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

3521210

Decision

Matter of: RJS Constructors

File: B-257457

Date: October 7, 1994

Ronald R. Sinn for the protester.
Lester Edelman, Esq., Department of the Army, Office of the Chief of Engineers, 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 procuring agency improperly allowed the upward correction of the awardee's low bid, to within .13 percent of the bid of the next apparent low bidder, where the only evidence presented by the awardee, its bid worksheet, contained significant discrepancies and inconsistencies, such that the worksheet was not in good order.

DECISION

RJS Constructors protests the award of a contract to Blick Construction Co., Inc. under invitation for bids (IFB) No. DACW25-94-B-0064, issued by the United States Army Corps of Engineers for exterior pump prime mover replacements. RJS contends that Blick was improperly permitted to upwardly adjust its low bid price prior to award.

We sustain the protest.

The IFB requested single, lump-sum bids for removing two existing diesel engines; rebuilding and reinstalling gear drives; providing and installing new drive shafts; new electric motors, controls, and necessary motor base modifications; and replacing the electrical service entrance.

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The following five bids and the government's estimate were received at the April 7, 1994, bid opening:

Blick	$276,379
RJS	$376,463
Bidder A	$386,700
Bidder B	$397,900
Government's Estimate	$421,351
Bidder C	$446,000

On April 12, Blick's president, C. John Blickhan, notified the contracting officer by telephone that he had made a mistake in his bid and requested the upward correction of his bid price. By letter of April 12, the contracting officer requested that Mr. Blickhan supply documentation--such as original worksheets, subcontractor quotations, or price lists--supporting his mistake claim. In response, Mr. Blickhan provided a page from his bid notebook, which he stated was the only workpaper Blick had to establish the bid mistake and its intended bid.[1] The workpaper's handwritten entry for this project appears as follows:

"4-5-94 LimaLake DACW25-94-B-0064

"General Pump Overhaul Pump 33111	35000
Motors 450 H.P. 21161 [revised from 18618]	22000
Gear Replace Amarrillo 17960	20000
Motor Brackets & Base	3000
Testing 8400-3500-2000	14000
Set Gear Boxes G.P. 3000	3000
Electric [Supreme]	138160
Blicks Remove & Replace Pumps	125000
Freight	9000
Drive Shaft 802 ea.	1800
Bond	5000
	276379"

Along with the worksheet, Mr. Blickhan sent the Corps an affidavit attesting to the worksheet's authenticity. Mr. Blick informed the agency that he had hastily prepared the bid late on the day before bid opening because he was waiting for prices from suppliers and because his secretary was leaving for vacation the next day, and she was to type the bid form submitted to the Corps. Mr. Blickhan stated

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[1]Mr. Blickhan attested that the submitted worksheet was the only workpaper used to prepare the bid except for scratch paper used to jot down figures for Blick's labor expenses, crane time, and bookkeeping time. Mr. Blickhan stated that he normally transposes these figures to the worksheet and does not keep the scratch paper and that he did not do so in this case.

that he made an arithmetical error when adding the figures for the various work items listed on his bid worksheet and did not double-check his addition before submitting the bid. Mr. Blickhan stated that Blick's intended bid price was $375,960, which is the figure that is obtained by adding all the entries included on the worksheet, and that he was not sure how he reached the incorrect total of $276,379, but since the arithmetic was not double-checked, the error was not discovered and the wrong figure was used in the bid. Blick did not provide quotes or other documentation from any of its purported suppliers or subcontractors.

The contracting officer confirmed that the handwritten entries, when added together, totaled $375,960 and determined that the submitted worksheet and Blick's affidavit presented clear and convincing evidence of a mistake, and of the intended bid. The Division Commander affirmed the contracting officer's determination and on May 19, the Corps accepted Blick's corrected bid of $375,960. RJS's protest followed.

RJS does not dispute that there was a bid mistake but argues that Blick's workpaper is not in good order and does not demonstrate by clear and convincing evidence Blick's intended bid price. RJS contends that there is insufficient documentation presented by Blick to permit the agency to allow Blick to upwardly adjust its bid price to within $503, or .13 percent, of RJS's next low bid.

An agency may permit correction of a bid where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. Federal Acquisition Regulation (FAR) § 14.406-3(a); Weather Data Servs., Inc., B-241621, Feb. 19, 1991, 91-1 CPD ¶ 185. In considering upward correction of a low bid, worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price and there is no contravening evidence. Great Lakes Dredge & Dock Co., B-248007.2, Sept. 3, 1992, 92-2 CPD ¶ 151. Whether the evidence meets the clear and convincing standard is a question of fact, and we will not question an agency's decision based on this evidence unless it lacks a reasonable basis. M. A. Mortenson Co., B-254152, Nov. 19, 1993, 93-2 CPD ¶ 296. However, the closer an intended bid comes to the next low bid, the more difficult it is to establish the amount of the intended bid, and the more closely we will scrutinize the claim of mistake. See J. Schouten Constr., Inc., B-256710, June 6, 1994, 94-1 CPD ¶ 353; Vrooman Constructors, Inc., B-226965.2, June 17, 1987, 87-1 CPD ¶ 606.

Here, we find unreasonable the contracting officer's determination that Blick's workpaper constituted clear and convincing evidence of Blick's alleged intended bid price.

It is true that the entries on Blick's workpaper, as submitted to the contracting officer, do not total $276,379--the amount bid, and that if the eleven entries listed on the bid worksheet are added together, the total is $375,960--the amount Blick asserts it intended to bid. Nevertheless, simply totaling the entries does not clearly and convincingly indicate Blick's intended bid because, as described below, Mr. Blickhan's handwritten worksheet is not in good order and is not credible.

First, the worksheet does not include any entries for profit or overhead, nor is there any explanation in the record from Blick as to whether its worksheet provided for profit and overhead, and if so, how these items were calculated. While the Corps states that "Blick's profit and overhead apparently have also been included" in the work to be performed by Blick, i.e., "Blick's remove and replace pumps," there is no evidence in the record that this is so or how it was to be calculated. Generally, clear and convincing evidence of an intended bid price cannot be ascertained where the workpapers of a bidder seeking correction do not adequately account for profit or overhead in the bid, since an unexplained failure to provide such customary items calls into question what bid price was actually intended. See Southwest Marine, Inc., B-225686, May 14, 1987, 87-1 CPD ¶ 510; Franco, B-214124, May 1, 1984, 84-1 CPD ¶ 488.

Next, Blick's worksheet lacks consistency or correlation between the costs allegedly quoted by suppliers and subcontractors[2] and the amounts entered on the worksheet, such that there is no pricing methodology or suggestive pattern evident to explain how Blick calculated each of its work entries. For example, while Blick stated that he "rounded up" quotes he received from some suppliers, he did not consistently round up all quotes he received. More significantly, there is no discernible pattern to the mark-ups for the quotes that Blick did "round up." Instead, Blick's mark-ups on the worksheet ranged from 3.9 percent to 11.4 percent.

Finally, two entries on the worksheet in the record appear to have been altered. Specifically, the second digit of Blick's "Motors 450 H.P." entry (the second 2 in $22,000)[3]

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[2]Blick did not provide any documentation supporting the quotes it asserts it received from suppliers or subcontractors.

[3]The record indicates that the supplier may have revised its quotation from $18,618 to $21,161, as was noted on Blick's

(continued...)

and the first digit of the cost estimate for the "freight" entry (the 9 in $9,000) appear to have been changed. There is no explanation in the record as to when these changes were made, other than Mr. Blickhan's sworn statement that the worksheet provided to the Corps had not been altered in any way since bid opening. While it is likely true that these changes were made while Mr. Blickhan was putting together his bid, the fact remains that there is no explicit explanation in the record as to when and why these changes were made.

In sum, we find, given these significant and unexplained discrepancies and uncertainties in Blick's worksheet, that the documentation provided by Blick did not provide the Corps with clear and convincing evidence of Blick's intended bid price. This is particularly so given the closeness of Blick's alleged intended bid price to that of the next apparent low bidder and the fact that a change of merely $504 in Blick's intended worksheet would have displaced Blick as the apparent low bidder. Accordingly, we find that the upward correction of Blick's bid price should not have been allowed.

We recommend that the Corps consider the feasibility of terminating Blick's contract for the convenience of the government and making award to RJS, if that bidder is otherwise eligible. If termination of Blick's contract is not practicable, RJS is entitled to recover its costs of bid preparation. 4 C.F.R. § 21.6(d)(2) (1994). We also find that RJS is entitled to recover the costs of filing and pursuing this protest, including reasonable attorney's fees. 4 C.F.R. § 21.6(d)(1). RJS should file its claim, detailing and certifying the time expended and costs incurred, directly with the Corps within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Robert P. Murphy
for Comptroller General
of the United States

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[3](...continued)
worksheet, and that Blick possibly revised its price accordingly (from $20,000 to $22,000). However, the original number can not be determined with any certainty from examining the worksheet.

Comptroller General
of the United States

Washington, D.C. 20548

12441710

Decision

Matter of: Commerce Land Title of San Antonio, Inc.--
Claim for Costs

File: B-249969.2

Date: October 11, 1994

Donald E. Barnhill, Esq., East & Barnhill, for the protester.
Michael J. Farley, Esq., and Kenneth A. Markison, Esq., Department of Housing and Urban Development, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Claim for costs of filing and pursuing a successful protest, including reasonable attorneys' fees, is allowed where protester and its attorneys have provided sufficiently detailed documentation to support claim.

2. Claim for attorneys' fees charged protester for activities occurring in period after decision sustaining protest was issued is allowed where attorneys' fees are associated with analyzing and explaining decision to protester and with pursuing claim for protest costs.

DECISION

Commerce Land Title of San Antonio, Inc. (CLT) requests that we determine the amount it is entitled to recover from the Department of Housing and Urban Development (HUD) for filing and pursuing its prior protest.

In Commercial Land Title of San Antonio, Inc., B-249969, Dec. 8, 1992, 92-2 CPD ¶ 400, we sustained CLT's protest against HUD's invitation for bids No. 37-92-113, for real estate closing services. We held that the invitation unduly restricted competition because it required that all bidders be attorneys licensed to practice in the state of Texas. We recommended that HUD cancel the invitation for bids and resolicit the requirement using a solicitation that would allow title companies to bid providing that they could show that they would subcontract with licensed attorneys for any

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services that had to be performed by a licensed attorney under Texas law. We also held that the protester was entitled to the costs of filing and pursuing the protest.

By letter of February 4, 1992, the protester filed its claim for costs with HUD seeking reimbursement of $9,152.63. The agency determined that the actual, documented costs of filing and pursuing the protest were only $6,619.65. Accordingly, HUD urges us to disallow a total of $2,532.98 of the claimed protest expenses. Of this amount, the protester concedes $259.91,[1] leaving $2,273.07 still in dispute.

A protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable, if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in pursuit of the protest. Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

The agency cites our decision in Bush Painting, Inc.--Claim for Costs, B-239904.3, Aug. 16, 1991, 91-2 CPD ¶ 159, as requiring disallowance of significant portions of the claim. In Bush Painting, we resolved a dispute concerning the amount of bid preparation and protest costs to which Bush was entitled as a result of our Office having sustained its earlier bid protest of an Air Force procurement. Since Bush had not documented its claimed bid preparation costs, we allowed only the portion of those costs that the Air Force had offered to pay Bush. Regarding Bush's claim for the costs of filing and pursuing the protest, we performed a detailed analysis of the various aspects of the claim and determined Bush was entitled to $1,758.75 of the total $8,091.61 claimed. Basically, we allowed Bush to recover only costs that were both properly documented and reasonably related to various protest activities.

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[1]HUD objected to payment of $254.59 for expenses such as reproduction of documents, computer research, postage, Federal Express, and long-distance service on the basis that the expenses were not described adequately nor shown to relate to the protest. HUD also found a $5.32 mathematical error in CLT's claim for its employees' time. Together these expense items total $259.91 of the claim which CLT withdraws.

HUD first argues that $428.94 in claimed protest costs[2] should be disallowed because the costs were incurred after CLT filed its protest but before HUD filed its report with our Office. HUD also argues that $130.95 in costs[3] should be disallowed because the expenses were incurred after CLT filed its comments on HUD's protest report but before our Office issued the decision sustaining CLT's protest. HUD argues that under the holding of Bush Painting, any expenses incurred in the period between protest filing and receipt of the agency report and in the period between filing of comments and issuance of our decision are not considered costs of pursuing the protest and may not be paid as a matter of law.

In Bush Painting, we disallowed costs related to Bush's attempts to gather information about the procurement under the Freedom of Information Act or by other means and attorneys' fees incurred by Bush. We found that the information-gathering expenses were not necessary to or otherwise related to Bush's pursuit of the protest. We also examined the services that were provided Bush by its attorney, before determining that the information provided by the attorney was not related to the pursuit of the protest. The timing of the information-gathering activities and communications with the attorney was but one factor in our determination that those costs simply were not related to Bush's pursuit of its protest. We did not hold that the costs of pursuing a protest would not be compensable merely because they were incurred during certain time periods.

In the current case, unlike the protester in Bush Painting, CLT retained counsel to assist it in pursuing its protest from the outset. CLT and its attorneys have presented detailed supporting documentation showing that CLT and its counsel discussed the protest and reviewed protest-related correspondence on several occasions pending our resolution of the matter, and CLT's attorneys have certified that the attorneys' fees were billed to and are the responsibility of CLT. In addition, the record shows that CLT's consultations with its attorneys were not excessive in number and that the attorneys' fees charged were well within the hourly rates

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[2]These expenses consist of the salaries of CLT's president/chairman of the board and general counsel for time spent on telephone calls with the firm's attorneys; and for reviewing protest-related correspondence, as well as attorneys' fees for those telephone calls, reviewing protest correspondence, writing to CLT, etc.

[3]These costs represent the salary of CLT's president/chairman of the board and attorneys' fees charged for time spent conferring on the telephone.

usually charged by lawyers in pursuing a bid protest. We think it is reasonable to expect that, after filing a protest, a protester will occasionally consult with its attorneys during all phases of the protest to discuss protest-related matters such as strategy, status, and calendar of events. See Bay Tankers, Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. While HUD objects to reimbursing CLT based upon the timing of the various expenses incurred, HUD does not argue that the expenses were unrelated to the protest or that the amount of the costs is unreasonable. In light of the documentation supporting CLT's claim for costs and attorneys' fees incurred in the period between protest filing and issuance of our decision, and because the costs appear reasonable in amount, we find the protester entitled to reimbursement of $559.89 in protest costs.[4]

Next, HUD argues that $1,555.80 of CLT's claim for costs[5] should be disallowed because the costs were incurred after our decision on the protest was issued. The agency cites Bush Painting and Tripp, Scott, Conklin & Smith--Claim for Costs, 72 Comp. Gen. 232 (1993), 93-1 CPD ¶ 414, for the proposition that a protester may not recover any money expended after issuance of our decision. As pointed out above, Bush Painting does not bar payment of costs merely because they were incurred in a particular time period, but rather, the test to be applied is whether the costs were reasonably incurred in pursuit of the protest. In Bay Tankers, supra, we explicitly approved costs paid to a law firm to analyze, explain, and consult with the protester concerning our protest decision. In Tripp, Scott, Conklin & Smith, the protester was a law firm, and yet claimed costs associated with its own employees' time incurred after issuance of our decision on the protest; we found that those costs were not necessary to the pursuit of the protest. In the current case, CLT used independent counsel throughout the protest process, and we believe that the attorneys' fees

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[4]This total represents $428.94 in costs incurred after filing but before receipt of the agency's report and $130.95 in costs incurred after commenting on the report but before our decision was issued.

[5]Part of these costs (totaling $418.30) are the fees charged by CLT's attorneys for reviewing the protest decision and explaining it to CLT's president/chairman of the board, as well as time spent by CLT's president/chairman of the board conferring with the attorneys and reviewing information received from the attorneys concerning the decision. The greater part of these costs (totaling $1,137.50) represents attorneys' fees charged for researching and pursuing this claim.

associated with analyzing and explaining the decision to the protester are legitimately incurred in pursuit of the protest and may be recovered. Since the costs are adequately documented and appear to be reasonable[6] in amount, we find the protester entitled to reimbursement of an additional $1,555.80.

HUD contends that $157.38 of CLT's claim should be disallowed because there are four instances of telephone calls between CLT's president/chairman of the board and CLT's attorneys that are not listed both on CLT's and its attorneys' list of telephone calls. Even though CLT's itemization of telephone calls does not corroborate every telephone call listed by its attorneys, we have no reason to doubt that the telephone conferences were held. In view of the long lists of documented phone calls between CLT and its attorneys, the failure of one party to confirm every call listed by the other party is not, in itself, a bar to reimbursement. We believe that the protester is entitled to reimbursement of these costs.

In sum, CLT is entitled to recover a total of $8,892.72 as the costs of pursuing both its protest costs and this claim for protest costs, as follows:

--$6,619.65:	The amount that HUD did not dispute.
-- 428.94:	Protest costs incurred after CLT filed its protest but before HUD filed its report.

[6]HUD also argues that CLT has claimed an unreasonable amount ($650) in attorneys' fees for various activities related to pursuing this claim. Costs, including those associated with pursuing a claim for protest costs, are reasonable if, in their nature and amount, they do not exceed that which would be incurred by a prudent person in a similar pursuit. See Patio Pools of Sierra Vista, Inc.--Claim for Costs, 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374; Federal Acquisition Regulation § 31.201-3(a). Here, CLT's attorneys spent 6 hours reviewing and summarizing protest costs, conferring with their client's employees regarding the statements that would be made in support of the claim, and presenting the claim to our Office, and have certified that the fees therefor were billed to CLT for payment; HUD has articulated no basis for asserting that the fees are excessive. See Data Based Decisions, Inc.--Claim for Costs, supra. Based upon our own examination of the claim, supporting documentation, and HUD's very detailed brief disputing many elements of the claim, we believe that the amount of attorneys' time spent was reasonable. Accordingly, these claimed attorneys' fees are allowed.

-- 130.95: Protest costs incurred after CLT filed its comments but before our decision was issued.

-- 418.30: Protest costs incurred after our decision was issued.

-- 157.38: Cost of four telephone calls between CLT and its attorneys.

-- 1,137.50: Attorneys' fees charged for researching and pursuing this claim.

for Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter: Frank D. Marden - Forfeited Annual Leave

File: B-256957

Date: October 11, 1994

DIGEST

An employee forfeited annual leave at the end of the 1978 leave year because he could not use it due to the exigency of public business. The agency restored the annual leave to the employee in 1979, and advised him it would be placed in a separate account. Subsequently, the employee transferred to another agency and the restored leave was recorded as a higher accumulation ceiling, rather than as restored leave, and was not used within the prescribed time period. The employee later transferred to another agency where the erroneous ceiling also was adopted. The error was not discovered until 1991, at which time it was determined that the excess leave in the employee's account had been forfeited. The employee argues that the forfeited leave should be restored on the grounds of administrative error. The claim is denied because forfeited leave that is not used within the prescribed time period is again forfeited and may not be restored, except under specific extenuating circumstances not present in this case.

DECISION

Mr. Frank D. Marden, an Administrative Law Judge employed by the Department of Labor, appeals our Claims Group settlement[1] denying his claim for restoration of 72 hours of annual leave and entitlement to a higher leave ceiling. We affirm the Claims Group's settlement.

BACKGROUND

As a result of a series of errors the Department of Labor (DOL) erroneously credited Mr. Marden with an annual leave ceiling of 312 hours, although the maximum number of hours to which Mr. Marden was entitled to carry over from year to year was 240 hours. 5 U.S.C. § 6304 (1988). The chain of events began in 1979, when Mr. Marden, who had been a federal employee for over 18 years, was working for the Department of Justice (DOJ). In early 1979, DOJ approved

[1]Settlement Certificate Z-2868738, March 8, 1994.

PUBLISHED DECISION
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Mr. Marden's request to have 104 hours of annual leave that was forfeited at the end of the 1978 leave year restored to him based on 5 U.S.C. § 6304(d)(1)(B), which authorizes the restoration of annual leave forfeited due to the exigencies of public business. (Mr. Marden had scheduled leave in advance for December 1978, but had the leave canceled due to trials scheduled for that same time.)

The record includes a memorandum from the DOJ Associate Director for Operations, Personnel and Training Staff to Mr. Marden approving the restoration of the 104 hours of forfeited leave and advising him that the restored leave would be placed in a separate account. That memorandum stated that the Payroll Office would be informed of the decision to restore the leave and that the Payroll Office would notify his timekeeper how to administer the separate leave account. These instructions are consistent with the statute authorizing the restoration of forfeited leave. See 5 U.S.C. § 6304(d)(2).

While it is not clear from the record, we assume that DOJ established a separate leave account for Mr. Marden's restored leave in accordance with their advice to him. Mr. Marden asserts, however, that DOJ granted him a higher leave ceiling "rather than simply allowing a one year carry over since my schedule for the following year would not allow my absence for additional vacation time." There is nothing in the record to support Mr. Marden's assertion regarding a higher leave ceiling, which could not have been properly authorized on this basis. However, it may be that the agency determined that the exigencies which prevented his use of the leave in 1978, continued into 1979 and beyond, allowing him to continue to carry over excess leave, and Mr. Marden misunderstood this to be a higher leave ceiling.

In late October 1980, Mr. Marden transferred to the Department of Health and Human Services (HHS). The leave transfer record prepared by DOJ incident to the transfer shows that Mr. Marden's leave ceiling was 240 hours. It also showed, however, that Mr. Marden had carried over 344 hours of annual leave from 1979, had accrued an additional 160 hours and had used 168 hours, leaving a balance of annual leave to date in 1980 of 336 hours. Although the leave transfer record did not distinguish between regular leave and restored leave, the record does not show whether anyone in Mr. Marden's new agency, HHS, questioned why he had 344 carryover hours and a 240-hour ceiling. In any event, HHS apparently continued to permit Mr. Marden to carry over hours in excess of 240. Subsequently, when Mr. Marden transferred to DOL in January 1987, HHS furnished a statement to DOL showing his leave balance as 312 hours. It appears that DOL initially established his maximum leave carry over as 240 hours. However, after he made several inquiries as to why the higher amount HHS had certified to DOL was not being credited to him, DOL credited him with a 312-hour ceiling, for reasons DOL is unable to fully explain. In this regard, a July 1987 note from the timekeeper shows a balance of

339 hours of annual leave and contains the handwritten notation, "credit extra leave . . . different leave ceiling."

In 1991, a DOL timekeeper discovered the error and reduced Mr. Marden's annual leave ceiling to 240 hours from his annual leave balance at that time, which was 312 hours, resulting in the forfeiture of 72 hours of annual leave.

In his initial appeal to our Claims Group, Mr. Marden argued that he was entitled to a higher leave ceiling and, in the alternative, that he was entitled to have the 72 hours of forfeited leave restored on grounds of administrative error. 5 U.S.C. § 6304(d)(1)(A). The Claims Group denied his claims.

In his request for reconsideration, Mr. Marden does not dispute the Claims Group's settlement with regard to the leave ceiling. Indeed, the Claims Group correctly noted that the maximum annual leave carryover ceiling is established at 240 hours for most employees by statute. 5 U.S.C. § 6304. This statute provides for higher annual leave ceilings for certain specified classes of employees, none of which applies to Mr. Marden.

Mr. Marden, however, refers to a January 22, 1992 letter from the DOL Assistant Regional Manager for Financial Management advising him that, although the 312-hour ceiling was erroneous, upon receipt from him of a formal request to have the lost leave restored, the agency would restore the leave and allow him 2 years in which to use it. He now is willing to accept that alternative.

As a result of Mr. Marden's appeal of the January 22 determination, the Director of Personnel Management and the Comptroller for the Department considered the matter, and issued an April 21, 1992 memorandum denying his claim for the higher leave ceiling and finding no administrative error upon which to restore the forfeited leave. Mr. Marden sought reconsideration, but in a May 11, 1993 memorandum, the agency Comptroller further advised Mr. Marden of his opinion that the restored leave was erroneously continued beyond its expiration date by his former agency and erroneously transferred to DOL. The Comptroller further advised that when the error was discovered at the end of 1991, the excess was correctly subtracted from Mr. Marden's leave account and DOL had no authority to return it to his account.

OPINION

We believe the analysis contained in the Comptroller's May 11 memorandum is correct.

The statutorily-authorized regulations issued by the Office of Personnel Management that implement 5 U.S.C. § 6304 provide that leave restored on the grounds of public

exigencies must be used not later than the end of the leave year ending 2 years after "(t)he date fixed by the agency head, or his designated official, as the termination date of the exigency of public business which resulted in forfeiture of the annual leave." 5 C.F.R. § 630.306(b).[2] The record does not disclose what this date was in Mr. Marden's case, although it could be no later than the date in 1980 when he transferred from DOJ to HHS, which would then at the maximum have allowed him until the end of the 1982 leave year to have used the restored leave. Forfeited annual leave may be restored only according to the terms of the applicable statute and regulations, and there is no provision for the extension of the time to use such restored leave, even in extenuating circumstances. Consequently, restored annual leave that is not used within the 2-year period is forfeited again with no further right to restoration. Dr. James A. Majeski, B-247196, Apr. 13, 1992.

Administrative error may not serve as the basis to extend the 2-year period in which to use restored annual leave. This is so even where the agency fails to establish a separate leave account as required by the statute (Patrick J. Quinlan, B-188993, Dec. 12, 1973), where the agency fails to fix the date for the running of the two years as required by the regulations (William Corcoran, B-213380, Aug. 20, 1984), or where the agency, absent regulations requiring otherwise, fails to properly advise the employee regarding the rules for the use of restored leave (Dr. James A. Majeski, supra).[3]

The basis for Mr. Marden's claim is that he should not lose the use of the restored forfeited leave since he believed DOJ had increased his annual leave ceiling because of his inability to schedule annual leave and that both HHS and DOL subsequently recognized this higher ceiling. As noted above, however, there is no evidence in the record to show that DOJ established a higher leave ceiling, which would not have been proper in any event. The memorandum approving his request for restored

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[2]There is a separate time period for leave forfeited due to extended exigencies which threaten the national security, safety or welfare, but that appears not to be applicable here. 5 C.F.R. § 630.309.

[3]The only exceptions to this rule we have recognized are where the agency erred in charging an employee's regular leave account instead of his restored account, contrary to his specific instructions and where no separate category appeared on his pay statement to reflect the restored hours, Robert D. McFarren, 56 Comp. Gen. 1014 (1977), and where the agency failed to follow its nondiscretionary policy that required the agency to plan and schedule an employee's leave to avoid forfeiture (Charles R. Cox, B-252773, Dec. 16, 1993). In those cases, we allowed the agency to substitute the restored leave for the charged annual leave and to then restore any resulting excess annual leave on the basis of administrative error. Neither exception applies to the facts of Mr. Marden's case.

leave expressly states the leave would be placed in a separate account and the leave transfer record prepared by DOJ upon his transfer to HHS showed that while his leave balance was 344 hours, his ceiling was 240 hours. Furthermore, even if he had been given such erroneous advice, that would not have tolled the running of the 2-year period in which he had to use the restored leave. Corcoran, supra.

While the errors and misunderstanding that occurred in this case are unfortunate, they may not serve as the basis for extending for another 2 years the period to use leave that was restored to Mr. Marden in 1979 and forfeited at the end of the 1982 leave year at the latest.

Accordingly, the Claims Group's settlement is affirmed.

for Seymour Efros

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

5351710

Decision

Matter of: LB&M Associates, Inc.--Entitlement to Costs

File: B-256053.4

Date: October 12, 1994

Paralee White, Esq., Cohen & White, for the protester.
John R. McCaw, Esq., and A. L. Haizlip, Esq., Federal Aviation Administration, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is entitled to reimbursement of reasonable costs of filing and pursuing protests where the agency did not undertake an adequate investigation of the validity of the protest grounds until more than 5 months after the protester filed the initial protest, which directly raised the issue that led to the agency taking corrective action.

DECISION

LB&M Associates, Inc. requests that our Office declare it entitled to reimbursement of the reasonable costs of filing and pursuing three protests challenging the award of a contract to Galaxy Scientific Corporation under request for proposals (RFP) No. DTFA02-93-R-00021, issued by the Federal Aviation Administration (FAA) for technical support services.

We find that the protester is entitled to the reasonable costs of filing and pursuing its protests, including attorneys' fees.

The RFP, issued on April 13, 1993, called for the award of a time and materials contract for a base year with 4 option years. Proposals were to include a detailed staffing plan describing the personnel to be assigned to fill each of the 14 labor categories. The RFP listed estimated annual hours for each labor category and required offerors to propose an hourly rate for each category. The proposed rates were to include direct and indirect labor, indirect material, overhead, general and administrative costs, and profit.

The project manager position, the most important single position, was not one of the labor categories for which a rate was to be proposed; instead, the RFP stated that the

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"project manager is considered to be an overhead cost." Although the RFP did not include an estimate of annual hours for that position, the FAA expected the project manager's services on a full-time basis.

Galaxy and LB&M were among the offerors submitting proposals. Galaxy's proposal included a separate labor category for a "program manager" (as opposed to the project manager called out in the RFP), and an hourly rate that would be a direct-charge for his services, which Galaxy estimated would be needed 600 hours per year.

The FAA raised a number of subjects with Galaxy during discussions, which that company claims lasted less than 15 minutes. In those discussions, the agency apparently did not question the basis of Galaxy's adding the program manager labor position; instead, the FAA told the company that doing so was acceptable, but could increase Galaxy's proposed price, thus jeopardizing its chances of success. Nonetheless, Galaxy retained the program manager position in its best and final offer (BAFO).

Because Galaxy's proposed BAFO price was significantly lower than LB&M's, while its technical rating was slightly higher, the agency selected Galaxy for award on December 9, 1993.

In its first protest, filed on December 17, LB&M alleged that the agency could not have conducted an adequate cost analysis because Galaxy's proposed price was unrealistically low, and that it was improper to allow Galaxy to add a program manager position. Upon review of the agency report, LB&M filed two supplemental protests in February 1994, raising other grounds related primarily to Galaxy's pricing structure.

In response to the protests, the FAA contended that it was not required to perform a cost analysis because there had been adequate competition. The agency also argued that this contract did not expose the government to the risk arising from a cost reimbursement contract because the rates for each labor category were fixed. The agency stated that it understood that Galaxy's program manager was a part-time supervisory position, separate and apart from the full-time project manager position.

Because of apparent inconsistencies in the agency's position, we asked the FAA to clarify a number of points related to the evaluation of the pricing structure in Galaxy's proposal, including the agency's reasons for finding acceptable Galaxy's proposed use of a program manager and for finding acceptable the estimate that this individual would work only 600 hours a year on the contract.

The FAA responded that it would pay Galaxy for each hour of the program manager's time devoted to the contract, but that it intended to closely monitor that person's work to avoid excessive hours. The agency stated that Galaxy's use of both a project manager and a program manager hurt Galaxy's competitive position in the price evaluation, since the program manager's 600 hours were added to Galaxy's proposed price, which the agency believed included overhead covering a full-time project manager.

LB&M's reply argued that the FAA erred in claiming that Galaxy was offering the agency two managers, and pointed out that, in fact, Galaxy's proposal identified the same individual, by name, both as program manager and project manager. According to LB&M, it appeared that Galaxy's program manager was a replacement for, not an addition to, the project manager called out in the RFP. LB&M contended that Galaxy had not treated the program/project manager as an overhead cost (as required by the RFP) and that its overall proposed price thus included only 600 hours of the manager's time, not full time plus 600 hours (the program manager's 600 hours and the project manager's full-time work), as the agency had assumed. In that case, obtaining Galaxy's manager's services on a full-time basis, which the agency expects to need, could entail direct charges well over three times the amount that Galaxy's proposal estimated.

Our Office then conducted a telephone conference with the parties to clarify the positions of the agency and Galaxy. During that conference, the agency conceded that Galaxy had named the same person for both positions in its BAFO, but argued that Galaxy had also provided an organization chart listing the name of a different individual to fill one of the positions.

Several days after the conference, the FAA advised our Office that "after analyzing data and information disclosed to [the FAA] in the GAO telephone conference," the agency had concluded that it was in the best interest of the government and the offerors to "immediately and thoroughly re-examine the underlying procurement in its entirety." In response to our Office's request that the FAA identify the recently disclosed "data and information" on which it was relying, the agency stated that it was referring to Galaxy's intent to use one person, whose time would be a direct charge to the agency, for the program/project manager position. Because the agency advised that it had decided to terminate Galaxy's contract, our Office dismissed the protests as academic.

LB&M contends that it is entitled to recover the costs of filing and pursuing its protests, including reasonable

attorneys' fees, under section 21.6(e) of our Bid Protest Regulations. 4 C.F.R. § 21.6(e) (1994). Under that provision, we may declare a protester entitled to costs, including reasonable attorneys' fees, where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558.

The FAA asserts that award of costs is unwarranted because its corrective action was not taken in response to a protest but rather in response to the discovery of new information justifying termination of Galaxy's contract. The agency argues that it took prompt corrective action after its "independent re-examination of the underlying procurement" disclosed deficiencies in Galaxy's proposal. The agency contends that LB&M's protest was not clearly meritorious, since the FAA had made "direct inquiries" of Galaxy during the course of the protests and had been assured that "the FAA's understanding and interpretation of the RFP and Galaxy's proposal [were] also Galaxy's understanding and interpretation."

In its initial protest and throughout the ensuing multiple filings, LB&M argued that the agency had improperly permitted Galaxy to add a program manager as a direct-charge position and had not considered the impact of that addition on Galaxy's price. While the agency claims that the corrective action was based on the FAA's independent reexamination of the procurement, that "re-examination" was not only a direct result of the protests, but also focused on the specific issues raised by the protests. We therefore reject the agency's argument that the corrective action was not taken in response to the protests.

In deciding whether the corrective action was prompt under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. David Weisberg--Entitlement to Costs, 71 Comp. Gen. 498 (1992), 92-2 CPD ¶ 91. Here, the FAA had an obligation to promptly and adequately investigate the validity of the protester's position that Galaxy's addition of a program manager position was improper. While the agency insists that it did raise this matter with Galaxy immediately after the initial protest was filed and was told that Galaxy and the agency shared the same "understanding and interpretation of the RFP," that inquiry was without effect. The only relevant information, which LB&M brought to the agency's attention, was apparent on the face of Galaxy's proposal: Galaxy had proposed the same named individual as both project manager and program manager. Once the agency considered the implications of that fact, it took corrective action within days--but more than 5 months

elapsed between the filing of the protest and the agency's conceding that Galaxy's direct-charge program manager was the very same person as the project manager.[1] Because the initial protest challenged the propriety of Galaxy's separate program manager position and the key evidence supporting that protest ground was apparent from the face of Galaxy's proposal, the agency's delay was not justified. See Tucson Mobilephone, Inc.--Entitlement to Costs, 73 Comp. Gen. 71 (1994), 94-1 CPD ¶ 12.

LB&M's protest of the award to Galaxy was clearly meritorious. As LB&M argued throughout, the agency's permitting Galaxy to add an extra labor category to the direct-charge items had given that company an unfair advantage over LB&M. From the initial protest filing, LB&M challenged the specific line item in Galaxy's proposal that eventually caused the agency to conclude that Galaxy's proposal, as submitted, was unacceptable. The defect presented by that line item was evident from the plain language of Galaxy's proposal. Accordingly, the unacceptability of that proposal and the merit of the protester's argument that award to Galaxy was improper should have been readily apparent to the agency. In short, neither legally nor factually was this a close case.

The agency's failure to take prompt corrective action frustrated the intent of the Competition in Contracting Act of 1984, 31 U.S.C. § 3551 et seq. (1988), by impeding the economic and expeditious resolution of these protests. See David Weisberg--Entitlement to Costs, supra. Accordingly, we find that LB&M is entitled to recover the costs of filing and pursuing the protests, including reasonable attorneys' fees.[2] LB&M should submit its claim for costs, detailing

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[1]Although during the telephone conference, the agency appeared to defend the acceptability of using the same person as both program manager and project manager, the agency apparently realized afterward that Galaxy's proposal may have substantially understated its actual probable cost to the government.

[2]The agency requests that, if our Office determines that LB&M is entitled to its protest costs, entitlement should be limited to costs associated with the program manager issue and exclude costs incurred pursuing other protest issues. We do limit the recovery of protest costs where the issues on which the protester prevailed are clearly severable from those on which the protester was unsuccessful. See, e.g., Komatsu Dresser Co., 71 Comp. Gen. 260 (1992), 92-1 CPD ¶ 202. In this case, however, there were no clearly severable issues; the protest grounds all concerned the

(continued...)

and certifying the time expended and costs incurred, directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

Robert P. Murphy
for Comptroller General
of the United States

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[2](...continued)
impropriety of the pricing structure in Galaxy's proposal, and the specific allegations were essentially components of the challenge to that pricing structure. Under these circumstances, we decline to limit the finding of entitlement to costs related to one component of that challenge.

Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: General Accounting Office Personnel Appeals Board - Compensation of Members

File: B-258548

Date: October 14, 1994

DIGEST

The statute establishing a specified rate of basic pay of members of the General Accounting Office Personnel Appeals Board permits compensation on an hourly basis for time spent carrying out the duties of the Board. Federal Retirement Thrift Investment Board, B-230685, October 6, 1988, and related cases overruled.

DECISION

The Chairman of the General Accounting Office Personnel Appeals Board ("the Board") asks whether a member of the Board must be compensated for a full day while carrying out Board business regardless of the hours worked. The compensation for Board members is set out in 31 U.S.C. § 751(e), which states in pertinent part:

> "While carrying out a member's duties (including travel), a member who is not an officer or employee of the United States Government is entitled to basic pay at a rate equal to the daily rate of basic pay payable for grade GS-18 of the General Schedule. . . ."

Board members currently are compensated at a rate equal to one-eighth of the daily rate for each hour that a member works on Board business.

In several decisions involving language similar to the compensation provision for Board members, we concluded that the board or commission members concerned were entitled to be paid a full day's pay for a partial day's work. The Chairman of the Personnel Appeals Board asks whether, in light of these decisions, the Board may continue its current practice of payment on an hourly basis. The Chairman explains that Board members often work only a few hours a day and are free to pursue other business. Based on the language of the statute establishing the compensation rate

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for Board members, we believe that the members may continue to be compensated on an hourly basis.

In a prior decision, 28 Comp. Gen. 211 (1948), the President of the Board of Commissioners of the District of Columbia asked for our opinion concerning a provision relating to per diem compensation to be paid to members of the District of Columbia Redevelopment Agency. The provision in question read in pertinent part:

> "[T]he member shall receive no salary as such, but those members who hold no other salaried public position shall be paid a per diem of $20 for each day of service at meetings or on the work of the Agency."

We were asked whether under this language the daily compensation should be paid irrespective of the number of hours actually spent on agency business. Although the language could be read to support either view, we held that the provision established a daily allowance which accrued to members for each day in which they worked regardless of the number of hours actually worked. We stated that it did not seem reasonable "to attribute to Congress an intent to require a proration of the stipulated per diem for service of less than 8 hours in any one day." 28 Comp. Gen. at 212. On several occasions since 1948, we have been asked whether members of commissions or boards paid in accordance with similar language must be paid for a full day's work irrespective of the amount of time actually worked. E.g., Federal Retirement Thrift Investment Board - Compensation of Members, B-230685, Oct. 6, 1988; Wiretap Commission, B-182851, Feb. 11, 1975; 45 Comp. Gen. 131 (1965). In each case we stated that the per diem compensation must be paid in full as long as the employee worked any part of the day, citing our 1948 decision.

The language governing compensation of Personnel Appeals Board members states only that they are "entitled to basic pay at a rate equal" to that of a GS-18. As was the case with the District of Columbia Redevelopment Agency in 1948, this statutory language is clearly broad enough to allow either daily compensation for Board members, who do not keep regular hours, or hourly-based compensation at the specified rate. We believe that, absent contrary direction in the applicable legislation, agencies with compensation authority similar to that applicable to the Personnel Appeals Board may compensate boards or commission members on an hourly or on a daily basis. As discussed below, this view reflects the previous change in our interpretation of similar statutory language applying to experts and consultants employed by the federal government under 5 U.S.C. § 3109.

It also recognizes the discretion evident in the authorizing language itself.

In a number of decisions prior to 1979, we held that temporary or intermittent employees appointed by federal agencies were "entitled, for each day of service, to the per diem rate prescribed in their contracts of employment regardless of the total number of hours worked or their daily rate of compensation." 28 Comp. Gen. 329, 330 (1948). See also, 46 Comp. Gen. 667 (1967); 58 Comp. Gen. 90 (1978). In construing similar language in 1979, however, we concluded that agencies had discretion to pay on either an hourly or daily basis. Land Commissioners, B-193584, Jan. 23, 1979.

In Land Commissioners, the commissioners concerned were appointed by the Federal District Courts under 5 U.S.C. § 3109, authorizing employment of experts and consultants. The act appropriating funds for their compensation stated that their pay "shall not exceed the daily equivalent of the [rate of a GS-18]." The Administrative Office of the United States Courts set the pay of the commissioners at the maximum amount, that is the daily rate for a GS-18, but decided to compensate the commissioners on an hourly basis because on some days they might spend only a few minutes or hours on commission work and were otherwise free to pursue other occupations. We recognized that neither the statute authorizing appointment nor the statute establishing the daily rate of pay required payment on a daily rate basis. Agencies, we concluded, had the discretion to pay on an hourly basis. In light of our statutory interpretation in Land Commissioners and the specific language governing pay of Personnel Appeals Board members, we conclude that Board members also may be paid on an hourly basis.[1]

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[1]We note that there are statutes which evidence a clear intention that board members or commissioners are to be compensated for an entire day irrespective of the number of hours worked. For example, in Navajo and Hopi Relocation Commissioners, B-236241, Feb. 25, 1991, the applicable statute provided that:

> "Each member of the Commission . . . shall receive an amount equal to the daily rate paid a GS-18 . . . for each day (including time in travel) or portion thereof during which each member is engaged in the actual performance of his duties. . . ." [Emphasis added.]

In that instance, we concluded that the Commissioners were entitled to a full day's pay for a "portion" of a day that they worked.

To the extent that this decision is inconsistent with prior decisions in cases such as Federal Retirement Thrift Investment Board, B-230685, Oct. 6, 1988, those cases are overruled.

for Comptroller General
of the United States

October 18, 1994

B-255548

DIGEST

The Clean Air Act authorizes the Environmental Protection Agency (EPA) to exempt clean fuel fleet vehicles from high-occupancy vehicle (HOV) restrictions. However, the clean fuel provisions of the Clean Air Act do not authorize EPA to establish ILEV standards for the purpose of granting the HOV exemption only to those vehicles qualifying as ILEVs.

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Comptroller General
of the United States

Washington, D.C. 20548

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B-255548

October 18, 1994

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

In your letter of August 3, 1993, and subsequent discussions, you requested our opinion as to (1) whether the Clean Air Act authorizes the Environmental Protection Agency (EPA) to exempt clean fuel fleet vehicles from complying with state-imposed high-occupancy vehicle lane restrictions, and (2) whether the act authorizes EPA to establish standards for Inherently Low Emission Vehicles (ILEVs) for the purpose of giving ILEVs relief from transportation control measures (TCMs) beyond that received by other clean fuel fleet vehicles. For the reasons discussed below, we believe that (1) EPA is authorized to exempt clean fuel fleet vehicles from HOV restrictions, and (2) the clean fuel provisions of the Clean Air Act do not authorize EPA to establish ILEV standards for the purpose of granting the HOV exemption to only those vehicles qualifying as ILEVs.

BACKGROUND

The Clean Air Act Amendments of 1990 established a clean fuel vehicle program, designed to encourage the manufacture and use of alternatively fueled vehicles.[1] The act defines "clean-fuel vehicle" to mean any vehicle that meets the applicable emissions standard.[2] A "clean alternative fuel" is any fuel used by a clean fuel vehicle.[3] Section 242 requires EPA to promulgate standards "for the clean fuel vehicles specified in this part."[4] Sections 243 and 245

[1]42 U.S.C. §§ 7581-90.

[2]42 U.S.C. § 7581(7).

[3]42 U.S.C. § 7581(2).

[4]42 U.S.C. § 7582(a).

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specify clean fuel vehicles and their associated emissions standards.[5]

Section 246 of the act requires states with "covered" areas[6] to establish, in their state implementation plans,[7] a mandatory clean fuel vehicle phase-in program for centrally fueled vehicle fleets. Under section 246(b), the affected states must require entities that operate centrally fueled vehicle fleets to supply a gradually increasing portion of their fleets with vehicles powered by clean alternative fuels.[8] Section 246(c) requires certain fleet vehicles to meet "accelerated" emissions standards in order to be considered clean fuel fleet vehicles.[9]

Section 246(f) establishes a clean fuel credit program, which allows fleet owners to receive credits for the purchase of ultra-low emission vehicles (ULEVs) and zero

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[5]42 U.S.C. §§ 7583, 7585.

[6]42 U.S.C. § 7586. States with "covered" areas are those containing ozone nonattainment areas that EPA has classified as "serious" or worse, or carbon monoxide nonattainment areas with a design value of at lease 16.0 parts per million. 42 U.S.C. § 7586(a)(2). Nonattainment areas are areas whose air quality does not meet EPA-established standards.

[7]The Clean Air Act establishes that "[e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State[.]" 42 U.S.C. § 7407(a). A state fulfills that responsibility by promulgating "a plan which provides for implementation, maintenance, and enforcement" of federally mandated air quality standards. 42 U.S.C. § 7410(a)(1). The state must submit this state implementation plan to the EPA for approval. 42 U.S.C. § 7410(k)(3). Once approved, the plan "become[s] federal law, and [is] fully enforceable in federal court." Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989).

[8]42 U.S.C. § 7586(b). The phase-in requirements commence in model year 1998. Id. Section 246 only applies to fleets with 10 or more vehicles. Id.; 42 U.S.C. § 7581(5).

[9]42 U.S.C. § 7586(c). The act imposes more stringent standards on light duty vehicles (LDVs), and light duty trucks (LDTs) less than 6,000 lbs. GVWR (gross vehicle weight rating), beginning with model year 2001. 42 U.S.C. § 7583(a), (b). Under section 246(c), fleet LDVs and LDTs under 6,000 lbs. GVWR must comply with the model year 2001 standards as early as 1998. 42 U.S.C. § 7586(c).

emission vehicles (ZEVs).[10] Fleet owners may use credits to offset section 246(b)'s clean fuel vehicle phase-in requirement, or sell the credits to other fleet owners.[11] Section 246(f)(4) provides that EPA may establish the ULEV and ZEV standards "solely for the purpose of issuing credits" to fleet owners whose vehicles meet these stricter standards.[12]

Section 246(h) of the act states:

> "The Administrator shall by rule, within 1 year after the enactment of the Clean Air Act Amendments of 1990, ensure that certain transportation control measures including time-of-day or day-of-week restrictions, and other similar measures that restrict vehicle usage, do not apply to any clean-fuel vehicle that meets the requirements of this section. This subsection shall apply notwithstanding [title I]."[13]

Title I of the Clean Air Act requires states, among other things, to adopt transportation control measures for certain ozone nonattainment areas classified as "serious," and all ozone nonattainment areas classified as "severe" or worse.[14] Transportation control measures include a variety of methods of reducing vehicle use, such as banning certain vehicles from congested areas during certain times of the day or days of the week, and establishing high-occupancy vehicle (HOV) lanes.[15]

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[10]42 U.S.C. § 7586(f)(1). Fleet owners also earn credits for purchasing more clean fuel vehicles than the act requires. Id.

[11]42 U.S.C. § 7586(f)(2)(A).

[12]42 U.S.C. § 7586(f)(4).

[13]42 U.S.C. § 7586(h).

[14]42 U.S.C. § 7511a(c)(5), (d)(1).

[15]See 42 U.S.C. § 7408(f)(1)(A). The only significant explanation of section 246(h) in the Clean Air Act Amendments legislative history appears in Representative Lent's extension of remarks discussing the amendments. In his remarks, Representative Lent, a supporter of the amendments, indicated his understanding that the TCM exemption was intended to be broad, in order to provide a market incentive for the development of clean fuel vehicles. Representative Lent did not refer to any EPA authority to

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On March 1, 1993, EPA promulgated the rule required by section 246(h), exempting clean fuel fleet vehicles from certain TCMs.[16] The rule requires states with "covered" areas to exempt all clean fuel fleet vehicles from those TCMs

> "existing wholly or partially for air quality reasons included in an approved state implementation plan which restrict vehicle usage based primarily on temporal considerations, such as time-of-day and day-of-week [restrictions]."[17]

However, the rule states that, with one exception, "[t]his exemption does not include access to high occupancy vehicle (HOV) lanes . . . ."[18] As discussed below, the one exception is for ILEVs.

In the rule, EPA defines standards for ILEVs, which are more stringent than the standards applicable to clean fuel fleet vehicles in general.[19] ILEVs are the only vehicles that the rule exempts from HOV restrictions.[20] In addition, the preamble to the rule states that EPA intends eventually to exempt ILEVs from all TCMs not primarily related to safety, to the extent practicable.[21]

EPA contends that section 246(h) authorizes the expanded TCM exemption for ILEVs, stating that the section allows EPA

> "to tailor which CFFVs [clean fuel fleet vehicles] are entitled to exemption from which TCMs (so long as each sub-set of CFFV is exempt from some vehicle usage restrictions, and every CFFV is

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[15](...continued)
establish a separate TCM exemption for clean fuel vehicles with especially low emissions.

[16]58 Fed. Reg. 11888 (1993) (codified at 40 C.F.R. § 88.307-94(a)).

[17]40 C.F.R. § 88.307-94(a).

[18]Id.

[19]Compare 58 Fed. Reg. 11907 with 42 U.S.C. § 7583 (a)-(c) (phase I standards), 42 U.S.C. § 7585.

[20]40 C.F.R. §§ 88.307-94(a), 88.313-93(c).

[21]58 Fed. Reg. at 11899.

exempt from time-of-day and day-of-week restrictions)."[22]

An attorney in EPA's Office of General Counsel has informed us that the legal views in the preamble represent those of the previous Administration. EPA does not currently have a position on whether section 246(h) authorizes the ILEV program. The ILEV program described in the March 1993 rule is now under review by EPA's Office of Mobile Sources. The attorney told us that the review is focusing on the policy implications of the program, rather than the legal authority for the program.

ANALYSIS

HOV Exemption for Clean Fuel Fleet Vehicles

In our view, EPA is authorized to exempt clean fuel fleet vehicles from HOV restrictions. The statute requires EPA to exempt clean fuel fleet vehicles from "certain" TCMs, "including time-of-day or day-of-week restrictions," and "other similar measures that restrict vehicle usage." Nothing in the language of section 246(h) defines the outer boundaries of the TCMs that may be covered by the exemption, other than that they be "similar" to time-of-day or day-of-week restrictions, and that they restrict vehicle usage. An HOV restriction typically is a time-of-day and day-of-week restriction. Further, there is no question that such a restriction is a transportation control measure that restricts vehicle usage.[23] Therefore, we see nothing in section 246(h) that prohibits EPA from exempting clean fuel fleet vehicles from HOV restrictions under section 246(h).

The sparse legislative history of section 246(h) does not compel a contrary result. The House-passed version of section 246(h) listed HOV restrictions in the same sentence with time-of-day and day-of-week restrictions as types of TCMs specifically covered by the exemption.[24] Thus, the House provision contained language that would have expressly required EPA to include HOV restrictions in the section

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[22]58 Fed. Reg. at 11896.

[23]Even if there are HOV restrictions that are in effect 24 hours a day, 7 days a week, in our view such restrictions would be sufficiently similar to the more typical HOV restrictions to be considered one of the "other similar measures that restrict vehicle usage" to which section 246(h) refers.

[24]H.R. 3030, 101st Cong., 2d Sess. § 201(b) (1990) (reprinted at 136 Cong. Rec. 12038) (permanent ed.).

246(h) exemption. An analogous provision in the Senate bill discussed trip reduction ordinances and vehicle use restrictions, but made no explicit mention of HOV restrictions.[25] The Conference Committee adopted the House version, but omitted mention of HOV lanes, and Congress enacted the bill as reported by the Conference Committee. The legislative history gives no explanation for the omission.

While section 246(h) as enacted omits the HOV language, it does not expressly prohibit EPA from exempting clean fuel fleet vehicles from HOV restrictions. Nor can this omission properly be construed as implicitly prohibiting EPA from doing so, where, as here, there is no explanation for the omission,[26] and, more importantly, where such a reading would be inconsistent with the apparent breadth of the language of the statute.[27] Accordingly, we conclude that

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[25]S.1630, 101st Cong., 2d Sess. S107 (1990) (reprinted at 136 Cong. Rec. S4389 (daily ed. April 18, 1990)).

[26]The Supreme Court has repeatedly refused to consider congressional failure to enact a given provision as evidence of congressional intent to effect the opposite result, because the Court generally considers congressional inaction to be an inadequate indication of legislative intent. E.g., Brecht v. Abrahamson, 113 S.Ct. 1710, 1719 (1993). On facts similar to those present here, our Office concluded that the deletion of language from a bill, absent an explanation in the legislative history, did not indicate that Congress intended to prohibit the conduct that the deleted language would have specifically authorized. 63 Comp. Gen. 498, 501-02 (1984).

[27]In this connection, section 1016(a) of the Intermodal Surface Transportation Efficiency Act (ISTEA), enacted after the Clean Air Act Amendments of 1990, deals with HOV restrictions. It delegates to the states the responsibility for defining the number of occupants a vehicle must have in order to be considered a high-occupancy vehicle. 23 U.S.C. § 102(a). However, this provision does not purport to modify EPA's authority under the previously enacted section 246(h). Moreover, we find nothing in the legislative history suggesting that Congress, in enacting ISTEA, intended to restrict or modify EPA's authority. Nor is there a conflict between the two provisions. Thus, section 1016 authorizes states to define what constitutes a high-occupancy vehicle, but does not purport to insulate HOV restrictions from the operation of other applicable federal laws, including section 246(h) of the Clean Air Act. Section 1016 of ISTEA does not implicitly repeal or modify

(continued...)

EPA is authorized to exempt clean fuel fleet vehicles from HOV restrictions.

Special HOV Exemption for ILEVs

With regard to the ILEV program, we believe that section 246(h) does not authorize EPA to single out clean fuel fleet vehicles that satisfy ILEV standards for the purpose of providing TCM exemptions beyond those received by other clean fuel fleet vehicles. Section 246(h) requires the Administrator to ensure that "certain" TCMs do not apply to "any clean-fuel vehicle that meets the requirements of this section." The provision does not purport to grant the Administrator discretion to determine which clean fuel fleet vehicles will benefit from the section 246(h) exemption. Under the language of the statute, "any" such vehicle meeting the requirements of section 246 receives it. A vehicle meets the requirements of section 246 if it is (1) a clean fuel vehicle (that is, if it complies with the applicable emissions standards established in section 243, 245, or 246), and (2) is part of a fleet subject to section 246.

As we indicated above, section 246(h) clearly gives EPA discretion to determine which TCMs fall within the exemption. However, once EPA makes that determination, the same set of exemptions must apply to "any clean fuel vehicle" that meets the section's requirements. We discern nothing in the provision's language that authorizes EPA to treat one type of clean fuel fleet vehicle differently from another.

In addition, the structure of the clean fuel provisions of the Clean Air Act strongly suggests that EPA's authority to establish additional benefits for particular clean fuel fleet vehicles is limited. The only discussion of such authority appears in section 246(f), authorizing the establishment of ULEV and ZEV standards. However, section 246(f) authorizes EPA to use those standards "solely" for the purpose of administering the credit program. Thus, EPA may not use these standards for the purpose of establishing an expanded TCM exemption. We find unpersuasive EPA's assertion that it may create standards for ILEVs, which are not specifically mentioned anywhere in the act, to establish an expanded TCM exemption for ILEVs, while the standards

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[27](...continued)
section 246(h). See TVA v. Hill, 437 U.S. 153, 189-90 (1977).

that section 246 specifically authorizes EPA to establish--for ULEVs and ZEVs--are unavailable for that purpose.[28]

Accordingly, we disagree with EPA's statements in the preamble to the March 1993 rule, to the effect that section 246(h) authorizes the creation of a multi-tiered TCM exemption for various types of clean fuel vehicles. As we noted above, while section 246(h) gives EPA discretion to decide which TCMs are affected by the exemption, it does not authorize EPA to tailor the extent of the exemption to the emissions levels of various clean fuel vehicles. Thus, we conclude that EPA is not authorized to grant an HOV exemption solely to ILEVs. Nor is EPA authorized to extend the ILEV exemption to all non-safety related TCMs, as the agency stated was its intention.[29]

CONCLUSION

For the reasons discussed above, we believe that (1) EPA is authorized to exempt clean fuel fleet vehicles from HOV restrictions, and (2) EPA is not authorized to establish ILEV standards for the purpose of granting the HOV exemption to only those vehicles qualifying as ILEVs.

We hope our comments are helpful to you. In accordance with our usual procedures, this opinion will be available to the public 30 days from its date.

Sincerely yours,

Robert P. Murphy

for Comptroller General
of the United States

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[28]We are aware that "where a statute is silent or ambiguous with respect to an issue" courts will give deference to an agency's statutory interpretation. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984). Here, however, section 246(h) is neither silent nor ambiguous with regard to EPA's authority to differentiate between types of clean fuel fleet vehicles for the purpose of administering the TCM exemption. Accordingly, courts would not be required to accord EPA's March 1993 interpretation deference in this case. See Presley v. Etowah County Commission, 112 S.Ct. 820, 831 (1992).

[29]EPA has cited to no other portion of part C of Title II of the Clean Air Act for authority to provide an expanded TCM exemption to ILEVs, and we have found none.

Comptroller General
of the United States

Washington, D.C. 20548

5302510

Decision

Matter of: Diagnostic Imaging Technical Education Center, Inc.

File: B-257590

Date: October 21, 1994

Manny Roman for the protester.
William E. Thomas, Jr., Esq., Department of Veterans Affairs, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a timely size protest was filed after small business-small purchase set-aside award, and the awardee was found by the Small Business Administration to be other than a small business, the agency, in the absence of legitimate countervailing reasons, should have terminated the contract and made award to the protester--the only eligible small business.

DECISION

Diagnostic Imaging Technical Education Center, Inc. (DITEC), protests the award of a purchase order to Radiological Service Training Institute (RSTI) under request for quotations (RFQ) No. 598-94-2-330-0192, issued by the Department of Veterans Affairs (VA) for the preparation of course materials and the teaching of two 10-day diagnostic imaging, glassware, and calibration courses.

We sustain the protest.

Two quotations were received by the February 11 due date; RSTI's was low at $17,600, and DITEC's was second low at $22,252. Both firms certified that they were small business concerns. On the same day, VA awarded the purchase order to RSTI. On February 25, DITEC inquired about the status of the award and was notified that award had been made to

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RSTI.[1] On March 2, DITEC timely protested the size status of RSTI to the contracting officer, who referred the matter to the SBA.[2] On May 16, the SBA found RSTI to be other than a small business. RSTI did not appeal this adverse determination.

Notwithstanding SBA's determination, VA did not terminate RSTI's contract. VA concedes that it could have terminated for this reason because RSTI was not a small business, but states that it determined that doing so would not be in the government's best interest because the contract was substantially performed. In this regard, VA explains that RSTI had completed preparation of a substantial amount of the course materials; the courses were scheduled to take place relatively soon--on July 18 and September 19--and VA had purchased nonrefundable airline tickets for its personnel to attend the courses. VA instead proposes to reimburse DITEC's protest costs.

In our view, VA should not have permitted RSTI's award to stand when it was apprised by the SBA that RSTI was not a small business. In American Mobilphone Paging, Inc., 69 Comp. Gen. 392 (1990), 90-1 CPD ¶ 366, we addressed facts very similar to those here, and concluded that two circumstances--the size protest was timely filed and the awardee did not appeal the SBA's determination--militated in favor of termination of the awardee's contract and award to the small business protester. Both circumstances are present here. First, RSTI's undisputably timely protest could not have been filed prior to award as it received only post-award notification. While FAR § 19.302(j) treats post-award size protests as having no applicability to the current contract, awards under set-aside procurements to other than small businesses should be terminated if possible, and SBA's regulations provide that such timely-filed size protests "shall apply to the procurement in question even though the contracting officer may have

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[1]Under the small purchase procedures which govern this procurement, there is no requirement that the agency issue a pre-award notice to unsuccessful vendors. See Federal Acquisition Regulation (FAR) § 13.106(b)(9).

[2]DITEC's protest was timely since it was filed within 5 business days of when DITEC received notice of the award to RSTI. 13 C.F.R. § 121.1603(a)(2) (1994); see also FAR § 19.302(d)(1)(ii).

awarded the contract prior to receipt of the protest."[3] 13 C.F.R. § 121.1603(a)(2); see also FAR § 19.302(d)(1)(ii). Further, RSTI did not defend its adverse size certification by appealing SBA's determination. Thus, in the absence of countervailing reasons, it would be inconsistent with the integrity of the competitive procurement system, and the intent of the Small Business Act, to permit a large business, which under the terms of the solicitation was ineligible for award, to continue to perform the contract. American Mobilphone Paging, Inc., supra.

We generally agree with VA that it was appropriate to take the best interest of the government into account in deciding whether termination was appropriate. However, we do not find support in the record for VA's determination that allowing RSTI's award to stand was in the government's best interest. There is no evidence that RSTI had already substantially performed the contract at the time of SBA's May 16 size determination. As noted above, the courses were scheduled on July 18 and September 19. Although RSTI's course materials show that they were prepared prior to May 16, there is no indication that any of the materials were prepared for the current procurement. In this regard, the course manual contains a 1987 copyright date and does not appear to include any specific references to the current VA solicitation. VA's purchase of the airline tickets for its employees was not relevant to the decision to continue RSTI's contract, since VA made the airline reservations and purchased the tickets on June 15 and July 25, that is, after being informed by SBA that RSTI was other than a small business.

We conclude that VA's determination to allow RSTI's award to stand upon receiving the SBA's determination that RSTI is other than small was improper, and sustain the protest on this basis. As the courses already have been conducted by RSTI, our agreement with the protester's position at this juncture obviously cannot result in termination of RSTI's contract and award to DITEC, the remedy DITEC seeks. DITEC is, however, entitled to reimbursement of its protest and proposal preparation costs. 4 C.F.R. § 21.6(d). In

[3]The agency also references FAR § 19.302(i) as allowing post-award SBA rulings to be ignored for the protested acquisition. However, that section, by its terms, only applies to appeals of SBA size determination.

accordance with 4 C.F.R. § 21.6(f), DITEC's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to VA within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States

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