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[B-167473]

Contracts—Negotiation—Evaluation Factors—Propriety of Evaluation

Where the Request for Proposals (RFP) contained a "Standards for Evaluation of Offers" provision and adequate competition had been obtained, the contracting officer was not required to evaluate the procurement on the basis of the cost analysis provisions of 10 U.S.C. 2306(f) and paragraph 3-807.3 of the Armed Services Procurement Regulation which require consideration of factors other than price. Under the criteria established by the statute and the implementing regulation, submission of cost or pricing data and certification thereof arises only in connection with changes or modification to the initial contract that exceed $100,000, and it is unreasonable to equate the RFP provision to the ASPR definition of "cost analysis" to impose on the contracting officer a duty not contemplated, and the award to the low offeror, determined to be a responsive offeror, is held to be in the best interest of the Government.

To the Gulton Industries, Inc., November 13, 1969:

We refer to your protest by letter dated July 8, 1969, with enclosures, and subsequent correspondence, against the award of a contract to Atlantic Research Corporation (ARC) pursuant to request for proposals (RFP) No. DAAA26-69-R-0446, issued by the Procurement and Production Directorate, Picatinny Arsenal, Dover, New Jersey.

The RFP contemplated a fixed-price contract for the supply of 72,035 units (with a 200 percent option quantity) of the XM22E4 Control, Power Supply. The RFP was issued on March 27, 1969, to 14 firms, including Gulton, prior to being synopsized in the Commerce Business Daily. The synopsis resulted in requests by 29 additional firms for copies of the RFP. Fourteen of the 43 firms submitted offers, and 7 of these were found to be in the final "Zone of Consideration." Amendment No. 1 to the RFP, issued April 4, 1969, incorporated two engineering orders, but left the closing date for submission of proposals unchanged at April 28, 1969. By telegram of May 29, 1969, the contracting officer advised the 7 offerors in the "Zone of Consideration" that they were "being considered in the final competitive negotiations which are being conducted. Request you review your offer and advise this Arsenal of your best and final offer. Any revision to your offer * * * must be submitted to Picatinny Arsenal no later than 2:00 P.M. EDST, 11 June 1969 * * *." Gulton was the low offeror, and ARC was second low, after the original submission of offers. While Gulton chose not to revise its price in response to the telegram of May 29, 1969, ARC reduced its price to $0.025 per unit below that of Gulton. The contracting officer then requested a preaward survey on ARC.

The preaward survey on ARC, conducted by the Defense Contract Administration Services District (DCASD), Van Nuys, California, recommended ARC for "complete award" of the contract. An evaluation was then made of the seven offers and the contracting officer concluded that award to ARC would be in the best interest of the

Government. The proposed award was reviewed and unanimously approved by the Picatinny Arsenal Board of Awards on July 1, 1969. Telegraphic notice of award was sent to ARC dated that day and formal award was made on July 10, 1969. You were notified of the award on July 2, 1969, and you subsequently filed your protest with this Office.

The substance of your protest is that although ARC offered the lowest price, the contracting officer failed to consider several advantages other than price, inherent in Gulton's offer, which should have led to award to you. You contend that the benefits which the Government would derive from these advantages would compensate for any monetary saving gained from contracting with ARC. These advantages are said to flow from your present contract (DAAA21-67-C-0601) for the initial production run of the XM22E4 Control Power Supply and a subsequently awarded research contract (DAAA21-69-C-0420) to improve the item's performance. You state that you have a proven technical and production capacity for the item which is the result of an established production line, skilled production employees, and qualified vendors. You contend that ARC, in contrast, has a problematical production capacity, only tentative and untried vendors, and a doubtful ability to meet delivery requirements. Accordingly, you request that our Office determine whether the contract with ARC is in the best interests of the Government.

Page 10 of the RFP contained the following "STANDARDS FOR EVALUATION OF OFFERS":

Factors of evaluation pertinent to this requirement are those which are set forth below. However, while certain factors are more applicable to this requirement than others, the Government reserves the right of such flexibility in evaluation as is necessary to assure placement of the contract in the best interest of the Government.

A. Price Evaluation Factors

1. Quoted Unit Prices: Consideration of basic unit prices will cover complete analysis of costs.
2. Discounts: Cash discounts providing a minimum time of ten (10) days for payment will be deducted from unit prices when evaluating offers.

B. Non-Price Evaluation Factors—(Administrative factors to be considered in making an award under this solicitation).

1. Record in performing other Government contracts.
2. Available capacity for performing the proposed award and ability to meet the delivery schedule.

Note: Notwithstanding any other provisions set forth above in this Solicitation, factors in evaluation of offers received in response hereto, shall be evaluated in accordance with "Standards for Evaluation of Offers."

In regard to the "Price Evaluation Factors" you object to the price analysis conducted by the procuring activity, in lieu of a cost analysis which you claim would have cast doubt upon ARC's ability to estimate production costs and ability to make timely delivery. The RFP does not define "complete analysis of costs" nor does it identify the types of

data which are relevant to the analysis. You appear to equate the RFP provision with "cost analysis" as required by 10 U.S.C. 2306(f) and Armed Services Procurement Regulation (ASPR) 3–807.2(c). In this respect, we agree with the administrative report that there was "adequate price competition," as defined in ASPR 3–807.1(b)(1), in the instant procurement. ASPR 3–807.2 states:

> Some form of price or cost analysis is required in connection with every negotiated procurement action. * * * *Cost analysis shall be performed in accordance with (c) below when cost or pricing data is required to be submitted under the conditions described in 3–807.3* * * *. Price analysis shall be used in all other instances to determine the reaonableness of the proposed contract price. * * * [Italic supplied.]

ASPR 3–807.3, in implementation of 10 U.S.C. 2306(f), provides for the submission of written cost or pricing data and for certification of the accuracy, completeness and currency of that data prior to:

> (a) * * *
> (ii) The award of any firm fixed-price * * * negotiated contract expected to exceed $100,000 in amount;
> (iii) any contract modification expected to exceed $100,000 in amount to any formally advertised or negotiated contract whether or not cost or pricing data was required in connection with the initial pricing of the contract * * *
>
> * * * * * * *
>
> unless, in the case of (ii), (iii) * * *, the price negotiated is based on adequate price competition * * *

Under the criteria of 10 U.S.C. 2306(f) and ASPR 3–807.3, submission of cost or pricing data and certification thereof was not required in the instant procurement. A requirement for such data and certification would arise only in connection with changes or modification to the initial contract wherein the price adjustment would exceed $100,000. This is properly reflected in the ASPR 7–104.29(b), 7–104.41(b) and 7–104.42(b) clauses which were either recited in full or incorporated by reference in the RFP. Since the statute and implementing regulations referenced above did not require the submission of cost or pricing data, there was no requirement thereunder for the contracting officer to conduct a "cost analysis" as described in ASPR 3–807.2(c). Therefore, we think it unreasonable to equate the RFP provision to the ASPR definition of "cost analysis," as this would impose a duty upon the contracting officer not contemplated by statute or regulation. Although it may have been expressed more aptly, we regard a more reasonable interpretation of the RFP to be that an appropriate cost or price analysis or both, as provided by law, was to be made of the proposals.

In a related argument you state that in view of certain conclusions expressed in our audit report (B–163874) of July 15, 1969, entitled "Reasonableness of Prices Questioned for Bomb and Hand Grenade Fuzes Under Three Negotiated Contracts," a cost analysis of propos-

als should have been conducted pursuant to 10 U.S.C. 2306(f) and ASPR 3-807. That report concerned three noncompetitive negotiated contracts to which the cost or pricing data provisions of the above-cited statute and implementing regulations clearly applied. The conclusions which we expressed in our report of July 15, 1969, are thus inapplicable to the instant procurement.

You further contend that proper consideration of the RFP's "Non-Price Evaluation Factors," set forth above, should have resulted in award to your firm in view of your current satisfactory production of the XM22E4 power supply. The preaward survey on ARC concluded that its performance record, production capability and ability to meet the required schedule were satisfactory, and "complete award" to ARC was recommended. While the record shows that several members of the preaward survey team expressed reservations about ARC's ability to meet the delivery schedule, this did not affect the positive recommendation of the team. In addition, the proposed award to ARC was reviewed and approved by the Picatinny Arsenal Board of Awards.

An offeror's prior performance record, capacity to perform a contract, and ability to make timely deliveries all are components of a firm's responsibility. In regard to the contracting officer's duty to determine and offeror's responsibility, in our decision B-163859, April 17, 1968, we stated:

> Our Office has consistently held that the determination of a bidder's overall responsibility is primarily the function of the contracting agency and not of the General Accounting Office, 38 Comp. Gen. 131; 33 *id.* 549. Whether a bidder is or is not, capable of producing in accordance with contract requirements is a question of fact, and absent evidence that the determination of a bidder's capabilities was based on error, fraud or favoritism, our Office will accept the findings of the contracting agency. 40 Comp. Gen. 294. We have also stated that the projection of a bidder's ability to perform if awarded a contract is of necessity a matter of judgment, which, while it should be based on fact and arrived at in good faith, must properly be left largely to the sound administrative discretion of the officers involved, since they are in the best position to assess responsibility, they must bear the major brunt of any difficulties experienced by reason of the contractor's lack of ability, and they must maintain the day-to-day relations with the contractor on behalf of the Government. For these reasons, we have held that it would be unreasonable to superimpose the judgment of our Office or any other agency or group on that of the contracting officials. 39 Comp. Gen 705, 711.

Since our review reveals no reason to conclude that there was not an adequate factual basis for the administrative determination that ARC was a responsible prospective contractor, this determination will not be questioned by our Office.

Finally, you refer to certain cost savings which Gulton was in a position to pass on to the Government as a result of your research contract. In your letter of July 18, 1969, you state "This was to be discussed during the negotiations; however, the opportunity to negotiate was not extended." There is nothing in the record indicating that any re-

quest by Gulton to negotiate concerning such savings was denied. You received a copy of the RFP on March 27, 1969, and submitted a detailed proposal on April 25. On May 31, you received the telegraphic request to review your original offer and to submit your best and final offer, which you did on June 11, 1969. It would therefore appear that there was ample opportunity for you to discuss with the Government the cost impact of your research contract.

In view of the foregoing we must conclude that the award was made in good faith to procure an item assigned an "02" issue priority designator, and that a valid and binding contractual agreement resulted, which will not be disturbed by our Office.

However, we are concerned with the lack of a clear expression in the RFP of standards for evaluation of offers, and are by letter of today, suggesting to the Secretary of the Army that in future procurements applicable evaluation standards should be specifically stated and offerors should be informed of the relative weights assigned to each factor.

[B-167479]

Military Personnel—Missing, Interned, Etc., Persons—Evacuation of Dependents—Temporary Lodging Allowance

The payment of a temporary lodging allowance incident to the evacuation of the dependents of a member of the uniformed services missing in action may not be authorized, as the allowance accrues only in connection with a permanent change of station to partially reimburse a member for the more than normal expenses temporarily incurred at hotel or hotel-like accommodations and public restaurants immediately preceding departure from an overseas station on a permanent change of station. Under the Missing Persons Act, which designates the items of pay and allowances that may be continued while a member is in a missing status, although a housing and cost-of-living station allowance may be paid, a temporary lodging allowance incident to the evacuation of dependents may not, because a member in a missing status cannot meet the permanent change-of-station requirement.

Military Personnel—Missing, Interned, Etc., Persons—Evacuation of Dependents—Transportation Entitlement

When it is necessary to evacuate the dependents of a member on active duty who is officially reported as dead, injured, or absent for a period of more than 29 days in a missing status, pursuant to 37 U.S.C. 554(b), irrespective of the member's pay grade, transportation may be provided for dependents, personal effects, and household effects—including the packing, crating, drayage, temporary storage, and unpacking of the household effects—to the member's official residence, to the residence of the dependents, or as otherwise provided, but no other allowances are payable incident to the evacuation.

Station Allowances—Military Personnel—Temporary Lodgings—Injured Member

The entitlement of an injured member of the uniformed services when prolonged hospitalization or treatment is anticipated to the transportation of dependents and household effects is no basis to authorize payment of a temporary lodging allowance incident to the evacuation of his dependents occasioned by his injured status, unless the movement of the dependents and household effects is in connection with an ordered permanent change of station for the member.

898-968 O—70——2

To the Secretary of the Army, November 13, 1969:

Further reference is made to letter dated June 30, 1969, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting a decision whether the Secretaries concerned have the authority to amend the Joint Travel Regulations to provide entitlement to temporary lodging allowance when the dependents of a member of the uniformed services move from an overseas residence incident to receipt of notice that the member is in a status as set forth in 37 U.S.C. 554(b). The request was assigned Control No. 69–27 by the Per Diem, Travel and Transportation Allowance Committee.

In the Assistant Secretary's letter it is stated that under the provisions of 37 U.S.C. 552(a), a member who is in a missing status, as defined in 37 U.S.C. 551(2), is, for the period he is in that status, entitled to receive or have credited to his account the same pay and allowances, as defined in chapter 10 of Title 37, to which he was entitled at the begining of that period or may thereafter become entitled. Further, it is stated that pay and allowances are defined in 37 U.S.C. 551 (3) (F) as including "station per diem allowances for not more than 90 days." And it is stated that station allowances include temporary lodging allowances (paragraph M4300–4, Joint Travel Regulations).

The Assistant Secretary says it is recognized that a member who is reported dead is not entitled to the pay and allowances referred to in 37 U.S.C. 552(a) and therefore the Secretaries could not prescribe a temporary lodging allowance under 37 U.S.C. 405 incident to movement of dependents upon receipt of notice of death of a member. He says it does appear, however, that the Secretaries, within the authority vested in them by 37 U.S.C. 405, may provide for continuation of payment of station allowances in the case of a member who was entitled thereto at the time he entered a missing status and payment of temporary lodging allowances to which he would have thereafter become entitled. But he says some doubt possibly may arise as to the legality of authorizing temporary lodging allowance in the case where the member is of a pay grade not entitled to station allowances at the time he entered a missing status as defined in 37 U.S.C. 551(2), or an injured status under the provisions of 37 U.S.C. 554(b).

Station allowances payable outside the United States consist of housing and cost-of-living allowances, interim housing allowances and temporary lodging allowances. Paragraph M4300–4, Joint Travel Regulations. Housing and cost-of-living allowances are authorized for the purpose of defraying the average excess daily living costs experienced by members on permanent duty. Paragraph M4301 of the regulations.

Temporary lodging allowances, however, do not relate to average excess daily living costs but, insofar as departure from the station is concerned, are authorized for the purpose of partially reimbursing a member for the more than normal expenses incurred at hotel or hotel-like accommodations and public restaurants necessarily used for prescribed periods immediately preceding departure from the overseas station on a permanent change of station. Paragraph M4303 of the regulations. The temporary lodging allowance accrues in such cases only incident to an ordered change of permanent station. As its name implies, it is a temporary allowance. It is not payable to everyone but is payable only to those members who must temporarily use the enumerated transient lodging and subsistence accommodations as a consequence of change of permanent station orders.

Section 552 of Title 37, U.S. Code, stems from section 2 of the Missing Persons Act, as amended, formerly contained in 50 U.S.C. App. 1002. The legislative history of the Missing Persons Act, first enacted in 1942 as temporary wartime legislation, shows that the basic purpose of the act was to provide for the dependents of members who were missing by continuing their pay or crediting to their account the same pay and allowances to which they were entitled at the beginning of such period of absence, or became entitled thereafter.

The act as amended and temporarily extended was further amended and made permanent by Public Law 85–217, approved August 29, 1957, 71 Stat. 491. Section 2 of the 1942 act, as amended, was further amended by the 1957 act to specifically designate the items of pay and allowances which a member is entitled to receive or have credited to his account while absent in a status within the contemplation of that section. Such items included "station per diem allowances for not to exceed ninety days, to which he was entitled at the beginning of such period of absence or may become entitled thereafter * * *."

Hearings were held on March 6, 1957, before Subcommittee No. 1, Committee on Armed Services, House of Representatives, on H.R. 2404, a bill which preceded H.R. 5807, that was enacted as Public Law 85–217. Under H.R. 2404, neither travel per diem nor station allowances would have been authorized incident to a missing status. Major E. A. Turrou, The Adjutant General's Office, Department of the Army, testified as to the need to continue station allowances. He said that it was the policy when an individual was placed in a missing-in-action status to carry him in such status generally for 30 days before action was taken to evacuate the dependents back to the United States.

Major Turrou further stated that during such period that the individual has dependents in the area, additional costs are accruing to

the dependents who must rent an apartment, purchase their food, and pay for utilities in that country on the higher living costs. Therefore, he said it was the feeling of the Department that those station allowances should continue as long as the need exists for the family of the individual, and as soon as they are evacuated to the United States, the allowances, of course, would be terminated.

It appears that, on the basis of such testimony, the provision for continuing station allowances for not to exceed 90 days was included in H.R. 5807. Nothing was said as to the payment of temporary lodging allowance incident to the evacuation of the dependents and it seems clear that it was the intention only to continue the station allowances (housing and cost-of-living) to which the member would have been entitled at such station if he had not entered a missing status.

In view of the legislative history as to the station allowances to be continued while the member is in a missing status and since a member in such status could not be ordered to make a permanent change of station, we are of the opinion that there is no legal authority to provide for the payment of temporary lodging allowance incident to the evacuation of the dependents of a member in such a status.

With respect to the evacuation of dependents, section 554(b) of Title 37, U.S. Code, provides that transportation (including packing, crating, drayage, temporary storage and unpacking of household 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." Such transportation may be provided to the member's official residence, to the residence of his dependents or as otherwise provided. Under those provisions no other allowances are payable incident to such move.

In the case of a member in an injured status, transportation of the dependents and effects may be provided (section 554(c)) only when prolonged hospitalization or treatment is anticipated. But, like the case of a member who is reported dead or in a missing status, we find no basis for authorizing temporary lodging allowance incident to the evacuation of his dependents because of his injured status unless their movement is in connection with an ordered permanent change of station for the member.

For the foregoing reasons, we are of the opinion that the proposed change in the Joint Travel Regulations is not authorized.

[B-167687]

Uniforms—Military Personnel—Sale—Removal of Military Insignia

An item described in a surplus sale as "Jumpers, men's: undress, cotton uniform twill white, enlisted men, navy * * *" is considered a distinctive military uniform within the contemplation of 10 U.S.C. 771, and, therefore, the sale of the item is subject to an administratively imposed condition requiring the mutilation or modification of the article by removing military insignia to make the uniform nondistinctive. While the condition is not based on specific statutory authority, its purpose is to preserve the integrity of the Navy uniform, a purpose that is consistent with 10 U.S.C. 771, which restricts the wearing of military uniforms to military personnel.

To the American Waste and Wiper Company, November 13, 1969:

Reference is made to your letter of August 7, 1969, concerning a requirement that certain items of unused military apparel, acquired by your firm through Department of Defense (DOD) sealed bid sale No. 41-9108 (invitation for bids 41-9108) conducted by the Defense Surplus Sales Office (DSSO), Ogden, Utah, be mutilated in a manner that would render these items unusable as garments.

Your firm was the successful bidder for items 126 through 130, described as "Jumpers, men's: undress, cotton uniform twill white, enlisted men, navy, * * *" each item description differing only as to size of the jumpers and the quantity offered for sale. All of the jumpers offered for sale were unused. These items were sold subject to article FA of the Conditions of Sale, on page 12 of the Sales Catalog, which requires the purchaser of these items to either mutilate or destroy the items, or to render them nondistinctive as an article of a military uniform, by removing the collar flap or altering the front of the jumper to button-up front and to mutilate or destroy any distinctive insignia (except when returned to the respective military service) so as to cause them to lose their distinctive characteristics prior to any loan, donation, transfer, or resale of the jumpers.

Article FA was made part of the sales contract pursuant to section 101-45.304-8a of the Federal Property Management Regulations (FPMR) which authorizes the use of necessary special provisions in sales contracts such as standard form 114-A (prescribed for use in the present procurement). Also, paragraph "A," chapter VII, of the Defense Disposal Manual permits DLSC to authorize interim invitations or changes to the special conditions prescribed for use in all sales of surplus, foreign excess and exchange/sale property.

In your letter of August 7 you question the validity of the requirement that these jumpers be mutilated, making them unusable as an item of apparel. You state that should we uphold the use of the mutilation clause, we will find that in the future your firm, as well as many others, will not bid on such items due to the fact that the

cost of preparing the items for sale will exceed their value. Additionally, you point out that the jumpers have no distinctive insignia which would identify them as part of a military uniform. You also state that, since these items are unused and are being disposed of as excess personal property, they must be obsolete.

The crux of your protest appears to be that there is no statutory or legal authority requiring mutilation of the items purchased by you and, presumably, your firm, as well as other firms, might offer a substantially higher return to the Government if such a condition were not included in surplus sales contracts. This Office has held that conditions in Government surplus sales contracts which may reduce the return to the Government from such sales are generally improper unless authorized by statute. 43 Comp. Gen. 15, 17 (1963). While admittedly there is no statutory authority specifically authorizing such a condition in a surplus sales contract, the underlying purpose of article FA is to preserve the integrity of the Navy uniform, such purpose being consistent with the statutory goal of 10 U.S.C. 771, which states:

> Except as otherwise provided by law, no person except a member of the Army, Navy, Air Force, or Marine Corps, as the case may be, may wear—
>
> (1) the uniform or a distinctive part of the uniform, of the Army, Navy, Air Force, or Marine Corps; or (2) a uniform any part of which is similar to a distinctive part of the uniform of the Army, Navy, Air Force, or Marine Corps.

To sell any items of the kinds described in that statute without removing or requiring the removal of the distinctive features thereof would encourage violations of the above statute, and we therefore believe that the provisions of article FA are a proper and reasonable implementation of the law. The material questions presented by your protest therefore are (1) are the items purchased by your firm distinctive articles of a military uniform; and (2) do the particular methods prescribed by article FA for rendering the items nondistinctive require more alteration than necessary for that purpose and thus reduce the probable value realizable by the Government? While the jumpers have no distinctive insignia which would identify them as part of a military uniform, attachment 11 to part 3, chapter XV, of the Defense Disposal Manual (DOD 4160.21M) lists Navy white jumpers as distinctive articles of the Navy uniform and, according to informal advice given to the Defense Supply Agency by the Navy Uniform Board, use of the patch pocket white jumper by Navy personnel who have such jumpers, is still authorized although the article is no longer being issued. The jumper is therefore still a distinctive article of the Navy uniform, even though the stock on hand has been determined to be excess and authorized to be sold as surplus.

As to whether the methods prescribed by article FA for rendering the items nondistinctive are such as might unnecessarily reduce the Government's return from such sales, we note that under article FA the purchaser is not required to mutilate the garment, but is given the alternative of modifying it by removing the collar flaps and/or altering the front of the jumper to a button-up front. We do not know how costly alteration of these items would be or if there is an acceptable alternative to mutilation or alteration. According to the administrative report, at one time all the Navy required was that the purchaser dye the distinctive article and destroy or mutilate the distinctive insignia. However, the Navy later concluded that this was not sufficient to make the article nondistinctive. As to the method proposed in your letter of August 7, i.e., affixing to each jumper a prominent colored stencil, there is no evidence in the record indicating that this method was ever considered by the Navy. But, in any event, the question of what change in a garment is sufficient to make it nondistinctive would appear to be one best answered by the agency involved. In the present case we do not find that the methods prescribed by article FA, in furtherance of the legitimate purpose of preserving the integrity of the military uniform, are so unreasonable as would unnecessarily reduce the Government's return from surplus sales.

In any event, the offering and your bid were clearly conditioned upon mutilation or modification in accordance with article FA and it would be prejudicial both to the interests of the Government and to those of other bidders to remove the restriction for your benefit after acceptance of your bid, which consummated a valid and binding contract of sale.

For the reasons stated, your protest must be rejected.

[B-167874]

Veterans Administration—Contracts—Training—Interagency Participation—Authority

The financing of a contract by the Veterans Administration (VA) for a hospital administrators interagency institute with a nongovernmental facility in the District of Columbia, the cost to be shared by other Federal agency members of the Interagency Committee, is precluded by section 307 of Public Law 90-550, which prohibits the use of the monies appropriated in the act to finance Interdepartmental Boards, Commissions, Councils, Committees, or similar group activities that otherwise would be financed under 31 U.S.C. 691, nor may the authority in section 601 of the Economy Act be used to provide the training, as some of the agencies of the Committee are not enumerated in the act. However, an interagency arrangement under the training act (5 U.S.C. 4101-4118) that would provide more effective or economical training would warrant VA contracting for the nongovernmental training facilities.

District of Columbia—Leases, Concessions, Rental Agreements, Etc.—Prior Appropriation Necessity

The Veterans Administration (VA) in contracting for Hospital Administrators Institutes in nongovernmental facilities located in the District of Columbia (D.C.) may not have the contractor procure room accommodations in D.C. for the live-in-participants attending the Institutes, 40 U.S.C. 34 restricting the rental of space in D.C. for the purposes of the Government, in the absence of an express appropriation. The VA appropriations do not provide for the rental of space in D.C. and VA may not avoid the leasing restriction by the inclusion of a cost reimbursement type provision in the contract. However, hotel services and facilities outside D.C. may be procured as necessary training expenses and furnished in kind to trainees in a travel status, and an appropriate reduction made in the per diem payable.

Veterans Administration—Contracts—Leases—Space in and Outside District of Columbia

Incident to the Veterans Administration contract for Interagency Hospital Administrators Institutes in nongovernmental facilities in the District of Columbia, room accommodations other than in the District may be procured and furnished on a reimbursable basis to officers of the military departments whose official duty station is the Washington metropolitan area, as the appropriations chargeable with the expenditures provide funds for the training expenses of members of the military services and commissioned officers of the Public Health Service.

To the Administrator, Veterans Administration, November 13, 1969:

We refer to your letter of September 9, 1969, requesting our decision upon certain questions relating to a contract and a proposed amendment thereto, between the Veterans Administration (VA) and Frederick H. Gibbs, Professor of Hospital Administration, George Washington University. Under the contract Professor Gibbs acts as the Director, Interagency Institutes for Federal Hospital Administrators. You say that the cost of the contract is shared by other Federal agency members of the Interagency Committee, i.e., Departments of the Army, Air Force, Navy, and the Department of Health, Education, and Welfare.

Your first question is whether the proposed interagency arrangement is precluded by section 307 of Public Law 90–550, 82 Stat. 956, which prohibits the use of monies appropriated by that act for financing Interdepartmental Boards, Commissions, Councils, Committees or similar groups under section 214 of the Interdepartmental Offices Appropriation Act of 1946, 31 U.S.C. 691, which do not have prior specific congressional approval for such method of financial support.

Section 9 of the act of March 4, 1909, 35 Stat. 1027, 31 U.S.C. 673, prohibits the use of public funds to pay the compensation or expenses of any commission, council, board or other similar body, or any members thereof, or for expenses in connection with any work or the results of any work or action of such groups, unless the creation of the same was authorized by law.

However, subsequently there was enacted into law section 214 of the

Independent Offices Appropriation Act, 1946, 59 Stat. 134, 31 U.S.C. 691, which reads as follows—quoting from the Code:

> Appropriations of the executive departments and independent establishments of the Government shall be available for the expenses of committees, boards, or other interagency groups engaged in authorized activities of common interest to such departments and establishments and composed in whole or in part of representatives thereof who receive no additional compensation by virtue of such membership: *Provided*, That employees of such departments and establishments rendering service for such committees, boards, or other groups, other than as representatives, shall receive no additional compensation by virtue of such service.

This latter provision of law, in effect, excepts from the provisions of 31 U.S.C. 673 executive department and independent establishment committees, boards, or other interagency groups of the type specified therein that are engaged in authorized activities of common interest to such departments and establishments. Thus, 31 U.S.C. 691 would appear to provide the necessary authority for the operation of the interagency committee involved here.

However, the general effect of section 307 of Public Law 90–550—section 410, H.R. 12307, 91st Congress, which would provide appropriations for independent establishments, including VA, for the fiscal year 1970 includes a similar provision—is to preclude with certain exceptions, not here pertinent, the financing from funds appropriated by Public Law 90–550 of "interdepartmental boards, commissions, councils, committees, or similar groups" engaged in any of the "authorized activities" which otherwise might have been financed by such interagency groups under 31 U.S.C. 691 unless specific congressional authorization has been given for such method of financing. Accordingly, it is our view that none of your Administration's funds may be used to finance the contract in question in its present form.

Concerning the use of the authority contained in section 601 of the Economy Act (31 U.S.C. 686) as a basis for the proposed arrangement, we note that that section permits only certain enumerated agencies to place orders with other agencies for services which the latter agencies may be in a position to procure by contract. Since the Department of Health, Education, and Welfare is not one of the enumerated agencies, VA may not obtain any services by contract for that Department under the authority of 31 U.S.C. 686.

We have examined the provisions of Title 5, United States Code, relating to the training of Government employees, 5 U.S.C. 4101–4118, and while that statute expressly provides for extension of one agency's Government facility training programs to employees of other Government agencies (5 U.S.C. 4101), nowhere in that statute have we found any language expressly authorizing one agency to contract for non-Government facility training to be utilized by other Government agencies.

398-968 O—70——8

On the other hand, one of the basic policies and objectives of the training statute is to obtain maximum training benefits from each training dollar spent. If the arrangement you propose under the authority of the training act is, in fact, to the financial interest of the United States by providing more effective or economical training for the dollars expended, then it is our opinion that such arrangement not only is in accordance with good business practice but would be consistent with the purposes and the spirit of the training statute. Thus, our Office would interpose no objection if the financial interest of the United States warrants to your Administration's contracting for non-Government facility training which could be utilized not only by VA but other Government agencies.

We understand that under the proposed terms of the contract the contractor would procure room accommodations for the actual number of live-in participants attending each Institute and that VA would reimburse the contractor the actual expenses incurred by him in procuring such accommodations. 40 U.S.C. 34 is a restriction on the rental of space in the District of Columbia to be used for the purposes of the Government in the absence of an express appropriation therefor. Such restriction is comprehensive, applying to all uses for such purposes whether temporary or permanent. See 35 Comp. Gen. 314 (1955). Thus, VA would not be permitted to use its appropriations to pay the lessor of such space. It has been held that an agency may not avoid a statutory restriction by contracting under a cost reimbursement type contract for the procuring of a service or facility which it could not procure directly. See 43 Comp. Gen. 697 (1964). The principle in that decision is equally for application here. Thus, we hold that you may not by a cost reimbursement type of provision in a contract procure space in the District of Columbia which you could not do on a direct leasing arrangement covering the premises.

Concerning the procuring of hotel services and facilities and furnishing them in kind to participant trainees who are in a travel status, we see no legal objection to such procedure provided the accommodations are not situated in the District of Columbia and that the procedure is administratively determined to be an appropriate means of incurring necessary training expenses. We understand that an appropriate reduction in the per diem rate payable to the employee would be made in such cases.

Your final question concerns the procuring and furnishing as a necessary training expense room accommodations to officers of the military departments whose official duty station is in the Washington metropolitan area. While the provisions of chapter 41 of Title 5, United States Code, do not apply to an "individual * * * who is a

member of a uniformed service during a period in which he is entitled to pay under section 204 of Title 37" we note that by virtue of appropriation provisions appearing annually in Department of Defense Appropriation Acts under the headings Operation and Maintenance, Army; Operation and Maintenance, Navy; and Operation and Maintenance, Air Force, funds are made available for certain training expenses of members of the military services. See for example Public Law 90-580, 82 Stat. 1122. See also the provisions contained in 10 U.S.C. 4301(a) and 9301(a) relating to members of the Army and Air Force, respectively. Similarly with respect to commissioned officers of the Public Health Service, see 42 U.S.C. 218a. In view of such authorities the procurement of and the furnishing of rooms to military personnel—provided it is not space rented in the District of Columbia—would be authorized if necessary for full participation in the training and reimbursement therefor from available military appropriations would be proper.

[B-167190]

Contracts — Negotiation — Competition — Competitive Range Formula

To categorize thirteen technically acceptable proposals to study the development of a fire detention system for manned spacecraft by declining degrees of acceptability—"significantly superior," and the only group considered to be within a competitive range for the discussion required by 10 U.S.C. 2304(g), even though discussions seem to have been in order for the next group classified as "technically acceptable," and the last two groups classified "not apparently adequate for operational spacecraft use," and "marginally acceptable"—diluted the usual meaning of the word "acceptable" to a point of meaningless, and further complicated and made uncertain the extent of "competitive range." The use of misleading classifications should be avoided, and the written or oral discussions contemplated by 10 U.S.C. 2304(g) conducted with all offerors submitting proposals within a competitive range.

To the Administrator, National Aeronautics and Space Administration, November 14, 1969:

Reference is made to letter KDP-1 dated September 11, 1969, from the Director of Procurement, reporting on the protest by Science Spectrum, Inc., against the award of a contract to General Electric Company (GE), under request for proposals (RFP) No. ERC/R&D KII-8-00114, issued by the Electronics Research Center (ERC).

There is enclosed for your information a copy of our decision of today denying the protest. However, your attention is invited to the following deficiency in negotiation which we believe requires some corrective action.

On June 3, 1968, ERC issued RFP No. ERC/R&D KII-8-00114, seeking to procure a study of submicron particle measuring tech-

niques leading to the development of a fire detection system for manned spacecraft. On June 26, 1968, proposals were opened and thereafter evaluated by a committee which issued its report on July 19, 1968. That report ranked Science Spectrum's proposal 10th out of the 13 proposals received and termed it "marginally acceptable." The proposals of GE and Meteorology Research, Incorporated (MRI), were ranked first and second respectively, and were rated "significantly superior" to the other 11 proposers.

Because of this marked superiority of the GE and MRI proposals, the other proposals were not considered to be within the competitive range. Science Spectrum contends that the provisions of 10 U.S.C. 2304(g), requiring that written or oral discussions be held with all responsible offerors who submit proposals within a competitive range, were violated by ERC since no discussions were held with Science Spectrum even though its technical proposal was evaluated "acceptable."

The basis for this claim is the evaluation committee's report of July 19, 1968, which evaluated 13 proposals and stated that all were "acceptable on a technical basis." The proposals were then listed numerically in descending order of merit, with GE first and Science Spectrum 10th out of 13. The proposals were also described by the evaluation committee as follows: 1 and 2 as significantly superior; 3–5, as technically acceptable but considerably lower than the first and second ranked proposals; 6–9 as not apparently adequate for operational spacecraft use; and 10–13 as "marginally acceptable."

Since Science Spectrum's proposal was rated only 10th out of 13 and was ranked in the lowest and least acceptable of the four groupings as marginally acceptable, such offeror was determined to be not within a competitive range for negotiation purposes. According to the report of the committee that evaluated the technical proposals, the ranking of Science Spectrum was based upon the fact that, "The only technique considered is an optical one which is quite sound technically but not strictly applicable." Apparently, although the technique is valid, it is not considered adequate for operational spacecraft usage. While the technical proposals in the next to last grouping may likewise be considered inadequate for similar reasons, it is not entirely clear that the technical proposals in the second group were so technically inferior as to preclude meaningful discussions. See 45 Comp. Gen. 417 (1966).

With regard to the nature and extent of negotiations to be conducted with offerors, National Aeronautics and Space Administration Procurement Regulation 3.805–1, implementing 10 U.S.C. 2304(g), requires that "written or oral discussions shall be conducted with all

responsible offerors who submit proposals within a competitive range, price and other factors considered." While we have held that a proposal must be considered to be within a competitive range so as to require negotiations unless it is so technically inferior that meaningful negotiations are precluded, we have also recognized that the determination of "competitive range," particularly as regards technical considerations, is primarily a matter of procurement discretion which will not be disturbed in the absence of a clear showing that such determination was an arbitrary abuse of discretion. 48 Comp. Gen. 314 (1968).

The categorization of the 13 proposals by declining degrees of acceptability to a point where the usual meaning of the word "acceptable" becomes so diluted as to become meaningless further complicates and renders uncertain the extent of "competitive range."

Accordingly, appropriate steps should be taken to avoid the use of misleading classifications such as were employed in this case.

As requested, we are returning herewith your file in this matter.

[B-167644]

Contracts—Specifications—Samples—Adequacy

The fact that the samples of fabric submitted with the low bid on one of several classes of furniture solicited met the color, pattern, finish, and/or appearance characteristics listed in the invitation, but not the composition requirements of the fabric to be furnished and otherwise referenced in the invitation, does not require rejection of the bid, where the samples served the purpose for which they were intended—evaluation to determine compliance with the listed characteristics—and were not required to meet or be tested for material conformity, and where the record evidences that the acceptable color and other characteristics of the submitted samples are available in the fabric to be furnished in the performance of the contract.

Contracts—Specifications—Descriptive Data—Unnecessary

Although failure to comply with a descriptive information requirement when it is needed for bid evaluation is a basis for bid rejection, a low bid that did not furnish required furniture dimensions that are not essential to the evaluation process is a responsive bid and may be considered for award, for notwithstanding the omission, the contractor will be required to meet the minimum specifications. Even if the bid exceeded the minimum dimensional requirements there would be no basis for rejecting the bid, unless the variations offered changed the general description of the item. However, invitations should not solicit unnecessary information in the absence of a legitimate justification.

Bids—Prices—Anticipated Loss

Where a bid price is competitive and a bidder is assumed to know the costs involved and intended the prices bid, there is no basis for the conclusion that performance of the contract would be at a loss. An anticipated loss in the performance of a contract does not justify rejection of an otherwise acceptable bid.

To Shelby Williams Industries, Incorporated, November 17, 1969:

Reference is made to your letters dated August 5, August 14, and October 6, 1969, protesting the procurement action of the General

Services Administration in connection with invitation for bids No. FPNFH–A–27783.

The solicitation was issued April 7, 1969, for a Federal Supply Schedule contract for FSC Group 71, part III, sections A and B, Class 7105, traditional and modern bedroom, dining room, and living room furniture, for the period October 1, 1969 through September 30, 1970. Bids were opened on May 13, 1969, and the Empire State Chair Company, Incorporated (Empire), was the low bidder for Group IV items in Zones 1, 2, and 3. Shelby Williams was the only other bidder on these items.

Empire submitted with its bid two samples of artificial leather of six colors each. One of these two bid samples was of Class VII material rather than Class IV as specified in the solicitation.

The solicitation also required three samples of laminated plastics, each sample in six colors. Empire submitted in this connection one sample pattern in solid suede of seven colors; one sample pattern in wood grains of seven colors; and one sample pattern in linen of five colors and one sample in grain leather.

You contend that Empire's bid should be rejected as nonresponsive to the solicitation. You first assert that Empire's samples did not conform to bid requirements in that:

1. One of the two bid samples for artificial leather was of Class VII material rather than Class IV as required.
2. The samples of laminated plastics consisted of four patterns, two in seven colors each; one in five colors; and one in one color.

You also allege that the contracting officer used separate standards for the requirements of artificial leather and for laminated plastics and that Empire failed to indicate the sizes of the items it proposes to supply. Finally you state that if awarded the contract, Empire would have to perform at a loss.

Paragraph 11 of Special Provisions of the solicitation states in part:

11. BID SAMPLES:

(a) Bid samples for Groups I and IV in the quantities, sizes, etc. required for the items so indicated in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. *Samples will be evaluated to determine compliance with all characteristics listed for examination in the invitation.* [Italic supplied.]

(b) Failure of samples to conform to all such characteristics will require rejection of the bid. * * *

(c) Products delivered under any resulting contract shall strictly comply with the approved sample as to the characteristics listed for examination and shall conform to the specifications as to all other characteristics.

* * * * * * *

(f) The minimum number of samples to be furnished for Group IV are indicated below:

Material:

	1 No. of different samples to be offered.	2 No. of colors of each sample submitted pursuant to column 1.	3	4
		* * *		
Artificial Leather, Class IV	2	6	* * *	
* * *				
Laminated Plastics	3	6	* * *	
* * * * * * *				

(k) *All samples are required for the purpose of determining the acceptability of the materials offered from the standpoint of color, pattern, finish and/or appearance in relation to their intended use.* [Italic supplied.]

The solicitation specifically stated that samples accompanying the bid would "be evaluated to determine compliance with all characteristics listed for examination" which were "acceptability * * * from the standpoint of color, pattern, finish and/or appearance." Composition of the fabric was otherwise set out in referenced specifications. Hence, the sample of a Class VII material submitted was subject to examination for color, pattern, finish and/or appearance. The sample did not have to meet, nor was it to be tested for conformity with, composition requirements for Class IV material. Since the record shows that the color and other listed characteristics were available in Class IV material we find no reason to consider the bid nonresponsive on this basis.

You have cited our decision of January 31, 1967, B–160503, in support of your contentions. In that case the solicitation required the submission of a sample that would show a "full repeat of pattern." The bidder submitted a sample 18 inches by 18 inches, which did not show a repeat of pattern. It was subsequently determined that a 22 inch by 22 inch sample was needed to show the repeat of pattern. The sample submitted failed to afford the information required. That situation is not comparable to the situation in the instant case. Here the samples afforded the specific information desired.

In the analogous case considered in our decision, B–147518, dated January 16, 1962, we held, concerning the purpose for which samples were required in that instance, that:

> * * * the last part of the clause specifically states the purpose and use for which the samples are required. In this connection it is provided that the samples are for administrative purposes to expedite the award and to determine bidders' capabilities; and that the samples will be used for selection of colors and/or patterns, and are not for the purpose of determining compliance with the specifications. It is further provided that the submission of the samples does not relieve any bidder awarded a contract from the responsibility of furnishing items fully complying with the applicable specifications.
>
> Under the specific terms of the clause, so long as the metal samples are adequate "for selection of colors and/or patterns" they comply with the stated purpose for which they were required. There is no requirement that the samples otherwise comply with the specifications nor is the bidder by the submission of such samples relieved from furnishing items fully in accordance with the specifications. The General Services Administration reports that the samples submitted by

Baker adequately show the colors and softened surface textures or patterns. This is a question of fact primarily for determination by the contracting agency and not this Office.

As to laminated plastics, three samples were required with a minimum of six colors for each sample. The contracting officer states in connection with the samples submitted by Empire that:

* * * Although Empire did not designate which individual pieces of formica were sample 1, 2, and 3, we believe that the only reasonable view of the submission is that the two sets of matching patterns are intended to constitute two samples and that the third sample includes a mixtures of five of one pattern and one of another.

We agree that this is the only reasonable view, particularly since the samples were required for the purposes indicated above.

The schedule of supplies or services solicited is prefaced by the statement:

BIDDERS SHALL INSERT IN THE SPACES PROVIDED HEREIN THE SIZES THEY PROPOSE TO FURNISH.—Sizes must equal or exceed sizes indicated in the specification or item descriptions.

Group IV items are chairs and each item description states, *inter alia*, the minimum height and seat diameter size of the particular chair acceptable. For instance, Item No. 26–67 describes the chair solicited as Figure 11 (pictured) with:

Arm, padded seat and back, with exposed wood frame on outside back; height (32¾) _____ inches, seat size, width (18) _____ inches, depth (18) _____ inches, overall width (21½) _____ inches.

Empire inserted no figures in the blank spaces on any of the Group IV items bid upon.

We have frequently held that bids may be required to include descriptive information and failure to comply renders the bid nonresponsive if the information was needed for bid evaluation purposes. See 43 Comp. Gen. 707 (1964); 40 *id.* 132 (1960); 36 *id.* 415 (1956). However, in this case we cannot find that the dimensions to be included in the blanks were needed to evaluate bids. The contractor would be required to meet the minimum specifications so long as he had submitted a responsive bid. On the other hand, there appears to be no basis for rejecting a bid for exceeding the minimum dimensions unless the variations were so great as to change the general designation of the item and a variation of such size would not be regarded as acceptable performance even if no information had been obtained in the bid. Since the information did not materially contribute to proper evaluation, its absence does not render a bid nonresponsive. B–160378, January 11, 1967. However, we do not believe that an invitation should solicit unnecessary information and we are requesting the Administrator, General Services Administration, to delete requests for information in the absence of a legitimate justification therefor.

The allegation that Empire, if awarded the contract, would have to perform at a loss because of an excessive initial investment is purely conjectural. Its bid price is competitive and it must be concluded that Empire knew the costs involved and intended the bid prices. There is no evidence that Empire's bid prices are other than as intended. However, even assuming that the allegation is correct, an anticipated loss in performance does not in itself justify rejecting an otherwise acceptable bid. B-149551, August 16, 1962.

As to your contention that the contracting officer used separate standards for the requirements of artificial leather and for laminated plastics, we cannot agree in view of the limited purpose for which samples were required.

For the reasons indicated above we find no legal basis for considering the bid of Empire nonresponsive. Your protest, accordingly, must be denied.

[B-167964]

Pay—Retired—Withholding—Veterans Administration Care and Treatment—Disposition of Pay Upon Incompetent's Death

The temporary suspension of the determination in 47 Comp. Gen. 25 to follow *Berkey* v. *United States*, 176 Ct. Cl. 1, holding that the retired pay withheld under 38 U.S.C. 3203(a)(1) from an incompetent veteran who died while receiving care in a Veterans Administration Hospital is payable to the "immediate family" of the deceased veteran, to await the outcome of a similar legal issue in the *Lorimer* case, USDC CA No. 206-67, respecting the persons considered eligible to receive payment, is removed, the court in the *Lorimer* case viewing the *Berkey* case as not applicable to relatives more remotely related to the decedent than wife, children, or dependent parents, and distribution of withheld retired pay may now be made on the basis of the *Berkey* case to the persons referenced in the *Lorimer case*. 40 Comp. Gen. 666; 43 *id.* 39; 47 *id.* 25, modified.

Decedents' Estates—Pay, Etc., Due Military Personnel—Amounts Withheld From Hospitalized Veterans—Retired Pay *v.* Pensions, Etc.—Insane and Incompetent Members

The retired pay waived under 38 U.S.C. 3105 in favor of disability compensation by an incompetent veteran although no longer considered forfeited pursuant to 38 U.S.C. 3203(b)(1) upon the veteran's death while receiving care in a Veterans Administration Hospital in view of *Berkey* v. *United States*, 176 Ct. Cl. 1, is not payable to a brother, half brother and half sister of the decedent who had been domiciled in Illinois, as the *Berkey* case is not considered applicable to relatives more remotely related to a decedent veteran than wife, children, or dependent parents. However, the retired pay that was not subject to withholding pursuant to 10 U.S.C. 2771 may be paid to the claimants, the rules of descent and distribution in the State of Illinois making no distinction between whole and half blood brothers and sisters.

To Major N. C. Alcock, Department of the Air Force, November 17, 1969:

Further reference is made to your recent letter (file reference ALRA) requesting an advance decision as to the propriety of making payment on a voucher in the amount of $3,220.45 in favor of two sur-

viving sisters and one surviving brother of Airman Third Class Freddie L. Robinson, retired, who died August 19, 1966. Your letter was forwarded here under date of September 19, 1969, by the Deputy Assistant Comptroller for Accounting and Finance and has been assigned Air Force Request No. DO–AF–1053 by the Department of Defense Military Pay and Allowance Committee.

The names of the payees appearing on the voucher and their relationship to the decedent as shown by the record, are, William C. Tennant (aka) William C. Allen, half brother; Betty Jean Holmes (aka) Betty Jean Hunter, sister; and William Dell Tennant (aka) Willie Dell McQuire, half sister. The claimants all reside in Chicago, Illinois, and each would receive one-third of the decedent's unpaid retired pay.

You state that Airman Robinson was placed on the permanent disability retired list effective March 19, 1951, under sections 402 and 409 of the Career Compensation Act of 1949, 63 Stat. 816 and 823, 37 U.S.C. 272 and 279, and that full retired pay was waived in favor of disability compensation awarded by the Veterans Administration effective October 1, 1953, and that no retired pay has been paid since October 1953.

You further state that because the member's estate exceeded $1,500 (as provided in 38 U.S.C. 3203(b)(2)) no payments (disability compensation) were made by the Veterans Administration Regional Office, Chicago, Illinois, to the legal guardian of Airman Robinson for intermittent periods commencing April 30, 1960, and ending August 19, 1966, as described in your letter. It is reported that the airman died August 19, 1966, at the Veterans Administration Hospital, Downey, Illinois. It appears that the amount of $3,220.45 represents the retired pay which accrued during the above-mentioned periods.

You express the view that under our decision 43 Comp. Gen. 39 (1963) and 10 U.S.C. 2771, one-half of the retired pay previously considered waived may be paid as arrears of pay and the remaining one-half (required to be withheld under 38 U.S.C. 3203(a)(1) and 3203(b)(1)) would be subject to the forfeiture provision of section 3203(b)(1) of Title 38, U.S. Code, pertaining to an incompetent veteran who dies before a lump-sum settlement is made.

You refer to our decision in 47 Comp. Gen. 25 (1967) concerning the ruling of the Court of Claims in the case of *Berkey* v. *United States*, 176 Ct. Cl. 1 (1966), and to our decision of June 24, 1968, B–156913, concerning the case of *United States of America* v. *Janna Silander Wire, Administratrix of the estate of John Nicholas Lorimer*, deceased, then pending in the District Court of the United States for the District of Columbia, Civil Action No. 206–67. In the *Berkey* case there was for consideration the effect of the phrase "and in the event of the veteran's death before payment of such lump sum no part thereof

shall be payable", as contained in 38 U.S.C. 3203(b)(1). Since the same prohibition was applicable in the *Lorimer* case as in the *Berkey* case, it was hoped that the District Court would consider the effect of that provision and provide further guidelines for settling similar cases.

In view of the doubt in the matter you ask whether the full amount of retired pay (as shown on the voucher) previously considered as waived may be paid as arrears of retired pay under 43 Comp. Gen. 39, or whether payment of the arrears of pay must be limited to that portion not subject to the withholding provisions of 38 U.S.C. 3203 (a)(1) and (b)(1).

It appears from your submission that Airman Robinson waived his full retired pay in favor of disability compensation awarded by the Veterans Administration in accordance with 38 U.S.C. 3105 (formerly 38 U.S.C. 26c (1952 ed.)). It further appears that a legal guardion had been appointed for the airman, indicating that he was rated by the Veterans Administration as being incompetent, and that at the time of his death he was hospitalized in a Veterans Administration hospital.

Under the provisions of 38 U.S.C. 3203(a)(1) and (b)(1), a veteran, whether competent or incompetent, having neither wife, child nor dependent parent, who is furnished hospital treatment or institutional or domiciliary care by the Veterans Administration for a 6-month period following admission, is entitled thereafter, while receiving such treatment or care, to only one-half of his "compensation or retirement pay," if the full amount involved exceeds $60 per month. Upon discharge from such treatment or care, the law further provides that the veteran or retired member shall be paid in a lump sum the total amount by which his veterans compensation or retired pay has been reduced.

In the event the veteran or retired member dies while receiving hospital care, etc., the law provides in section 3203(a)(2)(A) that the lump-sum payment shall be made to those mentioned in the following order of precedence: (1) spouse, (2) children in equal parts or (3) dependent parents in equal parts. In the case of an incompetent veteran who dies before payment of the lump sum, the law expressly provides in section 3203(b)(1) that "in the event of the veteran's death before payment of such lump sum no part thereof shall be payable."

In the case of an incompetent veteran whose status lies within the scope of the above-cited statutory provisions, section 3203(b)(2) of Title 38 provides that where his estate from any source equals or exceeds $1,500, further payments of "pension, compensation, or emergency officer's retirement pay" shall not be made until the estate is

reduced to $500. The amount withheld is payable to the veteran or retired member as provided in section 3203(a)(1) and (b)(1), but subsection (b)(2) further provides that "in the event of the veteran's death before payment of such lump sum no part thereof shall be payable." This prohibition is identical to the prohibition in subsection (b)(1) of section 3203. There is for noting that when Title 38 was codified and enacted into law by the act of September 2, 1958, Public Law 85–857, 72 Stat. 1105, "retired pay" was expressly excluded from the withholding requirement of section 3203(b)(2) when the incompetent's estate exceeds $1,500. See 72 Stat. 1235.

In our decision, 43 Comp. Gen. 39, which involved the withholding provision of section 3203(b)(2) of Title 38, we said that where a retired person files a waiver of retired pay so that he may receive disability compensation and that compensation is withheld under the provisions of section 3203(b)(2) and later becomes unpayable because of the member's death before release from the hospital, no right to compensation matured for the period it was withheld and not paid, and his right to retired pay was not finally waived for that period. The decision went on to say that since the payment of compensation for which retired pay was waived and which was being withheld under the limitation provided in section 3203(b)(2) is now precluded by that provision of law, it follows that his right to retired pay was not waived from the date of cessation of compensation payments and the amount of such retired pay is subject to disbursement as provided in 10 U.S.C. 2771.

The effect of the payment prohibition contained in 38 U.S.C. 3203(b)(1) was considered by the Court of Claims in the *Berkey* case cited above. The court held that payment to the plaintiff of the retirement pay which had been withheld from his father, a retired member of the Army who was incompetent and whose status at date of death was within the scope of section 3203(b)(1), was proper notwithstanding the specific forfeiture language contained in the cited statutory provisions. The court expressed the view that it could not have been the intent of Congress to discriminate against deceased retired military incompetent members of the Armed Forces—similar language was not included in section 3203(a)—by barring payment of withheld retirement pay to the surviving son in such a situation, even though the plain and specific language of section 3203(b)(1) prescribes exactly such a result.

In the *Berkey* case the court took note of the amendments to section 38 U.S.C. 3203 as provided in the act of August 7, 1959, Public Law 86–146, 73 Stat. 297, and the act of July 25, 1962, Public Law 87–544, 76 Stat. 208, and the legislative history of the 1959 act, with

respect to the distribution of "gratuitous benefits" to near relatives. The 1962 act removed from the order of precedence in section 3203 (a) (2) (A), "brothers and sisters in equal parts."

As pointed out by the court, the legislative history of the 1959 act clearly indicates that its purpose was to prevent gratuitous benefits for incompetent veterans, receiving care at public expense, from accumulating in excessive amounts and passing, on death, to relatives having no claim against the Government on account of the veteran's military service (namely, relatives other than wives, children, and parents). In our decision 47 Comp. Gen. 25 we said, for the reasons there stated, that we would follow the *Berkey* case. We also held that since the court did not indicate the specific statutory authority for determining the persons eligible to receive the retirement pay, distribution of such pay should be in accordance with 10 U.S.C. 2771, citing 40 Comp. Gen. 666 (1961) as the basis for this action.

In the light of the *Lorimer* case, cited above, which was then pending in the District Court of the United States for the District of Columbia, and which appeared to present for judicial determination by that court a similar legal issue with respect to the prohibition in section 3203(b) (1) as was ruled on by the Court of Claims in the *Berkey* case, we suggested, in our decision of June 24, 1968, B–156913, that administrative action which would be based on 47 Comp. Gen. 25 be suspended until the judicial proceedings in the *Lorimer* case are finally settled.

It was alleged in the Government's petition in the *Lorimer* case that he was a retired member of the U.S. Army who was admitted to St. Elizabeth's Hospital, Washington, D.C., on February 24, 1950, and remained there until his death on April 20, 1966. He was single and without dependents or parents and his care at the hospital was furnished at the expense of the Veterans Administration. Through error, Lorimer's retired pay was not reduced by 50 percent as required by 38 U.S.C. 3203(a) (1) and, consequently, he was overpaid retired pay during the periods September 1, 1950, to March 31, 1966, in the amount of $23,772.36. This amount was reduced to $23,674.93 by applying unpaid retired pay of $97.43. The Government sued for this amount.

We are now in receipt of a copy of an order dated December 3, 1968, wherein the District Court awarded judgment in favor of the Government in the *Lorimer* case in the amount of $23,674.93. No written opinion was rendered in this case but since the *Berkey* case was cited by the plaintiff in support of its position, it appears that the court viewed that case as not being applicable to relatives more remotely related to the decedent than wife, children or parents. We understand

informally from the Office of the United States Attorney for the District of Columbia that the defendant has appealed this judgment but that the appeal is based primarily on whether the Government is bound by the statute of limitations. In view of the action taken in the *Lorimer* case, and in the absence of any other relevant court decision, distribution of withheld retired pay under section 3203(a)(1) which was temporarily suspended under our decision of June 24, 1968, may now be paid on the basis of the *Berkey* case to the surviving wife, children or dependent parents in that order. Compare 38 U.S.C. 3203(a)(2)(A). To the extent that anything said in 40 Comp. Gen. 666, 43 *id.* 39 or 47 *id.* 25 is in conflict with the views expressed herein, those decisions no longer will be followed.

Based on the conclusions reached in 43 Comp. Gen. 39, it appears proper to view the retired pay which accrued during the periods Airman Robinson's disability compensation was withheld by the Veterans Administration under 38 U.S.C. 3203(b)(2), as not being subject to his 1953 waiver of retired pay in favor of disability compensation. Such retired pay was subject to the 50 percent reduction provisions of section 3203(a)(1), (b)(1). However, based on the *Lorimer* case any amounts of retired pay which were subject to withholding under the cited statutory provisions, may not be paid to the decedent's sisters and brother. The balance of retired pay not subject to withholding which accrued during the periods mentioned above is payable to the proper persons entitled thereto under 10 U.S.C. 2771.

Payment of arrears of pay, which includes retired pay, authorized to be paid to the classes of persons mentioned in 10 U.S.C. 2771, includes, in clause (6), "Person entitled under the law of the domicile of the deceased member." Under the rules of descent and distribution in the State of Illinois, a deceased's brothers and sisters are entitled to share in his estate in equal parts if there is no surviving wife, child or parent and there is no distinction between the whole and half blood. See section 11, chapter 3, Rules of Descent and Distribution, Smith-Hurd Illinois Annotated Statutes.

Accordingly, the voucher and supporting papers are returned herewith and if the voucher is amended to cover the retired pay which was not subject to withholding under 38 U.S.C. 3203(a)(1), (b)(1), payment is authorized thereon, if otherwise correct.

[B–168099]

Subsistence—Per Diem—Military Personnel—Training Duty Periods—More Than One

Members of the Army National Guard who incident to rotary wing aviation active duty training that will require more than 20 weeks to complete are issued

separate orders for less than 20 weeks each for two phases of training to be conducted at different locations may be paid per diem for the entire training period under the separate orders, whether or not the second period of duty immediately follows the completion of the first phase of the training. Revised paragraph M6001-1c(1) of the Joint Travel Regulations authorizes per diem for members of Reserve components ordered to active duty from home while they are at a permanent station for less than 20 weeks when Government quarters or mess, or both, are not available, and the regulation implements Public Law 90-168, that in its legislative history does not indicate its provisions are not for application to separate periods of training.

National Guard—Allowances—Per Diem—Training Periods

The fact that orders directing an officer of the Army National Guard to report for three phases of continuous rotary wing aviation training to be held at two different locations for a period in excess of 20 weeks were revoked to substitute two separate orders of 18 weeks each for training at different locations, with a service break in-between, does not operate to deny the officer entitlement to per diem for the entire period of training. Public Law 90-168, which is implemented by revised paragraph M6001-1c(1) of the Joint Travel Regulations to provide per diem for members of Reserve components ordered to active duty from home while at a permanent duty station for less than 20 weeks, where Government quarters or mess, or both, are not available, containing no indication in its legislative history that it is not applicable to separate periods of training.

To Major J. S. Medley, Department of the Army, November 17, 1969:

Further reference is made to your letter of August 11, 1969, AKPWO-F&A, requesting a decision whether payment is authorized on a submitted voucher in favor of First Lieutenant David H. Quinn, 002-32-3592, Army National Guard, for per diem for training duty under the circumstances set forth in your letter. The request was assigned PDTATAC Control No. 69-38 by the Per Diem, Travel and Transportation Allowance Committee.

By paragraph 5, Special Order No. 126, issued on July 15, 1969, by the Adjutant General, New Hampshire National Guard, Lieutenant Guinn was ordered from his home of record, Nashua, New Hampshire, for full time training duty in excess of 20 weeks. The orders required him to report on July 20, 1969, at U.S. Army Primary Helicopter School, Fort Wolters, Texas, to attend the primary phase of Rotary Wing Aviator Course (QS28C), Class No. 70-6, upon completion of which he was to proceed to U.S. Aviation School, Fort Rucker, Alabama, for phases II and III of the same course.

Paragraph 5 of the orders of July 15, 1969, was revoked by paragraph 11 of Special Orders No. 126 also dated July 15, 1969. By paragraph 12 of the latter Special Orders No. 126 the member was directed to proceed from his home to Fort Wolters reporting July 20, 1969, for 18 weeks' instruction in phase I of Rotary Wing Aviator Course, and upon completion of such duty to return to the place where he entered on the duty and stand relieved from duty. Paragraph 13 of the same orders directed him to proceed from his home to Fort Rucker, reporting November 15, 1969, for 18 weeks' instruction in phases II and III

of the Rotary Wing Aviator Course, and upon completion of such duty, to return to the place where he entered on the duty and stand relieved from duty. You say that departure from Fort Wolters is scheduled for Saturday, November 22, 1969, and that the reporting date at Fort Rucker is Tuesday, November 25, 1969. It is shown that Government quarters and mess are not available at Fort Wolters.

Lieutenant Quinn's claim is for travel allowance from Nashua to Fort Wolters and for per diem at Fort Wolters for the period July 20 to 31, 1969. You say that per diem was denied under the provisions of paragraph M6001 of the Joint Travel Regulations which prohibits payment of per diem to members called to active duty for training of 20 weeks or more as required by the original Special Orders No. 126. Also, you say that the oral denial of payment to this student resulted in National Guard Bureau message of July 31, 1969, to all state Adjutant Generals requiring that all orders issued to students be corrected to reflect two separate orders of less than 20 weeks each.

Lieutenant Quinn's claim is submitted to determine:

a. Entitlement to per diem under two separate orders issued for purpose of reducing one Full Time Training Duty (FTTD) period in excess of 20 weeks to one or more periods of less than 20 weeks when purpose of one such period of Full Time Training Duty (FTTD) is required to be performed at more than one installation.

b. Entitlement to per diem or PCS allowances under one order issued for purpose of performing Full Time Training Duty (FTTD) period in excess of 20 weeks at more than one point when:

(1) Period of Full Time Training Duty (FTTD) required at each point is equal but less than 20 weeks each, e.g. 18 weeks Fort Wolters and 18 weeks Fort Rucker. (This situation applicable to Officer Aviation Training when Phase II and III occur during Christmas holidays).

(2) Period of Full Time Training Duty (FTTD) required at each point is not equal but less than 20 weeks each, e.g. 18 weeks Fort Wolters and 16 weeks Fort Rucker. (This situation applicable to Officer Aviation Training beginning after Christmas holidays and ending prior to Christmas holidays).

(3) Period of Full Time Training Duty (FTTD) required at each point is not equal but is 20 weeks or more at one point, e.g. 20 weeks Fort Wolters and 16 weeks at Fort Rucker. (This situation applicable to all Warrant Officer Candidate Aviation Training or to Officer Aviation Training when Christmas holidays fall during Phase I training at Fort Wolters).

While all of your questions do not relate to the submitted voucher, you state that the training program began on July 20, 1969; that on the date of your letter you had received 110 claims; that claims are being filed at the rate of 55 each 2 weeks; and, that processing of all claims is being withheld pending our decision. It is assumed, therefore, that your questions relate to vouchers before you for payment.

In addition to the orders furnished by you we have also received copies of two orders issued on August 3, 1969, by the Adjutant General, West Virginia National Guard, which apparently were issued separately pursuant to instructions in the National Guard Bureau message. Those orders require separate periods of duty at Fort Wolters for the period August 3 to December 5, 1969, for phase I of the Rotary Wing

Aviator Course and at Fort Rucker from December 10, 1969, to April 21, 1970, for phases II and III of the Rotary Wing Aviation Course. In all of the orders examined it is stated that travel of dependents and shipment of permanent change of station weight of household effects is not authorized.

The Per Diem, Travel and Transportation Allowance Committee in transmitting your request invited our attention to an endorsed Comment No. 2, dated September 23, 1969, by the Chief, National Guard Bureau. In that comment it is contended that since paragraph 4b(1)(b), Army Regulations 350–5, lists the U.S. Army Primary Helicopter School (Fort Wolters) and the U.S. Army Aviation School (Fort Rucker) as separate installations, the training program here involved consists of separate courses of instruction at two schools and that under the definition of "permanent station" in paragraph M1150–10b, Joint Travel Regulations, members assigned to a course of instruction of less than 20 weeks at each school would be on temporary duty at each location. With respect to this latter comment, it may be noted that in each case the training duty station is the member's only station and the place where his basic duty assignment is being performed. In that view, therefore, each location must be viewed as a permanent station for the purpose of travel allowances under the provisions of 37 U.S.C. 404.

Section 404(a) of Title 37, United States Code, was amended effective January 1, 1968, by section 3 of the act of December 1, 1967, Public Law 90–168, 81 Stat. 525, by adding clause (4) thereto to provide for payment, under regulations prescribed by the Secretaries concerned, of travel and transportation allowances to a member of a uniformed service

> when away from home to perform duty, including duty by a member of the Army National Guard of the United States or the Air National Guard of the United States, as the case may be, in his status as a member of the National Guard, for which he is entitled to, or has waived, pay under this title.

In 48 Comp. Gen. 301 (1968), it was stated that the purpose of section 3 of Public Law 90–168 is to permit the payment of per diem to reservists ordered from their homes for short periods (less than 20 weeks) of active duty training at training duty stations other than at military installations where Government quarters and mess are available, and it was held that the provisions of 37 U.S.C. 404(a)(4) simply provide authority for the payment of per diem on that basis even though such training duty stations in fact are the members' basic posts of duty (permanent duty stations).

The law is broadly stated and its legislative history shows that the entitlements which its authorizes are to be provided by appropriate regulations. Certain revisions of provisions of the Joint Travel Regu-

lations relating to Public Law 90–168 were made effective July 9, 1969, on the basis of 48 Comp. Gen. 517 (1969), and B–152420, July 8, 1969. Paragraph M6001–1c(1) as so revised authorizes per diem for members of Reserve components ordered to active duty while at the permanent station "when the period of active duty contemplated by the orders is for less than 20 weeks" and Government quarters or Government mess, or both, are not available.

In the cases here involved the members were ordered to active duty for rotary wing aviation training. And, while the completion of such training requires more than 20 weeks, it is conducted in separate periods of less than 20 weeks at different locations. The successful completion of phase I of the training duty appears to be a condition precedent to a continuation of the training. However, we perceive no legal objection to the issuance of separate orders covering the period of duty at each separate location, even though the second period of duty follows shortly after the completion of the first period. Clearly separate orders would be needed when service operational requirements resulted in any substantial delay in the start of the duty at the second location and we find nothing in the legislative history of Public Law 90–168 indicating that its provisions are not for application to each period of duty in such cases.

The fact that prior revoked orders may have been issued directing the performance of the training duty on a continuous basis affords no basis for concluding that the subsequently issued separate orders are illegal insofar as they have a prospective application and they are not inconsistent with the governing regulations.

Accordingly, since in Lieutenant Quinn's case and in each of the situations presented by you neither the duty under instruction at Fort Wolters nor the duty under instruction at Fort Rucker exceeds 20 weeks excluding the Christmas holidays, per diem allowances as provided in Part E of the Joint Travel Regulations are authorized at each of those locations when Government quarters and mess are not available.

The voucher in favor of Lieutenant Quinn is returned for payment in accordance with the conclusions reached herein and payment in the other cases referred to by you is authorized provided, of course, that the circumstances in those cases are the same as those in Lieutenant Quinn's case.

[B–166846]

Bids—Qualified—All or None—Definite Quantities

A low bid submitted on an all or none basis under an invitation reserving to the Government an option to increase by 50 percent the number of air conditioning units solicited, and an option to purchase both interim and long leadtime repair

parts for the units was not a qualified bid that eliminated the Government's option reservations and the award to the bidder is valid. The "all or none" condition only indicated the bidder's unwillingness to accept an award for less than the definite quantity stated in the invitation and by this effort to protect itself from the possibility of an award for a lesser initial quantity pursuant to standard form 33A, and the bidder did not intend to include the option items on which the Government reserved the right to make an award at a later time.

To the A. G. Schoonmaker Company, Incorporated, November 19, 1969:

Further reference is made to a telegram dated May 2, 1969, as supplemented by letters of May 8, 23, 27 and June 17, 1969, protesting, on behalf of A. G. Schoonmaker Company, Incorporated (Schoonmaker), against award by the Department of the Navy of a contract to American Air Filter Company, Incorporated (AAF), under invitation for bids No. N00019-69-B-0056, issued February 28, 1969, by the Naval Air Systems Command (NAVAIR), Washington, D.C.

The procurement under item 1 required a quantity of 50 trailer mounted, diesel powered, air conditioning units, model NR-10. Other items included related data publications, engineer-drawings and first article approval testing. Item 3, calling for provisioning documentation, was explained at page 5 of the bid schedule as follows:

Item 3—The Provisioning Documentation and services shall be prepared in accordance with Specification MIL-P-21873 and Addendum 1, attached hereto entitled "Provisioning Requirements Statement." When documentation and services cannot be provided in a time frame to permit the selection and acquisition of spares and repair parts, through normal provisioning process, to support the scheduled delivery/operational dates of Item 1, the Interim Repair Parts option Item 6 may be exercised.

Items 6 and 7 covered interim repair parts and long leadtime repair parts respectively, and as to these two items the bid schedule included the preprinted word "Option," where the fixed price would otherwise have been inserted. Also with respect to items 6 and 7 the schedule provided at page 5:

Item 6—The Interim Repair Parts shall be as determined by the requiring activity, Aviation Supply Office, Philadelphia, in accordance with Specification MIL-P-21873 and Addendum 1, attached hereto entitled "Provisioning Requirements Statement."
Item 7—The Repair Parts shall be as determined by the requiring activity Aviation Supply Office, Philadelphia as a result of the provisioning conference held in accordance with MIL-P-21873 and Addendum 1, attached hereto entitled "Provisioning Requirements Statement."

The invitation called for a total aggregate price excluding items 6, 7 and 9 and reserved the right under an option clause to increase the quantity of item 1 by 50 percent either at time of award or within 120 days thereafter. Thirteen bids were opened on April 30, 1969, with your total bid price low in the amount of $692,200, allowing $20,000 for item 8, first article approval testing. AAF, the second low bidder at $693,726 (allowing $22,852 for item 8, first article approval test-

ing, had inserted at the top of page 3, of the bid schedule the legend, "Bid on all or none basis." Also a letter accompanying the AAF bid stated:

> With reference to the contract requirement for First Article Approval Testing (Item 8), and in accordance with Article 46 of the Additional Solicitation Instructions and Conditions, we wish to submit an alternate offer based on waiver of the First Article test requirement. In the event that the First Article Approval Test requirement is waived by the Government, there will be no cost for Line Item 8, and the pricing of all other line items will remain unchanged. In other words, our total contract price of $693,726, is reduced to $670,874 (a net reduction of $22,852) in the event that the Government elects to accept our alternate offer based on exclusion of the First Article Approval Test requirement.

Article (46) "Waiver of Requirement for First Article Approval," of the invitation permitted the bidder to identify any previous contract under which the Government had accepted identical or similar items from the bidder and provided for waiver of first article approval with consequent reduction in price of the amount included in the bid therefor. The AAF bid identified contract No. N00019-67-C-0606 as one under which the Government had accepted the identical or similar items, as a result, NAVAIR waived first article approval testing and determined AAF to be the low responsive, responsible bidder at $670,874. Due to the urgency of the procurement, a determination to award despite the pendency of a protest was made pursuant to Armed Services Procurement Regulation (ASPR) 2-407.9 (b) (3). The contract was awarded to AAF on May 20, 1969.

It is contended on behalf of Schoonmaker that by bidding on an all or none basis, AAF required that the contract incorporate the additional option quantity of 25 for item 1 and an authorization to furnish all items listed, including 6 and 7, thus eliminating the Government's right to order these items at its option and, with respect to items 6 and 7, calling instead for concurrent ordering to the extent authorized by specification MIL-P-21873 which was part of the invitation for bids. With respect to items 6 and 7 you point out that AAF, the only bidder who had previously produced and delivered the model NR-10 air conditioner for NAVAIR, was in the best position to know the interim repair parts and long leadtime items which were required for adequate support in the field. You assert that such a bidder who could compute his bid prices on the basis of manufacturing interim repair parts and long leadtime items concurrently with manufacture of units under item 1 would be in a favorable competitive position. Further you contend that Schoonmaker's bid prices would have been substantially lower if it could have bid on the same basis. In sum, it is your position that the use of the all or none provision rendered the AAF bid nonresponsive as in conflict with the Government's options to increase the item 1 quantity and to order under items 6 and 7 or, at the least, that the bid was ambiguous.

You also note that the extension of the delivery schedule by 60 days under the terms of amendment No. 3 to the invitation is inconsistent with the determination that award should not be withheld pending our decision. You state that the lack of urgency is supported by the fact that the invitation for bids required item 1 to be preserved and packed for domestic shipment only.

We cannot agree that the inclusion of the all or none provision in the AAF bid could reasonably be interpreted to eliminate the Government's options to increase the quantity of item 1 or with respect to placing orders under items 6 and 7. In addition to the schedule provisions already quoted relating to the items, it is indicated on page 13 of the schedule that spare parts shall be delivered as specified by the document that exercises the option. Under item 6 the option is to be exercised "if at all" within 210 days after contract award; under item 7 the option is to be exercised "if at all" by written change to the contract. At page 15 of the schedule the following provision appears:

REPAIR PARTS OPTION

There is hereby created an option in behalf of the Government to purchase from the Contractor, at fair and reasonable prices, repair parts in the range and quantity determined necessary by the Government to support the equipment being procured. This option is exercisable for a period of two (2) years after acceptance by the Government of the last production end item procured under item 1 of this contract. Exercise of this option will be by written notice from the Requiring Activity for Item 7 herein.

If, as you contend, the effect of AAF's all or none condition was to eliminate the Government's option either to order or not to order items 6 and 7, then the bid must be regarded as materially qualifying the terms of the invitation for bids. Further, if those items are included in the contract award they should be evaluated to determine the low bidder, an impossibility since at time of award they could neither be priced nor identified. However, we think this invitation is controlled by the precedent established in B–129322, November 16, 1956. In that case, the invitation for bids called for the manufacture of 465,980 pairs of trousers. Also, the Government reserved the option to order subsequent to award an additional quantity up to 50 percent of the base quantity. In the space provided for the bidder to insert the quantity bid on, the low bidder inserted the legend "465,980 (ea.) plus option—All or None." We held that the proper interpretation of the legend was that the bidder wished to indicate that he was not willing to accept an award for less than 465,980 pairs of trousers and that at the same time he was not precluding the award of the option. In other words, notwithstanding the use in the low bid of the phrase "plus option" the all or none qualification was limited to the quantities definitely specified for award under the terms of the invitation

for bids and did not include any quantities which under the terms of the invitation for bids the Government reserved the option to award at a later time. We think the same conclusion is required here. The reasonable interpretation of the condition in the low bid in this case is that the bidder wished to protect himself from the possibility that a quantity of less than the 50 units called for under item 1 could be awarded pursuant to paragraph 10(c) of the standard form 33A, entitled "Solicitation Instructions and Conditions," which provides in pertinent part as follows:

(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. * * *; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER.

Further, we find nothing in the record which shows the AAF purposely bid low on items used in the evaluation relying on known quantities of the option items. The abstract shows that the AAF bid price of $13,365 a unit on item 1 is $65 higher than your unit price of $13,300. It is, however, true that all offerors do not have the familiarity with the drawings and data equal to the firm who previously produced the equipment; the same is true in any procurement involving prior producers. A natural competitive advantage of this type is one which the procurement laws do not recognize as unlawful or even necessarily undesirable.

Concerning your question on the need for the change in delivery schedules effected by amendment No. 3 to the invitation for bids, the NAVAIR report states that the extension of delivery schedules was intended to provide sufficient time for fabrication and testing of the first articles and the production units. Rather than showing a lack of urgency, this necessary change made a prompt award even more important in order to meet fleet needs. Regarding the packaging for item 1, it is explained that while the units are for use in Southeast Asia, the packing requirements for this type of equipment are minimal. Normally, the units are tied down and the tires are blocked. They are not packaged or crated regardless of shipping destination.

Since the facts and circumstances shown by the record before us do not establish that the AAF bid qualification altered or nullified in any way the requirements of the Government, we find no basis for holding the award as made to be invalid.

Accordingly, your protest is denied.

[B-165110]

Compensation—International Dateline Crossings

Under the rule that generally an employee's pay may not be increased or decreased because of crossing the international dateline, an employee stationed in Hawaii—three time zones and 22 hours travel time difference away from his 2-week temporary duty assignment in Wake Island—who departed Honolulu Monday at 10:20 a.m. and arrived in Wake Island at 1:15 p.m. on Tuesday properly was paid for 40 hours at regular pay, plus overtime, for the first week of his temporary assignment, but incident to the second week of the assignment when he left Wake Island at 8:45 a.m. on Friday arriving in Honolulu at 3:30 p.m. on Thursday, he should not have been excused from work on Friday, and if he had been directed to work he would not have been entitled to additional pay for that day.

To R. J. Schullery, Department of Transportation, November 21, 1969:

We refer to your letter of October 22, 1969, concerning the pay and duty hours of employees of the Federal Aviation Administration when they are required to cross the international dateline on official travel in the performance of their assigned duties.

The case presented involves an employee officially stationed in Honolulu, Hawaii, who was assigned to perform 2 weeks temporary duty at Wake Island. Since Honolulu is located in the second time zone east of the international dateline and Wake Island is located in the first time zone west of the international dateline there is a time difference of 22 hours between the two locations. The employee left Honolulu at 10:20 a.m. on a Monday and arrived in Wake Island at 1:15 p.m. on Tuesday. Elapsed travel time was apparently 4 hours, 55 minutes. For that week the employee was paid for 40 hours work at his regular rate and 8 hours overtime for work actually performed on Saturday. The following week he left Wake Island at 8:45 a.m. on Friday arriving in Honolulu at 3:30 p.m. on Thursday. The elapsed time of that travel was apparently 4 hours, 45 minutes. Since the employee had worked 4 days at Wake Island and traveled one day during the second week in question he was not required to report for work on the Friday which began after his arrival in Honolulu.

The employee's pay for the first of the 2 weeks involved was based on decision 48 Comp. Gen. 233 (1968) in which we held that an employee's pay should not decrease because of the day lost crossing the international dateline in a westward direction. Regarding the treatment of the employee concerned and others who cross the international dateline in an eastward direction you ask:

1. May the employee properly be excused from duty on Friday, 26 September 1969 after his return to Honolulu, without charge to leave?
2. If the employee had been directed to work his regular tour of duty on Friday, 26 September 1969 would he be compensated for eight hours of base pay or would he receive eight hours at overtime rates, since these eight hours of duty are in excess of 40 hours in the administrative workweek?

In 48 Comp. Gen. 233 (1968) we held in line with a longstanding administrative practice that an employee's pay was not to be increased or decreased merely because of the crossing of the international dateline but recognized there might be special situations to which that rule could not be applicable. However, on the basis of the circumstances related above, we see no reason why the rule expressed in that decision would not be applicable here.

Accordingly, in answer to the questions presented, the employee should not have been excused from work on the day after his arrival in Honolulu and if he had been directed to work he would not have been entitled to additional pay for that day.

[B-166170]

Bids—Discarding All Bids—Compelling Reasons Only

The cancellation of an invitation for bids that contemplated a 1-year requirements type contract for motor vehicle repair parts and asked bidders to quote a discount from price lists included in the invitation, or as an alternative to quote separate discounts on "common parts" and "captive parts" was not justified on the basis that the bids received could not be evaluated as bidders were not required to commit themselves to any price lists prior to bid opening, and that the low bid offering 20 percent and 50 percent discounts was unbalanced. Absent an affirmative showing the Government's needs could not be satisfied, there was *no* "compelling reason" within the contemplation of paragraph 2-404.1 of the Armed Services Procurement Regulation for discarding the bids, and as bid unbalancing *per se* does not automatically preclude award, the low bid should be considered for award.

Bids—Unbalanced—Evidence

A low bid to furnish motor vehicle repair parts that offered a 20 percent discount on "common parts" available from several sources and 50 percent on "captive parts" procured from manufacturers or franchised dealers, is not an unbalanced bid *per se* automatically precluding an award to the bidder in the absence of evidence the discounts offered constituted an irregularity that affected fair and competitive bidding and, therefore, the low bid may be considered for award. It is in the best interest of the Government through appropriate invitation safeguards to discourage the submission of unbalanced bids based on speculation as to which items are purchased in greater quantities, and the contracting agency to eliminate the problem in the future will require bidders to cite only one discount on both common and captive parts.

To the Secretary of the Air Force, November 24, 1969:

By letter dated August 18, 1969, the Chief, Procurement Operations Division, DCS/S&L, furnished a documented report to our Office on the protest of Dover Auto Electric, Inc. (Dover), against the cancellation of invitation for bids (IFB) No. F07603-69-B-0146, issued December 23, 1968, by the Base Procurement Office, Dover Air Force Base, Delaware. The IFB was considered in our decision B-166170, April 4, 1969, to Wheeler Brothers, Inc. (Wheeler), wherein we denied Wheeler's protest concerning the proper evaluation of the prompt payment discount in the Dover bid and found that the proposed award

to Dover was "fully in accordance with the requirements of the procurement regulations and statutes, as well as with the terms of the subject invitation."

The IFB contemplates a 1-year requirements type contract for supplying motor vehicle parts for repair and servicing of automobile vehicles at Dover Air Force Base. The schedule of items appears under Item E on page 5 of the bid schedule. Item I, entitled Basic Bid, required the bidders to quote a discount from retail prices for all parts and accessories listed in price lists included in Appendix B, which is a six page index of motor vehicle and equipment price lists identified by each manufacturer's name, by part or parts, and, in most instances by date. As an alternate, separate discounts could be quoted on "common parts" and "captive parts," common parts being defined in the bid schedule as those available from several listed sources, and captive parts as those available only from the manufacturer or his franchised dealers without substitution.

Item II required an hourly rate charge for operation of store during nonduty hours for an estimated 100 hours.

Estimated dollar amounts of purchases of each class of parts were stated, and the invitation provided for an aggregate award on the basis of net price after discount for Items I and II, or for Items Ia, Ib and II.

Item III provided for furnishing of "non-price-listed" items, which are defined as parts which are either not listed in any published price lists or are contained in a price list not made a part of the contract (i.e., not in Appendix B). Payment for such parts was to be made at invoice cost to the contractor less all discounts, plus transportation charges and a fixed schedule of monthly service charges prescribed in Item G, which varied according to total dollar value of non-price-listed items furnished during the month. No estimate of purchases was made by the Government for such item.

Item H of the bid schedule, entitled "Parts Price Lists and Bidding," provided as follows:

Parts Price Lists and Bidding. Parts price lists must be designated to cover new, rebuilt, and exchange parts that are so listed by parts manufacturers, rebuilders, or vehicle manufacturers for the vehicle fleet listed herein. The price charged by the contractor for parts on price lists under this contract will be suggested retail list price contained in the applicable price list in effect at the time of the sale, less the discount offered under bid schedule—schedule of items. Bids will be based only upon this aggregate approved list. (Appendix B). Bids qualified to delete furnishing parts or supplies for any of the types of equipment listed herein will be considered non-responsive. On the effective date of the contract, the contractor will have in the on-base store one copy of each price list, extracted from the amendment referenced above, which he intends to use in the performance of the contract. Said list shall be current as of the date of award. After award, additional required lists may be used upon mutual agreement between the Contractor and the Contracting Officer. Prices paid for parts will constitute full compensation for labor, parts, overhead, profit and/or other

incidental expenses, with the exception of charges for nonduty hour operations or non-price-listed items which are covered as separate items of the bid schedule.

Item WW reads, in pertinent part, as follows:

CONTRACTUAL CONTENTS: This Invitation for Bids consists of the following listed documents which will be included in any contract awarded as a result of this IFB:

* * * * * * *

(d) Appendix B, Approved Consolidated Index of Motor Vehicle and Equipment Parts Price Lists, dated 29 November 1968.

The three bids received by the procuring activity were opened on January 21, 1969, as scheduled, and were evaluated in accordance with the IFB provisions, and the apparent low bid was that of Dover, who submitted an aggregate evaluated bid of $159,168 on the Alternate items as follows: 20 percent discount on Item Ia common parts and 50 percent on Item Ib captive parts.

By telegram of February 12 Wheeler, the second low bidder, protested the contracting officer's proposed award to Dover. After our denial of the protest in our decision of April 4, 1969, for the reasons stated therein, the contracting officer recommended award to Dover and forwarded the contract file to Headquarters, Military Airlift Command (MAC), Scott Air Force Base, for review and approval. MAC, however, disapproved the proposed award by memorandum of June 3, 1969, and in line with MAC's instructions the contracting officer advised each bidder by letter dated June 13 that the IFB would be canceled and the requirement readvertised for the following reasons:

a. Inasmuch as the IFB did not require bidders to commit themselves to any price lists prior to bid opening, the bids cannot be properly evaluated.
b. Statistics compiled by Air Force Logistics Command in response to their Sept. 1968 survey clearly show that discounts of 20% for common parts and 50% for captive parts are unbalanced unless there are extraordinary pricing factors.

By letters dated June 17 and 23, 1969, copies of which were furnished to our Office, Dover protested to the procuring activity against the MAC decision to readvertise the procurement after the bids had been opened. The substance of the protest is that the IFB requires commitment to the price list in Appendix B and clearly states the procedure for supplementing such price lists after award. Further, Dover takes issue with the argument by MAC that its bid, with the 20 percent discount on common parts and the 50 percent discount on captive parts, is unbalanced, on the premise that such argument is not relevant inasmuch as the IFB also made clear that award would be granted to the low dollar bidder.

The report on Dover's protest indicates that the identical requirement is to be readvertised in substantially the same format as the subject IFB, including an Appendix B, with only major change occurring in Item H. MAC proposes to amend this clause to allow bidders

to submit additional price lists to the lists contained in Appendix B, prior to bid opening. Upon receipt of these lists, the solicitation would be amended to incorporate them in an aggregate approved price list schedule, and bidder's would be required to identify in their bids those price lists in Appendix B, as amended, which they propose to use under the contract. Also, bidders could cite only one discount for common and captive parts. Additional language would bind the contractor to furnish all common parts from price lists included in, and subsequently added to, the contract unless the contracting officer determines that the contractor is unable to obtain any price list to cover particular common parts, in which event the parts will be treated as non-price-listed parts.

The process of evaluation and award in formal advertising can be said to embody two considerations: (1) that bids should be evaluated and contracts awarded on the basis of equal treatment of bidders in order to maintain and strengthen the competitive system, and (2) that the Government should obtain the most advantageous contract possible. See 10 U.S.C. 2305; Nash and Cibinic, *Federal Procurement Law* (1966) p. 198. The rejection of all bids after opening is objectionable because the publicizing of bids without award tends to discourage competition, thus compromising the first consideration cited above. For this reason, rejection of bids and cancellation of an invitation after bids have been opened are not justified without compelling reasons. See Armed Services Procurement Regulation (ASPR) 2-404.1; also, 36 Comp. Gen. 62 (1956).

MAC's argument for readvertisement of the procurement in this instance is threefold. First, MAC claims that Item H in its present context is not clear and does not commit the bidders to the use of any price lists with the results that (1) the bids cannot be properly evaluated and (2) many parts for which discounts are bid against price list estimates may ultimately fall into the non-price-listed parts category thereby rendering the proffered discounts fictitious. Second, MAC argues, even if Item H could be interpreted as requiring bidders to use all of the price lists in Appendix B, this is not practical since all such lists are not available. Third, MAC contends that the low Dover bid is unbalanced in view of the high discount offered on captive parts since it is common knowledge that much higher discounts can be expected for common parts than for captive parts.

On the issue of the basis for evaluation of bids, Item H requires that bids be based on the price lists in Appendix B, and Item E states that "discounts * * * are from Suggested Retail List Price * * * in contract price lists described in Appendix B." We believe that both provisions provide a realistic basis for bidding and

for the proper evaluation of bids. Further, no bidder raised any question as to such provisions, and it appears that all bidders based their discounts on the Appendix B price lists and consequently must be regarded as having bid on a common basis. Accordingly, we are unable to accept the position of MAC that there was no common, fixed, equal basis for bidding.

As to the argument that bidders were not committed to any price lists, which rests on the asserted inadequacy or ambiguity of Item II, we do not concur with such view. A primary rule of contract construction requires that the meaning of a contract be gathered from the instrument as a whole and that all provisions be given effect if possible with no provision being construed as being in conflict with another unless no other reasonable interpretation is possible. *Hol-Gar Manufacturing Corporation* v. *United States*, 351 F. 2d 972, 979 (1965), and court cases cited therein. In light of the clear language of Item WW incorporating into any contract awarded under the IFB the price lists contained in Appendix B without stating any exceptions, which provision also was not questioned by any bidder prior to bid opening, it is our view that absent any other language in the IFB providing that a bidder could elect to bind himself to less than all of the Appendix B price lists, bidders were bound to use all of such price lists unless the bids indicated otherwise, in which case the bids would have been nonresponsive to the IFB. There is no indication that any of the three bidders listed any exceptions to Appendix B in their bids.

In line with the foregoing, we do not believe that a general statement that past experience indicates that all price lists in Appendix B are not available affords an adequate basis for rejection of the exposed bids. Rather, we believe that nothing less than an affirmative showing that neither the low bidder nor any of the other bidders will be able to fulfill the Government's needs, i.e., support of the vehicles and equipment listed in Appendix A, from the Appendix B price lists will satisfy the "compelling reasons" requirement of ASPR 2–404.1 so as to justify the action directed by MAC.

As to MAC's position that the low bid is unbalanced in view of the fact that the discount offered on captive parts is higher than the discount offered on common parts, reference to the statistics compiled by the Air Force Logistics Command, which MAC cites as support for its position, shows that in 1964 the discounts ranged from 5 to 57 percent on common parts and from 5 to 25 percent on captive parts, while in 1968 the figures were 10 to 58 percent on common parts and 5 to 30 percent on captive parts. Further, while in most instances the captive parts discounts were lower than the common parts discounts, the 1968 statistics show that three activities (Edwards, Charleton and McConnell Air Force Bases) reported captive discounts which were

equal to or higher than the common discounts. In the circumstances, we do not believe that the discount statistics alone justify the conclusion that Dover's bid is unbalanced. In addition, although MAC has attached significance to the absence of evidence of extraordinary circumstances to justify Dover's bid, there is nothing in the record to show that all factors considered, as contemplated by the memorandum dated September 2, 1964, from Air Force Logistics Command to the procuring activities on the matter of contracts for operation of on-base motor vehicle and equipment repair stores, the prices quoted by Dover are not reasonable.

As to the matter of unbalanced bids generally, it is our view that it is in the best interest of the Government to discourage, through appropriate invitation safeguards, the submission of unbalanced bids based on speculation as to which items are purchased in greater quantities. 38 Comp. Gen. 572 (1959). However, bid unbalancing *per se* does not automatically operate to invalidate an award of a contract to a bidder. See B–161928, August 8, 1967. Further, the IFB provided for separate discounts on common parts and captive parts at the option of the bidders, and there is no evidence that Dover's discounts on these two kinds of parts constituted irregularity of such a substantial nature as to affect fair and competitive bidding. See B–164736, December 2, 1968. (We note that the MAC proposal to eliminate this problem of unbalanced bids by requiring bidders to cite only one discount for both common and captive parts in a revised IFB may effectively eliminate this problem.)

In the circumstances, we are unable to conclude that the existing record justifies discarding of the bids and readvertisement of the procurement. Accordingly, unless it is determined that other valid reasons exist for the rejection of Dover's bid, it should be considered for award.

We are transmitting a copy of this decision to the protesting bidder. The file forwarded with the report of August 18 is returned.

[B–167595]

Bids—Unbalanced—Evidence

Upon the unequivocal confirmation of an apparent unbalanced low bid on motor vehicle parts and accessories that offered discounts of 36 percent on "common parts" and 60 percent on "captive parts," acceptance of the bid was proper, for an unbalanced bid is not automatically precluded from consideration in the absence of evidence of irregularity, and the contracting officer properly held that bidders who had failed to identify price lists were bound by the lists included in the invitation, and that the low bid was responsive, notwithstanding the bidder did not have on hand at the time of award, all the price lists to which committed under the contract. The correction of mislabeled parts will be advantageous to the Government, without subverting the contract, and the Government in keeping with the spirit of the contract, will not request a part by brand name to obtain the higher discount.

Contracts—Protests—Award Approved—Prior to Resolution of Protest

Where an award of a new contract would cost the Government substantially less than continuing to procure motor vehicle parts and accessories under an existing contract by exercising the contract option, the determination by the contracting officer not to exercise the option and to award a new contract to other than the incumbent contractor prior to the resolution of its protest filed with the United States General Accounting Office was within the authority granted under paragraph 2-407.9(b)(2) and (3) of the Armed Services Procurement Regulation, prescribing the criteria for making an award prior to a determination on a pre-award protest, and paragraph 1-1505(c) of the regulation, providing criteria for the exercise of options.

To the Wheeler Bros., Inc., November 24, 1969:

We refer to your protest by telegram dated July 30, 1969, as supplemented by briefs and correspondence submitted by your attorneys, against the award by the Department of the Air Force of contract FO8650-70-C-0035 to McCotter Motors, Inc. (McCotter) under invitation for bids (IFB) FO3650-69-B-0124, issued June 18, 1969, by Headquarters, Air Force Eastern Test Range (AFETR), Patrick Air Force Base, Florida. The protest also encompasses the administration and performance of the contract.

The contract covers the requirements of Patrick Air Force Base, Cape Kennedy Air Force Station, and Headquarters Kennedy Space Center, Florida, for commercial parts and accessories for motor vehicles and other equipment specified in Appendixes A and D to the IFB from date of award (August 4, 1969) through July 31, 1970. The requirements for Patrick Air Force Base and Cape Kennedy Air Force Station are combined under Part VIII, and the requirements for Headquarters Kennedy Space Center are covered by Part IX. Your protest concerns only Part VIII, which was awarded to McCotter. (Part IX was awarded to you.)

Part I of the IFB, relating to scope of contract, provided that price-listed and non-price-listed parts shall be furnished as required under the contract, and parts for support equipment shall be only those which have application to motor vehicles.

Part III included the following pertinent definitions:

(c) Support Equipment. Equipment utilized in the general support of operations. Examples are tow bars, aircraft starters and engine heaters, cargo ladders, oxygen carts, generators, etc.

* * * * * * *

(h) Common Part. A part that is produced by more than one manufacturer thereby becoming available from more than one source of supply in the competitive commercial replacement parts system. For example, if a particular part for an International vehicle must be obtained from International or their dealers, the part is "captive." However, if the part or a substitute part also can be obtained from other manufacturers or dealers, the part is "common" regardless of where it is obtained. A seal for a Ford vehicle which can be obtained from sources other than the Ford parts distribution system is "common" even though the box it comes in may be marked "FOR FORD MODEL _____ YEAR _____."

(i) Captive Part. A part (1) manufactured or controlled by a single source and available only from the manufacturer or his dealers and (2) not available under the provisions of paragraph (h) above. A common part requested by the Government by brand name becomes a captive part.

(j) Non-Price-Listed Part. Any part which is not included in the price lists indexed in Appendix "B" of this contract.

* * * * * * *

(o) Centrally Managed Part. Any part centrally procured, stocked, and issuable by other Government agencies; e.g., AF, DSA, Army, etc.

Part IV, entitled "PARTS AND SUPPLIES NOT TO BE FURNISHED," reads, in part, as follows:

(a) Centrally Managed Parts. Those parts as defined in Part III, paragraph (o) above will not be furnished under this contract except (1) at the option of the Government, and then only upon the written authorization of the Central Manager or his authorized representative, or (2) as authorized below:

[a] DSA centrally managed motor vehicle parts when the line item value is $10.00 or less (Stock List Price),

[b] GSA stores items when the order value is $25.00 or less (Stores Stock Catalog Price),

[c] Federal Supply Schedule items when the minimum order is $50.00 or as otherwise provided in the Schedule (FSS Price),

[d] Urgent or emergency requirements that cannot be delivered in the time required through normal supply channels.

Part V, entitled "PRICE LISTS" reads, in part, as follows:

(a) Appendix "B" consists of an alphabetical index of price lists approved for use under the contract. The index identifies price lists which:

(1) except for rebuilt parts are in national distribution;

(2) cover new, rebuilt, and exchange parts by parts manufacturers, rebuilders, and vehicle manufacturers;

(3) are current as of the date of the solicitation; and

(4) provide adequate coverage for the Vehicle fleet listed in Appendix "A" and Appendix "D."

(b) If an offeror desires to submit additional price lists, he is encouraged to do so; however, identification of these lists must be submitted to arrive at the office issuing this solicitation at least ten days prior to the date scheduled for opening of offers. Any additional price lists that are approved for use by the Government will be incorporated in the consolidated schedule by issuance of an amendment to this solicitation. Each offeror, in his offer, shall identify those price lists found in Appendix "B," as amended, that he proposes to use during the contract. Failure to show adequate price list coverage of parts necessary to support the vehicles specified in Appendix "A" and Appendix "D" shall be cause for rejection of the offer.

(c) On the effective date of the contract, the Contractor shall have in the on-base store one copy of each selected parts price list or catalog. Each parts price list shall be current as of the date of award of this contract. Thereafter, additional required lists may be used upon mutual agreement between the Contractor and the Contracting Officer and as evidenced by appropriate contract modification.

Part VIII set forth six items of motor vehicle and equipment parts and accessories and one item covering operation of parts stores during nonduty hours when required. Discounts were solicited from the list price in contract price lists described in Appendix B and for price lists of manufacturers identified in Item 4 of Part VIII. Item 4, covering captive parts with a Government estimate of $892,426, listed numerous manufacturers and provided space for bidders to check the manufac-

turers whose price lists they intended to use to furnish the required captive parts for the vehicle fleet listed in Appendix A.

The evaluation and award provisions of Part VIII advised bidders, among other things, that award would be made only to the responsive and responsible bidder having the lowest total estimated net cost to the Government as evaluated in accordance with the IFB provisions. In addition, bidders were advised that responsiveness was to include a determination by the contracting officer that price lists selected by the bidder, other than those identified as mandatory under Item 4 of Part VIII, adequately cover parts necessary to support the vehicle specified in Appendix A.

Part X, entitled "PAYMENT," provided that payment for parts furnished under contract price lists shall be at list prices specified in contract price lists less discounts offered by the successful bidder and that payment for non-price-listed parts will be computed at net invoice parts cost to the contractor, plus the service charge shown in Part X for the total dollar value (for parts only), beginning at $100.01, plus transportation charges and applicable taxes.

Appendix B, entitled "SCHEDULE (INDEX) OF/PARTS PRICE LISTS," is an alphabetical listing of manufacturers with a general description of the particular parts available from each manufacturer (e.g., Arvin Industries—mufflers, tailpipes). A parenthetical notation beneath the title of Appendix B states that the most current list will be applicable. IFB Amendment No. 3, dated July 24, incorporated several additional price lists in Appendix B pursuant to Part V (b) of the IFB.

Three bids were received by the procuring activity and were opened on July 25 as scheduled. Based on estimated net cost to the Government, McCotter was lowest at $723,409; you were second at $1,027,415; and B&D Supply Company (B&D) was third at $1,221,281. In the area of discounts McCotter offered 36 percent on common parts, 25 percent on both rebuilt parts and rebuilt engines, and 60 percent on captive parts; you offered 58 percent on common parts, 50 percent on rebuilt parts, 25 percent on rebuilt engines, and 30 percent on captive parts; and B&D offered 33 percent on both common and rebuilt parts, 18 percent on rebuilt engines, and no discount on captive parts. No exceptions were stated by any of the bidders to any of the price lists indexed in Appendix B as amended.

On July 28, at 8:00 a.m., the contracting officer communicated with McCotter by telephone and requested McCotter to verify its bid in view of the 60-percent discount offered on captive parts. At that time McCotter verified the bid verbally. Written confirmation of the bid was subsequently received by the contracting officer in a letter dated

July 28, in which McCotter stated that all discounts listed in its bid "are correct and valid."

At 4:15 p.m. on July 28, the contracting officer received a telephone call from you advising of your intent to file a protest against award to McCotter, and on July 29 your telegram of July 28 confirming your verbal protest was received by the procuring activity. By telegram dated July 29 the contracting officer acknowledged your protest; informed you that the procurement was urgent and must be awarded by July 31, the expiration date of the existing contract; and requested you to advise the procuring activity no later than 9:00 a.m., July 30, of the basis for your protest.

A memorandum dated July 28, 1969, relating to information received by the contracting officer regarding the responsibility of McCotter, states that favorable reports on the performance by McCotter of similar contracts were received from three separate Air Force installations in Florida. Two of the reports stated that McCotter had been cited for its outstanding performance.

On July 30, the contracting officer received a telegram dated July 29 from you giving the following reasons for your protest:

1. THAT DISCOUNT OF 36 PERCENT FOR COMMON PARTS AND 60 PERCENT FOR CAPTIVE PARTS ARE UNBALANCED.
2. DISCOUNT OF 60 PERCENT ON CAPTIVE PARTS, PART VIII, ITEM 4, FROM REFERENCED PRICE LISTS IS NOT POSSIBLY AVAILABLE TO ANY BIDDER AND THEREFORE IMPOSSIBLE TO PASS ALONG TO THE GOVERNMENT. LOWEST BID, THEREFORE, IS OBVIOUSLY ERRONEOUS.
3. EXAMINATION OF LOWEST BID CLEARLY INDICATES MISTAKE OR IRRESPONSIBLE BID AND CONTRACTING OFFICER SHOULD REQUIRE LOWEST BIDDER TO VERIFY THE BID BY PRODUCING PRICE LISTS CITED IN PART VIII, ITEM 4 PRIOR TO AWARD OF CONTRACT TO DETERMINE RESPONSIBILITY OF BID.

(Your telegraphic protest dated July 30 to our Office has the same wording as the above telegram to the contracting officer.)

At the request of the contracting officer, representatives of the procuring activity and other concerned Air Force personnel met with McCotter's representative on July 30 to discuss the protest in view of your assertions of mistake. In response to the questions, "Do you know you could lose money on captive items; do you have the necessary price lists and are you correct in your discounts of 36 percent and 60 percent?" McCotter's representative is quoted as follows:

Again, let me verify that our bid as submitted is valid and is as we intended. We have been in this type of business for 23 years and are operating three other stores for the Air Force, and, as can be verified by the GAO and audit staffs, very successfully. There is a possibility of loss on captive items; however, we did not bid on one part, but the whole package. Where we lose on captive items we will more than make up on common items. We have every intention of moving as many items as possible out of the captive area and into common. We have adequate staff and research books to convert these items, any item that is captive, and we don't have a copy of the price list at the end of the transition period of 30 days, we will furnish the Air Force a copy of our invoice from the Manufacturer and discount it at 60 percent. We now have in our possession approxi-

mately 75 percent to 80 percent of the lists in question. The allegation of Wheeler Bros., Inc. that 60 percent discount on captive parts is not possible is incorrect. We are an established Ford dealer operating a dealership, in addition to three parts stores for the Air Force. We did in excess of $3,000,000 in sales last year and there are a number of suppliers who give us a 60 percent discount or better.

On July 31, the procuring activity, which was apparently satisfied with McCotter's explanation of its discount on captive parts, requested approval of immediate award to McCotter on the basis of urgency from Air Force Systems Command (AFSC), Andrews Air Force Base, Maryland, and our Office was notified of the intended award by Headquarters United States Air Force on the same date. On August 1, AFSC granted the requested approval, and the award was effected on August 4, as previously stated. By letter of August 8, McCotter advised the contracting officer that the procedure of discounting invoices for captive parts at 60 percent would be used only until such time as the particular mandatory price list has been acquired.

In a report dated August 25, 1969, on your telegraphic protest, the Department of the Air Force sustained the action taken by the procuring activity. The report states that you ignore the right of other bidders to knowingly quote prices below cost; that all bids were evaluated strictly in accordance with the IFB provisions; and that there was adequate support for the contracting officer's determination that McCotter is responsible. A legal memorandum dated August 13, 1969, forwarded with the report includes the following pertinent statements with respect to your protest:

2. There are three allegations in the protest: (1) that the apparent low bid is unbalanced; (2) that it is erroneous, and (3) that it is either mistaken or irresponsible so as to call into question the apparent low bidder's responsibility.

a. The allegation of unbalance is addressed to the two major items to be furnished under Part VIII of the contract called common parts and captive parts. The contractor offers a discount of 36% on common and 60% on captive parts. Since the Government estimate assigns by far the greater dollar value to captive parts, it is apparent why the protestant's offer of a 30% discount on captive parts was not low. However, the Government has made no representations regarding the respective dollar values assigned to captive and common parts. As Part I of the Schedule makes clear, the Government's estimates are based on Calendar Year 1968 requirements. The protest does not involve the issue of requirements but of cost estimates. Each bid necessarily involved a calculation as to the respective quantities of common and captive parts included in the estimated requirements. Since there is an undeterminable amount of interchangeability between common and captive parts, the discount assigned to each is obviously speculative. But that is in the nature of fixed price bids and is one of the risks assumed by the bidders. The contractor's bid was based on the assumption that a significant portion of the higher discount parts could be furnished at the lower discount. The protestant's theory was the reverse, based presumably on his experience with the previous contract. The latter overlooks the significant changes made in the contract format (directed by Air Force Logistics Command), and the fact that an automotive parts interchangeability manual, not previously available, will enable this activity to make greater use of additional sources and thereby obtain the common parts discount.

b. The contractor was given every opportunity to review his bid for mistakes but has unequivocally reaffirmed the correctness of his original bid. The statement that a discount of 60% on captive parts is not available is not unconditionally true. In addition to being a car dealer, the contractor has several other automotive parts contracts with the Government and is in a position to obtain

quantity discounts that may be unavailable to other bidders. Moreover, it does not follow that the contractor cannot give the Government a 60% discount, whatever his discount arrangement with the manufacturer. The contractor's authorized representative unequivocably assured the Contracting Officer that he stood by his 60% discount on all captive parts.

c. Whether the bid was irresponsible goes not to responsiveness but to responsibility and is therefore not a proper ground for protest. As regards the price lists mentioned in Part VIII, Item 4, Part V of the Schedule merely requires the contractor to have on hand those lists or catalogs selected by him. These lists are readily available from commercial enterprises. It is difficult to believe that any one interested in obtaining such lists would have any difficulty in doing so.

The contracting officer's statement of facts and findings reads, in part, as follows:

5. Comments on each allegation of Wheeler Bros, Inc. wire dated 30 July 1969 are as follows:

a. While the discounts of 36% for common parts and 60% for captive parts are unusual, they are far from being considered unbalanced. Whereas, a contractor might feasibly lose on some captive items, it is just as likely that he will more than make up on the common items.

b. This statement was completely absolved, as the low bidder is also a Ford dealer and does get 60% discount or better, in some cases, and would be able to pass these along to the Government.

c. Wheeler Bros. Inc. did not examine the lowest bid; they did, however, record the amount of discount, but without knowledge of entire bid could not possibly come up with an amount for low bidder or make a substantial statement as to irresponsibility. There is no inclusion in the Solicitation that requires submission of price sheets before award.

6. McCotter Motors, Inc. appears to have the same interpretation of their obligations as the Solicitation specified and has not imposed conditions which modify requirements of the Solicitation or limit their liability to the Government. The bid submitted by McCotter Motors, Inc. did not fall within any criteria included in ASPR 2-404.2.

In the briefs filed in implementation of your telegraphic protest, exceptions are taken to the Department's report of August 25 and to the supporting legal memorandum and statement of the contracting officer. Further, your attorneys draw an analogy between the instant procurement and a similar procurement at Dover Air Force Base, Delaware, and accordingly urge that the action in this case be the some as the actions which have already been taken and the current actions proposed by the Department in the Dover case.

The Dover procurement, which was initiated under an IFB issued December 23, 1968, contemplated a contract covering a period commencing March 1, 1969, or date of award if subsequent, through February 28, 1970. Bids were opened on January 21, 1969, and on February 12 you protested to our Office against consideration of a prompt payment discount in evaluating a certain item in the low bid, which also quoted discounts of 20 percent on common parts and 50 percent on captive parts. Pending resolution of your protest, the contracting officer elected to extend the existing contract beyond its February 28 expiration date under an option in the contract. In our decision B-166170, April 4, 1969, we denied your protest and held that award to

the low bidder would be in accord with the terms of the IFB and the procurement statute and regulations. Subsequently, the Military Airlift Command (MAC) declined approval of the award and directed that all bids be rejected and the procurement readvertised under a new IFB. The basis for this action was the alleged failure of the original IFB to require bidders to commit themselves to price lists, thus rendering their trade discounts of no significant value, and the absence of a common basis for bidding and for the evaluation of the bids. In addition, MAC stated its view that the low bid was unbalanced in light of the fact that the discounts on common and captive parts are not in line with previously recorded discounts according to statistics compiled by the Air Force Logistics Center (AFLC).

The low bidder on the Dover procurement has protested the action directed by MAC, and we have given consideration to its protest concurrently with consideration of your protest in the instant procurement. Pending issuance of our decision in the Dover case, the previous contract has remained in effect pursuant to the option exercised by the contracting officer prior to February 28.

Since your protest in the instant procurement was filed with our Office before award, your attorneys urge that, as in the Dover case, the contracting officer should have extended the existing contract with you beyond its expiration date of July 31, 1969, pending issuance of our decision in the matter. Further, your attorneys assert that in light of the option in the existing contract, continuity of service could have been assured by its exercise; accordingly, it is asserted, the statement of the contracting officer that there was need for award under the IFB is without merit.

Armed Services Procurement Regulation (ASPR) 2-407.9(b)(2) and (3), relating to protests against award, permits award prior to our decision on a preaward protest filed with our Office, upon approval of proper authority within the contracting agency at a level higher than the contracting officer, where the contracting officer determines that (1) the procurement items are urgently required; (2) delivery or performance will be unduly delayed by failure to make award promptly; or (3) a prompt award will otherwise be advantageous to the Government.

ASPR 1-1505(c), relating to options, provides that options should be exercised only if it is determined that (1) funds are available; (2) the requirement covered by the option fulfills an existing need of the Government; and (3) the exercise of the option is most advantageous to the Government, price and other factors considered.

Such regulations contemplate decisions in each procurement based on the particular circumstances involved. Accordingly, a decision in one procurement does not govern disposition of a similar procurement.

In the instant case, the Government estimate of parts consumption set forth for each of the six parts items in Part VIII, which is stated to be based on expenditures for the previous year [under the contract with you which expired on July 31, 1969, one day after your protest was filed with our Office], totaled $1,326,000. All three bids received under the IFB were lower than the Government total, with the largest differential, amounting to more than $600,000, being between McCotter's low net price of $723,409 and the Government estimate. Such factors clearly indicate that award under the IFB would cost the Government substantially less than continuing procurement under the existing contract. In the circumstances, we are unable to conclude that either the determination by the contracting officer as to the making of award to the low bidder before decision on your protest by our Office, or that as to declining to exercise the option in your existing contract, was not advantageous to the Government, and therefore we must regard them as properly within the authority granted to the contracting officer by the procurement regulations.

As to the action which was taken by the Dover procuring office with respect to exercise of the option in the previous year's contract, we have no information as to the basis thereof. However, we have no reason to suspect, and you do not claim, that such action was taken without the determination required by ASPR 1-1505(c) that exercise of the option was most advantageous to the Government price and other factors considered.

On the matter of the discounts offered by McCotter, your attorneys raise several issues. In line with your original charge that the bid is unbalanced because the captive parts discount exceeds the common parts discount, your attorneys cite as support for your position the view of MAC in the Dover case that the low bid offering 20 percent on common parts and 50 percent on captive parts is unbalanced. Accordingly, your attorneys urge, the McCotter bid should have been rejected just as MAC has directed in the Dover case.

The fact that a bid may be unbalanced does not render it nonresponsive, nor does such factor of itself invalidate an award of a contract to such bidder. As was stated by the Court in *Frank Stamato & Co.* v. *City of New Brunswick*, 90 A. 2d. 34, 36 (1952), "There must be proof of collusion or of fraudulent conduct on the part of such bidder * * * or proof of other irregularity of such substantial nature as will operate to affect fair and competitive bidding." Therefore, where a bidder has confirmed a bid which appears to be unbalanced and there is no indication that the bid is not as intended or evidence of any irregularity, we have held that the bid may be accepted if it is otherwise the lowest acceptable bid and the bidder is responsible. 38 Comp. Gen. 572, 574

(1959); B-161928, August 8, 1967; B-164736, December 2, 1968, affirmed June 10, 1969. See, also, our decision 48 Comp. Gen. 330 of today (on the Dover case) to the Secretary of the Air Force.

In view of the information of record that McCotter may be in a position to obtain a 60 percent discount on captive parts other than Ford parts, and of the unequivocal confirmation by McCotter of its bid, it is our view that the asserted unbalancing of the bid does not render it nonresponsive to the IFB nor does it affect the validity of the contract awarded to McCotter.

With respect to McCotter's statements regarding its intent to move as many items as possible from the captive area into the common, your attorneys contend that such action will subvert the contract and reduce the 60 percent bid discount on captive parts to a sham. To permit McCotter to take such action at its own discretion, it is argued, raises the question whether the contracting officer is serving the Government or the contractor. Further, it is urged that the contracting officer should exercise the right reserved by the Government in Part VIII(i) to request parts by brand name and thereby make them captive and subject to the 60 percent discount.

The procuring activity states that the determination whether a part is captive or common will be made by the contracting officer and his legal advisor based on the contract definitions and the automotive parts interchangeability manual which is now available for use by the procuring activity. This procedure, it is indicated, is intended to preclude a situation encountered in the past, in which classification of parts was left to the contractor's discretion with the result that many high discount parts were converted to captive parts and sold to the Government at no discount and an imbalance was thereby created between common and captive parts. It is this imbalance which the new IFB is intended to avoid. Conceding that by requesting a part by brand name the Government could in theory obtain the higher discount on any part under the contract, the procuring activity nevertheless states that such a sweeping revision of the contract format was not intended and should not be read into Part III(i). Rather, it is stated, such provision evidences the Government's intent not to be bound by past practice and an effort by the Government to establish by the contract language the correct designation of each part. "Any other construction," it is stated, "would constitute an overreaching on the part of the government as to amount to fraud. If the government decided that by virtue of the quoted language, it could pin the label of 'captive' part on what is universally considered a 'common' part, thereby boosting the discount available to it, such practice would not be within the spirit and intent of the agreement, although arguably within its letter."

To the extent that the proper administration of the contract and the facts of each case permit reversal of a previous incorrect part label, it is stated, the Government will abide by the facts and may be said to encourage interchangeability. Such action, it is asserted, will be advantageous to the Government, first, because it will result in lower costs, as has already been indicated by the substantial savings obtained during the first two months of the McCotter contract, and, second, because it will restore the proper nomenclature to the previously mislabeled parts. Accordingly, it is reported, while there may be conversion from high to low discount parts, such action will not be done in subversion of the contract but will be made only because the parts were erroneously labeled in the past; however, no part that is truly "captive," as defined in the contract, will be changed to "common."

As to the administration of the contract, the procuring activity states that the contractor will be rigidly held to the most punctilious observance of the contract requirements; further, there is no evidence that the contracting officer has permitted, or ever will permit, the contractor to refuse to fill any orders or permit a sham compliance with the contract.

Another factor on which your attorneys raise several questions is the price lists which are to be used under the contract. Although the record does not evidence that any question was raised by you or by any other bidder before bid opening as to the IFB provisions relating to the furnishing and use of price lists, your attorneys now contend that the IFB is defective because it does not require bidders to commit themselves to any price lists. In this connection, your attorneys again cite the Dover procurement, which the Military Airlift Command considers to be defective as stated above. Your attention is directed, however, to our decision of today, B–166170, to the Secretary of the Air Force, stating our conclusion that the Dover IFB requires the use of all of the price lists incorporated in the IFB. A copy of the decision is enclosed.

Although the price list provisions in this IFB differ to some degree from the corresponding provisions in the Dover IFB, which has but one set of price lists, we are compelled to reach a similar conclusion in this procurement. Part V required bidders to identify in their bids those Appendix B price lists which they proposed to use during the contract, and Item 4 of Part VIII required bidders to check off the names of the manufacturers of captive parts whose price lists would be used to furnish captive parts as required under the contract. Such provisions, in our view, require commitment to specific price lists.

As to the Appendix B price lists, we are advised by the Air Force that no bidder checked off any of the price lists either in the original

appendix or in the supplement added by the amendment which all bidders acknowledged. In the circumstances, the procuring activity states, all three bids were regarded as indicating agreement to be bound by all of the Appendix B price lists. While we believe that both Part V and the language in Part VIII, relating to responsiveness of bids, contemplated a specific statement in each bid as to the Appendix B price lists which were to be used in performing the contract, we are unable to conclude that the procuring activity's interpretation of the bids (which would appear to have been the interpretation of all the bidders as well), was unreasonable. Nor do we believe that any unfairness may be claimed by you or B&D since no bidder complied with the requirement of Part V.

As to commitment to the Item 4 captive parts price lists in Part VIII, your attorneys contend that agreement to use the price list of a stated manufacturer does not necessarily commit a bidder to any particular list of the manufacturer and in this case could lead to failure to supply the bulk of the parts from the stated manufacturers as captive parts. By way of example, your attorneys state that McCotter is using S–K Wayne Tools price list for Wayne parts; a Caterpillar supplement for Caterpillar parts; a Thew-Lorain supplement for Thew-Lorain parts; and Chicago Pneumatic air tools and auto equipment price list SP–3029–16 for Chicago Pneumatic parts. In addition, your attorneys cite nine supply orders against Chicago Pneumatic which it is claimed McCotter has refused to accept.

The contracting officer reports that in addition to the price lists which are identified by your attorneys as being used by McCotter, there are on file price lists for Wayne Sweepers, Caterpillar and Thew-Lorain which are being used as required by the contract. Further, the contracting officer has verified with Chicago Pneumatic that it is furnishing to McCotter a price list for each unit according to serial number, as each requirement is received from McCotter, a procedure which has been arranged because of the bulk of Chicago Pneumatic's complete price list.

With respect to the refusal by McCotter to accept nine orders for Chicago Pneumatic items, the contracting officer reports that such orders were for stationary equipment, which are not parts for support equipment having application to motor vehicles, as contemplated by Part I of the IFB. Accordingly, the contracting officer views McCotter's refusal as a right. We concur with such view, with the observation that, since the contract does not cover stationary equipment, the orders should not have been placed under the contract in the first instance.

As to McCotter's failure to have on hand at the time of award all of the price lists to which it committed itself under the contract, obviously such requirement was not to be met until after bid opening. Accordingly, noncompliance therewith does not afford a basis for declaring the McCotter bid nonresponsive but relates to performance of the contract. Further, while McCotter may be tardy in meeting such requirement, there is no evidence that in submitting its bid McCotter acted in other than good faith in offering to use the price lists of those manufacturers in the captive parts list whose names McCotter checked in its bid. In addition, McCotter has stated in its letter of August 8 that the use of invoices discounted at 60 percent for those captive parts for which McCotter does not have price lists is but a temporary measure, to be discontinued as soon as the particular price lists are available.

In light of the foregoing, we are unable to conclude that the IFB was defective with respect to commitment to price lists and bid evaluation. Further, we likewise are unable to find support for the argument that McCotter has sought to evade the price list furnishing requirement of the contract.

For the reasons stated, we see no legal basis for cancellation of the award to McCotter. Accordingly, your protest is denied.

[B-167944]

Contracts—Specifications—Restrictive—Particular Make—Invitation Sufficiency

An invitation for bids that in soliciting a brand name or equal sewer rodding machine listed as essential characteristics the nonoperational features of the machine that did not suggest the machine's primary function or its required level of performance is a restrictive invitation, for bidders could only determine the equality of their products from the listed characteristics of the brand name, whereas "or equal" means to be acceptable, a product need only be capable of meeting the same standard of performance as the brand name. It is not enough that an invitation furnish the essential characteristics of the brand name—now provided in section 1-1206.1(a) of the Armed Services Procurement Regulation in revision No. 3, June 30, 1969—and future invitations should contain sufficient information for the intelligent preparation of bids so as to obtain the maximum competition contemplated by 10 U.S.C. 2305(b).

To the Secretary of the Army, November 24, 1969

We refer to a letter, with enclosures, dated October 8, 1969, from the General Counsel, Office of the Chief of Engineers, relative to the protest of the Flexible Pipe Tool Division, Rockwell Manufacturing Company, against the award of contract No. DACW61-69-C-0193 to O'Brien Manufacturing Company, Inc., under invitation for bids DACW61-69-B-0072, issued on May 29, 1969, by the United States Army Engineer District, Philadelphia, Pennsylvania.

The subject invitation solicited bids for furnishing a sewer rodding machine, with associated parts, described on page 6 of the invitation as follows:

1. Sewer Rodding Machine, rear tow, trailer mounted, 2-wheel, with retractable swivel wheel on towing end, with 12-volt starter generator, "Flexible" Pipe Roder Model RPRS–1 or equal. The following accessories (or corresponding accessories on equipment other than "Flexible") shall be furnished with the rodding machine:	1	ea
(a) 18 foot Rod Guide Hose, Rod Guide Bell	1	ea
(b) Street Stand for Rod Guide Hose	1	ea
(c) EZY Manhole Guide Brace	1	ea
(d) RTOX 4" Root Saw	1	ea
(e) RT–1X 6" Root Saw	1	ea
(f) TP–1—6" Porcupine	2	ea
(g) SO–3–6—6" Selecto Blade, 3 blade cutter	1	ea
(h) RC–1 Flexicrome Rods and Couplings 5/16" Diameter × 36" L.	120	pcs
(i) Illustrated parts book	2	ea

Bidders were also advised on page 6 that since the equipment to be procured is to be used to clean drains on canal embankments, "Light weight and ease of maneuverability on steep slopes and embankments are essential features of the equipment to be furnished."

Paragraph SP 1.04 of the invitation contained the clause required by paragraph 1–1206.3 of the Armed Services Procurement Regulation (ASPR) informing bidders that the "brand name or equal" description was intended to be descriptive but not restrictive and was to indicate the quality and characteristics of products that would be satisfactory, and that bids offering "equal" products would be considered if it was determined that such products were equal in all "material" respects to the referenced brand name product.

Of the six bidders solicited, only two bidders responded: O'Brien Manufacturing Company, Inc., with a bid in the amount of $2,754; and Flexible Pipe Tool Division, Rockwell Manufacturing Company, with a bid in the amount of $2,910. O'Brien offered to furnish its model 900 HMC, sectional sewer rodder, as equal to Flexible's model RPRS-1, and on June 17, 1969, the procuring activity forwarded O'Brien's bid, together with its descriptive literature, to the Resident Engineer, Chesapeake City Resident Office, Maryland, for a technical evaluation. On June 19, 1969, the resident engineer determined that O'Brien's equipment was "equal" to the Flexible model within the meaning of ASPR 1–1206.4(a), and in accordance with his recommendation, the contracting officer awarded the contract on June 23, 1969, to O'Brien as the lowest responsive, responsible bidder. We understand that the item was delivered to the Government on September 25, 1969.

By telegram dated June 26, 1969, and letters dated July 16, August 13 and 27, 1969, Flexible unsuccessfully protested to the procuring activity against the award on the ground that the O'Brien unit de-

viated from the specifications covering the Flexible model and was therefore nonresponsive. By letter dated September 18, 1969, Flexible protested to our Office and requested that we review the procurement.

An examination of Flexible's corrspondence with the procuring activity indicates that its objection to the award is founded on asserted variances of the O'Brien model from the specifications covering the referenced Flexible model. We have been informally advised that specifications covering the Flexible model were not furnished with the invitation, and we have discovered no reference to such specifications in the invitation. See ASPR 1–1206.2(c). The principal difference advanced is that the O'Brien model has a hydraulic drive while the specifications for the Flexible model call for a mechanical drive. In its letter of August 13, 1969, to the procuring activity, Flexible maintained that any investigation into the types of machines available would reveal that there are both mechanically and hydraulically operated machines available and that it could have offered a competitive hydraulically operated machine. Also, Flexible questioned whether the weight of the O'Brien model, approximately 2,000 pounds as opposed to approximately 1,300 pounds for the Flexible model, rendered it unsuitable for the intended use described on page 6 of the invitation.

The contracting officer acknowledges that in additional to the type of drive and weight, the O'Brien model differs in other respects from the Flexible model, but maintains that the differences are not controlling and that the O'Brien model is in "all material respects 'equal' to that of Flexible, as far as performance characteristics are concerned." In this connection, the contracting officer's report contains the following comparison of the O'Brien and Flexible models, with respect to which it is stated that they "compare closely in many principal features":

O'BRIEN	FLEXIBLE
7 hp engine	6 hp engine
700 ft. rods	600 ft. rods
Chain drive (positive)	Chain drive (positive)
4000 lb. pull back	3000 lb. pull back
Overload clutch	Overload clutch
Variable speed transmission	Variable speed transmission
Disc brake on reel	Disc brake on reel
Footage meter	Footage meter
12-volt starter	12-volt starter

We have been informally advised, however, that the technical evaluation of the O'Brien bid was confined to the determination of its conformance to the characteristics listed on page 6 of the invitation.

The circumstances of this procurement evidence an inattentiveness

to the approach that should be followed in the preparation of purchase descriptions and lead us to the conclusion that the instant invitation did not permit the full and free competition required by 10 U.S.C. 2305(b).

If we give credence to the contracting officer's position that only the characteristics listed on page 6 were essential (and the stated scope of the technical evaluation of the O'Brien model is at least consistent with this position), the suggestion can be made that the invitation reflects literal compliance with our decisions in this area requiring disclosure of essential characteristics and is therefore not defective. In this connection, two recent decisions of our Office (49 Comp. Gen. 274 (1969); 48 Comp. Gen. 441 (1968)) have cited with approval the following rule expressed in B-157857, January 26, 1966:

> * * * Bidders offering "equal" products should not have to guess at the essential qualities of the brand name item. Under the regulations they are entitled to be advised in the invitation of the particular features or characteristics of the referenced item which they are required to meet. An invitation which fails to list all the characteristics deemed essential, or lists characteristics which are not essential, is defective. 41 Comp. Gen. 242, 250-51; B-154611, August 28, 1964. See, also, 38 Comp. Gen. 345 and B-157081, October 18, 1965.

We believe, however, that to yield to the conclusion suggested, it would be necessary to ignore the fundamental requirement that advertised invitations must contain sufficient information for the intelligent preparation of bids so that the maximum competition possible is obtained. The requirement that brand name or equal purchase descriptions set forth all material characteristics of the item deemed essential is but a derivative application of this principle.

As we view page 6 of the invitation, the contracting officer's interpretation requires one assumption which we believe reflects the restrictive character of the invitation; namely, that a potential bidder when examining the invitation would recognize that the equality of the product could be determined only by reference to the listed characteristics of the brand name and no other characteristics. It should be emphasized here that the "or equal" requirement is generally considered to mean that an acceptable product need only be capable of meeting the same standard of performance as the brand name. *Cf.* 45 Comp. Gen. 462, 466 (1966). With this in mind, it should be noted that apart from the requirement for a 12-volt generator and the need that the machine be light weight and maneuvered easily, the listed characteristics do not suggest to us any features of the machine itself affecting the performance of its primary function, nor for that matter is the required level of performance stated. In addition to the type of drive, the contracting officer's comparison of the O'Brien and Flex-

ible models would seem to us to suggest other operational features which might affect performance of the machine.

We are not in a position to reach a technical judgment as to which other operational features are in fact essential to performance of the machine. Nevertheless, it would be absurd to suggest that a product which fails to include any of these features could be determined to be acceptable, but this, in effect, is the conclusion that flows from the contracting officer's position. Certainly, no manufacturer of the equipment involved here would be insensitive to these features and, when faced with an invitation silent in this area, he is, in our view, required to divine the essentiality of these features, as well as their impact on the unstated level of performance. Under the circumstances, the brand name designation would be of no real assistance to the bidder in making this determination. It does, however, have the practical effect of limiting the named manufacturer's submission to the model specified and might suggest to potential bidders that all of the unstated features of the brand name are essential. And where, as is alleged by Flexible, a particular characteristic of the model designated distinguishes it from other competitive equipment offered by the brand name manufacturer and others, the adverse effect on the competitive base resulting from a failure to provide a sufficiently detailed description of the Government's needs is clear.

With respect to the use of a brand name or equal purchase description, the record indicates only that it was utilized here because no applicable military or Federal specification existed, and it was determined that it would be "impracticable or uneconomical to prepare a specification" for a "one-time procurement item." See ASPR 1–1202 (b)(vi) and (vii)(A). Given this determination, immediate recourse to a brand name or equal purchase description is not justified by our decisions. See 41 Comp. Gen. 76, 80 (1961); 38 *id.* 291, 294 (1958); 10 *id.* 555, 556 (1931); 5 *id.* 835, 837 (1926). The required approach is, we believe, clearly indicated by the governing regulation. ASPR 1–1206.1(a) (January 1, 1969), in effect at the time this procurement was initiated, provided as follows:

(a) A purchase description may be used in lieu of a specification when authorized by 1–1202(b) and, subject to the restriction on repetitive use in 1–1202 (b)(vii), where no applicable specification exists. A purchase description should set forth the essential characteristics and functions of the items or materials required. Purchase descriptions shall not be written so as to specify a product, or a particular feature of a product, peculiar to one manufacturer and thereby preclude consideration of a product manufactured by another company, unless it is determined that the particular feature is essential to the Government's requirements, and that similar products of other companies lacking the particular feature would not meet the minimum requirements for the item. Generally, the minimum acceptable purchase description is the identification of a requirement by use of brand name followed by the words "or equal." This technique should be used only when an adequate specification or more detailed de-

scription cannot feasibly be made available by means other than reverse engineering (see 1-304) in time for the procurement under consideration. Purchase descriptions of services to be procured should outline to the greatest degree practicable the specific services the contractor is expected to perform.

Thus, consistent with the requirements of 10 U.S.C. 2305(b), purchase descriptions are to set forth the "essential characteristics and functions" of the item required in terms that permit the broadest competitive base consistent with the Government's needs. This should, if possible, be the procedure of choice, as the above-cited decisions and the regulation indicate. Moreover, from the standpoint of affording potential bidders an equal opportunity to compete, it should be noted that even when a brand name or equal purchase description is used, the requirement for an identification of essential characteristics remains. ASPR 1-1206.2(b). Here, we find nothing in the record before us which suggests that the Government's requirements could not have been spelled out with particularity. In our view, the brand name or equal designation was included as a matter of administrative convenience to particularize its minimum requirement for a "sewer rodding machine." We believe that compliance with ASPR 1-1206.1(a) would have led to a complete specification of the standard of performance required of the requested item. Parenthetically, we note that ASPR 1-1206.1(a) (revision No. 3, June 30, 1969) now provides specific guidance in this area by listing characteristics which are to be considered in expressing the Government's minimum requirements:

(i) common nomenclature;
(ii) kind of material, *i.e.*, type, grade, alternatives, etc.;
(iii) electrical data, if any;
(iv) dimensions, size of capacity;
(v) principles of operation;
(vi) restrictive environmental conditions;
(vii) intended use, including—
  (A) location within an assembly, and
  (B) essential operating conditions;
(viii) equipment with which the item is to be used;
(ix) other pertinent information that further describes the item, material or service required.

In view of the fact that delivery of the equipment has already been made, no remedial action is now possible. We expect, however, that appropriate steps will be taken to avoid a repetition of the foregoing circumstances in the case of future similar procurements.

[B-166899]

Transportation—Transit Privileges—Through Rates—Section 22 Quotations Authority

A shipment of military communication outfits that moved under a Government bill of lading from California to North Carolina and was accorded storage-in-transit privileges at an intermediate point properly was billed and payment

made on the basis of a through rate, notwithstanding the absence of a through rate in the applicable transcontinental tariff. The concept of transit privileges rests on the fiction that two or more separate shipments are a single shipment on which the charges assessed are lower than the aggregate of the charges on the separate shipments, and although the concept is only applicable to private shippers when provided by tariff, the lower through rate is accorded the Government on its volume storage-in-transit shipments on practically all commodities by SFA Section 22 Quotation Advice A–610–F, as well as others.

To the Seaboard Coast Line Railroad Company, November 25, 1969:

Further reference is made to your letter of May 6, 1969, asking for review of the settlement of your supplemental bill 281509–P, our claim TK–885680. The shipment in question consisted of a military communication outfit moved under Government bill of lading AT–056387, from Avon, Kentucky, to Fort Bragg, North Carolina, with prior origin at Polk, California, and storage in transit at Avon.

For this service, you billed originally on the basis of a transit balance based on the through rate provided in Trans-Continental Freight Tariff 1015–A, applicable from Polk to Fort Bragg, less a rate shown as having been paid for the inbound movement to Avon, plus a transit charge as provided in SFA Section 22 Quotation Advice A–610–F. Thereafter, you submitted your supplemental bill for an additional sum of $320.15, based on local rates applicable to and from Avon, on the ground that the through rate from Polk to Fort Bragg was inapplicable because there was no authorization in the transcontinental rate tariff for application of the through rate to a shipment stored in transit at an intermediate point. By settlement certificate dated March 19, 1969, your claim was disallowed, and you have asked for review of that settlement.

In your request for review, you state, in effect, that the all-rail carload rate authorized by the transit quotation must be one that is applicable from point of origin to destination in effect by tariff or as provided in any applicable quotation. You further state that there was no applicable quotation rate in effect and that the through tariff rate in Trans-Continental Freight Tariff 1015–A was inapplicable because the provisions in Item 25 of that tariff would not permit the rate to apply on a shipment stored in transit at a point intermediate between origin and destination.

Additionally, you say that the transit quotation "does not at any place state that contrary to the tariff application that transit does not apply, transit hereunder will be authorized." Also, you refer to SFA Section 22 Quotation Advice A–529–B as illustrative of a quotation which expressly waives rate tariff prohibitions against transit and you point out that a provision of this kind is not carried in SFA Section 22 Quotation Advice A–610–F.

The entire concept of stopping in transit and the granting of transit privileges rests on the fiction that two or more separate shipments may be regarded as a single through shipment and through charges assessed which are lower than the aggregate of the charges otherwise applicable to the separate shipments. Interstate Commerce Commission rules governing the construction and filing of freight-rate publications provide that each carrier or its agent shall publish, post, and file tariffs which shall contain in clear, plain, and specific form and terms, all the rules governing and rates and charges for terminal and transit services. Tariff Circular No. 20, Rule 10. Thus, the through rates found in any line-haul rate tariff will not apply on shipments stored in transit at intermediate points unless the tariff containing such rates authorizes the application of the rates named therein in connection with a transit service at such intermediate points.

Government traffic patterns are not created and controlled by the economic considerations which govern the operations of private shippers. Consequently, Government storage and reforwarding installations often are located at points where storage-in-transit privileges are not accorded the general public. In addition, Government traffic often consists of commodities such as ammunition, guns, combat vehicles, etc., which ordinarily do not move in commercial channels and for which commercial storage-in-transit privileges are not provided by tariff. In consequence, if the rates assessed on most Government shipments accorded storage in transit were only those available by tariff, the rates in most cases would be those applicable to and from the transit points because the tariffs containing the through rates ordinarily would not authorize the application of such through rates on such traffic.

To avoid this consequence, most Government storage and reforwarding programs are accorded storage-in-transit privileges under section 22 quotations. These quotations, in effect, provide reductions from the combinations of rates which would otherwise apply to the through rates authorized by the quotations, plus an appropriate charge for the transit service. The basic purpose of these transit quotations is to afford the Government transit privileges which are not authorized in the rate tariffs containing the line-haul rates applicable from the initial origins to the ultimate destinations of the transited shipments.

SFA Section 22 Quotation Advice No. A–610–F is offered for and on behalf of all carriers by railroad parties to the Uniform Freight Classification and authorizes transit privileges at some 91 Government transit installations located throughout the United States. With minor exceptions relating to commodities for which transit privileges are

provided in other section 22 quotations, the transit privileges offered are applicable to practically all commodities. The quotation (including the appendix), as originally issued, consists of some 62 pages, of which some 28 pages relate exclusively to back-haul or out-of-route-haul provisions. In view of the scope and complexity of the quotation as a whole, it seems unlikely that it was intended to offer through rates on transited commodities in only those instances in which storage in transit was authorized by tariff in connection with the tariff rates. If transit privileges were authorized by tariff, there would be no need for the quotation.

Item No. 6 of the quotation specifies the rates and charges to be applied to shipments accorded storage in transit under the quotation. The first part of the item specifies the inbound rates to be applied on inbound shipments to the transit points. The second part of the item identifies the through rates to be applied on shipments reshipped from the transit points. For through rates, the item provides, in pertinent part, as to commodities reshipped from a transit point within 12 months from the date of the inbound freight bill:

> Each shipment made from its initial point or port of origin and after the effective date hereof shall be subject and entitled to the all-rail carload rate applicable to the inbound or outbound commodity whichever is higher, from such point or port of origin to the port, destination or railhead, in effect by tariff or as provided in any applicable Quotation on the date of such shipment from initial point or port of origin.

While, as you point out, the through rate so authorized is not expressly identified as one "in effect by tariff" without regard to tariff restrictions against storage at intermediate points, neither is it expressly identified as one subject to such restrictions. In our view, the through rate intended to be offered by the quotation is one "in effect by tariff" that would be applicable on a through shipment from initial origin to ultimate destination if there had been no stop in transit. The rate need not necessarily apply via a direct route through the transit point but can also apply via indirect routes by means of out-of-line-haul and back-haul provisions contained in the quotation.

In view of these provisions, the only rules, regulations and restrictions contained in the pertinent rate tariffs to be observed in determining the rate to be used under the quotation are those affecting the application of the rate as a through rate on a shipment which has not been stopped in transit. Any restriction in the rate tariff affecting the application of the rate because of an unauthorized stop in transit obviously is waived by the quotation; if this were not true, the transit privilege intended under the quotation would seldom, if ever, apply to shipments moving to and from Government transit installations. In our view, the express provisions of SFA Section 22 Quotation Ad-

vice A–529–B, to which you refer, are merely declaratory of the same intention which must be accorded the subject quotation by necessary implication.

For the reasons stated, settlement of your supplemental bill on the basis of the through rate applicable from Polk to Fort Bragg is sustained. It is noted, however, that the inbound charges credited in your original bill, and also applied as a credit in the settlement issued here, exceeded the amount of the inbound charges actually paid by the sum of $292.60. A revised settlement will be issued for this amount and payment should reach you in due course.

[B–167647]

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

Although the United States Merchant Marine Cadet School at San Mateo, California, is not a "service school" within the meaning of 10 U.S.C. 1333(2) and, therefore, attendance at the school as a cadet-midshipman, MMR, USNR, from August 1943 until April 1945 may not be credited in computing years of service upon retirement under 10 U.S.C. Chapter 67, relating to retired pay for non-Regular service, the period is allowable as "service, other than active service, in a reserve component" under 10 U.S.C. 1333(4), and is also creditable service for multiplier purposes for officers retiring with 20 years' service pursuant to 10 U.S.C. 6323, or for any of the purposes of any formula or other law enumerated in 10 U.S.C. 1405, which section groups the laws in one category and specifically includes in clause 4, service creditable under 10 U.S.C. 1333.

To the Secretary of Defense, November 25, 1969:

Further reference is made to letter dated August 5, 1969, from the Assistant Secretary of Defense (Comptroller) forwarding a copy of Committee Action No. 433 of the Department of Defense Military Pay and Allowance Committee and presenting for decision the following three questions:

1. Does full time attendance at the U.S. Merchant Marine Cadet Basic School, San Mateo, California, as Midshipman, Merchant Marine Reserve, U.S. Naval Reserve, from August 1943 until April 1945, constitute attendance at a "prescribed course of instruction at a school designated as a service school by law or by the Secretary concerned," within the meaning of 10 U.S.C. 1333(2) for the purpose of determining years of service for multiplier in the case of an officer retiring under Chapter 67, [10] U.S. Code?
2. Would such a period of attendance for the same purpose be properly allowable as "service (other than active service) in a reserve component of an armed force," within the meaning of 10 U.S.C. 1333(4)?
3. In the event of an affirmative answer to either or both of the above questions, could such service be considered properly allowable for multiplier under 10 U.S.C. 1405(4) in the case of an officer retiring under 10 U.S.C. 6323, or for any of the purposes of any formula or other law enumerated in 10 U.S.C. 1405?

The discussion attached to the submission makes reference to Committee Action No. 237 which was considered in our decision 38 Comp. Gen. 797 (1959), and points out that in June 1941 the Secretary of the Navy, pursuant to the Naval Reserve Act of 1938, established the

classification of midshipman, Merchant Marine Reserve; that in August 1942, all cadets, Merchant Marine Reserve, were appointed as midshipmen, Merchant Marine Reserve, and all cadets thereafter in the U.S. Merchant Marine Cadet Corps and State Maritime academies were appointed midshipmen, Merchant Marine Reserve, instead of cadets, in order to insure that cadets trained at Government expense for service at sea would be required to serve in the Merchant Marine or on active duty in the Navy.

The case involved in the present submission is that of an individual who, in the status of a cadet-midshipman, Merchant Marine Reserve, USNR, attended the Cadet Basic School at San Mateo, California. It appears that he accepted an appointment as a midshipman, MMR, USNR, in order to be permitted to attend that school, and that he had no other military status.

The first two questions presented relate to the multiplier factor in Formula No. 3, 10 U.S.C. 1401, to be used in the computation of retired pay authorized in chapter 67 (sections 1331–1337), Title 10, U.S. Code. Under this formula, the retired pay of the person concerned is computed by multiplying the monthly basic pay of the highest grade held satisfactorily by him in the Armed Forces by the product of 2½ percent times the number of years creditable to him under 10 U.S.C. 1333. A person's years of creditable service are determined by adding the service specified in section 1333 including—

(2) his days of full-time service * * * while attending a prescribed course of instruction at a school designated as a service school by law or by the Secretary concerned:

* * * * * * *

(4) 50 days for each year before July 1, 1949, and proportionately for each fraction of a year, of service (other than active service) in a reserve component of an armed force, in the Army or Air Force without component, or in any other category covered by section 1332(a)(1) of this title except a regular component; and by dividing the sum of that addition by 360.

The first question is, in effect, whether the U.S. Merchant Marine Cadet Basic School, San Mateo, is a school designated as a service school within the meaning of section 1333(2).

Title 46, Code of Federal Regulations, Cumulative Supplement, chapter III, part 310, and the 1943–1945 Supplements thereto, governed the appointment and training of enrollees in the Merchant Marine, including cadets in the U.S. Merchant Marine Cadet Corps who attended the different academies and schools there mentioned, including the Merchant Marine Cadet Basic School at San Mateo. Nowhere in such regulations is a cadet basic school, or the U.S. Merchant Marine Academy, referred to as a "service school." No provision of law or regulation issued by the Secretary of a department concerned has been found which defined a school such as that here involved as

a "service school" within the meaning of 10 U.S.C. 1333(2) and, hence, it must be concluded that a period of attendance at such school may not be credited in computing years of service under section 1333(2). The first question is answered in the negative.

In 47 Comp. Gen. 221 (1967), it was held that active service performed as a midshipman in a "non-academy" status properly may be included in establishing the multiplier factor under Formula No. 3, 10 U.S.C. 1401, in computing chapter 67 retired pay. It was also concluded that inactive service as a Reserve midshipman constitutes "service (other than active service) in a reserve component of an armed force," within the meaning of that phrase contained in clause 4, section 1333. The second question now presented is whether a period of attendance at the U.S. Marine Cadet School, San Mateo, is "service (other than active service)" within the meaning of that clause 4.

While our decision in 47 Comp. Gen. 221 related to midshipman service under the act of August 13, 1946, ch. 962, 60 Stat. 1057, the crediting of the member's service in that case was held to be authorized because of his status as a member of the Naval Reserve. The Merchant Marine Reserve was made a part of the Naval Reserve by sections 1 and 318 of the Naval Reserve Act of 1938, 52 Stat. 1175, 1185, section 318 providing that "The Merchant Marine Reserve shall be composed of those members of the Naval Reserve who * * *." It appears from such provisions that while attending the school at San Mateo a member of the Merchant Marine Reserve is also a member of the Naval Reserve. Thus, in the absence of a statute barring the crediting of such service, a cadet-midshipman, MMR, USNR, attending the Merchant Marine Cadet Basic School, from 1943 to 1945, may be given credit under 10 U.S.C. 1333(4) for such service as "service (other than active service) in a reserve component * * *." The second question is answered accordingly.

With respect to the third question, involving the crediting of such service for multiplier purposes for retirements under 10 U.S.C. 6323 or for any of the purposes of any formula or other law enumerated in 10 U.S.C. 1405, section 1405 provides that for the purposes specified therein the years of service of a member of the Armed Forces are computed by adding the service mentioned in clauses (1), (2), (3), and

> (4) the years of service, not included in clause (1), (2), or (3), with which he would be entitled to be credited under section 1333 of this title, if he were entitled to retired pay under section 1331 of this title.

Since all the laws enumerated in 1405 (including 10 U.S.C. 6323) are grouped in one category and the counting of service creditable under all parts of 10 U.S.C. 1333 is specifically included in clause 4 of section 1405, the third question is answered in the affirmative.