, submitted initial proposals by the proposal receipt date. EER's proposed cost was approximately $258 million, 6 percent lower than Swales's proposed cost of approximately $275 million. The two proposals were forwarded to a technical evaluation panel (TEP) and a business management panel (BEP). The TEP evaluated the offerors' Mission Suitability proposals, the BEP evaluated the Cost/Price proposals, and both panels jointly evaluated the Business Management proposals.

The panels used the evaluation methodology contained in NASA's Streamlined Acquisition Handbook and Mini-Source Evaluation Board Handbook, which established adjectival ratings of "excellent," "very good," "good," "fair," or

"poor" to measure a proposal's merit.[3] For the Mission Suitability evaluation, the TEP was also to agree on a numerical score within a given adjectival rating's point spread. Under the NASA handbook, a "poor" rating corresponded with no more than 30 percent of the points available under a Mission Suitability element; a "fair" rating, with no more than 50 percent of the points; a "good" rating, with no more than 70 percent of the points; a "very good" rating, with no more than 90 percent of the points; and an "excellent" rating, with better than 90 percent of the points.

Following its evaluation of initial proposals, the TEP assigned EER and Swales the following scores under the Mission Suitability factor:

	Swales	EER
Understanding the Requirements		
A-1 Overall Understanding	143	30
A-2 Sample Problems/ Demonstration Tasks	225	75
A-3 Professional Compensation	60	60
	(428)	(165)
Project Management & Resources		
B-1 Overall Capability	120	60
B-2 Personnel	315	210
	(435)	(270)
TOTAL	**863**	**435**

As illustrated by the point scores, the most marked difference between the two proposals occurred under those elements testing the offeror's comprehension of the RFP technical requirements, Overall Understanding and Sample Problems. Under both elements, EER's proposal was considered "poor," whereas Swales's overall understanding was considered "excellent" and its response to the sample problems was considered "very good." Under the two Project Management elements, Overall Capability and Personnel, Swales's proposal was considered "very good," as compared to EER's "fair" rating for overall capability and its "good" rating for personnel; both proposals were considered "good" under the Professional Compensation element. In terms of their consolidated Mission Suitability scores, EER's proposal was in the "fair" range overall (435 points), and Swales's was in the "very good" range overall (863 points). Both proposals were considered acceptable.

[3]NASA does not include an "unacceptable" rating in its evaluation handbook; thus, the lowest rating that the TEP could assign a proposal under any evaluation element was "poor."

The TEP generated proposed discussion questions for both offerors to address those proposal weaknesses deemed susceptible to correction, and forecasted the likely increase to the offerors' scores, assuming a satisfactory response to the proposed discussion questions. The TEP predicted that Swales might be able to improve its overall Mission Suitability score to 899 points, just below the "excellent" range, and that EER might be able to improve its score to 528 points, within the "good" range. However, the TEP doubted that EER could meaningfully improve its proposal under those elements testing the firm's understanding of the RFP technical requirements (Overall Understanding and Sample Problems); no more than a 13-point increase was expected overall. The TEP anticipated that discussions would mainly benefit EER under the Overall Capability element, where a 45-point increase was projected, and under the Personnel element, where a 35-point increase was projected.

Swales enjoyed only a slight advantage over EER under the Relevant Experience and Past Performance[4] and the Other Considerations[5] factors. EER surpassed Swales only under the Cost/Price factor, with an evaluated probable cost approximately 3 percent lower than Swales's. EER's probable cost was evaluated as approximately $272 million, representing an upward adjustment of $14 million from its proposed cost of $258 million.[6] Swales's probable cost was

---

[4]Swales's overall rating for Relevant Experience and Past Performance was very good, which represented, at the subfactor level, 2 excellent ratings, 1 very good rating, and 1 good rating. In contrast, EER's rating for each subfactor was good--hence, an overall good rating.

[5]Swales received an overall very good rating under the Other Considerations factor, as compared to EER's overall good rating. At the subfactor level, Swales received 2 excellent ratings, 2 very good ratings, and 4 good ratings; EER received 1 excellent rating, 1 very good rating, 2 good ratings, and 3 fair ratings. One subfactor, Labor Management Relations, was deemed inapplicable, since neither offeror was using unionized personnel.

[6]On January 12, 1994, 3 weeks after the BEP completed its probable cost evaluation and 4 months after the initial proposal receipt date, EER notified the contracting officer that it intended to submit a revised cost proposal reducing its proposed cost by more than $13 million "in the next few days." The contracting officer advised EER on January 13 not to submit the revised cost proposal, since the late proposal rules of Federal Acquisition Regulation (FAR) § 52.215-10 precluded the agency from considering a proposal

(continued...)

evaluated as approximately $281 million, an upward adjustment of about $6 million from its proposed cost.

The initial evaluation results were forwarded to the source selection official (SSO) for this procurement, who met with the Chairman of the BEP and the TEP, and other key personnel involved in the procurement on December 22. The purpose of this meeting was to determine the competitive range for this procurement, "recognizing that elimination of one offeror from the competitive range would be tantamount to selection of the remaining offeror." After reviewing and discussing the initial evaluation results, the SSO concluded that EER's proposal did not have a reasonable chance of being selected for award, stating:

> "[t]he EER proposal's moderate cost advantage did not offset the very significant technical superiority of the Swales proposal. This technical advantage could not be overcome through discussions and best and final offers as evidenced by the great differences of the projected scores."

The SSO considered Swales's technical proposal to enjoy a "decisive advantage" over EER's technical proposal, in that it possessed many more strengths and far fewer weaknesses, and earned appreciably higher scores under four of the five Mission Suitability elements. Even if given an opportunity for discussions, EER could not correct this imbalance unless it "completely rewrote the Overall Understanding and Demonstration Tasks sections of [its] proposal."

The SSO observed that EER's proposed cost was "moderately lower" than Swales's, but that EER's probable cost, though it remained lower than Swales's following the respective probable cost adjustments (which the SSO blessed), did not amount to a "significantly discriminating" advantage. Nor did the SSO consider the proposals significantly distinguishable under the Relevant Experience and Past Performance factor or the Other Considerations factor. Because the two proposals were more or less equally rated

---

[6](...continued)
revision submitted after the initial proposal receipt date. EER did not protest this determination within 10 days of receiving the contracting officer's January 13 notification, but waited until it filed its comments on the agency report some 3-1/2 months later. Accordingly, EER's protest that the agency should have considered this anticipated cost reduction in making its competitive range determination is untimely under our Bid Protest Regulations and will not be considered. 4 C.F.R. § 21.2(a)(2) (1994).

under all evaluated factors, except for Mission Suitability, and because EER was not expected to approach Swales's significant technical superiority for that criterion, even with discussions, the SSO eliminated EER's proposal from the competitive range. This protest followed.

II. PROCEDURAL ISSUES

On February 18, 1994, during the course of this protest, our Office issued a protective order pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(d), which covered material designated as protected, including the offerors' proposals and the agency's evaluation documentation. Counsel for Swales and counsel for EER requested, and were granted, admission to the protective order on February 23 and received all protected material, including the proposals and the evaluation documentation.

On April 7, counsel for EER requested the admission of experts to assist in reviewing the technical evaluation of EER's and Swales's proposals, and furnished the applications and affidavits of three University of Maryland professors. We reviewed the applications and affidavits of the experts, Swales's arguments opposing the experts' admission, and EER's arguments supporting their admission, and concluded that we would not grant admission to these experts based upon the record before us. Of particular concern, two applicants were vice presidents of an engineering firm whose marketing activities Swales had shown coincided with its own, including in some of the disciplines encompassed by the RFP. The third applicant was currently conducting research at the Goddard Space Flight Center, where this contract will be performed, in a technology specified by this RFP. We invited counsel for EER to assuage our concerns, if possible, through the submission of additional arguments in support of these experts, or to propose new experts to assist in the preparation of its case.

On May 5, EER submitted protective order applications and supporting affidavits on behalf of three new experts, Dr. Wijesuriya P. Dayawansa, Dr. Yogendra Kumar Joshi, and Dr. Balakumar Balachandran, each of whom is a professor at the University of Maryland.[7] In their affidavits, each

[7]The filing of these applications prompted Swales to file a request for injunctive relief in the United States District Court for the District of Columbia (Civil Action No. 94-1036). The court entered an order in this matter, which recognized Swales's and GAO's agreement that the proprietary information would not be disclosed to the experts until the lawsuit was resolved, although the GAO's consideration of the protest would otherwise continue.

expert furnished a list of academic research grants awarded through the University with which he had been involved in the last 2 years, and attested that these grants funded the only work performed by the expert other than his University teaching responsibilities. Counsel for EER designated each expert's grant list as protected material, and our Office invited Swales's counsel to provide written objections, citing appropriate legal authority, advising us why the grant lists should not be designated as protected. Swales's counsel failed to do so, and the grant lists remained subject to protective order coverage.[8]

We received objections to each expert's admission from Swales, and a rebuttal to these objections from EER, as supplemented by further affidavits by the experts. Based upon our review of the experts' applications and affidavits, as well as the arguments by the parties, our Office denied the applications on May 26.

The denial reflected our policy of not providing individuals access to information protected by a protective order where the individuals are involved in competitive decision-making or where there is an unacceptable risk of inadvertent disclosure of the protected material. See U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984). In considering the applications of experts to a protective order, our Office will consider and balance a variety of factors, including our Office's need for expert assistance to resolve the specific issues of the protest, the protester's need for experts to pursue its protest adequately, the nature and sensitivity of the material sought to be protected, and whether there is opposition to an applicant, expressing legitimate concerns that the admission of the applicant would pose an unacceptable risk of inadvertent disclosure. See Bendix Field Eng'g Corp., B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227; Matsushita Elec. Indus. Co., Ltd. v. United States, 929 F.2d 1577 (Fed. Cir. 1991); U.S. Steel Corp. v. United States, supra.

In this case, Swales objected to allowing the experts access to its proposal and the agency's evaluation of that proposal, including Swales's particular engineering approach to meeting NASA's requirements and its responses to sample engineering problems. Swales asserted, without rebuttal, that this material is highly proprietary and discloses Swales's unique engineering solutions and approaches, which it has developed in supporting NASA's needs. Swales

---

[8]Swales requested that we revoke the protective order privileges of EER's counsel because, among other things, counsel allegedly "embargoed" the experts' grant lists. We found no basis for doing so.

asserted that the disclosure of its highly sensitive and proprietary engineering approaches and solutions would be invaluable to any practicing engineer, including these University of Maryland professors, and thereby opposed each expert applicant. Swales stated that, while these expert applicants have not contracted to provide services to the federal government, they have received a variety of research grants, and their employer, the University of Maryland, has cooperated with Swales on various NASA engineering projects in a highly specialized competitive environment. Presumably, therefore, the University and these individuals may also work with firms that compete with Swales for contracts with NASA, which raised the risk of inadvertent disclosure of information learned from Swales's proposal.

From our review of the experts' applications and accompanying affidavits as well as Swales's and EER's arguments, it was not clear that granting these experts access to Swales's proprietary data posed a major risk of inadvertent disclosure. We were persuaded, however, that Swales's proprietary data is indeed very valuable and that any inadvertent disclosure might cause competitive harm to that firm, such that, on balance, we would only grant access to this data under our protective order if necessary to reach a fair and reasonable decision of the protest or if Swales did not object to the data's release. Our review of the protest record, including the pleadings of the parties and the agency, the evaluation documentation and the offerors' proposals, persuaded us that we could fairly and reasonably resolve the specific issues protested to our Office by EER without the need for the protester's experts. The technical issues raised by EER in its submissions basically concerned the significance attached to the weaknesses identified in its own and Swales's proposal--issues that, in our view, could be reasonably addressed by the protester and reasonably resolved by our Office without testimony from the protester's experts. Consequently, we denied the applications of Drs. Dayawansa, Joshi, and Balachandran for access to the protective order.

III. DISCUSSION

This protest concerns the propriety of NASA's competitive range determination. EER generally protests that its proposal should have been included in the competitive range and been the subject of discussions because it was technically acceptable and offered the lowest cost. EER claims that, under such circumstances, NASA acted improperly in establishing a competitive range limited to a single proposal.

In a negotiated procurement, the purpose of a competitive range determination is to select those offerors with whom the contracting agency will hold written or oral discussions. FAR § 15.609(a); Everpure, Inc., B-226395.2; B-226395.3, Sept. 20, 1988, 88-2 CPD ¶ 264. The competitive range is to be "determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award." FAR § 15.609(a). Hence, even a proposal that is technically acceptable as submitted need not be included in the competitive range when, relative to other acceptable offers, it is determined to have no reasonable chance of being selected for award. Wordpro, Inc., B-242100.2, Apr. 24, 1991, 91-1 CPD ¶ 404; see Hummer Assocs., B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. This "relative" approach to determining the competitive range, that is, comparing one offeror's proposal to those of other offerors, may be used even where it results in a competitive range of one. Everpure, Inc., supra; Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114. The evaluation of proposals and the determination of whether a proposal is in the competitive range are principally matters within the contracting agency's discretion, since agencies are responsible for defining their needs and for deciding the best method of meeting them. Advanced Sys. Technology, Inc.; Eng'g and Prof. Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153. Thus, it is not the function of our Office to evaluate proposals de novo, and while we closely scrutinize an agency decision which results, as in this case, in a competitive range of one, we will not disturb that determination absent a showing that it was unreasonable or in violation of procurement laws or regulations. Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273.

In this case, the major discriminator between the two proposals was in the demonstrated comprehension of the RFP technical requirements, as evaluated under the Overall Understanding and Sample Problems elements, where Swales's proposal was found to enjoy a decisive advantage that EER could not overcome even given the benefit of discussions. For the Overall Understanding element, under which EER's proposal was rated as poor, the TEP documented 20 major weaknesses, which it defined as weaknesses "so serious as to jeopardize performance of the contract." These major weaknesses--none of which the TEP believed could be corrected--derived from the fact that EER failed to discuss various explicit SOW work requirements, or included a response that was considered superficial, inaccurate,

obsolete, or impractical.[9] For this element, there were also 21 minor weaknesses of a similar nature, only 2 of which the TEP believed were correctable. Against this array of weaknesses, EER's proposal admitted only one major strength, an approved Quality Assurance system, and 10 minor strengths, which reflected a fair understanding of a limited number of SOW technical requirements, but which did not offset EER's recurrent failure to convey an adequate understanding of the technical effort contemplated by the RFP. The TEP summarized that, "EER's lack of in-depth, detailed discussion of how they would perform the work, relying instead on a paraphrasing of the requirements, was a theme through this section of [EER's] proposal." In contrast, the TEP evaluated 25 major strengths, 21 minor strengths, no major weaknesses, and 7 minor weaknesses in Swales's "excellent" proposal under the Overall Understanding element.

Similarly, under the Sample Problems element, the TEP judged EER's proposal to suffer from 13 major weaknesses, only 1 of which was considered correctable, and 5 minor weaknesses, none of which was considered correctable. Again, EER's weaknesses stemmed from its omission of several major elements elicited by the sample problems, poor treatment of others, and from erroneous assumptions underlying its solutions.[10] There were no major strengths and only 4 minor strengths in EER's response to the sample problems. As a result, the TEP concluded that the protester's

---

[9]By way of illustration, the TEP noted the following major weaknesses in EER's response to the SOW requirements: (1) under the Structural Design and Analyses job category, "[t]here was no narrative discussion on Mechanical Design and Mechanical Drawing Checking . . . [t]he information presented in the tables was cryptic and did not convey a strong understanding of how these areas relate to analysis"; and, (2) under the Electrical Engineering job category, "[EER] lumped instrument control system design with the spacecraft control system design as if they were the same problem."

[10]For example, the TEP noted the following major weakness in EER's response to the third demonstration task, entitled Systems Analysis of a Scientific Instrument:

> "EER missed most systems analysis issues entirely. They provided a general description of systems engineering and project management for a typical instrument with very few specifics directed to this problem. Their description of what they would do in the various development phases was often incorrect."

demonstrated ability to perform some of the more typical tasks contemplated by the contract was poor. In contrast, the TEP evaluated 10 major strengths, 8 minor strengths, no major weaknesses, and 6 minor weaknesses in Swales's "very good" response to the sample problems.

EER has not specifically contested the substantive findings of the evaluation panel with respect to its sample problems responses or overall understanding responses. Rather, the protester characterizes the numerous weaknesses attributed to its proposal under these elements as informational deficiencies that it could have corrected through discussions. According to the protester, "[b]ecause NASA's priorities with regard to the various topics of discussion were not evident in the RFP, EER was unsure as to which topics should have been discussed more extensively." The protester claims that, "[i]f NASA had conducted discussions and had indicated which areas of EER's proposal required amplification," it would have been able to furnish any information that was omitted and to amplify any information that was deficient.

At the outset, we question EER's characterization of the weaknesses found in its proposal as "informational deficiencies." Under this RFP, proposals that merely discussed each required task, but did not provide a holistic approach to performing these tasks, could reasonably be found to reflect the offeror's lack of understanding of the complex and interrelated SOW technical requirements. A proposal like Swales's, which gave integrated, comprehensive responses to the specific tasks encompassed by these elements and thereby manifested a holistic and realistic engineering approach, would understandably receive much more credit than a proposal like EER's, whose multitudinous omissions in detail and analysis could logically be viewed as not reflecting a meaningful understanding of NASA's requirements.[11] Moreover, given that this contract primarily requires the contractor to grapple with the difficult engineering problems that emerge in the development and operation of spacecraft mechanical systems and to provide NASA with expert advice and alternate

[11]For example, the TEP found that Swales's proposal for producing an integrated system design "provided a clear and concise overview of Project systems level development activities," whereas EER's proposal "offered no discussion of how each discipline affects and interacts with each other." Similarly, Swales's response to the first sample problem "provided an excellent, realistic approach to developing a packaging concept and conceptual thermal design approach," while EER's "conceptual thermal design was weak," and resulted in a response that was considered unrealistic.

solutions to resolve these problems, NASA could reasonably discount a proposal, such as EER's, that did not demonstrate insight and understanding in meeting the SOW requirements or in solving the sample problems. See Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16.

Notwithstanding that EER might have improved its Sample Problem and Overall Understanding responses if NASA had pointed out any erroneous, superficial, or omitted information, what was being evaluated under these elements was not whether the offeror could improve the problem areas in its proposal, but whether the offeror independently appreciated the technical requirements of the RFP. Had NASA discussed the numerous "informational" deficiencies and omissions in EER's technical discussion, NASA still would have had little assurance that EER could independently comprehend and satisfy the RFP technical requirements, thus defeating the primary purpose of the Sample Problems and Overall Understanding evaluation elements. Inasmuch as EER concedes that it was "unsure as to which topics should have been discussed more extensively," and would have been assisted had NASA "indicated which areas of EER's proposal required amplification," we think that the protester's initial proposal response was probably the most telling measure of EER's technical understanding. While the protester blames an alleged lack of guidance in the RFP for its deficiencies, we find the RFP most explicit as to the disciplines that must be addressed and the analyses that must be performed to convey the offeror's understanding of the requirements. Under the circumstances, we find that the agency reasonably determined that the weaknesses evident in EER's Sample Problem and Overall Understanding responses reflected a poor comprehension of NASA's requirements that could not be dramatically improved, even if discussions were conducted. See Modern Technologies Corp.; Scientific Sys. Co., B-236961.4; B-236961.5, Mar. 19, 1990, 90-1 CPD ¶ 301, recon. denied, B-236961.6, Aug. 15, 1990, 90-2 CPD ¶ 125; Syscon Servs., Inc., 68 Comp. Gen. 698 (1989), 89-2 CPD ¶ 258.[12]

---

[12]In addition to its evaluation under the Overall Understanding and Sample Problems elements, EER has also protested its evaluation under the Personnel element, arguing that the TEP improperly relied upon outside information in assuming that three proposed EER employees had left EER's employment and were unavailable for performance of this contract. In our view, the TEP was reasonably concerned about the availability of these individuals, and would have directed a discussion question to EER to address this issue, had EER's proposal been included in the competitive range. However, since the

(continued...)

With respect to the evaluation of its cost proposal, EER protests that NASA improperly adjusted its proposed labor rates. The cost adjustments to EER's labor rates were made by the Defense Contract Audit Agency (DCAA), and adopted by NASA in its probable cost analysis. EER's proposed labor rates for each RFP labor category were based upon category average rates (standardized salaries that individuals in that labor category would earn). DCAA questioned these category average rates because they did not account for the actual salaries being earned by the named personnel in EER's proposal, and so adjusted EER's proposed labor rates. While EER protests that it was improper to assimilate the actual salaries into its proposed rates, EER has not alleged that the adjusted rates do not reflect the labor costs that it will actually incur by employing the named personnel in its proposal. Accordingly, we have no basis for concluding that the probable cost evaluation here was unreasonable. See NSI Technology Servs. Corp., B-253797.4, Dec. 29, 1993, 93-2 CPD ¶ 344.

The protester asserts that NASA established the competitive range without accounting for EER's cost advantage, which it portrays as "substantial." In fact, EER's probable cost was only 3 percent lower than Swales's, and the SSO did consider it in establishing the competitive range, stating that "the relative cost position of each offeror with regard to the other was not significantly discriminating." We find this determination reasonable. Consequently, we have no basis to object to the agency's determination to compose a competitive range limited to a single proposal, since that proposal enjoyed a decisive technical advantage over the excluded proposal and did not appreciably differ from a cost standpoint. See American Sys. Corp., B-247923.3, Sept. 8, 1992, 92-2 CPD ¶ 158; StaffAll, B-233205, Feb. 23, 1989, 89-1 CPD ¶ 195.

EER protests that NASA should have rejected Swales's proposal as technically unacceptable because its discussion of the SOW technical requirements--for which the firm's proposal earned 143 of the available 150 points and an "excellent" rating--contained some informational omissions, as were noted by the TEP.

---

[12](...continued)
exclusion of EER's proposal from the competitive range primarily stemmed from its poor technical comprehension, not its proposed personnel, we find that the alleged evaluation impropriety was immaterial. Similarly, the alleged misevaluation of EER's proposal under one of the Other Considerations subfactors (Business Systems) was not material to the competitive range determination, and need not be considered.

Swales's discussion of the SOW technical requirements contained 25 evaluated major strengths and 21 minor strengths, distributed among each of the 13 evaluated job categories. There were no major weaknesses noted in any of its responses, and only seven minor weaknesses, among them, the two informational omissions protested. Under the System Safety Analysis job category, the TEP found that Swales did not discuss all of the required structural safety documents, though its discussion fully satisfied the other System Safety Analysis requirements. Similarly, under the Hardware Fabrication job category, Swales did not discuss the special test and evaluation equipment needed to support the operation of the required mechanical hardware, although its discussion did satisfy the numerous other Hardware Fabrication requirements and, in fact, evinced two major strengths in doing so. In characterizing Swales's overall response to the SOW requirements, the TEP noted that the "minor weaknesses were of insignificant importance when compared with the overall requirement," which Swales had demonstrably mastered.

EER argues that, by omitting information relative to a negligible portion of the contract work, Swales's proposal violated the RFP requirement that offerors "individually address each element of the SOW," and should have been found technically unacceptable. This argument not only contradicts EER's defense of its own proposal, which contained far more omissions, but mischaracterizes the RFP as establishing a series of minimum requirements for evaluation purposes. In fact, the RFP contemplates a qualitative evaluation of the offeror's comprehension of the overall technical requirement, and allows the agency to consider the magnitude and significance of some shortcoming in the offeror's proposal. In this case, the limited omissions in Swales's proposal provided no basis for its rejection as technically unacceptable as the proposal otherwise addressed the extensive SOW requirements in a thorough and comprehensive fashion.

EER makes a related argument that Swales's proposal should have been found technically unacceptable because not all of its proposed personnel met the position qualifications set forth in the RFP. Of the 31 employees proposed by Swales for the 21 designated personnel categories, the TEP found that 7 employees did not fully meet the RFP experience requirements. EER argues that the position qualifications set forth in the RFP are mandatory minimum requirements that require the rejection of a proposal as technically unacceptable if one or more proposed employees fall short of such requirements.

Contrary to EER's allegations, we believe that the RFP gave offerors the latitude to propose individuals who did not precisely meet the position qualifications, and the agency the latitude to consider the significance of some deviation in a proposed employee's experience. The RFP states that the agency will evaluate the proposed personnel on their "technical capability and experience . . . as compared to the applicable position descriptions." The RFP notes that,

> "[i]f a proposed individual does not meet all of the requirements set forth in the applicable position descriptions, the compensating factor(s) that make(s) the individual the 'right person for the job' will also be evaluated."[13]

This language invites offerors to exercise their best judgment in selecting suitable individuals for a designated position, and we do not believe that the agency could thereafter reject a proposal because an offeror did just that. In our view, NASA's personnel evaluation, which considered the appropriateness of an employee's experience "as compared to the applicable position descriptions," comported with the RFP evaluation scheme.

In this case, the TEP considered the deviations in the experience of seven proposed Swales's employees, concluded that the deviations amounted to minor weaknesses, and reduced the firm's personnel score accordingly. The TEP also considered the fact that Swales had proposed 17 individuals who exceeded the RFP education requirements and 7 employees who exceeded the RFP experience requirements. On balance, the TEP found that Swales had submitted a "very good" personnel proposal,[14] and we have no basis to disagree with that conclusion. In addition, we note that, while EER has protested that Swales's proposal should have been rejected as technically unacceptable for personnel weaknesses, EER's proposal suffered from even more weaknesses in this regard, i.e., 11 of its 31 proposed

---

[13]Similarly, while Section H of the RFP requires contractor personnel to "satisfy, as a minimum, the applicable labor category qualifications," it conditions this requirement, "whenever in the opinion of the [c]ontractor it may be necessary to employ personnel who do not meet personnel qualifications and experience requirements." Under such circumstances, the contractor may be granted a waiver of the position qualifications by the contracting officer.

[14]The RFP also permitted the agency to evaluate "[t]he collective ability of the key personnel to operate as a team."

employees were found to possess experience "that was not relevant and did not meet RFP requirements."[15]

In any case, the record reasonably supports the agency's determination that Swales's proposal, notwithstanding its weaknesses, was substantially technically superior to EER's proposal, which displayed considerably less comprehension of NASA's requirements and would have required substantial revisions to be improved. The fact that Swales's proposal still contained some weaknesses or deficiencies that had to be corrected before award was consummated does not undermine the agency's determination to eliminate EER's proposal from the competitive range and to conduct discussions only with Swales.[16] See FAR § 15.609(a), (b).

EER finally contends that the agency should have conducted cost discussions before making any adjustments to its cost proposal, and technical discussions with regard to the "informational" weaknesses in its technical proposal. However, FAR § 15.610(b) provides that the contracting officer shall conduct discussions with only those offerors who submit proposals within the competitive range. Since

---

[15]EER has protested that NASA underrated EER's proposed personnel and overrated Swales's proposed personnel, and that EER deserved a higher personnel score than Swales. The protester raised this specific issue in its comments on the agency report, which were filed more than 10 days after EER received the report and all the accompanying evaluation documentation necessary to establish this protest basis. Accordingly, the issue is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

[16]For the same reason, there is no merit to EER's contention that NASA was precluded from conducting discussions with regard to Swales's failure to include any subcontract cost information in its cost proposal, which the RFP required for any subcontracts expected to exceed $500,000. Swales's technical proposal states that the firm has access to several "on-call specialty subcontractors . . . when and if needed," but the cost proposal omits any subcontract cost information because, "[a]ll proposed effort is attributable to the prime contractor, with no priced subcontracts." As EER notes, the TEP was "unclear as to whether [Swales] would in fact provide all the services required by the RFP." This ambiguity could properly be clarified during discussions--as the agency intends to do--and did not invalidate the probable cost evaluation, as Swales completed all RFP cost schedules.

EER's proposal was properly eliminated from the competitive range, there was no duty to conduct discussions with the protester. Dehler Mfg. Co., B-250850, Feb. 17, 1993, 93-1 CPD ¶ 152.

The protest is denied.

Ronald Berger
for Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

12796

Decision

Matter of: Katherine H. Briley - Lodging Expenses - Government Quarters Available

File: B-256982

Date: June 10, 1994

DIGEST

A civilian employee of the Navy may not be reimbursed the lodging expenses she incurred in non-government quarters while on a temporary duty assignment because adequate government quarters were available for her, in which case payment is prohibited by 10 U.S.C. § 1589 (1988). Robert Samalis, B-252291, June 18, 1993, distinguished.

DECISION

The Department of the Navy has forwarded for our decision Ms. Katherine M. Briley's claim for lodging expenses she incurred staying in non-government quarters during a temporary duty (TDY) assignment.[1] The claim may not be allowed.

BACKGROUND

Ms. Briley is a civilian employee of the Navy who was required to perform temporary duty at New London, Connecticut, beginning on March 5, 1993. Her travel orders stated that government quarters would be available at New London. In fact, these quarters were available in the Suisse Chalet hotel which provided government contract lodgings located on the Naval base at New London. The cost of these quarters was $55.68 per night. Ms. Briley stayed there the first night of her TDY, but then stayed the next two nights in a hotel located off the base that charged $50.40 per night. Ms. Briley states that she returned to the Suisse Chalet for the remainder of her TDY at New London after being told that it was government contract quarters.

The disbursing Officer at Ms. Briley's permanent duty station refused payment on her claim for lodging expenses incurred for the two nights she stayed in the hotel off-base, citing the rule applicable to employees of Department

[1]The matter was referred to us by the Bureau of Naval Personnel.

of Defense components that, in the absence of a certificate of non-availability of government quarters, a traveler may not be reimbursed for commercial lodging costs.[2]

Ms. Briley argues that she was merely acting prudently in moving to less expensive quarters. The Defense Finance and Accounting Service recommended payment on Ms. Briley's claim based on our decision Robert Samalis, B-252291, June 18, 1993, in which we held that an employee in a somewhat similar situation could be reimbursed an amount not to exceed what it would have cost the government had he stayed in government procured commercial quarters that were available to him. However, in that case, because on-base government quarters were unavailable, the agency had booked space for the employee at a special rate in an off-base motel, which was canceled at no cost to the agency when the employee, due to a misunderstanding, stayed in a different motel. In Ms. Briley's case, the record indicates that the on-base contract quarters in the Suisse Chalet are considered "co-equal" with the bachelor officers quarters (BOQ), and the Disbursing Officer noted that the agency's contract with the Suisse Chalet required the agency to pay for any unoccupied rooms less than a contracted number.

OPINION

Section 1589 of title 10, United States Code, prohibits use of funds available to the Department of Defense to pay the lodging expenses of a civilian employee on official travel "where adequate Government quarters are available but are not occupied by such employee or person."

As we noted in Samalis, supra, it is implicit in this statute that appropriated funds may not be used to pay for lodgings while other appropriated funds are being used to maintain unoccupied quarters. In this case, unlike the Samalis case, the Suisse Chalet was contracted for by the agency on a continuing basis and for use, in effect, as BOQ. On that basis, the agency was obligated to pay for a minimum number of rooms whether or not they were occupied, and there is no indication that such obligation was not incurred during the two nights Ms. Briley stayed elsewhere.

---

[2]See Joint Travel Regulations, Vol. 2, para. C1055, ch. 325, Nov. 1, 1992.

Therefore, the limited exception allowed in the Samalis case is not applicable here. Accordingly, payment of Ms. Briley's claim is prohibited by the statutory provision cited above.

for Seymour Efros

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

1015216

Decision

Matter of: EDP Enterprises, Inc.

File: B-256368

Date: June 14, 1994

Major W. Park, Jr., Esq., Gage & Tucker, for the protester.
Riggs L. Wilks, Jr., Esq., Elizabeth D. Berrigan, Esq., and Jeffrey S. Dubois, Esq., Department of the Army, for the agency.
Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against solicitation provisions relating to the deduction of contractor payments for inadequate performance is denied where record shows that deductions bear a reasonable relationship to the approximate losses the government could suffer as a result of inadequate performance.

DECISION

EDP Enterprises, Inc. protests the terms of request for proposals (RFP) No. DABT31-94-R-0001, issued by the Department of the Army for dining facility attendant, management, and food production services at Fort Leonard Wood. EDP argues that the RFP's provisions relating to deductions from contract payments for unsatisfactory performance are unreasonable.

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

The RFP calls for offers to perform comprehensive dining facility attendant, management, and food production services for a base year and four 1-year options. The contractor will be responsible for furnishing all labor and janitorial/expendable supplies required for performance of the contract. The required services are to be furnished at numerous dining facilities located at Fort Leonard Wood and for troops in the field ("field feedings"). The RFP provides that the contractor will receive a lump-sum monthly payment for all services and supplies provided during the preceding month, 75 percent of which is for food production services, and 25 percent of which is for other services and janitorial/expendable supplies.

The 75-percent portion of the monthly payment which is for food production services is subject to deductions for unsatisfactory performance.[1] Specifically, the solicitation divides the food production services payment between eight separate categories of tasks, and each category is assigned an acceptable quality level (AQL). The AQL is the percentage of a contractor's performance which may be found unacceptable before the monthly payment is to be reduced. The categories, percentages, and AQLs, as set forth in the solicitation, are as follows:

Work Category	Percentage of Monthly Payment	AQL Percentage
Menu Planning	1	10
Main Line Food Preparation	20	10
Self Service Food Preparation	6	6.5
Food Serving	10	6.5
Headcount/Cashier Services	8	4
Administrative Requirements	10	10
Equipment Cleaning	8	10
Field Feeding	12	4

Where the contractor performs unsatisfactorily in a given category, its monthly payment may be reduced, in whole or in part, by as much as the applicable percentage depending on the extent of the unsatisfactory performance.

In order to determine whether a contractor is performing satisfactorily, the RFP provides for inspection of a representative sample of the contract work. Each of the eight work categories is divided into a number of tasks, and failure to meet the performance requirements for a stated number of tasks within a work category will result in the contractor receiving a defective performance rating for that inspection. Where a contractor is found to have more than the allowable number of defects per month in a work

[1]For one of the dining facilities, the Army provides food production services and the contractor provides only dining facility attendant services. Under this portion of the contract, 85 percent of the contractor's payment is for services and the remaining 15 percent is for supplies; the 85 percent service payment is subject to potential deductions for unsatisfactory performance. EDP's protest concerns only the potential 75-percent deduction that may be made for the food production portion of the RFP.

category, its payment in that category is reduced for the month.[2]

EDP argues first that the maximum 75 percent potential deduction in the monthly payment bears no reasonable relationship to the agency's actual potential losses, and thus the deduction schedule essentially constitutes an unreasonable liquidated damages provision. According to the protester, which is the incumbent contractor at Fort Leonard Wood, the maximum deduction percentage under its current contract totals only 15.75 percent, and this figure rather than the 75-percent maximum under the solicitation, accurately reflects the potential loss to the government for unsatisfactory performance. EDP specifically contends that because the RFP provides that the deductions are for "the reduction of the services performed," the Army may not properly take into consideration potential costs other than the monetary value of the services.

The Army reports that the percentages contained in the RFP represent a reasonable estimate of the losses that could arise from inadequate performance, and reflect similar percentages found in a prototype solicitation for food service contracts developed by the agency's Training and Doctrine Command (TRADOC). According to the Army, the percentages used in earlier contracts did not accurately reflect the reduced value of the services to the government, and also did not provide adequate incentive for contractors to perform in an acceptable manner. The Army maintains that the current provisions are reasonable and properly take into consideration potential losses, including those that do not arise directly from inadequate performance. The Army contends, by way of example, that the substantial medical and personnel costs that could result from food poisoning may properly be considered as a part of the measure of damages that the government would suffer from inadequate performance; the Army concludes that such damages are properly cognizable under the RFP's "reduced value of the services performed" language.

The Federal Acquisition Regulation (FAR) § 12.202, specifically authorizes the use of liquidated damages

---

[2]The RFP contains a formula for calculating the amount of the deduction. Deductions are calculated based on the percentage of defects as compared to the size of the sample taken. For example, if a contractor is found to have defects in 20 percent of the samples taken in the food serving category (a category worth 10 percent of the contractor's monthly payment), its contract payment is reduced by roughly 20 percent of the 10 percent it is entitled to for food serving or roughly 2 percent of its overall monthly payment.

provisions where adequate performance is such an important factor that the government may reasonably expect to suffer damages if the contract is improperly performed, and the extent or amount of such damages would be difficult or impossible to ascertain or prove. The rate of liquidated damages imposed must be reasonable and bear some relationship to the losses contemplated. FAR § 12.202(b). In considering the liquidated damages to be assessed, agencies may properly consider losses beyond the reduced value of the services performed, since the impact of deficient performance may extend beyond the mere loss of the services to be provided. See H H & K Builders, B-237885, Mar. 30, 1990, 90-1 CPD ¶ 349; W.M.P. Sec. Serv., Co., B-238542, June 13, 1990, 90-1 CPD ¶ 553. Where a protester contends that a liquidated damages provision is improper, it must show that there is no possible relationship between the liquidated damages to be assessed and the reasonable contemplated losses. R Squared Scan Sys., Inc., B-249917; et al., Dec. 23, 1992, 92-2 CPD ¶ 437.

Based on our review of the record, it appears that the deduction percentages assigned to the various categories of work are the result of a careful tailoring of the prototype TRADOC solicitation to the particular statement of work in this procurement.

The agency adjusted downward the maximum potential deduction (85 percent) set forth in the prototype TRADOC solicitation to account for differences in the required work under the contemplated contract. Further, in calculating the potential losses from unsatisfactory performance, the agency considered, reasonably in our view, losses beyond the approximate value of the foregone services. In this regard, the agency reports that the serious potential impact of food-borne illness was recently illustrated at a contractor-operated dining facility at another installation where a large number of personnel were affected by an outbreak of food poisoning. Given the agency's effort to tailor the schedule of deductions to the particular circumstances of this procurement, the potential costs beyond the value of the foregone services that could result from inadequate performance, and EDP's failure to refute in detail the agency's position, we have no basis for concluding that there is no reasonable relationship between the specified deduction percentages and the reasonably contemplated losses.[3]

---

[3]EDP's concern seems to stem primarily from the fact that the total potential deduction--as much as 75 percent--is higher than the total potential deduction under its predecessor contract. However, the mere fact that the Army has revised the deduction schedule used under the earlier

(continued...)

EDP objects to the definition of "lot size" found in the RFP. The lot size is a measurement of the work to be performed which will form the basis for calculating any deductions; using standard tables in the TRADOC prototype solicitation, the lot size determines both the number of samples that the Army is required to take during its monthly inspections and the number of defects which are permissible before a deduction from the monthly payment is made. Under the RFP, the lot size is defined as the total number of operational days for all facilities for each month. Because there are nine dining facilities, the lot size (assuming a 30-day month) is 270 units (9 buildings x 30 days = 270). Under EDP's predecessor contract, the lot size was defined as the number of meal serving periods for all buildings per month, which amounted to 720 (9 buildings x 80 meal servings = 720). EDP challenges the reduction in the lot size because it results in a significant reduction in the number of defects which are permissible before the contractor's payment is reduced.

EDP has not shown, nor is it otherwise apparent, how the change in lot size is prejudicial. Under the prototype solicitation, the number of inspections and defects are dictated by the lot size. While it is true that a larger number of defects would be permissible if a larger lot size were used, the number of inspections that would be required also increases correspondingly. For example, where the lot size is between 151 and 280, only 32 inspections per month are required. In contrast, where the lot size is between 501 and 1,200 (the lot size preferred by the protester) 80 inspections per month are required. Since both the number of inspections and the permissible number of defects are functions of the lot size, it makes no difference what lot size is used; the contractor is held to the same standard of performance, which is dictated by the AQL percentages. The AQL percentages remain constant regardless of the lot size, sample size, and number of defects. Thus, a change in the lot size will have no effect on the standard of performance to which the contractor is held.

In any event, the Army has explained its use of the smaller lot size for this solicitation as based on the availability of quality assurance personnel to perform inspections. The agency no longer has the quality assurance personnel necessary to perform the number of inspections that would be

---

[3](...continued)
contract does not show that the current schedule is unreasonable; each procurement action is a separate transaction and the action taken under one is not relevant to the propriety of the action taken under another procurement for purposes of a bid protest. Komatsu Dresser Co., B-251944, May 5, 1993, 93-1 CPD ¶ 369.

required if the old lot size definition were used. EDP does not challenge the agency's position in this regard. Under these circumstances, we cannot say that the lot size used in this RFP is unreasonable.

EDP also argues that two other aspects of the RFP are improper. First, EDP contends that each work category improperly bundles together a large number of tasks that were previously broken down into more work categories. According to EDP, this creates the potential for disproportionately high deductions because failure to perform adequately in only a few tasks can result in a deduction for an entire work category.

The Army states that it agrees with EDP and intends to issue an amendment to the RFP that will provide for prorating deductions within each work category for the tasks found to be deficient. Under the proposed scheme, a contractor will only receive a deduction for tasks that are actually found deficient, and will not suffer deductions for tasks within a work category that are performed acceptably. Since the Army has proposed corrective action that is responsive to EDP's concern, we need not consider this allegation, and accordingly dismiss it as academic. Steel Circle Bldg. Co., B-233055; B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139.[4]

Second, EDP claims that the RFP improperly fails to segregate the cost of services (which may be subject to deductions for inadequate performance) from the cost of expendable supplies to be furnished under the contract. EDP argues that as a result of deductions made for inadequate performance of the services, it might not be reimbursed for moneys spent for supplies. As already noted, however, the maximum deduction to which the contractor may be subject is 75 percent of the total monthly payment. The remaining 25 percent is for services not subject to deductions and expendable supplies. The RFP thus segregates the cost of supplies from the portion of the monthly payment subject to

[4]EDP requests that it be awarded its protest costs for this issue since the agency is taking corrective action in response to its protest. We deny EDP's request. Our Office will only award bid protest costs where we find that the agency unduly delayed its corrective action. PLX Inc.--Request for Declaration of Entitlement to Costs, B-251575.2, Mar. 10, 1993, 93-1 CPD ¶ 224. Here, the agency proposed corrective action in its report to our Office, and we view its action as a reasonably prompt response to EDP's protest.

the deductions. Consequently, EDP's concern is already addressed by the terms of the solicitation. Robert Wall Edge--Recon., 68 Comp. Gen. 352 (1989), 89-1 CPD ¶ 335.

The protest is denied in part and dismissed in part.

for Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Captain Ernest T. Foster, USAF (Retired) - Claim for Refund of Amounts Withheld from Retired Pay as Child Support

File: B-257000

Date: June 14, 1994

DIGEST

The former spouse of a retired member served the Defense Finance and Accounting Service (DFAS) with legal process to enforce payment of court-ordered child support. Since the legal process was valid on its face, DFAS was required to honor it, and the claim of the member for refund of amounts withheld from his retired pay (and related expenses) is denied.

DECISION

We have been asked to review our Claims Group's denial of the claim of Captain Ernest T. Foster, USAF (Retired), for $7,500. This amount includes $4,500 that Captain Foster believes was incorrectly withheld from his retired pay for child support, plus $3,000 for expenses he incurred in terminating the withholding. We affirm the Claims Group's settlement.

Until November 1990 Captain Foster had an allotment in effect to pay $300 per month to his former spouse for child support. In that month Captain Foster terminated the allotment, and in January 1991 his former spouse served the Defense Finance and Accounting Service, Denver Center (DFAS), with a Notice to Employer requiring that child support ordered by the District Court of Arapahoe County, Colorado, be withheld from Captain Foster's retired pay and remitted to the Clerk of the Court. Ms. Foster initially delivered the Notice to DFAS herself, but was told that the Notice should be notarized and sent to DFAS by certified mail. She followed those instructions.

On January 17, 1991, DFAS advised Captain Foster of the Notice it had received. Child support was withheld from Captain Foster's retired pay and remitted to the Clerk of the Court from January 1991 until January 1992. After receiving notice in January 1992 that Captain Foster had filed a motion with the court to terminate the withholding, DFAS withheld child support from his pay for the months of

February through April 1992, but held it pending the court's ruling.

On April 2, 1992, the District Court of Arapahoe County terminated Captain Foster's obligation to pay child support effective November 5, 1991, and directed that any child support payments made to his former spouse after November 5, 1991, be returned to him. In May 1992 DFAS returned to Captain Foster the amounts withheld for February through April 1992. Amounts withheld before February 1992 had already been sent to the Clerk of the Court and presumably had been disbursed to Ms. Foster.

Captain Foster contends that DFAS should have investigated the Notice to Employer before honoring it. Captain Foster argues that because the Notice was initiated directly by his former spouse without court action, and because it was not, in his view, otherwise properly served, it did not constitute adequate legal process for purposes of garnishing his pay. Captain Foster therefore claims all monies withheld from his retired pay: he calculates that amount to be $4,500, although DFAS states that $3,900 was remitted to the Clerk of the Court and $900 was returned to him. Captain Foster also claims reimbursement of $3,000 in expenses he incurred in terminating the withholding. The Claims Group denied Captain Foster's claim.

Section 659 of title 42 of the United States Code provides for enforcement of legal obligations to pay child support. Under the statute, monies payable to an individual, including a member of the armed services, as remuneration for employment are subject to legal process for enforcement of child support obligations as if the United States were a private person. When legal process is served on a government agency in accordance with 42 U.S.C. § 659 and the regulations implementing it (5 C.F.R. pt. 581), the agency must garnish the wages of the obligor.

The term "legal process" is defined in 42 U.S.C. § 662(e) to include a writ in the nature of a garnishment issued by a court of competent jurisdiction or by an official pursuant to a court order or state law for the enforcement of a legal obligation to pay child support. Colorado law allows garnishment to be activated by the obligee to whom support is owed under court order. The obligee accomplishes this by serving a Notice to Employer on the obligor's employer. Colo. Rev. Stat. § 14-14-107(7). Receipt of the notice confers the jurisdiction of the court on the employer. Id.

If the Notice to Employer appears regular on its face, the employing agency is required to begin withholding money from the obligor's pay in accordance with the Notice. 5 C.F.R. § 581.305. The government cannot be held liable with

respect to any payment made pursuant to legal process that is regular on its face as long as payment is made in accordance with the relevant statute and regulations. 42 U.S.C. § 659(f).

We believe that DFAS reasonably determined that the Notice to Employer submitted by Captain Foster's former spouse was regular on its face and properly served. The Notice to Employer form used was the standard Colorado form for that purpose. The Notice included the case number assigned by the District Court of Arapahoe County, Colorado, in the matter of Captain Foster's divorce. (Moreover, when DFAS received the Notice, it notified Captain Foster promptly and told him that he would have to take action in court if he wished to contest the garnishment.) DFAS's obligation for purposes of making the payments in issue was to determine the Notice's facial validity and, if deemed valid, to proceed to garnish Captain Foster's pay in accordance with the law and implementing regulations. DFAS's actions here were in accord with 42 U.S.C. § 659 and 5 C.F.R. pt. 581, and the government therefore is relieved of liability with regard to the payments made under the wage assignment. See Technical Sergeant Harry E. Mathews, USAF, 61 Comp. Gen. 229 (1982).

We note that Captain Foster points out that Colo. Rev. Stat. § 14-14-107(2)(a) requires validation of the support obligation by the "delegate child support enforcement unit" before the withholding is initiated, which apparently was not done here. However, the validation requirement was added to the law by an amendment that did not become effective until August 1, 1992; withholding of Captain Foster's retired pay was terminated in April 1992. (It is not clear, in any event, that lack of validation would be apparent on the face of a Notice.)

In sum, by the time the court, on April 2, 1992, relieved Captain Foster of the obligation to pay child support effective November 5, 1991, amounts withheld by DFAS through January 1992 had properly been remitted to the Clerk of the Court; the court's order includes a direction to Captain Foster's former spouse to repay those to him. Also, amounts held by DFAS for February through April 1992 properly were returned to Captain Foster.

Finally, claims cannot be paid in the absence of statutory authority, and there is no statutory basis for reimbursing Captain Foster for his expenses in resolving this matter. See 61 Comp. Gen., supra.

The Claims Group's settlement is affirmed.

Robert P. Murphy
Acting General Counsel

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

541216

Decision

Matter of: American Mutual Protective Bureau

File: B-243329.2

Date: June 16, 1994

Donald G. Featherstun, Esq., Pettit & Martin, for the protester.
Emily C. Hewitt, Esq., and Thomas Hawkins, Esq., General Services Administration; and David R. Kohler, Esq., and Susan L. Sundberg, Esq., Small Business Administration, for the agencies.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration (SBA) properly accepted requirements for guard services, which were a portion of the guard services currently contracted for from a small business, for inclusion in the section 8(a) program, where the SBA determined, in accordance with applicable regulations, that acceptance of the requirements would not constitute an "adverse impact" on the small business.

DECISION

American Mutual Protective Bureau (AMPB), a small business, protests the decision of the General Services Administration (GSA) and the Small Business Administration (SBA) to place a portion of the work encompassed by its guard services contract with GSA into the SBA's section 8(a) program.

We deny the protest.

Section 8(a) of the Small Business Act authorizes the SBA to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (1988 and Supp. IV 1992). Under the Act and its implementing regulations, the SBA may not accept any requirement into the 8(a) program if doing so "would have an adverse impact on other small business programs or on an individual small business." 13 C.F.R. § 124.309(c) (1994).

The SBA must consider "all relevant factors" in determining whether a proposed 8(a) award has an adverse impact. 13 C.F.R. § 124.309(c)(1). However, the SBA will presume adverse impact, and will not accept a procurement into the 8(a) program, when the following circumstances exist: (1) a small business concern has performed a specific requirement for at least 24 months; (2) it is currently performing the requirement or has concluded performance within 30 days of the procuring agency's offer of the requirement for the 8(a) program; and (3) the estimated dollar value of the offered 8(a) award is 25 percent or more of the small business concern's most recent annual gross sales. 13 C.F.R. § 124.309(c)(2).

On April 30, 1991, following a competition restricted to small business concerns, GSA awarded AMPB contract No. GS-09P-91-KSD-0036 to provide security guard services, on a firm, fixed-price basis, for a base year and 4 option years. The contract requires AMPB to provide security guard services at various GSA-administered buildings in the following California regions: (1) San Francisco, Marin and San Mateo Counties; (2) Contra Costa County; (3) Alameda County; and (4) Monterey, Santa Clara and Santa Cruz Counties. GSA had previously fulfilled its requirements for these geographic areas by four separate procurements, but decided to bundle these requirements in AMPB's contract for administrative convenience.

On November 19, 1993, during AMPB's second option year, GSA asked SBA to consider accepting into the 8(a) program those guard services then provided by AMPB. In making this offer, GSA broke up the requirements in AMPB's contract and restored the four original geographic lots, for consideration as separate 8(a) procurements. GSA advised SBA that, "one large contract serving all these areas was almost impossible to administer, so the decision was made by GSA to break up the requirements."

The SBA notified the protester of GSA's proposal by letter dated November 24. The letter requested that AMPB provide SBA with specific financial information, including financial statements for the last 3 fiscal years. The letter stated that SBA would use the information to ascertain whether the award of these requirements to an 8(a) contractor would adversely impact the protester.

The protester provided its financial reports for the preceding 3 fiscal years, as requested. In addition, AMPB furnished a government estimate appraising the value of its contract, and advised that this amount exceeded 25 percent

of AMPB's most recent annual gross sales. This being the case, the protester stated that acceptance of these requirements for 8(a) contracting would per se cause it to suffer an adverse impact.

The SBA rendered its impact determination on January 13, 1994. In making this determination, the SBA considered the estimated base year dollar value of the four requirements and calculated the percentage these requirements represented of AMPB's most recent annual gross sales. This calculation showed that this contract represented 45.3 percent of AMPB's annual gross sales broken down as follows: (1) San Francisco, Marin and San Mateo Counties--14 percent; (2) Contra Costa County--14 percent; (3) Alameda County--4.6 percent; and (4) Monterey, Santa Clara and Santa Cruz Counties--12.7 percent. Because the total contract value was significantly more than 25 percent of AMPB's most recent annual gross sales, the SBA presumed that acceptance of all four requirements into the 8(a) program would have an adverse impact on AMPB. However, the SBA recognized that "since GSA has decided to split the requirement and there will actually be four separate awards for the follow-on services," it could consider whether any of the broken out requirements could be diverted to the 8(a) program. The SBA then determined that it could accept for inclusion in the 8(a) program the requirements for Contra Costa County and Alameda County, which were valued at less than 19 percent of AMPB's most recent gross sales, without causing an adverse impact on AMPB. The SBA notified AMPB of its determination on January 21, and this protest followed.[1]

AMPB argues that the SBA was required to consider the protester's contract as a single entity, rather than considering the individual elements, such that adverse

---

[1]AMPB's contract was set to expire while this protest was pending. Shortly before that event, GSA exercised its option to extend the contract for an additional year with the intent of terminating that work designated for the 8(a) program. The protester argues that the exercise of this option manifests GSA's "clear intention to reserve the procurement as a small business . . . set-aside," which precludes SBA's acceptance of these requirements into the 8(a) program under 13 C.F.R. § 124.309(a) and (b). However, as the protester recognizes, the cited regulations apply to pre-award contract actions (e.g., the issuance of a solicitation as a small business set-aside or a Commerce Business Daily announcement of an intended small business set-aside), not to the agency's exercise of an option under an ongoing contract. Thus, we do not agree that the SBA must renounce its acceptance of a portion of AMPB's contract work because of the cited regulations.

impact would be presumed under 13 C.F.R. § 124.309(c)(2). The protester argues that the SBA and GSA improperly evaded the regulatory presumption of adverse impact by breaking out the requirements of AMPB's contract.

The Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program. Accordingly, our Office will not consider a protest challenging the decision to procure under the 8(a) program, absent a showing of possible fraud or bad faith on the part of government officials or that specific laws or regulations may have been violated. Microform Inc., B-244881.2, July 10, 1992, 92-2 CPD ¶ 13; San Antonio Gen. Maintenance, Inc., B-240114, Oct. 24, 1990, 90-2 CPD ¶ 326.

While the protester claims that 13 C.F.R. § 124.309(c)(2) required the SBA to consider the requirements of its incumbent contract as a single entity in making its "adverse impact" determination, it has provided no authority for this proposition and the SBA regulations do not support this claim. The "adverse impact" regulation directs SBA's attention to "proposed procurements" offered for 8(a) contracting, 13 C.F.R. § 124.309, not to existing contracts that no longer reflect how the agency intends to procure its requirements. Consistent with the discretion vested in a contracting agency to structure its requirements as it deems fit, the regulation contemplates that an agency may effect "an expansion or alteration of an existing requirement," and offer a new or different requirement to the SBA.[2] 13 C.F.R. § 124.309(c). The SBA's inquiry is defined by "the procuring agency's offer of the requirement for the 8(a) program," and is concerned with the impact of "the offered 8(a) award." 13 C.F.R. § 124.309(c)(2). Thus, we find that the SBA did not violate the regulation by considering the requirements as they were offered, in four separate lots.

---

[2]The regulation provides that, "[t]he expansion or alteration of an existing requirement shall be considered a new requirement where the requirement is materially expanded or modified so that the ensuing requirement is not substantially similar to the prior requirement due to the magnitude of the expansion or alteration." 13 C.F.R. § 124.309(c). The concept of adverse impact is designated as not applying to "new" requirements. Id. In this case, the SBA did not treat GSA's restructuring of the requirements in the protester's contract to amount to a "new" requirement in that it performed an impact determination.

We also find no evidence to support the protester's accusations of bad faith, namely, that the SBA and GSA were motivated by a desire to avoid the presumption of adverse impact that would attend if its contract were considered as a single entity. Here, the SBA was advised that GSA found it unduly arduous to administer one large contract serving the disparate geographic areas and wished to procure the requirements separately, as it had previously done. Given that the requirements of AMPB's contract were clearly divisible, we fail to see why GSA could not reasonably restore the previous geographic lots in making its offer to SBA or that either agency's actions were motivated by bad faith. See Information Dynamics, Inc., B-239893; B-239894, Oct. 1, 1990, 90-2 CPD ¶ 262.

The protester further asserts that SBA violated its regulations in another way. While the SBA was not required to presume adverse impact upon accepting two proposed procurements for inclusion in the 8(a) program, i.e., the guard service requirements for Contra Costa and Alameda Counties,[3] 13 C.F.R. § 124.309(c)(1) required the SBA to consider "all relevant factors" in determining whether or not acceptance of these requirements would have an adverse impact upon the protester. The protester contends that the SBA violated this regulation because the SBA "focused on the factors delineated in its internal Standard Operating Procedures to the exclusion of other considerations."

The factors stated in SBA's Standard Operating Procedures No. 80-05, paragraph 78(e), were whether the loss of the requirements would force the incumbent into bankruptcy, require the termination of a large percentage of the incumbent's employees and effect a significant change in the incumbent's future business capability, or significantly impair the value of the firm's assets that had been purchased exclusively for the requirements. The SBA determined that the loss of revenue represented by these requirements would not force AMPB into bankruptcy, as the firm's financial condition was sound. In addition, the SBA found that, while AMPB was likely to lose most of the employees currently performing these requirements to the successor contractor, AMPB would concomitantly reduce its labor and overhead costs, and would therefore not experience a significant change in its business capability. Finally, the SBA determined that a guard service contractor does not

[3]As noted above, the value of these requirements was 18.6 percent of AMPB's most recent annual gross sales, which is below the threshold for a presumptive finding of adverse impact.

invest heavily in assets specific to its contracts and would not suffer a capital loss were its contract terminated. Accordingly, the SBA determined that AMPB would not suffer the adverse impact contemplated under the regulations.

AMPB does not argue that the conclusions drawn by SBA under the above factors were incorrect. Rather, the protester argues that 13 C.F.R. § 124.309(c)(1) does not define what makes a factor relevant to the impact determination, such that "any factor which affects its business . . . is arguably relevant." AMPB proposes several of its own "relevant factors" and claims that, even though it did not present these concerns to SBA at the time it was requested to furnish information pertinent to the impact determination, SBA was required to exhaust any such relevant concerns in its analysis.

We disagree. The responsibility for defining what is and what is not a "relevant factor" under 13 C.F.R. § 124.309(c)(1) belongs to SBA, not the protester.[4] The analysis contemplated by this regulation involves an exercise of discretion on the part of SBA, which must balance various program requirements for different segments of the small business community. See Microform Inc., supra. In this case, SBA, based upon current information submitted by AMPB, determined that the loss of these requirements would neither force the protester into bankruptcy, significantly affect its future business capability, or cause it to suffer a significant capital loss, conclusions which the protester does not dispute. Although AMPB believes that SBA could have done more, the record does not establish that SBA did not make the adverse impact determination required by 13 C.F.R. § 124.309(c)(1). Id.

The protest is denied.

Ronald Berger
for Robert P. Murphy
Acting General Counsel

[4]Indeed, SBA states that it considers the factors now advanced by the protester to be irrelevant to an adverse impact determination, and it would not have changed its determination, even if AMPB had presented these concerns in a timely fashion--which it did not.

Comptroller General
of the United States

Washington, D.C. 20548

102276

Decision

Matter of: Premiere Vending

File: B-256437

Date: June 23, 1994

Donald Findley for the protester.
James L. Ropelewski, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against cancellation of invitation for bids filed more than 10 working days after protester knew basis for cancellation is untimely.

2. Agency decision to use negotiated procedures in lieu of sealed bidding procedures is justified where the basis for the award reasonably includes technical considerations in addition to price-related factors, and where the agency reasonably anticipates conducting discussions.

3. Protest that solicitation's evaluation criteria are defective is denied where agency demonstrates that criteria are reasonably related to its minimum needs.

4. Agency's determination not to set aside a procurement for small business concerns is reasonable where the agency concluded, after a thorough consideration of relevant factors, including the procurement history of the prior requirement, an informal survey of 10 small business concerns, and the concurrence of the Small Business Administration's representative, that it could not reasonably expect to receive proposals from at least two small business offerors.

5. Protest challenging requirement that offeror submit three copies of standard form 33 cover page is denied since protester fails to show how this provision is unduly restrictive, or otherwise prejudicial to the protester.

DECISION

Premiere Vending protests the terms of request for proposals (RFP) No. 122-0052, issued by the Federal Bureau of Prisons (BOP), Department of Justice, for inmate vending machine services at the Federal Correctional Institute (FCI) located in Dublin, California. Premiere primarily contends that the BOP improperly conducted this requirement as a negotiated, unrestricted procurement and that the RFP's evaluation criteria are defective.

We deny the protest.

BACKGROUND

This solicitation was initially issued by the agency on July 28, 1993, as an invitation for bids (IFB); however, due to the FCI's special delivery needs and inmate security requirements, the contracting officer subsequently decided that the procurement should be conducted using negotiated procedures. Consequently, on August 19--prior to the IFB's scheduled bid opening date--the contracting officer canceled the sealed bid procurement, and executed a brief written statement justifying use of negotiated procedures, as required by Federal Acquisition Regulation (FAR) § 6.401.

On September 29, the current RFP was issued. Of significance here, the solicitation required offerors to submit both a pricing schedule and a technical proposal; in the technical proposal, offerors were directed to explain "the approach, methods, schedules, manpower and the offeror's ability to satisfactorily complete the objectives" specified in the RFP's statement of work. The solicitation further provided that technical proposals would be comparatively ranked, and that contract award would be made to the responsible and responsive offeror whose proposal was in the "best interest of the government, price and other factors considered." The RFP also directed offerors that failure to provide three copies of the RFP's standard form (SF) 33 cover page "may result" in a determination of nonresponsiveness.

On November 30, the protester filed an agency-level protest challenging the cancellation of the predecessor IFB, and further arguing that the current requirement should be conducted as a small business set-aside with revised evaluation criteria and SF 33 submission instructions.

On December 17, the agency issued an amendment which--in response to Premiere's agency-level protest--substantially revised the scheme and language of the RFP's evaluation criteria. First, the amendment provided that the relative

merits of proposals were to be comparatively ranked as follows:

Factor	Percentage of Total Points
Technical Content	50 percent
Price Comparison	25 percent
Commission Comparison	25 percent

The amendment further specified that each proposal's technical content would be evaluated using the following evaluation factors:

> "A. Response Times - regularity of refilling machines, normal service calls, and emergency response time for machine repairs.
>
> "B. Past performance and experience of vendor on similar contracts.
>
> "C. Company Experience - available company facility and resources to include location, reputation, and years in business.
>
> "D. Management Controls - Attention to quality of merchandise, condition of equipment (new, used, etc.) reliability of employees.
>
> "E. Average price of selected product groups (i.e., sodas, chips, cakes, candy).
>
> "F. Highest stated commission as [percent] of Gross Receipts - commission to apply across the board to all items."

With respect to Premiere's remaining agency-level protest contentions, the agency denied these grounds by decision dated December 28.

On February 14, 1994--1 month prior to the RFP's scheduled March 29 closing date--Premiere filed this protest with our Office, which essentially reiterates its agency-level protest.

PROTESTER'S CONTENTIONS

Premiere first contends that the cancellation of the initial IFB was improper. Premiere also argues that this procurement should not be conducted using negotiated procedures, and that the use of traditional responsibility-type factors--i.e., past performance, company experience--as technical evaluation factors is improper. Premiere further contends that this requirement should have been set aside

for small businesses. Finally, Premiere asserts that the solicitation's SF 33 submission requirement--which states that noncompliance with this provision may render a bid nonresponsive--is improper.

ANALYSIS

Cancellation of the Original IFB

To the extent Premiere is challenging the cancellation of the predecessor IFB, its protest is untimely. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests based on other than an apparent solicitation impropriety--such as Premiere's challenge to the IFB's cancellation--must be filed within 10 working days from when the protester first knew or should have known its basis for protest. 4 C.F.R. § 21.2(a)(2) (1994). Our Regulations further provide that where--as here--a matter is initially protested to the contracting agency, any subsequent protest to this Office concerning that matter must be filed within 10 working days of the protester's receipt of adverse agency action on its agency-level protest. 4 C.F.R. § 21.2(a)(3).

Here, the record shows that Premiere initially protested the IFB's cancellation to the agency on November 30, 1993; although the agency denied this protest ground by decision dated December 28, the protester delayed protesting the cancellation to our Office until February 14, 1994--almost 2 months after receiving the denial of its agency-level protest. Under these circumstances, we will not consider Premiere's challenge to the IFB's cancellation as it is untimely. Insituform East, Inc., B-248954, Sept. 15, 1992, 92-2 CPD ¶ 181.

Negotiated Procedures

Premiere contends that this requirement is improperly being conducted using negotiated, rather than sealed bidding, procedures. In response, the agency reports that negotiated procedures are required here since award is to be made on the basis of technical factors as well as price, and because discussions may be required to explain some of the complexities surrounding this requirement since the contract involves a correctional setting--with complex delivery and security requirements--which may not be familiar to many vending contractors. The BOP also asserts that discussions may be required for it to clearly understand the offerors' past experience and dependability. As discussed below, we think the agency's use of negotiated procedures in this procurement is appropriate.

Under the Competition in Contracting Act of 1984 (CICA), contracting agencies are required to obtain full and open competition and, in doing so, are required to use competitive procedures--negotiation or sealed bids--that they determine to be best suited to the circumstances of a given procurement. 41 U.S.C. § 253(a)(1) (1988); Military Base Management, Inc., 66 Comp. Gen. 179 (1986), 86-2 CPD ¶ 720. CICA, and the implementing FAR provision, further provide that, in determining which competitive procedure is appropriate, an agency shall solicit sealed bids if: (1) time permits, (2) award will be based solely on price, (3) discussions are not necessary, and (4) more than one bid is expected. 41 U.S.C. § 253(a)(2)(A); FAR § 6.401. Because of this language, the use of sealed bidding procedures is required where the four specified conditions are present; otherwise, sealed bids are not appropriate and negotiated procedures should be used. 41 U.S.C. § 253(a)(2)(B); Knoll North America, Inc., B-250234, Jan. 11, 1993, 93-1 CPD ¶ 26.

Here, the agency clearly requires award to be based on factors which extend beyond an offeror's price; as noted above, the solicitation calls for submission of a technical proposal from each offeror which will be comparatively evaluated and ranked. Moreover, we think it clear that discussions may be required concerning technical elements of each offeror's proposal. Since the agency is considering other elements besides price in its award selection, and since discussions are contemplated, we think negotiated procedures are clearly appropriate.

To the extent Premiere suggests that the agency's use of a preaward survey could suffice as a substitute for negotiations, we think a preaward survey would not accomplish the BOP's purpose here. A preaward survey, as part of the agency's investigation of an offeror's responsibility, focuses on the firm's ability to perform as required and involves matters like financial resources, experience, facilities, and performance record. In contrast, the focus of the negotiation process--and the evaluation factors at issue here--is, on the one hand, to allow the agency to gain a full understanding of the offerors' proposals, and, on the other hand, to give the offerors an opportunity to fully understand the agency's requirements. See Essex Electro Eng'rs, Inc., 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92. In light of the agency's stated objectives, we think a preaward survey would not suffice here.

Technical Evaluation Criteria

Premiere contends that five of the solicitation's six technical evaluation criteria are defective: Response Time, Past Performance, Company Experience, Management Control, and Average Price. First, Premiere argues that Response Time--that is, the length of time it takes a contractor to respond to an agency request to service a vending machine--has been improperly designated as the most important evaluation factor by the agency; Premiere also maintains that this provision is vague, and fails to designate the type of vendor response time frame the agency is seeking. Premiere next contends that the Past Performance factor is defective because the specification's use of the term "similar contracts" is ambiguous; Premiere claims that the term does not explain whether all vending machine work will constitute similar past contract experience, or whether this term is limited to vending machine services performed in correctional facilities. With regard to the Company Experience factor, Premiere maintains that as a traditional responsibility-type factor, see FAR § 9.104-1,[1] this criterion should not be used in a technical evaluation, but only in the context of a general preaward survey of the prospective awardee. Premiere also contends that the Company Experience specification is unduly restrictive since most contractors do not have correctional institute vending

---

[1]FAR § 9.104-1 sets forth "general standards" of responsibility, and provides that "[t]o be determined responsible, a prospective contractor must--

> (a) Have adequate financial resources to perform the contract, or the ability to obtain them . . . ;
>
> (b) Be able to comply with the required or proposed delivery or performance schedule . . . ;
>
> (c) Have a satisfactory performance record . . . ;
>
> (d) Have a satisfactory record of integrity and business ethics;
>
> (e) Have the necessary organization, experience, accounting and operational controls, or technical skills, or the ability to obtain them . . . ;
>
> (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them . . . ; and
>
> (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations."

machine experience. Next, Premiere alleges that the Management Control evaluation criterion is defective since the "reliability" of employees--in Premiere's opinion--cannot be objectively evaluated since it similarly pertains to a responsibility-type factor which can best be addressed in a preaward survey. Finally, Premiere contends that the Average Price factor is deficient since the criterion "lacks specificity."

The determination of the agency's minimum needs and the best method of accommodating them is primarily within the agency's discretion. See U.S. Defense Sys., Inc., B-251544 et al., Mar. 30, 1993, 93-1 CPD ¶ 279. Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the use of particular evaluation factors or an evaluation scheme so long as the criteria used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. Renow, Inc., B-251055, Mar. 5, 1993, 93-1 CPD ¶ 210.

Congress has specifically recognized that responsibility-related factors, such as management capability and past experience of the offerors, are appropriate considerations in assessing the quality of proposals. Advanced Resources Int'l, Inc.--Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348. Consequently, traditional responsibility factors--such as the Past Performance, Company Experience and Management Control criteria at issue in this case--may be used as technical evaluation factors in a negotiated procurement when a comparative evaluation of those areas is warranted. Clegg Indus., Inc., 70 Comp. Gen. 679 (1991), 91-2 CPD ¶ 145. Premiere's challenge to the inclusion of these factors in the RFP therefore is without merit.

With respect to Premiere's remaining contentions, we think the challenged evaluation criteria are reasonably related to the BOP's inmate vending machine requirements. We further conclude that the specifications are not ambiguous or otherwise objectionable.

First, we agree with the agency that these evaluation factors emphasize the importance of a company's technical expertise and are consistent with the BOP's objective of ensuring that offerors have the requisite understanding and expertise for the required work. As explained by the agency, the criterion of Response Time is crucial in a correctional setting; poor response time can disrupt the safety and steady operation of an institution. Further, the agency reports that responsive vending services are considered an important mechanism in maintaining a contented inmate population. Although the protester has expressed general disagreement with the agency's conclusions, we see

no evidence to suggest that the emphasis on and use of Response Time as an evaluation factor is unreasonable. To the extent Premier contends that the Response Time factor is ambiguous, we think it apparent that the only objective sought by this specification is for the contractor to propose the quickest response time it can offer. We see no need for the agency to be more specific; consequently, we find the Response Time evaluation factor unobjectionable.

With respect to the next three challenged criteria, Past Performance, Company Experience, and Management Controls, we similarly conclude that these factors are consistent with the importance that is placed on providing vending services in a correctional setting. On their face, the explanations of these requirements in the solicitation show that each of these factors is consistent with the agency's obtaining quality performance. We have consistently held that such requirements--used here to enable the agency to determine whether an offeror has succeeded in complying with the specifications or has consistently failed to deliver acceptable services--are reasonable technical evaluation factors. RMS Indus., B-247229, B-247794, May 19, 1992, 92-1 CPD ¶ 451.

Although Premiere claims that these responsibility-type evaluation factors contain ambiguities and vague terms, we do not think the record supports this contention. Essentially, Premiere argues that it cannot ascertain whether these factors--in requesting details about "similar contracts"--seek information pertaining to correctional or non-correctional institution vending contracts; however, we think under the plain language of the specifications, both a correctional and non-correctional site vending machine services background would be applicable--although providing vending machine services at a correctional facility environment obviously would be preferable to the agency. See Management Sys. Designers, Inc. et al., B-244383.4 et al., Dec. 6, 1991, 91-2 CPD ¶ 518 (specific topical experience requirement reasonably encompassed by general personnel qualifications experience requirement and therefore was not required to be stated as evaluation subfactor); Washington Occupational Health Assocs., Inc., B-222466, June 19, 1986, 86-1 CPD ¶ 567 (even though solicitation did not itemize numbers of years experience as a technical evaluation factor, agency properly rated awardee's more experienced physician superior to protester's since solicitation's general personnel qualifications factor reasonably encompassed preference for more experienced candidates).

Finally, although Premiere contends that the Average Price factor is deficient due to a lack of specificity, we agree with the agency that this provision clearly conveys that the

average price for selected product groups will be considered as one factor in the technical evaluation--and that the lower the average price for the items offered, the higher the contractor's evaluation rating under this factor.

In sum, we find the five challenged evaluation factors to be reasonably related to the agency's minimum needs, and further conclude that these specifications contain sufficient information to allow offerors to compete intelligently and on an equal basis. Accordingly, the five evaluation factors are unobjectionable.

Unrestricted Status

Under FAR § 19.502-2, a procurement is required to be totally set aside for small businesses when there is a reasonable expectation of receiving proposals from at least two responsible small business concerns, and the award can be made at a reasonable price; conversely, unless such a determination can be made, a total small business set-aside should not be made. State Management Servs., Inc., B-251715, May 3, 1993, 93-1 CPD ¶ 355. To that end, the contracting officer must undertake reasonable efforts to ascertain whether there is a reasonable expectation that two or more responsible small business concerns will actually submit proposals. Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

In this case, the record shows that the contracting officer took the following steps in determining whether this requirement should be set aside for small businesses. First, the contracting officer reviewed the procurement history of this requirement and found that the prior procurement was both conducted as an unrestricted requirement and awarded to a large business. Next, the contracting officer conducted a telephone survey of 10 small business vendors--selected randomly from the yellow pages telephone book listings--and was unable to generate any interest from a small business contractor in competing for this requirement. At the time the solicitation was ready to be issued, the contracting officer was aware of only one small business concern's interest in competing for this requirement--Premiere's; consequently, since no other small business concern expressed an interest in competing, the contracting officer proceeded to issue the solicitation on an unrestricted basis.

In its protest, Premiere argues that the contracting officer acted unreasonably in her investigation of small business interest; according to Premiere, the telephone yellow pages list 65 small business firms which might be interested in this requirement. Based on these listings, Premiere argues that the contracting officer should have expected that at

least two small businesses would compete for this requirement. We disagree.

Generally, we regard a contracting officer's decision whether to set aside a procurement as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. State Management Servs., Inc., supra. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business concerns. Id.; FKW Inc., B-248189, Oct. 22, 1992, 92-2 CPD ¶ 270. In this regard, the agency's awareness of small business concerns--for example, the mere presence of small business concerns on a bidders' mailing list--is not necessarily conclusive on the matter of sufficient small business interest to justify a small business set-aside.[2] Kunz Constr. Co., Inc., B-234093, Mar. 30, 1989, 89-1 CPD ¶ 334.

Here, we conclude that the contracting officer acted reasonably by contacting 10 small businesses. Even assuming that 65 small business concerns actually do exist in the applicable geographic contracting area, as Premiere contends, we think that 10 firms is a sufficiently large sample from which to reasonably gauge small business interest in the procurement.

Further, the cognizant Small Business Administration (SBA) procurement center representative investigated and concurred in the contracting officer's decision. In this regard, the record shows that at Premiere's request, the SBA representative contacted the contracting officer and reviewed her determination to issue the RFP on an unrestricted basis. According to an affidavit filed with this Office by the SBA official, the contracting officer explained that she had telephoned 10 small business firms who had all expressed no interest, and that except for Premiere, no other small business firm had requested a copy of the solicitation. In light of these facts, the SBA procurement center representative stated that:

> "I found and still find that [the contracting officer] took reasonable steps in reaching her decision not to set aside this solicitation for small business concerns."

---

[2]This is so because small businesses frequently respond to advertisements for government requirements to remain apprised of potential subcontracting opportunities. See State Management Servs., Inc., supra.

Under these circumstances, where the contracting officer considered the prior procurement history, surveyed a reasonable representative number of small business firms who expressed no interest in competing, and received the full concurrence of the SBA procurement center representative, we find the decision to proceed with an unrestricted procurement unobjectionable.[3] See State Management Servs., Inc., supra.

SF 33 Submission Requirement

As noted above, this RFP sets forth the following SF 33 submission requirement:

> "NOTE: The SF-33 (Solicitation, Offer and Award) shall be completed, signed, and submitted in triplicate as specified on the form or the bid may be considered non-responsive. The OFFER section must be fully completed by the offeror."

In its protest, Premiere challenges this requirement on the ground that a proposal submitted under a negotiated procurement may not be rejected as nonresponsive; Premiere contends that the agency is improperly using a provision which applies only to sealed bidding procurements.

We agree that the concept of responsiveness is inapplicable in the context of a negotiated procurement and we do not think the agency properly could reject a proposal that failed to comply with the SF 33 requirement. However, since the requirement has minimal, if any, impact on the protester's, or any offeror's, ability to participate in the procurement, we see no basis to sustain the protest on this ground.

The protest is denied.

Ronald Berger
for Robert P. Murphy
Acting General Counsel

[3]To date, Premiere is the only small business who has requested a copy of the solicitation.

Comptroller General
of the United States

Washington, D.C. 20548

924236

Decision

Matter of: Accounting for Rebates from Travel Management Center Contractors

File: B-217913.3

Date: June 24, 1994

DIGEST

The General Services Administration may deposit commission rebate checks from Travel Management Center contractors to the general fund of the Treasury where, because of the processing costs and time involved, the agency elects not to credit rebates to appropriation originally charged.

DECISION

In 65 Comp. Gen. 600 (1986), we advised the General Services Administration (GSA) that federal agencies may deposit Travel Management Center (TMC) commission rebates to the credit of the appropriation originally charged the cost of employee travel. See also B-217913.2, Feb. 19, 1993. GSA advises that a number of agencies have declined to accept the TMC rebates because of the small amounts involved and the cost of processing the payments for credit to the originating account. Accordingly, the Director, Federal Supply Service Bureau, National Capital Region, GSA, asks what disposition should be made of the rebates refused by the federal agencies. For the reasons stated below, GSA may deposit the rebate checks to the credit of the appropriate Treasury general fund receipt account when the agency declines to accept them.

TMC contractors are travel agents who handle travel arrangements for federal agencies pursuant to "no cost" contracts with GSA. The contractors do not charge the government directly for the services they provide, but instead receive commissions from transportation or lodging establishments with whom they book reservations. The rebates constitute a recovery by the government of a portion of these commissions. The Director seeks guidance regarding the proper disposition of the rebates paid to GSA by the TMCs as required by the GSA contracts. The Director states that some small agencies consider the quarterly rebate checks a nuisance because the accounting workload required outweighs the small amount of money involved, and they decline to accept them. GSA, as the contracting office for

the TMC contracts, must ensure the proper disposition of the rebates.

As a general rule all funds received for the use of the United States must be deposited in the general fund of the Treasury to the credit of the appropriate receipt account,[1] unless deposit to the credit of an appropriation or other fund account is authorized by law. 31 U.S.C. § 3302. One exception to this rule is that an agency may retain receipts which qualify as "refunds". Such receipts represent a return of a portion of a prior agency payment and may be deposited to the credit of the appropriation against which the payment was initially charged rather than to a general fund receipt account. If the appropriation initially charged has not expired, the refund is available to support new obligations. If the appropriation account initially charged has expired, but has not yet closed, the refund is deposited to the credit of the expired account where it is available for recording or adjusting obligations properly incurred before the appropriation expired. 71 Comp. Gen. 502, 504-507 (1992); B-217913.2, Feb. 19, 1993.[2] See, GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, §§ 5.4, 4.3 (TS 7-43, May 18, 1993), 31 U.S.C. § 1552(b). In 65 Comp. Gen. 600 (1986), we held that rebates paid by TMC contractors may be accounted for as refunds and thus deposited to the credit of the appropriation initially charged with the cost of employee travel.

The exception permitting the deposit of refunds to the appropriation initially charged rather than to the credit of a general fund receipt account is permissive in nature.[3]

---

[1]See Volume I Treasury Financial Manual (TFM) 2-1500 and the supplement to I TFM entitled "Federal Account Symbols and Titles", Part I - Receipt Account Symbols and Titles, for listing of various general fund receipt accounts for accounting purposes.

[2]These "account integrity" procedures are intended to prevent unauthorized augmentation of current year accounts and to permit determinations of compliance with the Antideficiency Act, 31 U.S.C. Sec. 1341. Agencies may accept a "de minimis" credit of $100 or less and applying it against current year billings in order to effect a refund of prior year payments without adjusting the prior year accounts to reflect the credit as a refund to the accounts. B-250953, Dec. 14, 1992.

[3]Clearly, if an agency receives a refund check directly from a vendor and determines that it is not cost effective to

(continued...)

Therefore, should an agency decline to accept rebate checks, or indicate to GSA that it will not accept rebate checks below a certain amount, we have no objection to GSA depositing the checks in the general fund of the Treasury to the credit of the appropriate receipt account. Under such circumstances, GSA must deposit the rebate checks in accordance with the requirements of 31 U.S.C. § 3302.

for James F. Hinchman

Comptroller General
of the United States

[3](...continued)
deposit the refund to the credit of the appropriation initially charged, it would be required to deposit the refunds to the credit of the appropriate Treasury general fund receipt account.

Ordering Information

The first copy of each GAO report and testimony is free. Additional copies are $2 each. Orders should be sent to the following address, accompanied by a check or money order made out to the Superintendent of Documents, when necessary. Orders for 100 or more copies to be mailed to a single address are discounted 25 percent.

Orders by mail:

U.S. General Accounting Office
P.O. Box 6015
Gaithersburg, MD 20884-6015

or visit:

Room 1100
700 4th St. NW (corner of 4th and G Sts. NW)
U.S. General Accounting Office
Washington, DC

Orders may also be placed by calling (202) 512-6000 or by using fax number (301) 258-4066.

Each day, GAO issues a list of newly available reports and testimony. To receive facsimile copies of the daily list or any list from the past 30 days, please call (301) 258-4097 using a touchtone phone. A recorded menu will provide information on how to obtain these lists.

United States
General Accounting Office
Washington, D.C. 20548-0001

Bulk Mail
Postage & Fees Paid
GAO
Permit No. G100

Official Business
Penalty for Private Use $300

Address Correction Requested