United States General Accounting Office 152692

GAO

Office of the General Counsel

August 1994

Advance Sheets Volume 73

Decisions of the Comptroller General of the United States

GAO/OGC-94-30

Comptroller General
of the United States

Washington, D.C. 20548

10388

Decision

Matter of: Scott C. Thompson - Waiver - Nondeduction of Health Insurance Premiums

File: B-256828

Date: August 2, 1994

DIGEST

Waiver of an employee's debt is denied where the employee was aware that he was being overpaid when he received salary payments over a 7-year period from which the agency failed to deduct premiums for his health insurance coverage. Although the employee states that he promptly notified the agency's personnel office of the errors several times during the first 10 months, he apparently pursued the matter no further, allowing the overpayments to continue for another 6 years. When an employee is aware of receiving overpayments the employee cannot reasonably expect to retain them, but should set them aside for refund while he pursues the matter with the agency to have the error corrected.

DECISION

Mr. Scott C. Thompson, an employee of the National Labor Relations Board (NLRB), has appealed our Claims Group's settlement[1] which denied his request for waiver of a debt resulting from the NLRB's failure to deduct from his salary his health insurance premiums. For the reasons discussed below we sustain the Claims Group's denial.

BACKGROUND

When Mr. Thompson transferred from the Department of Labor to the NLRB effective January 13, 1985, he transferred his coverage under a health benefit plan. The Department of Labor had been deducting the premiums from his salary each pay period for this coverage, as required under the plan, but upon his transfer, the NLRB failed to continue to deduct premiums from his salary for this coverage. Mr. Thompson states that in examining his pay stubs shortly after his transfer, he noticed that his annual leave was incorrectly recorded and that no deductions were being made for his

[1] Z-2918341-050, July 21, 1993.

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health insurance premiums. He states that by June 1985 he had discussed these matters with NLRB personnel office representatives several times and was assured that the problems would soon be corrected. When they were not corrected, he states that he had several more discussions with NLRB personnel, and in November 1985 the NLRB began deducting the premiums. He indicates that although he had been told by an NLRB official that double deductions would be made to cover current premiums and the ones that had not been deducted, only single deductions were being made. He indicates he brought this to the agency official's attention and was told not to worry, that the double deductions would begin. However, only single deductions, with one exception, were effected from November 1985 through June 1986.

The NLRB inexplicably ceased making the premium deductions at the end of June 1986. Mr. Thompson states that he then called an official in the agency's personnel office and told her, and she said she would check into it. However, no further deductions were taken from his pay for health insurance for the next 6 years, until the NLRB discovered the error in June 1992. Although Mr. Thompson's efforts in 1985 apparently led to the agency's initiating deductions in November 1985, after the deductions ceased in June 1986, with the exception of the call he states he made at that time, he apparently made no further efforts over the next 6 years to have the matter corrected. It is clear that during this entire time he continued to receive the benefits of coverage under the plan, using his insurance on many occasions, without paying the premiums he knew were required of him for such coverage.

In August 1992, the NLRB notified Mr. Thompson in writing that he was in debt in the amount of $4,783.20[2] due to the

[2]Mr. Thompson notes the difference between the amount of the debt ($4,783.20) stated by the NLRB and the "gross amount of $5,249.95" of the debt stated by our Claims Group. The difference apparently is due to the Claims Group's use of the gross amount of all the premiums for Mr. Thompson's insurance from the time he transferred to the NLRB in 1985 to the time in June 1992 when the deduction error was corrected. The NLRB, however, used a net amount that takes account of the limited deductions that occurred between November 1985 and June 1986, but it erroneously concluded that it was barred from collecting the amount which had been outstanding more than 6 years when, in fact, it has authority to collect by administrative offset such debts which have been outstanding up to 10 years. See 5 U.S.C. § 5514, 31 U.S.C. § 3716, and 5 C.F.R. § 550.1106. The NLRB should establish the correct amount based on all premiums that were unpaid from the time Mr. Thompson transferred to

NLRB's failure over the years to properly collect the health insurance premiums from him. In November 1992 Mr. Thompson submitted a detailed statement concerning the matter and requested waiver of the debt. On February 4, 1993, the NLRB transmitted Mr. Thompson's request for waiver to our Claims Group with a report recommending that waiver be granted. The report stated that they had reviewed the circumstances, including the fact that Mr. Thompson had notified the agency in 1985 and 1986 of the deduction errors, although they were unable to contact some of the employees he stated he spoke to because they are no longer with the agency, and others who are still with the agency have only vague memories of the matter. However, the agency states it found no evidence of fraud, misrepresentation, fault, or lack of good faith on Mr. Thompson's part. In July 1993 our Claims Group denied waiver because even though the employee initially informed the agency of payroll errors, since he was aware of receiving erroneous overpayments, he should be prepared to make provisions for repayment.

Mr. Thompson disagrees with our Claims Group and seeks reconsideration.

OPINION

The waiver statute, 5 U.S.C. § 5584 (1988), allows us to waive an employee's debt if its collection would be against equity and good conscience and not in the best interests of the United States, and provided there exists no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee.

The standards implementing the waiver statute at 4 C.F.R. § 91.5(b) state:

> "Generally, waiver is precluded when an employee . . . receives a significant unexplained increase in pay or allowances, or otherwise knows, or reasonably should know, that an erroneous payment has occurred, and fails to make inquiries or bring the matter to the attention of the appropriate officials."

Mr. Thompson argues that all the criteria are met in his case, stating that he did not engage in, nor does anyone allege, any fraud, fault or misrepresentation on his part and that he acted at all times in good faith. He notes that over a 10-month period in 1985-1986 he "hounded" the agency over the matter, and thus he satisfied the requirement to notify the agency of the error.

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the NLRB in 1985.

From the record before us, it appears that the initial failure in 1985-1986 to begin deduction of premiums and to continue deductions once started was due to administrative error on the part of the NLRB and not due to fraud, misrepresentation, fault or lack of good faith on Mr. Thompson's part. However, from the record, it is clear that Mr. Thompson knew he was not entitled to health insurance without paying the premiums and that the premiums were not being deducted from his pay as required under the program.[3]

As indicated by the Claims Group's settlement, if an employee is aware of receiving erroneous overpayments, he not only has a responsibility to notify responsible agency officials, but he should set the erroneous amounts aside and be prepared to make repayment upon correction of the error; the employee cannot reasonably expect to retain the overpayments. Charles R. Ryon, Sr., B-234731, June 19, 1989; Hawley E. Thomas, B-227322, Sept. 19, 1988. In such circumstances, collection of the overpayments is not considered to be against equity, good conscience, or the best interests of the United States.

Mr. Thompson seeks to distinguish his situation from the situation in Ryon, supra, on the basis that the overpayments in each pay period in that case were duplicate paychecks of which accumulated to a large debt in a relatively short period of time, whereas the overpayments in his case were smaller amounts (ranging from about $16 to $40 per pay period). That difference is irrelevant here where Mr. Thompson clearly knew he was receiving overpayments. The situation in Thomas, supra, is very similar to Mr. Thompson's situation in that smaller overpayments of approximately $30 each pay period in that case accumulated to a substantial amount over a relatively long period of time - more than two years. In both cited cases the employee did bring the matter to the attention of the appropriate official, but waiver was denied because the employee knew about the overpayments and had an obligation to refund them.

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[3]See 5 U.S.C. § 8906, and implementing regulations in 5 C.F.R. § 890.502(b)(1), requiring contributions from the employee for participation in the Federal Employees Health Benefits Program which contributions are to be withheld from the employee's pay, and stating that the employee incurs an indebtedness to the United States for the amount of premiums not withheld. The Standard Form 2809 Mr. Thompson signed in August 1984 when he elected to participate in the program specifically provided for deductions from his salary to cover his share of the cost of such participation.

Mr. Thompson apparently made good faith efforts in 1985 to bring the matter to the agency's attention for correction, and those efforts apparently led to the initiation of the deductions in November 1985 which continued to June 1986. However, clearly he knew that deductions had not been made from January to June 1985 which he would be required to pay upon correction of the error. In addition, however, concerning the nondeductions which begain in June 1986 and continued through June 1992, we do not believe that Mr. Thompson's obligation to have the error corrected was satisfied by the oral contacts he states he made with NLRB personnel office representatives concerning the initial problems in 1985, nor the single call he said he made after the deductions stopped again in June 1986. Although the errors originated with the agency, he had the obligation to pursue the matter further, in writing and to a higher level if necessary, to have it corrected. This he did not do. Therefore, we cannot find him free from at least partial fault in allowing the error to continue for an additional 6 years during which he was covered by and made use of the insurance.[4] Compare John J. Williams, B-251667, Apr. 2, 1993.

Accordingly, the denial of Mr. Thompson's request for waiver is sustained.

Seymour Efros

for Robert P. Murphy
Acting General Counsel

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[4]Mr. Thompson complains that due to the agency's error, he is now indebted for a large sum which is a burden for him to repay. We note, however, that he is partially at fault for allowing the error to continue so long, and in any event, the agency has authority to collect the debt in installments.

Comptroller General
of the United States

Washington, D.C. 20548

115228

Decision

Matter of: Fritz Companies, Inc.--Claim for Costs

File: B-246736.7

Date: August 4, 1994

J. Michael Farrell, Esq., and James H. Roberts III, Esq., Manatt, Phelps, Phillips & Kantor, for the protester.
Jonathan Silverstone, Esq., Agency for International Development, for the agency.
Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Attorneys' fees claimed by prevailing protester are allowable if they are adequately documented and reasonable. They may not be recovered, however, to the extent the hours incurred are excessive for the services performed or were incurred for research performed after the protester filed its comments on the agency report.

2. Attorneys' fees may not be recovered to the extent they were incurred for hours spent by a second attorney to review the protest file when no information or documents were required by General Accounting Office or for hours spent performing work which duplicates work performed by another attorney.

3. Attorneys' out-of-pocket expenses for document production--a per page fee charged for each document a secretary must type that is more than two pages in length--are disallowed since such costs should be included in the secretary's salary which is taken into consideration in the hourly rate the client is charged for attorney time.

DECISION

Fritz Companies, Inc. requests that our Office determine the amount it is entitled to recover from the Agency for International Development (AID) for its costs of filing and pursuing a protest in Fritz Cos., Inc., B-246736 et al., May 13, 1992, 92-1 CPD ¶ 443. As discussed below, we determine that Fritz is entitled to recover $44,561.78 out of a total claim of $67,899.28.

PUBLISHED DECISION
73 Comp. Gen. ____

In its protest, Fritz challenged the award of a contract to Daniel F. Young, Inc. under request for proposals (RFP) No. W-FA-91-011. We sustained the protest because we found that AID improperly awarded the contract to Young on the basis of initial proposals. We also found that by permitting Young to revise a provision of its subcontracting plan, AID engaged in discussions with Young and therefore was required to give the other competitive range offerors a similar opportunity to revise their proposals. We recommended that AID reopen the procurement, establish a competitive range, and hold discussions with the competitive range offerors. We also found that Fritz was entitled to recover the costs of filing and pursuing its protest. Fritz and AID have been unable to agree on the amount that Fritz is entitled to recover and Fritz now requests that our Office determine the amount of entitlement pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(2) (1993).

Fritz requests reimbursement of $67,899.28 for its costs of filing and pursuing its protest. This amount includes $66,041.25 in attorneys' fees: $40,062.50 for one partner working 160.25 hours at a rate of $250 per hour (referred to in our decision as the first partner), $25,918.75 for a second partner working 94.25 hours at a rate of $275 per hour, and $60 for a paralegal working 1 hour at a rate of $60 per hour. The total claimed also includes $1,858.03 for the out-of-pocket expenses of Fritz's attorneys. The hours claimed for the attorneys and the paralegal are documented by monthly billing statements which identify the services performed, the dates of performance, the time spent and the attorney or paralegal who performed the work. In addition, the law firm's managing partner has certified that the billing statements reflect services and hours performed on behalf of Fritz, that the hourly rates charged represent the standard hourly billing rates established by the firm and that the costs have been or will be billed to Fritz.

AID has made a variety of contentions concerning the sufficiency of the documentation supporting the claim, the reasonableness of the hourly rates charged by the attorneys, and the numbers of hours charged for what AID argues was a relatively simple matter decided on the written record. We have no basis to question the hourly rates charged by the protester's attorneys since the rates are within the bounds of rates charged by partners similarly situated. However, as discussed below, we conclude that the claimed charges are not reasonably supported in many instances.[1]

AID specifically contends that the time which Fritz's attorneys spent analyzing the GAO decision and explaining it to Fritz--8 hours for each of the two attorneys--is excessive. Fritz has not responded to this contention and we agree with AID. The decision was eight pages long; three of those pages comprised the facts and the remaining five pages discussed three issues. In our view, 16 hours at a cost of $4,200 for reviewing and explaining this decision is excessive. Fritz may recover the costs of only 4 hours for each of the two attorneys. See Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257 (where the hours spent by the protester's attorneys on researching and writing were excessive and we disallowed one-fourth of those hours).

AID also asserts that it should not be required to reimburse Fritz for the attorneys' fees for hours that were incurred in connection with an investigation by GAO auditors into the procurement at issue in the protest. We agree. Audits undertaken by GAO auditors are not part of GAO protest proceedings. Moreover, the investigation concerned allegations of a conflict of interest on the part of an AID contracting official, a matter which was not an issue in the protest proceedings. Thus, the costs incurred in connection with the investigation may not be recovered. See Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. Accordingly, Fritz may not be reimbursed for 3.75 hours of partner time at $275 per hour and 7 hours of

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[1]AID argues that it should not be required to reimburse the costs for Fritz's argument that the government did not properly evaluate its decision to enter into a no-cost contract and Fritz's allegation that a Young subcontractor violated a solicitation prohibition on representing foreign governments because these are issues which our Office did not sustain and which were independent of and not intertwined with the sustained issues. In our view, the issues raised by Fritz are not so distinct or severable as to constitute different protests. Rather, they were intertwined parts of Fritz's objection that AID improperly awarded the contract to Young. Under these circumstances, Fritz is entitled to recover the costs of the hours spent on these issues. Data Based Decision, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

partner time at $250 per hour which were incurred in connection with the investigation.[2]

We also conclude, based on our review of the record, that Fritz is not entitled to recover the cost of 2.5 hours of attorney time, at $250 per hour, or 1 hour of a paralegal's time spent investigating the ownership of Pacific Cargoes, a subcontractor for Fritz. This research was conducted on April 8, after Fritz's comments on the protest were filed, and the protest record was closed. Accordingly, these services were not performed in pursuit of the protest. See Consolidated Bell, Inc., 70 Comp. Gen. 358 (1991), 91-1 CPD ¶ 325.

In addition, Fritz may not recover the cost of 61.25 hours set forth in the billing statements for the second partner. As we explain in detail below, the second partner spent numerous hours duplicating work that was performed by the first partner and numerous hours reviewing the protest file before the agency reports were due and when no information was required to be submitted to us. These hours were not reasonably spent in pursuit of the protest.[3]

Protester's are entitled to recover costs attributable to hours spent if they were reasonably necessary to the protest effort. Bay Tankers, Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. Protests filed by law firms generally are staffed with one partner and one or more associates. Associates generally are supervised by a partner and perform the day-to-day work on the protest, while the partner generally reviews the work of the associates. Here, however, the law firm retained by Fritz chose to staff the protest with two partners. Fritz' attorney explained this staffing decision by generally stating that in determining how to staff a legal project, the law firm considers not only the hourly billing rates of the attorneys involved in the project, but also the number

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[2]Since the daily hours are not broken down by task, we have not allowed reimbursement for any block of time where there are charges associated with the investigation. See Omni Analysis--Claim for Bid Protest Costs, 69 Comp. Gen. 433 (1990), 90-1 CPD ¶ 436.

[3]The claim record shows that the first partner was primarily responsible for preparing and filing the initial and supplemental protests and the protest comments, for checking the status of the protests and generally for managing the protest. Consequently, we have considered the hours claimed by the first partner on these tasks as opposed to those spent by the second partner as reasonably spent in pursuit of the protest.

of hours it anticipates that each attorney, based on his or her experience, will require to accomplish certain aspects of the project. Concerning this protest, Fritz's attorney explained that the two partners that staffed the protest had the requisite experience in government contracts, agency procedures and the substantive freight forward issues involved in the protest.

We do not question the law firm's decision that representation in this protest required contributions by attorneys with expertise in the substantive areas. Nonetheless, the monthly billing statements show that the second partner spent numerous hours duplicating the work of the first partner and reviewing work performed by the first partner rather than on substantive work that might have required his particular expertise. The billing statement describes many of the second attorney's hours as "RW [review] PROTEST REGARDING USAID" or "RW USAID PROTEST," which is basically the identical description of the work done by the first partner. Thus, many hours spent in pursuit of the protest by the second partner were unnecessary or excessive, and, as discussed below, Fritz should not recover for the costs associated with those hours.

We first address the hours spent by the second partner reviewing the protest file. The initial protest was filed with our Office on January 6, 1992, and a supplemental protest was filed on January 16. Once the protests were filed, AID had 25 working days, or until February 12, for the first protest, and February 25 for the second protest, to file its protest reports. Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1993). In fact, AID responded to both protests with a single report which Fritz received on February 18. The protester then had 10 working days to submit its comments on the report. 4 C.F.R. § 21.3(j). The protester submitted its comments on March 3 and because those comments raised new issues, we opened the comments as a third protest. The protester received the agency report on the third protest on April 1.

In each case, the billing statements include multiple hours which the second partner spent reviewing the protests after they were filed and before the agency reports were received and the comments were due and in the absence of any need for information from our Office. Thus, for example, after the first protest was filed on January 6, the second partner spent 1 hour each day on January 7, 8, and 9, reviewing the protest and 3 hours on January 10, reviewing the RFP "AND EFFECT ON AWARD." In total, the second partner spent 24.25 hours reviewing the protest file after the protests were filed and before the agency reports were received. Since comments were not due and no further information was required or requested by our Office during the time the second partner spent reviewing the protest file, in the absence of an explanation from the attorney involved, we cannot conclude that it was reasonably necessary for the second partner to spend these hours in pursuit of the protest. Accordingly, Fritz may not recover the costs associated with these hours.[4]

The billing statements also include hours incurred by the second partner after Fritz's comments were filed in response to the second agency report. The protester's comments on the second agency report were filed with our Office on April 7. Fritz should not recover its costs for 3.75 hours which the second partner spent on April 10, 23, and 30 to review the comments, on April 23 to review the protest record, and to engage in a telephone conference regarding the preparation of a response to AID. These hours were spent after the protester's comments were filed and there is no justification provided to demonstrate why they were reasonably and necessarily spent in pursuit of the protest. Accordingly, we find that they were not spent in pursuit of the protest; at the time the only role Fritz's attorney had was to wait for our decision and explain it to Fritz.

In addition, Fritz should not recover the costs of hours spent by the second partner on tasks which the first partner also performed. As explained, Fritz received the first agency report on February 18, and the second report on April 1. Although the first partner spent almost 30 hours to prepare and file comments in response to the first report and almost 15 hours to prepare and file comments on the second report, the record shows that the second partner spent 7 hours to prepare comments on the first report and 5.75 hours to prepare comments on the second report.[5] Based on the billing statements and other submissions by

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[4]Our Office does recognize that some review of the protest file may have been necessary during the course of the protest to inform the client or generally to stay knowledgeable about the protest. The first partner, who the record shows was primarily responsible for the protest, also spent over 50 hours reviewing the protest and we have allowed recovery for those hours. In addition, we have allowed recovery for 15 hours spent by the second partner on such tasks as conferring with the first partner, reviewing the amended protest, and reviewing the protective order issued in connection with the protest.

[5]Our conclusion that the second partner spent these hours preparing comments rather that reviewing comments prepared by the first partner is based on the notation "PP" in the billing statement which is defined as prepared.

Fritz, these 12.75 hours appear to duplicate hours that the first partner spent preparing report comments. In the absence of a justification for these hours, such as an explanation that the two partners worked on different substantive legal matters, we view these hours as unnecessary to the protest effort and Fritz may not recover these costs.

Similarly, Fritz should not recover the costs associated with 4 hours spent by the second partner preparing a response to a submission by an interested party since the first partner also performed this task. Nor should Fritz recover the costs of 1.5 hours which the second partner spent on April 14 to review the procedures regarding closing the file and further discovery proceedings since these hours also duplicate time the first partner spent on April 9 confirming that the protest file was closed.

Fritz should not be reimbursed payment for 1 hour that the second partner spent on February 3 in a conference, 1 hour on February 14 to review "USAID COMMENTS," and 2 hours on March 11 to check the status of the protest, take part in a conference with an unidentified person and take part in a conference with the first partner. The billing record does not identify with whom the conference took place on February 3 or the purpose of the conference and thus, we cannot conclude that the conference took place in pursuit of the protest. Regarding the AID "comments" reviewed on February 14, the protester received the agency's first report on February 18 and there is no record of any "comments" that the agency submitted to the protester. Regarding the 2 hours on March 11, again there is no indication with whom the first conference took place or the purpose of the conference, and there is no indication in the billing statement that the first partner with whom the second conference took place also was involved in a conference on that date.

Fritz also may not recover 11 hours spent on the protest by the second partner based on our view that these hours were excessive. While we recognize that every attorney can benefit from consultation with and review by another attorney, we do not believe it is reasonable for a partner to spend the same number of hours reviewing the work of a partner as he or she would spend reviewing the work of an associate. Thus, here, the first partner prepared the initial and supplemental protest and we do not believe it was reasonable for the second partner to spend 3 hours reviewing each of those submissions. See Armour of Am., Inc.--Claim for Costs, supra. Accordingly, the second partner may recover for reviewing each protest for 1 hour. Similarly, we will permit recovery for only one of the two hours that the second partner spent reviewing a motion to produce documents prepared by the first partner. Finally, since the first partner reviewed the agency report, we will allow the second partner to recover for 3 hours rather than the claimed 9 hours for reviewing the report.

Also, based on the documentation submitted, Fritz may be reimbursed for its attorneys' out-of-pocket expenses for postage, reproduction, long-distance telephone charges, facsimile transmission costs, computer legal research, and secretarial overtime. The monthly billing statements support these charges. However, Fritz may not recover the costs of document production. Fritz's attorney explained to our Office that document production is essentially a per page fee that is charged to the client each time a secretary must type a document that is more than two pages in length. In our view, it is unusual for an attorney to separately charge for secretarial typing and, in the absence of an explicit agreement for the client to pay for such services, we do not believe that they are reasonable expenses to be paid by the government. The retainer Engagement Letter between Fritz and its attorneys provides that Fritz will be billed for costs such as travel, reproduction of documents, messenger service, and long distance telephone calls. It makes no reference to a per page typing fee. Our calculations show that for this protest the document production charges totaled $927.50, and we disallow and subtract these costs from the $1,858.03 total which Fritz has requested for out-of-pocket expenses.

In conclusion, we find Fritz is entitled to recover $44,561.78. This consists of 146.75 hours of attorney time billed at $250 per hour, 25.25 hours of attorney time billed at $275 per hour and $930.53 in expenses.[6]

James F. Hinchman
for Comptroller General
of the United States

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[6]AID also asserts that it should not be required to pay for the costs attributed to the hours spent by Fritz's attorney on an alleged breach by Young's counsel of the protective order issued in the case. We disagree. Our Bid Protest Regulations provide for the issuance of protective orders in protest proceedings to aid the protester and interested parties in bringing and defending a protest. Since the protective order was issued by this Office, we conclude that the costs related to applying to, administering and enforcing the order are reimbursable costs associated with the pursuit of the protest. See Diverco, Inc.--Claim for Costs, supra. Accordingly, we believe that Fritz should be reimbursed for the time its attorney spent on the protective order, including the time spent bringing alleged violations of it to our attention.

Comptroller General
of the United States

Washington, D.C. 20548

937108

Decision

Matter of: Ronald L. Porcella

File: B-255591

Date: August 10, 1994

DIGEST

An employee who was receiving an interim geographic adjustment (IGA) differential, was telephonically informed by an agency administrative official that the IGA payments might be in error. When the error was later confirmed and repayment was requested, the employee requested waiver of the debt. Partial waiver was granted by our Claims Group for the payments received during the period prior to notice of error. On appeal, the Claims Group action is sustained. Verbal notice by an administrative official of possible pay error imposed an obligation on the employee to set aside the amount in question for repayment if necessary. Since the error was later confirmed, it is not against equity and good conscience to require repayment of the amounts received after notice was given.

DECISION

This decision is in response to correspondence from Mr. Ronald L. Porcella, who is appealing from our Claims Group Settlement Z-2918638, Sept. 24, 1993, which granted only partial waiver of his debt incident to an overpayment of an interim geographic adjustment (IGA) differential. We concur with our Claims Group's action, for the following reasons.

Beginning in 1988, the task of relocating the agency's National Strong-Motion Program to a more centralized location in California was initiated. In spring of 1990, action was taken to establish a permanent branch in Fresno for the Strong-Motion Program because the office lease in Menlo Park was to be canceled.

In August 1990, Mr. Porcella, an employee of the United States Geological Survey, United States Department of the Interior, stationed in Menlo Park, California, was asked to relocate to Fresno, California, to acquire temporary office/storage space for the Program. At approximately the same time, a personnel action was initiated by the Menlo Park office to change Mr. Porcella's duty station to the Fresno area, but it was not acted upon by the U.S. Geological Survey headquarters in Reston, Virginia.

In January 1991, an 8 percent IGA differential was authorized for the San Francisco area, to include Menlo Park. However, Fresno is outside that area. Since no documents had been issued to officially transfer Mr. Porcella from Menlo Park to Fresno, he began receiving the IGA differential.

On January 13, 1992, even though an SF-50 notification of change of duty station had yet to be issued to Mr. Porcella, he was informed telephonically by his administrative officer that he might be erroneously receiving the IGA differential. Thereafter, it was determined that he had actually been transferred to Fresno prior to January 1991, and an SF-50 was issued on February 12, 1992, showing a December 2, 1990, effective date of transfer. The transfer document was not received by Mr. Porcella's administrative officer until April 2, 1992. As a result, by the time Mr. Porcella's status was clarified and the IGA differential payments stopped, he was overpaid $4,252.46 for the period January 13, 1991, through April 18, 1992.

Our Claims Group granted waiver of $3,208.46, representing the IGA differential overpayments received by Mr. Porcella for the pay periods of January 13, 1991, through December 28, 1991, and denied waiver of $1,044, representing the payments received by Mr. Porcella after he was informed about the possible error.

In his appeal, Mr. Porcella argues that he was only told on January 13, 1992, that he "might be" receiving erroneous IGA payments, even though he had not yet been transferred from Menlo Park to Fresno. Secondly, he argues that the earliest date he actually knew that the transfer would be made retroactively and, therefore, that the IGA payments would become erroneous, was on April 2, 1992, when he received the SF-50 notification of transfer which had been signed on February 12, 1992. It is his view that, since the April 2 date was his official notice date, all IGA payments made prior to that date should be waived.

Waiver of a debt under the provisions of 5 U.S.C. § 5584 (1988) is an equitable remedy whereby the Comptroller General is authorized to waive debts arising from pay or allowances if "the collection . . . would be against equity and good conscience and not in the best interests of the United States."

We have held that an employee who accepts payments after notice that they are erroneous cannot reasonably expect to be able to retain them and should make provision for eventual repayment.[1] We see no essential difference between notice of error and notice of possible error regarding overpayments of compensation. It is not unreasonable to presume that the official had sufficient information at hand to warrant communicating with Mr. Porcella at that time. Therefore, it is our view that when Mr. Porcella received verbal notification of possible error, he was under an obligation to set aside the IGA payments for possible repayment, at least until being informed that the payments were not erroneous.

Since Mr. Porcella was notified on January 13, 1992, of possible error, which was later confirmed, we do not consider it against equity and good conscience to require him to repay that part of the erroneous pay received after that date.

for Seymour Efros
Robert P. Murphy
Acting General Counsel

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[1] Martha C. Barrios, B-245449, Nov. 26, 1991, and decisions cited.

Comptroller General
of the United States

Washington, D.C. 20548 34387

Decision

Matter of: Farmers Home Administration (FmHA) purchase of office chairs

File: B-251706

Date: August 17, 1994

DIGEST

1. The Farmers Home Administration (FmHA) improperly reobligated and expended FY 1990 funds for a FY 1991 order of office chairs after the original order was canceled. Although FY 1990 funds were unavailable to support the FY 1991 order, FmHA need not report an Antideficiency Act violation, since sufficient funds remained in the proper appropriation chargeable for the FY 1991 order.

2. While FmHA did not request delivery of chairs ordered during FY 1991 until early in FY 1992, no violation of the bona fide need rule occurred because the agency demonstrated a continuing need for the chairs to furnish office space and to replace stock. Items ordered under a federal supply schedule are properly chargeable to the year in which ordered.

DECISION

The Deputy Administrator for Management, Farmers Home Administration (FmHA), U.S. Department of Agriculture, Washington, D.C. (the Department), asks whether certain obligations FmHA incurred for the purchase of office chairs violated the Antideficiency Act. For the reasons indicated below, we find no reportable Antideficiency Act violation.

BACKGROUND

In June 1990, FmHA management approved funding for moving and improving the agency's headquarters office space in Washington, D.C. This project included sizeable procurements of modular office furniture. As part of this overall acquisition, FmHA, on September 11, 1990, issued two delivery orders, each for 225 ergonomic office chairs from a vendor under a General Services Administration (GSA) federal supply schedule contract, with delivery on or before September 28, 1990. FmHA charged fiscal year 1990 funds for the orders. FmHA delayed the orders, however, because the office space was not ready, and in October 1990, the agency issued replacement orders, changing, among other things, the delivery date to April 30, 1991.

On January 25, 1991, the Inspector General, without specifically mentioning the chair orders, concluded that many of the orders issued for the modular furniture acquisition were improper because some orders were split to circumvent the maximum order limitations of the federal supply schedule contracts and other orders did not identify specific items to be purchased. The Department of Agriculture's Office of General Counsel found that since such orders were void ab initio, the 1990 funds were unavailable for replacement orders. The Office of General Counsel recommended that FmHA cancel the furniture orders, deobligate the fiscal year 1990 funds, and reissue the furniture orders with fiscal year 1991 funds.

On June 28, 1991, FmHA combined and reissued the office chair delivery orders into one delivery order for a total of 440 chairs. FmHA ordered the chairs from the same vendor on the federal supply schedule, and deliveries were scheduled to take place in four shipments during November and December 1991 (fiscal year 1992). However, FmHA officials continued to charge fiscal year 1990 funds for the new delivery order.

Upon learning of a proposed audit finding by the Inspector General citing the chair purchase as a possible Antideficiency Act violation, FmHA officials modified the delivery order on December 26, 1991, to change the funding code from fiscal year 1990 to fiscal year 1991. At this point, FmHA had already made two payments to the vendor out of fiscal year 1990 funds. FmHA intended that remaining payments to the vendor be made from fiscal year 1991 funds. According to the submission, "FmHA also submitted documentation to change the payments made in fiscal year 1990 to fiscal year 1991 and to deobligate any remaining fiscal year 1990 funds."

The Office of the Inspector General issued a memorandum on January 2, 1992, regarding the chair purchase and recommended that FmHA consult with the Office of the General Counsel to determine if any Antideficiency Act violations had occurred. The Office of the Inspector General questioned "whether this procurement was, in fact, a fiscal year 1991 (June 1991) requirement since FmHA requested delivery in fiscal year 1992."

Responding in an April 30, 1992 memorandum, the Department's Office of General Counsel found that FmHA had exceeded the maximum order limitation for the 1990 chair orders. Thus, like the orders for the other modular furniture, the orders for the chairs should have been canceled as void ab initio, and fiscal year 1990 funds were not available for replacement orders. The Office of the General Counsel also cited FmHA for two violations of the Antideficiency Act. First, by issuing the delivery order on June 28, 1991 using fiscal year 1990 funds, FmHA violated the Antideficiency Act by obligating expired 1990 funds unavailable for putative 1991 needs. Second, the Office of General Counsel concluded that FmHA's subsequent correction to establish an obligation for the chairs in fiscal year 1991, and to make the remaining payments with fiscal year 1991 funds, violated the Antideficiency Act because the June 1991 order did not reflect a bona fide need of fiscal year 1991, but of fiscal year 1992. While FmHA concedes that errors were made in purchasing the office chairs, the Deputy Administrator disagrees that FmHA violated the Antideficiency Act, and asks for our opinion.

ANALYSIS

We do not find a reportable violation of the Antideficiency Act. Accepting, for purposes of discussion, the Office of General Counsel's determination that FmHA should have canceled the 1990 chair orders, then FmHA's reobligation of the 1990 account for the 1991 order and payments to the contractor from the 1990 account were improper. At the time FmHA issued a delivery order in mid-1991, the 1990 funds were not available for reobligation. However, FmHA had sufficient funds in the proper appropriation to be charged, and has adjusted the accounts to correct the mistake. As corrected, FmHA has not made or authorized an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation. 31 U.S.C. § 1341(a)(1) (Supp. IV 1992). Consequently, no violation of the Antideficiency Act need be reported with respect to the obligation of 1990 funds. See 63 Comp. Gen. 422, 424 (1984); 57 Comp. Gen. 459, 463-464 (1978); Acumenics Research and Technology, Inc. -- Contract Extension, B-224702, Aug. 5, 1987, at 13 - 14, 87-2 CPD ¶ 128.

The Department's Office of General Counsel also concluded that because the office chairs were delivered during fiscal year 1992, they were not a bona fide need of fiscal year 1991,[1] and consequently FmHA violated the Antideficiency Act when FmHA used fiscal year 1991 funds to pay for

[1] One of the fundamental principles of appropriations law is the bona fide need rule. The rule permits use of annual appropriations only for expenses serving a legitimate need of the year(s) for which the appropriation was made. Determination of what constitutes a bona fide need of a particular fiscal year depends primarily upon the facts and circumstances of each case. 61 Comp. Gen. 184, 186 (1981).

expenses improperly incurred in fiscal year 1991. We disagree.

Given the scheduling uncertainties involved in the office relocations, we are not prepared to say that the delayed delivery of the chairs requested by FmHA was unreasonable. Indeed, as described above, FmHA has evidenced a continuing need since fiscal year 1990 for office chairs. An agency official informally advised us that because the relocation plans were constantly being revised, the June 1991 order may not have been issued for any particular office space, but rather to replenish the agency's stock of office chairs as offices were renovated or relocated.

An agency may issue orders to replace stock items used in the year in which the contract is made, even though the replacement items will not be used until the following fiscal year. See 44 Comp. Gen. 695 (1965); 32 Comp. Gen. 436 (1953). Furthermore, an agency is required to charge supply schedule purchase costs against the appropriation which is current at the time the agency issues the order:

> "A MAS [Multiple Award Schedule] item represents a bona fide need of the fiscal year in which an agency orders it . . . . Since agencies will charge the appropriation which covers the fiscal year in which they place their order, they will be contracting against the appropriation which is current at the time they have a genuine need for the item. Clearly, this is in accord with the bona fide needs rule."

63 Comp. Gen. 129, 133 (1983). Thus, stock items ordered from a federal supply schedule contract, such as the office chairs at issue here, are chargeable to the appropriation available in the year ordered. The stock items need not be merely replacement items but could be additional stock for expanded office needs. Since we conclude that the delivery timeframe was reasonable under the facts and circumstances presented, FmHA did not violate the bona fide need rule when it issued the June 1991 delivery order.

James F. Hinchman

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

413258

Decision

Matter of: Mid-South Metals, Inc.

File: B-257056

Date: August 23, 1994

Nicholas Simonowich for the protester.
Gregory J. Gusching, Esq., Defense Logistics Agency, for the agency.
Adam Vodraska, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The protester's submission of multiple credit card accounts was responsive to the solicitation's material requirement for a bid guarantee, despite the solicitation's instructions that allowed the use of credit card accounts, but prohibited bidders from offering multiple credit cards, where the credit card information submitted with the protester's bid amounted to a binding bid guarantee; the submission of multiple credit card accounts is a waivable minor informality in these circumstances.

DECISION

Mid-South Metals, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 31-4688, issued by the Defense Reutilization and Marketing Service (DRMS) for the sale of certain surplus materials.

We sustain the protest.

The IFB solicited bids for any or all of 59 items of scrap materials. Bidders were required to provide a bid deposit in an amount equal to 20 percent of the total bid price, and the IFB provided that the bid deposit could be made by cash, cashier's check, certified check, traveler's check, bank draft, money order, or by charge to a "VISA or MasterCard" credit card account. Bidders were warned, however, that "SUBMISSION OF MULTIPLE CREDIT CARDS ARE NOT ACCEPTABLE AND WILL RESULT IN THE BID BEING REJECTED AS NONRESPONSIVE." [Emphasis in original.]

PUBLISHED DECISION
73 Comp. Gen. ____

Mid-South, which submitted the high bid for 6 of the 37 items on which it bid, provided two credit cards as its bid guarantee. DRMS rejected Mid-South's bid as nonresponsive because Mid-South had submitted multiple credit cards, contrary to the IFB's instructions. This protest followed. The agency is withholding award pending our decision.

The protester contends that since it provided the credit card account information requested by the IFB, its bid was responsive to the solicitation's bid guarantee requirement. The protester also contends that since either card had a sufficient credit limit to satisfy the bid deposit requirements, its submission of two credit cards should be waived as a minor informality.

The agency responds that the issue of bidders listing multiple credit card accounts is one of responsiveness to the IFB's material requirements and is not a waivable minor informality. In support of this contention, DRMS cites the IFB's instruction that warns that the listing of multiple credit cards would render a bid nonresponsive. In this regard, DRMS states that the use of multiple credit cards was prohibited because of the administrative problems created when bidders requested that the agency charge numerous credit cards to reach the amount required for the bid deposit. For example, bidders have requested the agency to charge the cards in a specific order the maximum amount available under each credit card until the required bid deposit was collected. The contracting officer would then attempt to debit the first card the entire amount of the bid deposit and failing that, would reduce the amount debited until the amount was accepted by the processing bank. The contracting officer would repeat this process until the required bid deposit was collected.

A bid deposit is a form of bid guarantee designed to protect the government's interests in the event of a bidder's default. N.G. Simonowich, 70 Comp. Gen. 28 (1990), 90-2 CPD ¶ 298. A bid deposit obligates a bidder not to withdraw before award and to pay the full purchase price; while a bid deposit may be applied towards the purchase price of goods being sold by the government, in the event the bidder defaults on his contractual obligations, the government may retain the deposit as liquidated damages. Id. The submission of a binding bid guarantee is a material condition of responsiveness with which a bid must comply at the time of bid opening. Castle Floor Covering, 70 Comp. Gen. 530 (1991), 91-1 CPD ¶ 510. Submission of a bid deposit in the exact manner and form called for by the solicitation demonstrates that the bidder has obligated itself to forfeit the bid deposit in the event that it withdraws before award or fails to pay the full purchase price. N.G. Simonowich, 70 Comp. Gen. 335 (1991), 91-1 CPD ¶ 299.

Here, we find the protester's bid was responsive to the bid guarantee requirement and that the submission of multiple credit card accounts was a waivable minor informality. As required in the IFB, the protester indicated on the cover page of its bid that it had submitted a credit card account to be debited to cover the 20-percent bid deposit charge. The accompanying credit card information sheet, required from any bidder who intended to charge either the bid deposit or final contract price on its credit card, was completed properly by the protester (other than its listing of two credit card accounts). In other words, Mid-South's bid contained all the credit card information needed by the agency to charge the amount of the required bid deposit and represented a firm commitment to be liable for the bid deposit.[1] Because Mid-South's bidding documents at bid opening clearly bound it to furnish the bid deposit by means of a credit card charge--an instrument explicitly approved for use as a bid deposit in the IFB--and because Mid-South listed a credit card number to be charged the required bid deposit amount, Mid-South's bid was responsive. Consequently, Mid-South's submission of an additional credit card number did not affect Mid-South's binding bid guarantee commitment. See N.G. Simonowich, 70 Comp. Gen. 335, supra (awardee's submission of credit card information was responsive to the bid guarantee requirement, although the credit card listed had an insufficient credit limit and the awardee had to substitute another credit card prior to award).

Because there is no doubt that Mid-South intended to be bound to its bid, Mid-South's failure to follow the IFB's instructions against submittal of multiple credit cards may be waived as a minor informality. Federal Acquisition Regulation (FAR) § 14.405 defines a minor informality or irregularity as "one that is merely a matter of form and not of substance. [For example,] some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders." While Mid-South deviated

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[1]While the protester did not list the dollar amount of the bid deposit or the total dollar amount of its bid price, the protester's total bid price was easily ascertainable from its bid and it authorized the agency to charge its credit account for 20 percent of the total bid price. See Vista Contracting, Inc., B-255267, Jan. 7, 1994, 94-1 CPD ¶ 61.

from the exact instructions of the IFB, it nevertheless provided credit card information that would allow the agency, if required, to debit Mid-South's account, which is sufficient to satisfy the purpose of the bid deposit requirement. Since Mid-South's deviation from the exact requirements of the IFB did not have a material effect on its legal obligations, it may be waived regardless of the instruction's mandatory nature. See Stone Forest Indus., Inc., B-246123, Feb. 7, 1992, 92-1 CPD ¶ 161 (requirement for initialing changes to bid is a matter of form and omission may be excused as a minor informality); Boardsen Assocs., Inc., B-245876, Jan. 27, 1992, 92-1 CPD ¶ 115 (bidder's failure to insert the word "none" in the Certificate of Procurement Integrity to confirm lack of procurement violations, despite instruction to "Enter None if None Exist," is not a material omission which would make the bid nonresponsive).

Whether or not a bidder can offer a credit card with sufficient available credit for the amount of the bid deposit concerns the bidder's responsibility. See N.G. Simonowich, 70 Comp. Gen. 28, supra. In view of the asserted administrative problems that may result from aggregating several credit card accounts to obtain a sufficient bid deposit, it seems reasonable for an agency to decline to allow such aggregation as acceptable security. In this case, however, the record shows that either of the two credit card accounts listed by the Mid-South had available credit limits sufficient to charge the bid deposit. Under the circumstances, we think that the contracting officer should ask Mid-South pursuant to FAR § 14.405 to cure the informality by designating which of the two credit cards the agency should charge, or should simply waive the dual credit card submittal and proceed to charge the entire bid deposit amount to one credit card or the other. Since we find that Mid-South's bid was responsive to the bid guarantee requirement, we recommend that DRMS award the sale to Mid-South on those items for which Mid-South was the high bidder, if Mid-South is determined to be responsible.

The protest is sustained.

for James F. Hinchman

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

23629

Decision

Matter of: National Linen Service

File: B-257112; B-257312

Date: August 31, 1994

Jed L. Babbin, Esq., Tighe, Patton, Tabackman & Babbin, for the protester.
Riggs L. Wilks, Jr., Esq., and Paul A. Debolt, Esq., Department of the Army, and Gregory H. Petkoff, Esq., Department of the Air Force, for the agencies.
Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Modification of existing Department of the Army contract to add laundry services for Department of the Air Force unit is proper where the additional services are within the general scope of the contract as originally awarded, which specifically provided for centralization of such services at the Army base.

2. Agency may cancel an invitation for bids for laundry services based on the potential cost savings that will be achieved by obtaining required laundry services under a proper modification to an existing contract.

DECISION

National Linen Service protests the modification of fixed-price contract No. DACA21-91-C-0045, awarded to Crown Management Services, Inc. by the Department of the Army, Fort Jackson, South Carolina, for laundry and dry cleaning services. National contends that the modification, which expands the services under the original contract to include laundry services for Shaw Air Force Base, South Carolina, is beyond the scope of the contract and amounts to an improper sole source award. National also protests the Department of the Air Force's cancellation of invitation for bids (IFB) No. F38601-93-B-8009, issued by Shaw Air Force Base for these services.

We deny the protests.

PUBLISHED DECISION
73 Comp. Gen.____

Shaw Air Force Base issued IFB No. F38601-93-B-8009 on January 7, 1994, to obtain laundry and dry cleaning services for a base year and 4 option years. By letter dated February 1, Army contracting officials at Fort Jackson informed Shaw officials of Fort Jackson's newly constructed laundry facility and its existing contract with Crown to operate that facility.[1] Army contracting officials also discussed with Shaw personnel the advantages to both the Air Force and the Army of having Shaw's laundry needs met by Crown under Crown's existing contract, and Crown submitted a price proposal to Fort Jackson for those services.

On February 8, Shaw received two bids under its IFB, including one from National, which was providing temporary laundry services to Shaw. After comparing the prices in National's low bid to the prices in Crown's contract with the Army, the contracting officer determined that obtaining the laundry services under the existing contract offered the Air Force a savings of approximately $24,000 for the first year and approximately $140,000 for the anticipated 5-year period. Based on this determination, Air Force officials requested that the Army modify its Fort Jackson contract to include these Air Force requirements. The Army issued modification P00010 to the Crown contract to cover laundry and dry cleaning services for Shaw, including pick up and delivery at Shaw three times a week. Crown signed the modification on April 8.

The Army states that the modification was proper under Crown's contract and points to paragraph 5.1.1, titled "Specific Tasks," in the scope of work (SOW) of the original RFP and contract, which states in part:

> "In keeping with its area support mission, Fort Jackson provides laundry service to other Department of Defense components such as other Active Army units, Air Force, Navy, Marine Corps, National Guard, Reserves and other Government agencies. The requirement to provide intra and inter-service support services shall be part of this contract. Intra and inter-service units supported presently are listed at Section J,

[1] In 1988, the Army Corps of Engineers awarded a contract to Crown for the construction of the laundry facility at Fort Jackson and the 20-year operation of the facility. Construction of the facility was completed in 1993 and laundry operations began on August 1, 1993.

> Exhibit 6.[2] These supported units require no pick-up or delivery services. All items will be delivered to the laundry facility by unit personnel and, upon completion of laundry services will be picked up and transported to the respective unit by unit personnel."

By letter dated April 20, the Air Force advised National that No. IFB F38601-93-B-8009 had been canceled and that the required laundry services would "be added to the Fort Jackson contract." These protests followed.

As a general rule, our Office will not consider protests against contract modifications, as they involve matters of contract administration that are the responsibility of the contracting agency. 4 C.F.R. § 21.3(m)(1) (1994). We will, however, consider a protest that a modification is beyond the scope of the original contract, and that the subject of the modification thus should be competitively procured absent a valid sole-source justification. Neil R. Gross & Co., Inc., 69 Comp. Gen. 292 (1990), 90-1 CPD ¶ 212.

In weighing the propriety of a modification, we look to whether there is a material difference between the modified contract and the prime contract that was originally competed. Neil R. Gross & Co., Inc., supra; Indian and Native Am. Employment and Training Coalition, 64 Comp. Gen. 460 (1985), 85-1 CPD ¶ 432. In determining the materiality of a modification, we consider such factors as the extent of any changes in the type of work, performance period, and costs between the contract as awarded and as modified. Id. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes that in fact occurred, or whether the modification is of a nature which potential offerors would reasonably have anticipated under the changes clause. Id.

Here, there were no significant changes in the services to be performed, in the performance period, or in the prices under the Crown contract. Under the original contract, Crown was to perform organizational laundry (cleaning individual items such as sleeping bags, sheets and pillowcases), and special services, including hospital laundry and bundle services for individual soldiers. Under the modification, Crown will perform only organizational laundry services for the Air Force, and will launder and dry

[2]Exhibit 6 lists 24 Reserve Officer Training Corp (ROTC) units located at South Carolina colleges and universities, military academies and high schools that are presently being serviced by the Fort Jackson facility.

clean the same items for Shaw as it does for Fort Jackson, including, for example, sleeping bags, blankets, mattress covers and pads; sheets, pants, shirts, and flight jackets; and insulated jackets and parkas. The contract period was not modified and the modification will result in only a minimal increase in the contract price: contract billings are expected to average $2.1 million annually (including $500,000 for debt retirement for the facility built by Crown at Fort Jackson); the Air Force's annual billings on the contract are expected to be only $86,900.

National asserts, however, that it does not matter that the addition of the Shaw Air Force requirement to the Fort Jackson contract changed neither the period of performance nor the nature of the work because, according to National, the language of the original RFP and the contract specifically excludes the addition of laundry services from outside Fort Jackson. To support this contention, National argues that the Army's reliance on paragraph 5.1.1 of the SOW is misplaced and ignores the previous paragraph, 5.1, which states that:

> "The Contractor shall provide laundry and dry cleaning services to individuals and organizations stationed at or satellited on Fort Jackson, South Carolina. . . ."

Because Shaw is not "satellited on Fort Jackson", National argues that it cannot be served under Crown's contract.

The protester also argues that the modification is improper because SOW paragraph 1.2 of the original solicitation and contract provides that an on-post facility:

> "can only be used in direct support of work required to serve Fort Jackson and customers listed in Exhibit 6, other Federal Government work shall be approved by the Contracting Officer and DCSLOG [Deputy Chief of Staff for Logistics] as per AR [Army Regulation] 210-130 Paragraph 5-2d. Any other outside work cannot be accommodated at the on-post facilities."

Because the laundry facility is located at Fort Jackson and because Shaw is a Department of Defense (DOD) agency and not a facility listed in Exhibit 6, National maintains that the contract cannot now be modified to include the Shaw work.

Where a dispute exists as to the actual meaning of a solicitation clause, we will resolve the matter by reading the solicitation as a whole and in a manner that is reasonable and which gives effect to all its provisions. See DDD Co., B-250213, Jan. 15, 1993, 93-1 CPD ¶ 48.

Applying this standard here, contrary to National's contention, we find that the Army intended under the original RFP and the contract, as stated in paragraph 5.1.1 of the SOW, that Fort Jackson would serve as a centralized laundry facility--providing such services to other DOD units as well as to other government agencies. While National believes that paragraph 5.1 limits services to those individuals and organizations "stationed at or satellited on Fort Jackson," we believe that this paragraph merely describes the general purpose of obtaining laundry service for Fort Jackson; the following paragraph, 5.1.1, as noted above, specifically authorized the centralization of DOD and other federal agency laundry services at Fort Jackson. The protester's reliance on the introductory paragraph fails to read the RFP and the contract as a whole, ignoring the following paragraph and the specific statement in that paragraph that "intra and inter-service support services shall be part of this contract."

For the same reasons the protester's assertion that paragraph 1.2 precludes the Fort Jackson facility from providing laundry services to other DOD agencies also conflicts with the obvious intent and specific language of the original RFP and contract. Moreover, this interpretation disregards a relevant section of AR 210-130, which, although not cited in the solicitation, specifies at paragraph 5-2c that inter-service support for Air Force and Navy units "will be provided under the terms of an ISSA [Interservice Support Agreement]." The Army reports that it is in the process of finalizing an ISSA, having stopped work on this agreement in the face of the protest.[3] Thus, the modification was within the scope of the Fort Jackson contract.[4]

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[3]While National argues that the agreement did not exist at the time of contract modification, the regulation is an internal instruction to aid agency personnel and the fact that the agency may have deviated from the precise requirement in the regulation does not provide outside parties with any legal rights. Sabreliner Corp., B-242023; B-242023.2, Mar. 25, 1991, 91-1 CPD ¶ 326.

[4]National also argues that the off-post pick ups and deliveries as provided for in the modification are outside the scope of the original contract. We find no merit to this argument. While the off-post ROTC units listed in Exhibit 6 in the original contract deliver their laundry to Fort Jackson, there is nothing in the solicitation that precludes laundry pick up for units, such as Shaw, not located at the base. Moreover, the original RFP and contract state that the contractor will pick up laundry from (continued...)

National also argues that the Air Force improperly canceled the IFB for laundry and dry cleaning services at Shaw. As the low bidder under the Air Force's IFB, National argues that it should be awarded the laundry services contract for Shaw.

An IFB may be canceled after bid opening only where there is a compelling reason to do so. Federal Acquisition Regulation (FAR) § 14.404-1(a); Xactex Corp., B-247139, May 5, 1992, 92-1 CPD ¶ 423. FAR § 14.404-1(c)(10) specifically permits cancellation, consistent with the compelling reason standard, where cancellation is clearly in the public's interest. Here, where the government has evidence that an award under the canceled solicitation would require the government to pay more for the required services than it would pay under the proper modification of an existing contract, cancellation is clearly in the public's interest and therefore proper.[5] See Color Dynamics, Inc., B-236033.2, Oct. 27, 1989, 89-2 CPD ¶ 391, aff'd, Color Dynamics, Inc.--Recon., B-236033.3, Dec. 22, 1989, 89-2 CPD ¶ 583 (compelling basis for cancellation exists where the agency has specific evidence suggesting that resolicitation would yield lower prices); see also JA & Assocs., Inc.; Son's Quality Food Co., B-256280.2; B-256280.4, Aug. 19, 1994, 94-2 CPD ¶ ___ (solicitation for services was properly canceled where the agency determined after receipt of proposals that it was in the government's best interest to novate the existing contract for the services).

Finally, the protester alleges that after the bid opening at Shaw, the Army "told Crown what price [it] should offer" for each item to be laundered or dry cleaned and improperly

[4](...continued)
approximately 60 locations on-post. The fact that the contractor currently picks up and delivers laundry on-post suggests that pick up and delivery services off-post, especially where such services are not specifically excluded by the contract, could have been reasonably anticipated and are not outside the scope of the contract.

[5]National also argues since the Air Force was considering canceling the solicitation and obtaining the services from Fort Jackson, the agency had an obligation to cancel the IFB before bid opening. While we agree with the protester that it is generally poor procurement practice to cancel a procurement after it has reached an advanced stage, we are aware of no statute or regulation that was violated here. See Essex Electro Eng'rs, Inc., B-206012.3, Oct. 4, 1982, 82-2 CPD ¶ 307.

manipulated the prices by dictating their increase to raise Crown's profits to a level just below the prices bid by National.

The record shows that on February 3, Crown submitted a proposal to the Army for services for Shaw under its current contract. Although Crown's proposed unit prices were not the same as the unit prices under the original contract, those unit prices were lower than National's prices under the Air Force solicitation, which opened 5 days later. Upon receipt of Crown's proposal, the Army informed Crown that it would be paid the same unit prices extant in its contract except that the cost of delivery would be a separate monthly line item. The Army calculated the unit prices for the modification by increasing each of the original contract unit prices by an amount which represents the Air Force's share of management and overhead (for organizational laundry), which was a separate monthly line item under the original contract. These adjusted unit prices, which were even lower than Crown's February 3 proposed unit prices, were submitted to and accepted by the Air Force. Thus, under the contract, as modified, the Air Force pays the Army for laundry and dry cleaning services based on the unit prices set forth in the modification, and the Army in turn pays Crown at the same unit prices set forth in the original contract.[6] Consequently, although the Army dictated that Crown would be paid under the modification based on the unit prices in the original contract, we see nothing improper in its doing so.

The protests are denied.

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

[6]Based on our review, the record does not support National's assertion that the Air Force will pay higher prices than the Army for the same services.

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