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[B–163026]

Contracts—Labor Stipulations—Nondiscrimination—Affirmative Action Programs

The revised "Philadelphia Plan" prescribing that no contracts or subcontracts shall be awarded for Federal or federally assisted construction projects unless the bidder had submitted an acceptable affirmative action program that included specific goals of minority manpower utilization to provide equal employment opportunity, conflicts with the intent of the Civil Rights Act of 1964, and Executive Order No. 11246, making the use of race or national origin as a basis of employment an unlawful employment practice. The Plan directed to correcting past discrimination by labor unions would in establishing a quota system for the employment of minorities accord preferential treatment in conflict with the prohibition in the Civil Rights Act, and in passing upon the legality of matters involving expenditures of appropriated funds, the act will be so construed.

Bids—Competitive System—Compliance Requirement

Contract conditions or stipulations which tend to restrict the full and free competition required by procurement laws and regulations are unauthorized unless reasonably requisite to the accomplishment of the legislative purposes of the appropriation act or other law involved, and no administrative authority can lawfully impose any requirements to contravene the prohibitions imposed by statute. Therefore, the revised "Philadelphia Plan" in imposing affirmative action programs for the employment of minorities constitutes discrimination on the basis of race or national origin in contravention of the prohibition in the Civil Rights Act of 1964, and Executive Order No. 11246.

Appropriations—Expenditures—Without Regard to Law—Legality Determinations

The duty imposed on the United States General Accounting Office (GAO) to audit all expenditures of appropriated funds involving the determination of the legality of expenditures, includes the determination of the legality of contracts obligating the Government to the payment of appropriated funds, and the authority to render decisions prior to actions involving the expenditures of appropriated funds has been exercised by GAO whenever any question of the legality of a proposed action has been raised, whether by an agency head, or by complaint of an interested party, or by information acquired in the course of other than audit operations, and in passing upon the legality of the expenditures of appropriated funds for Federal or federally assisted construction programs, the propriety of conditions imposed by the revised "Philadelphia Plan" will be for consideration. (But see *Contractors Assn. of Eastern Penna., et al.* v. *Secy. of Labor, et al.*, Civil Action No. 70–18, and B–163026, April 28, 1970.)

To the Secretary of Labor, August 5, 1969:

We refer to an order issued June 27, 1969, to the heads of all agencies by the Assistant Secretary for Wage and Labor Standards, Department of Labor. The order announced a revised Philadelphia Plan (effective July 18, 1969) to implement the provisions of Executive Order No. 11246 and the rules and regulations issued pursuant thereto which require a program of equal employment opportunity by contractors and subcontractors on both Federal and federally assisted construction projects.

Questions have been submitted to our Office by members of Congress, both as to the propriety of the revised Philadelphia Plan and the legal

validity of Executive Order No. 11246 and of various implementing regulations issued thereunder both by your Department and by other agencies. In view of possible conflicts between the requirements of the Plan and the provisions of titles VI and VII of the Civil Rights Act of 1964, Public Law 88–352, discussions have been held between representatives of our Office, your Department, and the Department of Justice, and your Solicitor has furnished to us a legal memorandum in support of the authority for issuance of the Executive order as well as the revised Philadelphia Plan promulgated thereunder.

The memorandum presents the following points in support of the legal propriety of the Plan:

> I. The executive has the authority and the duty to require employers who do business with the Government to provide equal employment opportunity.
>
> II. The passage of the Civil Rights Act of 1964 did not deprive the President of the authority to regulate, pursuant to Executive orders, the employment practices of Government contractors.
>
> III. The revised Philadelphia Plan is lawful under the Federal Government's procurement policies, is authorized under Executive Order 11246 and the implementing regulations, and is lawful under title VII of the Civil Rights Act of 1964.

Without conceding the validity of all of the arguments advanced under points I and II, we accept the authority of the President to issue Executive Order No. 11246, and the contention that the Congress in enacting the Civil Rights Act did not intend to deprive the President of all authority to regulate employment practices of Government contractors.

The essential questions presented to this Office by the revised Philadelphia Plan, however, are (1) whether the Plan is compatible with fundamentals of the competitive bidding process as it applies to the awarding of Federal and federally assisted construction contracts, and (2) whether imposition of the specific requirements set out therein can be regarded as a legally proper implementation of the public policy to prevent discrimination in employment, which is declared in the Civil Rights Act and is inherent in the Constitution, or whether those requirements so far transcend the policy of nondiscrimination, by making race or national origin a determinative factor in employment, as to conflict with the limitations expressly imposed by the act or with the basic constitutional concept of equality.

Our interest and authority in the matter exists by virtue of the duty imposed upon our Office by the Congress to audit all expenditures of appropriated funds, which necessarily involves the determination of the legality of such expenditures, including the legality of contracts

obligating the Government to payment of such funds. Authority has been specifically conferred on this Office to render decisions to the heads of departments and agencies of the Government, prior to the incurring of any obligations, with respect to the legality of any action contemplated by them involving expenditures of appropriated funds, and this authority has been exercised continuously by our Office since its creation whenever any question as to the legality of a proposed action has been raised, whether by submission by an agency head, or by complaint of an interested party, or by information coming to our attention in the course of our other operations.

The incorporation into the terms of solicitations for Government contracts of conditions or requirements concerning wages and other employment conditions or practices has been a frequent subject of decisions by this Office, many of which will be found enumerated in our decision at 42 Comp. Gen. 1 (1962). The rule invariably applied in such cases has been that any contract conditions or stipulations which tend to restrict the full and free competition required by the procurement laws and regulations are unauthorized, unless they are reasonably requisite to the accomplishment of the legislative purposes of the appropriation involved or other law. Furthermore, where the Congress in enacting a statute covering the subject matter of such conditions has specifically prohibited certain actions, no administrative authority can lawfully impose any requirements the effect of which would be to contravene such prohibitions. It is within the framework of these principles that we consider the order promulgating the revised Philadelphia Plan.

The Assistant Secretary's order states the policy of the Office of Federal Contract Compliance (OFCC) that no contracts or subcontracts shall be awarded for Federal and federally assisted construction in the Philadelphia, Pennsylvania, area (including the counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia) on projects whose cost exceeds $500,000 unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitations for bids, in trades utilizing the seven classifications of employees specified therein.

The order further relates that enforcement of the nondiscrimination and affirmative action requirements of Executive Order No. 11246 has posed special problems in the construction trades; that contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construction craft unions as their prime or sole source of their labor; that collective bargaining agreements and/or established custom be-

tween construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; that even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working the specified classifications are referred to the jobs by the unions; and that because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

It is also stated that because of the exclusionary practices of labor organizations, there traditionally have been only a small number of Negroes employed in the seven trades, and that unions in these trades in the Philadelphia area still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred for employment. The OFCC found, therefore, that special measures requiring bidders to commit themselves to specific goals of minority manpower utilization were needed to provide equal employment opportunity in the seven trades.

Section 7 of the Assistant Secretary's order of June 27 indicates that the revised Plan is to be implemented by including in the solicitation for bids a notice substantially similar to one labeled "Appendix" which is attached to the order. Such notice would state the ranges of minority manpower utilization (as determined by the OFCC Area Coordinator in cooperation with the Federal contracting or administering agencies in the Philadelphia area) which would constitute an acceptable affirmative action program, and would require the bidder to submit his specific goals in the following form:

Identification of Trade	Est. Total Employment for the Trade on the Contract	Number of Minority Group Employees

Participation in a multi-employer program approved by OFCC would be acceptable in lieu of a goal for the trade involved in such program.

The notice also provides that the contractor will obtain similar goals from his subcontractors who will perform work in the involved trades, and that "Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in section 6 of the Order * * *." Since section 6 of the order contains nothing relative to "failure," we assume the intended reference is to section 8, which reads as follows:

Post-Award Compliance

a. Each agency shall review contractors' and subcontractors' employment practices during the performance of the contract. If the goals set forth in the affirmative action program are being met, the contractor or subcontractor will be

presumed to be in compliance with the requirements of Executive Order 11246, as amended, unless it comes to the agency's attention that such contractor or subcontractor is not providing equal employment opportunity. In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is an issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions. Where the agency finds that the contractor or subcontractor has failed to comply with the requirements of Executive Order 11246, the implementing regulations and its obligations under its affirmative action program, the agency shall take such action and impose such sanctions as may be appropriate under the Executive Order and the regulations. Such noncompliance by the contractor or subcontractor shall be taken into consideration by Federal agencies in determining whether such contractor or subcontractor can comply with the requirements of Executive Order 11246 and is therefore a "responsible prospective contractor" within the meaning of the Federal procurement regulations.

b. It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in Federally involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders.

It is our opinion that the submission of goals by the successful bidder would operate to make the requirement for "every good faith effort" to attain such goals a part of his contractual obligation upon award of a contract. The provisions of section 8 of the order would therefore become a part of the contract specifications against which the contractor's performance would be judged in the event he fails to attain his stated goals, just as much as his stated goals become a part of the contract specifications against which his performance will be judged in the event he does attain his stated goals.

As indicated at page 4 of the order, the original Philadelphia Plan was suspended because it contravened the principles of competitive bidding. Such contravention resulted from the imposition of requirements on bidders, after bid opening, which were not specifically set out in the solicitation. The present statement of a specific numerical range into which a bidder's affirmative action goals must fall is apparently designed to meet, and reasonably satisfies, the requirement for specificity.

However, we have serious doubts covering the main objective of the Plan, which is to require bidders to commit themselves to make every good faith effort to employ specified numbers of minority group tradesmen in the performance of Federal and federally assisted contracts and subcontracts.

The pertinent public policy with respect to employment practices of

an employer which may be regarded as constituting unlawful discrimination is set out in titles VI and VII of the Civil Rights Act. title VI, concerning federally assisted programs, provides in section 601 (42 U.S.C. 2000d) that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Section 703(a) (42 U.S.C. 2000e–2(a)) of title VII states the public policy concerning employer employment practices by declaring it to be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national orgin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. Section 705(a) (42 U.S.C. 2000e–4(a)) creates the Equal Employment Opportunity Commission, and section 713(a), Rules and Regulations (42 U.S.C. 2000e–12(a)), provides that the Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of that title.

The public policy regarding labor organization practices is delineated in section 703(c) (42 U.S.C. 2000e–2(c)) wherein it is stated that it shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of that section.

Whether the provisions of the Plan requiring a bidder to commit himself to hire—or make every good faith effort to hire—at least the minimum number of minority group employees specified in the ranges established for the designated trades is, in fact, a "quota" system (and therefore admittedly contrary to the Civil Rights Act) or is a "goal" system, is in our view largely a matter of semantics, and tends to divert attention from the end result of the Plan—that contractors commit

themselves to making race or national origin a factor for consideration in obtaining their employees.

We view the imposition of such a requirement on employers engaged in Federal or federally assisted construction to be in conflict with the intent as well as the letter of the above provisions of the act which make it an unlawful employment practice to use race or national origin as a basis for employment. Further, we believe that requiring an employer to abandon his customary practice of hiring through a local union because of a racial or national origin imbalance in the local unions and, under the threat of sanctions, to make "every good faith effort" to employ the number of minority group tradesmen specified in his bid from sources outside the union if the workers referred by the union do not include a sufficient number of minority group personnel, are in conflict with section 703(j) of the act (42 U.S.C. 2000e-2(j)) which provides as follows:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group *on account of an imbalance which may exist with respect to the total number or percentage of persons* of any race, color, religion, sex, or national origin employed by any employer, *referred or classified for employment by any employment agency or labor organization*, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. [Italic supplied.]

While the legislative history of the Civil Rights Act is replete with statements by sponsors of the legislation that title VII prohibits the use of race or national origin as a basis for hiring, we believe a reference to a few of such clarifying explanations will suffice to further show the specific intent of Congress in such respect when enacting that title. At page 6549, Volume 110, Part 5 of the Congressional Record, the following explanation by Senator Humphrey is set out:

> * * * As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII.
>
> The able Senators in charge of title VII (Mr. Clark and Mr. Case) will comment at greater length on this matter.
>
> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or *to achieve a certain racial balance.*
>
> That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion. [Italic supplied.]

In an interpretative memorandum of title VII submitted jointly by Senator Clark and Senator Case, floor managers of that legislation in the Senate, it is stated (page 7213, Volume 110, Part 6, Congressional Record):

> With the exception noted above, therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.
>
> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, *whatever such a balance may be*, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.
>
> There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.
>
> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.) [Italic supplied.]

At page 7218 of Volume 110 the following objections, which had been raised during debate to the provisions of title VII, and answers thereto by Senator Clark are printed:

> Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.
>
> Answer: Nothing in the bill will interfere with merit, hiring, or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote.
>
> * * * * * * *
>
> Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory.

While, as indicated above, we believe that the provisions of the Plan affecting employers who hire through unions conflict with section 703(j) of title VII, and that the above statement by

Senator Humphrey further indicates that the act was not intended to affect valid collective bargaining agreements, we further believe that the appropriate direction of any administrative action to be taken where it is the policy of a union to refer only white workers to employers on Federal or federally assisted construction is indicated in the following question and answer set forth in the interpretative memorandum by Senator Clark and Senator Case (page 7217, Volume 110):

> Question. If an employer obtains his employees from a union hiring hall through operation of his labor contract is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection? If the hiring hall sends only white males is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.
>
> Answer. An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. If the hiring hall discriminates against Negroes, and sends him only whites, he is not guilty of discrimination—but the union hiring hall would be.

We believe it is especially pertinent to note that the "Findings" stated in section 4 of the order of June 27 as the basis for issuance thereof, consist almost entirely of a recital of practices of *unions*, rather than of contractors or employers. Thus, in attempting to place upon the contractors the burden of overcoming the effects of union practices, the order appears to evince a policy in conflict with the interpretation of the legislation as stated by its sponsors.

In this connection your Solicitor's memorandum contends that the principle of imposing affirmative action programs on contractors for employment of administratively determined numbers of minority group tradesmen, when such programs are for the purpose of correcting the effects of discrimination by unions prior to the Civil Rights Act of 1964, is supported by the decisions in *Quarles* v. *Philip Morris*, 279 F. Supp. 505; *U.S.* v. *Local 189, U.P.P. and Crown Zellerbach Corp.*, 282 F. Supp. 39; and *Local 53 of Heat and Frost Insulators* v. *Vogler*, 407 F. 2d 1047. We find, however, that decisions of the courts have differed materially in such respect; see *Griggs* v. *Duke Power*, 292 F. Supp. 243; *Dobbins* v. *Local 212*, 292 F. Supp. 413; and *U.S.* v. *Porter*, 296 F. Supp. 40.

Additionally, your Solicitor's memorandum cites cases involving affirmative desegregation of school faculties (*U.S.* v. *Jefferson County*, 372 F. 2d 836 (1966), and *U.S.* v. *Montgomery County*, 289 F. Supp. 647, affirmed 37 LW 4461 (1969) in particular). However, there is a clear distinction between the factual and legal situations involved in those cases and the matter at hand. The cited school decisions required reallocation of portions of existing school faculties in implementation of the requirement for desegregation of dual public school systems,

which had been established on the basis of race, as such requirement was set out in the 1954 and 1955 decisions of the Supreme Court in the *Brown* v. *Board of Education* cases (347 U.S. 483 and 349 U.S. 294). In the *Brown* cases desegregation of faculties was regarded as one of the keys to desegregation of the schools, and in the *Jefferson County* case the court read title VI of the Civil Rights Act as a congressional mandate for a change in pace and method of enforcing the desegregation of racially segregated school systems, as required by the *Brown* decisions.

The requirements of the revised Philadelphia Plan do not involve a comparable situation. Even if the present composition of an employer's work force or the membership of a union is the result of past discrimination, there is no requirement imposed by the Constitution, by a mandate of the Supreme Court, or by the Civil Rights Act for an employer or a union to affirmatively desegregate its personnel or membership. The distinction becomes more apparent when it is recognized that the order of June 27 pertains to *hiring* practices of an employer. Hiring was not at issue in the school cases, and those cases do not purport to hold that a school district must, or even may, correct a racial imbalance in its faculty by affirmatively requiring that a stated proportion of its teachers shall be hired on the basis of race. To the contrary, the court recognized in its decision in the *Jefferson County* case (page 884) that the "mandate of Brown * * * forbids the discriminatory consideration of race in faculty selection," and such consideration is expressly prohibited by section VIII of the court's decree in Appendix A of that case.

The recital in section 6b.2 of the order (and in the prescribed form of notice to be included in the invitation) that the contractor's commitment "is not intended and shall not be used to discriminate against any qualified applicant or employee" is in our opinion the statement of a practical impossibility. If, for example, a contractor requires 20 plumbers and is committed to a goal of employment of at least five from minority groups, every nonminority applicant for employment in excess of 15 would, solely by reason of his race or national origin, be prejudiced in his opportunity for employment, because the contractor is committed to make every effort to employ five applicants from minority groups.

In your Solicitor's memorandum it is argued that the "straw man" sometimes used in opposition to the Plan is that it "would require a contractor to discriminate against a better qualified white craftsman in favor of a less qualified black." We believe this obscures the point involved, since it introduces the element of skill or competence, whereas the essential question is whether the Plan would require the

contractor to select a black craftsman over an *equally* qualified white one. We see no room for doubt that the contractor in the situation posed above would believe he would be expected to employ the black applicant, at least until he had reached his goal of five nonminority group employees, and that if he failed to achieve that goal his employment of a white craftsman when an equally qualified black one was available could be considered a failure to use "every good faith effort." In our view such preferential status or treatment would constitute discrimination against the white worker solely on the basis of color, and therefore would be contrary to the express prohibition both of the Civil Rights Act and of the Executive order.

It is also contended in your Solicitor's memorandum that substantial judicial support for administrative affirmative action programs requiring commitments for contractors for employment of specified numbers of minority group tradesmen is contained in the decision of the Ohio Supreme Court in *Weiner* v. *Cuyahoga Community College District*, 19 Ohio St. 2d 35 (July 2, 1969) 249 N.E. 2d 907. That decision upheld the award of a federally assisted construction contract to the second low bidder, as a proper action in implementation of the policies of the Civil Rights Act of 1964, after approval of award to the low bidder was withheld by the Federal agency involved for failure of the low bidder to submit an affirmative action program (including manning tables for minority group tradesmen) which was acceptable to that agency pursuant to an OFCC plan established for Cleveland, Ohio.

While the decision in *Weiner* case (which was a majority opinion by five of the justices with dissenting opinions by two) has some bearing on the issues here involved, since the decision appears to be based in substantial part on the conflicting opinions of Federal courts cited earlier we do not believe the decision can be considered as controlling precedent for the validity of the revised Philadelphia Plan.

In support of the required procedure, which is admitted at page 33 of the Solicitor's memorandum to require contractors to take actions which are based on race, the memorandum relies upon the acceptance by the courts, in schools, housing and voting cases, of the use of race as a valid consideration in fashioning relief to overcome the effects of past discrimination. Aside from other distinctions, we believe there is a material difference between the situation in those cases, where enforcement of the rights of the minority individuals to vote or to have unsegregated educational or housing facilities does not deprive any member of a majority group of his rights, and the situation in the employment field, where the hiring of a minority worker, as one of a group whose number is limited by the employer's needs, in prefer-

ence to one of the majority group precludes the employment of the latter. In other words, in those cases there is present no element of reverse discrimination, but only the correction of the illegal denial of minority rights, leaving the majority in the full exercise and enjoyment of their corresponding rights.

In addition it may be pointed out that in those cases the judicial relief ordered is directed squarely at the parties responsible for the denial of rights, and we therefore do not consider them as supporting requirements to be complied with by contractors who, under the findings of the Plan, are themselves more the victims than the instigators of the past discriminatory practices of the labor unions. Moreover, in the court cases the remedies are applied after judicial determination that effective discrimination is in fact being practiced or fostered by the defendants, whereas the Plan is a blanket administrative mandate for remedial action to be taken by all contractors in an attempt to cure the evils resulting from union actions, without specific reference to any past or existing actions or practices by the contractors.

While it may be true, as stated in the Plan, "that special measures are required to provide equal employment opportunity in these seven trades," it is our opinion that imposition of a responsibility upon Government contractors to incur additional expenses in affirmative action programs which are directed to overcoming the present effects of past discrimination by labor unions, would require the expenditure of appropriated funds in a manner not contemplated by the Congress. If, as stated in the Plan, discrimination in referral is prohibited by the National Labor Relations Act and title VII of the Civil Rights Act of 1964, it is our opinion that the remedies provided by the Congress in those acts should be followed. See also in this connection section 207 of Executive Order No. 11246.

While, as indicated in the foregoing opinions and in your Solicitor's memorandum, the President is sworn to "preserve, protect and defend the Constitution of the United States," we question whether the executive departments are required, in the absence of a definitive and controlling opinion by the Supreme Court of the United States, to assess the relative merits of conflicting opinions of the lower courts, and embark upon a course of affirmative action, based upon the results of such assessment, which appears to be in conflict with the expressed intent of the Congress in duly enacted legislation on the same subject.

In this connection, it should be noted that, while the phrase "affirmative action" was included in the Executive order (10925) which was in effect at the time Congress was debating the bills which were subsequently enacted as the Civil Rights Act of 1964, no specific affirmative action requirements of the kind here involved had been imposed

upon contractors under authority of that Executive order at that time, and we therefore do not think it can be successfully contended that Congress, in recognizing the existence of the Executive order and in failing to specifically legislate against it, was approving or ratifying the type or methods of affirmative action which your Department now proposes to impose upon contractors.

We recognize that both your Department and the Department of Justice have found the Plan to be legal and and we have given most serious consideration to their positions. However, until the authority for any agency to impose or require conditions in invitations for bids on Federal or federally assisted construction which obligate bidders, contractors, or subcontractors, to consider the race or national origin of their employees or prospective employees for such construction, is clearly and firmly established by the weight of judicial precedent, or by additional statutes, we must conclude that conditions of the type proposed by the revised Philadelphia Plan are in conflict with the Civil Rights Act of 1964, and we will necessarily have to so construe and apply the act in passing upon the legality of matters involving expenditures of appropriated funds for Federal or federally assisted construction projects.

In this connection it is observed that by section 705(d) of the act, 42 U.S.C. 2000e–4(d), Congress charges the Equal Employment Opportunity Commission with the specific responsibility of making reports to the Congress and to the President on the cause of and means of eliminating discrimination and making such *recommendations for further legislation* as may appear desirable. That provision, we believe, not only prescribes the procedure for correcting any deficiencies in the Civil Rights Act, but also shows the intent of Congress to reserve for its own judgment the establishment of any additional unlawful employment practice categories or nondiscrimination requirements, or the imposition upon employers of any additional requirements for assuring equal employment opportunities.

We realize that our conclusions as set out above may disrupt the programs and objectives of your Department, and may cause concern among members of minority groups who may believe that racial balance or equal representation on Federal and federally assisted construction projects is required under the 1964 act, the Executive order, or the Constitution. Desirable as these objectives may be, we cannot agree to their attainment by the imposition of requirements on contractors, in their performance of Federal or federally assisted contracts, which the Congress has specifically indicated would be improper or prohibited in carrying out the objectives and purposes of the 1964 act.

383-950 O—70——3

[B-166604]

Taxes—State—Government Immunity—Assessment for Local Improvements

An invoice bearing interest presented by a State Drainage District to the Federal Government in the amount assessed against the Government for the rehabilitation of a drainage ditch that is computed in the same manner as the taxes levied against property owners other than the Federal Government imposes a tax, and the United States exempted by the Constitution from State taxation, the tax may not be collected by designating the tax an invoice or statement for services. While the payment of the tax may not be authorized, a claim for an amount representing the fair and reasonable value of the services received may be presented on a *quantum meruit* basis, and a utility type service agreement entered into for future services, the agreement to provide for compensation to cover the fair and reasonable value of the services to be furnished.

Acting Comptroller General Keller, August 5, 1969:

We have considered the claim of the Fort Osage Drainage District of Osage County, Missouri, for the amount of $32,051.25, alleged to be due because of services furnished the Lake City Army Ammunition Plant, Independence, Missouri, in connection with a drainage ditch for the Fire Prairie Creek Watershed.

The invoice presented is for $15,750, representing the amount assessed against the Federal Government for rehabilitation of the drainage ditch for the year 1967, plus interest in the amount of $551.25, from March 1 to October 1, 1968, at 6 percent, and $15,750, representing the amount assessed against the Federal Government for rehabilitation of the drainage ditch for the year 1968. The invoice states that the "Statement for services for year 1967 bears interest at rate of 6% per annum from March 1, 1968; statement for services for year 1968 bears interest at rate of 6% per annum from January 1, 1969."

In accordance with the laws of the State of Missouri, the Fort Osage Drainage District was established in 1914 in Jackson County, Missouri, for the purpose of reclaiming swamp lands in the county. A main drainage ditch approximately 8 miles long with an additional 2 miles in laterals was constructed. The District consists of 3,064.53 acres.

At the time the ditch was originally constructed the 404.1 acres of land now occupied by the Lake City Army Ammunition Plant (LCAAP) was farm land. This land was condemned and the LCAAP was built by the Federal Government in 1941. The cost of constructing and maintaining the ditch had been assessed against the benefited land. From the date LCAAP was established until April 1964, no action was taken by the Fort Osage Drainage District to render services on that portion of the ditch within LCAAP or to make demand for the then established assessment. Because of this loss of revenue and other economic factors, the ditch, beginning in 1950 was permitted to go unattended. As a result the ditch caved in and became filled with debris. It

no longer functioned effectively as an outlet for the Fire Prairie Creek Watershed. Substantial flood losses were suffered by the landowners and the LCAAP. It became apparent that something had to be done to rehabilitate the ditch. It was concluded that this could be done only if the Federal Government were to pay its proportionate share coupled with a general reappraisal of the lands within the district. Accordingly, on April 16, 1964, attorneys for the Fort Osage Drainage District wrote the Commanding Officer of LCAAP requesting consideration of a proposal to finance and open a waterway of sufficient course and capacity to carry the water.

After several conferences with representatives of the Army and an exchange of legal briefs, the Fort Osage Drainage District Board was informed through a letter dated August 25, 1964, to Senator Stuart Symington, from the Headquarters, United States Army Materiel Command, Washington, D.C., with supporting citations—that there was no legal authority for the Government to pay any involuntary exaction or tax, that as long as the Government availed itself of this type of service and the rate prescribed was a reasonable and proper measure of the services, payment could be made on a *quantum meruit* basis. The letter concluded:

> Although there is no legal authority for the Army Materiel Command to pay an assessment to the Drainage District for any benefits which might be furnished to the Lake City Army Ammunition Plant by the Fort Osage Drainage District, there would appear to be a reasonable basis for compensation to the Drainage District by way of contract for any actual drainage services made available to the Plant by the operation of the Drainage District. It is believed that this approach would constitute an equitable adjustment for all parties concerned.

In a letter dated March 24, 1969, to Senator Stuart Symington signed by William L. Turner of Gage, Hodges, Kreamer and Varner, Kansas City, Missouri, it was stated with reference to the letter of August 25, 1964, *supra:*

> The Board interpreted the letter to mean that although the Government would not pay an assessment in the form of a tax, it could compensate the District for its share of the expenses pursuant to a contract for services. So far as the District was concerned, the problem involving the Government's contribution was solved so the Board proceeded with the next step, i.e., the reassessment of the land within the District.

The letter of March 24, 1969, continues:

> The Board felt that a reassessment was necessary for two reasons. First, the land had not been appraised with regard to flood benefits, since 1916 and a good deal of changes and improvements had been made since the district was incorporated. The Board was dedicated to seeing that each of the individuals in the district paid his fair share towards the ditch rehabilitation. Secondly, although no assessment would be made against the Government, the Board felt that the most equitable method of determining a fair basis for a service contract with the Government would be a determination of the benefits afforded the Government by the ditch. The Board did not want the Government to pay any greater share, under a service contract, than the other landowners paid under an assessed tax.
>
> The Board petitioned the Circuit Court for a reappraisal and the Court appointed three commissioners to view the land lying within the District and the

Court directed that the commissioners report their findings to the court as to the benefits inuring to each parcel of land as a result of having an operating drainage ditch. This finding would constitute a tax base for the District. As an auxiliary to the commissioners' duties, the Board requested the commissioners to view the land within the Army plant and to advise the District as to the commissioners' opinion regarding the benefits that would be enjoyed by the Government through the flood control afforded by the ditch and to submit their findings in a written report. The commissioners toured the Government installation and completed their work, following which a report was submitted and approved by the court. The report found that the land lying within the District, excluding the Lake City plant, was benefited by a total of $770,218.50, and this figure was certified as a new tax base. The commissioners advised that the Government installation was benefited in a total sum of $450,000.

The District then secured a drag-line and an operator on a full-time lease basis and a bulldozer on a part-time hired basis. It was determined that approximately $42,000 would be required for the first year's operations; accordingly, a tax of 3½ percent was levied on the individual landowners and tax statements were mailed out through the County Collector's office. The taxpayers responded by paying their 1968 assessment one hundred percent. There was not one delinquency. We expect a similar response from the $26,923.32 tax now being collected. In accordance with the Government's suggestion, an executed contract was mailed to the Army through your office. The contract ($15,750) was for services for the calendar year of 1968. The basis of the contract was determined by applying 3½ percent to the benefit ($450,000) determined by the commissioners. In this way, although the Government was not taxed, they were treated equally with the landowners. Your office forwarded the contract to Headquarters, Army Material Command on February 5, 1968.

Following receipt of that contract, the Army initiated a series of studies, telephone calls and conferences. The final conference was held in the Jackson County Court House Annex on September 20, 1968. This meeting was attended by officials from the Army Material Headquarters, as well as the Lake City Plant and the Board of Supervisors of the District. The three commissioners appeared before the group and were questioned by the Army personnel. The meeting concluded with an agreement that the method of determining the amount of the service contract was no longer disputed by the Army. The undersigned was requested by the Army to prepare a new contract covering services for the years 1967 and 1968, including interest, and to submit the same through the Army Ammunition Plant for payment.

The undersigned commenced work on a contract, however, a few days after the meeting a call was received from Joseph F. Callahan, Executive Assistant of the Army Plant, advising that it had been decided that a contract was not required but, instead, that an invoice for services would suffice and should be forwarded to him. This invoice, in the total sum of $32,051.25, was signed by the Board and forwarded to Mr. Callahan on October 2, 1968.

No further reply was received from the Government the rest of the year, so on January 8, 1969 we forwarded a tracer to Mr. Callahan with a copy to you. You looked into the matter and on January 23, 1969 advised that the matter was being brought to the attention of the General Accounting Office for review. The next thing we heard was in the form of a letter from the Lake City Army Plant advising that the Judge Advocate General had somehow entered the picture with a legal opinion that the Government could not be taxed. So, we are right back to the position we were in on August 25,1964.

It is obvious that the Judge Advocate General failed completely to review the file, if indeed it was open to him. Had he reviewed the file, he would have found that:

(a) The Army concluded in 1964 that it could not involuntarily pay an assessment.

(b) The Army suggested that it pay for its benefits through a service contract.

(c) The Army agreed as to the District's method of computing the amount of the service contract.

(d) The Army decided that a contract was not required but that an invoice would suffice.

(e) The Board was not *assessing* the Government but rather was charging

the Government, at its own suggestion and in the form suggested, for drainage services rendered.

Senator Symington, the real tragedy of the Government's mis-channeling of this invoice is the dangers it presents to the ditch project. Induced by the Government's suggestion, the District expended $5,500.00 in legal and commissioners fees to have the land reappraised. Since the Government has paid nothing toward the work, the District has been required to issue tax warrants, bearing six percent interest, for the work on the ditch. The District is currently indebted in the sum of $11,236.00 for work already performed, a debt contracted upon the expectation that the Government money was forthcoming. It is difficult to see how this debt can be paid if the Government fails to fulfill its promise by paying for services rendered.

If we can once get this ditch dug out, the future maintenance cost will be nominal. The entire rehabilitation project is in great danger of being shut down unless the Government's check is received without further delay. The rehabilitation was planned in two stages. The first stage consisted of proceeding down one side of the ditch but taking out approximately two-thirds of the dirt. The second stage would consist of returning along the other side to complete the "clean-out." The first stage is completed with the exception of the Lake City Plant. I understand that the equipment has reached the outskirts of the Plant. From a point of economics, it would be a great deal cheaper to move on into the Government property now. The work in the Arsenal will take approximately two months, at which time the equipment would be transported to the opposite end of the ditch to commence the digging on the other side. The work on the Lake City property cannot commence until we have an agreement with the Government.

If the Government fails to pay for the services and forces a shutdown of the rehabilitation, a great deal of the work already performed will collapse and the ditch will rapidly fill back in. The $53,892.64 already paid, or now being paid by the landowners, will likely to be spent in vain.

In the final analysis, our rural clients have been induced by the Government's suggestion to incur a great deal of expense to improve flood protection for the Drainage District, including the Lake City Arsenal. The landowners have supported this project one hundred percent. If the case is distinguished by one single element, it is that the District does not ask one single penny from the Government in the way of gratuity. The District does not seek a grant, relief, federal aid or assistance of any kind. In an age where everyone and nearly every country seeks United States assistance, I believe that this is a novel request in that respect. The Board does insist, however, that the Army fulfill its promise by paying for the services received.

In the absence of congressional authorization, the property of the United States is exempt by the Constitution from taxation under the authority of a State. *Van Brocklin* v. *State of Tennessee*, 117 U.S. 151, 180; *Lee* v. *Osceola Improvement District*, 268 U.S. 643. Assessments upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes. *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 707. In the case of *Wisconsin Railroad Co.* v. *Price County*, 133 U.S. 496, 504, the court said—

It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from state taxation—and by state taxation we mean any taxation by authority of the State, whether it be strictly for state purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national

government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. *Van Brocklin* v. *State of Tennessee*, 117 U.S. 151, 168.

See, also, *Mullen Benevolent Corporation* v. *United States*, 290 U.S. 89; *United States* v. *Allegheny County*, 322 U.S. 174; and *People of Puerto Rico* v. *United States*, 134 F. 2d 267.

In line with the decisions of the courts the accounting officers of the Government have also held over the years that the United States is exempt by the Constitution from taxation under authority of a State. See 2 Comp. Dec. 375 (1896); 4 *id.* 116 (1897); 9 *id.* 181 (1902); 11 *id.* 629 (1905); 15 *id.* 231 (1908); 23 *id.* 386 (1917); 1 Comp. Gen. 150 (1921); 3 *id.* 416 (1924); 15 *id.* 380 (1935); 27 *id.* 20 (1947); and 29 *id.* 18 (1949).

It has also been held that a charge made by a State or a political subdivision of a State for a service rendered or conveniences provided is not a tax. Fair and reasonable compensation for a service rendered or a facility used is not a tax. See *Packet Co.* v. *Keokuk*, 95 U.S. 80; *Transportation Co.* v. *Parkersburg*, 107 U.S. 691; *Huse* v. *Glover*, 119 U.S. 543; *Sands v. Manistee River Improvement Co.*, 123 U.S. 288; 24 Comp. Dec. 45 (1917); 1 Comp. Gen. 560 (1922); 9 *id.* 41 (1929); 18 *id.* 562 (1938); 29 *id.* 120 (1949); 31 *id.* 405 (1952); 34 *id.* 398 (1955); and 42 *id.* 246 (1962). *Cf.* 42 *id.* 653 (1963).

In the present case there does not seem to be any question as to the Federal Government receiving a service for which it may properly make payment. However the method by which the charge for that service has been computed does not appear to bear any particular relationship to the service rendered.

The assessment against the property in the District as described in the letter of March 24, 1969, *supra*, apparently was made in accordance with the provisions of those sections of chapter 243 of Vernon's Annoted Missouri Statutes which provide for the assessment and levy of taxes in connection with drainage districts. The amount billed to the Federal Government was computed in exactly the same way as the amounts levied as taxes against property other than that held by the Federal Government. Having been computed in the same manner as a tax it must be regarded as a tax and as such cannot be collected from the United States by calling it an invoice or statement for services. See 15 Comp. Gen. 380 (1935).

While payment of the claim as presented would not be authorized we see no objection to the presentation on a *quantum meruit* basis of a claim for an amount representing the fair and reasonable value of

the services actually received by the United States. 18 Comp. Gen. 562 (1938).

Furthermore, as far as future services are concerned, we see no objection to entering into a utility type service agreement, the compensation to cover the fair and reasonable value of the services to be furnished.

[B-165484]

Military Personnel—Medically Unfit—Status

The holding in 48 Comp. Gen. 377 that inductees into the military service who because they did not meet medical fitness or retention medical fitness standards were released from the service are entitled to basic pay for the period of induction, and if qualified to disability retirement or separation under 10 U.S.C. chapter 61, is applicable to inductees released on the basis of a void induction prior to the decision. The decision relating to persons whose disability was dormant or overlooked and not to persons whose disability existed prior to induction, the provisions of paragraphs 1–8d and 1–8.1a(1) of Army Regulation 635–40, to the effect that a disease or injury that is not recorded at the time of entrance on duty is presumed to be service connected—any doubt to be resolved in the favor of the member—are not applicable to cases for consideration pursuant to 48 Comp. Gen. 377.

Military Personnel—Record Correction—Discharge Change as Entitlement to Pay, Etc.—Medically Unfit Persons

Where medically unfit persons were released on the basis of a void induction prior to 48 Comp. Gen. 377 holding that physically or mentally unqualified inductees into the military service are entitled to basic pay, and if qualified to disability retirement or separation under 10 U.S.C. chapter 61, the military records of the erroneously released persons may be corrected to show discharge as of the date of release from military custody and control, any disability retirement or severance pay determination effected under 10 U.S.C. 1552 to consider the aggravation of an unfit condition or a new or additional unfitting condition acquired while on duty. Absent a change in a physical condition while on active duty, discharge may be made for the convenience of the Government without disability retirement or severance pay, and all discharged persons may be informed of their entitlement to the pay and allowances that accrued prior to release.

To the Secretary of Defense, August 7, 1969:

Reference is made to letter of July 3, 1969, from the Assistant Secretary of Defense (Comptroller) requesting decision on certain questions which have arisen in connection with the application of our decision of December 3, 1968, 48 Comp. Gen. 377, to inductees who were inducted into the uniformed services and later discharged (released from military custody and control) because they did not meet the procurement medical fitness standards or the retention medical fitness standards. The questions, together with a discussion pertaining thereto, are contained in Department of Defense Military Pay and Allowance Committee Action No. 430.

Our decision of December 3, 1968, did not pertain to persons who have been judicially determined to be mentally incompetent prior to induction, but related to persons as to whom there was no affirmative

statutory prohibition against induction or absolute disqualification therefor, who did not refuse to be inducted, and who submitted themselves for induction into the Armed Forces without protest and presumably performed military training and service without protest against the lawfulness of their induction. As to such persons we expressed the view that the administrative failure to discover that their mental or physical condition was such as to warrant rejection for military service does not deprive them of the right to military pay and allowances or of the status of being entitled to basic pay.

Our holdings in that decision are summarized in the Committee Action as follows:

The administrative failure to discover that the mental or physical condition of a person inducted into the Armed Forces was such as would warrant rejection for military service, does not deprive him of his right to military pay and allowances and accrued leave.

Medically unfit persons inducted into the service are entitled to military pay and allowances from the time of entry on active duty through the date they are released from military control.

Transportation in kind or monetary allowance in lieu thereof may be furnished these persons to their homes of record upon release from military control.

An individual who, at the time of induction, neither met the procurement medical fitness standards nor the retention medical fitness standards and whose condition has not been aggravated by active service would not be entitled to disability severance or retired pay on separation from the service. Reason: the disability involved in this case would not be incurred while entitled to basic pay, but would be incurred prior to entrance into the service.

An individual who, at time of induction, neither met the procurement medical fitness standards nor the retention medical fitness standards but whose condition has been aggravated by active service or who acquired a new or additional unfitting condition is entitled to disability severance or retired pay on separation from the service. These individuals must otherwise meet the requirements of law, including the requisite degree or extent of aggravation of the preexisting disability.

An individual who did not meet procurement medical fitness standards at the time of induction, but did then meet the retention fitness standards and who acquired an unfitting medical condition after induction, would be entitled to disability severance or retired pay on separation from the service, provided, of course, he meets all of the qualifications therefor.

The Committee Action states that prior to our decision of December 3, 1968, a number of Army inductees (estimated to number several thousand) subsequently found not to have met entrance medical standards or medical retention standards were released from military control by virtue of a void induction without being processed for disability separation under the provisions of chapter 61 of Title 10 U.S. Code.

The Committee Action further states that individuals released by virtue of a void induction are requesting correction of their military records to show discharge by reason of physical disability or other action with entitlement to the benefits provided in that chapter. The opinion is expressed that the induction of an individual who did not meet the medical fitness standards at the time of induction is voidable, not void, and that these individuals are members of the Army and as

such eligible for physical disability processing under the provisions of Army Regulation 635–40, May 15, 1967, as changed by Change 1, February 7, 1968. The Committee Action noted that our decision of December 3, 1968, did not address itself to individuals who had previously been released under the provisions of paragraph 5–9.1, Army Regulation 635–200, July 15, 1966, as changed by Change 7, September 11, 1968.

The first question is:

1. Does the decision of the Comptroller General that inductees who did not meet medical fitness standards are entitled to basic pay and, if otherwise qualified, separation under title 10, United States Code, Chapter 61, apply to inductees who were released from the custody and control of the Army prior to the decision?

That question is answered in the affirmative. It should be noted, however, that paragraph 1–8*d* of Army Regulation 635–40, May 15, 1967, provided in pertinent part:

It will be presumed, in the absence of clear and convincing evidence to the contrary, that the disease or injury was incurred in line of duty. Any reasonable doubt will be resolved in favor of the member. Every member will be presumed to have been in sound condition when examined and accepted by the Army for service, except as to defects, infirmities, or disorders noted at the time of examination and acceptance * * *.

Change No. 2 to that regulation—now numbered 1–8.1*a*(1)—reads with respect to that matter that:

A member is presumed to have been in sound physical and mental condition upon entering active service except as to physical disabilities noted and recorded at the time of entrance. Any disease or injury discovered after a member enters active service is presumed to have been incurred in line of duty while entitled to receive basic pay and not due to the member's intentional misconduct or willful neglect.

Our decision of December 3, 1968, covered "a member who may have a dormant disease which is not discovered until some time after induction" as well as a member whose defect the "medical authorities may have overlooked * * * even though proper medical procedures were followed." Nothing contained in that decision was intended to sanction the disability separation or retirement of any person in such categories notwithstanding the above-quoted provisions of Army Regulations, and nothing contained herein should be so construed, since in these cases it has been determined that the disability existed prior to induction, that is, the above-quoted presumptions are not applicable here.

The second question reads as follows:

2. If the answer to question 1 is affirmative, would there be any objection if the Army takes the following action?

a. The Adjutant General, Department of the Army, will administratively correct the military records of individuals released prior to the Comptroller General's decision to show them discharged as of the date they were released from military custody and control, and

b. Where the individual's terminal physical examination indicates that his physical condition has been aggravated by active service or that he acquired a new or additional unfitting condition while on active duty, an administrative determination will be made as to the degree or extent of the disability, based upon the terminal physical examination. The individual will be given disability retirement or severance pay based on this determination. The individual will be notified of his right to demand a hearing under the provisions of title 10, United States Code, section 1214. For the purpose of computing severance pay under the provisions of title 10, United States Code, section 1212, he will be considered to have been separated on the date he was released from military custody and control, or

c. Where the individual's terminal physical examination indicates that his physical condition was not aggravated by active service and that he did not acquire a new or additional unfitting physical condition while on active duty, or where the physical examination does not contain sufficient information for a determination, the individual will be discharged for the convenience of the Government without disability retirement or severance pay, and

d. All individuals discharged under this procedure will be informed that they are entitled to all pay and allowances which accrued prior to the date they were released from the custody and control of the Army.

The second question is answered in the negative, provided disability benefits under chapter 61 of Title 10, U.S. Code, are paid only in cases where appropriate action is effected under 10 U.S.C. 1552. See 31 Comp. Gen. 444, 449–451 (1952), answer to fifth question.

[B–164842]

Pay—Retired—Increases—Retirement on Effective Date of Increase

A member of the uniformed services who is eligible to retire July 1, 1968, the effective date of a basic pay increase, either for disability retirement under 10 U.S.C. chapter 61, by virtue of the Uniform Retirement Date Act, or voluntarily for years of service under 10 U.S.C. 6323, is entitled to retired pay computed at the higher rates of active duty pay prescribed by Executive Order No. 11414, not on the basis of disability retirement—as the rate applicable to the disability retirement would be the rate in effect as if the retirement had not occurred under the act—but on the basis that the section 6323 retirement, which neither subject to the Uniform Retirement Date Act nor Formula 4 of 10 U.S.C. 1401, that requires computation of retired pay at the rate in effect the day before retirement, is the "other provision of law" most favorable to the member prescribed by section 1401, and he, therefore, is entitled to retired pay computed at the higher rate of active duty basic pay in effect July 1, 1968.

Pay—Retired—Increases—Entitlement

To determine if the Uniform Retirement Date Act (5 U.S.C. 8301) is applicable to Army and Air Force officers who if they first quality for retirement upon completion of 20, 30, or 40 years of service prior to June 1968, would be entitled to retired pay computed under Formula B of 10 U.S.C. 3991 or 8991, subject to footnote 2, on the basis of monthly active duty pay rates applicable on date of retirement, or if the officers are entitled to retired pay computed at the higher rates of active duty pay prescribed by Executive Order No. 11414, effective July 1, 1968, the time of qualification for retirement is an element for consideration.

Pay—Retired—Increases—Retirement on Effective Date of Increase

The fact that a member of the uniformed services had not requested voluntary retirement based on years of service when qualifying for retirement prior to July 1, 1968, does not defeat his right to retired pay computed under any "other provision of law" most favorable to him as prescribed by 10 U.S.C. 1401 when he retires on July 1, 1968, the effective date of the basic pay increases provided by Executive Order No. 11414, dated June 13, 1968, and the member, therefore, is entitled to retired pay computed at the higher rate of pay made effective July 1, 1968.

Pay—Retired—Increases—Under Public Law 89–132

The retired pay of a member of the uniformed services retired under 10 U.S.C. 1293, effective September 1, 1965, who had also qualified for voluntary retirement for years of service under 10 U.S.C. 6323, may be computed on the basis of the increased rate of basic pay prescribed by Public Law 89–132 (37 U.S.C. 203(a)), effective September 1, 1965. The act silent as to whether or not members whose retirements became effective on its effective date were authorized to compute their retired pay on the basis of the increased rates, the principles in 43 Comp. Gen. 425 and 44 Comp. Gen. 373; *id.* 584, apply.

To the Secretary of Defense, August 8, 1969:

Further reference is made to letter of June 13, 1969, from the Assistant Secretary of Defense (Comptroller) requesting a decision on certain questions concerning the proper rate of retired pay to be paid members of the uniformed services described therein who retired on the effective date of an increase in basic pay. The questions are stated and discussed in Department of Defense Military Pay and Allowance Committee Action No. 429, which accompanied that letter.

Active duty basic pay rates for members of the uniformed services were increased effective July 1, 1968, as prescribed in Executive Order No. 11414 dated June 11, 1968 (these rates were further increased effective July 1, 1969, as prescribed in Executive Order No. 11475 dated June 16, 1969).

The Uniform Retirement Date Act of April 23, 1930, now codified in 5 U.S.C. 8301 (formerly 5 U.S.C. 47a) provides as follows:

(a) Except as otherwise specifically provided by this title or other statute, retirement authorized by statute is effective on the first day of the month following the month in which retirement would otherwise be effective.

(b) Notwithstanding subsection (a) of this section, the rate of active or retired pay or allowance is computed as of the date retirement would have occurred but for subsection (a) of this section.

The questions presented in Committee Action No. 429 are as follows:

1. Is a member whose retirement for disability was effective on July 1, 1968, by virtue of the Uniform Retirement Date Act, but who was also qualified under 10 U.S.C. 6323 for voluntary retirement effective that date entitled to retired pay computed on the higher rates of active duty pay prescribed by Executive Order No. 11414 dated June 11, 1968?

2. If the answer to Question No. 1 is affirmative would the same answer apply in similar situations of Army and Air Force officers who also would have their retired pay computed under Formula B of 10 U.S.C. 3991 or 8991 if they first qualified for retirement by completion of 20, 30 or 40 years' service prior to June 1968?

3. Would the answers to the above differ depending upon whether or not any of the officers concerned had requested voluntary retirement?
4. Would a member retired under 10 U.S.C. 1293, effective September 1, 1965, be entitled to have his retired pay computed on the basis of the then increased rates of pay if he was at that time otherwise qualified for retirement effective that date under 10 U.S.C. 6323?

In the case of a member found eligible for retirement for disability under chapter 61, Title 10, U.S. Code, whose effective date of retirement is designated by the Secretary concerned as authorized in 10 U.S.C. 1221, the restriction of the Uniform Retirement Date Act is not for application. In such a case, the provisions of section 1221 expressly exclude disability retirements from the operation of the Uniform Retirement Date Act. However, where the Secretary concerned does not specify an effective date for retirement as authorized in that section, the 1930 act is applicable. See 43 Comp. Gen. 425, 427 (1963) (pertaining to the Mullins case) and 44 Comp. Gen. 373, at pages 379 and 380 (1965).

In computing retired pay by reason of disability, footnote 1 to 10 U.S.C. 1401 states "Compute at rates applicable on date of retirement or date when member's name was placed on temporary disability retired list, as the case may be." In commenting on the disability retirement of a member which became effective on July 1, 1968, the Committee Action states that such a member was not entitled to retired pay computed on the higher rates of active duty basic pay which became effective on that date.

Under 10 U.S.C. 6323(a), mentioned in questions 1 and 4, an officer of the Navy or Marine Corps who applies for retirement after completing more than 20 years of active service of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired "on the first day of any month designated by the President." In considering the situation of 11 members of the naval service who were voluntarily retired effective July 1, 1968, under section 6323, after having been scheduled for involuntary retirement under other provisions of law, we said, in decision of October 29, 1968, 48 Comp. Gen. 239, 249, with respect to section 6323 in conjunction with the 1930 Uniform Retirement Date Act, that:

Since each of these 11 members was qualified prior to June 1968 for retirement under the voluntary retirement law indicated and since the involuntary retirement law applicable in each case imposes no restriction on such retirement, they are entitled to have their retired pay computed on the basis of the rates of active duty pay in effect on July 1, 1968.

See, also, the answer to questions 1 and 2 in 44 Comp. Gen. 584 (1965).

With respect to question 1, it is stated in the Committee Action that such question is premised on the conclusion we reached in the *Noonan* and *Arnott* cases which were among the cases considered in the above decision of October 29, 1968, 48 Comp. Gen. 239. The view is

expressed that had Noonan or Arnott been otherwise qualified for voluntary retirement under 10 U.S.C. 6323, their retired pay would be properly for computation as if retired under that provision of law. Since the retirees in the decision of October 29, 1968, were otherwise retireable involuntarily, that is, they were subject to mandatory retirement, the Committee Action states that there appears to be no logical distinction between such cases and retirements for physical disability which under the law makes the member's termination of active service mandatory.

Warrant officers Noonan and Arnott considered in the decision of October 29, 1968, were voluntarily retired under 10 U.S.C. 1293 (warrant officers' retirement after 20 years of active service) effective July 1, 1968, after having been scheduled for involuntary retirement under 10 U.S.C. 564(a) effective that same date. Under both the voluntary and involuntary retirement laws, their retired pay was required to be computed under Formula 4 of 10 U.S.C. 1401 on the basis of the "Monthly basic pay * * * on day before retirement * * *." Since there was no other "pay formula" or "other provision of law" as provided in section 1401 under which these two members could compute their retired pay, we were required to conclude that under the law they were not entitled to compute their retired pay on the rates of active duty pay in effect on July 1, 1968.

Since the member mentioned in question 1 was entitled to be retired for either physical disability or for years of service under 10 U.S.C. 6323 effective July 1, 1968, and since retirement under section 6323—which is not subject to the restrictive provisions of the Uniform Retirement Date Act—is the "other provision of law" most favorable to him, it is our view that such a member is entitled to have his retired pay computed on the higher rates of active duty pay in effect on July 1, 1968. Question 1 is answered in the affirmative.

Concerning question 2, Army and Air Force officers who are otherwise eligible for retirement for years of service are entitled to have their retired pay computed under Formula B of 10 U.S.C. 3991 and 8991, subject to footnote 2, on the monthly basic pay "* * * at rates applicable on date of retirement." The time of qualification for retirement for years of service is an element to consider in determining whether the Uniform Retirement Date Act is applicable. In construing sections 3991 and 8991 in conjunction with the act of August 12, 1964, 78 Stat. 395, Public Law 88-422, effective September 1, 1964, which authorized an increase in rates of basic pay, we said, in decision of January 5, 1965, 44 Comp. Gen. 373, at page 379, that:

> Under the Uniform Retirement Date Act, the retired pay of Army and Air Force officers who were retired on September 1, 1964, and who compute their retired pay under Formula B of 10 U.S.C. 3991 or 8991 must compute their retired

pay under the rates of pay prescribed in the 1963 pay act if they first qualified for retirement by completion of 20, 30, or 40 years' service after July 1964. All other Army and Air Force officers retired on September 1, 1964, whose retired pay is computed under that formula are entitled to compute their retired pay on the basis of the rates prescribed in the 1964 pay act. 43 Comp. Gen. 425.

In the light of the foregoing, question 2 is answered in the affirmative.

The Committee Action states that question 3 arises because of a distinction made in 43 Comp. Gen. 425, 427, in the case of Chief Warrant Officer Robert H. Jordan, USMC. In that case, the officer completed 20 years of active service for retirement purposes in March 1959 but it was not until January 1963 that he requested that he be retired under 10 U.S.C. 1293 effective April 1, 1963. In that decision we said that had Mr. Jordan completed 20 years of qualifying service on March 22, 1963, and had requested retirement at that time, the effective date of his retirement would have been fixed as April 1, 1963, under the 1930 act. We further stated that since he did not request retirement when he met the eligibility qualifications of the statute, the situation contemplated to give effect to the purpose and intent of the 1930 act, no longer existed in his case. In concluding that he was not subject to the 1930 act, we said that the exercise of the administrative discretion to retire him effective April 1, 1963, was the result solely of his request to that effect.

The fact that the member in questions 1 and 2 might have otherwise qualified for voluntary retirement (years of service) prior to the dates there specified but had not requested such retirement at the time of qualification, does not defeat his right to have his retired pay computed under "any other provision of law" that is most favorable to him as provided in 10 U.S.C. 1401. Accordingly, question 3 is answered in the negative.

Question 4 refers to a member who retired effective September 1, 1965, and asks whether his retired pay should be computed under Public Law 89–132, approved August 23, 1965, 37 U.S.C. 203(a), which law became effective September 1, 1965, and increased rates of basic pay. It is pointed out that this law contained no specific language as to whether or not members whose retirements became effective on its effective date were authorized to compute their retired pay on the basis of the increased rates. A question somewhat similar to question 4 was considered by us in decision of April 15, 1968, 47 Comp. Gen. 549. The questions considered in that decision were stated as follows:

1. What would be the effective date of any upward adjustment in the monthly basic pay of members of the uniformed services authorized by section 8 of Public Law 90–207?

2. In the event that 1 July 1968 is the answer to Question 1 and in the absence of definitive legislation which would entitle all members retired on such date to have their retired pay computed on such increased rates, would the principles applied in 43 Comp. Gen. 425 and 44 Comp. Gen. 373; *id.* 584 be for application in the computation of the retired pay of such members?

In answer to question 2 in that decision we held, quoting the second syllabus, that:

While Public Law 90-207, approved December 16, 1967, which prescribes pay increases for members of the uniformed services comparable to those provided for civilian employees by the Federal Salary Act of 1967, does not indicate that all members retired on July 1, 1968, will be entitled to have their retired pay computed at the increased rates to be established by the act, in computing the retired pay of members who will retire on July 1, 1968 under different provisions of law, the principles in 43 Comp. Gen. 425 and 44 Comp. Gen. 373; *id.* 584, are for application.

In view thereof and of the answer to question 1 above, question 4 is answered in the affirmative.

[B-167407]

Military Personnel—Retired—Contracting With Government—Liaison Activities

The activities of a retired Regular Air Force officer as a self-employed small business representative to secure information concerning the needs of the aerospace industry for companies manufacturing components used by the industry are liaison activities with the view toward the ultimate consummation of a sale, which activities coupled with contacts for the purpose of negotiating or discussing changes in specifications, prices, cost allowances, or other terms of a contract, and possibly settling disputes concerning the performance of a contract, constitute "selling" within the contemplation of Defense Department Directive 5500.7, dated August 8, 1967, and under 37 U.S.C. 801(c) payment of retired pay to the officer so engaged would be precluded for a period of 3 years after retirement.

To Major N. C. Alcock, Department of the Air Force, August 8, 1969:

Reference is made to your letter of July 2, 1969, ALRA, with enclosures, requesting a decision whether, in the circumstances presented, the proposed self-employment of Colonel Paul E. Adams, USAF (Ret.), would constitute "selling" within the meaning of 37 U.S. Code 801(c) so as to preclude payment of retired pay while so employed for a period of 3 years after his retirement. The submission was approved by the Department of Defense Military Pay and Allowance Committee as Air Force Request No. DO-AF-1044.

Prior to Colonel Adams' retirement he advised you in letter of March 28, 1969, with copy of DD Form 1357 "Statement of Employment," that he would be employed with David L. Heitman and Associates, Oklahoma City, Oklahoma, and that his position would be that of partner/associate. On May 6, 1969, he submitted a more detailed description of his proposed duties. As of August 1, 1969, Mr. Heitman is leaving the firm and Colonel Adams proposes to operate the business in an individual capacity.

You say that from the total record it appeared his duties could in-

volve "selling" as defined in Air Force Regulations 30–30. You further say that the case was referred to Headquarters U.S. Air Force (AFJAG), and that office concurred with your position. The case was forwarded to the Office of the Air Force General Counsel and it was the opinion of that office that it could not be concluded that Colonel Adams would not be engaged in "selling" if he entered fully into the duties described in his DD Form 1357.

Colonel Adams described his proposed employment on DD Form 1357 (Statement of Employment), as follows:

1. Provide information on the local area market requirements for Industrial & Aero Space Products to companies we represent.
2. Provide technical advice and information for those products which can be produced and or manufactured by the companies we represent.
3. Provide information on the manufacturing details, workloads, delivery schedules, changes if any, etc.
4. Keep the customer and the manufacturer advised as to the others requirements and or changes.
5. Provide the companies we represent with information necessary to successfully manufacture required products and to meet schedules on a timely basis.

The duties of his proposed employment were amplified and explained in his statement of May 6, 1969, and were further explained in a statement which he submitted on July 7, 1969. The statement of May 6, 1969, is in part as follows:

ITEM 1: Provide information on the local area market requirements for Industrial and Aero Space Products to those companies we represent.
DISCUSSION: By visiting the government agencies' Small Business Office, which is available to any desired contractor, it can be determined what items are being requested for manufacture. These items will be in the form of a Bid Package which describes the items being purchased. Some of the packages are complete with drawings and others may have only a "Part Number." Through my experience and knowledge, I determine those items which are within the manufacturing capability of the companies I represent. The government agent frequently mails copies of these packages to known manufacturing sources and in addition will mail copies to the companies I represent after I have advised him which ones have the manufacturing capability. When the company receives this information, they prepare a formal bid and forward it to the agency making the original request. The government agent determines the lowest successful bidder and in turn will award a contract. If one of the companies I represent gets a contract, it is my duty to monitor it and be prepared to discuss in detail those questions asked by the government agent on the status of the contract. I do not sign contracts.
ITEM 2: Provide technical advice and information for those products which can be produced and/or manufactured by the companies I represent.
DISCUSSION: To do this I review the items being requested by the government agency and advise them which company, if any, of those I represent have the skill, machines, drawings, etc., to manufacture the requested item. The government agent then will provide the company with the capability a copy of the request for further consideration and possible bid.
ITEM 3: Provide information on the manufacturing details, workloads. delivery schedules, changes if any, etc.
DISCUSSION: Provide special instructions to the company I represent in the form of administrative details, quality control, special shipping instructions and other details that the government may request on an awarded contract or provide on a bid package. I will provide answers to government requests and questions after contacting the contractor for details. I do not sign changes involving contracts.

ITEM 4: Keep the contractor and government agent advised as to the others requirements, problems that may develop, changes, etc.
DISCUSSION: The government agent frequently asks for information regarding possibility of changes to schedules, versus overtime requirements and possible changes to cost as a result of his request. This information is discussed with the contractor and the results are passed to the government agent. Through these coordinated actions the government and the manufacturer can save valuable time and cost factors caused by extended lines of communication. The contractor may have trouble with insufficient drawings or blueprints and require additional information on either an awarded contract or for determining his capability to manufacture. Through my knowledge and experience, I can discuss these deficiencies with the government agent and acquire, when possible the additional drawings and information.

On the basis of Colonel Adams' description of his duties, his prospective employment would appear to constitute him a small business manufacturers' representative. The companies which he will represent manufacture various components used by the aerospace industry and it will be his responsibility to provide them with information as to the needs of the industry. Insofar as the Department of Defense is concerned he says he will obtain this information from invitations for bids at the "government agencies' Small Business Office." When the advertised needs can be supplied by any of his manufacturers he will see that an invitation for bid is mailed to his manufacturer. Doubtless some, if not all, of the contacts which he will make with Government personnel at this time will be with representatives of the Department of Defense.

When a contract is obtained by his manufacturer he will be required to monitor the progress of the contract and act as an intermediary between the Government and the manufacturer for the purpose of maintaining delivery schedules, clarifying specifications, resolving manufacturing difficulties and assisting in the expeditious processing of any needed changes. He will not, however, sign any bid, proposal, or contract, or negotiate any contract.

Colonel Adams appears to believe that, in his representative capacity, he should be viewed as rendering a service not involving selling rather than being engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to the Department of Defense.

It appears that Colonel Adams retired from the Regular Air Force on May 1, 1969, after 28 years' service. Section 801(c) of Title 37 U.S. Code (formerly 5 U.S.C. 59c), precludes payment of retired pay for a period of 3 years after retirement to, among others, an officer on the retired list of the "Regular Air Force * * * who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service."

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For the purpose of the above-cited provisions of law, the term "selling" is defined in paragraph I.C.2 of Inclosure 3-C, Department of Defense Directive 5500.7 dated August 8, 1967, to mean:

a. Signing a bid, proposal, or contract;
b. Negotiating a contract;
c. Contacting an officer or employee of any of the foregoing departments or agencies for the purpose of:
(1) Obtaining or negotiating contracts.
(2) Negotiating or discussing changes in specifications, prices, cost allowances, or other terms of a contract, or
(3) Settling disputes concerning performance of a contract, or
d. Any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefore is subsequently negotiated by another person.

Air Force Regulations 30-30 contains similar provisions.

On the basis of Colonel Adams' statements of his proposed activities there would appear to be little reason for doubt that he will be contacting officers or employees of Department of Defense agencies for the purpose of negotiating or discussing changes in specifications, prices, cost allowances, or other terms of a contract and, perhaps, for the purpose of settling disputes concerning performance of a contract within the contemplation of items c(2) and (3) of the directive. Also, since the only purpose of any contacts made by Colonel Adams with Department of Defense personnel for the purpose of ascertaining whether the needs of the Department can be supplied by his manufacturers is to obtain the business for them, there would appear to be a substantial basis for regarding such contacts as liaison activities with a view towards the ultimate consummation of a sale within the contemplation of item d of this directive.

Accordingly, it is our opinion that the duties of Colonel Adams' proposed self-employment as described by him, must be viewed as "selling" within the meaning of the statute. If, therefore, he enters fully into the duties of his self-employment he will not be entitled to retired pay while so engaged for a period of 3 years after the date of his retirement.

Your question is answered accordingly.

[B-166725]

Concessions—Contracts—Preference to Incumbent Concessioners

The award of a new long term concession contract to supersede an existing one to the contractor who had satisfactorily performed under successive contracts and who had been permitted to modify his initial proposal for the improvement of concession facilities at substantial investments in order to match the investment proposal of another bidder will not be disturbed, even though ordinarily the modification of an initial proposal requires the solicitation of new proposals, as 16 U.S.C. 20d in authorizing preference to an incumbent concessioner in the

renewal of a contract or in the negotiation of a new contract for the purpose of maintaining the continuity of operations and operators, and in not providing bidding procedures, removes concession contracts from normal rules.

Concessions—Contracts—Modification—Reporting to Congress

Where the proposed concession contract reported to the Congress 60 days before award pursuant to 16 U.S.C. 17b–1 is modified, the contract as executed by the National Park Service, Department of the Interior, is not the one reported to the Congress and, therefore, the requirement for reporting a proposed concession contract "in detail" 60 days before the contract is awarded was not met. However, the statute omitting to set forth the consequences resulting from failure to comply with the requirement, the contract awarded is voidable at the option of the Government, an option that is within the discretion of the Secretary of the Interior to exercise, the United States General Accounting Office taking action only when a contract is considered void, not voidable.

To Ireland, Stapleton, Pryor & Holmes, August 11, 1969:

We refer to your letter of April 18, 1969, and subsequent correspondence protesting on behalf of your client, Host International, Incorporated (Host), against the award of a contract by the National Park Service to Fred Harvey, Incorporated, for developing and operating the primary concession facilities in the Grand Canyon National Park, South Rim.

In conjunction with the consideration of your protest and pursuant to a request by the Chairman, Government Activities Subcommittee of the House Committee on Government Operations, we conducted an independent and comprehensive review, including field investigations, of all factors relating to the award of the contract to Fred Harvey. Our review disclosed the following facts and circumstances surrounding the award of the contract.

Fred Harvey has operated various concessions at the South Rim of the Grand Canyon National Park under successive contracts ever since the Park was established. Immediately prior to execution of the present contract Harvey had operated concessions at Grand Canyon National Park under contract No. 14–10–0100–346 which covered the period from August 1, 1954, through July 31, 1974.

During the period of the earlier contract, discussions took place between Harvey and the National Park Service (NPS) concerning the need for substantial improvements in concession facilities at the South Rim. In an August 1967 letter to the Superintendent, Grand Canyon National Park, Harvey suggested that a new contract be negotiated because the proposed improvements would require substantial investments, then estimated to cost about $1.6 million. After review by NPS staff and meetings with representatives of the concessioner, NPS determined that improvements aggregating approximately $5 million were needed and that a 30-year contract would be appropriate for such an investment. Accordingly, NPS prepared a "Fact Sheet" under

which a 30-year concession contract was to be negotiated for the operation of concessions at the Park.

The Fact Sheet noted that Harvey had been conducting concession operations at the South Rim in a manner satisfactory to the Secretary of the Interior and that Harvey had applied for a new long-term contract to supersede and cancel the existing contract as security for a substantial construction and improvement program. The improvement desired by NPS was estimated to cost $5 million. The Fact Sheet specified the improvements to be constructed during the first 5 years of the contract period at an estimated cost of $3 million and stated that the concessioner would invest an additional $2 million during the next 5 years of the contract period in construction of such additional facilities as would be agreed upon between NPS and the concessioner after completion of the 1971 operating season. In this connection, the Fact Sheet stated:

> This represents the present objectives of the National Park Service, but it is recognized that the specific details may be subject to amendment by mutual agreement between the Service and the concessioner. The principal objective, however, is to provide needed improvements within the next five years for the convenience of visitors at a cost of not less than $3,000,000, and to provide such additional facilities as may be determined necessary at a cost of not less than $2,000,000 after the specific program has been completed.

Additionally, the Fact Sheet: (1) quoted section 5 of the act of October 9, 1965, 16 U.S.C. 20d, concerning the preference to be given incumbent concessioners; (2) described the concessioner's right to be compensated for structures and improvements he constructs on Federal land if his right to use them for concession operations is terminated; and (3) quoted section 13 of Harvey's then current contract which relates to compensation for this possessory interest if the concession were awarded to another party. The Fact Sheet also noted that because of the pressing need for additional visitor facilities, the concessioner, with the approval of NPS, could initiate construction under the contract in advance of the effective date of the contract.

A notice of the intention to negotiate the concession contract with Harvey for the 30-year period from January 1, 1969, through December 31, 1998, was published in the Federal Register on September 5, 1968. The notice reads, in part, as follows:

> The foregoing concessioner [Fred Harvey] has performed its obligations under prior contracts to the satisfaction of the National Park Service, and, therefore, pursuant to the act cited above [10 U.S.C. 20d], is entitled to be given preference in the renewal of the contract and in the negotiation of a new contract. However, under the act cited above, the Secretary is also required to consider and evaluate all proposals received as a result of this notice. Any proposal to be considered and evaluated must be submitted within 30 days after the publication date of this notice.

Prior to the publication of this notice, Harvey stated in a letter dated August 26, 1968, that it was in agreement with the Fact Sheet.

In response to the September 5 notice in the Federal Register, Host presented its proposal on October 3, 1968. This proposal which was accompanied by architects' plans and renderings, contemplated a minimum investment of $10 million and a maximum investment of $15 million during the first 5 years of the contract.

The Host proposal provided for a number of facilities which were in addition to those called for in the Fact Sheet. The more significant additional facilities were:

1. A 20 million gallon underground water storage unit and completion of approximately 9 miles of pipeline to the Desert View area.
2. Replacing the existing hotel at El Tovar with a new 300 room hotel. This would provide 209 additional rooms at El Tovar. The new hotel was proposed for construction directly on the rim.
3. Sixty additional cabin units recommended at the Bright Angel area; 50 additional rooms recommended at Yavapai area and 50 additional rooms recommended at Desert View area.
4. A general store.
5. A new cafeteria at the Motor Lodge.
6. A rebuilding of Phantom Ranch.

By letter of November 8, 1968, NPS rejected Host's proposal. This letter, in pertinent part, reads:

As you were advised in earlier discussions, Fred Harvey, Inc., has provided service for the public to the satisfaction of the Secretary, and is, therefore, entitled to a preference in the renewal of its contract. Moreover, Fred Harvey, Inc., has agreed in all particulars to the construction and improvement program as well as all other conditions as detailed in the Fact Sheet. In our evaluation of your proposal, we find it unacceptable because of a high concentration of facilities and an overdevelopment on the Rim. Accordingly, we propose to negotiate a concession contract with Fred Harvey, Inc.

This rejection of its proposal was appealed by Host on November 15, 1968. Among other things, the appeal letter pointed out that at all points in its presentation to NPS, Host emphasized the negotiability of the details of the proposal and its flexibility and willingness to revise details of design and facility size and location by mutual agreement with NPS. Accordingly, Host contended that "rejection of the Host proposal on grounds that were specifically and admittedly subject to negotiation is plainly an abuse of discretion and, thus, should be reversed."

In response to this appeal the Assistant Secretary of the Interior advised Host by letter of January 7, 1969, that:

Your letter and statements suggest that the Park Service may have rejected Host's proposal because it believed it was compelled under the circumstances to accept Harvey's proposal as a matter of law. At the conferences on December 5, it was made clear that the Service's decision was not based on any such construction of the law; that its officers recognized, had they concluded Host's proposal was preferable to the development called for by the fact sheet, that

they could have issued a new fact sheet incorporating the features of that proposal. The Deputy Solicitor advises that in his view this represents a correct interpretation of the statute.

With respect to the first and second points raised in your letter, we are satisfied, in spite of the possibly misleading language about "high concentration of facilities and an overdevelopment on the Rim," contained in Mr. Hummel's letter of November 8, that the Service understood and acted on the basis that such things as the size and location of specific facilities contemplated by the Host proposal were negotiable.

The Service's decision was essentially based on its conclusion that the development called for by the fact sheet is all that is warranted or desirable on the South Rim of the Grand Canyon National Park at this time. As its representatives advised during the conferences, it is their view that both the proposal of Host (with modifications which they understood the company would have been willing to make) and the proposal of Harvey are compatible with the fact sheet and their developmental objectives for the area. This being the case they determined that Harvey was entitled to the concession contract under the preference provision of the statute.

By letters dated January 16, 1969, to the President of the Senate and Speaker of the House of Representatives the Interior Department transmitted copies of the proposed contract to be awarded to Fred Harvey in accordance with the provisions of 16 U.S.C. 17b-1. The letters noted that the proposed contract would supersede and cancel the existing contract and that its term was conditioned upon a two-phase building and improvement program of not less than $5 million to be completed during the first 10 years of the contract. The letters further noted that after evaluation of the Host and Harvey proposals it was determined that both were compatible with the objectives of the National Park Service for the area but it was determined that a contract should be negotiated with Harvey on the basis that it was, as a satisfactory concessioner, entitled to preference in the renewal of its contract.

We examined into the reasonableness of the decision by the Department that Fred Harvey had performed satisfactorily by reviewing visitors' complaints, health and sanitation inspection reports, and safety and fire hazard reports. Our review of complaints, inspection reports, and discussions with cognizant officials did not disclose any basis for questioning the validity of the Secretary's determination that Harvey's performance had been satisfactory.

On January 25, 1969, Host again appealed the rejection of its proposal by filing a petition of reconsideration with the Secretary of the Interior.

Thereafter, on March 14, 1969, during the 60-day reporting period specified in 16 U.S.C. 17b–1, the Director of the National Park Service sent the President of Fred Harvey a telegram reading as follows:

ADVISE RETURN TELETYPE THAT FRED HARVEY WILL MEET IN ALL RESPECTS THE EQUIVALENT INVESTMENT PROPOSALS OF HOST INTERNATIONAL AS MAY BE REQUIRED BY THE SECRETARY PURSUANT TO PROPOSED NEW CONTRACT.

On March 17, 1969, the President of Fred Harvey wired the Director, NPS:

IN RESPONSE TO YOUR TWX OF MARCH 17 [sic] I WISH TO ADVISE THAT FRED HARVEY INC. WILL MEET IN ALL RESPECTS THE EQUIVALENT INVESTMENT PROPOSALS OF HOST INTERNATIONAL AS MAY BE REQUIRED BY THE SECRETARY PURSUANT TO THE PROPOSED NEW CONTRACT.

Host was advised on March 25, 1969, by telegram from the Department of the Interior that its petition for reconsideration was denied. The next day, on March 26, the contract was executed by signature of the Acting Director, NPS.

While Host raises a number of contentions regarding the actions of the Interior Department in the selection process for the contract and the reasons given by Department officials for rejection of Host's proposal, the thrust of Host's protest to our Office concerns the legal effect of the March 14 and 17 exchange of telegrams. Host contends that the March 14 telegram to Fred Harvey constituted a solicitation in contravention of section 5 of the 1965 Concession Act, 16 U.S.C. 20d (Supp. III). Host argues that its proposal in effect became a modified fact sheet to which Fred Harvey, and no one else, was permitted to respond. This, it is contended, is a violation of 16 U.S.C. 20d.

The provisions of 16 U.S.C. 20d read as follows:

The Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or may grant a new contract or permit to the same concessioner upon the termination or surrender before expiration of a prior contract or permit. Before doing so, however, and before granting extensions, renewals or new contracts pursuant to the last sentence of section 20c of this title, the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result thereof.

In a report dated May 22, 1969, the Interior Department states that the exchange of telegrams did not change or attempt to change the position of the National Park Service in limiting developments on the South Rim of Grand Canyon to those facilities called for in the Fact Sheet and as set forth in the contract. The report continues:

* * * The fact sheet established the parameters of what the Service believed would be reasonable and desirable for the foreseeable future. There was a meeting of the minds between Fred Harvey, Inc., and the Service. Accordingly, a contract was signed on behalf of Fred Harvey, Inc., by its President on January 14. The usual 60 day waiting period, during which certain committees of the Congress had the opportunity to consider the proposed contract, followed the signing of the contract by Fred Harvey, Inc.

It was during the waiting period that the exchange of telegrams took place. Section 17 of the concession contract with Fred Harvey provides that the concessioner will construct such additional facilities, over and beyond those specifically required in the contract, as the Secretary, in his judgment, may at a later date deem appropriate. The purpose of the Service telegram was to obtain a preliminary reaction from Fred Harvey, Inc. as to its willingness, at a later

date and as might conceivably become necessary, to consider an investment of the dollar magnitude suggested by the Host International proposal. We believe Fred Harvey, Inc. recognized the preliminary nature of the Service interest as evidenced by the wording of the telegraphic response by Fred Harvey, Inc.

The reference to the Host International proposal in this telegram was perhaps unfortunate; however, there was never any desire or intent to modify, qualify, or affect our decision to restrict the developments at the South Rim.

Our investigation into the reasons for the exchange of telegrams revealed that the Department was prompted by a desire to have in writing an indication from Harvey that it was ready to undertake any additional development that might be requested under section 17 of the contract should it be decided, 2 or 3 years from the present, that a $15 million development such as that proposed by Host was desired for the Park. Since such a written statement from Harvey was not on hand the Director, NPS, sent the telegram of March 14, 1969, to obtain written confirmation that Harvey would meet the equivalent investment proposals of Host.

An examination of the Department's negotiation file on the contract reveals that after the exchange of telegrams, but before execution of the contract, the legal effect of the telegram exchange was given consideration by responsible officials of the Interior Department. In a memorandum dated March 21, 1969, the Assistant to the Director for Concession Management, NPS, and a member of the staff of the Office of the Solicitor, concluded that there was no legal obstacle to the execution of the contract since the exchange of telegrams was nothing more than a reaffirmation of section 17 by Harvey.

We cannot agree that the exchange of telegrams was a mere reaffirmation of section 17 of the contract. In our opinion, the exchange resulted in a substantive and fully effective amendment or modification of the contract.

Section 17 of the contract, which was also set forth in the Fact Sheet, provides, in pertinent part:

Sec. 17. *Preferential Right.* (a) * * * The Secretary will request the Concessioner to provide such new or additional accommodations, facilities, or services, of the same character as the Secretary may consider necessary or desirable for the accommodation and convenience of the public. If the Concessioner doubts the necessity, desirability, timeliness, reasonableness, or practicability of such new or additional facilities, the Concessioner shall be allowed sixty (60) days in which to prepare and present its case but, after consideration of the Concessioner's presentation and such hearings or testimony as the Secretary may consider appropriate, the decision of the Secretary in the premises shall be final. *If, after such decision, the Concessioner declines or fails within a reasonable time to comply with the request or demand of the Secretary, then the Secretary may, in his discretion, authorize others to provide such accommodations, facilities, or services,* but only upon terms and conditions substantially equivalent to those offered or allowed to the Concessioner. * * * [Italic supplied.]

Under the express terms of section 17 there is no definite commitment that the concessioner will provide such new or additional accommodations, facilities or services requested by the Secretary. He may

decline to do so and if he does the Secretary may authorize others to provide the accommodations and facilities. Under the terms of the contract as they existed prior to the exchange of telegrams Fred Harvey was legally obligated to expend no more than $5 million in the first 10 years of the term. However, by expressly agreeing to "meet in all respects the equivalent investment proposals of Host International as may be required by the Secretary pursuant to the proposed new contract" Fred Harvey has obligated itself to expend $15 million within the first 5 years of the term if the Secretary requires that this be done. The telegrams constituted an offer and an acceptance and, in our opinion, effectively modified the contract initially proposed.

We do not believe, however, that the provisions of section 5 of the 1965 act were violated by the above actions of the parties. The terms of section 5 vest broad discretion in the Secretary of the Interior in awarding concession renewal contracts. While the award of the contract to Fred Harvey under the circumstances presented here would have been highly questionable under normal competitive rules applicable to the awarding of Federal contracts, there is nothing in the statute that requires that the contract be awarded under the normal rules. Indeed, section 5 of the 1965 act was not intended by the Congress to set up a bidding procedure but only to assure all interested parties that in negotiating the contract all relevant factors would be taken into account. One of these factors, and a very important one in the eyes of the Congress, was the desirability of maintaining continuity of operations and operators. See H. Rept. No. 591 to accompany H.R. 2091 (the bill which became law), 89th Cong., 1st sess., page 5, and S. Rept. No. 765 to accompany H.R. 2091, 89th Cong., 1st sess., pages 4 and 5. Both reports contain the following identical comments on section 5 of H.R. 2091:

> Sixth, the bill provides that established concessioners who have performed satisfactorily shall be given preference in the renewal of old contracts and in the negotiation of new contracts. The Secretary may also, if circumstances suggest the desirability of such a course of action, extend or renew existing contracts upon or before their expiration. Extensions or renewals before expiration are sometimes necessary to enable a concessioner to raise capital for expanded improvements or, in cases of contracts due to expire within a year or two, to permit both the Government and the concessionaire to know where they will stand in the future and thus to assure continuity of park operations.
> Neither the preference just spoken of nor the right to extend or renew is absolute. The bill requires the Secretary to give public notice of his intentions to extend or renew and to consider and evaluate all proposals received as a result thereof. *This is not, and is not intended to be, a bidding procedure, with the award automatically going to the high bidders,* but it is intended to bring to the attention of the public, the Secretary, and all interested parties the situation and to assure all concerned that in negotiating the new contract all relevant factors are taken into account. *One of these factors, of course, and a very important one, is the desirability of continuity of operations and operators.* [Italic supplied.]

To the same effect see the statements of Representative Wayne N. Aspinall, Chairman of the House Committee on Interior and Insular Affairs, during the debate on the bill reported on page 22786, Congressional Record, September 14, 1965 (111 Cong. Rec. 23632).

On the basis of the statute and its legislative history we cannot conclude that the Interior Department misapplied the preference provision when it allowed Fred Harvey, in effect, to match the Host investment proposal.

We view the exchange of telegrams as a continuation of the negotiation process initiated by the notice in the Federal Register in September 1968 and, as such, did not require the issuance of a new Fact Sheet under which new proposals would be solicited. Moreover, assuming that any new Fact Sheet to be issued would be based on the investment proposals of Host, we see no useful purpose to be served by a resolicitation of proposals at this late date in view of the preference provisions of the 1965 act and Harvey's already established obligation to meet Host's investment proposals if required by the Secretary.

Of more serious import, in our opinion, is the failure of the Interior Department to abide by the requirements of 16 U.S.C. 17b–1 which reads as follows:

> The Secretary of the Interior shall on and after July 31, 1953, report in detail all proposed awards of concession leases and contracts involving a gross annual business of $100,000 or more, or of more than five years in duration, including renewals thereof, sixty days before such awards are made, to the President of the Senate and Speaker of the House of Representatives for transmission to the appropriate committees.

Since, in our opinion, the exchange of telegrams effectively modified the contract reported to the Congress on January 16, 1969, the contract executed on March 26, 1969, by the Interior Department was not the same contract reported to the Congress earlier and, thus, the 60-day waiting period set forth in the statute which requires reporting *in detail* was not met. While it is true that the statute does not set forth the consequences resulting from a failure to meet its provisions and cannot, therefore, be construed as automatically voiding any contract made in violation of its terms, we think that the contract is voidable at the sole option of the Government. Compare *United States* v. *New York and Porto Rico Steamship Company*, 239 U.S. 88, which in our opinion involved a violation of a more significant procedural statutory requirement than that in the present case and in which the Supreme Court observed:

> * * * Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice.

The question whether the contract should be voided is a matter within the discretion of the Interior Department which made the con-

tract and not this Office since we can take appropriate action in such cases only when we conclude that the contract is void, not voidable. By letter of today we are advising the Secretary of the Interior of our conclusions in this respect.

In view of the foregoing considerations your protest is denied.

[B-167198]

Unions—Federal Service—Dues—Deduction Discontinuance

The discontinuance of a payroll allotment for membership dues in favor of an employee organization is subject to 5 U.S.C. 5525 as implemented by Civil Service Regulations and, therefore, such an allotment may only be revoked twice a year. A request for revocation received between March 2 and September 1 is discontinued at the beginning of the first pay period commencing after September 1, and a revocation request received between September 2 and March 1 is discontinued effective at the beginning of the pay period commencing after March 1. Whether an employee may have a legal claim against an employee organization for dues paid under an allotment covering periods subsequent to the date he resigned his membership is a matter between the employee and the organization.

To Lieutenant Colonel T. W. Fitzgerald, August 12, 1969:

We refer to your letter of May 1, 1969, AMSMI-KF, transmitted here by letter of June 9, 1969, from Chief, Operating Activities Division, Office, Chief of Finance and Accounting, Office of the Comptroller of the Army, wherein you request a decision as to when a payroll allotment for membership dues in favor of an employee organization should be discontinued following notification by the employee concerned to the payroll office of the employing activity that he has resigned his union membership and to discontinue the allotment. We understand that no notification had been received by the agency or employee showing acceptance of the resignation by the union.

The applicable regulations promulgated by the Civil Service Commission pursuant to 5 U.S.C. 5527 in implementation of 5 U.S.C. 5525 are as follows:

§ 550.307(e). An allotment for the payment of dues to an employee organization may be revoked by the allotter only as provided by § 550.308(e).

* * * * * * *

§ 550.308 Discontinuance of allotment.

An agency shall discontinue paying an allotment when:

* * * * * * *

(d) Except as provided by paragraph (e) of this section, the circumstances under which an allotment is permitted under § 550.304 no longer exist;

(e) The written revocation of an allotment for the payment of dues as authorized by § 550.304(a)(5) is received in the employee's payroll office either by March 1 or September 1 of any calendar year. In this case the agency will discontinue the allotment at the beginning of the first full pay period for which a deduction would otherwise be made either after March 1 or September 1, as appropriate * * *

Under the controlling statutory provision, 5 U.S.C. 5525, as implemented by regulations of the Civil Service Commission issued pursuant to 5 U.S.C. 5527 and Executive Order No. 10982, allotments for union dues can be revoked only 2 times a year. Under such regulations when a request for revocation of an allotment for union dues is received in the payroll office of the employing activity between March 2 and September 1 of any year, the allotment is to be discontinued at the beginning of the first pay period commencing after September 1, and when a request for revocation is received between September 2 and March 1 the allotment is to be discontinued effective at the beginning of the pay period commencing after March 1 of such year.

When an employee authorizes an allotment for union dues, he does so subject to all requirements and conditions specified in the controlling regulations, including those relating to the discontinuance thereof. We find no exception to the application of the dues allotment provisions of such regulations in the case of an employee who notifies an agency that he has resigned his union membership. Whether the employee may have a legal claim against the employee organization for dues paid the organization under the allotment covering periods subsequent to the date he resigned his membership in such organization is a matter between the employee and the organization.

[B–167492]

Contracts—Negotiation—Evaluation Factors—Competitive Advantage Precluded

When a sole-source procurement solicited under 10 U.S.C. 2304(a)(13) to assure standardization and interchangeability of equipment parts is broadened to permit the submission of other proposals, adding a $40,000 evaluation factor to proposals other than the proposal of the sole-source offeror to cover the costs resulting from furnishing units different than the sole-source design without providing an opportunity to discuss the evaluation factor would be disadvantageous to the Government in making an award. The presence or absence of an evaluation factor and the amount of the factor can have a price impact and, therefore, a proponent whose offer was conditioned upon discussion of the evaluation factor and possible price reduction should be given an opportunity for discussion and another round of price revisions permitted.

Contracts—Negotiation—Evaluation Factors—Estimated Cost Higher Than Factor Used

The use of a $40,000 evaluation factor, when the factor estimated by the contracting office as $41,000 can be supported by reliable experienced cost data would be inappropriate. In using the lesser evaluation factor, the difference of $1,000 in a close price competition could have a material bearing in determining the low offer.

To the Secretary of the Navy, August 12, 1969:

Reference is made to letter 00J:RHM:jaw N00024–69–R–7493(S) Ser 63 of July 11, 1969, from the Director of Contracts, Naval Ship Systems Command, requesting a decision whether an award may be

made under request for proposals N00024–69–R–7493(S) without further discussion or negotiation.

Since no award has been made and a negotiated procurement is involved, our Office is restricted in its recitation of the facts. Paragraph 3–507.2 of the Armed Services Procurement Regulation (ASPR).

The initial request for proposals was restricted to a single source under a secretarial determination and findings made pursuant to 10 U.S.C. 2304(a)(13), authorizing the negotiation of contracts when it is necessary to assure standardization and interchangeability. Subsequently, because of the interest expressed by another source, the secretarial determination and findings were broadened to permit the submission of a proposal by other than the original sole source; however, an evaluation factor was provided with respect to any proposal from the new source to cover additional costs resulting from the furnishing of units different than the sole-source design. Thereafter, by letters of May 27, 1969, the interested concerns were advised of some changes in the specifications and that a $40,000 evaluation factor would be added to any proposal offering units not identical to those currently being installed. The May 27 letter further advised:

> In view of the foregoing changes, you are invited to submit a revised price proposal or to advise that your previous proposal remains unchanged. The Government may award a contract, based on offers received, without discussion of such offers. Accordingly, each offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.

It stated also that the closing time for the receipt of the proposal was 4:30 p.m., June 5, 1969, and that any offer received after that time would be treated as a late proposal in accordance with prescribed procedures.

On May 28, a source other than the sole source requested information explaining how the $40,000 factor was computed. This new source was advised by the Navy that the information would not be furnished and that the factor would not be changed.

By letter of June 4, 1969, the same source submitted a revised price proposal in which it expressed concern over the application of the $40,000 evaluation factor. The letter recognized that certain costs to the Government would be applicable, but expressed the view that the factor utilized was grossly overestimated and indicated a willingness to discuss the matter during negotiation with a possible equitable adjustment in price at that time.

The July 11 letter from the Director of Contracts has advised that the costs resulting from furnishing units other than the sole-source design have been reviewed by the Command which is satisfied that they represent a fair estimate since the costs have actually been estimated

to be $41,000 rounded out to $40,000. It is stated that the determination of the factor is a matter within the Command's area of responsibility and that it is not proper for negotiation. Further, it is stated that, while the May 27 letters did not strictly comply with the requirements of ASPR 3-805.1(b) with regard to the closing of negotiations, particularly in that offerors were not notified that, except for notice of unacceptability of proposals, no information would be furnished any offeror after the date specified until award was made, and that negotiations were, therefore, never formally closed, the negotiations were informally closed on June 5, citing B-165837, March 28, 1969. The Command states that further negotiation would approach the use of auction techniques and it therefore does not propose to afford offerors a further opportunity to submit revised offers.

We agree that the determination of the evaluation factor is a matter within the Command's area of responsibility. However, in our opinion, the presence or absence of an evaluation factor and the amount thereof can have an impact upon the prices offered and in that sense can affect one of the essential terms (price) of the contract. We believe that any prospective offeror or bidder who requests an opportunity to discuss the basis for a particular evaluation factor ordinarily should be accorded such an opportunity. Therefore, we conclude that the new source who requested an opportunity to discuss the $40,000 evaluation factor before submitting its revised proposal should have been granted that opportunity at that time. We recognize that opportunity for such discussion might not have resulted in any change in the amount of the evaluation factor, but the offeror, at least, might have satisfied itself, before submitting a revised offer, of the correctness of the administrative position or, in the absence thereof, would have had an opportunity to show the procurement activity wherein it may have erred. Moreover, it is entirely conceivable that changes benefiting the Government could result from such discussions. In this regard, ASPR 3-507.2(b) provides for discussion of technical and other information with prospective contractors and contemplates the issuance of amendments to request for proposals which reflect the results of such discussions. Thus, the ASPR seems to contemplate that offerors will have an opportunity to discuss those aspects of requests for proposals which are pertinent to the preparation of responses thereto. Since the objective of the procurement statute and implementing regulations is to assure that the award of a negotiated contract will be made to that responsible offeror whose offer is most advantageous to the Government, price and other factors considered, we do not believe that an otherwise eligible offeror should be denied the opportunity to discuss the elements of an evaluation factor which is directly prejudicial to its competitive position.

Accordingly, since the new source was deprived of an opportunity

to discuss timely the evaluation factor and it conditioned its offer upon such a discussion and explanation and possible price reduction, we believe it would be appropriate at this time to enter into discussions with that source, and any other responding source, concerning the evaluation factor and to permit another round of price revisions. We feel that this is especially required since negotiations have not been formally closed (*cf.* B–165837, *supra*). Whether such procedure approaches an auction technique is not material, since additional pricing information is necessary to correct what we believe has been an omission in the procurement process. In this regard, it is significant that the standing and prices of the offerors have not been revealed. Further, in 48 Comp. Gen. 536, February 13, 1969, it was stated:

> * * * In a sense, the very conduct of negotiations after receipt of initial proposals may be argued to resemble an auction technique, but this is what the law calls for. There is nothing inherently illegal from a procurement standpoint in an auction * * *.

In addition, we question the amount of the $40,000 evaluation factor when a $41,000 factor was estimated by the Navy Shipyard at Philadelphia. If the estimate was reasonably accurate, as the report seems to contend, it was inappropriate to use a lesser figure. We are uninformed as to the basic details of the $41,000 estimate; however, if it is supportable by reliable experienced cost data, the $41,000 amount should have been utilized. In close price competition, a difference of $1,000 may have a material bearing in determining the low offer.

[B–145471]

Missing Persons Act—Military Personnel—Members Injured While Stationed in United States—Transportation Rights

Members of the uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside the United States—whether or not they are in a duty, leave, or en route status—are entitled to the transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and the Joint Travel Regulations may be revised accordingly. The amendments to section 12 of the Missing Persons Act and its reenactment as 37 U.S.C. 554 removed the restriction that the act applies only to those members injured outside the United States. However, absent reference in 37 U.S.C. 554 to disease or illness, the section does not apply to a member who becomes ill or contracts a disease which does not result in his death while in an active duty status.

To the Secretary of the Army, August 15, 1969:

Reference is made to letter of June 14, 1969, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting a decision whether Volume 1 of the Joint Travel Regulations may be revised to show the transportation benefits of 37 U.S.C. 554 as applicable to cases of members of the uniformed services, regardless of

pay grade, who contract a disease or incur an injury by any means (auto accident, burns, etc.) while they are stationed inside the United States, whether or not they are in a duty, leave, or en route status. The request has been assigned PDTATAC Control No. 69-24, by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary states that the Missing Persons Act was originally enacted as temporary wartime legislation and apparently section 12 thereof (presently 37 U.S.C. 554) has generally been interpreted as applying only to members stationed outside the United States insofar as concerns casualty cases other than death. However, he indicates that our decision, 44 Comp. Gen. 43 (1964), appears to imply that section 554 may also apply to members, without regard to pay grade, who are injured while stationed inside the United States.

He says that this view is substantiated by the amendments to and deletions from that section by section 1 of the act of August 29, 1951, 65 Stat. 207, and section 5(2) of Public Law 90-83, September 11, 1967, 81 Stat. 221. He states further, however, that it seems obvious that the provisions of 37 U.S.C. 554 would not apply to cases involving a disease or illness since neither word appears in the text material of the law.

Section 12 of the Missing Persons Act, 56 Stat. 146, as amended, was amended by Public Law 131, dated August 29, 1951, 65 Stat. 207 (50 U.S.C. App. 1012 (1952 ed.)). The legislative history of the 1951 amendment, as contained in S. Rept. No. 584, Committee on Armed Services, 82d Cong, 1st sess., discloses that the principal intent of the amendment was to delete the phrase "as the result of military or naval operations" contained in the section, to overcome the interpretation of our Office in 28 Comp. Gen. 270 (1948), that the phrase was applicable to deceased and injured members as well as those in a missing status. The report stated that the section was revised to

> * * * make it clear that it was not intended to deprive dependents of injured and deceased personnel of the benefits of the section, even though such injury or death did not result specifically from military or naval operations.

As finally approved the amended section retained the classification of "injured" which the House of Representatives version of the measure had removed. Also, the following proviso was added:

> When the person is in an "injured" status, the movement of dependents or household and personal effects provided for herein may be authorized only in cases where the anticipated period of hospitalization or treatment will be of prolonged duration.

In addition, the section required of all classifications cited therein, that

> No transportation shall be authorized pursuant to this section unless a reasonable relationship exists between the condition and circumstances of the dependents and the destination to which transportation is requested.

Section 12 of the Missing Persons Act was further amended and made permanent by Public Law 85–217, August 29, 1957, 71 Stat. 491. By section 5 of Public Law 89–554, dated September 6, 1966, 80 Stat. 625, the Missing Persons Act was reenacted and recodified as chapter 10, Title 37, U.S. Code, sections numbered 551 to 558 inclusive, of which section 554 replaced section 12 of the 1942 act as amended.

The pertinent provisions of section 554 (a), (b), (c), and (d), when enacted were as follows:

(a) In this section "household and personal effects" and "household effects" may include, in addition to other authorized weight allowances, one privately owned motor vehicle which may be shipped at United States expense when it is located outside the United States, or in Alaska or Hawaii.
(b) Transportation (including packing, crating, drayage, temporary storage and unpacking of household and personal effects) may be provided for the dependents and household and personal effects of a member of a uniformed service on active duty (without regard to pay grade) who is officially reported as dead, injured, or absent for a period of more than 29 days in a missing status—
(1) to the member's official residence of record;
(2) to the residence of his dependent, next of kin, or other person entitled to custody of the effects, under regulations prescribed by the Secretary concerned; or
(3) on request of the member (if injured), or his dependent, next of kin, or other person described in clause (2), to another location determined in advance or later approved by the Secretary concerned, or his designee.
(c) When a member described in subsection (b) of this section is in an injured status, transportation of dependents and household and personal effects authorized by this section may be provided only when prolonged hospitalization or treatment is anticipated.
(d) Transportation requested by a dependent may be authorized under this section only if there is a reasonable relationship between the circumstances of the dependent and the requested destination.

By section 5(2), Public Law 90–83, September 11, 1967, 81 Stat. 221, subsection (a) of section 554 was amended by deleting the phrase "when it is located outside the United States, or in Alaska or Hawaii."

We are of the opinion that the changes in section 12 of the Missing Persons Act, as amended, including its reenactment by section 5 of Public Law 89–554, as 37 U.S.C. 554, are sufficiently broad to provide authority for the movement of dependents and household and personal effects in the case of a member of a uniformed service on active duty without regard to pay grade (including periods while on authorized leave, or while in an en route status) who is injured in the United States or outside the United States, if other statutory qualifications are met.

Accordingly, insofar as the cases of members who are officially reported as having incurred injuries in the United States are concerned, we have no objection to the proposed changes in the Joint Travel Regulations. Since, as the Assistant Secretary indicates, the case of a member who becomes ill or contracts a disease (which does not result in his death while in an active duty status) is not enumerated in section 554, the section has no application in such cases.

[B-148946]

States—Federal Aid, Grants, Etc.—Disaster Relief—Eligibility as Public Facility

The phrase "essential public facilities" as used in the so-called Federal Disaster Act (42 U.S.C. 1855-1855g), which authorizes assistance in any major disaster to States and local governments for emergency repairs to and temporary replacements of public facilities, does not mean all public facilities. To hold otherwise would make the word "essential" superfluous or void, contrary to the rule of statutory construction. The phrase may be defined as relating to those essential public facilities that are designed to serve the public at large, but limited to the extent of public entity responsibility, so that when a contract between a public entity and private entity exists, the essential public facility involved shall be regarded as whatever the public entity's responsibilities are under the contract.

States—Leased Property—Damages—Disaster Assistance

The cost of the emergency repairs occasioned by tornado damage to municipal airport buildings that are 80 percent leased and rental income used to maintain the facilities which are available for use by United States military and naval aircraft may be reimbursed under the so-called Federal Disaster Act (42 U.S.C. 1855–1855g), authorizing assistance to States and local governments to repair or provide replacements of essential public facilities damaged during a major disaster, to the involved municipal airport authority to the extent of its responsibility under the lease to repair the leased buildings or terminate the lease.

To the Director, Office of Emergency Preparedness, August 19, 1969:

Reference is made to your letter of August 5, 1969, which, you state, has a two-fold purpose: First, to obtain refinement of the meaning we ascribe to the phrase "essential public facilities" as that phrase is employed in the administration of the so-called Federal Disaster Act, Public Law 875 of the 81st Congress, 64 Stat. 1109, as amended, 42 U.S.C. 1855–1855g; and second, within the context of that refinement, to obtain a decision as to whether we would take exception to the grant of financial assistance under the act pursuant to a request filed by the Salina Airport Authority, Kansas.

One of the purposes of Public Law 875 of the 81st Congress, approved September 30, 1950, 64 Stat. 1109, as amended, 42 U.S.C. 1855 1855g, as disclosed by section 1 thereof, is to provide for Federal assistance to States and local governments "to repair essential public facilities in major disasters." Subsection (d) of section 3 of the act, as amended, 42 U.S.C. 1855b, authorizes Federal agencies, when directed by the President, to provide assistance in any major disaster by "making emergency repairs to and temporary replacements of public facilities of States and local governments damaged or destroyed in such major disaster * * * and making contributions to States and local governments * * *" for such purposes. Under section 3, according to your letter, Federal funds have been made available for emergency repairs to and temporary replacement of such essential public facilities

of local governments as water systems, sewage systems, streets, bridges, public buildings and the like. You advise that OEP regulations provide that "a public facility to be eligible for assistance must be essential to the health, safety or welfare of the people." (32 CFR 1710.10)

In 1962, you requested a decision from the Comptroller General as to whether exception would be taken if financial assistance were provided under Public Law 875 for the repair of certain buildings at a county airport in Texas damaged during a major disaster. In that case a number of the buildings were rented to commercial enterprises not directly related to the operation of the airport as such, and some were vacant. You point out that in reaching our decision, we took no exception to payments for the repair of the aforesaid buildings, and made the following statement (42 Comp. Gen. 6 (1962)):

> The term "public facilities" is not defined in the act itself. However, there is nothing in the basic act or its legislative history to indicate a Congressional intent to ascribe any special or technical meaning to the term. Hence, to effectuate the policy which the Congress has formulated with reference to the operation of this program, such term must be interpreted in its ordinary and popular sense as relating to essential public facilities which primarily are designed to serve the public at large.

Your experiences have led you to conclude that "essential public facilities" under Public Law 875 should be defined as relating to facilities which are designed to serve the public at large, but limited to the extent of public entity responsibility therefor, so that when a contract between a public entity and a private entity exists, the essential public facility shall be regarded as whatever are the public entity's responsibilities under said contract. You ask for our concurrence with such definition.

In view of our informal suggestion that you present a specific case to serve as an example of the definition, you submit the following specific case:

> On July 15, 1969, the President declared a major disaster in Kansas as a result of damage caused by a tornado. The municipal airport in Salina, Kansas, suffered extensive damage.
>
> The Salina Airport Authority is a municipal corporation organized under the laws of Kansas. The Airport was deeded to the Authority by the General Services Administration with the understanding that revenue from airport buildings would be used to maintain the facility. The Airport Authority leases approximately 80% of the airport buildings to Beech Aircraft Corporation of Wichita, Kansas. *The lease obligates lessor (Salina Airport Authority) to repair or terminate.* A number of these buildings were damaged in the disaster.
> The Airport Authority has requested Federal assistance under the Act for the repair of the leased buildings.
>
> This case is quite similar to the 1962 case involving the Texas airport. While the Salina Airport does not revert to the United States in the event of a national emergency, it is required to be available for use by United States military and naval aircraft. Rental income derived from the airport buildings provided 75% of total income of the airport in 1968.

You are inclined to consider the leased buildings as integral to the airport and an essential public facility within the meaning of the act and your regulations issued thereunder to the extent of Salina Airport Authority's responsibility to make repairs. You inquire as to whether we would take exception to such financial assistance.

Insofar as your first problem is concerned, we would like to point out that it is clear from section 1 of Public Law 875, as well as its legislative history, that one of the purposes of the act is to make Federal funds available for emergency repairs to and temporary replacement of "essential public facilities," of local governments. Had the act been intended to encompass all "public facilities" it appears that the word "essential" would have been omitted. It is a well-established rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another. Section 4705, Sutherland, Statutory Construction. To hold that "essential public facilities" means all "public facilities" would give no effect to the word "essential" as used in section 1 of Public Law 875 and would make such word superfluous or void.

Keeping the foregoing in mind, we would have no objection to a definition of "essential public facilities" under Public Law 875, which would relate such facilities to those "essential public facilities" designed to serve the public at large, but limited to the extent of public entity responsibility therefor so that when a contract between a public entity and a private entity exists the essential public facility involved shall be regarded as whatever the public entity's responsibilities are under such contract. *Cf.* 44 Comp. Gen. 746 (1965).

Subject to what is stated above, we concur with your proposed refinement of the phrase "essential public facilities" as set forth in your letter.

Insofar as the Salina Airport is concerned, it appears from your letter that the Salina Airport Authority leases 80 percent of the airport buildings to Beech Aircraft Corporation (Beech); that the airport was deeded to the Authority by the General Services Administration with the understanding that revenue from the airport buildings would be used to maintain the facility; that in 1968 rental income from the airport buildings provided 75 percent of the total income of the airport; that under the lease with Beech the Airport Authority is required to repair the leased buildings (or terminate the lease); and that the airport is required to be available for use by the United States military and naval aircraft.

Thus, as stated in your letter, the instant case is quite similar to that considered in 42 Comp. Gen. 6. Accordingly, in view of the facts and circumstances disclosed by the present record, the rationale of our above-cited decision would appear equally applicable to the instant case. Hence, we would not take exception to the expenditure of funds under Public Law 875 to provide financial assistance to the Salina Airport Authority for emergency repairs to the leased airport buildings, to the extent of the Airport Authority's responsibility to make repairs to such buildings.

[B-167262]

Bids—Mistakes—Subitems

Under an invitation for bids which listed 30 items, some comprising two or more subitems, but which did not provide that either unit prices or the aggregate bid price would govern, the rejection of the low bid was proper where the bidder refused correction of a mistake in the subtotal of four subitems correctly extended that would increase the subtotal, because the resultant increase in the aggregate bid price would displace the low bid, but claimed error in a subitem computation and entitlement to the contract award on the basis of the originally submitted total base bid price. No discrepancy having occurred between the subitem and extended price, the reduction in the subitem price was essential for the low bid to remain low, and absent evidence of the intended subitem price as required by section 1-2.406-3(a)(2) of the Federal Procurement Regulations, rejection of the erroneous bid was required to preserve the integrity of the competitive bidding system.

To Cake, Jaureguy, Hardy, Buttler & McEwen, August 20, 1969:

We refer to your protest, by telegram of June 18, 1969, and supplemental correspondence, on behalf of Glenn W. Shook, Inc. (Shook), against the award by the Department of Agriculture of a contract to Mann Construction Co., Inc. (Mann), for construction of Diamond Lake Recreation Area Water and Sewer Systems and Buildings—Phase II, Umpqua National Forest, Douglas County, Oregon, under invitation for bids (IFB) R6-69-151, issued April 30, 1969.

The IFB listed 30 items, a number of which were comprised of two or more subitems, with spaces for insertion of prices for each subitem. No spaces were included for item totals as such where items were divided into subitems, but spaces were included for subtotals of groups of items and subitems, as follows:

Items 1 through 10 appeared under the heading "Water Supply & Distribution System," and following item 10 was a line "SUBTOTAL WATER SYSTEM"; Items 11, 12 and 13, were headed "Waste Water Sumps & Hydrants" and followed by a line "SUBTOTAL WASTE WATER SUMPS & HYDRANTS"; Items 14 through 23 were headed "Sewer System" and followed by a line "SUBTOTAL SEWER SYSTEM"; Items 24, 25 and 26 were headed "Electrical" and followed by a line "SUBTOTAL ELECTRICAL"; Item 27, consisting of four subitems, was headed "Buildings" and followed by a line "SUBTOTAL BUILDINGS," there being no other building items. Immediately beneath the building subtotal line was a line "TOTAL BASE BID"; Items 28, 29, and 30, each consisting of several subitems, were additive items, and following them was a line "SUB-TOTAL ADD. ITEMS," with a final line "GRAND TOTAL" below it.

Following the above-described schedule there appeared a statement of the terms of award, reading in part as follows:

Items 28, 29, and 30 are additive items. The Government may award any number of these subitems in addition to the "base bid." The award will be made to the responsible bidder offering the lowest total price for the "base bid," plus those additive subitems the Government can award, available funds considered.

Your protest is concerned only with Item 27, which reads as follows:

Item No.	Description	Estimated quantity	Unit	Unit bid price	Amount bid
27	Buildings: Diamond Lake C.G. and Information Center:				
	a. Comfort Station Generator Bldg., Plan No. 960 (Includes engine-generator and all appurtenances).	1	Each	$	$
	b. Comfort Station Plan No. 1106–A (Sites 3–1, 3–7, 5–12, 6–1, 6–3a, 6–11).	6	Each	$	$
	c. Comfort Station Plan No. 1110–A (Sites 3–3, 5–1, 5–6, 5–9).	4	Each	$	$
	d. Comfort Station Plan No. 1110–A w/dry transformer, site 4–5.	1	Each	$	$
	Subtotal Buildings			$	$

On June 4, 1969, the five bids received in response to the IFB were opened. The total base bids, as amended by timely modifications, ranged in the following order:

Bidder	Price
Glenn W. Shook	$972,636.95
Mann Construction Co	989,273.50
D. G. Quinton Co., Inc	1,156,452.30
Teeples & Thatcher Contractors, Inc	1,197,729.00
Wildish Construction Co	1,302,174.00

Analysis of Shook's bid revealed that while Shook had made proper extensions of the unit prices quoted on the four subitems under Item 27 (i.e., the amount bid column reflected the product of the unit prices multiplied by the number of units required), the actual total of the extended subitem prices was $157,540, or $34,200 in excess of the amount of $123,340 entered by Shook for Item 27 opposite "SUB-TOTAL BUILDINGS." Further, the amount of $972,636.95 quoted by Shook as the base bid price could be reconciled only by using the lower amount entered by Shook as the total price of Item 27.

On the basis that the unit [subitem] prices listed by Shook represented Shook's intended bid, the contracting officer notified Shook that the total bid would be adjusted in accordance with the unit prices to the total of $1,006,836.95, an action which would result in the replacement of Shook by Mann as the lowest bidder. In a reply by letter dated June 6, Shook protested the adjustment, stating, among other things, that its intended price for subitem 27a was $29,940; that it had made a mistake in copying the price of the subitem as $64,140 instead of $29,940; that since award was to be made on the total base bid, unit prices did not govern; that the purpose of the unit prices was for computation of progress payments; that Shook intended its total prices to govern, not the unit prices; and that 42 Comp. Gen. 746 (June 27, 1963) and 38 Comp. Gen. 550 (February 13, 1959) stand for the proposition that a contract will be awarded on the total price bid, even though the total of the unit prices is greater than such total bid price, where the IFB has been on a total price basis and the bidder confirms its aggregate or total price as correct.

At this point, it may be noted that both the contracting officer and Shook have referred to the price of subitem 27a as the "unit price," and both parties have made reference to the "unit price" rule, stated in supply contracts in paragraph 1, Standard Form 33, under which unit prices govern in the event of an error in extension of price. Since there is no discrepancy between the unit and extended prices quoted by Shook for subitem 27a, clearly such unit price rule has no application to this case. Rather, the issue in this case is to what extent, if any, should subitem prices be considered in the event the total item price is not reconcilable with the actual total of the subitem prices and the total bid price in turn is not reconcilable with the arithmetical total of the items. For clarity, therefore, we shall use the term "subitem price" with respect to the amount shown in Shook's bid for the subitems which comprise Item 27 and "item price" for the amount shown for the total item.

In support of its claim of error, Shook furnished to the contracting officer copies of worksheets giving a breakdown of the elements of subitem 27a and showing a total price of $29,940 for the subitem, together with a computation of Shook's bid for the entire project showing a total base bid of $972,636.95 for the 27 base bid items. The Government's estimate for subitem 27a was $48,000, and the abstract of bids shows that the competing bids listed prices of $49,680, $62,000, $63,267, and $63,618 for the same subitem.

The contracting officer concluded that the discrepancies in Shook's bid were sufficient to indicate that a mistake had been made by Shook. However, since correction of the mistake was essential to Shook's re-

maining the lowest bidder and since the bid itself did not evidence the intended price, as is required by Federal Procurement Regulation (FPR) 1-2.406-3(a)(2) in order to justify correction in such circumstances, the contracting officer concluded that the integrity of the competitive bidding system could be preserved only by rejecting Shook's bid. Accordingly, Shook was verbally notified on June 17 that its bid was rejected and that award was being made to Mann, and a confirming notice was transmitted by letter of June 18.

In your protest to our Office, which incorporates the prior protest made by Shook, you contend that since only an aggregate award was contemplated by the IFB and since Shook has made no claim of error in its aggregate bid, the aggregate amount quoted by Shook governs the amount of the bid. In this connection, you refer to 42 Comp. Gen. 746 (1963), which Shook also cited, as standing for the proposition that bids on an "all or none" basis must be accepted if they are for the lowest aggregate price. Further, you state that neither the invitation in 42 Comp. Gen. 746 nor the invitation in the instant procurement requires that the aggregate bid equal the total of the individual item bids. In addition, you point out that there is no language in the IFB common to unit price bids (as contrasted with aggregate or lump-sum bids) such as "unit prices shall govern."

You also contend that 43 Comp. Gen. 579 (1964), affirmed at 43 *id.* 817 (1964), which the contracting officer has cited in support of his action, does not apply to this procurement. In the procurement which was considered at 43 Comp. Gen. 579 the IFB provided that all extensions of unit prices would be verified by the Government and in case of variation between the unit price and the extension the unit price would be considered as the bid. The bid which quoted the lowest total price included several price extensions for various items which did not correspond to the unit prices and quantities involved. Correction of such extended prices as provided in the invitation resulted in higher item prices and in higher totals for each of the alternate base bids than were quoted by the bidder. The bidder offered an explanation after bid opening that the total price stated in the bid for each alternate reflected a lump-sum deduction from the actual total of the items, but the bid did not include any such information. On the basis, therefore, that the bid was ambiguous and that the ambiguity was created by the bidder, we upheld the rejection of the bid. In affirming our conclusion in 43 Comp. Gen. 817, we made the following statements at page 820:

> In our view, it is an essential of a valid bid or offer that it be sufficiently definite to enable the offeree to accept it with confidence that the contract so made can be interpreted and enforced without resort to extraneous evidence. In the case of private parties, an ambigous offer may of course be clarified or even changed by further communications which may then become a part of the

contract finally reached. In the case of the Government, however, where the contracting process is governed by the statutory and regulatory provisions for formal advertising and competitive bidding, we believe that it is improper to permit a bidder to clarify or explain by supplementary statements a bid which, as submitted, in so unclear in its statement of the important element of price as to leave substantial doubt as to the rights and obligations which would arise by accepting it. In the peculiar situation here presented, where a bid is readily susceptible of being interpreted as offering either one of two prices shown on its face, one of which would be the lowest bid while the other would not, we believe that it would be unfair to the other bidder or bidders affected to permit the bidder who created such ambiguity to elect which price it should attempt to support.

You urge that the facts of the instant case differ from the facts considered in 43 Comp. Gen. 579. The current IFB, you again stress, does not provide that unit prices govern and does not contain a unit price schedule, and there is nothing in the IFB to support a conclusion that unit prices are to govern. Further, you state, the contractor in the instant case does not agree to perform for the unit prices stated, the only purpose of which is for computation of progress payments and bid analysis. Accordingly, you contend, an aggregate or combined price being the governing factor in making award under the IFB, the converse of the reasoning in 43 Comp. Gen. 579 is applicable; that is, "the sum of the individual items which differ from the 'base bid' would be correctible so as to conform to the stated 'base bid'."

In addition, you take issue with the view stated in a Department of Agriculture legal memorandum that the Government could not enforce against Shook its "base bid" as submitted. In this regard, you claim that since the base bid was the indicated basis for evaluation of bids and was not altered by Shook's claim of mistake in subitem 27a, the base bid is for consideration as originally submitted. Citing 39 Comp. Gen. 36 (1959), which was affirmed at 39 *id.* 405 (1959), you state, "The Comptroller General has held that when both parties are aware of the error when award was made, a valid and binding contract, presumed to express the understanding of the parties is created."

The Department of Agriculture asserts that Shook's bid should be evaluated at $1,006,836.95, the total of the item prices as based on the subitem prices. The Department quotes, in this regard, from 48 Comp. Gen. 748, May 14, 1969, as follows:

The correction of mistakes in bid has always been a vexing problem. It has been argued that bid correction after bid opening and disclosure of prices quoted compromises the integrity of the competitive bidding system, and, to some extent at least, this is true. For this reason, it has been advocated that the Government should adopt a policy which would permit contractors to withdraw, but not to correct, erroneous bids. We do not agree completely with this position, since we believe there are cases in which bid correction should be permitted. We do agree that regardless of the good faith of the party or parties involved, correction should be denied in any case in which there exists any reasonable basis for argument that public confidence in the integrity of the competitive bidding system would be adversely affected thereby. The present case, it seems to us, falls in this category.

The IFB in the instant case carried no language to the effect that the aggregate or base bid price would govern the event of its variation from the actual total price of the various individual items, nor did the IFB include any information apprising bidders that the item and subitem prices were requested only for the Government's purpose in computing progress payments under the contract. The actual language of the bid signed by each bidder stated a proposal to perform the work described "for the following amounts shown on the attached schedule of items." In the circumstances, such provisions cannot be read into the IFB and it was incumbent upon each bidder to check the extended prices for each subitem and group of items, to verify the totals for each group comprised of two or more items or subitems, and to verify the total base bid, and, in the event a total item price did not correspond to the actual total of the particular subitems and/or the base bid price did not correspond to the actual total of the item prices, to furnish with the bid an adequate explanation for the price variance(s). B–156145, March 8, 1965.

Since Shook's bid contained nothing to indicate why the Item 27 total price did not correspond to the actual total price of the related four subitems, the Government was unable to ascertain from the bid itself which price Shook intended to quote on Item 27. Further, since the unsubstantiated lower Item 27 price was carried over into Shook's base bid price, the Government could not be assured under the bid as submitted that Shook would perform at the stated base bid price. Accordingly, Shook's bid, in our opinion, comes squarely within the purview of 43 Comp. Gen. 579 and 817 and B–156145, March 8, 1965, and is an ambiguous bid which may not be considered for award. See, also, 49 Comp. Gen. 12, July 3, 1969.

Our decision at 42 Comp. Gen. 746 (1963) is not applicable here since the bidder in that case verified the *aggregate* bid before any other bid was opened, and it is to be noted that there was no mistake in the item prices, each of which was comprised of two or more subitems. Further, it is to be borne in mind that even if the bid in 42 Comp. Gen. 746 had been evaluated on the basis of the separate item prices, the total price still would have been lower than the next bid, a factor which is not present in this case. Similarly, 38 Comp. Gen. 550 (1959) does not apply, there being no question of any ambiguity or mistake in bids in that case creating doubt as to the intended bids.

With regard to 39 Comp. Gen. 36, where the bidder elected to absorb an error in its bid covering the cost of an omitted item, we direct your attention to the fact that in that case there was no ambiguity in the bid and it would have been lowest with or without correction of the particular mistake; therefore, acceptance of the bid after waiver of

the mistake by the bidder did not operate to the prejudice of any other bidder and bound the bidder to perform at the original bid price.

It may also be observed that decisions dealing with "all or none" bids are not applicable, since bids properly classifiable in that category involve situations where awards of different items may be made to different bidders and the "all or none" bid is conditioned upon award of all items to the one bidder.

As to your complaint that the procuring activity did not resolve Shook's protest before award to Mann, thereby depriving Shook of an opportunity to pursue a preaward protest with our Office, we note that the protest which Shook filed with the contracting officer did not contain any request that the matter be forwarded to our Office for consideration in the event of denial by the contracting officer. In the circumstances, the contracting agency properly could have made a determination without reference of the matter of our Office, as permitted by FPR 1-2.407-8(b)(2). See also B-125189, October 3, 1955, relating to administrative action by the Department of Agriculture in mistake in bid cases, and 46 Comp. Gen. 307 (1966) construing similar bid protest provisions in the Armed Services Procurement Regulation. Further, the record made available to our Office by the Department of Agriculture indicates that notice of the award to Mann was given by the Forest Service not only to Shook but to your Mr. Robert Rankin by telephone on June 17, 1969, the date the award was made, and was confirmed by written notice of June 18, the date of your protest to our Office, which we did not receive until June 19. Accordingly, we are unable to conclude that the contracting officer did not comply with the procurement regulations in this respect.

For the reasons stated, your protest is denied.

[B-163336]

Pay—Retired—Advancement on Retired List—Permanent *v.* Temporary Grade

The rule in *Jones* v. *United States* (187 Ct. Cl. 730) holding a retired enlisted member was entitled to be advanced on the retired list under 10 U.S.C. 6151 to the grade of chief warrant officer, W-3, the highest permanent grade formerly held by him and in which he served satisfactorily, even though the statute only authorized advancement to the grade of warrant officer, W-1, the highest grade in which he served satisfactorily under a temporary appointment, should be applied to all advancements under section 6151, as well as advancements under 10 U.S.C. 3963(a), 3964, 8963(a), and 8964, providing that the amount of retired pay depends upon service in the "highest temporary grade," in view of the fact that the court based its ruling on the earlier *Grayson*, *Friestedt*, and *Neri* decisions and considered all the arguments advanced in the *Jones* case against the conclusion reached.

To the Secretary of Defense, August 22, 1969:

Reference is made to letter of August 5, 1969, from the Deputy Assistant Secretary of Defense (Comptroller) requesting a decision on two questions relating to the extent that the rule in *Jones* v. *United States*, 187 Ct. Cl. 730, should be followed in the computation of retired pay of officers advanced upon retirement to the highest grade in which they satisfactorily served on active duty under a "permanent" appointment, notwithstanding that the statute under which advanced authorizes advancement to the highest grade in which the officer satisfactorily served under a "temporary" appointment.

A discussion concerning the question is contained in Department of Defense Military Pay and Allowance Committee Action No. 432.

The Committee Action points out that in *Jones* v. *United States*, decided May 19, 1969, the Court of Claims granted the plaintiff's motion for summary judgment, thereby holding that the plaintiff, a retired member of the naval service, was entitled to be advanced on the retired list under 10 U.S.C. 6151 to the highest permanent grade formerly held by him, even though the statute authorizes advancement to the highest grade in which he served satisfactorily under a "temporary" appointment. The court's judgment was based upon its decisions in *Grayson* v. *United States*, 137 Ct. Cl. 779 (1957); *Friestedt* v. *United States*, 173 Ct. Cl. 447 (1965); and *Neri* v. *United States*, 145 Ct. Cl. 537 (1959).

Grayson was federally recognized as of September 26, 1940, as brigadier general, Adjutant General's Department, Mississippi National Guard, was ordered to active duty for 12 months effective October 15, 1940, and was appointed brigadier general, National Guard of the United States, in February 1941, in which capacity he served on active duty from February 1941 to July 25, 1942. The Secretary of the Army determined that he had served satisfactorily for not less than 6 months while serving on active duty in the grade of brigadier general.

The Court of Claims said that under the provisions of section 203(a) of the act of June 29, 1948, ch. 708, 62 Stat. 1085, now codified in 10 U.S.C. 3963(a) and 8963(a), "It was satisfactory service in the grade that entitled the officer to an advancement, whether that grade was permanent or temporary," and that "Congress could not have intended to prefer service in a temporary grade over service in a permanent one." However, the court determined that Grayson's grade of brigadier general was temporary in nature, and that he was entitled to compute his retired pay on the basis of that grade.

In 37 Comp. Gen. 538 (1958) we said that the decision in the *Grayson* case "rests on the particular facts peculiar to that case" and that

cases believed to be "similar" to the *Grayson* case should be submitted to this Office for advance decision concerning the propriety of payment.

In *Friestedt* v. *United States*, the Court of Claims held that Friestedt (who was retired for disability while serving on active duty as an enlisted man) was entitled to retired pay benefits as a first lieutenant under the provisions of 10 U.S.C. 1372(2) authorizing computation of disability retired pay on the pay of the "highest temporary grade or rank in which he served satisfactorily" even though the highest grade in which he had served was the permanent grade of first lieutenant and he had never served in or held the temporary grade of first lieutenant at any time. Its decision in the *Friestedt* case was based on its prior holding in the *Grayson* case. In decision of July 8, 1966, 46 Comp. Gen. 17, we said that the rule of the *Friestedt* case may be applied to all disability retirements under 10 U.S.C. 1372(2), but not as to computation of retired pay under the provisions of 10 U.S.C. 3963(a), 3964, 6151, 8963(a) or 8964.

In *Neri* v. *United States*, the plaintiff served on active duty as an officer in the Army of the United States and was serving in the grade of captain, AUS, when he was retired for disability, although he had been previously appointed major, Officers' Reserve Corps, and held that grade at the time of his retirement. The Court of Claims said that his permanent rank of major in the Officers' Reserve Corps was just as real as his temporary rank of captain in the active service and that he was entitled to compute his disability retired pay on the pay of the grade of major. In decision of December 23, 1959, 39 Comp. Gen. 467, we said that we would follow the decision in the *Neri* case.

Earl Foster Jones served on active duty as a warrant officer, W–1, in the U.S. Naval Reserve from March 31, 1949, to June 14, 1951, and as a chief warrant officer, W–3, from June 15, 1951, to December 30, 1957, when he was discharged in order to reenlist on December 31, 1957, in the Naval Reserve. He served on active duty as an enlisted member through August 31, 1964. The highest temporary grade in which he served satisfactorily was warrant officer, W–1, and the highest permanent grade in which he served satisfactorily was that of chief warrant officer, W–3.

He was transferred to the Naval Reserve Retired List under 10 U.S.C. 6327 effective September 1, 1964, and advanced to the grade of warrant officer, W–1, with retired pay of that grade computed under 10 U.S.C. 6151, which authorizes advancement on the retired list to the highest officer grade in which he served satisfactorily under a temporary appointment as determined by the Secretary of the Navy. Later he was advanced to the highest permanent warrant officer grade, W–3, in which he had served satisfactorily.

In its order of May 19, 1969, granting summary judgment for plaintiff Jones, the Court of Claims concluded on the basis of its decisions in the *Grayson*, *Friestedt*, and *Neri* cases, that plaintiff was entitled to compute his retired pay under 10 U.S.C. 6151 on the basis of the highest grade (his permanent grade of chief warrant officer, W–3) in which he had served satisfactorily.

The first question is whether the services should apply the rule in the *Jones* case to all advancements under 10 U.S.C. 6151.

Since the defendant in the *Friestedt* and *Jones* cases submitted for the court's consideration all the arguments which have been suggested against the conclusion reached by the Court of Claims, and there is now no probability that it would reach a different conclusion in another case, the first question is answered in the affirmative.

The second question is whether the services should also apply the rule of the *Jones* case to all other statutes, such as 10 U.S.C. 3963(a), 3964, 8963(a) and 8964, under which the amount of retired pay depends upon service in the "highest temporary grade."

For the reasons stated in the answer to the first question, the second question is answered in the affirmative.

[B–167533]

Gratuities—Six Months' Death—Divorce—Invalid

The legal status of the spouse of an officer of the uniformed services who had been granted a divorce by the State of Nevada that was not recognized by the wife's matrimonial domicile, the State of North Carolina, in court proceedings in which she was also granted support and custody of the child born of the marriage, and at which the husband was present and consented to the decree, remained that of the officer's wife. Therefore, upon the death of the officer, the wife having maintained her status as lawful spouse is entitled to the payment of the 6 months' death gratuity, and the fact that the officer had consented to the decree of the North Carolina court is assurance the Government will receive a good acquittance by payment of the gratuity to the deceased officer's widow.

To Major N. C. Alcock, Department of the Air Force, August 22, 1969:

Reference is made to your letter of July 29, 1969, with enclosures, requesting an advance decision as to the propriety of making payment on one of two vouchers each in the amount of $3,000 for 6 month's death gratuity due in the case of Captain John M. Thigpen, USAF, who died June 26, 1969. One voucher is prepared in favor of Mrs. Anne Wilson Thigpen as widow of the deceased officer and the other in her capacity as guardian of John Jefferson Thigpen, the surviving son of Captain and Anne Thigpen.

Your letter was forwarded here under date of August 8, 1969, by the

Office of the Deputy Comptroller for Accounting and Finance, and has been assigned Air Force Request No. DO–AF–1046 by the Department of Defense Military Pay and Allowance Committee.

You refer to a decree of divorce granted Captain Thigpen on October 4, 1968, by the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, in the case of *John M. Thigpen* v. *Anne Corrine Thigpen.* You also refer to an order dated March 21, 1969, in the General Court of Justice, District Court Division, Wayne County, North Carolina, in the case of *Anne Corrine Thigpen* v. *John M. Thigpen,* wherein it is ordered, adjudged and decreed, that the decree of divorce in the State of Nevada is invalid and not entitled to full faith and consideration by the courts of the State of North Carolina.

In the light of the action taken by the North Carolina court, you say the question arises whether Anne Thigpen was the member's lawful spouse for death gratuity payment purposes at the time of the officer's death. If payment is denied Mrs. Thigpen as lawful spouse, you ask whether payment to her as legal guardian of the decedent's minor child would be authorized.

It appears from the enclosures submitted with your letter that on January 28, 1961, John and Anne Corrine Thigpen were married at Mt. Olive, North Carolina, and that a son, John Jefferson Thigpen, was born of that marriage on October 4, 1966. It is further stated that during part of his tour of active duty, Captain and Mrs. Thigpen resided in Clark County, State of Nevada, from January 1965 to July 1965, when the officer was transferred overseas. Mrs. Thigpen accompanied her husband overseas and in May 1966 she returned to her matrimonial domicile in Mt. Olive, North Carolina, and thereafter their son was born. The record further indicates that upon his return from overseas in July 1968, the officer was stationed at an Air Force base in Arizona, and on August 5, 1968, he instituted an action for divorce from Mrs. Thigpen in the Nevada court. On October 4, 1968, the court granted Captain Thigpen an absolute divorce.

The Nevada divorce decree recites, in part, that, "the Court has complete jurisdiction in the premises, as to the subject matter thereof, the parties thereto * * *." The decree states that the plaintiff (Captain Thigpen) is a *bona fide* resident of Clark County, Nevada, "and has been actually domiciled therein for more than six weeks immediately preceding the commencement of this action * * *." In addition, the decree states that the defendant (Mrs. Thigpen) "was personally served with Summons in the County of Wayne, State of North Carolina * * *." The decree dissolved the bonds of matrimony between the parties and ordered the officer to pay Mrs. Thigpen the sum of $50 a

month for the maintenance and support of their minor child. Mrs. Thigpen made no appearance at this proceeding nor was she represented by counsel.

On March 21, 1969, in the General Court of Justice, District Court Division, Wayne County, North Carolina, in the case of *Ann*[e] *Corrine Thigpen* v. *John M. Thigpen*, in an action for "alimony, child support and custody and reasonable attorneys fees," the court, after taking note of the Nevada divorce decree and after hearing all evidence and exhibits presented by both parties, found, in part:

1. That neither of the parties were residents of nor were domiciled in the State of Nevada at the time of the institution of the suit for divorce aforementioned;
2. That the defendant was never personally served in the aforementioned suit for divorce in the State of Nevada;
3. That the defendant did not appear in the aforementioned Nevada proceedings personally, specially, or by and through counsel;
4. That the plaintiff is a fit and proper person to have the custody of the child born of the marriage, to-wit; John Jefferson Thigpen;
5. That the plaintiff is entitled to alimony and child support and reasonable counsel fees;

In the light of these findings of fact, the court ordered, adjudged and decreed, in part:

1. That the decree of divorce in the State of Nevada pleaded by the defendant as a bar to this action is invalid and not entitled to full faith and consideration by the Courts of the State of North Carolina and does not constitute a bar to the plaintiff's action before the Court;

Captain Thigpen was present at the above proceedings and was represented by counsel. Furthermore, he consented to the order of that court as indicated by his signature on the last page of said order.

The record further indicates that on October 11, 1968, the officer executed AF Form 246, Record of Emergency Data, wherein he designated his mother, Lucille Flowers Thigpen, Mt. Olive, North Carolina, to receive the 6 months' death gratuity—if no surviving spouse or child—and he designated his son to receive his unpaid pay and allowances. It appears that the officer was killed in an airplane crash on June 26, 1969.

Also accompanying your submission are Letters of Guardianship issued on July 1, 1969, by the Clerk of the Superior Court, State of North Carolina, County of Wayne, in the matter of the estate of John Jefferson Thigpen, wherein Anne Thigpen is appointed guardian of her son's estate authorizing her to receive and administer all of the assets belonging to that estate.

In 26 Comp. Gen. 327 (1946), cited by you, the Montana divorce decree granted an Army officer was set aside by a court of the same State subsequent to his death because of fraud and lack of jurisdiction. It was held in that decision that since the decree had been declared void, the officer's wife (the defendant in the divorce proceedings)

maintained her status as lawful spouse and upon his death she became his widow and hence entitled to the 6 months' death gratuity.

It is stated in 24 Am Jur 2d, Divorce and Separation, section 955, that the courts are agreed that if neither party had a domicile or residence in the divorce State, so that the court did not have jurisdiction of the subject matter, the decree is not entitled to full faith and credit and may be attacked in another jurisdiction, especially where the defendant was not served in the divorce State and did not appear in the action. Numerous court cases and authorities are there cited, including the case of *Williams* v. *United States*, 325 U.S. 226 (1945). In the *Williams* case, a man and woman left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as that was done and they had married each other they left Nevada and returned to North Carolina to live there together as man and wife.

In 27B, C.J.S., Divorce, section 337 (domicile of one spouse), it is stated that the rule announced in the first *Williams* case (*Williams* v. *North Carolina*, 317 U.S. 287 (1942)) was amended in the second *Williams* case (*Williams* v. *North Carolina*, 325 U.S. 226 (1945)), so that, at least in the case of an "ex parte" proceeding, that is, one in which defendant was neither personally served nor appeared, a sister State is free to inquire into and to determine for itself whether there was the requisite domicile as to give the court jurisdiction to enter the decree. It is further stated that the second State is free to arrive at its own determination as to domicile in determining property rights, even though it may be required, under the *Williams* case, to recognize the divorce judgment insofar as the marital status of the parties is concerned. See collection of cases in Volume 3, ALR 2d, Supplementary 19–31, beginning with page 1089, on Recognition as to marital status of foreign divorce decrees attacked on ground of lack of domicile since *Williams* decision.

While the question might be raised in the instant case that since the North Carolina court awarded Mrs. Thigpen, among other things, "alimony" the court could be considered as recognizing the termination of the marital status by the Nevada decree. However, this would not seem to be the case since chapter 50, section 50–16, Divorce and Alimony, Volume 2A, General Statutes of North Carolina, vests in the court the authority to order payment of alimony without divorce, custody of children and counsel fees.

In the light of the findings in the North Carolina court, quoted above, and since that court declared that the decree of divorce in the State of Nevada "is invalid and not subject to full faith and consideration by the Courts of the State of North Carolina," we find no basis to conclude that Anne Thigpen was not the lawful spouse of Captain

Thigpen on the date of his death on June 26, 1969. It appears that the North Carolina decree recognized a continuing marital status between the parties which was not terminated by the Nevada decree. See the case of *Viola Richards Howell* v. *William R. Howell*, 125 S.E. 2d, 448(1962), where an Alabama divorce decree was held to be null and void for lack of jurisdiction and not entitled to full faith and credit in North Carolina where husband and wife perpetrated gross fraud on the Alabama court in representing that the wife was an Alabama resident for the required period. Compare, also, *Vanderbilt* v. *Vanderbilt*, 135 N.E., 2d 553, 153 N.Y.S. 2d 1 (1956), aff., 354 US 416 (1957); *Estin* v. *Estin*, 296 N.Y. 308, 73 N.E. 2d, 113 (1947), aff. 334 U.S. 541 (1948), and *Lynn* v. *Lynn*, 302 N.Y. 193, 97 N.E. 2d 748 (1951), cert. den. 342 US 849 (1951).

In view of the conclusion reached by the North Carolina court and the fact that the officer consented to its decree it is believed that the Government would receive a good acquittance by payment of the 6 months' death gratuity to Mrs. Anne Thigpen in her capacity as surviving spouse of Captain Thigpen and the voucher and supporting papers covering payment in that capacity are returned herewith. The voucher in favor of Mrs. Thigpen as legal guardian of her son will be retained here.

[B–166999]

Contracts—Subcontracts—Bid Shopping—Bidder Listed as Subcontractor

The low bidder awarded a contract for the modernization of a Government hospital under an invitation specifying the listing of subcontractors for the electrical work category of the project only, who although not a manufacturer listed itself in the bid as the subcontractor for the electrical work consisting of such off-the-shelf items as substations, switch gear, and transformers, had submitted a responsive bid. The requirement for listing subcontractors is intended to discourage bid shopping and encourage a competitive market among construction subcontractors, and does not apply to firms assembling off-the-shelf items but to manufacturers and fabricators who are required to meet particular invitation specifications. Therefore, the construction project is subject to the invitation provision that the contracting officer approve the electrical equipment to be installed and not to the provision for listing subcontractors.

To the Expert Electric, Inc., August 25, 1969:

Reference is made to your letter of May 14, 1969, protesting against an award to Fischbach and Moore, Inc., under an Invitation for Bids (IFB) dated April 7, 1969, issued by the U.S. Public Health Service, Department of Health, Education, and Welfare, for Project No. 176, electrical modernization of the U.S. Public Health Service Hospital, Bay Street and Vanderbilt Avenue, Staten Island, New York. We have been advised that the Department of Health, Education, and

Welfare, on the basis of urgency, made the award to Fischbach and Moore on July 10, 1969.

On May 14, 1969, the six bids received were opened. The low base bid was from Fischbach and Moore in the amount of $887,594. The next low bid was from Expert Electric, Inc., in the amount of $903,000.

Your firm protests any award to Fischbach and Moore on the ground that their bid was nonresponsive for failure to list the proposed subcontractors for "Electrical" work as required by paragraph 1B–07 of the specifications. You state that while the apparent low bidder identified itself as the subcontractor for electrical work, it is not a manufacturer or fabricator of the electrical equipment required to be manufactured in accordance with the specifications. Your interpretation of the cited provision is that it requires all bidders to list the names of the firms or subcontractors from whom they will obtain the substations, switch gear and transformers. You state for informational purposes that the electrical equipment involved is valued at approximately $300,000, thus forming almost 50 percent of the total value of the contract plans and specifications.

Paragraph 1B–07 of the Special Conditions entitled "*Listing of Subcontractors*" reads, in part, as follows:

a. For each category on the List of Subcontractors which is included as part of the bid form, the bidder shall submit the name and address of the individual or firm with whom he proposes to subcontract for performance of such category, *Provided*, that the bidder may enter his own name for any category which he will perform with personnel carried on his own payroll (other than operators of leased equipment) to indicate that the category will not be performed by subcontract.

b. If the bidder intends to subcontract with more than one subcontractor for a category or to perform a portion of a category with his own personnel and subcontract with one or more subcontractors for the balance of the category, the bidder shall list all such individuals or firms (including himself) and state the service to be furnished by each.

* * * * * * *

d. The list may be submitted with the bid or separately by telegraph, mail, or otherwise. If mailed separately, the envelope must be sealed, identified as to content, and addressed in the same manner as prescribed for submission of bids. Failure to submit the list by the time set for bid opening shall cause the bid to be considered non-responsive except under the conditions set out in Instruction No. 7 of the Instruction to Bidders (Standard Form 22).

e. Except as otherwise provided herein, the successful bidder agrees that he will not have any of the listed categories involved in the performance of this contract performed by any individual or firm other than those named for the performance of such categories.

f. The term "subcontractor" for the purpose of this requirement shall mean the individual or firm with whom the bidder proposes to enter into a subcontract for manufacture, fabricating, installing or otherwise performing work under this contract pursuant to specifications applicable to any category included on the list.

The administrative office reports that since the project is primarily one to be performed by the electrical trade, only "Electrical" was included in the "*List of Subcontractors*" issued with the IFB. The

IFB did not require the listing of subcontractors for excavation, foundations, concrete, painting, sheet metal work, etc. It further reports that the provisions regarding subcontractors in the specifications are identical to those used by the General Services Administration (GSA) and many other civilian Government agencies and that to its knowledge manufacturers or suppliers who do not perform work at the project site have never been required to be listed as subcontractors. It is also pointed out that no other bidders on the subject invitation except Expert Electric listed manufacturers or suppliers as subcontractors in their bids, and it is stated that the contracting agency does not consider them to be subcontractors under the requirements of the contracts. In this connection it is interesting to note that this project was previously solicited under date of December 10, 1968, with bid opening set for January 14, 1969; that at that time Expert Electric was the only bidder and that the list of subcontractors submitted with its bid at that time did not list any suppliers of material as subcontractors.

The Chief, Design and Construction Branch, Office of Buildings and Facilities, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, reports as follows:

The major electrical components required to be installed under the subject project are not manufactured or fabricated, in the strict sense of these words, especially for this contract. In order to meet the varying characteristics required for each individual job, upon the request of a purchaser the manufacturers or suppliers assemble a variety of catalog items in a manner which satisfies the specifications of the contract. As an example, in the case of switchgear, the basic structure is a catalog item to which are added other standard catalog items or features to provide the voltage, amperage and safety characteristics specified. The switchgear would be assembled by first placing together a number of standard panels or cubicles adjacent to each other. Insulating blocks to hold bus bars are then installed in standard pre-drilled holes. On the insulators copper bus bars are then installed, usually one for each 1,000 ampere rating specified. Other standard hardware items are inserted or affixed to produce cells into which any circuit breaker can be mounted. In fact the switchgear panels are shipped separately from the circuit breakers since all circuit breakers are standardized and interchangeable. Even accessory items for the breakers are represented by standard ASA device numbers in use by all manufacturers.

Strictly speaking, any agreement between a prime and a subcontractor for an item is a contract and in that sense would be considered a subcontract under the prime contract, however the type of subcontract under discussion is not within the intent of the "Listing of Subcontractors" clause. To my knowledge, subcontracts for an assembly of catalog items are generally interpreted by Government agencies not to fall within the meaning of this clause. If this interpretation were not placed on this clause the result would be the listing of manufacturers or suppliers of such items as paint. A paint manufacturer, for instance, supplies paint to meet the specifications of the contract. The manufacturer or supplier does not *manufacture* the paint especially for the project but adds pigment, gloss, drying components, etc., as necessary to meet the contract specifications.

Paragraph 1B-07 conforms to the procedures prescribed by GSA (41 CFR 5B-2.202-70(e)) for use by the Public Buildings Service in carrying on the construction activities of that agency. The purpose of the listing of subcontractors was to abolish or limit the practice of "bid

shopping," which had been found by GSA in many instances to result in performance of work by subcontractors whose competence and responsibility are questionable. A further reason for the listing requirement and the substantial elimination of bid shopping was to encourage the development of a true competitive market among construction subcontractors, with resultant savings accruing to the benefit of the Government.

As originally promulgated on February 26, 1966, 31 F.R. 3183, the subcontractor listing provisions of the GSA regulations included the following language for use in the Special Conditions of construction IFB's:

(b) The term "subcontractor" for the purpose of this requirement shall mean the individual or firm with whom the bidder proposes to enter into a subcontract for a listed category of work or material. If subcontracts are to be made with more than one subcontractor for a category of work or material, each proposed subcontractor shall be listed with a statement of the service to be furnished by each.

However, certain questions soon arose as to the interpretation of such provision. For example, in one instance a difference of opinion developed as to whether the fabricator of architectural cast stone in accordance with detailed specifications should be considered a mere supplier not subject to listing or a subcontractor whose listing was required. In our decision reported at 46 Comp. Gen. 156 (1966), we held that such a fabricator was required to be listed. See also 46 Comp. Gen. 194 (1966). Because of this and similar difficulties, the regulation 41 CFR 5B–2.202–70 was amended on November 24, 1966 (31 F.R. 14876), to provide, as quoted above from the IFB, that the term "subcontractor" should mean the individual or firm with whom the bidder proposes to enter into a subcontract for manufacture, fabricating, installing or otherwise *performing work* under this contract *pursuant to specifications* applicable to any category included on the list. We are of the view that such language was intended to encompass only those manufacturers and fabricators whose products are specially made to conform with particular IFB specifications, and not to firms such as those under consideration here who merely assemble off-the-shelf items. In this connection it appears to be pertinent to note the provisions of Article 9 of the General Conditions of the contract (Standard Form 23A) and section 12–03 of the Special Conditions, both of which require submission by the contractor (not by bidders) of details of machinery and mechanical and other equipment proposed to be incorporated into the work, subject to approval by the contracting officer. In the light of the statements in the administrative report quoted above it is our view that the electrical equipment to be furnished in the subject project is subject to these provisions rather than to the subcontractor listing requirements of the IFB.

We therefore conclude that the bid of Fischbach and Moore was responsive to the subcontractor listing requirements of the IFB and that your protest must be denied.

[B-167020]

Contracts—Data, Rights, Etc.—Status of Information Furnished—Government Participation in Development Costs

The software and related programs developed partially at Government expense solely for the operation of the computer service program "Legal Information Through Electronics" (LITE) when the contractor experienced difficulty in performing, properly was used to solicit benchmark tests to create competition. Not only did the Rights in Data clause of the contract provide that the data become the sole property of the Government, but when a mixture of private and Government funds are used to develop data, the rights are not allocatable on an investment percentage basis and the Government acquires unlimited rights to the data. The former contractor delayed unreasonably in waiting until after award of a new LITE contract to object to the use of the data, and as General Accounting Office has never ordered cancellation of a contract for the improper disclosure of proprietary data, it will not do so when cancellation is not justified.

To the McDonnell Automation Company, August 26, 1969:

Further reference is made to your letter of May 20, 1969, with enclosures, protesting the use of your programs and related software in connection with invitation for bids No. F05602-69-B-0011 issued on February 26, 1969, by the U.S. Air Force Accounting and Finance Center, Denver, Colorado, to provide the Air Force with complete computer services for producing the program entitled, "Legal Information Through Electronics" (LITE).

The subject invitation under Part I, entitled "LITE Technical Statement," provided:

> c. Current software and other unique programs currently used for operation will be provided as necessary for Benchmark and eventual contract performance.

The objective of the Benchmark test was to require bidders to demonstrate to the Government that they could process LITE searches through the system satisfactorily.

Nine bids were received and opened on April 3, 1969. The low bidder, Computer Management and Services Corporation, was furnished the necessary programs and related software as provided in Part I of the invitation for the performance of Benchmark tests. Following successful completion of the Benchmark tests, and rejection by the Air Force of your protest dated May 7, 1969, which was on completely different grounds, the contract was awarded to the low bidder on May 8, 1969.

By letter of May 20, 1969, you stated that the Government improperly supplied the low bidder with certain programs and related software for the performance of the Benchmark tests. You contend that

these programs and related software, which had been furnished to the Government by you under a prior contract, were not subject to the Rights in Data clause of your contract because they did not constitute data specified to be delivered, and had been submitted to the Government for use by the Government only. Lastly, you protest the inclusion of Part I, *supra*, in the subject invitation and cite two of our decisions, B–143711 and 43 Comp. Gen. 193 to support your position that the award was illegal and should be canceled.

The history of development of the emulation programs and related software in dispute, appears from the record to be as follows:

Contract No. F05602–67–C–0025 for Computer Search Services and New Data Base Creation and updating services for existing bases, was awarded to McDonnell Automation Company (McDonnell) on March 23, 1967, and expired on June 30, 1969. It is reported that, initially, McDonnell could not make the LITE IBM 1410 emulation programs work on its RCA Spectra 70/45 System. The months of May, June, July and part of August 1967 were spent developing emulation programs compatible with RCA Spectra 70/45, through the joint efforts of McDonnell, RCA and the Air Force. The manpower invested by the respective parties was unknown. However, the Air Force did not insist upon full production performance by McDonnell during these months and continued to pay the contract price of $17,750 per month for computer services, even though such services were not operational.

Meanwhile, the Air Force was concerned with obtaining computer program source decks and documentation for all McDonnell programs which would enable the agency to operate elsewhere on an identical RCA Spectra 70/45 System, since without such emulation programs and related software, the agency was completely dependent on McDonnell to run the LITE program. A memorandum, dated July 31, 1968, stated that the Air Force must have access to all programs required for operating the LITE System and concluded that Clause 37, Rights in Data, entitled the agency to the current versions of all programs at the end of this contract performance.

The Air Force files show that in June 1968 the Air Force requested source decks and documentation for all McDonnell provided programs and tape and instructions for a complete System Generation for LITE and standard 70/45 software, for storage by the Air Force. In reply, by letter of July 16, 1968, you expressed willingness to make available object decks for storage by Air Force LITE against emergency and catastrophic events that would enable McDonnell to perform contract services at its Denver facility, but stated that "the source decks for the specific emulation programs which McDonnell developed at

their cost to meet contract specifications will be stored by McDonnell at a separate facility for emergency backup."

This was determined by Air Force to be unacceptable, and a further request was made by letter of July 24, 1968, which requested delivery of source decks, documentation, and tape currently being used to operate the LITE system, consisting of ten specifically enumerated items, including Emulator Master Tape (Modified LITE version); also updated versions thereof and/or additional materials provided periodically and as requested by Air Force LITE. A memorandum to the file dated August 7, 1968, reports advice received by telephone that McDonnell had submitted the question of its rights to emulator programs to its general counsel. A further memorandum dated August 15 states that Mr. Fullerton, McDonnell's president, called Colonel Kelley on August 13 and requested withdrawal of his letter of August 12 concerning the rights to computer program. The letter referred to does not appear in the file.

So far as appears from the record, the matter was closed by the delivery by McDonnell to the Air Force on August 21, 1968, of all the requested material then in use.

Thereafter, the Air Force decided to formally advertise for continuation of the LITE System services, and the subject invitation for bids was issued on February 26, 1969. On April 7, 1969, the Air Force requested from McDonnell copies of currently updated versions of software used for the performance of contract F05602-67-C-0025. By letter dated April 8, 1969, McDonnell forwarded the requested software, but referred to it as material developed by McDonnell wholly at its expense, and stated the following reservation:

> This software is supplied for the sole use of the United States Government and access is not to be given to anyone outside the government.

Since the Air Force maintained that McDonnell was required under the contract to furnish the software involved, the restriction was disregarded and the Computer Management and Services Corporation was permitted to use the items to qualify under the Benchmark tests.

The question for our resolution is whether under the terms of the 1967 contract the Air Force had title to or the right to deliver or disclose to others the programs and related software obtained by the Air Force from McDonnell, including those furnished with the letter of April 8, 1969.

The McDonnell contract contained a "Rights in Data" clause, added as section 37 to the General Provisions, which included the following stipulations:

> (b) All Subject Data first produced in the performance of this contract shall be the sole property of the Government. The Contractor agrees not to assert any rights at common law or equity and not to establish any claim to statutory

copyright in such Data. The Contractor shall not publish or reproduce such Data in whole or in part or in any manner or form, nor authorize others so to do, without the written consent of the Government until such time as the Government may have released such Data to the public.

(c) The Contractor agrees to grant and does hereby grant to the Government and to its officers, agents and employees acting within the scope of their official duties, a royalty-free nonexclusive, and irrevocable license throughout the world (i) to publish, translate, reproduce, deliver, perform, use, and dispose of, in any manner, and any and all Data not first produced or composed in the performance of this contract but which is incorporated in the work furnished under this contract; and (ii) to authorize others so to do.

In addition, this contract provided under Item 1 of the Technical Statement "EDPS" that:

* * * Program changes necessary to provide computer capability for loading and searching data basis * * * will be accomplished by the contractor from Air Force documentation and program decks. If the vendor's equipment cannot emulate or translate present programs, the vendor may reprogram or provide alternative programs or subsystems at no expense to the Government.

The only ground stated by you in support of your claimed right to restrict use of the software is that at least some material part was developed by you at your own expense. The provisions of the Rights in Data clause do not appear to recognize this as a basis for excepting any of the material otherwise covered by the terms of the clause, and to the extent that the material was developed pursuant to the provisions of Item 1 of the Technical Statement quoted above it was required to be at your expense. In any event, it appears from the administrative report that the Government paid for a substantial part of the computer time used in developing the material. Where there is a mixture of private and Government funds, the developed data cannot be said to have been developed at private expense. The rights will not be allocated on an investment percentage basis and the Government will get unlimited rights to such data. See Hinrichs, *Proprietary Data and Trade Secrets under Department of Defense Contracts*, 36 Military Law Review, 61, 76.

Regardless of the relative investment of the three parties involved, it is clear that these programs and related software were developed solely for the purpose of operating the LITE system. In this regard, the Rights in Data clause incorporated in the subject contract states that all subject data *first produced* in the performance of this contract shall be the sole property of the Government.

Your letter cites the following decisions of our Office as supporting our position: B–143711, dated December 22, 1960, and 43 Comp. Gen. 193, dated August 22, 1963.

In B–143711, the Government had received unsolicited technical data from the contractor under conditions which clearly indicated that the Government had agreed not to use the data without consent. Therefore, our Office held in that decision that the Government could not

proceed with an Invitation for Bids in which such data would have been disclosed. Your protest is distinguished from B-143711, in that there is no agreement that the Government would consider the programs and related software as your proprietary data; on the contrary, the Air Force insisted throughout the performance of your contract, that it had a right to all programs required for operating the LITE System and that the Rights in Data clause entitled the Government thereto.

In 43 Comp. Gen. 193, the Government used proprietary data in an invitation for bids which had been obtained under a prior contract on the basis of assurances from contracting officials that the data would be held confidential and used only for a prescribed purpose. In the instant case, there is no evidence that the Government ever in any way indicated that the programs and the related software developed under your contract would be considered as proprietary to you.

On the basis of the facts as disclosed by the record before us, it is our view that the Air Force acquired unlimited rights, under the Rights in Data clause, in all programs and related software developed in the performance of your contract, and that the use of such data in the formally advertised procurement under invitation for bids No. F05602-69-B-0011 was not in violation of any rights vested in you. See 38 Comp. Gen. 667 (1959). Furthermore, we note that while the invitation was issued on February 26, 1969, and you raised questions as to the relative merits of your bid and that of Computer Management and Services Corporation by a protest dated May 6, prior to award, you did not then or at any time before the award note any objection to the terms of the IFB which announced the availability to the successful bidder of all current software. The courts have taken the position that a party to maintain his proprietary rights in information must take reasonable action to prevent or suppress its unauthorized use. See *Ferroline Corporation* v. *General Aniline and Film Corporation*, 207 F. 2d 912; *Globe Ticket Company* v. *International Ticket Company*, 104 A 92. While we have in several cases directed cancellation of a procurement where it appeared that it involved disclosure of proprietary data which the Government had no right to disclose, we have never done so after a contract had been awarded. See 46 Comp. Gen. 885 (1967). In our view such action would not be justified in this instance.

For the foregoing reasons your protest is denied.

[B-167599]

Bids—Evaluation—Delivery Provisions—Information—Reevaluation After Contract Award

A second reevaluation of bids after contract award under an invitation that required bidders to furnish shipping container data that disclosed the fact the low bidder's transportation costs on the basis of actual shipping experience were in excess of those of the second low bidder, does not affect the fact that the bid was responsive at the time of bid opening within the meaning of 10 U.S.C. 2305 and paragraph 2-301 of the Armed Services Procurement Regulation, and that the bid conformed to the specifications, which provided considerable leeway in the method of packaging and shipping weights, including the choice of container dimensions and use. The contracting officer's acceptance of the dimensions and weights of the containers offered in good faith for evaluation purposes was reasonable as the difference in the weights offered did not put him on notice of error.

Bids—Evaluation—Delivery Provisions—Guaranteed Shipping Weight

The award of a supply contract that failed to include the Guaranteed Maximum Shipping Weight and Dimensions Clause (Guarantee Clause) prescribed by paragraphs 2-201(b) and 19-210 of the Armed Services Procurement Regulation (ASPR), and was amended to include the clause, will not be disturbed as the successful bid remained low after the first reevaluation of the two lowest bids submitted under an invitation requiring bidders to furnish shipping container data. A contract provision holding the contractor responsible for costs and damages resulting from the loss of goods in transit or some unusual loss attributable to a failure to meet packaging requirements cannot substitute for the required Guarantee Clause, and future f.o.b. origin invitations should incorporate the ASPR mandatory Guarantee Clause.

To the Secretary of the Army, August 26, 1969:

Reference is made to a letter dated July 29, 1969, from the Acting Deputy Director of Procurement and Production, United States Army Materiel Command, forwarding a report on the protest of The Firestone Tire & Rubber Company against the award of a contract to Buckeye Rubber Products, Inc., under invitation for bids No. DAAG07-69-B-3058, issued by the U.S. Army Los Angeles Procurement Agency, Pasadena, California, on February 12, 1969.

The invitation solicited bids for 12,269 shrouds, track, for application to particular military vehicles, including an option for increased quantity. The invitation required bidders to offer prices f.o.b. origin, and provided in paragraph 29e that for evaluation purposes, the offeror was requested to furnish shipping data required on page 4A of

the solicitation. Page 4A of the invitation, in pertinent part, states as follows:

NOTE NO. 1:
FOR EVALUATION PURPOSES THE OFFEROR IS REQUESTED TO FURNISH THE FOLLOWING SHIPPING DATA:
Type of shipping container _____ _____ _____ _____ _____
(Wood box, carton, etc.)
Size of shipping container (inches) _____ _____ x _____ x _____ _____
(length) (width) (height)
Number of items per shipping container _____ _____ each.
Gross weight of container and contents _____ _____ lbs.

Bids were opened and recorded on March 7, 1969, and the two lowest bids were abstracted as follows:

Buckeye Rubber Products, Inc.—$22.60 each, for a total of $277,279.40, less a ½% discount of $1,386.40, making a total price before transportation evaluation of $275,893.

Firestone Tire & Rubber Company—$22.93 each, for a total of $281,328.17, less a 2% discount of $5,626.56, making a total price before transportation evaluation of $275,701.61.

The two low bids of Buckeye and Firestone were then evaluated computing the transportation data figures supplied by the respective bidders on page 4A of their bids, to determine the lowest delivered cost to the Government under each bid. The transportation officer determined that the transportation costs in accordance with the information supplied in Buckeye's bid would be $14,518.50, resulting in a total evaluated cost to the Government of $290,411.50. The transportation evaluation of Firestone's bid revealed prospective transportation costs of $15,805.08, indicating a total cost to the Government of $291,506.69.

In light of the above, Buckeye, subsequent to a favorable preaward survey, was awarded the contract on April 7, 1969, as the lowest responsive and responsible bidder. The original contract award in the amount of $277,279.40, due to a formal exercise of the option on May 12, 1969, was increased by $16,882.20, establishing the present contract price of $294,161.60.

By letter dated April 28, 1969, following discussions between the contracting officer and a representative of Firestone, Firestone contended that the award made to Buckeye was based upon a nonresponsive bid, as the number of units Buckeye proposed to pack within its exterior container dimensions was incorrect, amounting to an impossi-

bility of performance. The letter further requested cancellation of the award to Buckeye and award to Firestone as the lowest responsive bidder. On April 18, 1969, the contracting officer requested a reevaluation of the transportation costs based on the bids of Buckeye and Firestone. The reevaluation, dated April 23, 1969, although slightly narrowing the difference between the bids, still indicated that Buckeye was the low bidder. Without calculating the option units, Buckeye's transportation costs were evaluated at $14,496.11, and Firestone's at $15,356.11, resulting in a total evaluated cost to the Government of $290,389.11 and $291,057.72, respectively, a difference of $668.61 between the bids. After the reevaluation, the contracting officer contacted the Defense Contract Administration Services District, Dayton, Ohio, Quality Assurance Representative, on April 25, 1969, who confirmed that Buckeye's favorable preaward survey satisfied the preaward survey team as to their understanding of all the specifications and drawings including packaging requirements. The contracting officer requested and received by telegram dated May 5, 1969, an agreement by Buckeye to accept a guaranteed maximum shipping weight, dimensions and number of items per shipping container clause, subsequently formally incorporated into the contract by modification P001 dated May 12, 1969. The modification provides, in consonance with paragraph 2-201(b)(xii) of the Armed Services Procurement Regulation (ASPR), as follows:

4. The following paragraph is hereby added to Note 1, page 4a of the contract schedule:
GUARANTEED MAXIMUM SHIPPING WEIGHTS, DIMENSIONS AND NUMBER OF ITEMS PER SHIPPING CONTAINER.
Each bid (or proposal) will be evaluated to the destination specified by adding to the f.o.b. origin price all transportation costs to said destination. The guaranteed maximum shipping weights and dimensions of the supplies are required for determination of transportation costs. The bidder (or offeror) is requested to state as part of his offer the weights and dimensions. If separate containers are to be banded and/or skidded into a single shipping unit, details must be described. If delivered supplies exceed the guaranteed maximum shipping weights, dimensions or varies from the number of items per shipping container as guaranteed by the contractor, *the contract price shall be reduced by an amount equal to the difference between the transportation costs computed for evaluation purposes based on bidder's (or offeror's) guaranteed maximum shipping weights, dimensions or number of items per shipping container and the transportation costs that should have been used for bid (or proposal) evaluation purposes based on correct shipping data.* [Italic supplied.]

By telegram dated May 5, 1969, the contracting officer advised Firestone that Buckeye's bid was responsive, and offered Firestone an opportunity to review a copy of the freight evaluation, if it so desired. A telegram dated June 3, 1969, crystallized Firestone's protest, and was the first communication from Firestone subsequent to the contracting officer's May 5, 1969, telegram.

On June 26, 1969, a representative of Buckeye disclosed to the con-

tracting officer that 2,000 units of the procured items had been shipped in wire bound boxes, with measurements of 22″×25″×39″, containing 6 units each and weighing approximately 278 lbs. for each wire bound box (wood box wire wrapped). It should be noted at this point that Buckeye, in completing page 4A of the invitation indicated the size of the shipping container to be used as 26″×26″×25″, with 6 items per shipping container, with a gross weight of container and contents of 260 pounds.

Upon receipt of this transportation data based on actual shipment, the transportation officer reevaluated the transportation costs. This reevaluation indicated the Government's estimated transportation costs based upon the *actual* Buckeye transportation weights and dimensions would be $15,819.75. Utilizing this factor in reexamining the two bid prices, as against the bid submitted by Buckeye, it was disclosed that the bid prices of Buckeye would have been $206.06 higher than Firestone for bid evaluation purposes, and $655.03 higher than Firestone based on the April 23, 1969, reevaluation effected by the transportation officer.

Firestone contends, firstly, that the Buckeye bid was nonresponsive due to errors in the data furnished by Buckeye for transportation evaluation purposes, in that the information so furnished would make it physically impossible to pack 6 units into the size of the exterior container indicated at the stated weight. In addition, Firestone contends that the shipping weight, etc., guarantee modification was prejudicial to Firestone, in that Buckeye was given an opportunity to verify its bid, and withdraw same, prejudicing the competitive nature of the invitation.

The contracting officer states that the present contract, as it now stands, results in a cost saving to the Government of $668.61 based upon the April 23 reevaluation. This is based on the fact that the modification will operate to reduce the contract price as to the actual shipping costs over and above the weights and dimensions guaranteed by Buckeye. The Chief Counsel's report providing a legal analysis in response to Firestone's first contention states:

The first point raised by Firestone * * * is that the Buckeye bid was non-responsive due to errors in the data furnished by Buckeye for transportation evaluation purposes. The transportation data furnished by Buckeye was requested by the terms of the IFB * * * The Contracting Officer was further required by the terms of the IFB to utilize this information for evaluation purposes. Although Firestone protested after award, the terms of the IFB were not questioned prior to award, and indeed have not been questioned by Firestone to date of the submission of this Administrative Report. [July 29, 1969.]
The shipping data furnished by Buckeye did not indicate any apparent error on its face. Nevertheless, Buckeye was queried about its ability to comply with all specifications (including packaging) in a Pre-Award Survey conducted by Defense Contract Administration Service District, Dayton, Ohio. Buckeye stated to the DCAS representative that it understood the terms of the IFB and would be able to comply with them.* * * Without further hard facts to negate this as-

surance, the Contracting Officer's reliance on the shipping data furnished in Buckeye's bid was reasonable and required by the terms of the Invitation for Bids. Firestone contends that the Contracting Officer should have been on notice that Buckeye's proposed method of shipping was objectively impossible, and that Buckeye's bid was consequently non-responsive. This contention is without merit for the following reasons.

The Firestone bid stated that the four (4) Shrouds and the container weighed 180 pounds for a unit packed weight per Shroud of 45 pounds. Buckeye stated that the packed weight of six (6) Shrouds would be 260 pounds or 43⅓ pounds per packed Shroud. The difference even by *Firestone's bid* was negligible, and no notice to Contracting Officer can possibly be imputed under the facts.

Further, the Packaging Standard on page 19 of the IFB indicated a "unit package weight" of 37.81 pounds to which must be added the weight of the outside container in order to arrive at the total packed weight. With the flexibility in packing specifications allowed the Contractor (through the use of various types of wooden containers) there would be no basis to question the weight furnished where no large discrepancy is present as in the instant case.

We concur with the contracting officer's determination that Buckeye's bid was responsive. 10 U.S.C. 2305, dealing with formal advertisements for bids, provides, in pertinent part, as follows:

(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. *The specification 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.* Except in a case where the Secretary of Defense determines that military requirements necessitate specification of container sizes, no advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

(c) Bids shall be opened publicly at the time and place stated in the advertisement. *Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered.* However, all bids may be rejected if the head of the agency determines that rejection is in the public interest. [Italic supplied.]

Section 2–301 of ASPR provides in connection with the responsiveness of a bid:

To be considered for award, *a bid must comply in all material respects with the invitation for bids so that,* both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained. [Italic supplied.]

The specifications contained in the invitation allowed bidders considerable leeway in the method of packaging and shipping weights of the items procured, including choice of dimensions of containers and the choice of use of containers. In addition, the interpretation by the contracting officer that the dimensions and weights submitted by Buckeye were offered in good faith for evaluation purposes was reasonable and may not be questioned by our Office. Also, the difference in the

weights given by both bidders was not so glaring or obvious as to put the contracting officer on notice of an error in the dimensions furnished by Buckeye.

In B–153323, May 7, 1964, we held:

When not sufficient to place a contracting officer on notice of error, we have not in such matters viewed the degree of closeness of the estimated weight to the actual weight as a material factor for consideration in determining the responsiveness of the bid,* * *

Therefore, we concur with the opinion of the contracting officer as affirmed by members in the chain of command that the bid of Buckeye was responsive and conformed to the specifications of the invitation.

Firestone's second contention concerned the failure of the invitation to include a Guaranteed Maximum Shipping Weight and Dimensions Clause (Guarantee Clause), and the subsequent modification of the contract to include the same allowed Buckeye to so guarantee to the prejudice of the other bidders.

The legal report recognizes that the use of a guarantee clause would have obviated any difficulty, since Buckeye remained the low bidder, even after the April 23, 1969, reevaluation of transportation costs. Referring to the subsequent modification including the guarantee clause, the legal report describes it as an expression of additional language of the responsibility of Buckeye which existed already in the contract according to paragraph 29(6) of XSP HQ Form 29, at page 11, of the IFB, which contained the stipulation:

(6) Contractor shall be responsible for all damages and costs, including accessorial charges, resulting from failure to:
(i) package, pack and mark as required by the contract;

We do not agree that this provision is in essence a guarantee clause; we regard it as providing for contractor responsibility for costs and damages resulting from the loss of goods in transit or some unusual loss, attributable to a failure to meet the contract packaging requirements. If this interpretation were considered to be valid, the use of the quoted provision in contracts would preclude the need for a guarantee clause and render it superfluous.

ASPR 2–201(b)(xii) provides:

(b) For supply and service contracts excluding construction, the invitation for bids shall contain the following in addition to the information required by (a) above if applicable to the procurement involved.

* * * * * * *

(xii) When optional packing or packaging methods are permitted and when the bidder's shipping weights or dimensions will be a factor in evaluating transportation costs (see 19–210), * * *

GUARANTEED MAXIMUM SHIPPING WEIGHTS AND DIMENSIONS.

Each bid (or proposal) will be evaluated in the destination specified by adding to the f.o.b. origin price all transportation costs to said destination. The guar-

anteed maximum shipping weights and dimensions of the supplies are required for determination of transportation costs. The bidder (or offeror) is requested to state as part of his offer the weights and dimensions. If separate containers are to be banded and/or skidded into a single shipping unit, details must be described. If delivered supplies exceed the guaranteed maximum shipping weights or dimensions, the contract price shall be reduced by an amount equal to the difference between the transportation costs computed for evaluation purposes based on bidder's (or offeror's) guaranteed maximum shipping weights or dimensions and the transportation costs that should have been used for bid (or proposal) evaluation purposes based on correct shipping data.

ASPR 19–210 provides as follows:

Guaranteed Shipping Weights and Dimensions.

The provision in 2–201(b)(xii) shall be included in the solicitation when allowance is provided for optional packing and packaging methods and each bidder's (offeror's) shipping weights (or dimensions) will be a factor in determining transportation costs for evaluation purposes.

The failure to include the guarantee clause in the invitation was in violation of these ASPR provisions.

However, since Buckeye's bid remained the lowest evaluated bid after the April 23, 1969, reevaluation and since Buckeye's contract became subject to the ASPR guaranteed shipping weight clause as a result of the subsequent formal modification of the contract, we are not disposed to disturb the award at this late date. In this connection, we have been informally advised that nearly one half of the total number of units to be supplied under the subject contract has been shipped to their destination and that future deliveries will be accomplished in accordance with the required schedule. Also, it should be noted that the shipping container dimensions supplied by Firestone in its bid, had they been guaranteed, would have resulted in a higher cost to the Government based on its furnished transportation data. Therefore, the subsequent guarantee by Buckeye in no way prejudiced Firestone or stifled free and fair competition in this case.

We recommend that future f.o.b. origin invitations specifically incorporate the ASPR's mandatory clause referred to above to avoid repetitions of the circumstances which gave rise to this protest.

[B–167194]

Bids—Discarding All Bids—Compelling Reasons Only

The failure of the invitation for the purchase, lease-purchase, or rental of microfiche reader-printer units to provide for the evaluation of and request a delivery date for copy paper needed for the units on which information and prices were solicited, or to establish a lease period, is the "compelling" reason contemplated by section 1–2.404–1 of the Federal Procurement Regulations for the cancellation of an invitation after bid opening. Although the cancellation of the invitation after the disclosure of bid prices is regrettable, the invitation in not providing for consideration of all factors of cost was a defective invitation, and to award a contract for the reader-printer units without regard to the cost of the paper would not be in the best interests of the Government.

To the Minnesota Mining and Manufacturing Company, August 29, 1969:

Further reference is made to your protest against cancellation of invitation for bids No. SSP69-17, issued by the Social Security Administration for the procurement of 1,000 microfiche reader-printer units.

The canceled invitation was issued on January 8, 1969, with a closing date of January 23, 1969, and provided that the resulting contract would be for the purchase, lease-purchase, or rental of the machines. The invitation included specifications for the copy paper and related supplies to be used with the machines and estimated that approximately 15 million sheets of copy paper would be required annually for operation of the 1,000 machines. The invitation also requested the cost and shelf life of the copy paper. However, paragraph X, Basis of Award, of the invitation did not provide for award of a contract for the copy paper and it did not provide for consideration of the cost of copy paper as a factor in evaluating bids.

The committee evaluating the bids considered the cost of the copy paper in its evaluation. However, the Office of the General Counsel, Department of Health, Education and Welfare, advised the contracting officer that this factor could not be considered in the evaluation because the invitation did not so provide. Since the Social Security Administration personnel who were to use the equipment and who evaluated the bids considered the cost of the copy paper a very significant factor in selection of the equipment because the total cost would include the cost of the copy paper and since this factor could not be considered under the invitation as drawn, the contracting officer canceled the invitation on May 15, 1969. In addition to this deficiency, the contracting officer is of the opinion that the delivery clause was deficient because it permitted bidders to specify an unlimited delivery period. He also states his view that the clause concerning rental is ambiguous because it does not specify the lease period. A new invitation was issued on June 2, 1969, correcting these deficiencies. The new invitation sets forth a method of evaluating bids on the basis of overall cost, including cost of the equipment and supplies. It also provides for the submission of bids and the award of a contract for supplies. Although bids have been opened and evaluated, no award has yet been made.

It is your primary contention that the facts do not support the contracting officer's position that there was a need to "reconsider all cost factors." In this connection, you presented statistical data to

agency personnel illustrating that under any of the proposed methods of procurement your bid prices for the equipment and supplies are lower than the other bids submitted. You have submitted this data to our Office. Using the bid prices for your equipment and supplies as compared to Bell & Howell's bid prices for its equipment and supplies, projected for 5 years, you demonstrate that under either method of procurement the total cost to the Government of your equipment and supplies is more than $400,000 lower. You contend that in these circumstances, cancellation and readvertisement was not consistent with Federal Procurement Regulation 1-2.404-1(a), which requires a compelling reason as justification for cancellation. In this connection, you contend that it was implied throughout the invitation that supply costs were an important factor and would be given weight in the evaluation.

In addition, you contend that the requirement of FPR 1-2.404-1(a) that every effort be made to anticipate changes in the invitation prior to opening was not complied with since the invitation clearly indicated that the cost of supplies was an anticipated requirement and, therefore, the invitation should have provided for their consideration and evaluation. The agency's failure in this regard has, you argue, resulted in exposure of your bid price and should not be allowed as justification for cancellation. In this regard, you contend that canceling the invitation after exposure of your prices would be contrary to the principles of impartiality and fair play inplicit in the competitive bidding system as enunciated in 36 Comp. Gen. 364 (1956).

The authority for cancellation in the circumstances presented here is FPR 1-2.404-1, which permits cancellation of an invitation after bid opening only for "compelling" reasons such as those noted in subsection (b) thereof. Subsection (b)(3) provides that cancellation is in the best interest of the Government where—

> The invitation for bids did not provide for consideration of all factors of cost to the Government * * *

Contracting officers are clothed with broad powers of discretion in deciding whether an invitation should or should not be canceled and this Office will not interfere with such determination unless it is arbitrary or capricious or not based upon substantial evidence. 39 Comp. Gen. 396, 399 (1959).

In the instant case, the contracting officer based his decision on the advice of the agency personnel who will use the equipment and who were responsible for evaluating the bids and one the opinion of the Office of the General Counsel, Department of Health, Education, and Welfare. The former advised him that because the cost of copy paper

was significant and had a bearing on the total cost to the Government it should be considered in determining the equipment to procure. The Office of the General Counsel advised him that it could not be taken into account under the subject invitation. Therefore, he determined that the invitation should be canceled in the best interest of the Government and so notified the bidders.

We see no basis for questioning the contracting officer's decision. Although the invitation requested certain information concerning the copy paper, including the bidder's price, paragraph X, Basis of Award, specifically stated the factors to be considered in evaluating the bids and cost of the copy paper was not one of them. Therefore, determination of the low bidder under the invitation would have been required to be determined without regard to the cost of copy paper. With regard to the effect the cost of copy paper could have on the total cost to the Government, the contracting officer has furnished us information which indicates that copy paper compatible with other bidders' equipment can be purchased in the quantities estimated in the invitation for more than $220,000 less per year than the amount quoted in your bid. Furthermore, there was no legal obligation on the part of bidders to sell any paper at the prices quoted. In these circumstances, we agree with the determination that there was a "compelling" reason for cancellation and readvertisement.

Although it is regrettable that the invitation was defective in this respect, and the bid prices were disclosed, this does not require award where it would be contrary to the Government's best interest. It has been held that an invitation for bids does not import any obligation to accept any of the bids received. 41 Comp. Gen. 709, 711 (1962). Moreover, under paragraph 10 of the Solicitation Instructions and Conditions, the Government specifically reserved the right to reject any and all bids. While we subscribe to the "principles of impartiality and fair play" as stated in 36 Comp. Gen. 364, it should also be noted that we stated we "cannot, however, consider the matter of competitive bidding for Government contracts solely as a game, in which the contract must automatically go to the lowest bidder * * *."

In view of our conclusion that the invitation was defective for the foregoing reason, it is not necessary that we make a decision as to the sufficiency of the delivery and rental provisions.

Accordingly, we find no basis upon which our Office may properly object to cancellation of the invitation and readvertisement of the procurement.

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