Decisions of The Comptroller General of the United States

VOLUME 47 Pages 221 to 320

NOVEMBER 1967

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300092500

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1968

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.
Price 25 cents (single copy); subscription price: $2.25 a year; $1 additional for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

ASSISTANT COMPTROLLER GENERAL OF THE UNITED STATES

Frank H. Weitzel

GENERAL COUNSEL

Robert F. Keller

DEPUTY GENERAL COUNSEL

J. Edward Welch

ASSOCIATE GENERAL COUNSELS

John T. Burns

Ralph E. Ramsey

TABLE OF DECISION NUMBERS

Cite Decisions as 47 Comp. Gen.—

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-158027]

Pay—Service Credits—Cadet, Midshipman, Etc.—Nonacademy Service

In the computation of retired pay authorized in 10 U.S.C. 1331–1337 for non-Regular service, the full-time nonacademy service of a midshipman appointed under section 3 of the act of August 13, 1946, 60 Stat. 1058, may be used to increase the multiplier factor in formula 3, 10 U.S.C. 1401—2½ percent of years of service credited under section 1333—absent a restriction as to the status in which active service must have been performed in order to be creditable service. However, in establishing the multiplier factor, credit for inactive midshipman service in a Naval Reserve prior to July 1, 1949 may only be included pursuant to that part of clause (4), section 1333, that does not refer to service covered by section 1332(a)(1), the inactive service constituting "service (other than active service) in a Reserve component of an armed force" only within the meaning of that phrase in clause (4), section 1333.

To the Secretary of Defense, November 2, 1967:

Further reference is made to letter of September 28, 1967, from the Assistant Secretary of Defense (Comptroller) forwarding a copy of Committee Action No. 401 of the Department of Defense Military Pay and Allowance Committee presenting the following three questions for decision:

1. Under the authority of section 3(b) of the act of August 13, 1946 (Public Law 729, 79th Congress), Ch. 962, 60 Stat. 1057 [1058], a member is appointed a midshipman in the Navy and so serves on active duty for the period 20 December 1946 through 21 July 1948. Throughout this period he had no status other than midshipman. May this service be used to increase the multiplier authorized to be applied under section 1401 of title 10, U.S. Code (Formula No. 3) in the computation of retired pay under Chapter 67?
2. Would the answer be the same as to a midshipman in the Naval Reserve appointed under the authority of section 3(a) of the act of August 13, 1946 who similarly served on active duty?
3. If a part of the service of the midshipman concerned in question 2 had been other than active service, but in the status of midshipman, may such service be used to increase the multiplier authorized to be applied in the computation of retired pay under Chapter 67, title 10, U.S. Code?

All three questions relate exclusively to the multiplier factor in formula No. 3, 10 U.S.C. 1401, governing the computation of retired pay authorized in chapter 67 (sections 1331–1337), Title 10, U.S. Code, for non-Regular service. It is pointed out in Committee Action No. 401 that the sole issue raised is whether "full-time non-academy midshipman service" may be used to increase the multiplier factor in computing chapter 67 retired pay. It is further pointed out that no issue is raised with respect to academy midshipman service and the applicability of the provisions of 10 U.S.C. 6116 in the case of Naval and Marine Corps officers.

As stated in Committee Action No. 401, under formula No. 3, 10 U.S.C. 1401, chapter 67 retired pay is computed by taking the retiree's monthly basic pay (as provided therein) and allowing 2½ percent of it for each year of service credited to him under 10 U.S.C. 1333. Thus, in determining the multiplier factor for the purpose of computing the

retired pay of a person under chapter 67 his years of service and any fraction of such a year are computed by adding—

(1) his days of active service;
(2) his days of full-time service under sections 316, 502, 503, 504, and 505 of title 32 while performing annual training duty or while attending a prescribed course of instruction at a school designated as a service school by law or by the Secretary concerned:
(3) one day for each point credited to him under clause (B) or (C) of section 1332(a)(2) of this title, but not more than 60 days in any one year; and
(4) 50 days for each year before July 1, 1949, and proportionately for each fraction of a year, of service (other than active service) in a reserve component of an armed force, in the Army or the Air Force without component, or in any other category covered by section 1332(a)(1) of this title except a regular component,

and by dividing the sum of that addition by 360.

The term "active service"—see clause (1) above—is defined in 10 U.S.C. 101(24) as meaning "service on active duty." Section 101(22) defines the term "active duty" as follows:

"Active duty" means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.

In decision of June 7, 1963, 42 Comp. Gen. 669, it was held that active duty "non-Naval Academy" midshipman service in the Regular Navy may be credited toward the "more than 20 years of active service" required for retirement under the provisions of 10 U.S.C. 6323. That conclusion rested on the fact that the restrictions imposed by 10 U.S.C. 6116 on service performed as a midshipman at the U.S. Naval Academy (or as a cadet at the U.S. Military Academy), if appointed as a midshipman or cadet after March 4, 1913, are not applicable to active duty "non-Naval Academy" midshipman service.

In computing retired pay under the provisions of 10 U.S.C. 6323(e) the multiplier factor is based on "the number of years of service that may be credited * * * under section 1405," Title 10, U.S. Code. Under section 1405 the number of years of service creditable for the purposes of section 6323(e) include "his years of active service." In decision of December 20, 1965, 45 Comp. Gen. 363, it was held (quoting the syllabus):

Active service as a midshipman in the Regular Navy performed under the authority of section 3 of the act of August 13, 1946, by an officer retired under 10 U.S.C. 6323, providing for the computation of retired pay at 2½ percent of the basic pay of the grade in which retired, multiplied by the years of service prescribed by section 1405, may be credited to establish the percentage multiple for computing the officer's retired pay, section 1405 prescribing but not defining "years of service," the definitions in 10 U.S.C. 101(22) and (24) are for application, and the paragraphs containing no restriction as to status in which active service must have been performed in order to be creditable, the active service of the officer as a midshipman is creditable under section 1405 and should be included in determining the percentage multiple to be used in computing his retired pay.

In view of the conclusions reached in the two decisions mentioned above, active service performed as a midshipman in a "non-Academy" status properly may be included in establishing the multiplier factor under formula No. 3, 10 U.S.C. 1401, in computing chapter 67 retired pay. Questions 1 and 2 are answered in the affirmative.

Question 3 poses the issue whether inactive midshipman service in the Naval Reserve may be included in establishing the multiplier factor in formula No. 3, 10 U.S.C. 1401. As above pointed out the multiplier factor in formula No. 3 is based upon the number of years of service creditable under section 1333. Clause (3) of section 1333 authorizes credit of 1 day for each point credited under clause (B) or (C) of section 1332(a) (2) but not more than 60 days in any 1 year. Clause (4) of section 1333 authorizes a credit of 50 days for each year before July 1, 1949, and proportionately for each fraction of a year of service (other than active service) in a Reserve component of an armed force, in the Army or the Air Force without component, or in any other category covered by section 1332(a) (1) except a Regular component.

Section 1332(b), Title 10, U.S. Code, provides that:

> (b) The following service may not be counted under subsection (a):
>
> * * * * * * *
>
> (7) Service in any status other than that as commissioned officer, warrant officer, nurse, flight officer, appointed aviation cadet, or enlisted member, and that described in clauses (I) and (J) of subsection (a) (1).

Since midshipman service, active or inactive, Regular or Reserve, is not listed in such statutory provisions, such service may not be credited under clause (3) or that part of clause (4) of section 1333 which refers to service covered by section 1332(a) (1). However, in active service as a Reserve midshipman does constitute "service (other than active service) in a Reserve component of an armed force" within the meaning of that phrase contained in clause (4), section 1333. Therefore inactive Reserve midshipman service prior to July 1, 1949, should be credited as there prescribed in establishing the multiplier factor in formula No. 3, 10 U.S.C. 1401. Question 3 is answered accordingly.

[B-159868]

Bids—Competitive System—Subcontractors—Antitrust Immunity

The fixing of prices and allocation of the coal sold to European prime contractors by an American export association of subcontractors claiming Webb-Pomerene Act, 15 U.S.C. 61–65, immunity to the antitrust laws is restrictive of the competitive negotiation required by paragraph 3–102(c) of the Armed Services Procurement Regulation, as the requirement is not dependent upon or subject to the antitrust laws and, notwithstanding the contract awarded is a fixed-price contract, the control exercised by the Army over every aspect of the procurement extinguished the distinction between prime and subcontractors and the Government ultimately bearing the excessive subcontracting costs has been prejudiced by the noncompetitive activities of the subcontractors. However, although the

contract is voidable at the option of the Government, practical reasons preclude disturbing the award, but future coal procurements should be on a fully competitive basis.

To the Secretary of the Army, November 7, 1967:

Reference is made to a letter dated May 17, 1967, from the Acting Director of Procurement Policy and Review, furnishing our Office with a report on the protest by Ginsburg & Feldman, attorneys for Independent Miners & Associates, under request for proposals (RFP) No. DAJA37-67-R-0248, issued by the United States Army Procurement Center, Frankfurt, Germany, for the procurement of coal for use by the Army at European bases during fiscal year 1968. The primary basis of the protest is directed to the fact that the RFP is, by its terms, restrictive of competition. A similar protest was filed by DeHumber Handelmaatschappij, the European importer for coal mined by the independent miners, with regard to the procurement of coal for use at European bases during fiscal year 1966. That protest was considered in our decision B-157145 dated May 3, 1966.

The nature and history of this procurement were set forth in our earlier decision and therefore need not be restated in detail here. For the purposes of this decision, it is sufficient to note that, for policy reasons, coal for use by the Army in Europe has been procured since 1962 in Europe from European prime contractors, who are required by the terms of the annual RFPs to supply only American coal procured from American exporters, who in turn buy from American mines. Since the beginning of this procurement in 1962, the Anthracite Export Association (AEA), which is composed of members of the "Big 6" American mines, and the association's common export company, Foreston Coal Company (Foreston)—all of whom are potential first or second tier subcontractors to the prime offeror—have joined together to fix prices and allocate shares of coal to be supplied through Foreston under the authority of the Webb-Pomerene Act, 15 U.S.C. sections 61-65. This statute provides immunity from the antitrust statutes in the case of associations entered into for the sole purpose of engaging in export trade. And, in this regard, we note that a suit has been filed by the Department of Justice against AEA in November 1965, alleging that the price fixing and coal allocation practices engaged in by AEA are not protected by the Webb-Pomerene Act and that therefore such practices are prohibited by the antitrust laws.

We stated in our earlier decision on the 1966 fiscal year procurement that:

* * * in bid protest cases our Office is primarily concerned with determining whether the award of a Government contract will be, or has been, made in accordance with the requirements of applicable *procurement* laws and regulations. Our Office is not directly concerned with enforcement of the antitrust laws, and any question arising with regard to violation of such laws is properly for consideration by the Department of Justice.

The decision concluded that there was no statutory or regulatory prohibition against the award of Government contracts to firms which have been charged with, but not convicted of, violations of the antitrust laws.

The current protest does not challenge the validity of this proposition. Rather, it is now contended that, irrespective of any antitrust violations, the price fixing and coal allocation practices of AEA violate the mandate in Armed Services Procurement Regulation (ASPR) 3–102(c) which requires that negotiated procurements be on a competitive basis "to the maximum practical extent," and that the propriety of these practices therefore is cognizable by our Office. Accordingly, the Independent Miners have requested that the RFP be appropriately amended to assure adequate competition. We are advised that award of a contract under the instant RFP was made on July 7, 1967.

The provisions of the fiscal year 1968 RFP which are pertinent to our consideration of the protest are set out below:

SP–8 CERTIFICATE OF INDEPENDENT PRICE DETERMINATION

1. Each prime offeror shall require all tiers of sales agents and prospective US suppliers of prepared coal hereunder to submit the following certificate, which the prime offeror must submit to the Contracting Officer with his offer:

(a) By submission of this proposal, I certify, and in the case of a joint proposal, each party thereto certifies as to its own organization, that in connection with this procurement:

(1) the prices in this proposal have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other offeror or with any competitor;

(2) unless otherwise required by law, the prices which have been quoted in this proposal have not been knowingly disclosed by the offeror and will not knowingly be disclosed by the offeror directly or indirectly to any other offeror or competitor at the same subcontract tier; and

(3) no attempt has been made or will be made by the offeror signing this certificate to induce any other person or firm to submit or not to submit a proposal for the purpose of restricting competition.

(b) Each person signing this proposal certifies that:

(1) he is the person in the offeror's organization responsible within that organization for the decision as to the prices being offered herein and that he has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above; or

(2)(i) he is not the person in the offeror's organization responsible within that organization for the decision as to the prices being offered herein, but that he has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above, and as their agent does hereby so certify; and

(ii) he has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above.

SIGNED _____

2. A proposal will not be considered for award where (b) above has been deleted or modified. Where (a)(1), (a)(2), or (a)(3) of the certificate has been deleted or modified, the proposal will not be considered for award unless the offeror, who is required to sign the certificate, furnished with his proposal

a signed statement which sets forth in detail the circumstances of the disclosure. Where any tier subcontractor has deleted or modified (a)(1), (a)(2), or (a)(3) of the certificate, the prime offeror will submit the certificate to the Contracting Officer as soon as practicable after receipt from the prospective subcontractor. The Contracting Officer will then forward the certificate to the Assistant Secretary of the Army (I & L) or his designee, who will determine whether (i) to accept the proposal as being in the best interest of the Government, or (ii) to reject the proposal if he determines that the deletion or modification in the certificate was made because of activities constituting unlawful restriction of competition.

SP–21 COMPETITION IN SUBCONTRACTING

a. All offerors shall select subcontractors (including suppliers of prepared coal) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the procurement. As a minimum, the prime offeror shall solicit all known responsible US coal export firms and sales agencies interested in participating in this procurement, and shall require such export firms and sales agencies to solicit the maximum number of responsible suppliers of prepared coal consistent with the organizational structure of the export firm or sales agency. This requirement is not intended to require or encourage any firm to solicit or interfere with the business relationships of any competing organization which has established legal and proper franchise arrangements, or any other recognized exclusive agency arrangements, with its clients or members. When a solicitation is issued and the individual or firm to which it is issued refuses to give a quotation, the firm issuing the solicitation shall make a record of the solicitation, including the date, the firm solicited, and the grounds given (if any) for the refusal to give a quotation. This record shall then be transmitted to each successively higher tier of prospective subcontractors up to the prime offeror, who shall then provide such record to the Contracting Officer.

b. Each prime offeror agrees to insert the above subparagraph a in all of his solicitations, and to require each tier of prospective subcontractors to insert the same provision in their solicitations.

NOTE: A list of known US coal export firms and sales agencies is attached as Appendix A, dated March 67, to the request for proposals. The list furnished is not to be considered as limiting the offeror to the firms appearing thereon, nor does the furnishing of a list constitute an approval of the sources as subcontractors. If offerors do not solicit all firms on the list furnished, reasons for not doing so will be furnished the Contracting Officer in writing when submitting their proposals. Offerors not including reasons for non-solicitation will not be considered for award.

SP–25 SUBCONTRACTING-ALL TIERS

Except as otherwise provided in the contract, the contractor shall not, without the prior written consent of the contracting officer, place any subcontract hereunder which amounts to $100,000, or its equivalent in local currency, or more, or which, together with current subcontracts with the same subcontractor, will aggregate $100,000, or its equivalent in local currency, or more; nor shall the contractor or any subcontractor permit lower tier subcontractors to place subcontracts or purchase order hereunder unless the lower tier subcontractors agree to obtain the prior written consent of the contracting officer for the placement of such subcontracts or purchase orders which amount to $100,000, or its equivalent in local currency, or more, or which with current subcontracts with the same subcontractor will aggregate $100,000, or its equivalent in local currency, or more. Subcontracts requiring submission to the Contracting Officer for approval pursuant to the above clause will be mailed or otherwise furnished the Contracting Officer so as to reach him not later than 30 days after date of award of prime contract.

The protestants contend specifically that the competitive negotiation contemplated by ASPR 3–102(c) is frustrated by the inclusion of clauses SP–8 and 21, quoted above, and by clause SP–3, which permits "all or none" quantity discount. It is also contended that unduly re-

strictive specifications with regard to ash and fusion temperatures violate ASPR 1–1201(a) which requires that specifications state only the minimum needs of the Government. The protestants point out that our May 3, 1966, decision considered this point and concluded that adequate information for the drafting of specifications did not exist and that tests should be performed in order to assure that the Army specifications stated only the minimum needs of the Government. The protestants further point out that to date the tests have not been performed, even though one procurement has been effected and a second fiscal year procurement is in process. We are therefore requested to "determine the ASPR 1–1201(a) issue on the fairly substantial record before you."

Paragraph SP–8 requires that all tiers of subcontractors submit a certificate of independent price determination, and, if portions of the certificate are deleted or modified, to submit a statement detailing any disclosure of price information. In cases where such statements are submitted in lieu of the completed certificate, the Assistant Secretary of the Army (Installations and Logistics) is required to reject the proposal if he determines that the deletion or modification was made "because of activities constituting *unlawful* restriction of competition." [Italic supplied.] The protestants maintain, and we agree, that the insertion of the word "unlawful" in this clause renders it ineffective in the case of price disclosures by AEA so long as it can claim antitrust exemption under the Webb-Pomerene Act. The protestants advise that the Agency for International Development (AID) has developed a certificate of independent price determination which specifically precludes price disclosure by a so-called "Webb-Pomerene Association" and they urge that the Army is required by ASPR 3–102(c) to insert a similar certificate in the current RFP to assure adequate and effective price competition.

The above-quoted certificate of independent price determination was included in the solicitations for fiscal years 1967 and 1968. In response thereto, the members of AEA submitted statements wherein they admitted price fixing and allocation practices under the Webb-Pomerene exemption. A representative sample of the statements submitted is set out below:

The undersigned is a member of the unincorporated Anthracite Export Association, which was duly organized in 1952 for the sole purpose of engaging in export trade, as provided in the Export Trade Act (Title 15 U.S. Code, § 62), and which is actually engaged solely in such export trade. The Association has duly filed with the Federal Trade Commission the Annual statements required by law and has not failed to furnish to that Commission any required information as to its organization, business, conduct, practices or other matters.

In offering anthracite coal in connection with the U.S. Army's Request for Proposals DAJA37–67–R–0248, the undersigned has been and is acting as a member of such Association, in conjunction with other such members. Agreements made and acts done by this unincorporated Association, i.e. its members,

in the course of export trade are specifically exempted by the aforesaid Federal statute from the Federal antitrust laws, within certain stated limitations. Observing those limitations, members of the Association, including the undersigned, acting solely as such members, have entered into consultations, disclosures and agreements between themselves in respect of quantities, prices and related matters in connection with the aforesaid proposed export transaction. Solely because of such actions, taken within the framework of the Association and believed to be permitted by law, the undersigned has modified (a)(1), (a)(2) and (a)(3) of the Certificate of Independent Price Determination being furnished on its behalf in connection with the aforesaid Army procurement.

The May 17, 1967, letter from the Acting Director of Procurement Policy and Review states that the "Certificate of Independent Price Determination" clause contained in ASPR 1–115 was adopted, as above quoted, for use in the European coal procurement, but that it was determined that the factual issue as to whether or not Webb-Pomerene subcontractor sources actually restricted competition was "one of the major elements of the litigation in the District Court of Pennsylvania" and that the clause should therefore be worded so as to allow consideration of proposals from subcontractors claiming Webb-Pomerene immunity.

Our understanding of the Webb-Pomerene issue in litigation is that the question is not whether Webb-Pomerene activity restricts competition, but rather, whether the restriction of competition resulting from the admitted price disclosure and coal allocation practices of the "Big 6" is in fact protected and countenanced by the Webb-Pomerene exemption. It may be fairly stated that disclosure of prices and allocations among competitors can have no other result but to restrict competition. Such disclosures or allocations are admitted in the statements accompanying the Independent Price Certificates submitted by the "Big 6." The insertion of the word "unlawful" in the current certificate of independent price determination appears to us to be a tacit admission that Webb-Pomerene activity does, in fact, have the effect of restricting competition.

With regard to the Pennsylvania litigation, we have been informally advised by Department of Justice representatives that a stipulation of facts has been filed with the court wherein it is stipulated that the litigation is limited to the single question as to whether the Webb-Pomerene Act immunizes the price fixing and allocation practices of AEA from the application of section 1 of the Sherman Act, 15 U.S.C. 1. We also have been informally advised by Department of Justice representatives that no conflict would exist if our Office exercised its jurisdiction to determine whether these practices constituted improper restrictions on competition for the award of a Government contract.

The question for decision, therefore, is the one raised by the protestants, i.e., whether the price fixing and allocation practices of AEA

are patently inconsistent with and in derogation of the requirement of ASPR 3–102(c) that negotiated procurements be on a competitive basis "to the maximum practical extent."

Generally speaking, the provisions of ASPR and the military procurement statute relate to dealings between the Government and bidders or offerors and/or its prime contractors and, therefore, do not apply to dealings between such primary parties and their subcontractors. B–150103, April 23, 1963; 41 Comp. Gen. 424. However, those cases recognize that in the case of prime contracts providing for cost reimbursement where subcontracting costs are borne by the Government, subcontracts should not be approved where their execution would be prejudicial to the interests of the Government. While the contract in the instant case is a fixed-price contract, the rationale applied in cost-type contracts is applicable here because, in this particular case, the prices quoted to the prime contractor by the American coal exporter bear a direct and substantial relation to the prices quoted to the Government by the offerors and are, therefore, ultimately borne by the Government. This is so because the fixed price to the Government is composed basically of the cost of coal to the prime contractor, the cost of transportation, and the prime contractor's handling costs. The cost of ocean transportation, as opposed to the cost of inland transportation after acceptance in Europe, can fairly be excluded from any consideration of relative cost factors because it will be the same at any given time for all prospective contractors. The cost of inland transportation and the incidental handling costs comprise but a small percentage of the total cost, with the result that the price of coal may be said to directly determine the price quoted by the prospective prime contractor. For example, in the 1966 procurement, the average price per metric ton, exclusive of ocean transportation, paid to the prime contractor by the Government was approximately $23 while the average price per metric ton paid to Foreston by the prime contractor was approximately $18 or roughly 78 percent of the total price. Similarly, in the 1964 procurement the percentage was approximately 75 percent, and in 1965 it was approximately 77 percent.

Additionally, while under the contract the Government does not take title to the coal until it is inspected and accepted in Europe, the control exercised by the Army over every aspect of the procurement, from the mine to ultimate destination, points up the overriding importance to the Government of the "subcontract" cost of coal to such an extent that the usual lines of distinction between prime and subcontract tiers become relatively unimportant. Many of the controls exercised by the Army are those which normally would be

considered to be indications of ownership. For example, (1) ocean transportation of coal procured under the instant contract, as well as under several preceding contracts, is accomplished by the Military Sea Transportation Service (MSTS), although ASPR 1-1404 specifically reserves the use of MSTS to the transportation of materials and supplies already owned by the Government; (2) no Shipper's Export Declaration Forms, which are generally required of exporters by 15 CFR 30.1 for use by the Department of Commerce, were filed, although the only applicable exemption to the filing requirement applies to commodities consigned to the United States Armed Forces for exclusive use as opposed to commodities not so consigned but destined for the ultimate use of the Armed Forces; and (3) the payment of custom duties and taxes was exempted under a provision of the Status of Forces Agreements which permits duty free import of provisions and supplies to be used by United States forces rather than under the annual duty free allowance for U.S. source coal which would be for application absent the Government control of the coal. Finally, the Government approved the sources of the mined coal, prescribed stringent specifications for that coal, and reserved the right to inspect the coal during its transportation phase.

We think that the above aspects of this procurement reasonably establish that the nominal prime and first tier subcontractors are, in reality, mere conduits providing coal distribution services to the Government. In view of the special nature of this procurement, it is our opinion that the strict application of the general rule that the provisions of ASPR and the procurement statute do not apply to subcontract matters would be inappropriate in this situation.

The underlying policy of the military procurement statute and ASPR as expressed in ASPR 1-300.1, 3-102(c), and 3-802.2 is that reasonable prices may be obtained only when there is secured the maximum competition possible under the circumstances of the particular procurement. In particular, ASPR 3-102(c) provides, in pertinent part:

> Negotiated procurements shall be on a competitive basis to the maximum practical extent. When a proposed procurement appears to be necessarily noncompetitive, the purchasing activity is responsible not only for assuring that competitive procurement is not feasible, but also for acting whenever possible to avoid the need for subsequent noncompetitive procurements. This action should include both examination of the reasons for the procurement being noncompetitive and steps to foster competitive conditions for subsequent procurements, * * *

Clearly, as discussed above, there can be no competition where prices are disclosed and allocations are made between competitors. The "Big 6" producers and their export company, Foreston, are the only offerors who are capable of offering the entire quantity requested by the RFP. In our opinion, the inescapable conclusion to be drawn from

this situation is that the Government is deprived of a competitive price at the prime contract level because of the noncompetitive activities of the prospective subcontractors. The stated purpose of the Army in inserting the certificate of independent price determination clause as well as the competition in subcontracting clause in the last two annual RFPs was "to obtain maximum competition." But no "competition" has resulted in view of the Webb-Pomerene activity which has been permitted by the terms of such clauses. It is our opinion that the award of coal subcontracts to producers engaged in Webb-Pomerene activity was, and is, prejudicial to the interests of the Government because of the noncompetitive nature of that permissive activity. The Armed Services Procurement Regulation—which has been accorded the force and effect of law—requires "maximum price competition." Clearly, this requirement is not dependent upon or subject to the antitrust laws. Hence, it is our view that the action of the contracting officer in approving subcontracts containing admissions of price fixing and allocation practices was improper and rendered the award suspect.

We cannot conclude, however, that the award in the instant case is void *ab initio* since the contracting officer acted in good faith in reliance upon the advice and recommendations of authorized officials of your Department. Accordingly, we conclude that the resulting contract is voidable at the option of the Government. In this regard, we are advised that substantial costs have already been incurred in the initial stages of this contract; that there are no substantial reserves of coal on hand in Europe; and that because of the complicated arrangements necessary to assure timely shipments of coal to European bases, any delay in implementing the instant contract would seriously jeopardize timely receipt of coal for use during the 1967–68 winter. In view of these practical considerations, we agree that the interests of the Government require that the award not be disturbed. However, we feel that it is imperative that immediate steps be taken to assure that future coal procurements of this nature are on a fully competitive basis. It is our opinion that the certificates of independent price determination and the competition in subcontracting clauses should be redrafted to preclude any Webb-Pomerene activity in connection with such future coal procurements.

With regard to the specifications for ash content and fusion temperature, we again request, as we did in our decision of May 3, 1966, B–157145, that the tests now being performed by the Bureau of Mines to determine the minimum acceptable specifications be expedited and that the test results be taken into consideration in determining the Government's actual minimum requirements for future anthracite procurements.

In this regard, and pointing up the compelling need for expedition of the tests, an adult of the history of this procurement recently completed by the General Accounting Office has disclosed that in addition to the 2,876 metric tons accepted under the fiscal year 1967 contract with an ash content in excess of 9.75 percent mentioned in the May 17, 1967, letter from the Acting Director of Procurement Policy and Review, 539,181 metric tons amounting to approximately 55 percent of the total tonnage received were accepted in fiscal year 1965 with an ash content in excess of 9.75 percent. Similarly, 402,249 metric tons amounting to approximately 45 percent of the total tonnage received were accepted in fiscal year 1966 with an ash content in excess of 9.75 percent. In fact, the audit also discloses that price premiums were paid on this high ash content coal in some instances because the BTU characteristics of the coal were sufficiently in excess of those required by the specifications to warrant payment of a premium under the terms of the contract.

It seems clear, therefore, that BTU characteristics are more important than ash content and that coal containing ash in excess of 9.75 percent could be satisfactorily used so long as it is acceptable from a BTU standpoint. If experience in this procurement has shown this to be the case, it is suggested that serious consideration be given to relaxing at least the ash content requirement before the completion of the Bureau of Mines tests.

On the question of the "all or none" quantity discount, the protestants contend that since only one offeror can quote on the entire coal requirement, an offer of an "all or none" quantity discount results in higher rather than lower prices to the Government because its ultimate effect "is to eliminate competition in the procurement, thus increasing the cost of the procurement in the long run." The protestants also contend that the application of an "all or none" discount can serve to increase the cost in an individual instance because a discount not related to cost economies offered by the only producer capable of supplying the entire quantity could result in a higher price being paid on all blocks than the price which would be made possible by accepting a lower price offered by a small producer on some blocks coupled with a partial discount from the large producer on the remaining blocks. In support of this contention, the protestants present a hypothetical example showing how a lower offer on only a portion of the total requirement can be defeated by the application of the "all or none" discount.

Our May 3, 1966, decision stated in this regard:

> We have held that under formally advertised bidding conditions an "all or none" bid submitted in response to invitation for bids for definite quantities may be considered even though there is no provision therefore in the invitation and

that an award of all lots to one bidder, where no more advantageous price may be obtained otherwise, is not objectionable. 35 Comp. Gen. 383 and cases cited therein. Compare 41 Comp. Gen. 455. It hardly need be emphasized that, all other things being equal, if such results are permissible in formally advertised procurements they may certainly be permitted in negotiated procurements.

While the hypothetical example shows how, under the conditions stipulated, the application of an "all or none" discount could cost the Government more money, we feel that any determinations by our Office of possible savings to be gained by eliminating the discount would, on the basis of the record before us, be at best conjectural. Therefore, we cannot conclude that a more advantageous price could be obtained by elimination of the discount. However, we note that the Department of Justice, in a letter dated May 20, 1966, addressed to Major General John A. Goshorn, Director of Procurement, is also highly critical of the "all or none" discount on the ground that its net result is higher rather than lower prices. In view of this, we suggest that the practice of permitting such a discount from the only bidder capable of supplying the entire coal requirement be thoroughly reviewed, and if it is determined that such practice could result in higher prices, the "all or none" discount should be eliminated.

In accordance with the foregoing considerations, we conclude that future RFPs should contain effective and meaningful certificates of independent price determination and competition in subcontracting clauses. Also, consideration should be given to revising the coal specifications to reflect what experience has apparently shown to be the minimum needs of the Government.

[B–162092]

Bids—Evaluation—Aggregate *v.* Separable Items, Prices, Etc.—Single *v.* Multiple Awards

The award of a single janitorial service contract at a higher cost than the award of multiple contracts would have cost on the basis that the aggregate award would permit centralized management by the contractor having a superior performance record and Government administration of one contract, and that the savings effected by making multiple awards would be minimal compared with the magnitude of the contract, is not justified absent the offset of the higher price by administrative savings and the inclusion in the invitation of provisions for such an award and the establishment of administrative cost savings for use in evaluating bids pursuant to paragraph 2-201(b)(xix) of the Armed Services Procurement Regulation, and as an award may be justified on the basis of reference in 10 U.S.C. 2305(c) to "price and other factors considered" only when a low bidder is not qualified, should the low bidder on several of the invitation items qualify and be willing to accept an award, these items should be deleted from the contract and reawarded.

To the Secretary of the Army, November 9, 1967:

Reference is made to a letter of September 28, 1967, OASA(I&L)(PP), forwarding a report on the protest of Daniels-Hawaii, Ltd.,

under solicitation No. DAGA-01-67-B-0174, covering janitorial services at Fort Shafter, Fort DeRussy, Schofield Barracks, and other Army installations in Hawaii.

The invitation required the bidder to quote prices on all items, namely 1, 1a, 1b, 2, 2a, 3, 4, 4a, and 5. The invitation further provided:

> *AWARD:* AWARD will be made on either A or B as follows:
>
> A—on an "all or none" basis for Items 1, 1a, 1b, 2 and 2a inclusive, and a separate award on Item 3, 4 and 4a.
> B—On Item 5.

Item 5 was for all the work called for under items 1 through 4a inclusive. This award clause reserved to the Government the right to make two separate awards by areas or to make award for all items to a contractor on the basis of his aggregate bid under item 5. Seven bids were received; the contracting officer evaluated the three low bids on both a multiple award basis and on a single award basis, taking into consideration all discounts offered. Notwithstanding that a saving could be realized by making multiple awards, the contracting officer determined that award on the basis of the low aggregate or total bid under item 5 was in the best interest and to the advantage of the Government. Award of the total procurement was made to Pyramid Enterprises, Incorporated, on June 26, 1967.

The general rule, where the Government has reserved the right to award items separately or in the aggregate, is that awards are permitted to be made to one or more bidders for one or more items or to one bidder for all items, depending on which is more in the interest of the Government. B-149085, August 28, 1962. In this instance the contracting officer felt an aggregate award was in the best interest of the Government in that it would provide centralized management by one contractor and administration of only one contract, allow total award to a contractor with a superior performance record, and the saving of over $3,000 was minimal compared with the magnitude of the contract. We do not concur with this decision. Award should be made to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the Government, price and other factors considered. 10 U.S.C. 2305(c). This Office has held that provision to require award to the low bidder with certain exceptions not applicable here. 37 Comp. Gen. 330; 28 *id.* 662.

When the contracting officer reserves the right to make multiple awards Armed Services Procurement Regulation 2-201(b)(xix) requires substantially the following provision to be inserted in the invitation:

> EVALUATION OF BIDS. In addition to other factors, bids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards). For the purpose of making

this evaluation, it will be assumed that the sum of $50 would be the administrative cost to the Government for issuing and administering each contract awarded under this invitation, and individual awards will be for the items and combinations of items which result in the lowest aggregate price to the Government, including such administrative costs.

The contracting officer should have used the method prescribed by regulation in evaluating the bids. Further, this Office has held that in determining the best interest of the Government the phrase "price and other factors considered" does not justify award to other than the low bidder, unless that bidder is found not qualified. 37 Comp. Gen. 550. Considerations of centralized management and administration justify an aggregate award at a higher price only when the higher cost is offset by administrative savings; and even in those circumstances the invitation must provide for such award and establish the administrative cost saving to be used in bid evaluation.

The language of the invitation set out above calls for an aggregate award or separate awards by areas. Award for items 1, 1a, 1b, 2 and 2a was to be made on an "all or none" basis with a separate award for items 3, 4, and 4a. The language used implies only a single award for the latter three items, not three individual awards. This Office has taken the position that the use of the term "award" in the singular without further explanation could well lead the bidders to assume that bids were solicited, and that award would be made, on an "all or none" basis. B–143263, July 28, 1960. In this case the conclusion is supported by the fact that the work to be performed under items 4 and 4a involve the same building. It is unlikely that the contracting officer intended to have one contractor doing the general cleaning of a building (item 4) and another contractor cleaning both sides of the windows with bars (item 4a). The problems of administration and coordination of separate contracts for items 4 and 4a negate the drawing of such an inference in the absence of clear evidence that two contracts were intended. Further, the record indicates that the contracting officer in evaluating the bids considered only a single award for items 3, 4 and 4a. Therefore, in view of the interrelation of items 4 and 4a and the language of the invitation, we find no basis for interpreting a "separate award" to mean individual awards for each item. Rather, we conclude one award for item 3, 4, and 4a, or the Schofield Barracks area was intended.

The contracting agency should include the clause appearing in Armed Services Procurement Regulation section 2–201(b) (xix), entitled "Evaluation of Bids," in any solicitation for a similar procurement in the future. Further, for the reasons stated the award of items 3, 4, and 4a should be deleted from the contract with Pyramid Enterprises. However, if Daniels-Hawaii, the low bidder, is now

unwilling to accept award of those items, or if that company is not an otherwise acceptable bidder, the contract with Pyramid Enterprises may be allowed to remain as awarded.

[B-160692]

Contracts—Specifications—Restrictive—Disposal Areas Under Dredging Contracts

The restrictions contained in an invitation for bids that precluded consideration of a more economical and practical method of river dredging to be accomplished by means of alternate rehandling operations and use of other than Government furnished disposal areas, although the invitation provided for negotiation of alternate disposal areas after contract award, were unjustified, and the alternate bidding method not *per se* invalid nor considered bidding on a different job but rather bidding on a common basis with other bidders, meeting the needs of the Government, the restrictions on a bidder's customary internal operations, even if intended to encourage other bidders, were inconsistent with the full and free competition contemplated by 10 U.S.C. 2305 and, therefore, the invitation should be canceled and reissued, or modified. However, if the full and free competition required under section 2305 creates dredging procurement problems, the matter should be presented to the Congress.

General Accounting Office—Decisions—"Dictum"

A recommendation by the Comptroller General of the United States that is contained in a letter to the head of an agency rather than in the decision sent to the protesting bidder concerning areas in the agency's procurement practices which were brought to light by the protest is not "dictum"—the term used as an abbreviation of "obiter dictum" that means a remark or opinion uttered by the way—and the recommendation may not be disregarded as a comment which is not essential and is less authoritative than the actual decision to the protestant. Therefore, any action by a procuring agency that is contrary to a recommendation may result in the disallowance of credit in the disbursing officer's accounts.

To the Secretary of the Army, November 13, 1967:

Reference is made to the protest of American Dredging Company (ADC) concerning certain restrictions contained in Invitation for Bids No. DACW 61-67-B-0037 issued on December 27, 1966, by the Philadelphia District of the Army Corps of Engineers for maintenance dredging of an estimated 2,222,600 cubic yards of material from four separate areas of the Marcus Hook Anchorage in the Delaware River. By amendment No. 0004 of February 14, 1967, the date for opening bids was postponed until further notice.

The IFB provided under paragraph TP-3 of the Technical Provisions as follows:

TP-3 DISPOSAL OF EXCAVATED MATERIAL

a. The material excavated shall be transported, deposited, confined, and graded to drain within the limits of the Government furnished disposal area shown on the drawings. Bids received will be based on utilizing only the above described area. Alternate areas will not be considered until after the award of the contract. REHANDLING OPERATIONS WILL NOT BE PERMITTED.

b. If, after the award of the contract, a disposal area other than that stipulated in these specifications is proposed, its acceptance will be subject to the approval of the Contracting Officer after an adjustment of the contract price if found necessary by the Contracting Officer to protect the Government interest. The

contractor shall obtain the written consent of the owners of the substitute grounds and furnish evidence thereof to the Contracting Officer. All expenses incurred in connection with providing and making available such disposal areas shall be borne by the Contractor, and all materials deposited thereon, and all operations in connection therewith shall be at the contractor's risk.

Substitution of disposal areas is not considered to be "value engineering" within the meaning of the VALUE ENGINEERING INCENTIVE clause of the contract, and the Government will be entitled to the full amount of any reduction in contract cost for permitting the use of alternate disposal areas.

c. *Materials Excavated by Hydraulic Dredges* shall be transported by pipeline directly to final position in the approved disposal area without rehandling or placing in scows or other vessels.

d. Any material that is deposited elsewhere than in places designated or approved by the Contracting Officer will not be paid for and the contractor may be required to remove such misplaced material and deposit it where directed at his expense.

After the contracting officer denied ADC's request of January 9, 1967, that the above provision be revised to permit bidding on use of alternate disposal areas and rehandling operations, that company protested to the Philadelphia District Engineer and to this Office by telegram of January 17, 1967, the restrictions which prohibit responsive bids based on the rehandling of materials by bucket dredging operations and the use of alternate disposal areas. Citing 43 Comp. Gen. 643 and B–158933, April 29, 1966, ADC stated the grounds for its protest as "the said restrictive language precludes bidders from submitting bids predicated on accomplishing the dredging work and disposing of the spoil by the most economical means available to them thereby depriving the Government of possible savings in project costs." American Dredging Company's protest was either endorsed, or additional protests filed, by Atkinson Dredging Company, Gahagan Dredging Corporation, Norfolk Dredging Company, Great Lakes Dredge & Dock Company, Atlantic Gulf & Pacific Company, Southeastern Dredge Owners Association (with membership of 16 dredging companies) and the National Association of River and Harbor Contractors (representing 22 dredging companies) all of which oppose the restrictions on bidding on alternate areas, and most of which advocate that bidders be permitted to submit bids based on utilizing the most economical dredging means and methods suitable for the performance of the work. By letter of June 2, 1967, Bauer Dredging & Construction Co., Inc., advised this Office that it had declined to join ADC in the protest, and stated that it favored all firms bidding on use of an area furnished by the Government with consideration of alternate areas being reserved until after award.

In support of its objection to the prescription against rehandling, ADC contended that the two shoaling areas on each side of the anchorage near the center of the work area, containing estimated quantities of 41,000 and 10,000 cubic yards of material, could be more economically removed by use of a bucket dredge (with attendant rehandling of the

material) instead of by use of a hydraulic pipeline dredge, and that it would be uneconomical and impractical to run a pipeline the entire distance across the busy anchorage to remove the isolated 41,000 cubic yards of shoaling material situated near the channel, or to remove by such hydraulic dredging skipped spots or spot shoals shown on the after-dredging soundings. Based on its past experience of dredging in the Marcus Hook area, ADC states it believes that at least 20 to 25 percent of the total materials removed will be granular type materials which the successful bidder should be permitted to conserve through bucket dredging and rehandling operations, and that bidders should not be prevented from estimating the value of such materials and making allowance therefor in preparing their bid prices.

Concerning ADC's contention that it was uneconomical and impractical to remove the estimated 41,000 cubic yards of shoaling material situated near the channel by hydraulic dredging pipeline equipment, it is stated in the contracting officer's supplemental report of June 6, 1967:

Removal of the "isolated" shoal on the northerly edge of the anchorage is no longer moot; the shoal does not exist. Continuing accumulation made its existence undesirable, and it was therefore removed by Government forces between 30 April and 13 May 1967.

It is assumed that the removal was effected by Government hopper dredge. Although, as indicated above, the removal of the shoal renders academic the issue of whether it was uneconomical and impractical to remove the shoal by hydraulic pipeline dredging, the contracting officer has stated as a matter of interest that hydraulic dredging in busy anchorages, including the subject one, is commonplace and feasible. We observe that such statement does not assert that it is commonplace to remove similarly situated shoals by hydraulic dredging, nor does it refute the specific contention that it was uneconomical to do so in the instant situation. While it is stated that "Continuing accumulation" made the shoal's existence undesirable, the extent of such accumulation is not shown nor is it indicated that the shoal constituted a shipping hazard. In such connection, it would appear that the existence of the shoal was considered to be "undesirable" when it was originally included in the project work, and it is noted that the 230 days allowed by the IFB for completion of the work extends considerably beyond the period when the removal was performed. Such circumstances do not preclude the possibility that upon further consideration it was, in fact, recognized as uneconomical to remove the shoal by hydraulic pipeline dredging, as contended by ADC, and that savings were to be realized by removing the shoal from the project work and performing the dredging "in house." In support of its contention ADC stated:

At the meeting held on January 5, 1967, which is referred to in the Report, the Contracting Officer (Col. Watkins) told Mr. Greaser that he agreed

that it would be more economical to remove the isolated shoaling areas and "spot shoals" after dredging, with bucket dredging equipment. He stated that after award of the contract he would consider such a proposal based on a credit to the contract price. He also indicated it would be acceptable to him, after award of the contract, for the successful bidder to place sand and gravel into scows as a conservation measure provided a credit to the contract price was offered.

The contracting officer's comments thereon, which do not disavow the statements attributed to him, are as follows:

Contract requirements are established, not in informal meetings with the Contracting Officer, but in formal Invitations for Bids, and written Amendments thereto, promulgated to all bidders. The Contracting Officer will, as a matter of policy, consider any proposal from any bidder or contractor at any time. Manifestly he has not accepted the proposal to amend the specifications; what he will do after award is not at issue, and will abide the event.

Regarding the rehandling provision, the contracting officer reported (February 20, 1967):

14. The "Rehandling" proscribed by the specifications is a method of dredging in which bottom material is removed from the river bed by a clamshell dredge, a bucket dredge, or a dipper dredge. The material is placed in a scow and hauled to a selected "rehandling basin," where it is dumped, subsequently to be pumped ashore. Such "rehandling operations" are permissible if heavy material, such as coarse sand or gravel, is to be dredged. Such operations are necessary, where light material is to be dredged, if there is no disposal area in the vicinity to which the material can economically be pumped.

15. Neither of the above situations obtains in this case. The borings indicate the material to be, overwhelmingly, light, soft, organic clay—in laymen's terms, mud. Its very presence in the Anchorage indicates its mobility. In such situation, rehandling operations permit a portion of the dredged material to escape during the process and to return to the river, a circumstance inimical to, and at variance with, the Government's intent to get all of the material ashore and properly secured. Further, there is here no necessity for rehandling, because the Government-furnished disposal area is nearby, within reach of a hydraulic discharge line.

16. This job is basically a hydraulic dredging operation, wholly and completely. The use of bucket, clamshell, or dipper dredges is uneconomical and unnecessary. In view of the nature of the material, and the location of the Government disposal area, it is difficult to conceive of a job in which hydraulic dredging is more obviously called for.

17. On 5 January 1967 the protester conferred with the Contracting Officer upon the matters involved in this protest and set forth in the protester's 9 January letter. In view of that discussion, we believe that the protester concurs in our analysis of the job as basically a hydraulic operation. It happens, however, that in hydraulic dredging, certain spots on the river bed are occasionally missed during the initial pass, to await discovery during the Government's after-dredging survey. Specification paragraph SP–12, FINAL EXAMINATION AND ACCEPTANCE, requires removal of such "shoals, lumps, or other lack of contract depth." It is the protester's apparent contention that such small shoals can be removed more economically by bucket dredge than by hydraulic dredge—that it is cheaper to utilize a bucket dredge for such spot operations than to relocate, say, a 27'' hydraulic dredge and its appurtenant discharge line for accomplishing that kind of work. He further contends that use of bucket dredges and scows would "permit the contractors to conserve materials and to use such materials for backfilling or other purposes, thereby bringing about further reduction of costs to the Government."

18. However valid the above contentions may be, the Contracting Officer finds them to be insufficient justification for permitting rehandling. His reasons follows:

a. The incidence of skipped spots—"holidays," as it were—is a matter within the contractor's control. The more carefully the initial passes are made, the less return trips will be necessary to remove isolated shoals that were missed.

In this maintenance job, involving soft materials, there is a generous allowance of two feet for overdepth dredging (TP–4a.), to be paid for at the contract price. Accordingly, the exercise of ordinary care on this job should reduce "spot shoals" to a minimum, thus eliminating return trips, without which there need be no conjecture upon the alleged economies espoused by the protester.

b. Paragraph SP–12, which requires removal of spot shoals, also provides, "but if the bottom is soft and the shoal areas are small and form no material obstruction to navigation, the removal of such shoal may be waived by (sic) the discretion of the Contracting Officer." Exercise of such discretion is clearly indicated in this project.

c. The borings on this job fail to disclose any material suitable for "backfilling or other purposes," and accordingly there will be no occasion for "the contractors to conserve materials." Although it is true that isolated pockets of heavy material may now and then be encountered, such occurrences within the project limits will be minimal, and could have little or no effect upon the contract price. Should heavy material be encountered, and conservation thereof is indicated, such can be accomplished under the "Changes" article of the contract.

d. The specification at issue has been used by the Philadelphia District for many years, whenever the nature of the work required its use. American Dredging Company has many times importuned District personnel to delete the clause. No other firm has ever complained, nor has American heretofore made formal protest, notwithstanding use of the clause in many earlier American Dredging contracts. The Contracting Officer perceives no basis for changing a specification provision to permit a construction procedure which would not be compatible with the job requirement or purpose.

19. The reason for the prohibition against rehandling, namely, the Government's requirement that all material removed from the river bed be prevented from reentering the stream, applies with greater force to the prohibition against pumping into scows. Settlement of soft dredged material requires a disposal area of many acres; such settlement cannot be accomplished within the limited confines of a scow. On the contrary, only heavy material, such as sand or gravel, will settle out in a scow. Light material simply flows over the coamings and returns to the river. That kind of operation cannot be countenanced in this project, in which virtually all of the work involves light material.

20. It is the Contracting Officer's prerogative to delineate the work to be done, and the method by which it will be done. He has established the method in this case, for the valid reasons heretofore mentioned. The Contracting Officer requires a "clean" job, without the inevitable escape of quantities of spoil during rehandling and scow operations. The material is not to be in part removed from the river and in part relocated in the river; on the contrary, *all* of the material is to be removed. Those considerations far outweigh the supposed economies alleged by the protester. The Contracting Officer having written a specification provision necessary for proper performance of the job, applicable to all bidders and giving preference to none, such provision should remain undisturbed: "It is, of course, not within the province of this Office to draft specifications for the contractual needs of administrative departments and agencies of the Government," *33 Comp. Gen. 586* (1954).

The contracting officer has further pointed out in his supplemental report of June 6 that the prohibition is not against use of the bucket dredge, but against dumping the scow and the attendant pumping ashore (rehandling).

While attention is given above (paragraph No. 19) to the prohibition against pumping dredged materials hydraulically into scows (TP–3c), the original protest did not mention such proscription, and, although reference was made thereto in subsequent communications, ADC has clarified its protest as not contesting the pumping into scows provision.

In response to the contracting officer's position, ADC reaffirms its belief that there are significant quantities of good granular materials available from virgin materials to be found within allowable overdepth, including side slopes, and nonpay yardage, which are suitable for backing-up or raising dikes or for other purposes, and, states that, if permitted to do so, it plans to bid the job based on conserving or utilizing such anticipated materials by use of bucket dredges and rehandling in its enclosed rehandling basin. As surmised by the contracting officer, ADC concurs in his view that the job is basically a hydraulic dredging operation, but not "wholly and completely" for the stated reasons that hydraulic pipeline dredging is only economical for continuous dredging over a large area, and that the combined use of bucket dredging permits conservation of granular type materials when encountered, and is not only less costly, but also minimizes the obstructing of navigation, in removing comparatively small isolated shoals and in cleaning up skipped spots or subsequent shoaling based on after-dredging soundings. ADC also states that "The dredging process is not an exact science, and no matter how much care is exercised by the dredge crew in initial passes there are bound to be 'spot shoals' shown on the after-dredging soundings." In such connection it is noted that the contracting officer also states that in hydraulic dredging certain spots in the river bed are occasionally missed on the initial pass and he does not contend that exercise of ordinary care would completely eliminate skipped spots but only that it would reduce them to a minimum. That such skipped spots seem to be expected is indicated by the provision for final examination and acceptance (SP–12) which provides in part:

> Should any shoals, lumps, or other lack of contract depth be disclosed by this examination, the contractor will be required to remove same by dragging the bottom or by dredging at the contract rate for dredging, but if the bottom is soft and the shoal areas are small and form no material obstruction to navigation, the removal of such shoal may be waived by the discretion of the Contracting Officer.

Such provision does not define small shoal areas or provide any assurance that removal of any of such areas will, in fact, be waived so as to provide a clear understanding on which bidders can evaluate such factor in preparing their bids. Further, it appears that in a "dragging" operation—the use of which seems to be within the discretion of the contractor—the shoal is not removed but is merely relocated, and considerable disturbance could be involved where the shoals are large and comprised of soft material. We also find it somewhat difficult to reconcile the contracting officer's statement that "Exercise of such discretion is clearly indicated in this project" with his other statements regarding "the Government's intent to get all of the material ashore and properly secured" and "The material is not to be in part removed from

the river and in part relocated in the river; on the contrary, *all* of the material is to be removed." Concerning the contracting officer's further contention in such respect that "The Contracting Officer requires a 'clean' job, without the inevitable escape of quantities of spoil during rehandling and scow operations" as justification for prohibiting rehandling operations, we refer to the following excerpt from a presentation made by the contracting officer on behalf of the Corps of Engineers (North Atlantic Division) to representatives of the dredging industry in Philadelphia on April 17, 1967, concerning the relationship of dredging to pollution:

Now I would like to review with you some of the ways in which our dredging methods can, and do, affect water quality.

A. In *Bucket Dredging With Scows*—Disturbance of the bottom during dredging, spillage during the operation, and bottom dumping from scows cause increased turbidity and increased oxygen demand.

B. In *Hydraulic Pipe-Line Dredging*—Agitation and leakage along pipelines can cause similar problems.

C. In *Hopper Dredging*—Free dumping adds pollution directly to the dumping area and agitation dredging adds pollution to suspended load in dredging area.

D. In *Rehandling Operations*—Improperly enclosed basins cause loss of polluted material to tidal currents both during dumping and rehandling operations.

E. In *Disposal Area Operation*, low-quality effluent will seriously affect quality of adjacent waters, no matter how much care is exercised in delivering the spoil to the area.

Our present methods, then, can all be considered "dirty" methods, to varying degrees. It is up to us, the Corps of Engineers and the dredging industry, to research and develop cleaner methods. Stricter quality standards with criteria will force the issue. [Last Italic supplied.]

It is noted that the presentation refers to "improperly" enclosed basins as causing loss of polluted material, and that hydraulic pipeline dredging can cause problems similar to those found in bucket dredging with scows. Further recognition that disturbance problems exist in hydraulic dredging is indicated by specification TP–3f which requires that the daily samples of surface water be taken "up current" from the dredges.

In a reply to the presentation addressed to the division engineer under date of June 12, 1967, by a Special Committee of the Dredging Industry, made up of the presidents of seven dredging firms including those protesting the subject solicitation, it is stated that bucket dredging is not "dirtier" than hydraulic dredging as "It can be demonstrated by engineering computations that approximately twice the surface area per unit of material dredged is exposed to possible suspension in the stream by hydraulic dredge method as compared with bucket dredging method." It is also stated therein that where enclosed rehandling basins are used there is no significant loss of materials by bottom dumping from scows. The committee's statement concerning the effect of dredging operations upon pollution is as follows:

Executive Order No. 11288

The Order which is entitled "Prevention, Control and Abatement of Water Pollution by Federal Activities" is primarily directed at water pollution caused by

waste from Federal facilities, buildings, and installations. Provision is also made for review by the Secretary of Interior of any report proposing authorization or construction of any Federal water resource development project. The only pertinent policy provision (Section 1. (3)) states:

"Pollution caused by all other operations of the Federal Government, such as water resources projects and operations under Federal loans, grants, or contracts, shall be reduced to the lowest level practicable."

Section 7 provides for a review of Government contractors' operations only where they contribute to pollution and "for which there is a significant potential for reduction of water pollution." Obviously, this Executive Order does not justify the unreasonable requirements which the Corps contemplates imposing on dredging contractors.

The Infinitesimal Effect of Dredging Operations Upon Pollution and Siltation

The various papers presented by the Corps of Engineers Representatives at the meeting of April 17, 1967 failed to put the pollution problem in its proper perspective in relation to the effects of dredging. Before the various Federal agencies should become overly concerned with the minute details of quantity and quality of dredge effluent, its magnitude should be compared to that of the watershed in question, for example the Delaware River Basin.

The Corps claims that in its principal stream, the Delaware River, they anticipate 6,000,000 cubic yards of maintenance dredging annually. This quantity of material could easily be removed by a 27" hydraulic dredge working 12 months of the year. During this yearly period, U.S. Geological Survey records indicate that a median minimum flow of 4,130 cfs. (cubic feet per second), a maximum of 24,500 cfs. and a mean flow of 12,400 cubic feet per second. A 27" dredge, during operations, might possibly return to the river a maximum of 80 cfs. with a more realistic average of 65 cfs., however, with the effluent return to the river from a disposal area over the entire 12 months of the year, the average spillway discharge would be approximately 37 cfs. This means that the average discharge from a 27" dredge represents one part in 333 of the average river flow.

There are other factors that affect the quality of the water of this mean river discharge. It is estimated that the sedimentation load from upland sources in the Delaware River is from 4 to 6 million cubic yards annually. In some tributaries up to 50% of this load is found to be combustible material, primarily coal culm, and in others a high concentration of raw sewage. The City of Philadelphia has a drainage area of 83,000 acres. Rainfall at the intensity of one inch per hour, which occurs at least five times annually on 100 acres of paved city streets will result in a run-off of approximately 80 cfs., which is equal to the peak flow of a 27" dredge. However, the city has a drainage area of 1000 times this example, and the Delaware River Basin 100 times that of the city. One inch of dust, dirt and ashes washed down the storm sewers could deposit 1⅓ million cubic yards annually into the Delaware River.

Within the tidal estuary of the Delaware River alone, decomposing vegetation from the meadow area is producing organic soil at the rate of one foot in 480 years, or each acre is producing 3⅓ cubic yards of material that is returned to the river; or approximately 500,000 c.y. annually. Obviously there are many factors that affect the quality of river water in an intensity many times the order of magnitude than dredge effluent.

Much has been said about pollution. There are no studies that indicate dredging pollutes a waterway. The worst that can be said about dredging is that it disturbs polluted material. What is so undesirable about the so-called polluted materials that are disturbed by dredging? The basic problem is that the oxidation of this polluted material has a large oxygen demand upon the water. Polluted material that is dredged and placed on an upland disposal area returns the river water into the stream at a higher quality due to the aerating effects of the dredging process and the retention in the disposal area. It has been demonstrated that in some instances polluted water dredged from the river has improved in quality to the extent that it is fit for human consumption by the time it reaches the disposal area weir.

The infinitesimal effect of dredging operations on sedimentation and pollution is obviously apparent when the rate of river flow is compared with the rate of materials returned to the river by a 27" dredge. The power of the river is

beyond imagination. Regardless of the quality of dredge effluent, it can not have any significant effect on the quality of the river water since the river flow is many times greater. This can be illustrated by the following Table:

DREDGE EQUIVALENTS OF VARIOUS RIVER STAGES AT MARCUS HOOK ANCHORAGE

(Maximum discharge 27" dredge equals 80 cfs.)

	Cfs.	No. of Dredges
Mean Minimum River Flow	4, 130	52
Mean Average Flow	12, 400	155
Mean Maximum Flow	24, 500	305
Maximum Flood Tide	300, 000	3, 750
Maximum Ebb Tide	255, 000	3, 180

Other forces of Nature must also be considered to put this issue into a proper perspective. Wind picks up fantastic amounts of soil, redistributing it over other land and water areas. In 1934, one single wind storm blew over 300,000,000 tons of dust from dry western plains, carrying much of it eastward to the Atlantic Ocean. Thus, any spillage or loss of materials from a dredge, or from a disposal area, in relation to the overall problem, is infinitesimal.

In his reply of August 25, 1967, to the committee, the Division Engineer addressed the committee's recommendation—that prohibition on rehandling materials be eliminated from dredging specifications—as follows:

As for rehandling material, referred to in sub-item e, the nature of material to be dredged requires individual consideration in each case; rehandling will be permitted where found to have no adverse effect on navigation or found to create no pollution problem.

Concerning the operation since 1961 of its enclosed rehandling basins situated adjacent to the Marcus Hook and the Mantua Creek Anchorages, ADC states:

At no time during the operation of these enclosed-rehandling basins has the Corps of Engineers ever contended that dredged materials were lost during the dumping or rehandling operations. Not once has the permittee been requested by the Corps to remove shoaling at the entrance or in the vicinity of the rehandling basins. Past experience shows that in a properly enclosed-rehandling basin, such as those operated by American Dredging Company, there is no "excessive escape of fines" into the stream. This is irrefutable. Thus, it is plain that the prohibition of "rehandling operations" in the subject IFB, for the reasons stated, cannot be justified. There is no "valid" operational reason to prohibit "rehandling operations" where a bidder has available to him an enclosed-rehandling basin constructed in accordance with the requirements of the Corps of Engineers.

ADC further contends that other districts of the Corps of Engineers do not prohibit rehandling operations, even in open basins, and that since the Philadelphia District started using the provision in invitations for bids in about 1962 it has been deleted by the contracting officer at the request of ADC and the enclosed rehandling basin provision inserted. While the contracting officer states that the requirements of other districts are not at issue, and that the Philadelphia

District will permit rehandling in the future whenever the circumstances "require" such method, ADC contends that the practice in other districts is relevant in determining whether there is a valid operational reason for prohibiting rehandling operations and we believe there is merit to such contention. Concerning such variations in specifications the industry committee in the report referred to expressed the following views:

> Representatives of Corps seek to justify variations in their specifications on the basis of (i) nature of the materials, (ii) options available for disposal, (iii) regional or local interests, (iv) Fish & Wildlife, Ecologic and Anti-Pollution interests, and (v) drainage problems. These are not valid reasons for opposing standardization since the problems are common to all Districts. Each District has the same range of materials. What is good for silt or sand in Norfolk, Va. should be equally applicable to any other District. The options available for disposal should not vary. What is good for one District should not be bad for another District. Local interest is the same. Drainage problems are similar. The same Fish & Wildlife policy applies. There are no peculiar conditions between the various Districts which would justify a departure from a standard policy.

While the contracting officer states that the reason for prohibiting rehandling operations is to insure that *all* material removed from the river bed be prevented from re-entering the stream, it appears from the foregoing that neither 100 percent hydraulic pipeline dredging, with its attendant agitation, leakages and return of permissible quantities of suspended materials from the disposal area, nor the prohibiting against rehandling operations under the subject specifications, would insure such a result. Further, in our view the record does not require a conclusion that enclosed rehandling basins, such as that owned by ADC near the Marcus Hook Anchorage, cannot be used under reasonable inspection and operating requirements for the limited purposes proposed, so as to prevent the escape of a substantial amount of soft material out of the project areas, or without creating a significant pollution problem, or without otherwise failing to comply with the requirements specified in the division engineer's letter of August 25, under which rehandling operations are considered to be permissible.

In formal advertisements, 10 U.S.C. 2305 requires that the specifications and invitations for bids "shall permit such free and full competition" as is consistent with the procurement of the property and services needed by the agency concerned. As stated in 33 Comp. Gen. 586, cited by the contracting officer, it is not within the province of this Office to draft specifications for the contractual needs of the departments and agencies. It is, however, a proper and significant function of this Office, in connection with our audit of expenditures of appropriated funds in payment of obligations arising under public contracts, to insist upon valid justification for restrictions or prohibitions placed in invitations for bids which do not directly serve an actual need and

do not permit bidders to compete fully, as provided by the above statute, by restricting their operations and preventing them from offering their lowest prices for furnishing the described needs of the Government. The establishment of such justification is a positive requirement concomitant with the decision to include the proscription in the invitation for bids, and, when called upon, it is the responsibility of the agency to substantiate the validity of the restrictive provision or otherwise to amend or delete it. Here, the Government's actual need is to have the material removed from the bottom of the anchorage to a specified depth and properly secured ashore. While we do not question that the job can, and should, be performed without creating significant pollution problems or that relocation in the river of a substantial portion of the material is "a circumstance inimical to, and at variance with," the Government's need, we do not believe, as indicated above, that adequate justification has been shown for prohibiting all rehandling operations, which in our view prevents one prospective bidder, at least, from competing fully and offering its most favorable price for fulfilling the Government's actual needs.

In response to an inquiry by this Office to the Department of the Army concerning whether bucket dredge and rehandling operations could be employed without the escape of a "prohibitive amount" of the soft materials here involved to other parts of the anchorage or river, we were advised to the effect that since such operations were not "essential," the amount of soft materials escaping would therefore be prohibitive. We cannot accept the view that any additional amount of material which may escape into other areas through the combined hydraulic and bucket dredge operations, as proposed, would be prohibitive without comparative reference to the significance of the amounts and effects of such escaping materials, and to the possible cost factors involved. When drafting specifications or invitations for bids which restrict the application of techniques, methods or operations to a single, or administratively preferred, process under which prospective contractors are required to perform the work, the criterian for inclusion of such restrictions is not whether alternate processes are "required" or "essential" but is, instead, whether a valid justification has been established for prohibiting bidders from basing their bids on the use of any customary methods of operation which, in their considered judgment, provide the most economical means available to them and will result in the lowest cost to the Government. That in the opinion of procurement officials concerned a particular operation cannot be economically employed in the work performance by a bidder, or by all bidders, provides no valid basis for prohibiting such operations, since determinations as to the operational areas in which econo-

mies may be effected by the individual prospective contractor, in performing a particular job reside more properly with the contractor than with the procurement officials, and constitute an essential element to his competing freely and fully for the procurement as intended by 10 U.S.C. 2305. See also 15 U.S.C. 631(a) where it is stated in connection with small business concerns "The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of *personal initiative and individual judgment be assured.*" [Italic supplied.]

Regarding the provisions in TP–3 requiring that bids be based on utilizing the Government furnished disposal area, and specifying that alternate areas will not be considered until after award of the contract, the propriety of use of disposal areas, other than the Government furnished areas set forth in the IFB's, has been considered by this Office on prior occasions. In our July 1959 report to the Congress, reviewing spoil activities of the Corps of Engineers, we noted that the Corps policy did not provide for accrual to the Government of benefits obtainable through use of alternate areas, and we recommended that dredging contracts be executed to allow for an adjustment of price in the event a contractor's costs are substantially reduced through use of such areas. While we did not address therein the question of bidding and awarding contracts, in the first instance, on the basis of the use of disposal areas other than those provided by the Government, the Corps recognized that benefits to the Government were derived from such bidding in the following statement contained in its comments of May 14, 1959, on the proposed report:

> * * * Moreover, major benefits have been realized by the United States through competitive bidding procedures in cases where the spoil was known by the contractor to be saleable and its value was reflected in the bids received for the dredging work.

The question of bidding on the use of alternate areas was considered in our letter to you of April 1, 1964, 43 Comp. Gen. 643. In the case referred to therein we declined to interfere with the contract—which had been awarded pursuant to the contracting officer's decision not to reject all bids and readvertise under specifications permitting use of alternate disposal areas—since the dredging was urgently needed and we did not consider the award made to be clearly contrary to the public interest or in violation of law (see B–158933, April 29, 1966, to Great Lakes Dredge & Dock Company). However, we expressed our doubt to you as to whether the competitive bidding system permits the elimination of possible bids based on use of alternate areas, if bidders through the exercise of their own initiative and efforts are able to locate and wish to bid upon use of such an area. Further, we suggested

that consideration be given to revising the existing procurement procedure so as to permit bidders, whenever practicable, to submit responsive bids based upon use of alternate disposal areas.

We again considered the matter of bidding on use of alternate disposal areas in our letter of April 29, 1966, B-158933, to the Secretary of the Navy in which we asked that the existing procurement procedures of that Department

> be reviewed and, if necessary, amended to insure that, in keeping with the spirit and basic principles of the competitive advertising system, bidders in future procurements are afforded the opportunity whenever practicable to initially submit bids based on accomplishing the desired dredging and satisfactorily disposing of the spoil by the most economical means available to them.

In the case there under consideration—which involved the rejection of all bids received (under an IFB requiring bids to be based on a specific disposal area) and readvertisement to permit submission of bids based on either contractor or Government selected areas—we considered and specifically rejected the protesting bidder's contentions that it is an improper and irregular procedure to permit contractors to select and bid on alternate disposal areas and that disposal areas unspecified by the Government should be considered only after award.

Our letter to the Secretary of the Navy of April 29, 1966, was inserted (on September 20, 1966) at page 3252 of the record of the Senate Hearings, Public Works Appropriations for 1967, 89th Cong., 2d sess., on H.R. 17787 (making appropriations for certain civil functions—Delaware River, Philadelphia to the Sea (Anchorages), Delaware, New Jersey, and Pennsylvania), by the Chairman of the Subcommittee of the Committee on Appropriations in connection with testimony by the Corps' Director of Civil Works that the Corps would to the greatest extent possible conform to the views and recommendations of the General Accounting Office in our report of July 1959 "and in subsequent decisions with respect to the use of spoil disposal areas." In its report of October 3, 1966 (No. 1672), to the Senate (to accompany H.R. 17787) the Committee on Appropriations reported as follows:

> DELAWARE RIVER, PHILADELPHIA TO THE SEA (ANCHORAGES) DELAWARE, NEW JERSEY, AND PENNSYLVANIA
>
> The committee has been advised that the Corps of Engineers has reconsidered its previous proposal to acquire disposal areas by condemnation. In this connection, the committee feels that the Corps of Engineers, as a matter of policy, should avoid acquiring fee simple title in land for use as spoil disposal areas, particularly in localities where land suitable for future industrial use is scarce, or where the corps can make suitable arrangements for an easement to fill land in the vicinity.
>
> The July 1959 report to Congress by the Comptroller General (Subject: Review of Spoil Disposal Activities, Corps of Engineers, Civil Functions, Department of the Army), concluded that "* * * the Congress may wish to give further consideration to the matter of the adequacy of the Government's current participation in land enchancement (resulting from the disposal of spoil on low land)."

Pursuant to the second specific recommendation in that report, the committee believes the Government would realize the benefits of broader competition if the Corps of Engineers in preparing invitation for bids on dredging work would set forth the locations of all available disposal areas known to the corps including such information as may be readily available concerning acceptable alternate disposal areas which may be available for use because of existing needs of State or local municipalities for spoil on projects financed with Federal funds. *Bidders should not be discouraged from exercising their own initiative in locating acceptable alternate disposal areas where the use of such areas are to the advantage of the Government.* [Italic supplied.]

* * * * * * *

Although the position of this Office regarding proscriptions in IFBs against bidding on use of disposal areas not described in the specifications is clearly shown in the above decisions and letters, and has been recognized elsewhere, we are advised that it is still the policy of the Corps of Engineers to preclude bids based on the use of alternate disposal areas, and to consider the use of contractor furnished areas only after award by negotiations with the successful bidder. In the administrative reports furnished this Office it is argued at length that permitting bids based upon use of alternate disposal areas violates the underlying principles of the competitive bidding system, and is *per se* invalid; that bids based upon placing the spoil in an area other than that specified in the IFB are not on a common basis but are bids "upon different work, upon a different job altogether;" that if bids based upon use of alternate disposal areas were permitted in this case, "American Dredging would have an apparent advantage over other bidders which would tend to discourage and lessen competition;" that it is "Protester's plain intention to obtain a corner on all practicable disposal areas on all major projects in the Delaware River * * * should his efforts succeed, and his right be upheld to use 'alternate' areas, to the exclusion of other bidders, Protester will have obtained, not merely the advantage over competition which he now enjoys, but a stranglehold upon competition in this area;" that if local contractors in other areas are "encouraged" to obtain exclusive rights to choice disposal areas this would have the effect in many instances of eliminating much if not all competition, to the ultimate disadvantage of the Government; and that while the Corps has followed the specific "decisions" in the above-cited cases (presumably in identical factual situations), the views of this Office as expressed in our letter to you and to the Secretary of the Navy concerning the undesirable situations evidenced by those protests have not been followed for the reason that such letters were considered to be "dictum" accompanying the decisions.

The term "dictum" is generally used as an abbreviation of "obiter dictum" which means a remark or opinion uttered by the way. 21 C.J.S.—page 311. We find a distinction as to the effect (for administrative purposes) between the actual decision to a protesting bidder in

a particular case and our letter to the head of the agency, concerning areas in the agency's procurement practices brought to light by the protest where revisions are considered desirable, to be somewhat novel. To have the positions of this Office as stated in such letters disregarded by a Federal organization merely by categorizing them as dictum seems particularly futile when it is obvious that administrative actions taken contrary to such stated positions may result in the disallowance of credit in the disbursing officer's accounts. In this connection it is noted that the Chairman of the Subcommittee of the Committee on Appropriations intended no technical distinction between our letter to the Secretary of the Navy of April 29, 1966, and the attendant decision to Great Lakes Dredge & Dock Company, when he inserted such letter into the record as follows:

> The most recent *decision* of the General Accounting Office on this subject, of which I am aware, is that of April 29, 1966, copy of which will be inserted in the record at this point. [Italic supplied.]

Further, we do not accept the Corps' position that "the case at hand differs in material facts from the cases in which the dicta arose." In the decisions of April 1, 1964 and April 29, 1966, to Gahagan Dredging Corporation and Great Lakes Dredge & Dock Company, the disposal specifications restricting bidding on use of alternate disposal areas were quoted and regarded as a material factor in disposing of the protest. In quoting the disposal specification in our decision of April 29 we stated "The disposal specifications, *which must be regarded as the basic factor* giving rise to the situation at hand, provided as follows * * *." [Italic supplied.] Clearly the alternate area proscription, was a point within the issues presented in those cases and considered in arriving at our decisions.

Concerning the Corps' contention that ADC should not be permitted to submit a bid based upon use of its nearby Raccoon Island disposal area for the reason that such an apparent advantage would tend to discourage and lessen competition, the clear mandate of 10 U.S.C. 2305 is that invitations "shall permit" such free and full competition by bidders as is consistent with the actual needs of the Government being fulfilled. The Government's actual needs, as stated hereinbefore, are to have the subject material removed from the anchorage and satisfactorily disposed of ashore. There is no need that any of the material be deposited in the disposal area designated in the specifications, nor is it inconsistent with the procurement of such particular services for the material to be eventually deposited in the Raccoon Island, or another, disposal area, as the Corps is willing to negotiate for use of alternate areas after award. While we have in a few limited situations approved the Government's introduction of factors tending to offset or equalize to some extent the competitive advantages of

producers, particularly where the advantages were derived from use of Government property or equipment, or where the Government has caused or contributed to the inequalities, we have also pointed out that the Government is not required to do so. We find nothing in 10 U.S.C. 2305 to indicate that such statute contemplates that a bidder's right, as provided therein, to compete freely and fully may be administratively restricted or controlled by procurement officials in the drafting of invitations for bids, for the sole purpose of encouraging other prospective contractors to participate in the bidding, to the extent that any bidder is precluded from computing his bid price on the maximum utilization of his own property, facilities and equipment. Accordingly, we hold that such administrative restrictions in the areas of a bidder's internal operations, even for the purpose of obtaining a larger number of bidders, is basically inimical to *free* and *full* competition by the individual bidder, and may be condoned only where it is clearly required in order to secure the actual needs being procured. Although it is the policy of the Corps to draft invitations so as to not allow responsive bidding on acceptable alternate disposal areas furnished by the contractor, that policy does not permit bidders to compete freely and fully in situations such as that at hand for the work actually required by the Government and to the extent that such policy conflicts with 10 U.S.C. 2305 the statute must prevail.

Further, we are not persuaded by the contention that bids based upon placing the spoil in an area other than that specified in the IFB are not on a common basis but are "upon different work, upon a different job altogether" since the "work," as it requires bidding on use of a particular disposal area, introduces a restrictive bidding factor not essential to procuring the end result needed by the Government, and the common basis upon which bids are to be evaluated should not, as a general rule, include matters going beyond the procurement of such needs. We are also unable to rationalize such view with the additional contention that use of alternate areas should be negotiated with the successful bidder after award. If, as contended, a bid on use of an alternate area constitutes a bid on a different job there would appear to be no basis for negotiating with the successful bidder for use of his alternate area since it would be for a job other than that actually needed by the Government. Also, under this theory the change would not be within the scope of the contract and would therefore be unauthorized, but would have to be advertised and bid as a different project. To pursue such contention further one could arrive at the erroneous conclusion that a formal advertisement for bids may be issued on a specific job and used only as an instrument in selecting a contractor with whom negotiations may be conducted for a different job altogether. It is elementary that invitations for bids were designed to secure a firm con-

tract price for the Government's needs described therein and not as the first step for negotiation procedures.

That invitations permitting bidding on the basis of alternate factors are not *per se* invalid by violating the principle of competitive bidding on a common basis, see *John Reiner & Company* v. *United States*, 163 Ct. Cl. 381. Should the Corps find that one potential bidder is in fact in so advantageous a position with respect to particular work that no other could compete on even terms, negotiation with that bidder in the first instance would be more in keeping with the law than procedures proposed.

Regarding the Corps' speculations as to ADC's intentions of obtaining a corner on all practicable disposal areas along the Delaware River, and as to what contractors in other areas may do, the possible effects and consequences of the formal advertisement provisions are matters which received the consideration and deliberations of the law-making branch of the Government at the time the statute was being enacted into law. That an agency believes future problems and undesirable situations will arise from contractors exercising the free and full competition which the statute demands be afforded bidders in fulfilling the agency's needs, provides no basis for not administering the statute in accordance with its clear terms. If the situations envisioned by the Corps eventually occur, and it finds that the activities of favorably situated contractors severely interferes with its efforts to make arrangements for suitable disposal areas to offer bidders on its dredging projects, a proper approach to a solution would appear to be in again presenting its disposal area problems for the consideration of Congress.

For the reasons stated we conclude that the invitation in question should be canceled and reissued, or modified, in accordance with these views.

[B–161334]

Bids—Evaluation—Negotiation—Criteria Establishment

The determination to evaluate proposals for furnishing tape recorders, spare parts, and use documentation on the only common basis offered, the price of the recorder, rather than on the basis of the points assigned to the cost, management, and technical criteria established after the issuance of the request for proposals was not a proper exercise of administrative discretion, for unlike management and technical evaluations, cost evaluations can be objectively measured on overall costs and, therefore, negotiation of the procurement with only one of five offerors was not in accord with paragraph 3–804 of the Armed Services Procurement Regulation requiring clarification of defectively priced proposals. However, even in applying the defective cost evaluation technique, one of the rejected proposals coming within the "competitive range" contemplated by 10 U.S.C. 2304(g) should have been considered as it was not so technically inferior as to preclude meaningful negotiation. Although the award made will not be disturbed, steps should be taken to avoid a recurrence of similar negotiation procedures.

To the Secretary of the Air Force, November 13, 1967:

Reference is made to a report dated May 24, 1967, from the Deputy Chief, Procurement Operations Division, Directorate of Procurement Policy, Department of the Air Force, Washington D.C., relative to the protest of Consolidated Electrodynamics Corporation (CEC) against the award of contract No. FO4695-67-C-0132 to the Ampex Corporation under request for proposals (RFP) FO4695-67-R-0064.

By letter dated November 15, 1966, the Air Force Satellite Control Facility, Space Systems Divisions, Air Force Systems Command, Los Angeles, California (AFSCF SSD) requested price and technical proposals on a fixed-price basis for fabricating, testing and delivering 22 magnetic tape recorders with associated spare parts and documentation for use in the Space Ground Link Subsystem, in accordance with an attached statement of work, entitled "Magnetic Tape Recorders," and Aerospace Corporation report No. TOR-669(6110-01)-16, reissue A (TOR/16), dated September 23, 1966, entitled "Wideband Magnetic Tape Recorders." Section 3 of that report dealing with the general concept of TOR/16 stated that: "The recorders shall be a standard product line from a well recognized manufacturer of proved reputation." Further, the information and instructions accompanying the solicitation, advised offerors, in part, as follows:

* * * * * * *

4. You are requested to respond strictly to the requirements of the attached Statement of Work. However, any alternative solution or use of other equipment should be submitted in a separate proposal.

* * * * * * *

8. Your proposal should include your design or plan for accomplishing this procurement. If in submitting this plan, you should include information which you do not want disclosed to the public or used by the Government for any purpose other than evaluation of the proposals, you should mark each sheet of data which you wish to restrict with the legend below:

(a) Your proposal should include a Maintainability Program Plan containing fully descriptive planning for the accomplishment of each Maintainability Program task specified by the Statement of Work. This should include:

(i) The work to be accomplished for each specified task as delineated in MIL-STD-470.
(ii) The time phasing of each task.
(iii) The contractor organizational element responsible for implementing the maintainability program.
(iv) General techniques for allocating quantitive requirements to lower level functional elements of the system (subsystem, assembly or components).

* * * * * * *

31. Blocks 23, 24, 25 and 26 of the various line items of the DD Form 1423, Contract Data Requirements List, which is attached to the Statement of Work, are to be filled in and this become a part of your cost proposal. Care should be exercised in the completion of this form.

Of the 13 sources originally solicited, five firms submitted technical and price proposals by the closing date December 9, 1966, as follows:

Hewlett-Packard	$762,720
CEC	$803,440
Ampex Corporation	$917,962
Honeywell, Inc.	$985,319
3M Company	$1,007,086

By TWX, dated December 9, 1966, CEC advised that as a result of an error in the preparation of its proposal the unit price for the tape recorders should be corrected to $33,180 and the extended total should be correspondingly corrected to $729,960. The TWX was, however, transmitted after the 12:01 p.m. closing time for receipt of proposals and was therefore determined to be a late modification and, in accordance with Armed Services Procurement Regulation (ASPR) 3-506(g), was treated as a late proposal and not further considered. CEC does not question this determination.

On December 22, 1966, a Proposal Evaluation Board (PEB) was established with three panels to perform a point evaluation of the cost, technical and management aspects of the proposals. Evaluation criteria for each area were determined before the proposals were opened, and the distribution of points among the respective areas was as follows: cost-500 points; technical-350 points; management-150 points. However, in the area of cost evaluation it became necessary to adjust the evaluation criteria to take into account certain pricing discrepancies in the proposals of Honeywell, Hewlett-Packard, and CEC. In this respect, it appears that the Ampex and 3M price proposals were complete in that they included the costs of the tape recorders, spare parts and the required documentation. It was determined, however, that the CEC proposal did not include either spare parts or documentation costs. Further, the Honeywell price proposal excluded the spare parts cost and it could not be determined from the Hewlett-Packard proposal whether documentation costs were included. To provide a basis for comparison and cost weighing, all proposals were evaluated on the basis of the tape recorder costs only.

Upon evaluation, the proposals received the following scores:

	Cost	Technical	Management	Total
Ampex	451	208	59	718
Hewlett-Packard	500	139	34	673
Honeywell	434	82	34	650
CEC	475	72	32	579
3M Company	405	110	53	568

Despite the relative position of the Hewlett-Packard, 3M Company and Honeywell proposals in the total point standings, the proposals of these offerors were determined by the technical evaluation panel

to be unacceptable, and were not further considered. In this regard the following technical evaluation categories were established in conformance with the RFP: Tape Transport (TOR–16); Heads (TOR–16); Direct Record/Reproduce Electronics (TOR–16); Wideband FM Electronics (TOR–16); Primary Power Requirements (TOR–16); Acceptance Test (Para. 2.1.7); Quality Assurance (Para. 2.1.8); Reliability (Para. 2.1.8); Maintainability (Para. 2.2.2); Personnel Subsystem (Para. 2.2.3); Configuration Management (Para. 2.4); Training (Para. 2.5); Deliverable Data & Documentation; Index of Compliance Specifications. The administrative report indicates the emphasis placed on the foregoing factors, and the basis for the determination of technical unacceptability, as follows:

5. Within the technical evaluation category five items were determined to be critical: the tape transport, the heads, the direct record/reproduce electronics, the wideband FM electronics, and the primary power requirements. Prior to bid opening the Technical Panel had determined that if any proposal received a unanimous zero from all individual evaluators (i.e., if the proposal did not "Evidence a minimally adequate (or better) approach to satisfaction of the requirement") for any of these critical items, the proposal would be considered totally unacceptable.

6. The proposals of Hewlett-Packard, 3M Company and Honeywell, Inc., were determined technically unacceptable under the criteria described in paragraph 5 above. * * *

On January 5, 1967, PEB confirmed the findings of the cost, management and technical panels, and, as expressed in the minutes of the meeting, unanimously agreed that:

a. Ampex is rated highest
b. CEC is rated second highest.
c. All other bidders (3M, Honeywell, and Hewlett-Packard) are technically unacceptable and will not be considered.

On the next day, a representative of CEC and a representative of Ampex met individually with the contracting officer to answer "some questions clarifying the * * * proposal(s) submitted in response to the subject RFP." With regard to the meeting with the CEC representative, the contracting officer, in a memorandum dated January 6, 1967, advises that the CEC representative confirmed the contracting officer's conclusion that the CEC price proposal did not include spare parts or documentation costs. Since the CEC representative did not have the cost information relative to these items immediately available, the contracting officer contacted the chairman of PEB to determine whether the information could be supplied later that day or on the following Monday. The chairman advised that the information could not be accepted.

However, by TWX, dated January 6, 1967, CEC stated as follows:

Re: Your conversation this date with our Mr. Schnieder and request for clarification whether required spares (11 sets) and documentation were included in our referenced proposal and TWX amendment.

Please be advised that the referenced proposal for 22 magnetic tape systems at $36,520.00 each included both 11 sets of spares and modified Air Force documentation. Our referenced TWX amendment served to remove the cost of documentation which we believe should not have been included in the equipment price. Our amended unit price of $33,180.00 for 22 units, includes 11 sets of spare parts.

The clerical error which included documentation as a part of the equipment pricing in our referenced proposal was corrected by our referenced TWX on the same date our proposal was submitted, and prior to close of business on the bid due date.

We are advised that in view of the conflicting representations by CEC, PEB decided to consider the CEC proposal as not including the cost of spares and documentation.

By memorandum dated January 12, 1967, the Commander of the Air Force Satellite Control Facility, the final authority which reviewed PEB's findings and recommendation, authorized the Director of Procurement and Production (SSOK) to initiate negotiations solely with Ampex. The Commander's memorandum supports this determination as follows:

3. The two remaining proposals were scored by the board: Ampex, receiving a score of 718 and Consolidated Electrodynamics Corporation, receiving a score of 579. The board recommends that Ampex only be selected for negotiation. In analyzing the difference, I noted particularly that in the technical area Ampex received a score of 208 as compared to 72 for CEC. In the area of cost, CEC led with 475 as compared to 451 for Ampex. However, from the board's analysis of the cost factor, it would appear that this cost variation was not completely realistic because Ampex included pertinent costs which CEC had not included, to wit, costs of documentation and the cost of the replacement of 4 FR–1600 tape recorders. From my analysis of this very substantial variance in score, particularly the very great difference in the technical score, I conclude within the meaning of 10 U.S.C. 2304g and ASPR 3–805.1 that CEC's proposal was not within the competitive range, price and other factors considered, and that negotiations need be conducted only with Ampex Corporation.

Negotiations were completed with Ampex on February 15, 1967, and the contract in the amount of $917,962 was awarded on March 10, 1967, with the modifications as proposed by the contracting officer on February 15, 1967, as follows:

a. Paragraph 2.5 *Training* was deleted as no requirement exists for training of AFSCF personnel. This was verified by Major Hegland, SSOPT. The proposed price submitted by Ampex Corporation was not affected by the deletion of Para. 2.5 as the requirement pertaining to the number of personnel to be trained was not stipulated in the RFP and therefore, it was quoted on a per person basis and not included in the total price proposed.

b. Ampex Corporation originally proposed to replace four (4) each Model FR1600 now installed at VTS, and OL–5 with the current configuration models at no cost to the Government, however, the proposal did not include the spares. Their current offer includes the provision of thirteen (13) sets of spare parts rather than eleven (11) sets as originally proposed. The two (2) additional sets of spares are for the four (4) models to be exchanged.

We have been informally advised that the Ampex offer to replace four previously installed tape recorders was not considered in the evaluation of the Ampex proposal.

By TWX dated March 30, 1967, CEC filed a protest against the award with the contracting officer, and by letter dated April 28, 1967, CEC brought the matter to the attention of our Office. The administrative report advised that as of May 14, 1967, Ampex had incurred $125,000 in costs, and that "any delay in the performance of the contract would jeopardize programs of the utmost national importance." In its letters of April 28, June 21 and August 29, 1967, CEC maintains that the procuring activity in negotiating solely with Ampex violated the "competitive negotiation" requirements of section 2304(g) of Title 10, United States Code. That section provides as follows:

(g) In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or service to be procured, and *written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: Provided, however,* That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion. [Italic supplied.]

In support of this contention, CEC alleges that its technical proposal was wholly responsive to the specification, and that its cost proposal was significantly lower than the Ampex proposal. It is further suggested that the point evaluation was influenced primarily by personnel preferences. The procurement agency's report, on the other hand, advises that the decision not to negotiate with CEC was a proper exercise of administrative discretion in determining the existence of the "competitive range, price and other factors considered." Further, attention is again focused on the wide point differential (approximately 20 percent overall and 60 percent in the technical area) between CEC and Ampex as indicative of the correctness of the decision. With particular regard to the CEC proposal evaluation, AFSCF SSD advised Headquarters, Air Force Systems Command, on May 30, 1967, as follows:

* * * *The CEC proposal had no outstanding strongpoints* evidenced resulting from the evaluation. *Their proposal was considered weak in the following areas:*

A. Acceptance test—no information was included on acceptance testing.

B. Quality assurance—no information was included on a quality assurance program.

C. Reliability—no information was included on a reliability program.

D. Maintainability program.

E. Personnel subsystem—no discussion relative to personnel subsystem or human engineering activity was included.

F. Configuration management—inadequate information in proposal to permit evaluation.

G. Training—no mention of a training program was included.

H. Documentation—the proposal indicates only that documentation would be negotiated with the Air Force at a later date, and that they would provide a quotation for the required information upon request.
I. Index of compliance specifications—none was included in their proposal.

* * * *It is important to note here that if a proposal merely indicates that all requirements can be fulfilled without evidence as to how they can be fulfilled, there is no basis for the evaluators to determine they are acceptable for negotiations. The proposal was the mechanism used in the instant case* * * *. [Italic supplied.]

In response, CEC maintains that with the exception of "D," above, "Maintainability Program," information in the other areas was "not requested for the proposal phase by the RFP, and that the lack of this unrequested data may have been used as a reason to down-rate both the Technical and Management sections of CEC's proposal."

Upon the record presented, it is our opinion that the negotiation procedures employed in this procurement did not conform to the procurement statutes or the implementing regulations.

Considering first the selection of evaluation criteria and the determination of the relative importance attached to each factor, we must acknowledge that these matters are primarily the responsibility of the procuring activity. CEC has not questioned either the use of the point evaluation system, or the relative point distribution among the areas of cost, technical, or management aspects of the technical evaluation, and we find no basis for raising an objection in this respect. However, it is necessary to draw attention to the improper adjustment of the cost evaluation criteria after it was discovered that three of the proposals contained pricing discrepancies. In our opinion, the procuring activity's decision to evaluate and assign points in the cost category solely on the basis of a segment, albeit the major portion, of the procurement was inconsistent with the concept of fair and equal evaluation. Unlike technical evaluations, which necessarily involve the exercise of discretion, cost evaluation is susceptible of objective measurement on the basis of the overall cost to the Government of the procurement. Fairness to all offerors requires no less. While it can be said that the tape recorder costs were the only common denominator present in all proposals, this fact obviously does not insure that proposals would be capable of evaluation on a common basis. An examination of the Hewlett-Packard and Ampex proposals demonstrates the speculative character of the adjusted criteria as an evaluation basis. Since we are advised that it was impossible to eliminate the cost of spare parts from the Hewlett-Packard proposal, it cannot be said that the assignment of the maximum number of points to that proposal remedies the inherent underrating of the Hewlett-Packard proposal in the absence of an adjustment of the points assigned to the other proposals. Further, while the Ampex proposal lists the required documentation as a no-cost item, we may agree, as is pointed out in the

exhibits to the report, that the cost of this item would be carried as a part of the price of the tape recorders. To this extent, the Ampex proposal was similarly underrated.

With respect to the evaluation of the CEC proposal in this area, we note CEC's contention that the process used to convert points in the cost category has "obviously been chosen to produce very little point spread for very significant price differences" is based upon the assertion that its proposal price of $803,440 included the price of documentation and spares. In examining the CEC proposal, the contracting agency concluded that the cost of spares and documentation was not included. This conclusion is not unreasonable on the face of the CEC proposal. In the cover letter to the CEC proposal, it was stated that: "It was our interpretation of the * * * RFP that spare parts and documentation would be negotiated with SSD by the successful contractor. If this interpretation is in error, we will provide any necessary quotation within seven (7) days upon your request." This understanding of the RFP was reflected in the CEC price proposal when, in lieu of a price of item 2, spare parts package, the proposal stated "to be negotiated." Further, no reference in the proposal itself is made to the documentation cost, and the CEC proposal did not include DD Form 1423, Contracts Data Requirements List, as required by the terms of the RFP.

It is clear that in the absence of an accurate understanding and expression of all cost elements (tape recorders, spare parts, documentation), the price proposals did not reflect the cost to the Government of the requested services. Given the fact that the 3M and Ampex proposals were complete from the standpoint of price, we are unable to understand why sound procurement policy dictates that these otherwise complete price proposals be obscured in an attempt to provide a basis for comparison with three other proposals evidencing various degrees of price uncertainty or incompleteness. Certainly, the policy of ASPR 3-804 would have dictated a clarification of the defective pricing proposals as the only acceptable alternative. That section provides as follows:

> Conduct of Negotiations. Evaluation of offerors' or contractors' proposals, including price revision proposals, by all personnel concerned, with the procurement, as well as subsequent negotiations with the offeror or contractor, shall be completed expeditiously. Complete agreement of the parties on all basic issues shall be the objective of the contract negotiations. *Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid. Basic questions should not be left for later agreement during price revisions or other supplemental proceedings.* Cost and profit figures of one offeror or contractor shall not be revealed to other offerors or contractors. [Italic supplied.]

Moreover, we cannot consider that the contracting officer's meeting on January 6, 1966, with CEC, remedied the initial failure to seek

the price clarification required by ASPR 3-804. This meeting served no purpose, but merely confirmed prior assumptions and perpetuated a faulty cost criteria. With respect to the subsequent inconsistent CEC cost representation expressed in the CEC TWX of January 7, 1967, it was certainly not in the Government's best interest for the cost evaluation panel to disregard this later written commitment and consider the CEC proposal to be $803,440, as originally submitted, without spares or documentation. There is, however, no question that CEC was in a "competitive range" from the standpoint of price even if we apply the defective criteria.

Turning next to the management evaluation, we cannot agree with CEC's suggestion that the inclusion of this category in the evaluation may be questioned because the procurement is for standard off-the-shelf equipment and that the use of broad design oriented criteria was improper since: "For standard equipment procurements the management evaluation is normally influenced by the past performance record of the bidder, capabilities and facilities survey's, etc." As we have indicated, the selection of evaluation factors is properly within the sound discretion of the procuring activity. See ASPR 1-903.2 and sub-part (a) (ii) thereof, which authorize the imposition of additional standards for evaluation purposes. We do, however, believe that the advice in the RFP with respect to a preaward survey may have led offerors to deemphasize the need for management information. In this regard, the solicitation advised as follows:

14. It is expected that the offeror or offerors with whom the Government intends to negotiate and award a contract will be required to undergo a pre-Award Survey and received a satisfactory determination therefrom prior to commencement of negotiations and award.

CEC further alleges, in questioning the difference in the points assigned to its proposal in this area as compared to Ampex, that:

* * * Whereas, C.E.C. readily concedes that the overall capabilities and facilities of both Ampex and C.E.C., as two of the nation's oldest and largest instrumentation manufacturers are completely adequate to perform this contract, C.E.C. believes that Ampex has performed poorly on an important recent contract with AFSCF SSD, and that this poor performance was not reflected in the heavy point advantage assigned to Ampex in "the Management" category. Specifically, C.E.C. believes that the four (4) government-owned Ampex FR 1600s listed in the present contract as Item 3 were previously purchased by AFSCF SSD from Ampex and that these equipments were (1) not delivered on schedule by several months, and (2) could not be initially accepted for technical non-performance reasons when received.

In this regard, we have been informally advised that there was a prior deficiency on the part of Ampex, but that such deficiency was corrected, and that there was no contract default. However, in our opinion, the difference in management scores may be traced to the determination that the CEC proposal was informationally deficient.

This is confirmed by the report of the management panel which states, in relevant part, as follows:

6. Weak points of the various proposals which the panel desires to bring to the attention of the Board are as follows:

* * * * * * *

CEC—The proposal does not contain information on how the proposer intends to meet the TOR/Work Statement requirements. The proposal merely states CEC will comply.

* * * * * * *

7. It is again emphazied that proposals were evaluated against RFP requirements as amplified by TOR–16 and the Work Statement and against predetermined criteria in the organization and facilities sub-areas. Proposals were not evaluated against one another in the Management Area.

Turning to the technical evaluation, the report advises that the determination not to negotiate with CEC was based primarily on the technical evaluation of the proposals. In this respect, AFSCF SSD advised Headquarters, Air Force Systems Command, that the Ampex proposal was "far superior," as evidenced by the following factors:

A. Tape transport—the pre-amplifiers have a 4 MHZ bandwidth for future expansion. Vacuum drive is used, which eliminates pinch rollers. End-of-tape sensing is provided, Mechanical parking brakes are provided, which also function as emergency brakes to prevent tape spillage in the event of power failure. Mass is added to the capstan to reduce high-frequency flutter, yet the required time displacement error can be maintained. As a special option, an automatic programming system, either by computer or card programer control, could be provided.

B. Wideband FM electronics—tests have been run with typical PCM formats and photographs of the reproduced signals appear to be satisfactory. Added features, not specifically requested in the TOR are:

(1) Squelch (zero output with no input).
(2) Output limiting which prevents over-driving of equipment following the recorder.
(3) Loss-of-signal-indicator.
(4) Filter switch which allows the noise bandwidth to be optimized for each particular signal.
(5) DC calibration meter for quick set-up for operation. The optional automatic programming system can be used to change the channel configuration under computer control.

C. Acceptance test—a very complete acceptance test procedure was included.

In commenting on these "strong points," CEC has maintained that all of the features to the extent requested are included features of the CEC equipment, and that, if requested, CEC could have provided the optional items. By letter dated August 9, 1967, the Directorate of Procurement Policy responded, in part, as follows:

5. CEC contends that the recorders it proposed to furnish contained some of the features of the Ampex recorders which the Air Force technical personnel considered strong points. The CEC proposal, however, failed to mention any such features and could not therefore be evaluated as offering any of those features.

Since the evaluation of the proposals in this area requires the exercise of a technical judgment, we may not, as CEC suggests, reevaluate or compare the relative merits of its proposal vis-a-vis that of Ampex. However, it is significant to note that it has not been suggested that

the "far superior" character of the Ampex proposal is attributable to a technological breakthrough, or advancement in the state of the art. See, in contrast, 45 Comp. Gen. 749, June 6, 1966, wherein the protestant maintained that it was improperly excluded by the administrative agency from participation in negotiations since its proposal had satisfied the Government's minimum technical requirements, and therefore was within a "competitive range, price and other factors considered." In denying the contention, we observed as follows:

> The administrative report introduced the distinguishing fact that Link's proposal was considered far superior because it incorporated a surprisingly novel and allegedly proprietary approach to the RFP requirements, and was considered to be such a substantial advancement in the state of the art in the field of graphic recording that it rendered meaningless any negotiations on the more orthodox approach proposed by Maurer.

Here, the procuring activity acknowledges that CEC has in its technical proposal offered complete compliance with the work requirements and TOR 16. The objection is that insufficient information was supplied to permit a technical evaluation. There was, however, no request in the RFP that offerors provide a technical dissertation verifying responses to the tape recorder requirement.

Considering the overall impact of the informational defects in CEC's proposal preparation, especially with respect to the technical aspects of its proposal, we may give significant effect to the fact that despite these defects CEC's proposal was technically acceptable to PEB. This determination is, we believe, even more significant in light of the rejection of three other proposals for failing to meet all five of the "critical" technical evaluation factors. We, therefore, draw your attention to a portion of our decision at 45 Comp. Gen. 417, 427, which we believe is pertinent here:

> The term "negotiation" generally implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by the parties. 10 U.S.C. 2304(g) implements and clarifies the definition of "negotiate" in 10 U.S.C. 2302(2) and it is our view that the term "negotiate" must be read in conjunction with 10 U.S.C. 2304(g) to include the solicitation of proposals and the conduct of written or oral discussions, when required, as well as the making and entering into a contract. See page 5 of House Report No. 1638, on H.R. 5532, 87th Congress, which was enacted as Pub. L. 87-653, adding the new subsection (g) to 10 U.S.C. 2304.
>
> In this context, we believe that an obligation to negotiate with AAI existed notwithstanding that ITTFL's proposal was determined to be technically superior to AAI's. *We find nothing in the record which would indicate that AAI's proposal was so technically inferior as to preclude any possibility of meaningful negotiation with such offeror. This is what both the law and the ASPR require in order to assure the competition contemplated.* [Italic supplied.]

See, also, 46 Comp. Gen. 191.

Finally, it must be noted that the RFP did not state the evaluation criteria or the relative weight assigned to each factor. This failure is, in our opinion, inconsistent with a stated request for strict confor-

mance with the terms of the REP, and the advice that the proposal was the "mechanism" for determining a competitive range. From the standpoint of avoiding the informational and pricing defects in proposal preparation evident on the face of the record, clear instruction as to those areas of particular significance to the contracting agency will result in more accurate and realistic proposal preparation. See B-149344, December 26, 1962; B-147394, September 4, 1962. See especially our decision to you at 44 Comp. Gen. 439, 442, wherein we stated that:

With respect to the failure of the Air Force to specifically advise prospective offerors of all evaluation factors and to indicate the relative importance attached to each, it is our opinion that sound procurement policy dictates this should be done * * *.

While practical considerations preclude further action on our part in this matter, we strongly suggest that appropriate steps be taken to avoid a recurrence of similar negotiation procedures.

[B-162057]

Contracts—Damages—Liquidated—Shipment *v.* Performance Failure

Under a contract for power circuit breakers that provided for delivery of one unit for Government testing and acceptance before the remaining units were shipped, and which included a provision to charge liquidated damages for failure of the contractor to perform or to ship within the time specified, the mere shipment of defective breakers after notice the initial unit had failed acceptance testing did not stop the accrual of liquidated damages, the reference in the liquidated damages clause of the contract to the "failure to perform" relating to the basic contract obligation to produce units capable of meeting performance requirements. Therefore, the shipment of the units not being the decisive event on which the application of the liquidated damage clause depends, the Government, notwithstanding the long delay in getting acceptable power circuit breakers into operation is entitled to liquidated damages for the period of the delay.

To the Allis-Chalmers Manufacturing Company, November 13, 1967:

Reference is made to your request by letter dated July 14, 1967, for refund of the net amount of $152,400 assessed against you by the Department of the Interior as liquidated damages under contract No. 14-06-D-4202 with the Bureau of Reclamation (the Bureau). This basis of your claim is that the liquidated damaged provision in the contract was either misinterpreted by the Government or was subject to two interpretations and is therefore ambiguous.

The contract, which was awarded to you on October 12, 1961, obligated you to furnish nine 230 kilovolt power circuit breakers for the Bureau's Central Valley Project, Bethany, California. Shipment of one unit (Item 1) was required within 360 calendar days after the date of receipt of notice of award, and of the remaining eight units

(Item 2) within 420 calendar days after the date of receipt of the notice of award. A notation at the end of the purchase description of Item 1 cited, as the reason for the earlier delivery requirement therefor, paragraph C–14 of the special conditions of the contract, which provided that the Government could perform certain tests, including interrupting performance tests, on the Item 1 unit as a condition to acceptance of all of the circuit breakers, and which contains the following pertinent language:

* * * in the event that the breaker tested does not demonstrate specification compliance, it shall be the contractor's responsibility to redesign and rebuild not only the sample breaker but all other breakers of the same identical group and to demonstrate that the redesign meets specifications under a further Government field testing program and at no additional expense to the Government. The cost of these retests and any subsequent retests will be charged to the contractor * * *.

Special conditions of the contract included a notice of delay provision, paragraph A–9, which required the contractor to give written notice to the contracting officer of any performance delay, either by the contractor or his subcontractor, which might be excusable under the default clause, within 30 days from the beginning of the delay or such additional period as allowed by the contracting officer prior to final settlement of the contract. The contracting officer, in turn, was required to make a findings of fact as soon as practicable after receipt of the contractor's notice of delay, which findings would become final and conclusive on the parties subject only to appeal under the disputes clause.

Paragraph B–6 of the special conditions stressed the importance of timely delivery, and paragraph B–7 added to the standard default clause the following liquidated damages provisions:

Paragraph 11(f) of Standard Form 32, General Provisions (Supply Contract), is redesignated as Paragraph 11(g) and the following is inserted as Paragraph 11(f):

(f) (i) In the event the Government exercises its right of termination as provided in Paragraph (a) above, the contractor shall be liable to the Government for excess costs as provided in Paragraph (b) above and, in addition, for liquidated damages, in the amount set forth elsewhere in this contract, as fixed, agreed, and liquidated damages for each calendar day of delay, until such time as the Government may reasonably obtain delivery or performance of similar supplies or services.

(ii) If the contract is not so terminated, notwithstanding delay as provided in Paragraph (a) above, the contractor shall continue performance and be liable to the Government for such liquidated damages for each calendar day of delay until the supplies are delivered or services performed.

(iii) The contractor shall not be liable for liquidated damages for delays due to causes which would relieve him from liability for excess costs as provided in Paragraph (c) of this clause.

If the contractor refuses or fails to perform or make shipment of the power circuit breakers within the desired times specified in the schedule or within the period stated by the contractor in his bid, if such period is greater than the desired time, or should the contract be terminated as provided above, the amount of liquidated damages to be charged for failure to perform or for failure to ship each complete power circuit breaker, or any part thereof under an item of the

schedule, within the desired time specified in the schedule, or within the period stated by the contractor in his bid, if such period is greater than the desired time, will be as follows for each calendar day of delay: Fifty dollars ($50) for the circuit breaker under Item 1; and fifty dollars ($50) for each circuit breaker under Item 2: *Provided,* That the total amount of liquidated damages that will be charged under Item 2 will not exceed one hundred and fifty dollars ($150) per day.

Notice of award of the contract is reported to have been received by you on October 16, 1961, thereby establishing October 11 and December 10, 1962, as the dates for shipment of Items 1 and 2, respectively.

In a letter dated April 24, 1962, the Bureau inquired of you whether shipment of the Item 1 circuit breaker could be expedited inasmuch as the Government would perform acceptance tests on the unit (authorized by section C–14 of the Technical Requirements of the contract) at Grand Coulee Switchyard (Washington) and was attempting to establish a definite date for the tests. The letter advised you that the tests would consist of line switching, short line faults, and bus faults, with the interrupting duty at the switchyard bus as near as possible to the nameplate rating; that the services of your erecting engineer would be utilized in erecting and in obtaining the optimum adjustment of the breaker; and that it was assumed that you would desire to be represented during the tests. Further, the Bureau solicited your comments on the test program.

The first article, Item 1, was shipped on November 13, 1962, to the testing site, Coulee City, Washington, and acceptance tests were conducted during the night of December 11. By letter dated December 20, 1962, the Bureau advised you that the breaker had failed to perform in accordance with the specification requirements during the tests and therefore all of the circuit breakers of the same design which you intended to supply under the contract were unacceptable. The letter also included the following pertinent language:

* * * Until modifications are made and the modified breaker is ready for testing, it would appear futile to ship the remaining breakers to the project.

* * * * * * *

The delay in shipment which has already been encountered and the inevitable further delay which will result from redesign and retesting is of utmost concern to me. Existing circuit breakers, to be released upon arrival of the new breakers, are scheduled for installation in other locations. Three separate construction contracts are involved, and delays will be costly to the Government. It is imperative that you exert every effort to effect early delivery of satisfactory equipment.

The record indicates that despite the contrary suggestion in the first quoted sentence you shipped the eight additional circuit breakers to the project site on various dates during the period December 14, 1962 through January 4, 1963, without any redesign or modification to cure the defects found in the tests of the first item. In a letter dated Jan-

uary 10 to the Bureau, in which you referred to its letter of December 20, you offered as explanation for your action the lack of storage space at your factory. Further, you stated that you planned to make necessary modifications at the project site and were giving the modification program top priority.

It is reported that the unit furnished under Item 1 was subsequently modified several times after failing to pass the initial acceptance tests and that a total of eight acceptance tests on the unit were conducted during the period December 11, 1962 to June 22, 1964, on which date the unit (which had been completed for shipment on May 25) finally met specification requirements. The remaining eight breakers were thereafter rebuilt by you to conform to the design of the accepted unit, shipment of the necessary replacement parts having been completed on various dates from February 4 to March 23, 1965.

In computing the liquidated damages for late delivery of the circuit breakers, the Bureau has determined that there was a delay in shipment of Item 1 of 591 days covering the period, October 11, 1962, the date required by the contract for shipment of such item, to May 25, 1964, the approximate date of completion of the modifications which resulted in successful performance of the acceptance test of June 22, 1964, and that there should be deducted from such period 20 days to cover the time (December 1 to 21, 1962) during which the item was in control of the Bureau for acceptance testing. Accordingly, the Bureau has determined that damages for 571 days at $50 per day, total $28,550, are assessable for Item 1. For Item 2, the Bureau computes the period of delay from the required shipping date of December 10, 1962, and damages as follows:

Shipment of replacement parts completed as follows:
One breaker—2–4–65—787 days delay
One breaker—2–12–65—795 days delay
Two breakers—2–19–65—802 days delay
Two breakers—3–11–65—822 days delay
Two breakers—3–23–65—834 days delay
Liquidated damages=822 days at $150 per day plus 12 days at $100 per day=$124,500

The total liquidated damages as so computed are $153,050, or $1,000 less than the amount of $154,050 which the Government has withheld from the contract price. You concede that assessment of the amount of $1,650 to cover the delay of 33 days from October 11 to November 13, 1962, in shipping Item 1 is authorized.

You contend that the assessment of liquidated damages after November 13, 1962, is based on the Government's interpretation of the words "failure to ship" in paragraph B–7 of the Special Conditions as meaning that if Item 1 was shipped within the contract schedule, but subsequently failed the paragraph C–14 Government acceptance

tests and in the interim the delivery date for the eight additional breakers had passed, liquidated damages would be charged. Such interpretation, you claim, is unreasonable; i.e., the total liquidated damages are attributable to the failure of only one circuit breaker (Item 1) to pass tests and the damages would amount to more than three times the value of the one unit, and neither party would have known, when the contract was awarded, at what date liquidated damages would begin to run because the Government need not have performed the line dropping and field fault tests under the terms of the contract. You contend, in substance, that the phrase "failure to ship" in the liquidated damages clause would apply only if no circuit breakers identifiable as such had been shipped by the required date, and that defects disclosed only upon acceptance testing by the Government would not justify the assessment of liquidated damages. Only in this way, you contend, would the liquidated damages bear a reasonable relationship to the potential damage for late delivery. You point out that both the contract schedule and the liquidated damages provision in paragraph B–7 refer only to shipment of circuit breakers and are silent on the matter of acceptance testing, the factor which you claim the Government maintains as the basis for determining whether liquidated damages are chargeable.

With respect to our decision of June 22, 1966, 45 Comp. Gen. 823, cited by the Government for the principle that a contractor's obligation is not only to deliver on time but also to deliver precisely what is ordered, you state that while you are in complete accord with that conclusion, it does not follow that liquidated damages should run against you in this case until delivery by you of precisely what was ordered. Such an interpretation, you contend, would permit charging of liquidated damages after shipment upon discovery of a latent defect after as much as 5 years of continuous use and would result in liquidated damages of over $90,000 for a defect which might be corrected at a cost of only $50.

Finally, you urge that the breakers need only have passed the production tests required by paragraph C–12 to be performed by you at your plant, and you state that such tests were passed and that the necessary test data were made available to the Government.

The Department of the Interior points out that the reason for an earlier shipping date for the single breaker to be furnished under Item 1 was to enable the Bureau to test that unit and to determine its compliance with the contract before the other breakers were shipped, the intent being that if such unit were defective, the time required for transporting the other eight breakers back to the factory for necessary modification could be avoided.

Concerning the production tests which you were required to perform under paragraph C–12, the Department states that such tests were preliminary and were required only to assure compliance with minimum standards of production and freedom from construction or assembly defects. On the other hand, the line dropping and field fault interrupting tests on the Item 1 breaker which were provided for by paragraph C–14 as a condition of acceptance of all nine breakers covered by the contract were to be "sufficiently complete to verify the overall specified performance of the breakers at their maximum rating to the extent possible under field test conditions and capacity." Concerning the results of the tests, the Department states that during the first test on December 11, 1962, the breaker failed to switch line charging current of 55 amperes, or less than one-fourth the maximum of 250 amperes specified in paragraph C–2*b*, without multiple restrike; that when an attempt was made to switch line charging current of only 140 amperes, severe multiple restrikes and an internal flashover occurred causing internal damage to the circuit breaker and necessitating discontinuance of the test; and that it was not until 11 months later, after modification of the interrupter units and extensive testing of the breaker by you, that the breaker was able to switch the specified maximum line charging current of 250 amperes. The second phase of the Bureau's acceptance testing, which involved testing of the circuit breakers specified interrupting rating of 20 million kva, commenced on November 22, 1963, immediately after completion of the successful line charging current test. After four unsuccessful tests of the breaker's interrupting rating, during which certain internal components of the breaker were damaged, you again modified the breaker by increasing the height of the external tank 14 inches and making revisions to certain internal components, the modifications being completed on May 25, 1964, and followed on June 22, 1964, by a successful interrupting rating test.

We cannot accept the view that "shipment" is the decisive event on which application of the liquidated damage clause depends. The clause includes the language:

* * * the amount of liquidated damages to be charged *for failure to perform or for failure to ship* each complete power circuit breaker, * * * *within the desired time* specified in the schedule, * * * will be as follows * * * [Italic supplied.]

The word "perform" in this provision must obviously refer to your primary contract obligation, which was to manufacture circuit breakers capable of meeting the stated performance requirements of the Government. Among these requirements were that the breakers would switch line charging currents up to 250 amperes without multiple restrikes, and have an interrupting rating of 20 million kva. Manufacture of breakers with a switching capacity less than 55 amperes,

and which suffered damage to components upon attempted operation at the 20 million kva interrupting rating, could under no conceivable theory be accepted as performance of your obligation, and we see no justification for considering the shipment of such defective articles as stopping the accrual of liquidated damages.

The purpose of the stipulation for liquidated damages was to compensate the Government for delay in getting acceptable circuit breakers into operation where they were intended to be used and the concomitant delay in moving existing circuit breakers to another point where they were needed. The mere shipment or delivery of circuit breakers which were so defective in basic design as to preclude any possibility of their acceptance could have no effect upon the damages accruing to the Government and to adopt such an interpretation as you propose would virtually nullify the liquidated damage provision.

A valid contractual stipulation for liquidated damages will be enforced according to its terms, and, the parties having agreed in advance on the amount of such damages, the question of actual damages, or the amount thereof resulting from a breach of the contract, is not for consideration. *Sun Printing & Publishing Association* v. *Moore*, 183 U.S. 642; *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105; *Wise* v. *United States*, 249 U.S. 361. A contract provision for liquidated damages for refusal or failure to make shipment within the specified time obviously contemplates shipments meeting the specifications, and liquidated damages are not excusable because materials were shipped if said materials prove on inspection to be unacceptable. 15 Comp. Gen. 903; 17 *id.* 354. Under a contract for the purchase of cranes by the Government providing for testing of a completed crane before acceptance, the Government was not obligated to accept delivery of parts for cranes until one crane had been assembled and satisfactorily passed the tests provided for. *Anthony M. Meyerstein, Inc.* v. *United States*, 139 Ct. Cl. 305. The essence of the promise of a contract to deliver articles is the ability to procure or make them, and a delay resulting from inability to make them, however difficult, is not a cause excusing the imposition of liquidated damages stipulated for failure. *Carnegie Steel Co.* v. *United States*, 240 U.S. 156.

With respect to your argument that a decision upholding the assessment of liquidated damages in the circumstances of your case could logically result in the imposition of liquidated damages in the event of a disclosure 5 years after delivery of a latent defect in the delivered items, we direct your attention to the statement of the Supreme Court in *Wise* v. *United States*, *supra*, to the effect that whether a party should be relieved from a plain stipulation for liquidated damages upon the ground that a penalty was really intended will depend upon

the facts of the case and not upon a conjectural situation that might have arisen under the contract. We believe the same reasoning would be applicable here, even if we were to agree with your logic, which appears to ignore the effect of acceptance and other pertinent considerations in your hypothetical case.

For the reasons stated, your claim is denied except to the extent that an adjustment of $1,000 appears to be due you by reason of the recomputation of the liquidated damages on Item 1 to exclude the period subsequent to May 25, 1964, the date of completion of the modifications which led to the successful testing of the item. Payment of that amount by the administrative office is being authorized.

[B–160939]

Pay—Retired—Annuity Elections for Dependents—Children—Payments to Natural Guardian

The monthly annuity payments due under the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446, for the use and benefit of the minor children of a deceased member of the uniformed services may be paid to the mother, granted custody of the children when divorced from the decedent, as natural guardian of the children, notwithstanding the $1,000 limitation imposed under paragraph 40504b(5) Military Pay and Allowances Entitlements Manual on payments to a parent as natural guardian will be exceeded, and the mother refuses to obtain letters of guardianship appointing her legal guardian of the children, absent a restriction on the receipt of small periodic amounts, even though such payments if projected over a period of time may total more than the limitation on payments authorized without appointment of a legal guardian, provided the mother complies with Title 4, section 42.3, General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies.

To N. R. Breningstall, Department of the Air Force, November 14, 1967:

Further reference is made to your letter dated September 25, 1967, your file ALRA–1, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $1,743 representing monthly annuity payments for the period June 1, 1966, through August 31, 1967, under the Retired Serviceman's Family Protection Plan, to Mrs. Dorothy J. Nunes for the use and benefit of the minor children of the late Staff Sergeant Eugene J. Unczur, USAF, Retired. Your request was forwarded to this Office by letter dated October 11, 1967, from the Directorate of Accounting and Finance and has been assigned Air Force Request No. DO–AF–965 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Unczur was retired from the United States Air Force effective March 18, 1966, under the provisions of 10 U.S.C. 1201 and died May 5, 1966. On October 14, 1965, he elected (option 2 with option 4 under the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446) to receive a reduced amount of retired pay to pro-

vide an annuity payable to or on behalf of his surviving child or children. By final decree of divorce, apparently granted June 11, 1965, Dorothy J. Unczur was granted a divorce from Sergeant Unczur and further was granted the custody of the minor children of the marriage and they are currently in her custody.

The monthly annuity payments in the amount of $116.20 (payable until the youngest child reaches the age of 18 years or is married) have now exceeded $1,000—the amount of death gratuity which may be paid to a parent as natural guardian under paragraph 40504b(5), Military Pay and Allowances Entitlements Manual, see our decision of December 16, 1958, 38 Comp. Gen. 436. Since Mrs. Nunes has refused to obtain letters of guardianship appointing her legal guardian of the children, annuity payments due the children of the deceased member have been withheld, with the exception of the payment for the month of May 1966, which was allowed in her favor by settlement of our Claims Division dated July 17, 1967. Therefore, you request a decision regarding payments of annuity under the Retired Serviceman's Family Protection Plan to the natural guardian of minor children when the total amount due will be in excess of $1,000.

It is provided in 10 U.S.C. 1444, that the President shall prescribe regulations to carry out the Retired Serviceman's Family Protection Plan and that determinations and certifications of eligibility for, and payments of, annuities and other payments or refunds under the plan shall be made by the department concerned. By section 2 of Executive Order No. 10499, dated November 4, 1953, 18 FR 7003, the President delegated to the departments concerned the authority to prescribe regulations for the administration of the plan. Paragraph 504 of those regulations, effective October 4, 1961, reads as follows:

> Annuities for a child or children will be paid to the child's guardian, or if there is no guardian to the person(s) who has care, custody, and control of the child or children.

It has long been the practice of the administrative officers and of this Office, in the absence of statutory provisions to the contrary, to make small payments due minor children from the United States to those persons who act as guardians and who have custody of the minor children without the necessity of their being appointed legal guardians of the property of such minors unless there is doubt that the proceeds will be used for the benefit of the child or children.

In our decision of December 16, 1958, cited by you, we referred to the rule that the mother and father are generally regarded as the natural guardians of a child. Since the laws of many States authorize payments of small amounts due a minor to be made to his parents, we held that we would have no objection to regulations which would permit

6 months' death gratuity payments not in excess of $1,000 to be made to the father or the mother as natural guardian.

Although State laws generally impose limitations on the amount of the minor's estate that a natural guardian may receive, there appears to be no general restrictions on the receipt of small periodic payments that may be due the minor even though such amounts if projected over a period of time may total more than the limitation on payments authorized without appointment of a legal guardian. See 18 Comp. Gen. 899 and 19 *id.* 789.

In view of the administrative regulations and the practice prevailing relative to the payment of an annuity due minors under the Retired Serviceman's Family Protection Plan to persons having the care, custody and control of such minors, we have no objection to payments of monthly annuity to a natural parent having custody of the minor to whom the payment is due provided the claimant complies with the requirements of section 42.3, Title 4, GAO Policy and Procedures Manual. See copy of statement dated July 10, 1967, of Mrs. Nunes, forwarded herewith.

Accordingly, the voucher, which is returned herewith, may be paid, if otherwise correct, and succeeding monthly payments of annuity may be made to the mother as natural guardian of the minor annuitants as such payments become due and payable.

[B–162398]

Bids—Evaluation—Estimates—Sufficiency of Evaluation Base

The award of a contract to furnish computer time for an estimated number of hours to the bidder whose equipment performed more efficiently on the basis that notwithstanding higher hourly charges, the ultimate cost to the Government would be significantly less than if the work would be performed at the lower hourly charges offered by other bidders should be canceled, the invitation although providing for the evaluation of bids on the basis of the difference in equipment speeds in failing to relate the speeds to estimated job mixes or applications did not provide the full and free competition contemplated by 41 U.S.C. 253, for bidders uninformed of the "performance factors" to be used in the evaluation of bids could not intelligently prepare their bids.

To the Secretary of State, November 15, 1967:

Reference is made to letter of September 28, 1967, from the Deputy Under Secretary for Administration, reporting on the protest of Datacomp Data Service against the award made under invitation for bids ST–67–50.

The invitation solicited hourly rates for furnishing the department computer time as needed during the period of August 12, 1967 through June 30, 1968. The invitation specified the minimum computer configuration which would meet the Government's needs (IBM system 360, model 30 or 40). The price schedule in the invitation solicited

offers on a prime time, and other than prime time, basis, and information as to the performance characteristics of the equipment offered for use. Paragraph "K" of the special provisions estimated the total number of hours of computer use that would be needed during the prime shift and during other than the prime shift based upon the speed of an IBM system 360, model 30. Paragraph "L" thereof provided that to determine which bid is most advantageous to the Government, bids would be evaluated on the basis of the speeds of the equipment offered in relation to the prices quoted based on the estimated hours of usage specified in paragraph "K."

Three bids were received as follows:

	Rates per hour	
	Prime time	Other than prime time
Datacomp Data Service	$50	$30
IBM 360/30		
IBM 360/40	60	40
Computer Usage Development Corp.		
IBM 360/30	75	50
Applied Data Research		
IBM 360/40	80	60

From the information furnished by each bidder, the characteristics of the equipment were determined to be as follows:

	360 model	Core size	Tape
Datacomp Data Service	30	64K	30KB
	40	64K	30KB
Computer Usage Development Corp.	30	64K	60KB
Applied Data Research	40	128K	120KB

The abstract of bids states that the model 40 is 5 percent more efficient than the model 30; that the 128K core size is 20 percent more efficient than the 64K core size; that 60KB tapes are 175 percent more efficient than 30KB tapes; and 120KB tapes are 250 percent more efficient than 30KB tapes. Applying these "performance factors" to the equipment offered by the bidders, it was determined that the equipment of Applied Data Research was capable of performing so much faster than the equipment of the other bidders that, notwithstanding its higher hourly charges, the ultimate cost to the Government for performance would be significantly less than if the work were performed by either of the other bidders. Accordingly, the contract was awarded to Applied Data Research on August 10, 1967.

Section 1-3.409 of the Federal Procurement Regulations provides that in a requirements contract—

> * * * An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. * * *

The information as to estimated total quantities of work is also important for a proper evaluation of bids. By using estimated quantities for bid evaluation different from actual anticipated needs, the possibility arises that a bidder may be found low on evaluation who is not the lowest bidder on the real requirements, or the best estimate thereof. 42 Comp. Gen. 257, 260.

In the present case, the invitation estimated the number of hours of work which would be required. In making such an estimate, it would appear to be necessary to consider the different functions to be performed by the equipment and the degree of performance of each function since the equipment does not operate at the same speed for all functions. However, the data on workloads involved in different applications were not included in the invitation and, for that matter, neither were the "performance factors" which were used to evaluate the bids. The information as to the workloads involved in different applications was necessary for a proper evaluation of bids since the cost to the Government depends upon the hours of use of the equipment which, in turn, are dependent upon the type of processing the equipment is required to perform. In this case, the invitation provided for the evaluation of bids on the basis of the difference in the speeds of the equipment but those speeds were not related to estimated job mixes or applications which were not set out in the invitation. If such information had been included in the invitation and if the invitation had provided that such information would be considered in the evaluation of bids, bidders would have been in a position to intelligently prepare their bids in the light of known evaluation factors whereunder equipment speeds would be related to estimated job applications or mixes.

In that connection, it was stated in 36 Comp. Gen. 380, 385:

> The "basis" of evaluation which must be made known in advance to the bidders should be as clear, precise and exact as possible. Ideally, it should be capable of being stated as a mathematical equation. In many cases, however, that is not possible. At the minimum, the "basis" must be stated with sufficient clarity and exactness to inform each bidder prior to bid opening, no matter how varied the acceptable responses, of objectively determinable factors from which the bidder may estimate within reasonable limits the effect of the application of such evaluation factor on his bid in relation to other possible bids. By the term "objectively determinable factors" we mean factors which are made known to or which can be ascertained by the bidder at the time his bid is being prepared. Factors which are based entirely or largely on a subjective determination to be announced by representatives of the contracting agency at the time of or subsequent to the opening of bids violate the principle for the

reason that they are not determinable by the bidder at the time his bid is being prepared.

Moreover, the competitive bidding statute, 41 U.S.C. 253, requires that specifications and invitations for bids be drawn so as to permit full and free competition. However, the invitation here did not provide for full and free competition because of the deficiencies discussed above. Therefore, the contract awarded thereunder should be canceled.

[B-151204, B-157587]

Equipment—Automatic Data Processing Systems—Authority

The right reserved to Federal departments and agencies in Public Law 89-306, which authorizes the General Services Administration (GSA) to coordinate and provide for the economic and efficient purchase, lease, maintenance, operation and utilization of automatic data processing equipment (ADPE), to select types and configurations of equipment does not encompass the authority to procure the equipment, the legislative history of the act evidencing the intent that GSA function as the sole purchaser of ADPE equipment for the Government, subject to the direction and control of the President and the Bureau of the Budget, and if the purchase function was not intended to be placed exclusively in GSA, there would have been no need to limit the delegation of authority in section 111(b)(2) of the act to purchase ADPE equipment to the period during which the single purchase concept could be implemented.

To the Administrator, General Services Administration, November 21, 1967:

By letter of July 11, 1967, you requested our opinion with respect to the authority of the Administrator of General Services under the provisions of Public Law 89-306, 79 Stat. 1127, 40 U.S.C. 759, which amended the Federal Property and Administrative Services Act of 1949 to provide for the economic and efficient purchase, lease, maintenance, operation, and utilization of automatic data processing equipment by Federal departments and agencies.

The complete text of Public Law 89-306 reads as follows:

"Sec. 111. (a) The Administrator is authorized and directed to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies.

"(b)(1) Automatic data processing equipment suitable for efficient and effective use by Federal agencies shall be provided by the Administrator through purchase, lease, transfer of equipment from other Federal agencies, or otherwise, and the Administrator is authorized and directed to provide by contract or otherwise for the maintenance and repair of such equipment. In carrying out his responsibilities under this section the Administrator is authorized to transfer automatic data processing equipment between Federal agencies, to provide for joint utilization of such equipment by two or more Federal agencies, and to establish and operate equipment pools and data processing centers for the use of two or more such agencies when necessary for its most efficient and effective utilization.

"(2) The Administrator may delegate to one or more Federal agencies authority to operate automatic data processing equipment pools and automatic data processing centers, and to lease, purchase, or maintain individual automatic data processing systems or specific units of equipment, including such equipment used in automatic data processing pools and automatic data processing

centers, when such action is determined by the Administrator to be necessary for the economy and efficiency of operations, or when such action is essential to national defense or national security. The Administrator may delegate to one or more Federal agencies authority to lease, purchase, or maintain automatic data processing equipment to the extent to which he determines such action to be necessary and desirable to allow for the orderly implementation of a program for the utilization of such equipment.

"(c) There is hereby authorized to be established on the books of the Treasury an automatic data processing fund, which shall be available without fiscal year limitation for expenses, including personal services, other costs, and the procurement by lease, purchase, transfer, or otherwise of equipment, maintenance, and repair of such equipment by contract or otherwise, necessary for the efficient coordination, operation, utilization of such equipment by and for Federal agencies: *Provided*, That a report of equipment inventory, utilization, and acquisitions, together with an account of receipts, disbursements, and transfers to miscellaneous receipts, under this authorization shall be made annually in connection with the budget estimates to the Director of the Bureau of the Budget and to the Congress, and the inclusion in appropriation acts of provisions regulating the operation of the automatic data processing fund, or limiting the expenditures therefrom, is hereby authorized.

"(d) There are authorized to be appropriated to said fund such sums as may be required which, together with the value, as determined by the Administrator, of supplies and equipment from time to time transferred to the Administrator, shall constitute the capital of the fund: *Provided*, That said fund shall be credited with (1) advances and reimbursements from available appropriations and funds of any agency (including the General Services Administration), organization, or contractor utilizing such equipment and services rendered them, at rates determined by the Administrator to approximate the costs thereof met by the fund (including depreciation of equipment, provision for accrued leave, and for amortization of installation costs, but excluding, in the determination of rates prior to the fiscal year 1967, such direct operating expenses as may be directly appropriated for, which expenses may be charged to the fund and covered by advances or reimbursements from such direct appropriations) and (2) refunds or recoveries resulting from operations of the fund, including the net proceeds of disposal of excess or surplus personal property and receipts from carriers and others for loss of or damage to property: *Provided further*, That following the close of each fiscal year any net income, after making provisions for prior year losses, if any, shall be transferred to the Treasury of the United States as miscellaneous receipts.

"(e) The proviso following paragraph (4) in section 201(a) of this Act and the provisions of section 602(d) of this Act shall have no application in the administration of this section. No other provision of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section.

"(f) The Secretary of Commerce is authorized (1) to provide agencies, and the Administrator of General Services in the exercise of the authority delegated in this section, with scientific and technological advisory services relating to automatic data processing and related systems, and (2) to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards. The Secretary of Commerce is authorized to undertake the necessary research in the sciences and technologies of automatic data processing computer and related systems, as may be required under provisions of this subsection.

"(g) The authority conferred upon the administrator and the Secretary of Commerce by this section shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Bureau of the Budget. Authority so conferred upon the Administrator shall not be so construed as to impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and the selection of the types and configurations of equipment needed. The Administrator shall not interfere with, or attempt to control in any way, the use made of automatic data processing equipment or components thereof by any agency. The Administrator shall provide adequate notice to all agencies and other users concerned with respect to each proposed determination specifically affecting them or the automatic data processing equipment or components

used by them. In the absence of mutual agreement between the Administrator and the agency or user concerned, such proposed determinations shall be subject to review and decision by the Bureau of the Budget unless the President otherwise directs."

Your letter includes a summary of actions which have been taken to date by the Bureau of the Budget and the General Services Administration in getting underway implementation of the concepts inherent in section 111. GSA has prepared draft regulations designed to achieve what are believed to be the objectives of that section—to establish a single purchaser for all general purpose ADPE used by Federal agencies. You point out that the draft of these Government-wide regulations is based upon the interpretation that section 111 provides GSA with exclusive authority to procure all general purpose ADPE for use by Federal agencies but that the regulations will not include procedures or controls which could be interpreted as interfering with determinations of requirements for or use of ADPE by Federal agencies.

With a view to expediting and facilitating the orderly functioning of the procurement processes in the acquisition of ADPE, you request a decision on the question of the extent to which other Federal agencies may have independent authority to procure ADPE. Specifically you ask:

* * * whether, on the one hand, other agencies are legally required to obtain a delegation of procurement authority from GSA or use GSA as the agency to purchase their general-purpose ADPE, or whether, on the other hand, agencies may acquire ADPE without regard to any actions which might be taken by GSA pursuant to section 111.

Your inquiry is prompted by the fact that although subsections 111(a) and (b)(1) of this act, 40 U.S.C. 759(a) and (b)(1), state that the Administrator shall provide ADPE for use by Federal agencies, they do not in so many words foreclose other agencies from acting without regard to your actions or regulations in the procurement of ADPE. Also, subsection (g), 40 U.S.C. 759(g), states that GSA is not to interfere with agency rights to select types and configurations of equipment needed. You point out that since selection of types and configurations of equipment is so closely related and interwoven with the actual acquisition, subsection (g) might be interpreted as implying authorization to agencies to acquire ADPE. Because the plain meaning associated with "types" in the ADPE field is that of a particular brand name, authority to select types might be considered tantamount to purchase of the equipment.

It is your belief, however, that the right, reserved to using agencies under subsection (g), to select types of equipment needed refers only to agency determinations regarding what equipment is to be purchased and does not encompass the procurement itself of such equipment.

The language of the act and its legislative history make it clear, in our opinion, that it was the legislative intent to place GSA in the position of acting, subject to direction and control by the President and the Bureau of the Budget, as the Government's single purchaser for all general purpose ADPE estimated to cover about 90 percent of the Government's requirements. At the same time it was recognized that full implementation of this single purchaser concept would necessarily require a considerable period of adjustments. The legislative history shows that the delegation authority provided in subsection (b) (2) was to be resorted to during the period the Administrator would be developing the necessary procedures toward assuming his exclusive jurisdiction in the ADPE area. See the lengthy treatment afforded the concepts underlying the act, as set forth in S. Rept. No. 938, dated October 22, 1965; H. Rept. No. 802, dated August 17, 1965; and Hearings before a subcommittee of the House Government Operations Committee on H.R. 4845, March 30, 31 and April 7, 1965.

Subsections 111(a) and (b) (1) quoted above clearly place authority in the administrator of General Services and direct him to "provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal Agencies." Any question as to whether such authority and direction were intended to be exclusive is dispelled, it seems to us, by the provisions of subsections (b) (2) and (e), 40 U.S.C. 759(b) (2) and (e).

Subsection (b) (2) authorizes the Administrator to delegate his functions where he deems it necessary or desirable to do so. Such authority to delegate would not be necessary if the functions involved were not intended to be placed in GSA exclusively.

Subsection (e) eliminates for purposes of section 111 the exemptions granted certain agencies by sections 201(a) (4) and 602(d) of the Property Act with respect to the procurement of personal property generally. When the Property Act was passed in 1949, it was recognized at that time that, due to the peculiar missions of various agencies, complete compliance with the uniform procedures might interfere with their operations; therefore, certain agencies were granted exemptions in sections 201(a) (4) and 602(d). Subsection 111(e) takes away these exemptions in the administration of section 111.

We recognize that responsibilities related to determining ADPE requirements, selecting types and configurations, and the use to be made of such equipment are divided by a fine line from responsibilities related to actual purchase of the equipment desired. Subsection (g) provides that the Administrator of General Services shall not interfere with determinations made by agencies in these areas. But whatever problems may arise between the various agencies and the exercise of GSA's procurement authority, subsection (g) specifically provides for

their resolution by the Bureau of the Budget and the President. Again, it hardly seems necessary to spell out a forum for settling differences between GSA and the agencies, if GSA's authority were not otherwise intended to be exclusive.

The only evidence which might be interpreted as supporting the independent right of other agencies to procure ADPE, is found in subsections 111(c) and (d), 40 U.S.C. 759(c) and (d), which establish the ADP revolving fund. It could be argued that the authority given to GSA in subsections (a) and (b) (1) is to be invoked only in connection with fund activities, and until there is some affirmative action on the part of GSA to make a fund procurement on behalf of, and at the request of an agency, that agency would be free to continue procuring on its own. We believe, however, that this argument is severely weakened by the provision for delegation of authority in subsection (b) (2). If the only exclusive authority the Administrator had been given was authority to purchase ADPE through the revolving fund, there would be no particular need to give him power to delegate procurement authority.

We have carefully reviewed the legislative history of Public Law 89–306 and find that it clearly supports the construction reached upon examination of the language of the act itself. Accordingly, you are advised that we concur in your construction of section 111 of the Federal Property and Administrative Services Act of 1949, as added by Public Law 89–306, as providing exclusive authority to GSA to procure all general-purpose ADPE and related supplies and equipment for use by other Federal agencies.

[B–161782]

Contracts—Negotiation—Limitation on Negotiation—Propriety

Negotiation procedures unlike formal advertising procedures designed to be flexible and informal, the reservation in a request for proposals to award a contract on the basis of initial proposals was not an irrevocable determination, and having invoked 10 U.S.C. 2304(a)(10) authority, the contracting officer should have negotiated a late price reduction that replaced the low offer as required by paragraph 3–805.1 of the Armed Services Procurement Regulation, paragraph 3–506, respecting the acceptance of a late offer, not precluding negotiation, and the exercise of a contract option within the discretion of the Government, the price reduction is not considered an attempt to "buy-in," absent evidence of "inside" knowledge or fraud on the part of the offeror. However, no law or regulation having been violated, the contract awarded is legal, but a future recurrence of the situation should be prevented and the contract option not exercised unless advantageous to the Government.

To the Secretary of the Navy, November 21, 1967:

We refer to a telegram of June 12, 1967, and subsequent correspondence to our Office, from Unitec Industries protesting against the award of a contract to Bendix Field Engineering Corporation under Request

for Proposals. No. N00178–67–R0020 issued by the Naval Weapons Laboratory, Dahlgren, Virginia, for the operation and maintenance of the Navy Space Surveillance System.

The request for proposals was issued on January 16, 1967. Proposals were opened on March 15, 1967, as scheduled. Six firms submitted proposals. These proposals, without the pricing information, were forwarded to the U.S. Naval Space Surveillance System Headquarters (NAVSPASUR) for technical evaluation on March 16, 1967. On the technical evaluation, three proposals, including those submitted by Unitec and Bendix, were found acceptable with good or better ratings; two others were found to be marginal to good; and one was found to be technically unacceptable. Thereafter, on March 22, 1967, the prices proposed were released to NAVSPASUR which, on the same day, then recommended award to Bendix at its price of $738,455. This recommendation was predicated on the combination of price and technical factors. In that connection, however, it should be noted that Unitec and Bendix received the same adjective rating of "very good" on the technical evaluation and that as to "technical preference" Unitec was rated No. 1. On the same day (March 22) the contracting officer concurred in the recommendation, but withheld action pending receipt of further justification for the disqualification of two marginal offerors.

It is reported that on March 23, 1967, the contracting officer received a telegram dated March 22, 1967, from Unitec reducing its cost proposal from $795,397 to $636,317, but he informed Unitec by telephone that the cost reduction would be considered as a late modification.

On April 6, 1967, the contracting officer initiated a Request for Authority to Contract which was approved on May 25, 1967, and returned to the contracting officer on May 29, 1967, for further action. A contract was awarded to Bendix on June 12, 1967, without negotiations with any offeror. During the period April 7 through June 12, 1967, Unitec and its attorney repeatedly contacted the contracting officer contending that the contracting officer should enter into negotiations with Unitec. Unitec and its attorney were notified of the award on June 12, 1967. A telegram of protest against the award was sent on June 12, 1967, to the contracting officer and our Office and was received by us on June 13, 1967.

It is urged by Unitec that ample time remained to permit negotiations since the then current contract with Unitec would not be completed until August 31, 1967 (if the 2-month "phase-in" option was exercised), and that the reservation of the right not to negotiate should be utilized only when price considerations are such that an initial proposal would clearly give to the Government the best possible price.

It is further urged by Unitec that in view of the substantial reduction in price contained in Unitec's proposal of March 22, an uncertainty was created as to the best price proposal which, under Armed Services Procurement Regulation (ASPR) 3-805.1(v), obligated the contracting officer to withhold award until further exploration and discussion with the offerors. It is also contended that the transition period between the phasing-in of a new contractor and the phasing-out of the old, is a difficult and costly one, and that there should be negotiations to insure a smooth transition. Unitec concludes that "what is involved herein is strictly a question of dollars, and the U.S. Government, in making an award to a contractor at a price far in excess of the price proposed by Unitec, has acted with imprudence and in complete disregard of the tax payers money."

Unitec's letter of August 14, 1967, advances additional arguments. It emphasizes a contention that its counsel understood that no award would be made to other than Unitec prior to notification to Unitec. This letter also states:

"It is submitted that once a decision is made to embark on a procurement pursuant to negotiation, that all of the provisions of Section 3 of ASPR come into play. This means that the determination to effect a procurement by the negotiation process must be decided upon in good faith and in this connection it is necessary that determinations and findings in accordance with ASPR 3-300 must be made as to that particular criteria which is utilized by the procuring activity as its basis for using negotiation as the basis for the procurement, as opposed to formal advertising. In other words, before the RFP was sent out, one of the seventeen (17) bases for negotiation pursuant to 10 U.S.C. 2304(a) had to be selected and an appropriate determination and finding issued pursuant thereto.

It is submitted that the Contracting Officer has twisted completely the intention of ASPR 3-805.1. The availability to the Contracting Officer of a clause permitting the Contracting Officer to make an award without further negotiations after submission of the initial price proposal was never intended to be a device by which the procuring activity could avoid the clear injunction of ASPR to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate overall cost to the Government * * *.

The following Determination and Findings dated November 1, 1966, was executed by the contracting officer in support of negotiation for the services required under the subject RFP:

Upon the basis of the following findings and determination the proposed contract may be negotiated without formal advertising pursuant to the authority of Title 10 U.S.C. 2304(a)(10) as implemented by Paragraph 3-210.2(vii) of the Armed Services Procurement Regulation.

1. The proposed contract will provide for the furnishing of technical, nonpersonal engineering services of trained technicians and qualified engineers necessary to maintain and operate nine (9) field stations of the U.S. Naval Space Surveillance System for a period of twelve (12) months, with an option for extension on a yearly basis for a period up to three (3) years. * * *

Work will include, but not be limited to: (a) performing routine station equipment operation and providing technical support therefore; (b) maintaining all communication and electronic equipment; (c) installing, operating, maintaining and/or modifying existing, new, special, or research and development equipment; (d) conducting maintenance of stations, equipment and facilities; (e) maintaining stations logs, repair records, technical reports, and materials usage data, as well as maintaining current the "Handbook for Maintenance and

Operations of the U.S. Naval Space Surveillance Stations." (f) performing general support duties at each station as required; and (g) preparing and furnishing activities reports.

2. The proper assembly, installation, servicing, maintenance, and operation of the highly technical and specialized receiving and transmitting equipment located at each of the above-mentioned Naval Space Surveillance Stations require the services of highly skilled technicians and/or engineers who are thoroughly familiar with this type of equipment.

3. It is impracticable to formally advertise the proposed procurement because it is for technical, nonpersonal services in connection with the assembly, installation, servicing, maintenance, and operation of equipment of a highly technical and specialized nature.

4. The price is not fixed by law or regulation.

The use of a negotiated contract, without formal advertising, is justified because the contemplated procurement is for technical, nonpersonal services in connection with the assembly, installation, servicing, and maintenance of equipment of a highly technical and specialized nature.

The written findings by the contracting officer executed in support of his determination to negotiate under 10 U.S.C. 2304(a)(10) are made final by statute (10 U.S.C. 2310(b)) and, thus, cannot be legally questioned by our Office. However, we think it consistent with the facts to state that while, on the one hand, the contracting officer invoked negotiation authority to accomplish the procurement; on the other, he made no use of the procedures permitted by that authority in the face of a situation which clearly called for its use. For all intents and purposes formal advertising procedures were actually used in awarding the contract. In view of this and, also, since at least three responsive, responsible offers were received, we question the wisdom and necessity of invoking negotiation authority in the first instance.

In support of the actions taken here by the contracting officer, the commander of the Naval Supply Systems Command forwards by indorsement dated July 27, 1967, a report, apparently prepared by the contracting officer, which advances the following arguments:

First, Unitec's telegram of March 23 was considered to be a "late modification" which was received *after* the reviews and award recommendations of NAVSPASUR had been concurred in by the contracting officer.

Second, the late modification was evaluated using the criteria of ASPR 3-506(b), (c) & (g) and under these criteria the late modification was determined unacceptable because: (1) Unitec was not the otherwise successful offeror, (2) more than one proposal was received, (3) Unitec's proposal offered no item that could be considered to be of extreme importance to the Government, and (4) the modification was not timely mailed.

Third, all offerors were informed in writing by the RFP that the Government might award on initial proposals received without discussion of such proposals.

Fourth, since: (1) the price offered by Bendix was determined fair and reasonable, (2) there was no doubt or uncertainty in the pricing

or technical aspects of the procurement, (3) the offerors had been forewarned that the award might be made without further discussions, and (4) there was adequate competition, "the decision was made to award to BENDIX, the lowest responsive, responsible bidder, *without negotiations* pursuant to ASPR 3-805.1." Moreover, it is stated, Unitec's late modification could not be considered and the decision of the contracting officer to award to Bendix had been made prior to its receipt and "If the Government had used the cost information contained in UNITEC's late modification it would be putting itself in a position of bargaining."

Fifth, it is contended:

CONCLUSION—In conclusion it can be stated that negotiations, no matter how well planned or executed will not produce the price that a competitive procurement will produce. When the Contracting Officer determines that the product or service is of such a nature that it can be obtained on a fixed price competitive basis, but has some reservations that negotiations might be necessary, and forewarns proposed contractors in writing of this intent, he should not arbitrarily negotiate. This arbitrary negotiation will eventually dilute the system by having contractors purposely bid higher prices in hopes that resulting negotiations will realize a higher profit for them, resulting in a higher overall cost to the Government.

The foregoing reasons advanced for not conducting negotiations after the receipt of Unitec's price reduction on March 23 demonstrates, in our opinion, considerable confusion on the part of the contracting officer in respect to applicable laws and regulations governing negotiation procedures. For example, we fail to see the significance in the argument that Unitec's price reduction proposal was received *after* the contracting officer had concurred in the award recommendation of NAVSPASUR. We find nothing in either law or regulation which, on the facts present here, makes such a "concurrence" irrevocable. On March 23, when Unitec's offer was received, the acceptance of Bendix's offer had not been communicated to Bendix. Short of an actual contract award, there was nothing in this case to prevent the Government's procurement officials from reconsidering any subjective undisclosed intent or decision to award to Bendix.

The contracting officer's reliance on ASPR 3-506(b), (c), and (g) and ASPR 3-805.1 (arguments 2 and 4) is, we think, misplaced and begs the basic question presented in Unitec's protest. Unitec does not contend that its March 23 price reduction offer should have been accepted, as such. Unitec only contends that the contracting officer, upon receipt of its March 23 telegram, should have conducted negotiations with *all* responsible offerors who had submitted proposals within a competitive range, price and other factors considered, as required by ASPR 3-805.1(a). While the provisions of ASPR 3-506 operate to preclude, in the specified circumstances, acceptance of a late offer or modification as such, they do not, and were never intended

to, preclude the opening-up of negotiations with all offerors competitively situated upon the receipt of a late modification to a timely offer which fairly indicates that such negotiations would prove to be highly advantageous to the Government. In that connection, it should be noted that the provisions of ASPR 3-506 have no greater weight or force than those of ASPR 3-805.1. Negotiation procedures, unlike those required for formal advertising, are designed to be flexible and informal. These procedures properly permit the contracting officer to do things in the awarding of a negotiated contract that would be a radical violation of the law if the procurement were being accomplished by formal advertising. This is recognized by a provision in ASPR 3-805.1(v) which permits resolicitation of offerors upon the receipt of a *nonresponsive* offer. The provision states:

> * * * when the proposal most advantageous to the Government involves a *material departure* from the stated requirements, consideration shall be given to offering the other firms which submitted proposals an opportunity to submit new proposals on a technical basis which is comparable to that of the most advantageous proposal, *provided* that this can be done without revealing to other firms any information which is entitled to protection under 3-507.1. [Italic supplied.]

The emphasis here is on permitting the contracting officer to take a course of action which would be of great benefit to the Government. Certainly, if ASPR authorizes the consideration of an *initially nonresponsive* offer it ought not, *a fortiori*, to preclude the opening-up of negotiations upon the receipt of a late price modification to a responsive timely proposal. ASPR 3-506 does not, in our opinion, require that anomalous result.

The above referenced report makes much of what the contracting officer considers to be the receipt of a fair and reasonable price from Bendix. This conclusion was apparently reached on the basis of a comparison (shown in paragraph 9.a. of Enclosure 1 of Exhibit II) between the Bendix and the reduced Unitec prices which were broken down into a "cost/technical man-year" per 10-month period and into a "cost/technical man-year" per option period. On this basis Unitec's price proposal for the 10-month period is $7,070 and Bendix's is $7,705. On the option period the cost/technical man-year for Unitec is $7,940 and for Bendix it is $7,782. (It should be pointed out that Bendix proposed to furnish 115 technical personnel, whereas Unitec proposed 108.) The net difference for both periods is then computed and it is shown that Unitec would only be low on a cost/technical man-year basis for both periods by $477. On the basis of these figures paragraph 9.a. concludes as follows:

> Two assumptions can be drawn from the above analysis—(i) BENDIX's costs for the first and second periods are still reasonable after taking into consideration the large reduction offered by UNITEC; and (i) UNITEC's large reduction for the first period appears to be an attempt to "Buy-In."

In our opinion, the analysis and conclusions set forth in paragraph 9.a. are faulty and misleading since they are based on criteria (i.e. "cost/technical man-year" and "option" period) which were not set forth in the request for proposals as the basis for evaluation of offers or upon which offers were invited. We see nothing in the RFP indicating that offers were invited, and would be evaluated, on a cost/technical man-year basis. It is noted that the contract was awarded on a lump-sum basis. Moreover, as to the option period, paragraph 9.14.1 of the RFP, which was added by an amendment dated February 7, 1967, provides in pertinent part:

The offeror shall submit his bid for the option stipulated above and include his cost breakdown in the same detail and format as required for the initial year. *The award will be made to the lowest responsive, responsible bidder on the initial bid. The priced option will not be used to determine the low bidder.* * * * [Italic supplied.]

In view of the above we see little to support the contracting officer's conclusion that, after taking into consideration the large reduction offered by Unitec, Bendix's costs are still "reasonable." The fact remains that a contract was awarded to Bendix at a price of $738,455 in the face of an outstanding offer from Unitec in the amount of $636,317 or a difference of $102,138. Furthermore, since exercise of the option for the second year is wholly within the discretion of the Government, with no assurance that it would be exercised, we see no basis for the contracting officer's conclusion that Unitec's large price reduction for the first period appears to be an attempt to "buy-in." (It is noted, in that connection, that Unitec's reduced lump-sum option price is lower than Bendix's option price—$847,520 as opposed to $895,000.) In its letter of June 15, 1967, to the contracting officer which protested the award to Bendix, Unitec states:

As expressed in the telegram [which reduced Unitec's price], the reduction was by reason of "certain business considerations." Said business considerations were that Unitec had in the interim decided as a matter of corporate policy to become a publicly owned corporation, and had decided to make every effort to retain business presently on hand even if this meant reducing substantially its profit margin and cutting costs to the minimum possible * * *.

This statement of the reason why Unitec reduced its price after proposals were opened has not been controverted by the contracting officer and it appears to be at least as persuasive as his "buy-in" conclusion. In any event, short of convincing evidence tending to indicate "inside" knowledge or fraud on the part of the offeror, we see no need to speculate on the reasons why an offeror has chosen voluntarily to reduce his price.

In regard to reason number three cited by the administrative report in support of the action taken by the contracting officer, it need only be noted that merely because the RFP informed all offerors that the

Government has reserved the right and may make an award on initial proposals without discussion, such advice and reservation of the right to do so can hardly be cited as *justification* for exercising the reserved right. Unitec has not questioned the Government's right to make an award without discussion but does question the soundness of the discretion used by the contracting officer in exercising the right. On the facts presented in the record before us we also question the soundness of the decision to award without discussions.

Finally, we find the fifth reason cited in the report as a "Conclusion" to be without merit and it tends to raise a question of whether the subject procurement could not have been just as feasibly accomplished by formal advertising. If, as indicated in the report, the contracting officer "determines that the product or service is of such a nature that it can be obtained on a fixed-price competitive basis, but has some reservations that negotiations might be necessary" then by all means he should *negotiate* when, after receipt of initial proposals he is presented with a situation whereby the Government stands to benefit greatly from such negotiations. We find it difficult to conceive how the opportunity to save the Government approximately $100,000 by legally authorized and proper negotiations can be characterized as "arbitrary."

Inasmuch as the actions taken by the contracting officer in this case are the result of what we believe to be only the unsound exercise of discretion and not in violation of law or regulation, and the record fails to indicate culpability or fault in the matter by the successful offeror, we do not question the legality of the contract as awarded. The matter is brought to your attention in the hopes that it may serve as an example to contracting officers in your Department and will prevent recurrences of like cases in the future. Also, we must advise that the exercise of the option for the second-year services in the Bendix contract without first soliciting formally advertised bids or negotiated offers, as the case may be, to determine whether the option is the most advantageous alternative to the Government, would be considered improper by our Office and we would be constrained to apply this view in the audit of expenditures of appropriated funds under any contract for the services in question.

[B–160591]

Quarters Allowance—Dependents—Proof of Dependency—Divorce Validity

Although generally for the purpose of paying quarters allowances (BAQ) to members of the uniformed services who remarry after obtaining a Mexican divorce, a judicial determination of the validity of a second marriage is re-

quired under the laws of the jurisdiction where the marriage is performed, *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709, has been regarded as constituting a judicial determination for cases falling squarely within that case, and, therefore, an officer who prior to September 1, 1967, the effective date of the revision of the New York (N.Y.) State divorce law, remarried in the State of N.Y. would be entitled to BAQ, if one of the parties was domiciled in that State, but the *Rosenstiel* decision having no application in jurisdictions other than N.Y. State, if the marriage occurred outside the State, the officer would not be entitled to BAQ, even if one of the parties had been a N.Y. domiciliary. However, after September 1, 1967, because of the uncertainty of section 250 added to the Domestic Relations Law, the *Rosenstiel* case no longer will be viewed as constituting a judicial determination of the validity of a Mexican divorce.

To the Secretary of Defense, November 22, 1967:

Further reference is made to letter of September 28, 1967, from the Assistant Secretary of Defense (Comptroller), requesting a decision as to the validity of Mexican divorces for the purposes of payment of quarters allowances, particularly with respect to Mexican divorces obtained by members of the Armed Forces domiciled in the State of New York after the effective date of section 250, Domestic Relations Law, McKinney's Consolidated Laws of New York. The questions and circumstances are set forth and discussed in an enclosed copy of Committee Action No. 403 of the Department of Defense Military Pay and Allowance Committee.

The questions presented are as follows:

1. If the officer concerned in the decision of February 17, 1967, B–160591, had remarried in the State of New York and his second wife had not been a New York domiciliary, would he have been entitled to BAQ in behalf of the second wife in the absence of a judicial determination of the validity of his second marriage?
2. Would the answer to Question 1 differ if he did not remarry in the State of New York, but his second wife had been a New York domiciliary?
3. Do the provisions of section 250, Domestic Relations Law, McKinney's Consolidated Laws of New York Annotated require the conclusion that on and after September 1, 1967, any service member within its purview who obtains a Mexican divorce must have that divorce decree recognized as valid by a court of competent jurisdiction of the State of New York before he may be considered entitled to BAQ in behalf of a wife of a second marriage?

In its discussion of questions 1 and 2, the Committee says that in decisions of October 27, 1965, and May 3, 1966, B–157498, there was considered the case of an officer (Gonzales) who personally appeared before a Mexican court in an action in which he was granted a divorce, his wife having been represented by an attorney who expressly submitted her to the court's jurisdiction. Both parties to the divorce were domiciled in the State of New York and the officer later remarried in South Carolina, the second wife also being domiciled in New York State. The Committee states that in that case we said that in view of the decision of the New York Court of Appeals in *Rosenstiel*, v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709, the New York courts presumably would recognize as valid the officer's Mexican divorce. In view, however, of the doubt whether South Carolina, the State where

the second marriage was performed, would recognize as valid such divorce, we concluded that in the absence of a judicial determination of the validity of the officer's marriage the matter was too doubtful to credit him with allowances for a dependent wife. A similar conclusion was reached in decision of September 23, 1965, 45 Comp. Gen. 155, involving a remarriage in Maryland.

The Committee refers to our decision of February 17, 1967, B–160591, in the case of Lieutenant James C. Nabors, USN, involving a legal and factual situation identical with the legal and factual situation before the court in the *Rosenstiel* case. The Committee says that since that case fell squarely within the *Rosenstiel* case, it was decided that the officer was entitled to BAQ for his wife although no court of competent jurisdiction in the United States had recognized as valid that particular Mexican divorce decree.

The Committee points out also that in 36 Comp. Gen. 121, involving a Mexican divorce we held that the officer concerned was required to resort to court proceedings to claim recognition of the validity of his Mexican divorce.

The Committee says it may be inferred from the *Nabors* case that if the second marriage had not occurred in New York between New York domiciliaries, the case would not fall squarely within the *Rosenstiel* case and that in this situation members in the categories covered by questions 1 and 2 who may have remarried in the absence of a judicial determination of the validity of the second marriage could be denied BAQ entitlement on behalf of the second wife.

As a general rule, the State courts of the United States have not recognized the validity of Mexican divorces. Consequently, in cases where the prior marriage of one of the parties to a marriage has been the subject of a Mexican divorce, we have, with the exception of the Nabors' case, consistently required a judicial determination of the validity of the marriage before approving credit of basic allowance for quarters for dependents on account of the second wife. We do not view our decision in the Nabors' case as being inconsistent with that position. Since the Applicable State law and the facts in the Nabors' case were identical with those considered by the court in the *Rosenstiel* case, it was our view that the decision in the *Rosenstiel* case could be regarded as being tantamount to a judicial determination of the validity of the Mexican divorce in the Nabors' case.

The decision in the *Rosenstiel* case may not, however, be viewed as a judicial determination of the validity of any marriage in cases of this nature where there is any difference in either the applicable State law or the material facts.

In the decision of October 27, 1965, B–157498 (Gonzales), we held that since the second marriage did not take place in New York State

and the record did not show the domicile of the second wife, there was no basis for concluding that the State where the second marriage took place would recognize as valid the Mexican divorce. However, where New York domiciliaries obtain a Mexican divorce in the same manner as that considered in the *Rosenstiel* case prior to September 1, 1967, and the second marriage takes place in New York while one of the parties is domiciled in that State we believe that since New York is the matrimonial jurisdiction in the case of the second marriage, the *Rosenstiel* decision would be for application regardless of the domicile of the other party. Therefore, question No. 1 is answered in the affirmative.

As a general proposition the validity of a marriage is for determination under the laws of the jurisdiction where the marriage is performed. Since question No. 2 involves remarriage in a State other than New York and the *Rosenstiel* decision has no application in jurisdictions other than the State of New York, the answer is in the affirmative. See decision of May 3, 1966, B-157498.

The domestic relations laws of the State of New York were amended by section 11 of the act of April 27, 1966 (ch. 254, 189th sess., 1966) by inserting a new section to read as follows:

250 Divorces obtained outside the state of New York. Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

The provisions of this section shall not apply to a divorce obtained in another jurisdiction prior to September first, nineteen hundred sixty-seven.

Those provisions were enacted in conjunction with a general revision of the New York divorce law and, while their impact on *Rosenstiel* type cases is not clear, they clearly represent a substantial change in State law. Accordingly, the decision in the *Rosenstiel* case may not be viewed as constituting a judicial determination of the validity of Mexican divorces obtained after the effective date of such provisions. Question No. 3 is answered in the affirmative.

[B-162676]

Pay—Retired—Members Who Served in Higher Grade After Retirement—Early Release

An Army sergeant retired in grade E-6 upon his own application under 10 U.S.C. 3914 who under orders recalling him to active duty in grade E-7, with his consent, serves only 7 months 6 days of a 2-year period because of hardship is entitled to the recomputation of his retired pay on the basis of the higher grade, for had he been retired at grade E-7 rather than released from active duty, he would have been eligible under 10 U.S.C. 3961 to retire in that grade, and 10 U.S.C. 1402(a) prescribing the computation of retired pay on the monthly

basic pay of the grade in which a member would be eligible to retire if retiring upon release from active duty performed subsequent to retirement, the sergeant's retired pay properly may be recomputed effective the day following release from active duty on the monthly basic pay of grade E–7.

To Lieutenant Colonel Frank Berrish, Department of the Army, November 22, 1967:

Further reference is made to your letter of August 30, 1967, requesting a decision as to the propriety of making payment on a voucher stated in favor of Sergeant First Class (E–6) Walter W. Neumann, a retired enlisted member of the Army. The amount of the voucher, $237.61, represents the difference in retired pay based on grade E–7 and grade E–6 for the period January 12, 1967, to July 31, 1967, inclusive. Your request was forwarded here October 9, 1967, by the Office of the Comptroller of the Army under D. O. Number A–962 allocated by the Department of Defense Military Pay and Allowance Committee.

Sergeant Neumann was retired effective March 1, 1963, in grade E–6 upon his own application in accordance with the provisions of 10 U.S.C. 3914. He was ordered (with his consent) to active military service in grade E–7 effective June 6, 1966, to serve for a period of 2 years. However, under authority of paragraph 11*b*, AR 601–250, August 11, 1966, and paragraph 6–4*b*, AR 635–200, July 15, 1966, he was released from active duty on January 11, 1967, not by reason of physical disability and the following day he reverted to an inactive status on the retired list.

The question presented, i.e., whether his retired pay properly may be recomputed effective January 12, 1967, on the basis of the monthly basic pay of grade E–7 rather than grade E–6, arises by reason of the fact that he did not serve the full 2-year period for which he consented to be recalled to active duty.

Paragraph 11*b* of AR 601–250 (August 11, 1966) provides that the standards and criteria for early relief from active duty contained in Army regulations in the 635 series are applicable (with some exceptions not here pertinent) to retired enlisted personnel on active duty. Paragraph 6–4, AR 635–200 (July 15, 1966) provides that at the discretion of the Secretary of the Army, an individual may be discharged or released, as appropriate, from active military service because of—

a. Dependency. * * *

b. Hardship, when in circumstances not involving death or disability of a member of his family, his separation from the service will materially affect the care or support of his family by alleviating undue and genuine hardship.

The record shows that Sergeant Neumann was released from active military service on January 11, 1967, in accordance with the administrative policy above outlined after having served only 7 months and 6 days under the orders recalling him to active duty for a period of 2 years.

Paragraph 10*f*(1), AR 635-230, Change 4, July 17, 1963 (in effect during the period preceding February 8, 1967), provided:

f. (Added) Individals promoted to pay grades E-7, E-8, or E-9 on or after 1 July 1963 will be required to serve a minimum of 2 years active duty in such grade before being eligible for retirement in grade unless entitled, upon retirement, to a higher retired grade than that in which serving on active duty.
(1) Exceptions to 2 years active service in grade may be granted where the best interests of the service are involved, or where substantial hardship would otherwise result. These are the only exceptions that may be considered.

It is suggested in your letter, that since Sergeant Neumann appears to have been granted an exception—under the above-quoted regulations—from the 2 years' active service in grade requirement, he may be entitled to recompute his retired pay effective from January 12, 1967, on the basis of grade E-7. Despite such suggestion, however, you add that—

doubt exists that he is entitled to recomputation of retired pay based on the higher grade of E-7 to which he was promoted and served in less than 2 years, since his retired grade remains E-6, and Title 10, U.S. Code, Section 1402(a) specifically provides that retired pay be computed on the monthly basic pay of the grade in which a member would be eligible to retire if retiring upon release from active duty performed subsequent to retirement.

We find nothing in the language contained in section 1402(a) to which you refer which would bar recomputation of Sergeant Neumann's retired pay on the pay of grade E-7.

Section 3961, Title 10, U.S. Code, provides that:

Unless entitled to a higher retired grade under some other provision of law, a Regular or Reserve of the Army who retires other than for physical disability *retires in the regular or reserve grade that he holds on the date of his retirement.* [Italic supplied.]

On January 11, 1967, when Sergeant Neumann was released because of hardship, he held and was serving in grade E-7. If he had been retiring upon that release from active duty, he would have been eligible under authority of section 3961 to retire in that grade. Accordingly, under the provisions of section 1402(a), his retired pay properly may be recomputed effective January 12, 1967, on the monthly basic pay of grade E-7.

The voucher, payment on which is authorized if otherwise correct, and the supporting papers are returned herewith.

[B-162232]

Bidders—Qualifications—Administrative Determinations—Review

A contracting officer who notwithstanding verification of a low bid suspiciously out of line with other bids and the Government's estimate is still doubtful of the reasonableness of the low bid price, as well as the bidder's—a small business concern—financial capacity, experience, and ability to subcontract work on a proposed research tunnel and, therefore, unable to make the preaward determi-

nation of bidder responsibility required by administrative regulation, upon refusal of the Small Business Administration to issue a certificate of competency, properly considered the low bidder nonresponsible, a determination found upon review by the General Accounting Office under its audit authority to be supported by the record, and the contracting officer having acted within the scope of his authority, his rejection of the low bidder as nonresponsible is not subject to judicial review.

Bids—Rejection—Propriety

Although not authorized to review a Small Business Administration (SBA) determination or to direct the issuance of a certificate of competency, the General Accounting Office is not precluded from reviewing the rejection of a small business concern as nonresponsible, whether or not SBA issued a certificate of competency, as the question upon review of all pertinent information and evidence available to the contracting officer and the SBA is whether the bid rejection was proper, and where the record justifies the doubt of the contracting officer and SBA, it is immaterial that the record might also support a determination of bidder responsibility, in view of the fact that a prospective contractor has the burden to affirmatively demonstrate responsibility, and the contracting officer is not required to independently gather information to resolve doubt, instead any doubt should be resolved against the bidder.

To the Phoenix General Construction Co., Inc., November 24, 1967:

Reference is made to your protest by telegram dated August 9, 1967, as supplemented by subsequent correspondence, against the rejection of your low bid by the National Aeronautics and Space Administration (NASA) and the award of a contract to another bidder under Invitation for Bids (IFB) No. L–7929, issued April 4, 1967, by the Langley Research Center, Langley Station, Hampton, Virginia, for the construction of a tunnel structure and foundations for the V/STOL Transition Research Tunnel, West Area, Langley Research Center. Since the administrative reports and a report from the Small Business Administration (SBA) have been made available to you, only such facts as are essential to our decision will be set forth herein.

The IFB, which solicited both a base bid and an alternate bid, described the work, which is to be completed within 530 days after receipt of notice to proceed, as including reinforced concrete foundations and slabs and steel tunnel circuit, the major portions to include the tunnel, stagnation area and exhaust tower, air intake tower, turning vanes, diffusing screens, nacelle to house drive motor system, air intake flaps, air control valve, and removal of existing duct and valve house. Bidders were placed on notice that the tunnel erection work should be coordinated with the completion of the drive system installation and test chamber and mechanical-electrical equipment room construction by others. The wage rate determination issued by the Solicitor of Labor and incorporated in the IFB, as amended, had an expiration date of September 6, 1967.

On May 24, 1967, the four bids received in response to the IFB were opened. The standing of the bids was as follows:

Bidder	Base Bid	Alternate A
Phoenix General Construction Co., Inc.	$1,418,000	$1,455,000
Chicago Bridge and Iron Co.	2,070,000	2,090,000
Pittsburgh Des Moines Steel Co.	2,174,000	2,224,000
Blount Construction Company	2,249,000	2,294,700

The Government's estimate for the cost of the work was $1,988,800.

On May 25, 1 day subsequent to the bid opening, the procurement officer met with three of your principals and requested that there be furnished to the Government data regarding your financial and subcontracting arrangements in order to establish your capability to perform the work, as well as a statement concerning the anticipated cash flow requirements for the contract. Further, because of the substantial disparity between your price and the Government's estimate and between your price and the three competing bids, you were requested to furnish certain additional information and to confirm in writing your bid prices for the base bid and alternate, and by letter of May 25, you were informed that the request for bid verification was made because the price disparity gave rise to suspicion of a mistake in your bid.

By letter dated May 30, addressed to the Langley Research Center, you confirmed your bid price. In addition, you contended that the competing bids did not offer the Government a fair price and that the Government's estimate was out of line for the work involved, and you offered to substantiate such allegations. In another letter of the same date, also addressed to the Langley Research Center, you furnished a statement of your estimated monthly cash outlays based upon 18 months' completion time.

In a letter dated June 2, 1967, to the contracting officer, you listed several firms fabricating the various types of material which would be required for the work, and you confirmed statements which your representatives apparently made on May 25 at the conference with the contracting officer, 1 day after the opening of bids, that you proposed to do all of your own concrete work, demolition, and erection of the tunnel. You also stated that you were considering other fabricators on some items and would submit their names for approval by NASA at a later date.

In a telegram dated June 5 to you, the contracting officer referred to the letter of May 30 in which you made the allegations that the competing bids were not fair and questioned the accuracy of the Government estimate, requested you to substantiate such allegations, and further requested that your reply be submitted by June 8. By telegram dated June 6, however, you replied that it was not your intent in writing the letter of May 30 to supply any additional information regard-

ing *your* estimate [bid price], and you stated that, while you were willing to furnish additional information regarding the matters discussed at the May 25 meeting with NASA, including the experience of your key personnel, financial and bonding capabilities, and subcontractors and vendors, you did not choose to make any other statements except under oath and subject to the right to subpoena witnesses.

By June 8, in addition to the information which you had furnished, the contracting officer was also in possession of a credit report which indicated that you anticipated annual sales of $1,500,000 but reflected a worth of only $20,000 in addition to assets "in good five figures;" a statement from your proposed surety that you qualified for at least $6 million bonding capacity; and statements from your bank indicating that the balance in your account had ranged from a moderate to middle 5 figure account but no problem would be anticipated in arranging credit in low 6 figure amounts, statements which the contracting officer construed to mean that the bank would extend credit to you of $100,000 to $300,000. Further, other information available to the contracting officer indicated that you had been organized in 1966; that your organization consisted of five active individuals, necessitating subcontracting of a major portion of the work; that while your key personnel had had experience with other construction companies, the experience of your president was chiefly in management and administration rather than in an engineering or technical capacity; and that there was no indication that the background and experience of your proposed field superintendent, any more than that of your president, adequately established the professional engineering competence necessary to manage successfully the construction of the subject facility. After consideration of all of the available information, the contracting officer concluded that there was doubt as to your financial capacity, your experience, your ability to subcontract effectively (absent evidence of commitments or arrangements with responsible subcontractors), and the reasonableness of your bid price; accordingly, the contracting officer further concluded that he was unable to make the preaward determination required by NASA Procurement Regulation (NASA PR) 2.407-2 and NASA PR 1.902 that you were a responsible prospective contractor. However, since you were a small business concern and the factors which prompted the contracting officer's negative determination of your responsibility concerned your capacity and credit, the contracting officer, in accordance with section 2(8) of the Small Business Act of July 18, 1958, Public Law 85-536, as amended [15 U.S.C. 637(b)(7)] and pursuant to the certificate of competency (COC) procedures set forth in NASA PR 1.705-4(b), notified SBA by letter of June 8 of his intent to reject

your bid on the basis of nonresponsibility and stated that, in compliance with the COC procedures, he would withhold award pending SBA action concerning issuance of a COC to you or the expiration of 15 working days after receipt by SBA of the letter of notification, whichever was earlier. You were advised of the contracting officer's action by telegram dated June 9.

The record indicates that you subsequently filed with the SBA Southwestern Area Office in Dallas, Texas, an application for a COC and that you submitted to that office certain data relating to your pricing, proposed work schedule, contemplated subcontractor arrangements, and other pertinent information. The area office records indicate that incident to evaluating the pricing and planning documentation which you submitted, that office evaluating your estimates and verified the informal quotations and by comparing such figures with the prices which you showed in your computations concluded that your bid price was realistic. Further, the area office checked the availability of the necessary additional labor at the contract site with the Virginia Employment Commission and with two labor unions, and verified that the necessary equipment to perform the work was available to you on a rental basis. The area office also reports that it checked with former employers and other references listed for your president and for your project superintendent, and that such inquiries elicited responses on which the office concluded that both individuals enjoy excellent professional reputations for construction management, engineering and supervision on projects which the area office regarded as much more sophisticated than the NASA tunnel project. Further, it was concluded that Mr. Curtis Mathes, Jr., of your organization enjoys a good mechanical engineering reputation and an excellent reputation in business and financial management. The area office records also indicate that the office checked on a project at the Arnold Research Center, Tullahoma, Tennessee, which was included in a list of eleven contracts on which your president had reportedly served as general supervisor for the contractor, Chaney & James Construction Co., Inc., and concluded that the work in question was wind tunnel construction. Advice received from a representative of the Corps of Engineers, Department of the Army, Mobile, Alabama, was to the effect that the contractor had satisfactorily completed the work at Arnold Research Center, and the employment of your president by the contractor was verified. Accordingly, and on the basis of favorable information from various sources concerning your financial capacity, the area office was disposed to take favorable action on your COC application and so notified the contracting officer, as provided by SBA procedures, prior to the expiration of the 15 working days allotted for SBA action, in order to afford the contracting agency (NASA) an opportunity to

furnish additional information, if desired, regarding your capacity and credit. The contracting officer, however, elected to request referral of the case to SBA headquarters in Washington, D.C., for review prior to final action, as is also provided under SBA procedures, and SBA headquarters accepted the case. (See Delegation of Authority No. 30, Revision 12, January 7, 1967, 32 Federal Register (FR) 179, and Delegation of Authority No. 5, Revision 1, January 7, 1967, 32 FR 178.)

In its review of the case, SBA headquarters conducted an independent investigation of your capacity and credit and also gave consideration to the likelihood of your sustaining losses on the contract such as would impair your ability to perform, a factor which SBA considers particularly important where, as in your case, a bidder's own financial resources are limited and it must rely on outside sources for financial support. The substance of SBA's findings with respect to your financial capacity is set forth hereafter in quotations from SBA letters dated August 15 and September 1, copies of which have been made available to you, and therefore will not be repeated here.

In the course of verifying the information which appeared in various credit reports and other records concerning the qualifications of the members of your organization a check by SBA headquarters with the firm of Chaney & James on the eleven contracts which your surety represented as having been performed for the Government under the general supervision of your president disclosed that only four of the contracts were performed while your president was in the employ of Chaney & James. On the remaining seven contracts it appears that your president was serving in the capacity of an electrical subcontractor doing business as Pioneer Electrical Constructors, Inc. (Pioneer). Moreover, a check with Department of the Army personnel who had been directly involved with the Arnold Research Center project at Tullahoma, one of the four contracts performed while your president was directly employed by Chaney & James, resulted in the receipt of unfavorable reports to the effect that the steel fabrication was inferior, the preparation for welding was poor, and performance had resulted in numerous claims which were only recently settled; further, the project was identified as duct work to connect the plenum evacuation system with the propulsion wind tunnel, rather than wind tunnel construction. Information obtained regarding the F–1 project, Huntsville, Alabama, on which Pioneer was a subcontractor to Chaney & James, was to the effect that there was lack of cooperation and failure to meet schedule on the part of the subcontractor. Inquiry regarding the performance of Pioneer on the Sonic Fatigue Building, Dayton, Ohio, on which Chaney & James was prime contractor, resulted in

a report to the effect that contracting office personnel of the Corps of Engineers could not recall your president but the project was completed in 1964 and numerous claims for additional compensation were filed under the contract.

In addition, SBA headquarters communicated with Iowa State University and was informed that your president had attended the university as a freshman only and was not a graduate as is stated in a document furnished by your proposed surety.

Based on the foregoing and on additional factors which are included in the excerpts quoted hereafter from the SBA letters of August 15 and September 1, SBA headquarters declined to issue a COC to you, and the contracting officer was notified of such action by letter dated August 10 from the Associate Administrator of SBA.

At that time, NASA could have proceeded with award to the next lowest, responsive, responsible bidder, as authorized by NASA PR 1.705–4(b). However, upon advice from our Office of the receipt of your telegram of August 9, in which you protested the proposed rejection of your bid, requested a preaward decision in the matter by our Office, and stated that a letter would follow, NASA agreed to defer the award to permit our Office to review the case but indicated that deferment beyond August 25 would delay related programs at the contract site.

On August 11, you were accorded a conference with SBA officials in Washington, D.C., at which the SBA action in your case was discussed, and on August 14, the SBA area office discussed the matter with you. In addition, the Administrator of SBA addressed to a member of the United States Senate, who had expressed an interest in your protest, a letter dated August 15 reading as follows:

> In conformance with a verbal request by a member of your staff, I am forwarding information on the basis for declining the Phoenix General Construction Company, Dallas, Texas, application for a Certificate of Competency in connection with NASA IFB–7929 for a research wind tunnel.
>
> The applicant company, while established over a year ago, has done no work to date. It has drawn management personnel from other firms, and been actively engaged in the preparation of bids, but has not been awarded or performed on a contract. The applicant's bid is $1,418,000, which is $652,000 lower than the next higher bid, and lower than the Government estimate for the cost of the tunnel, which is $1,988,800. The company proposes to subcontract steel fabrication, steel erection, purchase materials, hire all of its productive employees, rent its equipment and assemble an organization to meet a production schedule which must be dovetailed with the work of other contractors. The experience of its principal, Walter Lage, is the focal point around which the organization would be built.
>
> Our examination of the material supplied by the applicant failed to show that the applicant's bid was based on a firm structure of subcontractor quotations, and it was only after much insistence on the part of the Small Business Administration that some of the quotations were obtained in writing which were, of course, dated after the bid opening. We were unable to reconcile quotations against the applicant's cost spread sheet, or to tie them in with the bid price. While there is some limited wind tunnel experience in the background of some

of the principals in the applicant organization, applicant's men have never constructed a wind tunnel of this type.

The firm is capitalized with $20,000 capital stock, 20% owned by applicant's principal (Walter G. Lage). $130,000 of additional operating capital was provided by another stockholder on debentures payable $10,000 annually, commencing on September 1, 1967. As of June 15, 1967, only $5,105 of cash remained with only $23,000 in other assets. Applicant has not started or performed any business operations, but in its first year shows a loss of $130,000. This loss for a firm with only two to five employees, and not performing any business, shows an unusually high overhead cost. A $300,000 bank line of credit exists and it is not limited to this contract. Applicant's cash flow projection and other information indicates that they are bidding on other contracts and expect to perform on all contracts without using any of the $300,000 line of credit.

The projection assumes progress payments will provide complete financing of the project. It overlooks the fact that most of the work on the proposed contract will be performed by subcontractors; the major subcontractor, with a quotation of $593,000 for some of the steel sections will require a 45% payment, or $267,300 when it receives the material and supplies in its own shop. We were advised by the contracting agency that such payments are generally not authorized, but when authorized must be specifically included in the IFB. We were also advised that this specific provision is not included in this IFB. Practically all of the capital is being provided by a single stockholder of the firm who holds a 40% interest. If he becomes discouraged or disenchanted, the firm would obviously have to fold, since it has no capital or credit of its own.

There is strong doubt as to the experience, subcontracting arrangements, the ability to acquire the necessary skilled help, and the ability to put together and finance a going organization suitably equipped to meet the required construction schedule.

In view of the above, the Phoenix application was declined on August 10, 1957.

On August 21, you were accorded a conference with representatives of our Office, at which you presented a letter dated August 19, relating mainly to your conferences with SBA, and furnished copies of certain data pertaining to the computation of your bid and your experience in the field of wind tunnel construction, which, you stated, had not been made available to the contracting officer but would substantiate your claim that there was no mistake in your bid and your contentions about the unfairness of the competing bids and the inaccuracy of the Government's estimate. At the conference, our Office furnished to you a copy of a statement dated June 9 by the contracting officer, which accompanied his referral of the case to SBA, setting forth the basis for the adverse administrative determination regarding your responsibility. Later the same day, NASA agreed, at the request of our Office, to defer the award even beyond August 25, if necessary, to consider the material submitted by you to our Office and to review carefully, in the light of such data, the Government's estimate of the cost of the contract. In addition, SBA volunteered to consider the same data and to review its decision accordingly.

On August 31, representatives of NASA and of the SBA Washington office met with representatives of our Office. NASA presented a report dated August 30 advising our Office that after a careful examination by its engineering and procurement personnel of all available information relating to your responsibility and reexamination of the

Government's prebid cost estimates (one prepared by the private architect-engineer firm which had prepared the detailed specifications and drawings included in the IFB, and the other by NASA technical and engineering personnel) NASA had again determined that your bid should be rejected on the basis that you could not be considered a responsible bidder for this procurement. The report includes an extensive discussion of the various items in your pricing sheets on which the Government's estimate was higher than your prices and urges that the major reason for the overall difference of $565,081 between your bid and the Government estimate is that you did not base your price on the type of fabrication required for the tunnel steel. Concerning the nature of the work, the report stresses the need for sophisticated fabrication technique due to the exacting dimensional tolerances and other requirements. With respect to your work approach, the report points out that the use of more than one fabricator, as you propose, for the various tunnel sections is highly unsatisfactory because there is no assurance that the section made by one fabricator will match and align with a section made by another fabricator, a critical item of wind-tunnel design; that due to the limited area in which the work is to be performed, there being another wind tunnel to the north of the construction site and the property line and State highway to the south, sequential deliveries of the tunnel sections are required to efficiently utilize the areas available rather than early deliveries of all tunnel sections as you propose; and that your PERT (critical path) schedule is overly optimistic generally as to certain areas such as the matter of preparation and submission of all reinforcing steel shop drawings, for which you allow only 15 days, but for which NASA's experience shows that a full month is generally required to cover the cycle of mailing to the architect-engineer for checking, return by the architect-engineer to NASA, and, after approval or other action, return by NASA to you and ultimate relay to the subcontractor. With regard to the matter of your experience, the report comments that the material which you furnished relating to work performed by your president and another member of your firm at Tullahoma, Tennessee, indicates only the performance of modifications to a propulsion wind tunnel, rather than experience with the construction of supersonic and transonic wind tunnels.

The report further states that while the contracting officer and the technical staff, who have had many years of experience in designing and constructing similar wind tunnels, have endeavored to be as objective as possible and to find some reason to establish at least a marginal finding of responsibility, the contracting officer, even after further investigation and consideration of the additional data, has not

been able to conclude that you are a responsible bidder for this procurement within the meaning of the procurement regulation. The report concludes with the statements that the material received from our Office (which has been returned to our files) had been treated as proprietary and that no contacts had been made with any of the potential suppliers to either verify or clarify their quotations.

In addition, SBA voluntarily undertook to reexamine its position, and again concluded that it would not issue a COC. In its letter dated September 1, 1967, to our Office, SBA made the following statement:

> The Small Business Administration in its administration of the Certificate of Competency program has an obligation to the public and to the procuring agencies, as well as to the COC applicant. We, therefore, cannot issue a COC merely to accommodate a small business concern where the facts available to SBA fail reasonably to demonstrate that the concern can perform the work. To grant a COC under these circumstances could imperil the mission of the procuring agency. Moreover, a small firm which receives the COC for work it cannot perform is not benefited. Indeed, its very existence might be put in jeopardy by failure to perform.

In further elaboration of its reasons for declining to issue a COC, SBA stated:

> Among other things, the Washington SBA survey revealed that Phoenix, which was organized in 1966, only employs five persons and has no current organization or equipment. It, therefore, would have to create an organization to perform the contract work. No specific plans or personnel were made available to us from which we could determine that the necessary organization to perform a complex construction project could be effected.
>
> Moreover, the Washington SBA survey cast considerable doubt as to the veracity of the claims made concerning the education and experience of its President and General Manager, Mr. Walter G. Lage, who is to act as project manager. For example, the statements with reference to Mr. Lage's employment by Chaney and James Construction Company at Arnold Research Center suggest experience on a wind tunnel. We are informed that this work performed by Chaney and James Construction Company related only to addition of a connecting duct and valve to an existing wind tunnel and not the construction of the tunnel itself. A complete report on the background of Mr. Lage is also enclosed.
>
> The Washington SBA survey also raised doubt concerning Phoenix's understanding of the complexity of the work. Phoenix has declared that much of the steel work is in line with that performed by tank fabricators and ordinary steel fabricators. The Washington SBA survey contradicts this conclusion. The survey evaluation, which is consistent with the views of the procuring activity, is to the effect that at least four sections of the wind tunnel require special skills not ordinarily found among steel or tank fabricators. For example, sections 4 and 6 are transitional and contain conical elements that require unusual shaping. Section 5 houses an 8,000 horsepower electric motor and requires machining facilities for the nacelle support. Section 8, the entrance cone, is fabricated from close tolerance curved plate formed to meet exacting aerodynamic requirements. Both the procuring activity and the Washington SBA have reservations as to the ability of Richmond Engineering Co., Inc., to fabricate the tunnel sections as indicated on page 3 of Exhibit PP of the supporting information supplied GAO by Phoenix.
>
> Another negative aspect of Phoenix's plan to perform the work is the idea that the tunnel sections can be fabricated at different plants and assembled at the job site. This arrangement would very likely require the extensive use of jigs and templates in order to insure the proper fit and interfacing of the separate sections. However, no provision for such jigs and templates is to be found in Phoenix's plans. This adversely reflects on Phoenix's understanding of the nature of the work and the validity of its bid.

In our opinion, Phoenix's proposal to subcontract the major portion of the work makes it imperative that SBA know who the proposed major subcontractors will be and for us to evaluate their capabilities. However, when our survey was made, Phoenix was not in any position to name, with certainty, such subcontractors. Instead, Phoenix proposed to negotiate subcontracts after it received the contract. SBA considers such arrangement most unsatisfactory since subcontract costs are vital when the prime contractor has limited in-house financial capabilities. A detailed discussion of this question is contained in a memorandum dated August 9, 1967, from Mr. Ernest W. Reisner to Mr. Clyde Bothmer, a copy of which is in the file previously sent to your office.

Phoenix's financial planning does not appear to warrant a finding that it has the necessary credit to perform this contract. The company is capitalized with $20,000 capital stock and obtained an additional $130,000 by the sale of debentures to one of its stockholders. It sustained a loss of $130,000 in its first year of operation and, on June 15, 1967, had only a cash balance of approximately $5,000 and approximately $23,000 in other assests. To supplement this limited financial status, Phoenix proposes to borrow $45,000 from one of its principals and has obtained a $300,000 line of credit from the First National Bank of Dallas. We do not believe that the financing arrangements and limited capital are sufficient for this contract if, as appears likely, Phoenix will sustain substantial losses in performing this work. A full explanation of the reasons for this view is contained in the file previously sent to you.

Our carefully considered evaluation of the information of record and supporting documentation led to the conclusion that Phoenix failed to establish that it had the necessary capacity or credit to perform the contract in accordance with its terms and within the specified time frame. SBA, therefore, declined to issue a Certificate of Competency.

On September 1, our Office was advised by NASA headquarters that a determination had been made, on the basis of urgency, that award should be made to the second lowest bidder, who was both responsive and responsible. Formal notice of the award, which was made on August 31, was given to you in a letter dated September 5, which includes the following pertinent statements:

At this time the GAO has not issued a decision on your protest regarding award to any other bidder. However, the Davis-Bacon rate decision specified in the subject invitation is to expire September 6, which would probably require the rejection of all bids and subsequent readvertisement. More importantly, further delay in making award of this contract would unreasonably delay installation work on a related contract for the drive motor and associated electrical equipment, thus increasing the costs to the Government and subjecting it to additional claims for delay of an existing related contract.

Accordingly, pursuant to NASA Procurement Regulation 2.407-8(b)(3) I have made a determination that award of contract for the Transition Research Tunnel is urgently required and performance would be delayed by failure to make an award promptly. This determination was concurred in by our NASA Headquarters. Therefore, your bid on subject Invitation has been rejected due to nonresponsibility of your firm on this procurement and award has been made to Chicago Bridge & Iron Company, on August 31, 1967.

In various letters addressed to our Office, you have charged that the contracting officer's determination regarding your responsibility was arbitrary, capricious, and made in bad faith. You have accused the contracting officer of improper conduct, including deceit and other serious failings, and you have contended that as a result of such conduct, which you consider a misuse of his office, you have been illegally denied the contract in question. Great stress is laid by you on the difference of more than six hundred thousand dollars between your bid

and the bid which was accepted by NASA. In addition, there are several areas on which specific comments will be made below.

You have also made several critical statements concerning SBA's action and have implied that the procedures employed in this case, whereby the final decision on the matter of issuance of a COC was made in the Washington office rather than in the area office, were not proper. While our Office has no authority to require that SBA issue a COC, and we therefore will not undertake to reply to your exceptions to its refusal to do so, we deem it appropriate to call to your attention that under the delegations of authority issued by the Administrator of SBA and published in the Federal Register, as cited above, NASA was entitled to have the matter considered and reviewed by the SBA Washington office. Further, we see no basis on the record made available to our Office for your inference that the decision which was made by SBA was dictated or controlled by NASA, since the contracting officer's statement date June 9 to SBA concerning the facts justifying his determination of your responsibility was required under the COC procedures (NASA PR 1.705–4(b)), and since SBA has conducted an independent review.

The statute which governs procurements by NASA, 10 U.S.C. 2301–2314, provides with respect to advertised procurements that award shall be made to the responsible bidder whose bid conforming to the invitation will be the most advantageous to the United States, price and other factors considered. 10 U.S.C. 2305(c). Consistent with such provision, NASA PR 1.902 provides that contracts will be awarded only to responsible prospective contractors and requires that a prospective contractor demonstrate affirmatively his responsibility, including, when necessary, that of his proposed subcontractors; NASA PR 2.407–2 requires a preaward determination of responsibility; and NASA PR 2.404–2(e) provides that low bids received from concerns determined not to be responsible bidders shall be rejected. The minimum standards prescribed in NASA PR 1.903 for responsible prospective contractors include possession of adequate financial resources or the ability to obtain such resources as required during the performance of the contract and the necessary experience, organization, operational controls, technical qualifications, skills, and facilities, or the ability to obtain them, including the ability to subcontract effectively.

The sources from which NASA PR 1.905–3 requires the contracting officer to obtain the necessary information to make his determination of responsibility include representations and other information contained in or attached to bids and proposals; replies to questionnaires; financial data, such as balance sheets, profit and loss statements, cash forecasts, financial history of the contractor and affiliated concerns;

current and past records of research and development and facilities; written statements or commitments concerning financial assistance and subcontracting arrangements; and analyses of operational control procedures. NASA PR 1.906, relating to subcontractor responsibility, provides that a prospective prime contractor may be required to establish in writing the responsibility of his prospective subcontractors or an effective subcontracting system affording a method for determining subcontractor capability. Of paramount importance in issuing the determination of responsibility is the following language from NASA PR 1.902:

> The contracting officer shall make a determination of nonresponsibility if, after compliance with 1.905 and 1.906, the information thus obtained does not indicate clearly that the prospective contractor is responsible. * * * Doubt as to productive capacity or financial strength which cannot be resolved affirmatively shall require a determination of nonresponsibility.

In addition to the regulations concerning responsibility, NASA PR 2.406–1 requires preaward verification by the bidder in cases in which a bid mistake other than an apparent mistake is suspected. Moreover, when a particular mistake is suspected, it is not sufficient for the contracting officer to merely request verification of the bid; he must make known to the bidder his suspicions in such circumstances in order to hold the bidder to the bid as submitted. 35 Comp. Gen. 136. See, also, *United States* v. *Metro Novelty Manufacturing Co., Inc.*, 125 F. Supp. 713. Consistent therewith, NASA PR 1.406–3 (d)(1) requires that the bidder be informed of the reason for the request for verification, citing as an example a bid which is significantly out of line with other bids or with the Government's estimate.

Considering first the contracting officer's action in requesting that you verify your bid and suggesting to you the possibility that you had made a mistake in your price, while a difference in bid prices does not necessarily mean that a seemingly low bid is in error, the contracting officer was obviously endeavoring to comply with the regulations. Further, in a case such as this, where the project is a technical one and the Government's estimate, which has been prepared by personnel who have had experience in the particular type of work involved, exceeds the low bid by such a large amount but is in line with the higher prices of the competing bidders, who also have had experience on the same type of work, it is our view that the contracting officer would have been subject to criticism had he not complied with the requirement of the regulation concerning bid verification. Accordingly, we see no valid basis for objection to the contracting officer's conduct in this respect.

Under NASA PR 1.902, *et seq.*, the contracting officer's subsequent action in soliciting from you certain information relating to the mini-

mum standards of responsibility for prospective contractors was also authorized. Thereafter the burden was on you to establish affirmatively your responsibility and, if necessary, that of your proposed subcontractors, and the contracting officer, in the event of doubt concerning your financial strength or productive capacity, was required by the regulation to issue a determination of nonresponsibility.

The statutes requiring Government contracts to be awarded after advertising and competitive bidding were enacted for the protection and benefit of the Government, and confer no judicially enforceable rights upon bidders, and the selection of a contractor by the contracting officer acting within the scope of his authority has been held not to be subject to judicial review. *Friend* v. *Lee*, 95 U.S. App. D. C. 224, 221 F. 2d 96; see also *O'Brien* v. *Carney*, 6 F. Supp. 761; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. The authority of our Office with respect to such matters stems from our statutory authority to audit expenditures by the administrative agencies of the Government of funds appropriated by the Congress, to assure that such expenditures are made in accordance with all laws prescribing or affecting the manner of their use. The audit of expenditures of public funds in payment of obligations arising under contracts necessarily involves consideration of the legality of such contracts, and our authority to disallow credit in public accounts for payments under illegal contracts is the ultimate sanction for enforcement of our decisions on contract awards. To justify such action, however, the illegality must be clear and cannot be asserted merely on the basis of errors on the part of the contracting officials in the exercise of judgment or discretion within the areas of their authority.

Where a contract has been awarded to other than the low bidder on the ground that the low bidder is not responsible, the only question before our Office on a protest by the rejected bidder is whether or not there is in the record any reasonable support for the action taken.

It is immaterial that the record might also support an affirmative determination of responsibility, or that we might on the same record have made such a determination. The responsibility for making the decision as to a prospective contractor's responsibility, and for rejection or acceptance of its bid, lies primarily with the contracting officer. In the case of small business bidders, Congress has authorized the Small Business Administration to certify a bidder's competency, as to capacity and credit, to perform a specific Government contract, and the contracting officer is authorized to accept a certificate of competency issued by SBA as conclusive. (Section 8(b)(7) of the Small

Business Act of 1958, Public Law 85–536; 15 U.S.C. 637 (b) (7)). This authority offers a large measure of protection to small business concerns against arbitrary, prejudiced or discriminatory actions by Government procurement officers.

While it has been said in some of our decisions that we have no authority to review determinations of the Small Business Administration, and it is true that we cannot direct that agency to issue a COC, the statement in those decisions is not to be understood as precluding our review of the rejection of a bidder as nonresponsible, whether or not SBA has refused to issue a COC. In any such review the question before us is whether the rejection of the bid is proper, and in reviewing that action we will review all pertinent information and evidence available either to the contracting officer or to SBA. See B–161339, September 25, 1967.

In the instant case, after the contracting officer had determined your nonresponsibility and SBA had refused to issue a COC, and as the result of your strong representations bringing in question whether all factors bearing on your responsibility had been adequately considered, we requested NASA to review the matter in the light of the evidentiary material submitted by you. As indicated above, that agency after such review reported that it found no sufficient basis to conclude that you were responsible for the proposed contract.

We have examined the records of both NASA and SBA which form the bases for the various findings and conclusions set out above relative to your capability to perform the contract. Viewed as a whole, we must conclude that the nature of the additional information which resulted from the investigation conducted by SBA headquarters was such as to cast substantial doubt upon both the adequacy of the investigation conducted by its Dallas office and on the validity of the conclusions drawn by that office. Whether further investigation, including discussion with officials of your company, should have been conducted by SBA in an effort to resolve such doubts either for or against your company is a question which is not properly before us for determination. As previously indicated, our decision must be based upon whether the contracting agency, in the light of the information of record, could reasonably conclude that your company was not a responsible bidder. While the applicable procurement regulations list various sources from which a contracting officer may obtain information on which to determine the responsibility of a bidder, the regulations do not impose any duty or responsibility to independently gather such information as may be necessary to resolve any doubt

relative to a bidder's responsibility which may be raised by the information submitted by the bidder, or by information which may otherwise be available to the contracting agency. Instead, and as indicated by NASA PR. 1.902, such doubt is to be resolved against the bidder. In this area, our Office can impose no greater requirements on the contracting agency. In view thereof, and of our conclusion that the entire record is such as to justify the doubt of both SBA and NASA that your company is capable of performing the contract satisfactorily and at its bid price, we are unable to conclude that the administrative action in rejecting your bid was unreasonable or improper.

With regard to your apprehension that the information which you submitted to our Office, and which we in turn forwarded to NASA for its consideration in connection with its review of the procurement and report on your protest, might be used to the advantage of another bidder, we have no reason to doubt the contracting officer's statement in his report of August 30 that such information was treated as proprietary even though it was not so marked.

Based on the record made available to our Office, we are unable to conclude that the contracting officer's actions were in other than good faith or that they were not in accord with the procurement regulations. Conversely, the record indicates that NASA afforded a generous amount of time for action by SBA on your COC application, that is, from June 8 to August 10, and NASA's willingness to reconsider the matter notwithstanding SBA's denial of a COC to you evidences its good faith. Further, since the basis of the award to the second lowest bidder prior to our decision was urgency, no comment is necessary on the effect of the pending expiration of the wage rate determination which was included in the IFB, and since the award is supported by the determination required by NASA PR 2.407-8(b)(3), we find no legal basis to question it.

For the reasons stated, your protest is denied.

[B-162703]

Officers and Employees—Transfers—Relocation Expenses—Appraisal Fees

An employee who had obtained both Federal Housing Administration (FHA) and Veterans Administration (VA) appraisals incident to the sale of his residence at his old duty station in order to facilitate the sale of his residence as the two appraisals were not interchangeable, having sold his residence under FHA financing and received reimbursement for the FHA appraisal may not be reimbursed pursuant to section 4.2b of the Bureau of the Budget Circular No.

A-56 for the cost of the VA appraisal, absent authority for the reimbursement of more than one appraisal fee incident to the sale by an employee of his residence at a former duty station, one appraisal being considered sufficient to enable a seller to determine the asking price for his property.

To Steve J. Orlovski, United States Department of the Interior, November 24, 1967:

This refers to your letter of October 12, 1967, with enclosures, reference D-311A, requesting our decision whether you may certify for payment the enclosed voucher for $25 in favor of Mr. John V. Walker, an employee of the Bureau of Reclamation.

The $25 represents a Veterans Administration appraisal fee obtained by the employee incident to the sale of his residence at his old duty station upon a permanent change of station. The employee says that appraisals from the Federal Housing Administration and the Veterans Administration were necessary prior to final offer of the buyer. Federal Housing Administration and Veterans Administration appraisals are not interchangeable. The residence was finally sold under Federal Housing Administration financing and the employee has been reimbursed the $35 Federal Housing Administration appraisal fee.

Section 2 of Public Law 89-516, approved July 21, 1966, 80 Stat. 323, 5 U.S.C. 5724a, amended the former Administrative Expenses Act of 1946 (60 Stat. 806) by providing, among other things, that under such regulations as the President may prescribe reimbursement may be made to an employee for costs incurred in connection with the sale of his residence incident to a change of his official station within the United States and other areas designated therein. By Executive Order No. 11290, dated July 21, 1966, the President delegated his authority to prescribe such regulations to the Director, Bureau of the Budget. Such regulations have been prescribed in the Bureau of the Budget Circular No. A-56, Revised October 12, 1966. Section 4.2b thereof provides for reimbursement of "Other advertising and selling expenses" and includes authority for reimbursement of the "Customary costs of appraisal."

The regulation does not specifically provide whether the seller may be reimbursed the cost of more than one appraisal incident to the sale of his residence. Admittedly, the procuring of a number of appraisals (both Government and private) by the seller (employee) might facilitate the sale of his residence. However, one appraisal normally is sufficient to enable a seller to determine the asking price for the property. Whether a seller, for the benefit of a purchaser, obligates himself to procure additional appraisals is a matter of negotiation between the parties much in the same manner as the price of the prop-

erty. Thus, in the absence of a regulation of the Bureau of the Budget specifically authorizing reimbursement for more than one appraisal fee incident to the sale of a residence at the former station of the employee we are of the opinion that the cost of only one such appraisal is reimbursable.

Accordingly, the voucher, which is returned herewith, may not be certified for payment.

[B-162618]

Leaves of Absence—Sick—Recredit of Prior Leave—Break in Service

An employee who between a voluntary separation in 1953 from a post in which he had accumulated sick leave and his reemployment in 1956 to a position subject to the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. 6301, served under several temporary appointments on a when-actually-employed basis during which time he was not subject to the leave act, is entitled to recredit of the sick leave accumulated prior to his separation in 1953 as of the date of his reemployment in 1956, the term "break in service" in section 30.702(a) of the Civil Service Regulations providing for recredit of sick leave upon reemployment having reference to actual separation from the Federal service. Therefore, any leave without pay (LWOP) charged to the employee after his reemployment may now be charged to the recredited sick leave and the employee paid for the LWOP period from the account to which the balances of salary funds from prior years have been transferred.

To the Architect of the Capitol, November 27, 1967:

We refer to your letter of October 19, 1967, concerning the right of Mr. Robert J. Wallace an employee of the Office of the Architect of the Capitol to have recredited to his account as of the date of his reemployment on July 14, 1956, certain sick leave he had accumulated during prior service.

Mr. Wallace was separated voluntarily on October 25, 1953, at which time he had a sick leave balance of 298 hours. Between that date and July 14, 1956, Mr. Wallace was employed by the Office of the Architect of the Capitol under several temporary appointments during which he was not assigned regular tours of duty but was paid on a when-actually-employed basis. Under the circumstances of Mr. Wallace's temporary employment he was not subject to the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. 6301, and consequently the sick leave previously accrued could not be recredited for use during such periods of employment. 31 Comp. Gen. 215. However, on July 14, 1956, he was transferred to a full-time position on the permanent force which was subject to the leave act and the question arises as to whether he was entitled to a recredit of the 298 hours of sick leave at that time.

In that connection, section 30.702(a) of the Civil Service Regulations in force during the period in question provided:

(a) Upon reemployment of an employee subject to this Act who was separated on or after January 6, 1952, without break in service, or a break in service of not more than 52 continuous calendar weeks, the employee's sick leave account shall be certified to the employing agency for credit or charge to his account.

In 31 Comp. Gen. 485, it was held that an employee serving under a when-actually-employed appointment does not necessarily forfeit the sick leave he has previously accrued in that if subsequently assigned to a position having a regularly scheduled tour of duty his accrued sick leave may be used in accordance with the Annual and Sick Leave Regulations. Counting the periods of temporary employment there was no single break in Mr. Wallace's service which was as much as 52 weeks in length.

We understand from the Civil Service Commission that the term "break in service" as used in the above regulation was intended to refer to an actual separation from the Federal service. That view appears to be supported by the wording of past regulations and we perceive no objection thereto.

Since Mr. Wallace's service was not interrupted by an actual break of 52 weeks, his sick leave should have been recredited to him upon reemployment in a regular position on July 14, 1956. Your first two questions are answered accordingly.

Regarding your third question, any leave without pay charged Mr. Wallace on or after July 14, 1956, which would have been charged to sick leave but for the fact that he did not have sufficient accumulated sick leave to his credit may now be charged to such recredited sick leave. Payment of the amounts involved for the sick leave granted under such circumstances should be from the account to which the balances of salary funds from prior years have been transferred. See 31 U.S.C. 701.

[B-162652]

Highways—Construction—Federal Aid Highway Program—Antitrust Violation Recoveries

Although the United States is entitled to a pro rata share of the actual damages, less out-of-pocket expenses, recovered by a State Highway Department in antitrust proceedings in which an award of treble damages was made on the basis the award of actual damages reduced the cost of the federally aided highway projects that incorporated the products on which fixed prices were conspired, the Federal Government may not share in the recovery of punitive damages, such damages not reflecting upon the cost of the highway projects, for absent specific authority, the partnership arrangement under which the Federal-aid highway program is prosecuted does not reach beyond the project costs shared by the Federal and State Governments.

To the Administrator, Federal Highway Administration, November 27, 1967:

By letter of October 6, 1967, Mr. Lawrence S. Casazza, Interim Director of Administration, transmitted certain correspondence from the North Dakota State Highway Department concerning recovery made by the State in antitrust proceedings against Armco Steel Corporation.

Because Armco conspired to fix prices upon corrugated culverts, structural plate pipes, and metal end sections used in highway construction work, the State of North Dakota alleged in an action under section 15 of Title 15, United States Code, that it had been damaged by reason of higher highway construction contract prices than would otherwise have prevailed. Judgment of $775,065 in treble damages and an attorney's fee allowance of $72,500 were awarded the State and affirmed on appeal. An additional attorney's fee of $5,000 was allowed for the appeal together with the cost of printing the supplemental record filed by the State on the appeal. See *Armco Steel Corporation* v. *State of North Dakota* (1967) 376 F. 2d 206.

A substantial number of the highway projects into which the products of Armco were incorporated were financed with Federal-aid funds made available to the State under the provisions of Title 23, United States Code, ch. 1.

We are requested to furnish an opinion as to whether a pro rata share of the award received by the State of North Dakota should be recovered from the State by your Administration; and, if so, whether the amount to be recovered should be based on actual damages of $258,355 or treble damages of $775,065.

In a similar situation with respect to the State of Missouri, in which actual damages but not treble damages were recovered, we advised you in letter dated October 11, 1967, B–162539, that:

> There would not appear to be any reason for considering the recovery made by the State as other than a reduction in the cost of the various highway projects to which it applies. In reality, only a portion of the funds recovered constitutes recovery of overpayments by the State of State funds, since the remaining portion had been previously reimbursed the State by the Federal Government pursuant to the Federal-aid highway program. To allow the State to retain the full amount recovered would be to deny the Federal interest therein and would permit the State a profit to the extent of that Federal interest.
>
> On the other hand, it must be recognized, equitably, that the State incurred certain out-of-pocket expenses in effecting the settlement reached. Full recognition of the partnership arrangement between the State and the Federal Government with respect to the recovery effected dictates that the out-of-pocket expenses incurred also be shared proportionally.

What we said in connection with the Missouri case is equally applicable here, so far as concerns the actual damages recovered and any

out-of-pocket expenses incurred. However, the punitive damages recovered by the State of North Dakota do not in any way reflect upon the cost of highway projects in which the Federal Government participated. We do not believe that the partnership arrangement under which the Federal-aid highway program is prosecuted may properly be said, in the absence of specific governing provisions, to reach beyond the project costs shared by the Federal and State Governments.

The question presented is answered accordingly.

[B–162705]

Compensation—Overtime—Early Reporting and Delayed Departure—Duty-Free Lunch Period

Guards scheduled for daily duty tours of 8 hours and 15 minutes who have a 30-minute duty-free lunch period, although required to remain on call in the Government building in which employed to be available in the event of emergencies, are in an actual work status only 7 hours and 45 minutes on each daily tour of duty and, therefore, the guards are not entitled to overtime compensation on the basis of *Albright* v. *United States*, 161 Ct. Cl. 356, in which decision the court found the guards did not have relieved duty-free lunch periods.

To the Secretary, Smithsonian Institution, November 27, 1967:

Your letter of October 12, 1967, with enclosures, requests our decision whether members of the Smithsonian guard force are entitled to overtime compensation for 15 minutes included in their daily scheduled tours of 8 hours and 15 minutes.

Your letter relates that beginning February 8, 1965, the Smithsonian guard force was placed on three reliefs of 8 hours and 15 minutes duration with a half-hour lunch period included during which the guards are relieved from duty. We understand that the guards do not remain at their duty posts during their lunch period but generally do remain within the building unless excused by the guard officer in charge. Also, it appears from the record that the 30-minute luncheon breaks may be interrupted only in emergencies and that when so interrupted such breaks will be rescheduled. Further, we understand that since February 5, 1965, there is no known instance when any guard has been recalled during the lunch period to perform emergency duties.

The American Federation of Government Employees contends, on behalf of the guards, that they are entitled to overtime compensation for the extended tours on the basis of *Albright* v. *United States*, 161

Ct. Cl. 356 (1963) and our decision of October 8, 1964, 44 Comp. Gen. 195, relating to guards in the Bureau of Engraving and Printing.

Our decision in 44 Comp. Gen. 195 is analogous to the *Albright* case only to the extent that in both cases it was established that the early reporting of 15 minutes before each tour of duty was officially ordered or directed.

In the *Albright* case the court found as a matter of fact—absent proof by the Government to the contrary—that the guards did not have relieved duty-free lunch periods. In 44 Comp. Gen. 195, however, we agreed with the determination of the Bureau of Engraving and Printing that in view of the unique conditions to which employees of the Bureau were subjected, the lunch periods of all of its employees (including guards), which for many years (beginning in 1862) had been regarded administratively as duty time, properly could continue to be considered as work time. That decision was not intended to be authority for treating lunch periods as duty or work time for other guards in the Government solely because of the fact that the guards—or other employees—are required to remain in the building on call in the event of emergencies. See B-153307, March 11, 1964; *Bantom* v. *United States*, 165 Ct. Cl. 312 (1964).

Since February 8, 1965, the guards at the Smithsonian Institution appear to have had relieved duty-free luncheon periods of 30 minutes in each daily tour of 8 hours and 15 minutes. Thus, they are in an actual work status only for 7 hours and 45 minutes each daily tour. The fact that the Smithsonian guards are required to remain on the premises during their lunch periods, in itself, is not material to the issue. In *Skidmore* v. *Swift*, 323 U.S. 134 at page 139, the court said:

> * * * Although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances * * *. (I.e., in the facilities furnished by the employer.)

Also, see *Rapp* v. *United States*, 167 Ct. Cl. 852 (1964); *Bantom* v. *United States*, 165 Ct. Cl. 312 (1964); *Wright* v. *United States*, 144 Ct. Cl. 810 (1961); *Armstrong* v. *United States*, 144 Ct. Cl. 659.

On the facts presented by your letter we must concur in the opinion expressed by your General Counsel and, therefore, we conclude that there is no legal liability on the part of the Government to pay overtime compensation to the Smithsonian guards for the extended tour of 15 minutes.

[B-162904]

Contracts—Increased Costs—Labor Costs

Under a personal service contract with the Government, a contractor who pursuant to the Service Contract Act of 1965 is required to pay the minimum wage rates specified in the Fair Labor Standards Act of 1938, as amended, is not entitled to a price adjustment for the subsequent wage increase prescribed by the Fair Labor Standards Amendment of 1966, neither the amendment nor the contract providing for an adjustment to cover the wage increase, and the contractor having based its bid on the assumption that labor could be obtained for the period of the contract at no more than the then current minimum wage fixed by the act, voluntarily assumed the risk of increased costs, whether occasioned by a change in law or otherwise, and the fact that the increase in the wage rates was the result of Government action does not afford the contractor greater rights than if the contract had been with any other party.

To the Olsten Temporary Services, November 27, 1967:

Reference is made to your letter of November 6, 1967, requesting relief in a matter arising in connection with your performance of General Services Administration contract No. GS-07S-10872 for Material Handling Services which was awarded June 13, 1966.

Under the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, contractors for personal services to the Government are required to pay their service employees no less than the minimum wages specified in the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et. seq.* At the time your firm submitted its bid and undertook to perform its contract, the statutory minimum wage rate was $1.25 per hour. However, under the Fair Labor Standards Amendment of 1966, 80 Stat. 830, 29 U.S.C. 206(a)(1), which was approved September 23, 1966, and became effective February 1, 1967, the minimum wage rate was increased to $1.40 per hour. The General Services Administration refused your request for an adjustment in your contract price to compensate you for the increased labor cost, and you are claiming the amount which you compute to be the difference between the contract rate and what you consider a proper rate, for the period from February 1, 1967, to the expiration of your contract.

In the absence of a contract provision for price adjustment to compensate for changes in labor rates, this Office is without authority to either authorize or direct an increase in contract price on the basis of an amendment to the minimum wage law, since the statute did not authorize such adjustment. Whatever may appear to be the equities or ethics of the case, we are required to settle claims against the Government on the basis of law, and in this situation we find the law to be clear that a party entering into a contract to furnish certain specifically described services for a definite period of time at a fixed rate of charge bears the risk of subsequent events which may affect

his cost of performance, unless the contract provides otherwise. In the case of *Columbus Railway, Power & Light Co.* v. *The City of Columbus*, 249 U.S. 399, the Supreme Court held that a 50 percent wage increase ordered by the War Labor Board in 1918 did not absolve the Company from its obligation, under a 25-year franchise granted in 1901, to continue to operate a street railway system at rates of fare fixed in the franchise. In another World War I case, *Converse* v. *United States*, 61 Ct. Cl. 672, the Court of Claims denied recovery to a Government contractor whose labor costs had been increased as the result of a Presidential Proclamation.

It has also been held that a stipulation in a Government contract requiring the contractor to pay not less than a stipulated scale of wages is not a representation by the Government that the contractor will be able to obtain labor at the stipulated rates (*United States* v. *Binghamton Construction Co.*, 347 U.S. 171) and on this principle it is clear that if you chose to base your bid for your contract on the assumption that you would be able to obtain labor throughout the term of the contract at no more than the then current minimum wage fixed by the Fair Labor Standards Act, 29 U.S.C. 206, you voluntarily assumed the risk of any increased costs, whether occasioned by a change in the law or otherwise. You must have been aware that the minimum wage rate fixed by the statute had already been increased several times since its enactment in 1938 and that further increases were not unlikely.

The fact that the increase was the result of Government action affords you no greater rights than if your contract had been with any other party, since the law was of general application and not directed particularly at you or your contract. Inasmuch as the Congress did not see fit to provide in this law for any adjustment of contract prices where the costs of performance of Government contracts were increased by the change in the minimum wage, and your contract contained no provision for such adjustment, no official of the Government is authorized to make any adjustment.

In view of the foregoing your claim must be rejected as having no legal basis.

[B–151167, B–156724]

Printing and Binding—Christmas Cards

The rule that seasonal greeting cards constitute a personal expense to Government personnel is not changed by the fact that the names of the officers and employees sending the cards are not included and nothing attached to the cards indicates the compliments of any individual, nor is the personal nature of the cost of the cards changed because a trust fund rather than appropriated funds is charged. Therefore, the cost of printing and mailing seasonal greeting cards by

National Park Service personnel is an expense that is not chargeable to "Fund 14X8037, National Park Service, Donations," a receipt account in the trust fund series established for deposit of cash accepted as donations under 16 U.S.C. 6 for the purposes of the national park and monument system.

To the Secretary of the Interior, November 29, 1967:

This is in reference to letter of October 3, 1967, from the Acting Director, National Park Service, file F3819–ABF, requesting that Notices of Exception Nos. 300179 and 300180, dated June 20, 1963, issued to Certifying Officers Charles J. Arnold and Edward G. Beagle, Jr., respectively, be reconsidered and withdrawn.

It is stated in the Acting Director's letter that it is the feeling of that office that all of the pertinent information relating to the subject was not made available to or not known by the auditors when exceptions were taken to the payments for printing and mailing "nonpersonal" greeting cards.

The letter continues, in part, as follows:

> We should like to point out that the payments in question were not made from appropriated funds, but from donated (trust) funds received from private sources. Under authority of the Act of June 5, 1920 (41 Stat. 917; 16 U.S.C. 6), the National Park Service has through the years accepted many donations of money from private sources, totaling approximately $15 million. While most of the money donated to the Service is tendered and accepted for specific park purposes, a significant amount is tendered for general purposes with the understanding or provision that such funds may be expended at the discretion of the Director of the National Park Service without regard to the usual requirements relating to procurement of supplies, materials, equipment, printing, etc. Based on past rulings made by your Office, it is our opinion that in these circumstances it is proper to expend donated (trust) funds received from private sources for purposes connected with the National Park Service that would otherwise not be proper for expenditure from appropriated funds. Since donated (trust) funds were made available for use at his discretion, this was the basis on which the Director of the National Park Service administratively determined that it was not improper to print and mail nonpersonal greeting cards to various individuals, organizations, Members of Congress, etc.
>
> Our position to the effect that it was not improper to use donated (trust) funds to pay for printing and mailing these greeting cards is further borne out by your decisions 16 CG 650–655 and 46 CG 379–382. Both decisions, in our opinion, bear out the propriety of using donated (trust) funds for certain purposes (not unlike the printing and mailing of nonpersonal greeting cards) determined by the bureau to be in furtherance of bureau objectives when they are not contrary to the trust, even though the procedure followed may not be fully consistent with the general regulatory and prohibitory statutes applicable to public funds.

The exceptions in question were taken by our Office with the full knowledge that trust funds were involved. It was stated on each exception that "The expenditures were charged to Fund 14X8037 National Park Service, Donations, a receipt account in the trust fund series established by the Treasury Department for deposit of cash accepted as donations under authority of 16 U.S.C. 6, which provides that the Secretary of the Interior may accept money for the purposes of the national park and monument system." It was also stated on the excep-

tions that it is well established that appropriated funds are not available for the purchase of seasonal greeting cards for the reason that such purchases represent a personal expense, 37 Comp. Gen. 360, to be borne by the officer who ordered and sent the cards, and that the personal nature of the cost of the seasonal greeting cards is not changed by the fact that a trust fund was sought to be charged since the availability of the trust fund is limited to purposes of the national park and monument system.

Greeting cards have long been viewed by the accounting officers as a personal expense to be borne by the officer who ordered and sent the cards, and this view is not changed by the fact that the names of the officers or employees sending the cards were not included and nothing attached to the cards to indicate the compliments of any individual. See 37 Comp. Gen. 360 and decisions cited therein. Also, as to the personal nature of such cards see paragraph 18 of the regulations of the Joint Committee on Printing which provided, at the time the subject exceptions were stated, and have so provided in the years subsequent thereto that:

> Printing or engraving of calling or greeting cards is considered to be personal rather than official and shall not be done at Government expense.

We therefore cannot accept as valid the assumption upon which the Acting Director's request is based, i.e., that the greeting cards were "nonpersonal." Accordingly, since the moneys constituting the trust funds here involved could only be accepted for purposes of the national park and monument system as provided by 16 U.S.C. 6, we find no legal basis for expenditures of such funds for seasonal greeting cards, items long considered as personal rather than as official expenses. The exceptions are therefore sustained.

The decisions cited in the Acting Director's letter pertained to the recognized authority of custodians of the trust funds therein considered to make expenditures necessary to carry out the purposes of the trust without reference to general regulatory and prohibitory statutes applicable to public funds. They did not modify the decisions of long-standing that seasonal greeting cards constitute a personal expense.

[B–162901]

Property—Private—Damage, Loss, Etc.—Personal Property—Claims Act of 1964

The claim of a civilian employee of the Defense Supply Agency for reimbursement of the cost of repairing the damage to his hearing aid, which occurred without negligence in the normal execution of the employee's duties as a test driver while

using a Government-furnished crash helmet and safety glasses, is for the consideration of the Secretary of Defense or his designee under the Military Personnel and Civilian Employees' Claims Act of 1964, and any settlement upon approval by the Secretary or his designee of the employee's claim for the personal property damage would be final and conclusive as it is not within the jurisdiction of the General Accounting Office to consider damage claims for the loss of or damage to the personal property of Defense Department employees.

To Lieutenant Commander P. J. Mason, Defense Supply Agency, November 29, 1967:

By letter dated November 8, 1967 (reference DSAH-CFF), the Deputy Comptroller, Defense Supply Agency, forwarded to our Office your letter of October 30, 1967 (your reference DCRC-FRT), and enclosures, requesting an advance decision as to the propriety of payment of a voucher in the amount of $52.50 in favor of Mr. Clyde S. Giggey, covering costs he incurred for the repair of his hearing aid.

The facts and circumstances giving rise to Mr. Giggey's claim, as disclosed by the record, are set forth below.

On August 30, 1967, Mr. Giggey, an Automotive Equipment Quality Control Representative at Food Machinery Corporation, San Jose, California, employed as a civilian employee by the Defense Supply Agency, was preparing to test drive the first Vulcan C-1xM741 vehicle for final acceptance by the Government. He wore his privately owned Beltone Hearing Aid and Government-furnished safety glasses. As he placed the Government-furnished Bell-Toptex crash helmet on his head, the ear mold of his hearing aid was pulled from his left ear. He pushed the hearing aid back in its place in his ear and immediately experienced a loud ringing noise. Believing that the volume control was advanced, he lowered this control until the ringing noise disappeared. Upon completion of test driving the vehicle he proceeded to his place of work to complete the required written test reports, and at that time noticed that he could not hear well enough to understand what his supervisor and other employees were saying. He increased the volume control of his hearing aid and, once again, experienced a ringing noise. At this point he removed the hearing aid and discovered that the case of this device was completely broken in two pieces and was being held together with the internal receiving tube. On September 1, 1967, he took the damaged hearing aid to Jack B. Taylor and Associates, Inc., Oakland, California, for repair, and was informed that the receiving tube was separated from the receiver and would require complete overhaul by the manufacturer of this device, Beltone Mfg. Co. A written statement was made by W. L. Perry, Commander, USN, Chief, Defense Contract Administration Services Office, Food Machinery Corporation Plant Office, where Mr. Giggey is employed, that the damage to Mr. Giggey's hearing aid occurred in the normal

execution of his (Mr. Giggey's) duties as test driver while using Government-furnished equipment (crash helmet), and that there was no indication of negligence or misuse of the helmet which would have caused damage to the hearing aid.

In the Administrative Report enclosed with your letter there appears the following:

> Since no injury was sustained by Mr. Giggey but only minor damage to his personal property; viz., hearing aid, the claim is not one which properly comes under the purview of the United States Employees Compensation Act, as amended, and since the damage caused to his hearing aid was not the result of any negligent or wrongful act and/or omission of any other government employee, the Federal Tort Claims Act is not for application and, accordingly, there is no known legal basis available for the payment of this claim.
>
> Recommendation is made that the claim be disallowed in view of the fact that the damage was caused by the claimant and was not the result of any negligence by the Government either by the use of government equipment or an employee.

Section 3(a) of the Military Personnel and Civilian Employees' Claims Act of 1964, Public Law 88–558, 78 Stat. 767, 31 U.S.C. 241(a), authorizes the head of an agency (or his designee), under such regulations as he (the agency head) may prescribe, to settle and pay claims by an employee of that agency for damage to, or loss of, personal property incident to his service. Section 3(c)(3) of the same act, 31 U.S.C. 241(c)(3), provides, that a claim may be allowed under section 3(a) for damage to, or loss of, personal property only if it was not caused wholly or partly by the negligent or wrongful act of the claimant, his agent, or his employee. Section 4 of the act, 31 U.S.C. 242, provides that notwithstanding any other provision of law the settlement of a claim under the act (Public Law 88–558) is final and conclusive.

In view of the above provisions of law, it is not within the jurisdiction of our Office to consider claims for damages for loss of, or damage to, personal property of employees of the Department of Defense. Any such claims would be for consideration by the Secretary of Defense, or his designee, and settlement thereof, if made in accordance with the provisions of the above cited act and applicable regulations, would be final and conclusive.

Accordingly, the allowance or disallowance of Mr. Giggey's claim is a matter for determination by the Secretary of Defense, or his designee, in accordance with the provisions of the Military Personnel and Civilian Employees' Claims Act of 1964. Since there is nothing in the record before us to indicate that Mr. Giggey's claim was considered or allowed by the Secretary of Defense, or his designee, on the present record, the voucher submitted by you may not be paid. However, if Mr. Giggey's claim is subsequently presented to, and allowed by, a properly designated authority, pursuant to the provisions of the above cited act, the voucher, which is returned herewith, may be paid; otherwise there would be no authority to pay the claim.

[B-128527]

Travel Expenses—Miscellaneous Expenses—Insurance Premiums

A Department of State officer who when administratively reimbursed the travel expenses incurred incident to attending in his official capacity the American Bar Association's National Institute on Marine Resources is not allowed a $7.50 air insurance fee may not recover the amount from the contribution made to the Department under 22 U.S.C. 809 to cover the "actual" travel expenses of the officer, and even if the gift had not been conditioned, the insurance cost personal to the officer, the Department could only accept reimbursement for the cost of the air insurance for its own benefit, and as the Bar Association is not one of the acceptable donors described in 26 U.S.C. 501(c)(3), the officer may not under 5 U.S.C. 4111 accept $7.50 as a contribution from a private source.

To Edward G. Boehm, Department of State, November 30, 1967:

Your letter of October 24, 1967, requests our decision concerning the propriety of payment to an officer of the Department of State of the sum of $7.50 representing the cost of air insurance purchased by such officer when performing official travel between Washington, D.C. and Long Beach, California, incident to his attendance on June 7, 1967, at a meeting held by the American Bar Association's National Institute on Marine Resources. You point out that because of the Department's interest in the legal aspect of marine resources matters the officer was authorized to participate in the Institute in his official capacity.

The American Bar Association offered to pay the travel expenses of the officer in question and after completion of the travel the officer advised the American Bar Association that he had incurred the expenses itemized below and requested that reimbursement therefor be made payable to the order of the Department of State:

Air Fare	$274.50
Air Insurance	7.50
Taxi, Airport to Hotel	10.00
Taxi, Hotel to Airport	15.00
Total	$307.00

That part of the officer's claim for reimbursement from the Department covering the item for air insurance was disallowed administratively upon the basis of the holding in 40 Comp. Gen. 11 and similar cases. Subsequently, the American Bar Association forwarded a check to the officer payable to the Department of State in the amount of $307 which included reimbursement for the $7.50 item covering air insurance. The officer forwarded the check to the Department with a request that $7.50 be deducted therefrom and turned over to him and that the balance thereof be regarded as a gift to the Department.

You point out that the Department of State is authorized to accept gifts under section 1021 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 809, so that the only question involved is whether the officer now may be reimbursed the $7.50 item out of the contribution received from the American Bar Association.

The only statutory authority of which we are aware permitting an employee to receive a contribution from a private source incident to his attendance at a meeting in an official capacity is that contained in 5 U.S.C. 4111. Under that section contributions may be accepted by employees only when the donor is an organization described in section 501(c)(3) of Title 26, United States Code. Our understanding is that the American Bar Association is not one of the organizations described in section 501(c)(3). Thus, it is only because of the authority of the Secretary of State to accept gifts that the gift may be accepted at all. That being so, the contribution must be regarded as a gift to the Department of State and not to the employee.

Under section 1021 of the Foreign Service Act of 1946, as amended, the Secretary of State is authorized to accept on behalf of the United States unconditional gifts for the "benefit of the Department including the service or for the carrying out of any of its functions." Also, conditional gifts "* * * may be so accepted at the discretion of the Secretary, and * * * any such conditional gift shall be * * * used in accordance with its conditions * * *."

The facts of the instant case indicate that the contribution by the American Bar Association was conditional since it covered the actual amount of the travel expenses incurred by the officer including the $7.50 cost of air insurance.

The cost of air insurance purchased by the officer is a matter personal to the officer and not a cost that the Department is required or authorized to incur. Therefore, where as here the gift ($7.50) is made upon the condition that it be expended only for such purpose (purchase of air insurance), it would not constitute a gift on behalf of the United States for the benefit of the Department or for carrying out a function of the Department. It follows that the Department would not have authority under section 1021 of the Foreign Service Act of 1946 to accept a gift subject to such condition and, therefore, the $7.50 should be returned to the donor. If the American Bar Association gift had not been conditional then the full amount of the gift could have been retained by the Department of State in behalf of the United States for the benefit of the Department.

Thus, in no event would it be proper to certify a voucher for payment to the employee of the $7.50 item in question.