U.S. Department of Transportation
Federal Aviation Administration

Memorandum

Subject: ACTION: Program Guidance Letter 91-9 Date: 27 SEP 1991

From: Manager, Grants-in-Aid Division, APP-500 Reply to Attn. of:

To: PGL Distribution List
91-9.1. Procurement of Professional Services (Jim Borsari, 267-8822).

Recently there have been instances where sponsors have requested cost or pricing information to be submitted with proposals for professional services. This is to clarify sponsor requirements when requesting proposals to provide such services in conjunction with an Airport Improvement Program (AIP) grant.

Section 511(a)(16) of the Airport and Airway Improvement Act of 1982, as amended, states:

> "(16) each contract or subcontract for program management, construction management, planning studies, feasibility studies, architectural services, preliminary engineering, design, engineering, surveying, mapping, or related services will be awarded in the same manner as a contract for architectural and engineering services is negotiated under title IX of the Federal Property Administrative Services Act of 1949 or an equivalent qualifications-based requirement prescribed for or by the sponsor of the airport;"

Paragraph 802(b) of FAA Order 5100.38A, the AIP Handbook, states, "A price quotation may accompany the initial submittal by the contractor provided it is in a separate sealed envelope which may not be opened until actual negotiations by the sponsor have begun with that contractor." (This issue was addressed in Program Guidance Letter 90-4, which deleted the "sealed envelope" option (copy attached as attachment 1)). It has been pointed out that the "sealed envelope" option conflicts with previous General Accounting Office (GAO) decisions. Copies of 64 Comp. Gen. 772 and 65 Comp. Gen. 476 are attached for your information as attachment 2.

GAO indicated that even though the evaluation board did not have knowledge or access to the cost proposals, requesting such information is improper since the Brooks Act only provided for cost proposal consideration after final ranking of the firms.

Some sponsors, however, have continued to request cost information. Therefore, to avoid any conflict with section 511(a)(16) of the AAIA, Airports offices should advise sponsors that no grant recipient may request any cost information (such as total cost, cost per chargeable hour, man-hours, etc.) for the services listed above until after a determination of the most highly qualified firm. After discussions with the most highly qualified firm to define the scope of work, that firm would then be requested to submit cost information to commence fee negotiations. The process would be repeated with the next "highly qualified firm" only if negotiations with the first firm are unsuccessful. This prohibition includes both formal requests under a Request for Proposals and informal requests made during discussions with firms to determine the most highly qualified firm.

Sponsors should be advised to delete any requirement for submittal of cost or pricing information in the submittal of qualifications. If a sponsor chooses to request such information, it should be advised that this method is contrary to Section 511(a)(16) of the AAIA and 49 C.F.R 18.36(t) and we would not be able to provide Federal aid for the resulting professional services contract. This guidance is applicable to airport and planning agency sponsors, including states.

This guidance has been coordinated with AAS-1. Changes to Advisory Circular 150/5100-14 and the AIP Handbook will be forthcoming.

Lowell H. Johnson

Attachments

ATTACHMENT 1

U.S. Department of Transportation
Federal Aviation Administration

Memorandum

Subject: Program Guidance Letter 90-4

Date: 27 JUL 1990

From: Manager, Grants-in-Aid Division, APP-500

Reply to Attn. of:

To: PGL Distribution List

90-4.1 Index of Current Items. Attachment 1 contains a new index of current items in Program Guidance Letters. Updates will be dated and may be retained for quick reference to PGL subject areas.

90-4.2 Grant Agreement Form - Mark Beisse (267-8826). Attachment 2 contains another version of page 3 in the standard grant agreement form which should replace that in Order 5100.38A and your supply of FAA Form 5100-37. This will improve the readability of grant agreements until we formally change the handbook and reprint the forms. Grants issued on the forms replaced by this PGL should be left unchanged.

90-4.3 Auditing 5 Percent of AIP Grants - Dick Angle (267-8825). The guidance furnished by PGL 89-5.2 and subsequently deferred in PGL 90-1.3 is hereby cancelled. The OMB agreed with the OIG position that we should not require these audits. (Attachment 3 is a copy of the OMB response.) We are revising the OMB "Compliance Supplement" to provide additional guidance for the Single Audit Act auditors to use. Attachment 4 is a copy of what was sent to OST. We also encourage you to request audit assistance from the OIG whenever you believe there may be a significant problem.

90-4.4 Procurement Methods - Dick Angle (267-8825). Please line through the sentence in FAA Order 5100.38A, paragraph 802b(2) that states "A price quotation may * * * have begun with that contractor." This statement is inconsistent with Advisory circular 150/5100-14A and Section 511 of the Airport and Airway Improvement Act of 1982, as amended. This sentence will be removed by the next change to 5100.38A.

90-4.5 Special Condition for Pavement Quality Control - Ed Williams (267-8809). Based on comments from the field we have revised certain portions of the special condition required by PGL 90-2.1. Please delete suggested paragraph c under item 1 and

ATTACHMENT 2

[B-218489, et al.]

chitect, Engineering, etc. Services—Costs, etc.

Form (SF) 254, "Architect-Engineer and Related Services Ques-
h architect-engineer (A-E) firms can document their general pro-
ons, need only be updated on annual basis, SF 255, "Architect-
ted Services Questionnaire for Specific Project," by which A-E
nt their SF 254 with specific information on the firm's qualifica-
r A-E project, should contain information which is "current and

hitect, Engineering, etc. Services—Practices—Evaluation of Competitors—Stated Criteria

which found the two top-ranked architect-engineer (A-E) firms
erred," acted improperly when it thereupon requested the firms
osals prior to selecting for negotiations the most highly qualified
ooks Act, 40 U.S.C. 541-544 (1982), which governs the procure-
es, contracting officials may not consider the proposed fees in
ional qualifications of A-E firms.

chitect, Engineering, etc, Services—Practices—Brooks Bill Applicability—Equality on

agency (1) failed to hold discussions with three architect-engineer
ticipated concepts and the relative utility of alternative methods
uired under the Brooks Act, 40 U.S.C. 541-544 (1982), (2) may
rms in order of preference based upon out-of-date or misleading
improperly requested firms to submit cost proposals prior to se-
ons the most highly qualified firm, agency's post-award decision
ns with the three A-E firms initially evaluated as most highly
evaluate their qualifications based upon updated information is

otests—Moot, Academic, etc. Questions—ion Proposed, Taken, etc. by Agency

contracting agency's proposed corrective action are matters for
and judgment of the agency. The inability to achieve total com-
a recompetition or speculation as to the agency's likely bad faith
ecompetition does not preclude otherwise appropriate corrective

nting Office—Recommendations—Contracts—Deficiencies—Correction

ing agency, although receiving notice of a protest within 10 days
nevertheless allows contract performance to continue on the
the contractor to cease performance would not be in the best
ited States, then GAO, in the event that it determines that the
nply with statute or regulations, must recommend corrective
rd to any cost or disruption from terminating, recompeting or

Matter of: Mounts Engineering; Department of the Inter
Request for Advance Decision, August 16, 1985:

Mounts Engineering (Mounts) protests the Department of
terior (Interior), Bureau of Mines' award of architect-engin
E) contract No. S0156015 to Potomac Engineering and Su
(Potomac). Mounts challenges the agency's determination t
tomac was the firm most highly qualified to perform the r
services, the collection of mine subsidence data, and alleg
the agency failed to comply with the requirements set forth
Brooks Act, 40 U.S.C. §§ 541-544 (1982), which governs the p
ment of A-E services.

Although Interior contests most of Mount's allegations,
cedes that contracting officials failed to conduct discussions
least three A-E firms as required under 40 U.S.C. § 543. Acc
ly, the agency proposes to reevaluate the qualifications of
the A-E firms which originally offered to satisfy the agen
quirement, this time conducting the required discussions w
firms. Interior requests an advance decision from our Office
31 U.S.C. § 3529 (1982), as to the propriety of its proposed co
action.

We sustain Mounts' protests and make no objection to In
proposed corrective action.

Generally, under the selection procedures set forth in the
Act and in the implementing regulations in the Federal
tion Regulation (FAR), subpart 36.6, 48 C.F.R. §§ 36.60
(1984), the contracting agency must publicly announce
ments for A-E services. An A-E evaluation board set up
agency evaluates the A-E performance data and statem
qualifications already on file, as well as those submitte
sponse to the announcement of the particular project. Th
then must conduct "discussions with no less than three f
garding anticipated concepts and the relative utility of alt
methods of approach for furnishing the required servi
U.S.C. § 543. The firms selected for discussions should inc
least three of the most highly qualified firms." FAR, § 36.
Thereafter, the board recommends to the selection official
of preference no less than three firms deemed most high
fied.

The selection official then must make the final selection
of preference of the firms most qualified to perform the
work. Negotiations are held with the firm ranked first
agency is unable to agree with that firm as to a fair and re
price, negotiations are terminated and the second-ranked
invited to submit its proposed fee.

By notice published in the Commerce Business Daily
September 11, 1984, Interior announced a requirement
lection of mine subsidence data, *i.e.*, data on ground surfa

l by underground mining, at Kitt No. 1 Mine in Bar- West Virginia. The agency requested interested firms ındard Forms (SF's) 254, "Architect-Engineer and Re- s Questionnaire," by which A-E firms can document professional qualifications, and 255, "Architect-Engi- lated Services Questionnaire for Specific Project," by rms can supplement their SF 254 with specific infor- ıe firm's qualifications for a particular project. Poto- and nine other firms responded to the announcement. :d above, Interior then evaluated qualifications with- ıe required discussions with three A-E firms.

ıcy's initial evaluation of qualifications, Potomac re- ghest point score, 890 points, while Mounts received ighest score, 880 points. The next highest point score points.

closeness of the evaluation of the two firms, contract- determined that Potomac and Mounts were "equally ıd therefore requested them to submit cost proposals. s objected that it was improper to consider cost before of the most highly qualified firm, the contracting offi- that Mounts might be considered "non-responsive if n't submit costs." Mounts thereupon submitted a cost hich it offered to provide the required services at unit g from 26.7 percent to 100 percent above those offered

ereafter, the evaluation board was requested to re- qualifications of Potomac and Mounts in order to st preferred firm. Upon reevaluation, the board gave alifications a score of 930 points and Mounts' qualifi- re of 915 points. We note that the contracting officer [a]t no time did the evaluation board have knowledge to the cost proposals submitted by Mounts or Poto-

bsequently informed Mounts that it was negotiating c as the most preferred firm. Mounts thereupon pro- agency. When the contracting officer denied that pro- ead made award to Potomac, Mounts protested to our ts later supplemented its initial protest to our Office protest against award to Potomac.

Mounts' Allegations

estions both the procedures used in evaluating qualifi- he ultimate determination that Potomac was the most ied firm. Mounts argues that the procedures used to ac were improper, alleging that (1) the evaluation nted in bad faith and lacked the expertise required properly evaluate the qualifications for this type of

work, (2) that the board failed to conduct discussions wi three of the most highly qualified firms regarding antici cepts and the relative utility of alternative methods of and (3) that the agency should not have requested cost before selecting the most preferred firm. Mounts also qu determination that Potomac was the most highly qualifie leging (1) that there was no indication that Potomac coul requirement set forth in the CBD announcement for surveyor(s)," since the SF's 254 and 255 initially submitt mac, although indicating that the firm employed "Surv not indicate that its surveyors were "registered," (2) th sons listed in Potomac's SF 255 as key personnel for t either lacked surveying experience or were not emplo firm, (3) that Potomac lacked experience in subsidence r (4) that Potomac's "capacity" to perform was less th Mounts, (5) that the board gave Potomac credit in the past performance on government contracts for current monitoring work at another site performed at Potomac and in anticipation of the award of a contract for that s the board failed to give Mounts credit for having a local the work site and for its allegedly superior knowledge of ty of the project, (8) and that the reevaluation of qualifi inevitably influenced by Interior's knowledge of Poton prices. Finally, Mounts contends that Interior acted im permitting Potomac to amend its SF 255 after award include the resume of a registered surveyor with the other key personnel.

Interior's Response and Proposed Corrective Act

While Interior contests most of Mounts' allegations that the board failed to conduct the required discussio least three of the most highly qualified firms. The a agrees that the SF's 254 and 255 submitted by Potomac up-to-date," although it maintains that it is not unus SF's 254 and 255 submitted by A-E firms to be "out-o that the Brooks Act and FAR only require that firms aged to submit them on an annual basis.

In view of the failure to conduct the required discuss or proposes to undertake certain corrective measures. In the agency proposes (1) to obtain updated SF's 254 an the three firms previously rated most highly qualifiec point a new evaluation board, comprised of qualifiec from outside the Bureau of Mines, to conduct discussion reevaluate the qualifications of the three firms, and (mine, based upon the results of the above, whether to c contract with Potomac or to terminate it and make a other firm.

ver, requests that we render an advance decision ty of its proposed actions.

eficiencies in the Evaluation Process

became the Brooks Act was amended specifically cting officials to conduct discussions, regarding an- ts and alternative methods of approach, prior to he firm with which the agency should commence s to assure "as extensive an evaluation of alterna- and design concepts as is possible without requir- n work to be performed." H.R. Rep. No. 92-1188, ss. 8 (1972). The importance with which this "man- nent was viewed was apparent from the expectation n authority:

ns with an appropriate number of the firms interested in the sufficient knowledge as to the varying architectural and engi- hat, together with the information on file with the agency, will him to make a meaningful ranking.

2-1188, pp. 8, 10; Sen. Rep. No. 1165, 92d Cong., 2d

above, Potomac and Mounts were found to be ed" in the initial evaluation, while the reevalua- a mere 15 point or 1.6 percent difference between and 915 points, respectively. Given the closeness of we think that the failure to conduct discussions ented a meaningful ranking and could have de- f the opportunity for award.

the evaluations may be open to question on other

des that Potomac's SF's 254 and 255 were "not up- or example, although Potomac indicated in the SF nitted in response to the September 11 CBD an- he project that its proposed project manager was ated with Potomac, Interior has determined that has not worked for Potomac since he was hired by lines] in July, 1984."

ains that it "is not unusual for the SF 254 and 255 &E firms to be out-of-date" and that A-E firms couraged to submit them on an annual basis."

us, however, that at least SF 255 must be current of the particular project, since, under the regula- a means by which a SF 254 already on file can be ith specific information, information which is both D FACTUAL," as to a firm's qualifications for a ct. FAR, §§ 36.702(b)(2) and 53.301-255. The policy ouraging annual statements of qualifications, 40 plemented through submission and annual updat- SF 255. FAR, §§ 36.603(d) and 53.301-254.

Moreover, in setting forth the criteria which evaluatic could use in ranking A-E firms, neither the Act nor t menting regulations include cost as a consideration. 40 U. FAR, §§ 36.602-1 and 36.602-3. On the contrary, the Act for the consideration of cost during negotiations, *i.e.*, after ranking of firms, 40 U.S.C. § 544, while the regulations pr consideration of fees during discussions, FAR, § 36.602-3(fore, we question the propriety of requesting cost propo A-E firms prior to selecting the most highly qualified A-E

This reflects the congressional intent to continue the t method of procuring A-E services by first ranking the order of their qualifications and only then negotiating gress was convinced that any consideration of the propos a factor in ranking A-E firms would result in undue pr the firms to lower their proposed fees, which in turn versely affect the quality of the design by favoring the se "the less skilled, and those willing to provide a lowe effort." H.R. Rep. No. 92-1188, pp. 2-4; S. Rep. No. 116 Accordingly, it believed that:

[I]n no circumstances should the criteria developed by any agency hea the ranking of architects and engineers on the basis of their professior tions include or relate to the fee to be paid the firm, either directly o

H.R. Rep. No. 92-1188, p. 10; Sen. Rep. No. 1165, p. 8.

We recognize that we have previously held that where selection official, after taking into account all the evalu tors, including both price and technical factors, is unable between offerors, then he may properly consider "oth which are rationally related to a selection decision for t lar procurement," even though as a general rule award based upon evaluation criteria set forth in the solicitati *Hospital Service, Inc., (Blue Cross of Texas)*, 58 Comp. (1979), 79-1 C.P.D. ¶ 245. Nevertheless, given the legisl date to rank A-E firms without reference to compensati lieve that the fee proposed by a firm is not a factor ratio ed to deciding which A-E firm is most highly qualified the required services.

Accordingly, we see no reason to question Interior's sion to conduct discussions with the three firms ranked the initial evaluations and to reevaluate their qualific protest is sustained.

Mounts' Objections to Interior's Proposed Corrective

Mounts also objects to some portions of Interior's p corrective action. Mounts questions Interior's intention updated SF's 254 and 255, believing that this would give competitive advantage as a result of the experience gain employees hired in performing the current contract

nether contracting officials can be trusted to undertake evaluation. In any case, it argues that the proposed ction does not address all of the allegations that it

previously held that the details of implementing one of endations for corrective action are within the sound id judgment of the contracting agency. *General Electric Services Company*, B-190632, Sept. 21, 1979, 79-2 . We believe that the agency possesses a similar discre- as here, it decides on its own to implement corrective

as not demonstrated that Interior abused this discretion to consider updated SF's 254 and 255 in the reevalua- ifications. Mounts has itself called into question the hich Potomac's original SF's 254 and 255 accurately re- mac's qualifications at that time. Moreover, we do not unreasonable for Interior to seek to assure itself that ermined to be most highly qualified upon reevaluation urrently best able to perform under a new contract, firm's current, as opposed to past, capability which is nt to the quality of the work the government can ceive. Cf. *Beacon Winch Company—Request for Recon-* -204787.2, Aug. 15, 1983, 83-2 C.P.D. ¶ 205 (responsibil- ther a bidder has the apparent ability and capacity to contract requirements, should be based on the most rmation available to the contracting officer); but cf. *achez Associates*, B-218404.2, B-218474, June 10, 1985, en. 603 85-1 C.P.D. ¶ 661 (evaluation of A-E firm's s relative to other offerors differs from a negative re- determination).

nize that Potomac's competitive position may benefit perience gained and from the additional staff employed g the current contract. Nevertheless, we do not think to preclude Interior in a reevaluation from considering erformance under the current contract. *Honeywell In- ystems, Inc.*, 56 Comp. Gen. 505 (1977), 77-1 C.P.D. ¶

oint out that Mounts' contention that the reevaluation conducted in good faith is wholly speculative at this *General Electric Information Services Company*, B- a, 79-2 C.P.D. ¶ 209 at 3 (speculation as to proposed tion). Interior has proposed selection of a new evalua- comprised of qualified personnel from outside the lines, and Mounts has failed to demonstrate that the will not fairly evaluate the firm's qualifications. Cf. *cturing Co., Inc.* B-217515, B-217516, Feb. 7, 1985, 162 (to establish bad faith, a protestor must present

virtually irrefutable proof that government officials and malicious intent to injure the protester).

Given Interior's decision to reevaluate qualificatio updated SF's 254 and 255, we need not consider Mou contentions as to other possible improprieties in the uations, since these are now academic. See *Sunbelt In* B-214414, July 20, 1984, 84-2 C.P.D. ¶ 66.

Recommendation

Mounts' initial protest to our Office was filed 8 after the award to Potomac. Although we notified the protest on the same day it was filed, Interior permitt continue contract performance, finding that it would best interest of the Government" to direct Potomac formance.

The bid protest provisions of the Competition in C of 1984 § 2741(a), 31 U.S.C.A. §§ 3551-3556 (West Su quire a federal agency to direct a contractor to ceas where the contracting agency receives notice of a pro days of the date of contract award unless the head o ble procuring activity makes a written finding either performance is in the best interests of the United there are urgent and compelling circumstances signi ing the interests of the United States which do not for a decision. 31 U.S.C. § 3553(d). Where the agen formance to continue without a finding of urgent a circumstances, we must recommend any required co without regard to any cost or disruption from termi peting or reawarding the contract. 31 U.S.C. § 3554(b)

By separate letter to Interior, we are therefore that if Interior determines upon reevaluation that than Potomac is the best qualified firm, the agency nate the contract with Potomac and award to that mutually satisfactorily contract can be negotiated w to FAR, § 36.606.

Since qualifications are to be reevaluated with M full opportunity to compete, we have not declared M titled to the costs of pursuing its protests, cf. *Feder R.I., Inc.*, B-218192.2, May 7, 1985, 85-1 C.P.D. ¶ 5 the costs of pursuing a protest inappropriate where an opportunity to compete for award under a cor tion), and of responding to the CBD announcer § 21.6(e).

ıent of attorney fees and other expenses incurred in the foreclosure proceedings initiated in state courts, including ses of a court-ordered sale of an employee's former resi- evertheless, we have expressed the view that the term ı" as used in the regulations has the limited meaning of a v or an action before a court.[7]

ɔresent case we consequently find that Mr. and Mrs. Bis- sfer of title to their old residence by warranty deed to the Housing Finance Authority, in exchange for $10 and their ɔm their mortgage contract, constituted a "sale" within ing of that term as used in 5 U.S.C. § 5724a and FTR, 1, notwithstanding that the transaction did not involve ry open-market realty sale. We further find that Mr. Bis- n may not properly be disallowed on the basis that he is eimbursement of the costs of litigation, since no suit at ion before a court was ever initiated in this matter.

ion, we find that the legal fees and expenses incurred by e were necessary and reasonable for representational and ervices required in negotiating the transfer of title, and ay therefore be reimbursed in the full amount claimed if determines that the fees and expenses were within the range in the locality.[8]

estion presented is answered accordingly. The voucher d documents are returned for further processing consist- ne conclusions reached here.

[B-218489.4]

—Architect, Engineering, etc. Services— ent Practices—Evaluation of Competitors— s

ns with three architect-engineer (A-E) firms—as to anticipated con- relative utility of alternative methods of approach—required under ct, 40 U.S.C. 541-544 (1982), should contribute to making possible a anking of the A-E firms. Accordingly, they should occur prior to the ne most highly qualified firm. Moreover, they may include questions lated to an evaluation of a firm's qualifications.

—Architect, Engineering, etc. Services— ent Practices—Evaluation of Competitors— s

quiry as to cost of protester's equipment, made during discussions d the final ranking of architect-engineer firms, has not been shown to inappropriate concern and in any event did not prejudice the re (1) agency reports that question was motivated only by personal in- t the answer was not considered in evaluation, (2) nothing in record

Sale, 61 Comp. Gen. 112, *supra;* and *Foreclosure Sale*, B-214837, *W. Lay*, 56 Comp. Gen. 561, *supra;* and *Daniel J. Everman*, B-210297,

indicates otherwise, and (3) there is no showing that the cost of the equipn opposed to the cost of personnel—was such that it would be a substantial determining the likely fee.

Contracts—Protests—General Accounting Office Procedu Timeliness of Protest—Date Basis of Protest Made Know Protester

Protest filed more than 10 working days after basis was known is untimely. 21.2(a)(2) (1985).

Contracts—Architects, Engineering, etc. Services— Procurement Practices—Evaluation of Competitors— Application of Stated Criteria

In procurements conducted under the Brooks Act, 40 U.S.C. 541-544 (1982), tracting agency is required to consider the location of an architect-engin and its knowledge of the locality of the project—unless application of the would not leave an appropriate number of qualified firms. Higher evaluati for location closer to project is reasonable.

Contracts—Architect, Engineering, etc. Services— Procurement Practices—Evaluation of Competitors— Application of Stated Criteria

Protest that the architect-engineer (A-E) firm selected as the most highly A-E firm did not comply with state licensing laws is denied where the stat work only required the use of a registered surveyor, the awardee proposed registered surveyor, and a state investigation indicated that the awardee censed surveyors.

Contracts—Architect, Engineering, etc. Services— Procurement Practices—Evaluation of Competitors— Evaluation Board

Contracting agency did not act unreasonably when it failed to inform t evaluating the qualifications of architect-engineer firms of the allegation firm had failed to fully comply with a requirement in a prior contract fo registered surveyor where the question of licensing is unresolved and pendi the state licensing authority.

Matter of: Mounts Engineering, April 14, 1986:

Mounts Engineering (MOUNTS) protests the selection Bureau of Mines, Department of the Interior (Interior), of E Engineering and Surveying (Potomac) as the architect-engir E) firm most qualified to collect mine subsidence data at Ki Mine in Barbour County, West Virginia. The selection mac—and the consequent decision not to terminate the (No. SO156015) for the same services previously awarded mac—was made after a reevaluation of qualifications und pursuant to our decision in *Mounts Engineering; Departmer Interior—Request for Advance Decision*, B-218489, *et al.*, 1985, 64 Comp. Gen. 772, 85-2 C.P.D. ¶ 181. We deny Mou test.

Generally, under the selection procedures governing t ment of A-E services as set forth in the Brooks Act, 4

(1982), and in the implementing regulations in the Fed-
isition Regulation (FAR), 48 C.F.R. §§ 36.600-36.609
e contracting agency must publicly announce require-
A-E services. An A-E evaluation board set up by the
aluates the A-E performance data and statements of
ons already on file, as well as those submitted in re-
the announcement of the particular project. The board
conduct "discussions with no less than three firms re-
ticipated concepts and the relative utility of alternative
of approach for furnishing the required services." 40
13. The firms selected for discussions should include "at
e of the most highly qualified firms." FAR, 48 C.F.R.
c). Thereafter, the board recommends to the selection of
der of preference no less than three firms deemed most
lified.

ction official then must make the final selection in order
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otiations are held with the firm ranked first. If the
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otiations are terminated and the second-ranked firm is
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11, 1984, Interior announced a requirement for the col-
mine subsidence data—data on ground surface move-
sed by underground mining—at Kitt No. 1 Mine in Bar-
ty, West Virginia. The agency requested interested firms
Standard Forms (SF's) 254, "Architect-Engineer and Re-
ices Questionnaire," by which A-E firms can document
ral professional qualifications, and 255, "Architect-Engi-
Related Services Questionnaire for Specific Project," by
firms can supplement the SF 254 with specific informa-
e firm's qualifications for a particular project. Potomac
d nine other firms responded to the announcement.
then evaluated qualifications without holding the r
cussions with three A-E firms. In the agency's initia
Potomac received the highest point score, 890 point
nts received the second highest score, 880 points. Th
st point score was only 770 points.
e closeness of the evaluation of the two firms, contrac
s determined that Potomac and Mounts were "equall
and therefore requested them to submit cost proposal
ereupon submitted a cost proposal in which it offered it
e required services at unit prices ranging from 26.7 p
percent above those offered by Potomac.
hereafter, the evaluation board was requested to
qualifications of Potomac and Mounts in order
most preferred firm. Upon reevaluation, the board g

Potomac's qualifications a score of 930 points and Mounts' c
cations a score of 915 points.

When Interior subsequently selected Potomac as the mo
ferred firm, Mounts protested first to the agency and then
Office.

In addition to challenging the failure to conduct discussio
the request for cost proposals prior to selecting the most pr
firm, Mounts alleged that (1) there was no indication that P
could meet the requirement set forth in the CBD announc
for "registered surveyor(s)," since the SF's 254 and 255 i
submitted by Potomac, although indicating that the firm em
"Surveyors," did not indicate that its surveyors were "regis
(2) the persons listed in Potomac's SF 255 as key personnel
project either lacked surveying experience or were not emplo
the firm; (3) Potomac lacked the necessary experience and ca
and (4) the board failed to give Mounts credit for having
office near the work site and for its allegedly superior knowl
the locality of the project.

In response, Interior admitted that it had failed to cond
required discussions. It also acknowledged that the SF's 2
255 submitted by Potomac for purposes of evaluation were "
to-date." Accordingly, the agency proposed to (1) obtain u
SF's 254 and 255 from the three firms previously rated most
qualified; (2) appoint a new evaluation board, comprised o
fied personnel from outside the Bureau of Mines, to conduct
sions with and reevaluate the qualifications of the three firm
(3) determine, based upon the results of the above, whether
tinue the contract with Potomac or to terminate it and
award to another firm.

In our prior decision, we concluded that the failure to
the required discussions could have prevented a meaningfu
ng and could have deprived Mounts of the opportunity for
We also indicated that the evaluations were open to ques
ther grounds as well. We pointed out that while SF 255
urrent as of the time of the particular project, Interior h
ated that Potomac's SF's 254 and 255 were "not up-to-date.
ver, we found Interior's request that firms submit cost p
rior to its selecting the most highly qualified firm for nego
be improper since the Brooks Act only provided for the c
tion of cost during negotiations—*i.e.*, after the final ran
rms, 40 U.S.C. § 544—and the regulations prohibit the c
tion of fees during discussions. FAR, 48 C.F.R. § 36.602-
erefore sustained Mounts' protest and concluded that th
reason to question Interior's decision to conduct discussio
three firms ranked highest in the initial evaluations an
aluate their qualifications.

Interior subsequently requested Potomac, Mounts a
rm—L. Robert Kimball & Associates (Kimball)—to

SF's 254 and 255. A new evaluation board reviewed the up-
ns and conducted discussions with the three firms.
the evaluation criteria provided to the board, the firms
e evaluated on the basis of (1) professional qualifications
for satisfactory performance (25 percent), (2) "[l]ocation
l geographical area of the project and knowledge of the
f the project" (25 percent), (3) specialized experience and
competence in the type of work required (20 percent), (4)
o accomplish work in the required time (15 percent), and
erformance (15 percent).
c was found to be the most qualified firm under these cri-
eiving a total of 968 evaluation points. Mounts was ranked
eceiving 951 points, while Kimball was ranked third at 808

thereupon filed this protest.

DISCUSSIONS

questions both the timing and content of the discussions
the three firms.
first contends that the evaluation board acted improper-
t held discussions "prior to the re-evaluation."
agree. FAR, 48 C.F.R. § 36.602-3(d), provides that the eval-
ard shall:

> selection report for the agency head or other designated selection au-
> mmending, in order of preference, at least three firms that are consid-
> the most highly qualified to perform the required services. The report
> e a description of the discussions and evaluation conducted by the board
> selection authority to review the considerations upon which the recom-
> are based.

selection of the most highly qualified firm should take
unt the content of the discussions held with the three
e discussions must occur prior to the final evaluation of
ions.[1]
the content of the discussions, Mounts points out that one
aluators inquired as to the cost of the equipment which
proposed to utilize for this project. Mounts suggests that
cost of its equipment "directly influences" the fee it must
his inquiry was improper. In addition, Mounts argues that
ation board acted improperly when it questioned the firm
e design of a theoretical subsidence program, since, accord-
ounts, that was a subject "completely outside the scope of
red services."
onse, Interior explains that the evaluator inquired about
of Mounts' equipment "only to compare [the cost with]
office had paid for similar equipment"; it denies that the

[1] e that there was no requirement here for a preliminary evaluation to
firms with which discussions would be conducted, since these firms
y selected on the basis of the original evaluations.

evaluation board considered the cost in the evaluation. The
maintains that the questions about the design of a theoretic
sidence program were undertaken pursuant to the requiren
FAR, 48 C.F.R. § 36.602-3(c), to discuss "concepts and the
utility of alternative methods of furnishing the required se
and indicates that the answers "revealed much about a
qualifications to perform the project."

Mounts has not demonstrated that the evaluator's inquir
the cost of certain equipment was an inappropriate concern.
event, nothing in the record indicates that Mounts suffer
prejudice as a result of the questions and its answers. Mou
made no showing that the cost of the equipment—as opposed
cost of its personnel—was such that it would be a substantia
in determining the fee Mounts was likely to propose. Mo
nothing in the record indicates that the evaluation board
considered the cost of the equipment in evaluating Mounts'
cations. See also *Douglas County Aviation, Inc., et al.*, B-21
Sept. 27, 1985, 64 Comp. Gen. 888, 85-2 C.P.D. ¶ 345 (protest
uation method denied in the absence of prejudice from use
method).

In addition, we conclude that Mounts has not shown th
questions about the design of a theoretical subsidence p
were not reasonably related to a consideration of alternat
proaches or to the evaluation of Mounts' professional qu
tions.

LOCATION AND KNOWLEDGE OF THE LOCALITY

As indicated above, an evaluation criterion for "[l]ocation
general geographical area of the project and knowledge of
cality of the project" was assigned 25 percent of the total
evaluation points. Although both Potomac and Mounts hac
ously worked in northern West Virginia, Potomac maintai
office within 35 miles—or a 1-hour drive—of the project sit
Mounts' nearest office was determined by the board to be
60-65 miles—or a 2-hour drive—of the project. The eva
board therefore assigned Potomac an average evaluation s
241.66 points for location and knowledge of the locality, 2
points than the 212.66 points assigned to Mounts under thi
rion.[2]

Mounts, however, objects to the consideration of geograph
cation, maintaining that both firms are located in the same
geographical area. In a December 23 submission to our

[2] *Although Mounts alleged during its prior protest that it maintained an*
Philippi, West Virginia, "only a few miles from the site," the updated SF
mitted to the evaluation board indicates that it closest office is in Wa
Pennsylvania, approximately 60 miles from Barbour County, West Vir
the project site is located.

pinted out that the chairman of the evaluation board his report of the evaluation results—a report which cluded in its submission—that since all three firms were thin 100 miles of the project site, location should not n an evaluation factor. The chairman indicated that as the most qualified firm if location was not considered. bsequent submission to our Office filed on January 31, pinted out that the chairman had also stated in the report tracting officer that if location was to be considered, then 25 percent of the possible evaluation points to the crite- excessive. Mounts therefore argued that if location was a terion, it was "certainly weighted too heavily."

ially point out that our Bid Protest Regulations, 4 C.F.R. 5), require that protests—other than those based upon al- proprieties in a solicitation—be filed within 10 working r the basis of protest is known or should have been hichever is earlier. 4 C.F.R. § 21.2(a)(2). Since Mounts east as early as its December 23 submission that Interior ned 25 percent of the possible evaluation points to the cri- location, but did not protest the weight accorded this cri- il its submission filed on January 31, more than 10 work- ater, its protest in this regard is untimely.

er, we note that FAR, 48 C.F.R. § 36.602-1(a)(5), provides nsideration of geographical location and knowledge of the except where the application of this criterion would not appropriate number of qualified firms. Mounts does not the adequacy of the competition remaining after applica- is criterion, and we have no independent basis to question y's decision to consider geographical location. Cf. *Bartow* -217155, Mar 18, 1985, 85-1 C.P.D. ¶ 320 (requirement for within 30 miles of project). Nevertheless, since Mounts argument on the conclusion that Potomac and Mounts ntially equal in regard to location, we consider it to be ng the application of the criterion as well as its propriety. view of an agency selection of an A-E contractor is limited ning whether that selection is reasonable. We will ques- agency's judgment only if it is shown to be arbitrary. , the protester bears the burden of affirmatively proving *Y.T. Huang & Assocs., Inc.*, B-217122, B-217126, Feb. 21, 1 C.P.D. ¶ 220.

gh the chairman of the evaluation board assigned the nt score to both Potomac and Mounts under the criterion ion, the remaining two members of the board assigned a oint score to Potomac as a result of its office being located les closer to the project site. Since evaluating proposals in- bjective as well as objective judgments, it is not unusual l evaluators to reach disparate conclusions. *Digital* B-216441, May 10, 1985, 85-1 C.P.D. ¶ 526; *Western*

Engineering and Sales Co.; B-205464, Sept. 27, 1982, 82-2 C.P ¶ 277. The average scores here for the location criterion, and th fore the total evaluation scores, reflected the conclusion of tw the three evaluators that Potomac's location 30-35 miles close the project site justified a higher score under the location criter Mounts has failed to demonstrate that the overall judgment of evaluation board in this regard lacked a reasonable basis.

PROFESSIONAL QUALIFICATIONS

The CBD notice stated that the project "requires a registe surveyor(s) to conduct the survey," while the Statement of W indicated that "registered surveyor(s) and crew(s) shall conduct survey(s)." In the SF 255 it submitted in response to Interior's quest for updated SF's 254 and 255, Potomac listed 6 "Survey as currently employed by the firm and provided a brief resume one land surveyor—registered in West Virginia, Maryland Ohio—whose services it anticipated utilizing for the project.

Mounts, however, points out that by letter of June 5, 1985, State Board of Examiners of Land Surveyors in West Virginia—state where Kitt No. 1 Mine is located and where Potomac m tains an office—notified Potomac that the Board of Examiners received a complaint filed by Mounts and that it appeared that tomac was "not in full compliance" with West Virginia law "s . . . [the owner of Potomac] is not a licensed land surveyor." W Potomac allegedly failed to respond to this letter, the Board of aminers, by letter of August 26, informed the firm that "in vie the information provided by Mounts Engineering regarding y surveying/activities, you are requested to cease and desist s practice in the State of West Virginia."

A contracting agency may require an offeror to comply wit specific known state or local licensing requirement as a prere site to award. See *Olson and Assocs. Engineering, Inc.*, B-215 July 30, 1984, 84-2 C.P.D. ¶ 129. It need not, however, impose s a requirement, and if it does not then the contracting officer ge ally need not concern himself with state or local licensing requ ments. See *North Park Village Homes, Inc.*, B-216862, Jan. 1985, 85-1 C.P.D. ¶ 129; *Olson*, B-215742, *supra*, 84-2 C.P.D. ¶ at 2.

The statement of work here did not require the proposed cont tor itself to possess a license as a prerequisite to award. Rathe merely required that the contractor use a registered surveyor crew to conduct the survey; a requirement which Potomac prop to meet through utilization of the services of a registered land veyor. Cf. *Mounts Engineering*, B-218102.3, May 31, 1985, 8 C.P.D. ¶ 622 *aff'd*, *Mounts Engineering—Reconsidera* B-218102.4, July 24, 1985, 85-2 C.P.D. ¶ 77 (offeror took no ex to requirement for registered surveyor).

ase, we note that the West Virginia Board of Examiners 8 requested the Attorney General of West Virginia to relevant state law, noting that Potomac is a "sole pro-" which "hires persons licensed and/or registered in ngineering and Surveying fields to certify the work or ovided." Further, we also note that the contracting offi-es that he will take "[a]ppropriate action" once the At-neral clarifies state law. See *Lewis & Michael, Inc.; Lines of Columbus, Inc.—Reconsideration*, B-215134.2, June 26, 1984, 84-1 C.P.D. ¶673 (if contractor is not in with state or local law and, as a result of enforcement he state or locality, chooses not to perform the contract bited from doing so, the contract may be terminated for

circumstances, the August 26 cease and desist order did the subsequent selection of Potomac unreasonable. Cf. *an Ambulance Service, Inc.*, B-213943, Jan. 9, 1984, 84-1 1 (where a contracting officer determines that enforce-mpts by state or local authorities are likely and that reasonable possibility that such action may delay per-by an unlicensed contractor, he may find the contractor sible under a solicitation's general licensing require-

PRIOR PERFORMANCE

c listed its current work under a contract for mine subsid-ey—the Blacksville project in Pennsylvania and West Vir-the sections of its updated SF's 254 and 255 in which of-asked to provide examples of projects undertaken in the ars (SF 254) and projects best illustrating the firm's cur-fications for providing the required services (SF 255).[3]

, however, alleges that the evaluation board was not in-y Interior of certain allegations concerning Potomac's e with the requirement in the Blacksville contract for egistered surveyor. In particular, Mounts refers to a Sep-, 1985, letter from the Bureau of Mines in which the formed Potomac that it had received information that the eyor whom the firm indicated was supervising the Blacks-ect in fact "never certified nor sealed any plans, docu-reports relative to this project." Interior therefore re-

h Potomac in fact described the Bureau of Mines project in question in and 255 as "Mine Subsidence Survey, Blacksville, WV [West Virginia]," timated cost of $110,000, we understand the reference to be to contract 11 awarded to Potomac by the Bureau of Mines for a $110,000 mine sub-at "Blacksville No. 2 Mine" in Greene County, Pennsylvania. We rmally advised by Potomac that it has received only one contract for le mine subsidence survey, but that the project in fact extends over two Virginia and Pennsylvania.

quested Potomac to furnish the agency with "evidence of the individual providing these services" so as to assure the age "full compliance" with the requirements of the contract.

Interior informs us that the "licensing matter is in qu pending further information from the state Board of Profes Engineers" and Mounts reports that state licensing proceedir garding Potomac's practice in Pennsylvania are pending ir state. Interior therefore argues that since the matter is still solved," it was not for consideration by the evaluation board.

We note that the evaluation board was provided with the ed SF's 254 and 255 by letter of October 25, 1985, and tha chairman of the board reported the evaluation results by let November 15. Since Interior viewed the licensing concerns a resolved," we do not consider that it was unreasonable fc agency to refrain from reporting these concerns to the evalu board. Cf. *NJCT Corp.*, B-219434, Sept. 26, 1985, 64 Comp. Ge 85-2 C.P.D. ¶342 (protester failed to demonstrate that a lacked a reasonable basis for characterization of potential co tor's performance on other contracts).

The protest is denied.

[B-219220]

Compensation—Periodic Step Increases—Upon Reconver to General Schedule—After Erroneous Conversion to Mer Pay—Propriety of Agency Action

When an agency assigns employees to the merit pay system and then re them back to the General Schedule system, those employees are not entitled roactive pay and within-grade waiting time credit equal to what they woul accrued if they had remained in the General Schedule system, unless adminis error occurred. An agency that properly converted an employee to merit pay and then reconverted him to the General Schedule upon its prospective adop a new standard of employee coverage under the merit pay system, and prop signed the employee to comparable pay levels, acted in conformity with the r statutes and regulations, and did not commit administrative error. Therefo employee is not entitled to additional pay and within-grade waiting time based on his claim that he was improperly assigned to the merit pay system.

Matter of: John R. MacDonald, April 14, 1986:

We have been asked to review a settlement of our Claims denying the claim of Environmental Protection Agency (EPA ployee John R. MacDonald for backpay and within-grade st crease waiting time credit arising out of his assignment t merit pay system. In light of the facts presented, and the ap ble provisions of statute and regulation, we deny Mr. MacDo claim and sustain our Claims Group's settlement in the matte

Background

The Civil Service Reform Act of 1978 established a r system for federal supervisors and management officials in