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[B-170287]

Bids—Evaluation—Delivery Provisions—Reasonable Delivery Date

Under an invitation for bids (IFB) that stated that delivery was desired within 120 days, but was required within 150 days; that bidders may propose a different date but not beyond 150 days; and that if no delivery date was offered, the desired 120 days would apply, an offer of delivery within "approximately 120 days" takes exception to the desired schedule and fails to state a definite delivery date, and the bid is nonresponsive. To interpret "approximately 120 days" to mean a time period not substantially varying from 120 days, and that in no case would the delivery period extend beyond 150 days, requires a reasonableness test that would result in the uneven or unpredictable treatment of bidders; whereas the terms of the IFB demand that the ascertainment of the time chosen by the bidder be made on an objective basis without recourse to the subjective processes of evaluation involved in the application of a reasonableness test.

Bids—Evaluation—Basis for Evaluation—Bid Itself

Principles applicable to the interpretation of existing contracts may not be applied to determine whether a bid is responsive, and the responsiveness of a bid must be determined from the bid itself without reference to matters extraneous to the bid.

Bids—Ambiguous—Two Possible Interpretations—Both Reasonable

Where two different interpretations of the delivery provision in a bid that offered delivery in "approximately 120 days (as requested)" in response to an invitation stating delivery was desired within 120 days, but required within 150 days, are reasonable, the delivery term stated is at best ambiguous; and, therefore, B-170287, dated August 18, 1970, holding the bid should be rejected as nonresponsive, is affirmed.

To the Secretary of the Navy, December 4, 1970:

Reference is made to a letter dated September 21, 1970, with enclosures, from the Deputy Commander, Purchasing, Naval Supply Systems Command, requesting reconsideration of our decision B-170287, August 18, 1970.

In that decision, we held that a bid stating a delivery time of "Approximately 120 days (as requested)" did not conform to the delivery requirements of invitation for bids (IFB) No. N00600-70-B-0386 and should, therefore, be rejected as nonresponsive. In view of this holding, we did not consider questions arising from the bidder's submission of unsolicited descriptive literature or the effect of the preprinted qualifying terms appearing on the letter accompanying its bid and in the descriptive literature submitted.

The procuring activity cites numerous, but factually distinguishable, cases for the proposition that "approximately" means "about" or "nearly" or "reasonably near to," etc. Consequently, it maintains that the bidder, Pandjiris Weldment Co., would appear to be bound to effect delivery near to and not substantially varying from 120 days after date of contract. In no case, it contends, would "approximately" be interpreted to permit delivery beyond 150 days—the "required" delivery date of the IFB.

A legal memorandum, submitted with the letter of September 21, 1970, takes a somewhat different approach in demonstrating that the bid was responsive to the delivery requirements. The initial premise is that where a bidder, in submitting his bid, states no delivery time other than the delivery time stated in an IFB and time is of the essence, the bidder is considered to have consented to the time stated in the IFB. The contention is then made that the controlling time of the instant IFB is the "required" delivery time of 150 days, and thus "unless the qualification as to the 'desired' delivery schedule can be skewed to allow for exceeding the 'required' delivery, the qualified 'desired' schedule cannot be held to be nonresponsive." It is therefore concluded that since the bidder qualified only the "desired" delivery time as it was allowed to do, but not the "required" time, as to which it remained silent, it is assumed to have accepted the controlling delivery time, i.e., 150 days. In connection with the foregoing, we are referred to numerous cases which, upon consideration, do not appear to be dispositive of the matter here involved.

Pursuant to the IFB, delivery was desired within 120 days after date of contract but required within 150 days after date of contract. Without prejudice, a bidder could fix a delivery time of his own choosing but the time so chosen, as the following provision makes abundantly plain, had to be definite and clearly within the 150-day period previously mentioned:

> Bids offering delivery of a quantity under subject terms or conditions that delivery will not clearly fall within the applicable required delivery period specified above will be considered nonresponsive and will be rejected. Bids offering an indefinite time for delivery or offering delivery contingent upon availability or receipt of material will not be considered. If the Bidder/Offeror does not propose a different delivery schedule, the Government's DESIRED DELIVERY SCHEDULE SHALL APPLY.

In our original decision, we recognized that the term "approximately" indicated a timeframe of uncertain duration before and after a certain fixed time. We were cognizant also that the timeframe could be described by the terms urged by the procuring activity. The problem with the definition of "approximately" urged by the procuring agency is that it lacks specificity and definiteness and, consequently, there must be considered the question whether an approximate time for delivery is acceptable on the basis of reasonableness. In 46 Comp. Gen. 745 (1967), we held that award under an IFB containing ambiguous delivery terms, in that it did not clearly establish a required delivery time, was improper. In reaching that conclusion, we recognized our prior application of a reasonable time test under the circumstances outlined below:

> We have upheld invitations permitting the bidder to select a delivery date so long as such date was within either a stipulated or a reasonable time after the

"desired" delivery date stated in the invitation. In these cases bids offering delivery after the "desired" date have been regarded as responsive so long as such offered date was within the stated time limitation or if no time limit was stated within a reasonable time after the "desired" date. See B-155989, February 24, 1965, and B-155035, November 20, 1964.

Under the above circumstances, we did not consider a reasonableness test to be entirely adequate, for we went on to state in the same decision:

Although we have upheld as legally sufficient invitations specifying only the "desired" delivery dates, so that the responsiveness of offered delivery terms could only be governed by a reasonableness test, as a matter of policy we feel such open ended delivery terms are unwise in that they afford an opportunity for the arbitrary inclusion or exclusion of bids. Even granting impartial consideration, these undefined delivery terms can only result in uneven and unpredictable treatment of bidders, because reasonable men will differ on what constitutes a reasonable delivery date under any given set of circumstances.

The above rationale, militating against the utilization of a reasonableness test in the foregoing situation, is equally applicable to the present facts. In either case, the evil of "uneven or unpredictable treatment of bidders" is present simply because the resolution process under a reasonableness test lends itself to differing conclusions on the same facts. We believe this factor alone is a sufficient reason to preclude its use in determining whether or not Pandjiris was responsive to the delivery requirements of the IFB.

An additional reason does exist, however, for not using the reasonableness test. The IFB herein requires, in the event a bidder chooses a delivery date other than 120 days, a definite statement of time clearly within the 150-day "required" delivery time when delivery is to be made. It is our opinion that such a requirement demands that the ascertainment of the time chosen by the bidder be made on an objective basis without recourse to subjective processes of evaluation such as are involved in the application of a reasonableness test. That test is, therefore, contrary to the specific requirements of the delivery provisions of the IFB.

We turn now to the arguments advanced by Counsel for the Naval Supply Systems Command. His initial premise is based on court cases which deal with claims based on contracts and, hence, involve principles of contract interpretation. These cases are factually distinguishable from the present bid situation. Moreover, we have often stated that the responsiveness of a bid must be determined from the bid itself without reference to matters extraneous to the bid. 48 Comp. Gen. 593, 601 (1969). We do not consider the cited authorities involving the interpretations of contracts to be controlling in the present situation.

We do not construe the IFB as establishing a fixed, definite delivery date. Rather, it establishes parameters of time within which a bidder may offer a delivery period of its own choosing and still meet the Government's time requirements. Thus, no delivery time is established

until that choice is made and indicated in a bid, unless the bidder makes no choice, in which event the stated desired delivery schedule applies. It is the bid, then, and not the IFB, in this case, which establishes a bidder's obligation with respect to delivery time. In view of this, we cannot conclude that a bidder's silence as to the "required" delivery time stated in the IFB obligates the bidder to deliver within that time. Admittedly, the "required" delivery time has a direct bearing on whether a chosen time is responsive. But this is a far step from Counsel's contention that a bidder's mere silence obligates him to perform within the required 150 days. As recognized in our August 18, 1970, decision, silence by Pandjiris would have, by the terms of its bid, bound it to the desired delivery time of 120 days but not to the 150 days urged by Counsel.

Counsel makes several other contentions which we do not have to consider in detail here. Suffice it to say that "reasonable and substantial compliance" with the delivery terms of the IFB requires subjective rather than objective determinations. In addition, even if we concede that Counsel's interpretation of the phrase "as requested" is reasonable, we believe our interpretation of the same phrase, as set out in our original decision, is equally as reasonable. Faced with two such reasonable interpretations of the same phrase, we conclude that the phrase is at best ambiguous. See 48 Comp. Gen. 757, 760 (1969).

In view of the foregoing and the explicit requirements of the IFB, our prior decision is affirmed.

[B–169843]

Sales—Bids—Identical

The awards made under a sales invitation for bids on the basis of lots drawn by the three bidders who had submitted identical bids because there was no other evidence of collusive bidding, where the Justice Department had taken no action on the report of the receipt of the identical bids, and the bid prices submitted were reasonable, were not proper, even though the provisions of DOD Manual 4160.21–M were followed. Although the awards will not be disturbed, steps should be taken to obtain in future surplus sales the full and unrestricted competition contemplated by the competitive bidding system and to avoid the acceptance of reasonable bid prices as a substitute for adequate competition; and if circumstances do not permit a reasonable determination that price competition was adequate, the sale should be resolicited.

To the Director, Defense Supply Agency, December 7, 1970:

Enclosed is a copy of our letter of today to the attorney for the Petrof Trading Company in response to that firm's protest against awards made under sales invitation for bids No. 21–0144 issued by the DSSO, Atlanta Army Depot. The matter was the subject of a letter dated June 11, 1970, your reference DSAH–G.

As indicated in the enclosure, three bids were submitted on six of the items in the bid schedule; in each case the three bids were identical. It appears to be the position of the contracting activity that award on each of these items by drawing lots was proper because (1) the receipt of identical bids was reported to the Justice Department, which took no further action and (2) the prices bid were reasonable. The administrative report on the matter, dated June 9, 1970, continues:

> * * * there is no requirement or justification for the rejection of such bids in the absence of other evidence which might tend to establish collusive bidding. To the contrary, the regulations are very clear as to how the awards are to be made and the required procedure was followed in this instance.

We agree that the provisions of the Department of Defense Manual 4160.21–M were in fact followed; we do not agree, however, that award is proper simply because there is no other evidence of collusive bidding.

One of the chief purposes of the competitive bid system is to obtain for the Government the benefits of free and unrestricted competition. *United States* v. *Brookridge Farm*, 111 F. 2d 461, 463 (CCA 10, 1940). We recognize that whether the required degree of competition has been obtained in a given situation is substantially a subjective determination to which a reasonable degree of administrative discretion must inhere. *Cf.* B–145959, August 29, 1961. Nevertheless, in the present case we find it difficult to conclude that the facts permit any reasonable conclusion that adequate competition was obtained.

Nor do we believe that the awards may be justified on the basis of reasonable price. The contracting officer's judgment, however valid, that a price may be regarded as reasonable, is not an acceptable substitute for adequate competition. *Cf.* 23 Comp. Gen. 395 (1943); 16 Comp. Gen. 318 (1936).

We do not believe it would be appropriate to take any remedial action with respect to the instant sales. However, we recommend that contracting officers on surplus sales be instructed with respect to future procurements that, where identical prices are received, consideration should be given not only to whether there is other evidence of collusion but also to whether adequate competition was obtained. If the circumstances do not permit a reasonable determination that the price competition was adequate, the sale should be resolicited.

Please advise us of the steps being taken to implement our recommendation.

[B–171052]

Bids—Acceptance Time Limitation—Extension—Effect of Request to Extend

The fact that bidders are asked to extend their bid acceptance time pursuant to paragraph 2–404.1(c) of the Armed Services Procurement Regulation does not give the bidders an option to withdraw their bids, and a bidder who does not

extend his bid acceptance time must accept a contract awarded to him prior to the expiration of his initial bid acceptance period; and as the request for the extension of the bid acceptance time does not convert the formally advertised procurement into a negotiated procurement, bidders may not be permitted to revise their bid prices when granting an extension, for this would be tantamount to permitting them to submit a second bid after bid opening contrary to competitive bidding principles.

Contracts—Awards—Small Business Concerns—Set-Asides—Competition Sufficiency

The determination not to set aside any portion of a procurement, which was made after consulting with the small business representative, because the most recent set-aside for the same item had failed to generate sufficient competition, was within the policy stated in paragraph 1–802 of the Armed Services Procurement Regulation, and within the ambit of sound administrative discretion; and absent a showing of abuse in the exercise of that discretion, there is no basis for the United States General Accounting Office to object to the failure to set aside the procurement.

To the Northwest Packing Company, December 11, 1970:

Further reference is made to your protest against the award of a contract to another firm under solicitation No. DSA 13H–70–E–0454, Addendum No. 16, issued by the Defense Personnel Support Center, Defense Supply Agency, Philadelphia, Pennsylvania.

The subject solicitation for the procurement of 11 line items of canned Bartlett pears was issued on September 1, 1970, with a closing date of September 22, 1970, and a minimum acceptance period of 20 days. On October 9, 1970, because of the possibility that evaluation of bids would not be completed within the minimum acceptance period, the contracting officer requested that bidders extend the acceptance period from October 12 to October 16, 1970. With the exception of your firm, extensions were granted by all bidders. Evaluation was completed by October 16, 1970, and awards made on October 16, 1970, to the low responsive and responsible bidders. It is reported that you were not low on any of the items on which you bid.

Your protest is based on two grounds. First, you contend that asking for an extension of the acceptance period transforms an advertised procurement into a negotiated procurement; that as a result thereof bidders are permitted to withdraw their bids if desired; and that the low bidder is afforded an opportunity to use his knowledge of the bid prices to his advantage and to the disadvantage of all other bidders. Therefore, you contend that if the procurement is changed to negotiation in these respects, it should be expanded to allow bidders to revise their prices when granting an extension. Second, you contend that denial of your request to set aside a portion of the procurement for labor surplus area concerns was contrary to the announced policy as stated in section VIII of the General Provisions of DPSC Form 3020–8. In this connection, you say that you were advised the procurement did not lend itself to a set-aside because the quantities involved could not be

divided into economic production runs. You take exception to that position, and cite two previous set-aside procurements as indicating the invalidity thereof.

The contracting officer reports that the decision to request an extension of the acceptance period was based upon the realization that she might be prevented from making awards within the original acceptance period due to difficulties in obtaining freight rates necessary to evaluate the bids in accordance with the terms of the solicitation.

Although the statute governing procurement by formal advertising contemplates that the award of any contract will be to the low responsive and responsible bidder, it does not import any obligation to accept any of the bids received or require that an award be made within the time of bid acceptance specified in the bid. 10 U.S.C. 2305(c); 42 Comp. Gen. 604 (1963). In this connection, Armed Services Procurement Regulation 2–404.1(c) provides that in order to avoid readvertisements where administrative difficulties are encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested to extend the bid acceptance period. In the circumstances of this case, it seems that the extension of the bid acceptance period was requested for a valid reason.

Where a bidder has limited the period within which his bid may be accepted, he has the legal right to refuse award after that time and may refuse to grant an extension, thereby avoiding an award where, after prices are exposed, he feels it to his advantage to do so for one reason or another. However, he cannot withdraw his bid when an extension is requested, and he must accept a contract awarded prior to expiration of the initial acceptance period. In these circumstances, we see no basis for concluding that a formally advertised procurement is thereby transformed into a negotiated procurement. Therefore, bidders may not be permitted to revise their bid prices when granting an extension, as this would be tantamount to permitting them to submit a second bid after bid opening contrary to competitive bidding principles. B–158182, March 4, 1966, and cases cited.

The contracting officer denies that your request for a labor surplus set-aside was refused because the quantities involved could not be divided into economic production runs, or that you were so informed. She reports that the decision not to set aside any portion of the procurement was made after consultation with the small business representative because the most recent set-aside for the same item had failed to generate sufficient competition, and various pertinent documents indicated that Bartlett pears were in short supply. Since it was considered doubtful that prices no higher than those obtainable from other concerns would be obtained, the procurement was not considered

appropriate for a set-aside within the policy stated in Armed Services Procurement Regulation 1–802. The determination whether a procurement should be set aside is a matter within the ambit of sound administrative discretion. 45 Comp. Gen. 228 (1965). Where, as here, there is no clear showing of abuse of the discretion permitted, there is no basis for our Office to object to the failure of a procurement to be set aside.

Accordingly, your protest is denied.

[B–170773]

Station Allowances—Military Personnel—Excess Living Costs Outside United States, Etc.—Dependents' Absences

When a member of the uniformed services remains at his permanent duty station outside the United States while one or more of his dependents returns to the United States for a visit, the cost-of-living allowance adjustment required by paragraph M4301–3c(1), items 1, 2, and 3 of the Joint Travel Regulations may be waived if the absence is for 30 days or less, and the paragraph amended accordingly. 37 U.S.C. 405, which authorizes the consideration of the cost-of-living element in prescribing the payment of a per diem, indicates no requirement to adjust cost-of-living allowances during absence of a member's dependents for short periods; and the waiver of the adjustment would be in harmony with the regulations implementing the cost-of-living allowances provided by section 221 of the Overseas Differential and Allowances Act, 5 U.S.C. 5924, for civilian employees of the Government.

To the Secretary of the Army, December 14, 1970:

Further reference is made to the letter of August 19, 1970, from the Deputy for Reserve Affairs, requesting a decision of the Comptroller General concerning the legality of a proposed amendment of paragraph M4301–3c(1), items 1, 2, and 3 of the Joint Travel Regulations, as recommended by one of the uniformed services. The proposed amendment would restrict the requirement of the cited paragraph to adjust the cost-of-living allowance for a member of the uniformed services who remains at his permanent duty station outside the United States, while one or more of his dependents returns to the United States for a visit, to cases where the period of absence of the dependent or dependents is for more than 30 days. The request was assigned PDTATAC Control No. 70–45 by the Per Diem, Travel and Transportation Allowance Committee.

The letter indicates that, in the case of absences of 30 days or less, the costs of making the adjustments are, on the average, more than the amounts collected. Using Alaska as an example, it is stated that the daily amount collected in these cases averages 20 cents, while manpower costs alone to process the individual adjustments are approximately $10. Individual cases are described which show adjustments of from $1 to $5.82 where the visits involved one or two dependents and

ranged from five to 13 days. In addition to this savings in manpower costs, it is indicated that further savings will accrue from a reduction in material and computer costs and personnel operations incident to annual certification for cost-of-living allowances.

The Deputy for Reserves Affairs says that although it is recognized that, generally, the expenses which comprise the cost-of-living allowance may not be incurred while the member and/or his dependents are in the United States, it is questionable whether, under the economic theory of diminishing returns, the adjustment is warranted. He concludes, however, by saying that doubt exists as to the legality of the amendment discussed above and, therefore, our decision thereon is requested.

Section 405 of Title 37 U.S. Code provides that, without regard to the monetary limitations of that title, the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside the United States, or in Hawaii, or Alaska, whether or not he is in a travel status, except that dependents may not be considered in determining the per diem allowance for a member in a travel status. Under the law as amended by the act of October 22, 1970, Public Law 91–486, 84 Stat. 1085, the housing allowance and cost-of-living allowance portions of the per diem may be prescribed independently of each other and without regard to the elements of cost of living used in computing each other.

Section 221 of the Overseas Differential and Allowances Act, 74 Stat. 793, 794, 5 U.S.C. 5924, Supp. V, provides for cost-of-living allowances to civilian employees of the Government assigned to foreign posts when the cost of living is substantially higher than in Washington, D.C. Implementing regulations governing the cost-of-living allowances for civilian employees are prescribed in chapter 200, Standardized Regulations (Government Civilians Foreign Areas). Subchapter 225 "Continuance During Absence From Post" provides in pertinent part:

225.2 Employee With Family

The post allowance grant to an employee with family continues at the "with family" rate including increments, if any, for children

a. while the employee and all members of his family are outside the country of assignment for short periods of absences (up to 30 consecutive calendar days) unless the officer designated to authorize allowances determines that the grant should not continue. On the 31st day of absence the grant is to be terminated. * * *

b. while the employee is temporarily absent from the country of assignment under official duty orders and his family remains in the country of assignment; and

c. for a period not in excess of 30 days while any or all members of his family are temporarily absent from the post and the employee remains in the country,

except as otherwise provided in sections 227.1 and 227.2. On the 31st day any grant shall be reduced appropriately.

This Office has not objected to continuance of the allowances during such temporary absence.

We have recognized that, in authorizing a per diem, 37 U.S.C. 405 has reference to the overall cost of living of members serving in overseas areas, regardless of when any of the particular costs may have to be paid; and when a per diem is prescribed in accordance with the statute, it represents a commutation on a daily basis of the average excess living cost of all members concerned and is payable in proper cases without regard to when or whether the actual costs in any individual case are incurred. 47 Comp. Gen. 362, 364 (1968).

In that view of the matter, and considering that basically the statutes authorizing payment of cost-of-living allowances to military and civilian personnel were enacted for the same purpose, and since there is nothing in section 405 or its legislative history to indicate a requirement to adjust cost-of-living allowances during absence of a member's dependents for short periods, we perceive no legal objection to amending the Joint Travel Regulations, Volume 1, in the manner proposed.

[B-170655]

Subsistence—Per Diem—Temporary Duty—Aboard Submarines, Vessels, Etc.

Civilian employees periodically assigned to perform temporary duty aboard Government vessels to conduct oceanographic and hydrographic surveys, who are at sea 25 to 28 days and in port 5 to 7 days and are paid per diem in accordance with paragraph C8101-2d of Volume 2 of the Joint Travel Regulations, may not be required to occupy quarters aboard the vessel during periods exceeding 3 days in port, nor may their per diem be reduced because of the availability of quarters aboard the ship in the absence of the actual use of the quarters, or a determination by proper authority under paragraph C1057-3 that the exigencies of the service require that the employees occupy quarters aboard the vessel while in port.

To the Secretary of the Navy, December 15, 1970:

Our Office has been asked to consider the propriety of per diem rates paid to employees of the U.S. Naval Oceanographic Office in the circumstances related below.

The employees concerned are assigned periodically to perform temporary duty aboard Government vessels for the purpose of conducting oceanographic and hydrographic surveys. The survey schedules usually provide for 25 to 28 days at sea and 5 to 7 days in port. For the entire period of temporary duty aboard the survey ships, including time in port, the employees are paid per diem in accordance with paragraph C8101-2d of Volume 2, Joint Travel Regulations, as follows:

d. *Government Ship.* Except as limited in subpar. 3b(6), the following per diem rates, not subject to further reduction, are prescribed for travel aboard a Government ship:

1. $2 when meals and quarters are furnished without charge,
2. $4 when the traveler is required to pay only for meals,
3. $6 when the traveler is required to pay for meals and quarters.

In the event that the traveler is required to maintain commercial quarters ashore for use following the completion of one or more trips at sea, the rates indicated in items 1, 2, and 3 will be increased by the actual commercial cost of quarters.

Since the employees are paid the above per diem rates for the time they are in port, they are required to occupy quarters aboard the ship during such periods, or bear the substantial expense of utilizing available commercial facilities. The employees object to such practice on the ground that living conditions aboard the various survey ships are unsatisfactory. Furthermore, they contend that the practice violates paragraph C1057–1 of Volume 2, Joint Travel Regulations, which provides in part as follows:

* * * Except as provided in subpars. 2 and 3, mandatory use of Government quarters while in a temporary duty status will not be required, nor will per diem allowances be subject to reduction on the basis of availability alone of such quarters. Certificates of nonavailability of Government quarters are not necessary and will not be required.

Subparagraph 2, referred to in the paragraph quoted immediately above, is not applicable here, but subparagraph 3, referred to therein, provides:

3. *SPECIAL PROJECTS AND MISSIONS.* Employees assigned to special projects or missions may be required to occupy available Government quarters when a determination is made by the Secretary of a separate military department or the head of an agency of the Department of Defense that the exigencies of the service require occupancy of such quarters to assure accomplishment of the project or mission. Travel orders will include citation of the determination and applicable conditions and limitations.

Paragraphs C1057–1 and 3 are based upon section 5 of Public Law 88–459, approved August 20, 1964 (Now 5 U.S.C. 5911(e)), and our decision published at 44 Comp. Gen. 626 (1965). Section 5911(e) reads as follows:

(e) The head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise.

Examination of the pertinent legislative history leads us to conclude that the underlying intent of the quoted legislation is not applicable in the special circumstances inherent in this case. See, generally, 44 Comp. Gen. 626 (1965). The employees here involved are assigned extended tours of temporary duty aboard specific survey vessels and during voyages, including stopovers for taking on fuel and other supplies, the vessels—as distinguished from a port at which a stop might be made—are, in essence, the employees' temporary duty

stations. See in this connection the definition of "voyage" at 5 CFR 630, 702(b) concerning entitlement to shore leave. We, therefore, are of the opinion that the employees involved are entitled under ordinary circumstances only to the per diem prescribed in paragraph C8101–2d, quoted above.

Where, however, a vessel remains in port for a time in excess of a reasonable stopover period, we believe it would be inconsistent with the overall spirit of 5 U.S.C. 5911(e) to provide during such excess period for reduced per diem on the basis of the availability of quarters aboard the Government vessel without regard to whether such quarters are utilized. We have been advised that in the case of oceanographic survey vessels a stopover period up to 3 days would not be unreasonable for purposes of replenishing supplies, refueling, and permitting the crew and civilian employees to go ashore.

Accordingly, we hold that civilian employees assigned temporary duty aboard a survey vessel may not be required to occupy quarters aboard the vessel during periods exceeding 3 days in port, nor may their per diem be reduced because of the availability of such quarters in the absence of their actual use or a determination by proper authority under paragraph C1057–3, above, that the exigencies of the service require that the employees occupy quarters aboard the vessel while in port.

Since the current practices of the Department of the Navy conflict with the views expressed above, your office should take the necessary action to effect compliance with this decision.

[B–171076]

Contracts—Negotiation—Evaluation Factors—Point Rating—Criteria Factors

Where in the evaluation of management, financial, and technical factors offered under a request for quotations for the operation overseas of a communication system, offerors are found equally qualified technically on the basis of normalizing the results of the numerical scoring system used by a Source Selection Evaluation Board and the analysis of the Board's evaluation by a Source Selection Advisory Council using its independent scoring and weighting—referred to as the "no gain technique"—and on the basis of reevaluating manpower proposals, an award of a cost-plus-award fee contract to the lowest offeror was proper, and the award is unaffected by the Advisory Council's deviation, with permission, from the evaluation guidelines in the Army Command Pamphlet 715–3, and by the changes in scoring made between evaluations, since the relative weights of the evaluation criteria were preserved.

Contracts—Cost-Plus—Evaluation Factors—"Realism" of Costs and Technical Approach

In the award of cost-reimbursement contracts, procurement personnel are required to exercise informed judgments as to whether submitted proposals are realistic concerning proposed costs and technical approach, and such judgments must properly be left to the administrative discretion of the contracting agen-

cies involved, since they are in the best position to assess "realism" of costs and technical approaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis. Should the Government fail to adequately measure the "realism" of low quantum of costs, the definition of "reasonable" cost to mean low cost *per se* on a comparative basis would be improper for award purposes.

Contracts—Requests for Quotations—Evaluation Factors—Disclosure

Although offerors under a request for quotations should be informed of the relative weight or importance attached to each evaluation factor, there is no requirement to disclose the precise numerical weights to be used in the evaluation process. If an offeror is in doubt as to the relative importance of the evaluation criteria to be used, the time for resolution of the matter is before the closing date set for receipt of quotations.

Contracts—Requests for Quotations—Evaluation Factors—Disclosure

In a second evaluation of offers to operate a communication system overseas, the application of bonus and penalty points in the weighting system, points not provided for in a request for quotations, does not constitute a substantive change that should have been furnished to all offerors by means of amendment, as the purpose of the weighting system was to enable the Source Selection Advisory Council to apply its independent judgment to the evaluation criteria considered by the Source Selection Evaluation Board, and the inclusion of the additional points was in accord with procedures established prior to the receipt of quotations.

To Page Communications, Engineers, Inc., December 16, 1970:

Reference is made to your letter of October 20, 1970, and subsequent correspondence concerning your protest against the award of a cost-plus-award fee contract to Federal Electric Corporation (FEC), under request for quotation (RFQ) DAEA-18-70-Q-1997.

The RFQ was issued on May 18, 1970, by the Procurement Division, Fort Huachuca Support Command, United States Army, Fort Huachuca, Arizona, to procure the following requirements in Southeast Asia: (1) field engineering, operation and maintenance services, and on-the-job training (OJT) for the Integrated Communication System (ICS), and the Dial Telephone Exchange (DTE); (2) communication engineering services and emergency on-call technical support for Cable Heads and eight additional sites; (3) operation and maintenance of two Area Maintenance and Supply Facilities (AMSF). The RFQ further provided that all work requirements would be performed in a period of 1 year from date of award, with an option by the Government for renewal for four 1-year periods.

Section D.3 of the RFQ, as amended, informed prospective offerors of the evaluation factors for award as follows:

D. 3. EVALUATION FACTORS

The omission of any of the required responses constitutes lack of response by the quoter and shall result in an evaluation of being unresponsive to the RFQ. Factors are set forth in order of equal or decreasing importance.

a. *Management Factors:* The offeror must respond to each of the below listed factors to enable the Government to evaluate the offeror's capability to perform the services:

441-658 O—71——2

1. Recognition and understanding of the scope and level of management effort required, as evidenced by a comprehensive plan for the overall approach to providing the services required. This will include a description of the methods and procedures proposed to accomplish specific contract operations, performance schedules, recruitment and retention of specialized personnel, safety management, security management (to include concept for assuring continuity of operation in periods of emergency.)

2. Provision of organization chart and sufficiently detailed supplementary material to show clearly:

a. Organization structure proposed for performance of contract.

b. Number and description of personnel, matched to organization structure.

c. Education, experience and special qualifications of key personnel (to include security clearances) as required by succeeding sections of this RFQ.

d. Project Manager's relative position in offeror's organization and degree of authority of the Project Manager.

e. Ratio of home office support personnel to management and technical personnel directly engaged in execution of the contract.

3. Provision of a detailed phase-in plan.

4. Description in detail of past performance and experience of offeror in work similar to the requirement of this solicitation.

b. *Financial Factors:* The offeror must respond to each of the below listed factors to enable the Government to evaluate the offeror's financial submission:

1. Proposed contract cost to include base and maximum fee. Detailed estimates and schedules must be submitted which will permit a comprehensive evaluation of costs for the individual items of work described in the nine sections identified under Par F.1. Contractor Services, Section F Description of Supplies/Services to be performed.

2. Proposed method for implementing and maintaining a cost accounting and cost reporting system. As a minimum, monthly cost and financial reports will be required. Budget and cost controls will be provided for in order that contractor cost and performance may be evaluated. An accounting structure will be developed to provide cost data for the items of work identified in the nine sections listed in Section F previously referred to. Elements of expense will be costed. Also, costs of U.S. personnel and foreign nationals will be segregated. Costs by site are desirable, but not mandatory if the maintenance of such costs is too expensive. Bidders will include this provision with an estimate of cost and manning.

3. Provide a separate detailed cost schedule for the phase-in plan.

4. Offeror's financial position as evidenced by documentary evidence, i.e., Balance Sheet, Profit and Loss Statement.

5. The qualifications and assignments of personnel with proposed salary scale.

6. Record of cost performance on Government Contracts comparing final cost to estimated cost.

c. *Technical Factors:* The offeror must respond to each of the factors listed below to enable the Government to evaluate the offeror's capability to perform the technical services:

1. Recognition and understanding of the technical services required, evidenced by a detailed plan to satisfy the operation and/or maintenance requirements for each system, subsystem, and support facility specified in succeeding sections of this RFQ.

2. Description of plan to train US Military and RVNAF, to operate and maintain each system, sub-system and support facility specified in succeeding sections of this RFQ.

3. Description of plan to meet quality assurance requirements for each system, sub-system, and support facility specified in succeeding sections of this RFQ.

4. Description of plan to provide communications engineering services which will be responsive to the immediacy of Government's requirement to re-configure systems and sub-systems to match re-deployment of forces.

Additionally, section D.1 of the RFQ informed offerors as follows:

D.1 NOTICE TO QUOTERS

The Government intends to evaluate responses to this solicitation and to award a contract based on factors other than the lowest probable cost. It shall be the

responsibility of the quoter to give sufficient evidence to enable the Government to evaluate the proposal applying the technical managerial and financial factors outlined below. Each factor will be weighted with respect to its relative importance.

For evaluation purposes, the Army had prepared an estimate that 2,012 personnel would be necessary to perform the contract of which number 1,103 would be United States citizens and 909 would be Vietnamese. In this connection, the RFQ set forth the Government's estimate of the number of technically skilled personnel needed to provide the services at the installations. An independent Government Cost Estimate was also developed to provide the Department with a basis for a comparative evaluation of the quotations.

The RFQ was issued to 34 prospective contractors. On May 28, 1970, a preproposal conference was held for the purpose of explaining the technical and administration requirements and to afford an opportunity to answer questions about the procurement. At that conference, the following question and answer was supplied concerning the evaluation of phase-in-costs for the contract:

Q—Reference Part 1, General Instruction, Section D.3c(3). How will "phase-in" costs be evaluated?
A—The phase-in cost will be submitted as a separate part of the proposal and will be evaluated and negotiated separately. Should the successful contractor have a phase-in cost, his final negotiated phase-in cost will become a ceiling for phase-in cost on that contractor's proposal. However, each contractor's proposal less the phase-in cost will be evaluated separately for consideration for award. The final contract award price will include all costs.

Four quotations were received by the procuring activity on July 3, 1970, including submissions from your concern and FEC.

The record indicates that these quotations were subsequently analyzed in accordance with an evaluation plan established prior to the issuance of the RFQ. That plan established procedures for a detailed evaluation of quotations by a Source Selection Evaluation Board (SSEB) and an analysis of the Board's evaluation by a Source Selection Advisory Council (SSAC).

The plan established three major areas (Management, Financial and Technical) to be evaluated. It also established factors, subfactors and elements for numerical scoring purposes within each of the areas. Within the financial area the following pertinent factors, subfactors and elements, among others, were established for evaluation:

2.1 Reasonableness and Realism of proposed cost and fee.
2.1.a Reimbursable costs[1] ICS.

* * * * * * *

2.1.a.8 General and administrative cost[1].

[1] (These costs were also set forth as evaluation subfactors with respect to all the other required operations).

* * * * * * *

2.1.j Proposed fee criteria.
2.1.j.1 Proposed basic fee.

2.1.j.2 Proposed award fee.
* * * * * * *
2.3 Phase-In Cost.
2.3.a Direct cost salary and benefits.
* * * * * * *
2.3.h General and administrative costs.

Within the technical area the following pertinent factors, subfactors and elements, among others, were established for evaluation:

3.1 Understanding of the O&M services required.
a. ICS.
(1) Qualifications of personnel.
(2) Adequacy of manning level.
* * * * * * *
b. DTE.
(1) Qualifications of personnel.
(2) Adequacy of manning level.
* * * * * * *
c. AMSF.
(1) Qualifications of personnel.
(2) Adequacy of manning level.
* * * * * * *
d. ASC.
(1) Qualifications of computer personnel.
* * * * * * *
(3) Adequacy of manning level.
(4) Qualifications of other personnel.
* * * * * * *
e. AUTOSEVCOM.
(1) Qualifications of personnel.

Within the management area the following pertinent factors, subfactors and elements were established for evaluation:

1.1 Management (General)
* * * * * * *
c. Adequacy of overall plan.
* * * * * * *
1.2 Management Structure
(a) Structure proposed for performance.
* * * * * * *
(4) Qualifications of key management personnel.

The SSEB was directed to utilize a scoring system providing for a maximum of 10 points for an outstanding rating in each of the specified elements which were to be added and averaged through the factor level to provide a combined score for each of the three areas. It was further provided that the SSEB would not rank the quotations, but furnish the raw area scores to the SSAC. The SSAC was directed to apply its own judgment to the analysis and to "weight" the SSEB raw area scores by multiplying the scores by predesignated values which were: Management-10; Financial-8; Technical-8. Upon completion of the evaluation process, the SSAC was to present findings to the Commanding General, United States Army Strategic Communications Command (USASTRATCOM), upon which he could base recommendations for future actions.

The record shows that the SSEB reported the results of its evaluation of the quotations on July 20, 1970. The SSEB area scores for Page and FEC were:

	Management	Financial	Technical
FEC	7.55	6.88	5.38
Page	9.31	6.86	6.59

The scores were accompanied by lengthy narrative statements setting forth the strengths and weaknesses of the two quotations, upon which basis the scores were apparently assigned.

With respect to the financial area of the FEC quotation, the SSEB noted that the total cost quoted therein for supplying 1,590 personnel spaces distributed to 628 U.S. citizens, 877 local nationals (LN), and 85 third-country nationals (TCN) was favorable; that the base fee was only 1 percent; and that the award fee ranged from minus 2 percent to plus 6 percent, which was stated to show the contractor's confidence in his performance. Weak points in FEC's financial quotation were noted in pertinent part as follows:

> The reasonableness and realism of the base salary rate is suspect. Although the minimum, medium, and maximum scales for US and TCN employees are shown, the application of the rates was generally on the minimum scale. Also, the LN costs were at the lowest step of the pay schedule. This would tend to indicate, for example, that the technicians to be employed would be at the lowest level of technical experience.
>
> The low base salary range is also suspect since the bidder plans to hire and utilize encumbent personnel presently in country. It is doubtful if the bidder can recruit at the salary range quoted. In addition, it would appear that the number and associated costs of personnel do not provide the resources needed to meet government standards for systems security, safety, proficiency, and back-up capability.

With respect to the financial quotation submitted by Page, the SSEB noted that the company specified 1,697 personnel spaces distributed to 413 U.S. citizens, 892 local nationals and 392 third-country nationals. The Board determined that Page's cost estimate and proposed fixed fee were favorable to the Government; that the proposed salary rates were adequate inducement for procurement of qualified personnel and that direct labor charges for all classifications of personnel appeared reasonable. However, the SSEB noted that the company's proposed award fee of 8.2 percent and the subsistence rates for personnel outside the Saigon area were excessive; that the burden rate and the General and Administrative (G&A) expenses were unfavorable to the Government; and that a salary raise factor of 1.5 percent was considered excessive.

The record shows that the SSAC was briefed concerning the results of the SSEB evaluation on July 21, 1970. The Chairman of the SSEB advised the SSAC that three of the four evaluated quotations reflected a thorough understanding of the work requirements; that the fourth

offeror had submitted an inferior quotation, but its manning estimate most nearly matched the Government estimate; and that in view thereof, discussions should be held with all of the offerors.

In accordance with the evaluation plan, the SSAC prepared an analysis of the SSEB findings and the quotations. With respect to FEC, the Council observed that the company's cost estimate was extremely optimistic and had a high cost growth potential. Furthermore, the SSAC stated that some redirection would be required to attain a manning level that could reasonably be expected to assure that the Government would receive adequate operations and maintenance service.

With respect to the quotation submitted by Page the SSAC reiterated the data set forth by the SSEB concerning the excessive costs and fees contained in the concern's proposal and stated that the level of manning proposed by the concern should be increased in the maintenance and quality assurance areas.

Based on the weaknesses of each quotation, the procuring contracting officer developed a list of items for negotiation with each company. Discusssions with the subject concerns were thereafter conducted prior to the SSAC's final evaluation. The record indicates that discussions in depth were held with FEC and Page during late July and the first week of August concerning the weaknesses discussed in the SSEB report.

The results of the discussions with FEC concerning the various items of cost in its quotation were set forth in a memorandum dated August 5, 1970, which was signed by the contracting officer and the cost analyst for the procurement. Pursuant to these discussions, FEC granted the contracting officer the right to adjust its quotation for what the Government considered to be deficiencies in costs FEC proposed for demobilization, minimum salary range, foreign service allowance, war risk insurance, and completion bonus. Pursuant to this agreement, the Government included Foreign Service and War Hazard bonuses of 25 percent each in FEC's quotation. This addition was subsequently deleted when FEC agreed that these bonuses would not be an allowable cost for the first-year contract. Furthermore, FEC agreed to ceilings on G&A and phase-in costs. Accordingly, the Government concluded that FEC's quotation was "fair and reasonable" and that all areas of underestimated costs had been clarified to the satisfaction of the contracting officer.

Discussions concerning the cost of Page's quotation were conducted on August 1, 1970. The evaluation record indicates that the company proposed a G&A rate of 9 percent, but that it accepted a rate of 8.4 percent recommended by the Government "auditor." In this connec-

tion, there is nothing in the record to indicate that Page offered, or was asked if it would agree to, a ceiling on these costs. Page was also questioned about its proposed costs for travel and per diem, general office support in Manila and Bangkok, and raises. In summary, the Government analysts concluded that the Page quotation was also fair and reasonable.

Technical discussions with each concern were also held during this period. The record shows that both FEC and Page were informed that their proposed manning levels were austere in certain areas, and that pursuant to such advice, the concerns subsequently made adjustments to their manning estimates. Government representatives concluded that as a result of such modifications, the manning levels proposed by each offeror were realistic and provided assurance that the work requirements of the contract could be adequately performed.

Pursuant to the technical and cost discussions, each offeror submitted revisions to its quotations, together with executed copies of a "model" proposed contract, to the procuring activity prior to the cutoff date set for receipt of revised quotations on August 6, 1970. The "model" contracts included the salient features of the RFQ as amended, and the phase-in plan of each offeror, but did not contain any of the other individual data set forth in each offeror's quotation.

Upon conclusion of the negotiations, the results were orally presented to the SSAC. Since the SSEB had completed its evaluation prior to the negotiations, the SSAC developed a scoring method for use in applying its own judgment to the results of the negotiations. Utilizing this method, the SSAC assigned its own score to each of the factors scored by the SSEB, with the provision that the SSAC scores could equal but not exceed the SSEB scores. This provision is referred to as the "no gain technique." The two scores on each factor were then added and averaged to provided a "normalized" value for each of the three areas (technical, financial, management) set forth in the RFQ. The area scores were then multiplied by the area weights, noted above, to determine lump sum scores.

The results of the "normalized" scoring process were as follows:

Management

Factor	Page			FEC		
	SSEB	SSAC	% Change	SSEB	SSAC	% Change
Overall Management	9. 30	6. 51	−30%	6. 77	6. 77	0%
Management Structure	9. 09	6. 36	−30	8. 44	8. 44	0
Phase-in Plan	9. 47	7. 58	−20	7. 47	7. 47	0
Past Experience	9. 40	8. 48	−10	7. 50	7. 50	0
Overall	9. 31	7. 23	−22%	7. 55	7. 55	0%
Management Normalized Value		8. 27			7. 55	

Financial

Factor	Page			FEC		
	SSEB	SSAC	% Change	SSEB	SSAC	% Change
Reasonableness and realism of estimated cost	5. 24	4. 72	−10%	5. 65	5. 65	0%
Cost Accounting and Reporting	8. 88	7. 99	−10	8. 50	8. 50	0
Phase-in Cost	4. 50	4. 05	−10	5. 27	5. 27	0
Previous Cost Experience	8. 75	8. 75	0	8. 50	8. 50	0
Qualifications of Personnel	5. 80	5. 80	0	5. 00	5. 00	0
Financial Position	7. 96	7. 96	0	8. 34	8. 34	0
Overall	6. 85	6. 55	− 4%	6. 88	6. 88	0%
Financial Normalized Value		6. 70			6. 88	

Technical

Factor						
O&M Service	6. 11	3. 67	−40%	5. 75	5. 18	10%
Training Requirements	7. 23	6. 50	−10	5. 43	5. 43	0
QA Program	6. 25	6. 25	0	5. 05	5. 05	0
Engineering Services	6. 77	6. 09	−10	5. 28	4. 22	−20
Overall	6. 59	5. 63	−15%	5. 38	4. 97	− 8%
Technical Normalized Value		6. 11			5. 27	

The final lump sums of the area scores, after applying the area weight multipliers to the "normalized" area scores of the concerns, were:

FEC—172.70
Page—185.18

The SSAC final analysis noted that Page and FEC were both fully qualified in all areas of the RFQ, and therefore concluded that the award should be made on the basis of the offer that represented the lowest realistic cost to the Government; that estimated cost was not a valid basis for realistic cost comparison, but that a comparison of certain cost and fee ceilings (phase-in and base fee) proposed by the offerors was valid in determining an award, since the base fee was fixed and the phase-in cost contained a ceiling; and that, of the two concerns, FEC had submitted the lowest base fee, phase-in cost, and the lowest proposed award fee. In view of this comparison, the fact that FEC had also agreed to a low ceiling on G&A costs and have waived the overseas and hazardous duty bonuses, and since FEC's manning offer contained a higher percentage of U.S. personnel than either of

the two other companies and therefore suggested a more qualified work force, the SSAC recommended that the award should be made to FEC.

Although the SSAC had stated that estimated cost was not a realistic base for cost comparison, it also noted that FEC's management cost offer was a million dollars less than the cost of the management structure proposed by the other offerors. The record indicates that this consideration was cited as an additional reason for directing an award to FEC rather than Page.

In concluding its recommendation that an award be made to FEC, the Council observed that the successful contractor would be assured of the post-award opportunity to add personnel based on operational necessity, which would result in cost growth even though the contractor could not increase his fees. Nevertheless, the SSAC concluded that FEC's fee structure appeared to provide sufficient motivation for the contractor to perform on the contract.

The above evaluation and recommendation was apparently completed prior to the receipt of final offers from the offerors, but after the memoranda of the negotiations had been furnished to the Council. The relative difference in the fees and ceilings was not changed by the submission of the final offer, although there was a reduction in these items for the companies. In this connection, FEC proposed a "zero" base fee. The company also agreed that foreign service and hazardous duty pay bonuses would not be reimbursable costs for the life of the contract, including any additional period of time required by exercise of the options in the contract.

Subsequently, the findings and recommendations of the SSAC were transmitted to the Office of the Assistant Secretary of the Army (Installations and Logistics). That office did not accept the Council's recommendation for award to FEC. Instead, it directed that all offers be reevaluated. This directive was set forth in a memorandum dated August 20, 1970, signed by Brigadier General Vincent H. Ellis, USA, as Deputy for Procurement as follows:

> It has been brought to my attention that the evaluation of the Source Selection Evaluation Board and the Source Selection Advisory Council were based upon the original Government manning estimate.
>
> It apparently has been determined by the U.S. Army Strategic Communications Command that fewer people could perform the required services. This office should be provided with the details and justification of this revised Government manning estimate including overtime and mix of employees since it is a critical part of the selection for award.
>
> It is requested that the Source Selection Advisory Council be reconvened to: (1) reevaluate all offers including results of negotiations in accordance with the criteria set forth in the solicitation based upon the revised Government manning estimate; (2) reevaluate all offers without using the no gain technique previously employed by SSAC; (3) present a revised SSAC report to the HPA.
>
> When the foregoing has been accomplished, the matter should again be submitted for Secretarial pre-award review and notation along with the records of negotiations.

BY DIRECTION OF THE ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS AND LOGISTICS):

By memorandum of August 28, 1970, the Chairman of the SSAC instructed the Chairman of the SSEB to reevaluate all offers, including results of the negotiations, in accordance with the criteria set forth in the RFQ as follows:

Utilize the COMVETS Source Selection Evaluation Plan, supplemented by AMCP 715-3, in the revision of the original SSEB report dated 20 July 1970.

Reevaluate and rescore, using all available information, including original work papers, proposals, and subsequent clarification by offerors.

Develop and use a weighting plan to be used at the sub-factor and element level, with rationale therefor. It is suggested that you consider using the "check list" type of approach for appropriate subfactors and elements to eliminate the need for weighting each item and to place emphasis on the more significant items. Weights would be applied only by the SSEB Chairman/Executive Committee and would not be divulged to SSEB evaluators. Such sub-factor and element weights will be completed, marked with time and date, sealed and filed with the Staff Judge Advocate. This action will be accomplished on or after 28 Aug. 70 without further reference to the SSAC, except for reporting time of accomplishment. The on or after date is specified so that SSAC Area and Factor weights may be similarly signed and sealed before SSEB weighting is frozen.

Resolve and eliminate any inconsistencies within and between area narrative summaries, and provide rationale explaining apparent inconsistencies that are retained.

Provide specific examples of strengths and weaknesses reported in narrative summaries.

In addition to the above, and as a separate action, the SSEB will provide the SSAC with detailed input for a sensitivity analysis designed to determine confidence limits for the differences in total weighted scores between contractors.

By memorandum of August 31, 1970, the Commanding General (USASTRATCOM) advised the Chairman of the SSAC that the Government manning estimate would not be an "incontrovertible" standard to evaluate offeror's manpower proposals, and that cognizance should be taken that the contracting officer and his negotiating team had concluded as a matter of judgment, that the final manpower proposal made by each offeror was adequate to realistically provide the services specified in the RFQ.

In accordance with these directives, the SSEB developed a scoring and weighting plan at the subfactor and element level which allotted a maximum of 400 points for each area. Within the financial area, 100 points were allotted to the subfactors comprising each of the factors set forth therein, in pertinent part as follows:

2.1 Reasonableness and realism of proposed cost and fee.
a. Reimbursable costs—ICS—32
* * * * * * *
b. Reimbursable costs—D.T.E.—12
* * * * * * *
c. Reimbursable costs—AMSF—9
* * * * * * *
d. Reimbursable costs—Special Requirements—4
* * * * * * *
j. Proposed fee criteria—13

For scoring purposes the SSEB defined "Reasonableness" and "Realism" of proposed costs as follows:

(a) "Reasonableness of proposed costs" is defined as the lowest proposed total dollar cost to the government for the item being evaluated. This is a comparative evaluation. As an example, the lowest total dollar proposal for an ICS item may be considered most reasonable, and given a score of 10, (SSEP scoring table). The highest dollar estimate may be given a score of 5, based upon the rationale that costs associated with manpower, as submitted by offerors, are generally acceptable to the Government as a result of negotiations. Intermediate total cost estimates for the item should then be scored pro rata in relationship to the estimated costs of the lowest and highest estimate.

(b) "Realism of proposed costs" is defined as the most valid estimated cost that the government can expect to pay for the proposed services. The initial criteria for evaluation of the "realism of proposed costs" will be the rates in the Independent Government Cost Estimate (IGCE). For example, in the element "direct cost, salary," the initial evaluation of the "realism of proposed costs" will be based on a sample of the hourly salary rates of the predominant number of personnel in the Government Estimate compared with the counterpart rates contained in the proposals. From the comparison, the offeror falling closest to the IGCE may be scored a 10; the offeror with the greatest deviation above or below may be scored a 5. Intermediate offerors should be scored in pro rata relation to deviations from the government estimate.

Additional considerations include such matters as erroneous computations, omissions of major cost items, and major unallowable cost items, etc. If these matters warrant a score or less than 5, complete justification will be noted on the COMVETS Form 1.

The SSEB further provided that phase-in costs would be scored on a comparative basis in accordance with the numerical scale set forth in the definition of "reasonableness." The SSEB also noted that certain subfactors in the Technical area, for example, Qualifications of Personnel, should be scored equally, since all offerors had signed identical "model" contracts which described identical prerequisites for personnel to be furnished in connection with performance of the contract.

To evaluate the total manpower and multi-skill scores of the offerors' manning estimates, the SSEB determined that a comparative numerical evaluation should be designed with a maximum score of ten. The Board proposed to evaluate the quality of the "mix" of the offerors' manning estimates by using a predetermined ratio of the personnel of the three nationality groups involved.

The record shows that "raw" numerical scores were assigned to the proposals based on the above criteria, which were then weighted by the SSEB Chairman, Deputy Chairman, and members of the executive committee, and the following scores were assigned:

Management

Factor	Page	FEC
Management General	100.00	76.50
Management Structure	92.75	92.58
Phase-in Plan	98.52	91.01
Past Experience	98.35	78.30

Financial

Factor	Page	FEC
Reasonableness and Realism of Proposed Cost and Fee	69. 50	94. 38
Cost Accounting and Reporting	88. 50	86. 70
Phase-in Cost	86. 70	100. 00
Previous Cost Experience	90. 00	83. 30
Qualifications and Assignment of Personnel	Not scored	Not scored
Financial Position	Not scored	Not scored

Technical

Factor	Page	FEC
O&M Services	68. 97	63. 53
Training Requirements	86. 19	61. 86
Quality Assurance	78. 16	66. 94
Engineering Services	66. 19	54. 19

The SSEB scores by area were:

	Management	Financial	Technical	Total
Page	390	335	300	1025
FEC	338	364	247	949

The strengths of FEC's financial quotation cited in the SSEB report were the same factors cited by the SSAC in its initial recommendation that FEC should receive this award, as listed above. Additionally, the SSEB noted that FEC's quotation was most "favorable" to the Government on the basis of comparative evaluation of proposed costs, even after an adjustment was made in FEC's costs to include a 1 year's completion bonus and demobilization costs. As a weakness in the proposal, the SSEB found that FEC's proposed salary rates might hamper recruiting.

In the financial area, the SSEB narrative discloses that Page's quotation was considered weak because its G&A cost and rate appeared to be high, and its billeting and mess rates for U.S. Citizens were considered excessive. However, overall, Page's cost proposal was considered both reasonable and realistic.

The record indicates that the SSEB evaluation was forwarded to the SSAC on September 30, 1970.

In accordance with the directive of the Commanding General, USASTRATCOM, the SSAC had developed a scoring and weighting system in accordance with the guidelines in Army Materiel Command Pamphlet (AMCP) 715–3, chapter 3, paragraph 3–3d(6) (b) and (c) (including the use of bonus and penalty points), which are set forth as follows in that pamphlet:

(b) Another system of weighting often used establishes a base, say 1000 points as a possible total score, and distributes the available points to elements, factors, and subfactors in accordance with their importance (fig G–12, app G).

(c) Another frequently used method of weighting consists of the application of bonus and penalty points by the SSAC. It is an arrangement wherein the SSAC reserves points for its own use, e.g., a maximum of 100 out of a total possible score of 1,000 points or 10 percent of the maximum score. With the points thus retained, the SSAC adds or subtracts amounts from the scores awarded by the SSEB prior to the application of the weights established before the issuance of the RFP. In this way, the SSAC is able to reward and penalize such previously unforeseeable features as the overall quality of the total proposal as well as significant strengths (e.g., a technical breakthrough or a new approach) and weakness inadequately recognized in the weights previously established. The original SSEB scores modified by the pre-established weights, both with and without adjustment by bonus and penalty points, are thereafter presented to the SSA for his guidance (fig G–13, app G).

In accordance with the method stipulated in section (b), and in order to provide a way of weighting the SSEB scores at the factor level, the SSAC assigned one thousand points to each of the three evaluation areas which were broken down as follows:

(1) Management Area (1000 points)
  (a) 1.1 Management General (400 pts)
  (b) 1.2 Management Structure (250 pts)
  (c) 1.3 Phase-In Plan (250 pts)
  (d) 1.4 Past Experience and Performance (100 pts)
(2) Financial Area (1000 points)
  (a) 2.1 Proposed Cost and Fee (550 pts)*
  (b) 2.2 Cost Accounting and Reporting System (200 pts)
  (c) 2.3 Phase-In Cost (200 pts)
  (d) 2.4 Previous Cost Performance (50 pts)
  (e) 2.5 Qualifications and Assignment of personnel (0 pts)*
  (f) 2.6 Financial Position (0 pts)
(3) Technical Area (1000 points)
  (a) 3.1 O&M Services (550 pts)
  (b) 3.2 Training Requirements (300 pts)
  (c) 3.3 Quality Assurance Program (75 pts)
  (d) 3.4 Engineering Services (75 pts)

The record shows that the SSAC reviewed all factors in all areas to ensure the retention of a reasonable balance among all factors, in order to preclude a single factor in a given area from having undue weight in the overall score.

The system provided that the factor scores established by the SSEB evaluation were to be multiplied by the relative weight each SSAC factor weight bore to the 1000-point total for each area as follows:

$$\frac{\text{SSEB weighted factor score}}{100} \times \text{SSAC Weight} = \text{SSAC Weighted Factor Score}$$

*The SSEB did not score factor 2.5 because the criteria for that factor already had been considered in factor 2.1. The SSAC had allowed 50 points in its weighting scheme for factor 2.5. Since the criteria for factor 2.5 was applied to factor 2.1 by the SSEB the SSAC transferred the 50 points allowed for 2.5 to 2.1. This increases the factor 2.1 weight to 550 and eliminates any score for factor 2.5.

The score for each area was then to be determined by adding the SSAC weighted factor scores.

In accordance with the cited AMCP guideline, the SSAC also reserved for itself a maximum assessment of 100 points in each area of evaluation to be added to or subtracted from each offeror's merit rating prior to application of the same SSAC area weighting multipliers which had previously been applied in the first evaluation, as noted above. The allocation of these points was to be based on the overall quality of each offer, significant strengths and weaknesses inadequately recognized in the weighted scores, highly attractive features worthy of special attention in the selection process, and risks which could have an impact on the success of the project.

The application of the SSAC factor-weight formula to the scores furnished by the SSEB furnished the following results by area:

	Management	Financial	Technical	Total
Page	977	778	747	2502
FEC	843	934	626	2403

The SSAC analysis of FEC's management quotation reveals that the Council apparently disagreed with the SSEB's evaluation of the feasibility of the company's plan for the phase-in operation. Although the SSEB believed the feasibility of the plan was questionable, the SSAC considered this plan outstanding. Additionally, the SSAC considered the company's quotation relating to methods and procedures to be excellent, which view was not fully shared by the SSEB.

In view of the SSAC's determination that FEC's proposal in the management area was fully responsive and indicated a comprehensive understanding of the RFQ requirements, and insofar as the SSEB weighted score apparently did not fully reflect such assessment, the SSAC determined that 50 bonus points should be assigned to FEC's proposal in this area.

In the financial area, the SSAC concluded that FEC's quotation merited 100 bonus points for the following reasons:

Financial. Company A [FEC] scored substantially higher than any other offeror in this Area, having submitted the offer that represents the lowest overall cost to the Government. The reasonableness of Company A's offer is unchallenged. With regard to realism, Company A has shown a willingness unique among the contending offerors to accept substantial financial risk. This is characterized by the voluntary establishment of ceilings, and agreement to a zero base fee and an award fee that will result in financial loss if minimum acceptable performance standards are not met (see pg II–A–8 for a listing of commitments). The net impression gained is that the offeror has high confidence in his ability to perform the contract within the costs quoted. The SSAC has no information to the contrary and concludes that the ranking of Company A far ahead of the other offerors based on overall economic considerations is fully justified (pg III–2, par 1c(3)).

The preceding subparagraph is the basis for the SSAC's awarding the maximum of 100 bonus points in the Financial Area as a means to emphasize and

adequately assess "highly attractive features worthy of special attention in the selection process." The scoring and weighting system used by the SSEB at the element and sub-factor level does not provide a means for such emphasis and recognition. In addition, this action by the SSAC highlights that specific proposal which will obtain the levels of performance prescribed in the RFQ at the most realistic and reasonable costs to the government. Not only does Company A make more binding commitments to the government but the estimated cost differences are substantial: $4.5 million on a proposed basis and $3.6 million on a comparable basis.

In the technical area, FEC was assessed 10 penalty points.

Turning to the evaluation of Page's proposal, the record indicates that the company was assessed 50 penalty points in the management area because of the following:

Company B [Page] has had extensive experience in Southeast Asia since 1956 and has had comparable C–E contractual experience in Viet Nam since 1962. The proposal clearly develops Company B's extensive knowledge in C–E O&M operations. The SSAC agrees that the company's past performance is impressive, but not to the degree implied by the SSAC score. Accordingly, this provides a basis for assessing penalty points.

Company B's proposal reflects a high manning level when compared to another offeror and is largely due to the proposed use of excessive numbers of overhead personnel. The quantity of support personnel (administrative and drivers) appears to be high. Further, the proposed use of support to COMVETS from out of country field offices is unique to Company B's offer. The validity of a requirement for this support as a resource chargeable to COMVETS is questioned, especially since it further increases the already excessive overhead manning. This provides the basis for the levy of penalty points by the SSAC.

Company B's proposed use of senior site supervisors in a dual role of subsector supervisors strains the span of control to the point that the important supervision of ICS and DTE sites may be diluted. The proposal does not specify the location of the ICS sector supervisors, which further increases the concern for adequate sector supervision. This provides the basis for the levy of penalty points by the SSAC.

The company was not penalized, or given bonus points, in the financial area. However, it was assessed a net penalty of 10 points in the technical area.

The final scores for the companies as adjusted by the bonus and penalty points were:

	Management	Financial	Technical	Total
FEC	893	827	493	2213
Page	927	622	589	2138

Based upon this evaluation, the SSAC recommended that an award be made to FEC.

In view of this analysis and recommendation, an award was made to FEC on October 20, 1970. In this connection, we have been advised that prior to award a representative of the Assistant Secretary of the Army "noted" the intention of the procuring activity to make an award to FEC.

On October 21, 1970, Page filed a protest with this Office on the basis that the award to FEC was inconsistent with section D.1 of the RFQ, which is quoted above. Thereafter, on October 26, 1970, Page

filed suit in the U.S. District Court for the District of Columbia, seeking, *inter alia*, a preliminary injunction enjoining the Army from accepting or aiding performance under the contract until this Office reviewed the merits of the protest. On November 3, 1970, that Court entered a preliminary injunction enjoining the Army from accepting or aiding any performance under the subject award for a period of 45 days, or until this Office rendered a decision on the merits.

The following provisions of the Armed Services Procurement Regulation (ASPR) have been cited in your correspondence as being relevant to the matters in issue:

3-805.2 Cost-Reimbursement Type Contracts. In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (1) the lowest proposed cost, (2) the lowest proposed fee, or (3) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. *The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and appropriate to the work to be performed (see 3-808). Beyond this, however, the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government.* [Italic supplied.]

15-201.3 Definition of Reasonableness.

(a) General. A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business. The question of the reasonableness of specific costs must be scrutinized with particular care in connection with firms or separate divisions thereof which may not be subject to effective competitive restraints. What is reasonable depends upon a variety of considerations and circumstances involving both the nature and amount of the cost in question. In determining the reasonableness of a given cost, consideration shall be given to—

(i) whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;

(ii) the restraints or requirements imposed by such factors as generally accepted sound business practices, arm's length bargaining. Federal and State laws and regulations, and contract terms and specifications;

(iii) the action that a prudent business man would take in the circumstances, considering his responsibilities to the owners of the business, his employees, his customers, the Government and the public at large; and

(iv) significant deviations from the established practices of the contractor which may unjustifiably increase the contract costs.

You contend that the Army gave controlling weight to the lowness of the estimated costs and fees submitted by FEC in violation of section D.1, "Notice to Quoters," of the RFP, and of the provisions of ASPR 3-805.2; that by defining "reasonable costs" as the lowest estimated cost submitted, the Army violated ASPR 15-201.3; that by changing the evaluations factors, weightings, and procedures after quotations had been reviewed and given a raw score evaluation the Army violated ASPR and AMCP 715-3, paragraph 3-3d(5), which

provides that weights must not be altered once the proposals have been received; that by giving great weight to phase-in costs, the Army violated and abandoned the instructions given in the questions and answers for bidders; that the Department's evaluation records show that Page should have won the award; and that the award to FEC should be cancelled.

Before addressing your argument that, for the purpose of award, the Army gave *controlling* weight to the low quantum of estimated costs and fees submitted by FEC, we note that you apparently concede at page 4 of your November 20 brief that some weight should be given to estimated costs and proposed fees, at least in determining an offeror's "understanding of the project and ability to organize and perform the contract," in accordance with that part of ASPR 3-805.2 which is underlined above. Obviously, it was intended that such determination would be a factor in determining the most advantageous quotation for award. We agree that the RFQ did not provide that lowness *per se* of the cost estimates would be a factor in the award. However, we cannot agree with the position implicit in your argument that the RFQ further permitted an offeror to give less than significant consideration to the *quantum* of proposed costs and fees, in the interest of submitting an exceptional proposal in the technical and managerial areas. We do not believe that any reasonable offeror could have concluded that the quantum of estimated costs for the various work items would not enter into the determination of the contractor's ability to perform the contract at his estimated cost, and, hence, his eligibility for the award. Certainly, any reasonable offeror should have known that the quantum of the costs he proposed might be considered excessive or deficient by the procuring activity, when measured against the work requirements of the RFQ, and merit an adverse rating on his ability to organize and perform the contract, even if his proposal had superior merit in the technical and managerial areas.

In this connection, it is our opinion that the first sentence of section D.1 of the RFQ, as well as the word "controlling" in ASPR 3-805.2 quoted above, must be construed as meaning that estimated costs and proposed fees will not override all other factors which are to be considered in selecting a contractor. Clearly, if any consideration at all is to be given to estimated costs and proposed fees, such consideration, regardless of how small, may become controlling if all other factors are substantially equal.

Accordingly, for the purposes of discussion, we must conclude that the RFQ specifically advised all offerors that the quantum of costs and fees proposed to accomplish the work objectives of the contract would

be a consedered factor in the evaluation of proposals. In this perspective, we believe it is unnecessary to consider the authorities and lengthy argument set forth in your letter of November 20, 1970, to the effect that the quantum of cost estimates need not be a mandatory evaluation factor in all cost reimbursement procurements, since in the subject procurement the procuring activity was under an obligation to evaluate the quantum of cost estimates and fees in accordance with the stated evaluation criteria set out in the RFQ, and we cannot conclude that such criteria were in conflict with ASPR 3-805.2 or the decisions of this Office.

The argument you have advanced to demonstrate that the Army gave "controlling" weight to the low quantum of costs, fees, and ceilings proposed by FEC involves several allegations; first, that the Army did not conduct a thorough and impartial analysis of FEC's costs to determine whether the costs and fees were "realistic," which you allege is demonstrated by the almost "perfect" score of 94.38 for "reasonableness and realism" of costs and fees given to FEC by the second SSEB, notwithstanding several weaknesses noted in FEC's quotation which lessened the SSEB's confidence in the realism of FEC's proposed cost; second, that the Army defined "reasonableness" of cost to mean low cost on a comparative basis in contravention of ASPR 15-201.3, and with full knowledge that such action would give great emphasis to FEC's low estimated costs; third, that the Army gave great weight to phase-in costs in contravention of the instructions given to offerors prior to the closing date set for receipt of proposals; and fourth, that the Army did not fully and fairly evaluate each quotation in the management and technical area.

With respect to the first allegation, the record indicates that the Board and the Council received reports from the Defense Contract Audit Agency (DCAA) which indicated that both Page and FEC possessed satisfactory accounting systems, and that confidence therefore could be placed in the systems as a basis for cost estimating and as reflecting actual costs. Furthermore, the Army evaluators noted that both your concern and FEC had an excellent past cost performance on other significant contracts involving operation of sophisticated communications systems, with no significant contractor-caused cost growth. Since you have not demonstrated that these statements are erroneous, the determination of whether the Army sufficiently evaluated the "realism" of FEC's proposed costs and fees must be made within the perspective of such statements.

The record indicates that the evaluators initially questioned the realism of several aspects of FEC's cost structure, as noted above, for deficiencies in estimated costs for demobilization, minimum salary

range, foreign service allowance, war risk insurance, and completion bonus. FEC agreed to let the Government adjust its quotation to compensate for these deficiencies. Pursuant to the agreement, the Government included Foreign Service and War Hazard bonuses of 25 percent each, which were subsequently deleted when FEC agreed to waive reimbursement for these bonuses for the first year of performance. Thereafter, as noted above, FEC waived reimbursement for the bonuses for the life of the contract. Because of these considerations, and since the Army had concluded that the managerial and technical approaches proposed by FEC were adequate to accomplish the work requirements of the contract, the second SSEB evaluation concluded that FEC deserved a high rating for realism of costs proposed, i.e., ability to perform the contract at its estimated cost.

In view of the foregoing, we do not believe that such high score may be considered to have been arbitrarily assigned, or based upon less than a full and fair analysis of FEC's costs, notwithstanding the fact that the second SSEB evaluation indicated reservations concerning the adequacy of FEC's proposed salary rates. In this regard, we cannot conclude that FEC was insufficiently penalized for such reservations, since the SSEB did in fact give FEC less than a perfect score, presumably because of the defects enumerated above.

Concerning your collateral observation that the Army anticipated a substantial cost overrun with an award to FEC, the record indicates that the Army recognized the possibility of cost growth in the event of an award to any of the potential contractors, since any contractor would have the opportunity to add personnel based on operational necessity. In this regard, the Army had an analysis made of the potential cost growth, and, consequently, of the reliability of the cost estimates, which was intended to present a "worst case" estimate for FEC costs compared to reasonably predictable estimates for Page. In this analysis, FEC's costs were augmented by factors for salary increases, war hazard and overseas bonuses, and a factor for potential manning estimates where the Government considered the contractor's manning weakest, although apparently adequate. Page's estimate was augmented by a factor for potential manning requirements in those areas where the Government considered Page's manning weakest although apparently adequate. The Army states that this was not done on an assumption that these costs would be incurred or reimbursed, but as part of an analysis to determine the "sensitivity" of the decision to possible weaknesses in the cost estimates.

The Department concluded that even on the basis of its "worst case" analysis, FEC's probable costs were approximately $2 million less than Page's. A similar analysis on a 5-year basis revealed a cost advantage of some $17.5 million in favor of FEC.

Our Office has noted that the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic concerning the proposed costs and technical approach involved. B–152039, January 20, 1964. We believe that such judgment must properly be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess "realism" of costs and technical approaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis.

In view of the foregoing, we cannot agree that FEC's low quantum of estimated costs and fees may be considered unrealistic, or that the Army was precluded from considering the realism of such factors for award purposes or that the action of the Department in giving such consideration in contemplation of an award to FEC resulted in giving controlling weight to the lowness *per se* of FEC's costs and fees.

Concerning your allegation that the Army improperly defined reasonableness of cost in the second evaluation, we note that ASPR 15–201.3, the regulation you cite as authority for that proposition, is for application in determining the allowability of costs during contract performance, and not for determining the most advantageous offeror for award of a cost-reimbursable contract. We agree that a definition of "reasonable" cost to mean low cost *per se* on a comparative basis would be improper for award purposes if the Government had failed to adequately measure the "realism" of such low quantum of costs. However, in the instant case, the Government adopted a system of assessing the realism of all costs proposed by all offerors, which appears to have adequately compensated for any deficiencies in the approach of defining "reasonable" cost as "low" cost.

Your third allegation is that the Army gave significant weight to phase-in costs in contravention of the information furnished all offerors prior to the submission of quotations that such costs would be separately evaluated. In this connection, you also point out that the Department's negotiator advised your concern that you needed a greater manning effort in this area.

We agree that the answer provided by the Government to all offerors at the preproposal conference on May 28 may reasonably be interpreted in the manner you allege. However, such interpretation would appear to be in conflict with the advice set forth in section D.3.b.3 of the RFQ that phase-in costs would be an evaluation factor. Certainly, it is difficult to perceive why such costs would be listed as an evaluation factor without intending that responses to that factor would be evaluated for award purposes. In any event, it is our opinion that all offerors

were placed at the same bidding disadvantage from such erroneous advice. Accordingly, we cannot maintain that the error constitutes sufficient grounds for canceling the contract.

In this connection, the Department concurs in your allegation that the Government suggested that you increase the requirements of your phase-in plan, although accepting an inferior approach by FEC in this matter. However, the Department maintains that the superiority of your phase-in plan was fairly and fully reflected in the scores you received in the technical and management areas, which were substantially greater than the scores assigned to FEC in these areas. Accordingly, the Department maintains that you were not prejudiced by such negotiation approach. From our examination of the evaluation reports, we find no basis for disagreement with the Department's advice.

Concerning your fourth allegation, that the Army did not fully and fairly evaluate the technical and management aspects of your quotation, we note that your concern was consistently given superior ratings in these areas, which superiority was preserved even after the second SSAC applied its independent judgment to the evaluation process by means of the bonus and penalty procedure. In view thereof, and in consideration of the extensive analysis of all proposals in these areas, as summarized above, we are unable to agree that the Army gave less than a full evaluation to these areas.

The argument you have advanced to show that the Department's change of evaluation factors, weightings, and procedures for use on the second round of evaluations was unfair and fatally defective involves the following contentions: first, that the Army failed to disclose the weights of the evaluation criteria; second, that the Department radically changed its numerical weighting system for the second round of evaluations, which you allege should have been the subject of an amendment to the RFQ; third, that AMCP 715–3 contains several references to the effect that weights are to be established in advance of the issuance of the RFQ and not changed thereafter; fourth, that the use of bonus and penalty points was not permitted in the existing circumstances; and fifth, that disregard of the manning schedule in the second round of negotiations prejudiced the consideration of your offer.

Concerning your contention that the Department failed to disclose the weights of the various evaluation criteria, the decisions of our Office have held that offerors should be informed of the relative weight or importance attached to each factor. B–167175(1), October 13, 1969; B–166052(2), May 20, 1969. But our Office does not require the disclosure of the precise numerical weights to be used in the evaluation

process. In this connection, if you had any doubt as to the relative importance of the evaluation criteria in the subject RFQ, we believe the time for resolution of the matter was before the closing date set for receipt of quotations.

In response to your contention that the Army's evaluation procedures constituted a "radical" departure from those established for the initial evaluation, the Department maintains that the weighting and scoring system used by the SSEB at the subfactor and element level, and the weighting system used by the SSAC at the factor and area level, preserved the relative importance of the evaluation criteria initially set out in the RFQ. As noted above, the area multipliers were the same in both evaluations, and the area weights established in the second evaluation preserved the relative equality of the importance of the area criteria, since a total of one thousand points were reserved for each of the three areas. Although the factor weights utilized by the second SSAC gave greater emphasis to the first-listed factor within each area than was given by the evaluation system utilized on the first evaluation, the Department maintains that such change cannot be considered radical, since the relative weights were still within the framework of the advice in the RFQ that "factors are set forth in equal or decreasing order of importance." We agree with these conclusions, and since offerors were not entitled to be advised of the exact evaluation procedures which were to be used by the Board or the Council, we are unable to agree with your contention that the foregoing changes adopted in the weighting procedures should have been the subject of an amendment to the RFQ.

The other "change" in the weighting system on the second evaluation involved the application of bonus and penalty points. The Department maintains that the use of this system enabled the Council to apply its independent judgment to the evaluation criteria, just as it did in the first evaluation by averaging its own factor weight scores to each of the scores furnished by the SSEB. Although you maintain that the established procedures did not provide for the SSAC to exercise its independent judgment in the scoring process, as noted above the record indicates that one of the procedures established prior to the receipt of proposals was a directive to the SSAC to apply its own judgment to the SSEB scores. Certainly, in view of such mandate, there would not appear to be any substantial basis for questioning the SSAC's right to quantify its judgment in the numerical scoring analysis. We believe such conclusion is necessitated whether the method for the numerical weighting of its judgment was on a factor-by-factor basis, as in the first evaluation, or was on a selected-factor approach as in the second evaluation. In view thereof, we can-

not agree that use of the bonus and penalty point system constituted a radical departure from the evaluation procedure utilized in the initial round of evaluation. Accordingly, we cannot accept your statement that the evaluation system utilized on the second evaluation constituted a substantive change in the requirements of the RFQ which should have been furnished to all offerors by means of an amendment.

Turning to your contentions that AMCP 715–3 specifically prohibits the changing of the evaluation weights after proposals have been received, and that use of the bonus and penalty scheme is not properly for application in an evaluation process when a different set of weights have been formulated after receipt of proposals, the Army points out that AMCP 715–3 was not mandatory for this procurement and that the procurement principles set forth therein could be adopted on a case-by-case basis. Accordingly, it maintains that the changes made in the evaluation weighting system cannot be considered legally defective for failing to strictly comply with all the provisions of AMCP 715–3.

Although the provision regarding the application of bonus and penalty points would appear to be more properly applicable to the situation where the weights established prior to the receipt of proposals inadequately reflect the strengths and weaknesses of the proposals, we see no legal basis for questioning the validity of the Department's position that the bonus and penalty scheme was only a means of introducing the Council's independent judgment into the evaluation process. Obviously, other means could have been chosen to "weight" this judgment, and we must agree that the provisions of AMCP 715–3 are not mandatory for procurements of the type here involved. See the Preface, page v, of AMCP 715–3.

With respect to whether the addition of bonus and penalty points to the SSAC *weighted* factor scores may have resulted in dual application of the Council's judgment to the reasonableness and realism of proposed cost factor, we note that application of proportionate bonus and penalty points to the Board's weighted factor scores, without application of the SSAC factor weights, would also have resulted in a higher total point score for FEC than for Page.

In view thereof, and since the relative weights of the evaluation criteria were preserved in the second evaluation, even considering the application of these special points, we cannot conclude that adoption of the points and penalties system was illegal.

You also allege that the Department disregarded its manning schedule in the second round of negotiations to the prejudice of your concern. In this regard, the Department states that the Government manning estimate was found to be considerably in excess of the estimate provided by any of the offerors, and that the office of the Assistant

Secretary of the Army (Installations and Logistics) felt that some explanation of this disparity was essential. Accordingly, the office directed that proposals be reevaluated with respect to the realism of the manning estimate and that a revised Government manning estimate be furnished to that office.

The record indicates that the Commanding General, USASTRATCOM, chose not to prepare a revised estimate. Instead, he determined that the extensive analysis of offers conducted on the first evaluation had revealed that the manning estimates of your concern and FEC were clearly adequate for performance. Accordingly, the proposals were evaluated with this directive imposed on the entire evaluation process.

We believe that it would have been the better course for the Department to have prepared a revised estimate for evaluation purposes in the second evaluation. Certainly, such estimate would have provided a more uniform basis for evaluating the adequacy of each quotation, rather than relying on each offeror's estimate, plus the subjective judgment of each evaluator. However, we can find no basis for maintaining that your concern was uniquely prejudiced by such action.

All offerors had prepared their quotations using the Government manning estimate, and it would therefore appear that all offerors could claim they were equally disadvantaged by the Army's decision to disregard the estimate for evaluation purposes. In this connection, FEC points out that the "mix" in its manning schedule more nearly complied with the "mix" contemplated by the Government estimate, and FEC therefore claims to have been prejudiced by the failure to fully apply the Government manning estimate in the second evaluation. Under the circumstances, we are unable to conclude that Page was prejudiced by the change in the evaluation of manning schedules so as to require or justify cancellation of the contact awarded to FEC.

In this connection, the Court of Claims has held that a contract should be canceled only if its illegality is clear. See *John Reiner and Company* v. *United States*, 163 Ct. Cl. 381, 325 F. 2d 438 (1963), cert. denied, 377 U.S. 931 (1964); *Brown and Son Electric Company* v. *United States*, 163 Ct. Cl. 465, 325 F. 2d 446 (1963).

Based upon our review of the entire record in the instant case, we are unable to find such clear illegality, and your protest must therefore be denied.

[B-164786]

Post Office Department—Employees—Transfers—During Retroactive Period of Compensation Increases

Former General Schedule employees of the Post Office Department who transferred to a higher General Schedule position in another agency between August

12, 1970, the date of enactment of the Postal Reorganization Act, which provides approximately an 8-percent salary increase, and the effective date of the act, the first pay period beginning on or after April 16, 1970, are entitled to have the "not less than two-step increase" authorized in 5 U.S.C. 5334(b) for employees who are promoted or transferred, computed on the revised General Schedule rate of the Post Office Department; for in the absence of specific language to the contrary, the rule for application is that retroactive salary increases apply as if the increase had been in force and effect at the time of the change of status of the employee.

Compensation—Rates—Highest Previous Rate—Retroactive Salary Increases

Where an agency has a policy to extend the benefit of the highest previous rate rule prescribed in 5 U.S.C. 5334(a), the salary of an employee who left the Post Office Department during the retroactive period between enactment of the Postal Reorganization Act and its effective date may be adjusted to reflect the increase authorized by the act; and where an agency does not have an established policy, but did give the employee the benefit of his last Post Office Department rate, it is within the agency's discretion whether or not to adjust the employee's salary to reflect the increase in the Post Office rate. However, section 531.203(d)(4) of the Civil Service Commission Regulations relating to general increases in the General Schedule and not to special increases, an employee who was not on the rolls at the time of enactment of the Reorganization Act may not be given the benefit of the increased rate for the purposes of the "highest previous rate" rule.

To the Chairman, United States Civil Service Commission, December 18, 1970:

This is in further reference to your letter dated October 8, 1970, requesting a decision on certain questions occasioned by the proposed issuance of a bulletin on the subject of adjusting salaries for employees who separated from the Post Office Department on or after the effective date of the retroactive pay adjustment provided by the Postal Reorganization Act (April 18, 1970, for employees in the postal field service; April 19, 1970, for General Schedule employees), and were employed in another Federal agency on the enactment date of the act, August 12, 1970.

Section 9 of the Postal Reorganization Act, Public Law 91–375, approved August 12, 1970, 84 Stat. 784, 39 U.S.C. 1003 note, provides, in pertinent part:

SEC. 9(a) The Postmaster General, under regulations made by him, shall increase the rates of basic pay or compensation of employees in the Post Office Department so that such rates will equal, as nearly as practicable, 108 percent of the rates of basic pay or compensation in effect immediately prior to the date of enactment of this Act. Such increases shall take effect on the first day of the first pay period which begins on or after April 16, 1970.

(b) Retroactive pay, compensation, or salary shall be paid by reason of this Act only in the case of an individual in the service of the United States (including service in the Armed Forces of the United States) on the date of enactment of this Act, except that such retroactive pay, compensation, or salary shall be paid—

(1) to an officer or employee who retired, during the period beginning on the first day of the first pay period which began on or after April 16, 1970, and ending on the date of enactment of this Act, for services rendered during such period; and

(2) in accordance with subchapter VIII of chapter 55 of title 5, United States Code, relating to settlement of accounts, for services rendered, during the period beginning on the first day of the first pay period which began on or after April 16, 1970, and ending on the date of enactment of this Act, by an officer or employee who died during such period.

You point out that the above provisions as they relate to entitlement to retroactive pay are similar to those customarily included in general pay acts for this purpose—an employee (1) must have been an employee in the Post Office Department on the date of the adjustment; and (2) must have been in the service of either the Post Office Department or some other Federal agency (including service in the Armed Forces of the United States) on August 12, 1970, the date the Postal Reorganization Act was enacted. It is stated further that while it is clear that an individual must have been employed by the Post Office Department in order to be paid at a salary that included the 8-percent increase, the Commission needs clarification on how this increase affects the salaries of those employees who moved (or move) to other Federal agencies. The following questions have been submitted for our decision:

(1) Must the salary for an employee who transfers from a General Schedule position in the Post Office Department to a higher grade General Schedule position in another agency be fixed under 5 U.S.C. 5334(b) at a rate in the regular range of the grade that will give him the equivalent of two step increases above the salary he was receiving under the increased General Schedule range in the Department? Is the equivalent of two step increases in this case computed on the amount of regular step increases in the General Schedule, or on the amount in the revised schedule of the Post Office Department?

(2) If an agency has a policy of giving an employee the benefit of his highest previous rate or existing rate when he is brought on the rolls by transfer or reemployment, is the salary of an employee who left the Post Office Department during the retroactive period to be adjusted to give him the benefit of the 8-percent increase assuming he was entitled to that increase? If the agency did not have such an established policy but did give the employee the benefit of his last Post Office Department rate at the time he entered on duty, is his salary to be adjusted to reflect the increase in his Post Office Department rate? If this is not mandatory, (a) does the agency have discretion to make the adjustment, or (b) may it make the adjustment if its determines that it would have given the higher rate if it had been in effect at the time of the personnel action?

(3) May a former employee of the Post Office Department who was not on the rolls on the date of enactment of the Postal Reorganization Act and not entitled to the retroactive increase, be given the benefit of the increased rate for the purposes of the "highest previous rate" rule?

In regard to the first question, 5 U.S.C. 5334(b) provides, in pertinent part, as follows:

(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. * * *

Decisions of our Office concerning the retroactive provisions of salary increase acts have consistently required—in the absence of specific language to the contrary—that such acts be applied to reflect the salary status of each employee under the increased rates as if such rates had been in force and effect at the time of the change of his status. 31 Comp. Gen. 166 (1951); 38 *id.* 188 (1958); 44 *id.* 171 (1964). Thus, employees who were entitled to the retroactive increases even though transferred to another agency during the period April 19,1970, to August 12, 1970,

would be treated the same as employees transferring on and after that date assuming there has been no change in the law or regulations.

We note that the language of Public Law 91–375 did not specifically amend the General Schedule as set forth in 5 U.S.C. 5332, but merely provided that all employees of the Post Office Department, which includes employees in the General Schedule, would have their salaries increased by approximately 8 percent. In any event, the effect thereof was to create special salary rates for employees in the Post Office Department subject to the General Schedule which are approximately 8 percent higher at the present time than the salaries of all other employees subject to the General Schedule (excluding special categories). Since there is no indication in Public Law 91–375 that General Schedule employees of the Post Office Department were to be removed from the General Schedule or otherwise exempted from the provisions of law applicable thereto, our view is that section 5334(b) above is applicable and that their existing rates of basic compensation must be regarded as the regular General Schedule rates as increased by Public Law 91–375. This appears to accord with the treatment in the Commission's regulation (531.204) of special rates authorized under 5 U.S.C. 5303. It follows that in promotion situations to which you refer that the required two-step increase would be computed on the revised General Schedule rates of the Post Office Department.

In regard to question (2), consisting of four parts and concerning the "highest previous rate" rule, 5 U.S.C. 5334(a) provides that the rate of basic pay to which an employee is entitled when, among other things, he is transferred or his position is changed from one grade to another, is governed by "regulations prescribed by the Civil Service Commission." In the absence of regulations precluding or limiting consideration of the Post Office increases in the computation of the highest previous rate, such as, for example, 5 CFR 531.203(d) with respect to special rates established under 5 U.S.C. 5303, the first part of question (2) is answered in the affirmative. As to the second part of the question, where an agency did not have an established policy but did give the employee the benefit of his last Post Office Department rate at the time he entered on duty, it would be within the discretion of the agency concerned as to whether his salary should be adjusted to reflect the increase in the Post Office rate. This is for the reason that pursuant to part 531.203(c) of the Commission's regulations, the authority granted administrative agencies with respect to use of the highest previous rate is not mandatory, but permissive. With regard to part three, the agency has discretion to make the adjustment and part four, therefore, does not require an answer.

In regard to question (3), there is for consideration section 531.203(d)(4) of the Commission's regulations which provide, in

pertinent part, as follows: "If the highest previous rate was earned in a General Schedule position, it is increased by subsequent amendments of the General Schedule."

We believe the above regulation was intended to relate only to general increases in the General Schedule and not to special increases such as here involved. Thus, a former employee of the Post Office Department who was not on the rolls on the date of enactment of the Postal Reorganization Act and otherwise not entitled to the retroactive increase may not be given the benefit of the increased rate for the purposes of the "highest previous rate" rule.

[B-170269]

Contracts—Negotiation—Evaluation Factors—Inflation and Escalation Recovery Costs

An award under a solicitation for class destroyers that provided for the inclusion in price evaluation of inflation and escalation recovery factors, to the offerer whose high initial target cost was reduced by evaluating estimated escalation recovery costs as greater than estimated inflation costs rather than to the low base cost offeror displaced by the inclusion in the evaluation of estimated inflation costs that exceeded estimated escalation recovery factors, and of higher target profits, was proper. An award on the basis of initial low target costs is not required where the Government is protected from the possibility of offerors manipulating inflation and escalation recovery factors, and recouping losses under the reset provision of the contract.

Contracts—Negotiation—Audit Requirements

The failure to audit the fourth and final round of proposals under a solicitation for class destroyers did not violate paragraphs 3-101, 3-807.2(a), and 3-809(b)(1) of the Armed Services Procurement Regulation (ASPR), where not only were the proposed prices in each of the first three rounds of negotiations audited and found to be based on sound business judgment, but the ASPR provisions do not require the audit of proposals on each and every round of a negotiated procurement, and paragraph 3-809(b)(1) provides that audits may be waived whenever it is clear that information already available is adequate for the proposed procurement, and the determination of "adequate" is within the discretion of the procuring activity and will not be questioned unless clearly erroneous.

To vom Baur, Coburn, Simmons & Turtle, December 21, 1970:

Reference is made to the letters of September 1, September 3, 1970, and subsequent correspondence, including the letters of October 19, 1970, and November 12, 1970, with attached Memorandums of Law, concerning the protest by Bath Iron Works Corporation (Bath) against the award of a contract to Litton Systems, Incorporated (Litton), by the Department of the Navy for the construction of DD-963 class destroyers.

In a letter dated August 26, 1970, our Office reported to Senator Margaret Chase Smith certain findings concerning the award of this DD-963 contract, and this report has been made public by Senator

Smith. On page 4 of Attachment I to the letter of August 26, our Office made the following comparison of Bath's and Litton's proposals of February 2 (the 3rd proposals) and March 26 (4th and "final" proposals):

	Bath		Litton	
	(in millions per ship)			
	3rd 2/2/70	4th 3/26/70	3rd 2/2/70	4th 3/26/70
Target Cost	$64. 9	$61. 3	$64. 7	$54. 9
Target Profit:				
Rate	13. 5%	12. 2%	11. 1%	8. 8%
Dollars	8. 8	7. 5	7. 2	4. 8
Target Price	$73. 7	$68. 8	$71. 9	$59. 7
Ceiling Price	$81. 1	$79. 7	$80. 8	$71. 3

Included in the prices of the proposals submitted by Bath and Litton were the offerors' estimates of inflation and escalation recovery, and these factors were considered in the price evaluations. The significance of the inflation and escalation factors in the selection of the successful offeror was discussed in the August 26, 1970, letter to Senator Smith as follows:

Litton, in its final proposal, estimated that its escalation recovery based on the Navy tables would be $143.7 million more than the escalation they would actually experience, and reduced their final proposal by this amount. Litton's estimates of their recovery of escalation on the third and fourth proposals are shown below in millions of dollars.

	Proposals (in millions)	
	2 Feb. 1970	*26 Mar. 1970*
Estimated inflation	$485. 5	$297. 45
Estimated escalation payable by Navy	409. 576	441. 15
Less: Net escalation estimate included in proposal	72.	
Estimated (Under) or Over-recovery of escalation	($4.)	$143. 7

* * * * * * *

Bath, in its final proposal estimated that its escalation recovery from the Navy tables would be $146.3 million less than it would incur. Bath's projected under-recovery from the tables is shown below in millions of dollars.

	Proposals (in millions)	
	2 Feb. 1970	*26 Mar. 1970*
Estimated inflation	$454. 704	$428. 219
Estimated escalation payable by Navy	296. 068	281. 934
Estimated under-recovery of escalation	($158. 636)	($146. 285)

In effect, because Litton anticipated an over-recovery from the tables and Bath an under-recovery, the disparity between the two bids in total dollars was approximately $290 million. The impact of escalation was, therefore, a significant factor in the price competition for the 30 DD–963 destroyers.

Attachment 1 to the letter of September 3, 1970, from your counsel, is a chart entitled "Comparison of Litton and Bath Price Proposals of Feb. 2, 1970 and March 26, 1970" expressed in thousands of dollars and this chart is set forth below:

	LITTON INDUSTRIES (1)		*BATH IRON WORKS (1)*	
	Feb. 2, 1970	*March 26, 1970*	*Feb. 2, 1970*	*March 26, 1970*
BASE COST	$1,864,130	$1,789,770	$1,788,874	$1,694,125
PROJECTED INFLATION	$ 485,500	$ 297,450	$ 454,704	$ 428,219
EXPECTED TOTAL COST	$2,349,630	$2,087,220	$2,243,578	$2,122,344
PROJECTED ESCALATION RECOVERY	$ (409,500)	$ (441,150)	$ (296,068)	$ (281,934)
TARGET COST	$1,940,130	$1,646,070	$1,947,510	$1,840,410
TARGET PROFIT	$ 215,340	$ 143,130	$ 202,890	$ 225,180
TARGET PRICE	$2,155,470	$1,789,200	$2,210,400	$2,065,590

(1) All numbers based on information contained in GAO report of August 26, 1970, to Senator Smith of Maine, *B–170269*.

Bath's position is that its offer was the true low offer since evaluation should have been pursuant to 1969 base costs only and that, therefore, the award to Litton should not be permitted to stand. The following represent summaries of the arguments and contentions which have been made by Bath's counsel in support of its position:

(1) It is Bath's view that by manipulation of the inflation and escalation recovery factors, a prospective contractor could reduce his initial target cost by underestimating inflation and over-estimating escalation recovery with the expectation that any resulting losses could be recouped after the reset date when either the firm target figure or the fixed-price amount, whichever is agreed upon, will be substituted for the initial target figures and will become the basis for the application of the indices.

(2) It is argued by Bath that, in view of the floor on profit, any overrun difference between initial target cost and firm target cost could not have any substantial effect on the firm target profit to be established at the reset point.

(3) Bath contends that prior to 1962 Navy's method of evaluation of inflation and escalation recovery was different from that used in this case.

(4) Bath contends that the inclusion of inflation and escalation recovery for evaluation is contrary to the way these factors are evaluated in advertised procurements.

(5) Another contention made by counsel for Bath is that, by failing to make an audit of the final proposals, Navy violated Armed Services Procurement Regulation (ASPR) secs. 3-101, 3-807.2(a), and 3-809(b)(1) which requires cancellation of the award to Litton. It is urged that there was no basis for waiver of an audit under ASPR 3-809(b)(1), since it was not clear that the information already available was adequate for the proposed procurement. In connection with this argument counsel for Bath has cited *Schoenbrod* v. *United States*, 187 Ct. Cl. 627 (1969), and 47 Comp. Gen. 252 (1967).

(6) Bath argues that the information obtained during the audit of the first three rounds could not be used in analyzing Litton's proposal for the final round, since the contract structure was changed between the third and fourth rounds from fixed-price incentive to fixed-price incentive with successive targets and the reset provision.

With respect to Bath's first argument, we agree that the operation of the reset provision is such that there may be a possibility of recoupment of losses after the reset date. However, this does not mean that it was open to offerors to offer unrealistic targets based on manipulated inflation and escalation recovery factors, since there are other features of the contract which protect against such manipulation.

One feature of the contract which would afford some protection to the Government against manipulated inflation and escalation recovery estimates is the fact that if there is an overrun difference between the initial targets and the amounts agreed to at the reset point, this will have a negative impact on the profit negotiated at the reset point.

Another feature of the contract which would afford some protection against manipulation of the target price by inclusion of unrealistic estimates for inflation and escalation recovery is the ceiling price. The difference between the ceiling price and the target price is a cushion for the contractor against unanticipated costs that may arise in the performance of the contract. Litton's ceiling price is some $8.4 million per ship lower than Bath's ceiling price. The ceiling price in Litton's proposal of $71.3 million dollars per ship will remain firm throughout the life of the contract and will not be affected by any changes in the targets which may come about as the result of negotiations under the reset provision. It is true that recovery under the escalation provision is outside the operation of the ceiling price and will not be considered in computing whether the contractor's costs have exceeded the ceiling. In this regard, Litton's contract states in paragraph (h) of Article VI as follows:

> (h) No adjustment shall be made in the initial or firm target cost, target price, or ceiling price on account of upwards or downwards adjustment in compensation made in accordance with this Article and hence said adjustments are outside the incentive price revision formulae provided for in ARTICLE XXI, "INCENTIVE PRICE REVISION (SUCCESSIVE TARGETS)." Accordingly, even if the ceiling price is exceeded, amounts otherwise payable to the Contractor in accordance with this Article shall continue to be paid.

However, despite this provision, the ceiling price still would operate as a limit which an offeror had to take into consideration before deciding to undercut his targets by manipulating estimates of inflation and escalation recovery since, as indicated, these factors entered into the computation of the ceiling price and thus affected an offeror's cushion against unanticipated expenses. It seems, therefore, that the operation of the ceiling afforded some protection to the Government against an offeror's submitting an unrealistic target price based on manipulated estimates of inflation and escalation recovery.

With respect to Bath's second argument we agree that there is a floor on profit as urged by Bath. However, the operation of the ceiling as previously described would tend to offset the risk that the floor on profit might tempt an offeror to quote unrealistic initial targets.

With respect to Bath's third contention, we agree that the inflation-escalation arrangement in this procurement was not in use in Navy's fixed-price-type ship construction and conversion contracts before 1962. However, since 1962 the Navy has entered into firm fixed-price contracts with Bath aggregating over $100 million dollars on the same basis as the arrangement in this procurement. While there may have been a different procedure with respect to inflation and escalation evaluation prior to 1962, this would not be a basis for concluding that the evaluation in this case should have been pursuant to pre-1962 procedures which would have been contrary to the ground rules established for this procurement.

In regard to Bath's fourth contention, we do not agree that Navy's approach in including the offerors' estimates of inflation and escalation recovery factors as part of the price evaluation is inconsistent with what would be done in a formally advertised procurement in a similar situation when escalation provisions are to be included in the contract. In such case, a bidder calculates what his recovery will be under the escalation provision and how inflation will affect his cost of operation, and the bidder can adjust his price upward or downward based on his judgment of how his price will be affected by these factors. See ASPR 2-104.3 and the clause in ASPR 7-106.2. In advertised procurements, the proposed price may include the bidder's own estimates of the impact of inflation on his costs of operation and the bidder's estimates of how much will be recovered under the escalation clause. Award is made on the low bid, which presumably includes the bidder's estimates of the two factors. We recognize that greater uncertainties as to the final cost to the Government inhere in contracts of the type here under consideration than in firm fixed-price contracts. Nevertheless, the fact that circumstances dictate the use of the less certain type of contract does not mean that a proposed price, reason-

ably evaluated, should not remain a significant factor in the selection of a contractor.

A further consideration with regard to the overall question whether inflation and escalation recovery should be included in the price evaluation is that an offeror apparently can through ingenuity and judgment exercise some measure of control over how inflationary factors will affect its costs of production. Some of Litton's inflationary control measures were set forth in our August 26 letter to Senator Smith. Navy's view is that if one offeror has better control over the impact of inflation than another offeror, this should be reflected in the offeror's price and should be considered in evaluating proposals. Pursuant to our review, we find we must agree with Navy on this point.

Bath's fifth and sixth contentions are interrelated and will be considered together.

Pursuant to the audits of the first three rounds of negotiations, it was determined that Litton's proposed prices in each of these rounds was based on sound business judgment. The audits of each of the first three rounds apparently would have disclosed whether an offeror included unrealistic estimates in its proposed prices. As stated in Attachment I to the letter of August 26, a comparison of Bath's and Litton's "best and final" offers with Navy's own estimates showed a high degree of similarity in the required engineering and labor hours estimates and the proposed material costs; consequently, Navy concluded from this comparison that Litton's prices were credible and that an audit of Litton's final proposal was not necessary.

Litton has asserted that the material and labor costs, including adjustments for inflation and escalation recovery, set forth in its Supplemental Support Data for the fourth round were traceable to corresponding figures in Litton's third round price proposal on which, as indicated, an audit was made. The defense Contract Audit Agency (DCAA) in its postaward audit reviewed the data on which Litton's inflation and escalation adjustments were based and concluded that this data was traceable to Litton's third round price proposal. There was, of course, no way of auditing whether the events which were the bases for Litton's projections, such as Litton's LHA material cost experience and Litton's projections of an upward trend in material and labor indices based on current increases of the indices, would actually occur under this contract; and in drawing its conclusion regarding inflation and escalation, DCAA assumed that such events would occur as projected by Litton. We understand Navy agrees that the figures in Litton's fourth round Supplemental Support Data were traceable to the corresponding third round prices, and Navy claims that this factor entered into Navy's determination not to audit Litton's fourth round proposal.

The case of *Schoenbrod, supra*, cited by Bath's counsel, concerned a situation where the factor of price was not considered at all in the evaluation of proposals, and it was held that an award pursuant to such a procedure was invalid. The decision at 47 Comp. Gen. 252 (1967), also cited by counsel for Bath, held that the improper adjustment of pricing proposals which contained discrepancies was a defective negotiation technique. The cited cases involved factual situations which were different from the one presently before our Office and are not applicable here. It is our view that even if there had been a failure to make an audit required by the ASPR sections cited by Bath, an award would not necessarily be invalid.

Moreover, we do not find that the ASPR provisions cited by counsel for Bath require that there be an audit of the proposals submitted on each and every round of a negotiated procurement. The very regulation cited by Bath's counsel at ASPR 3-809(b)(1) provides that audits may be waived whenever it is clear that information "already available" is "adequate" for the proposed procurement.

The determination whether or not "already available" information is "adequate" is a matter primarily within the discretion of the procuring activity, which will not be questioned by our Office unless shown to be clearly erroneous. In view of the above analysis concerning the protection in the structuring of the contract type proposed in the fourth round against an offeror's including unrealistic estimates for inflation and escalation, and the traceability aspects of Litton's third and fourth round price proposals, we do not find that Navy's decision not to audit Litton's final proposal was such an abuse of discretion as to violate the regulations.

By letter of December 11, 1970, you advised us of another alleged defect in the procurement procedures followed in this case, namely, that prenegotiation and postnegotiation business clearances had not been obtained for the contract award as required by section 1-403.50 of Navy Procurement Directives (NPD). Section 1-403.50 of NPD states that business clearance is the required approval by the Chief of Naval Material of the business aspect of proposed contractual actions. We have been advised informally by the Navy that the Source Selection Authority in this case was the Chief of Naval Material himself, so that the approval contemplated by NPD 1-403.50 was obtained. Your letter of December 11 also advises that you have been informed that Litton has concluded that it is not feasible to construct the DD-963 ships in accordance with the length, width, and tonnage originally specified. It is our understanding that some minor changes in vessel configuration have been suggested by Litton through an Engineering Change Proposal which is presently under consideration by the Navy. We do

not construe your letter as taking the position that approval of such changes would be either improper or unusual.

We have carefully reviewed each of the contentions raised by counsel for Bath, and we have found no basis for concluding that the evaluation should have been pursuant to 1969 base costs only. In the circumstances, we find that it was not improper to include the inflation and escalation recovery factors in the price evaluation, and that there is no basis to question the award made by Navy.

For these reasons your protest is denied.

[B–164186]

Pay—Additional—Hazardous Duty—Assignment Status

Officers of the uniformed services trained in parachute jumping and the demolition of explosives, who incident to staff billet assignments evaluate training programs and equipment, entailing the observation of actual training exercises by special warfare forces, are not entitled to the dual hazardous duty incentive pay provided in 37 U.S.C. 301 unless they are assigned to an operational team and actually perform parachute jumping in a jump status or perform demolition duty as a primary assignment. The mere evaluation or observation of operational team activities does not qualify the officers for incentive pay; and in the absence of proper orders, any parachute jumping or demolition of explosives actually performed by the officers would not entitle them to additional pay.

To D. L. Dreher, Department of the Navy, December 22, 1970:

In letter dated October 2, 1970, you requested an advance decision as to whether Commander James H. Barnes, USN, 606890, and Lieutenant Bruce Van Heertum, USN, 696635, are entitled to dual incentive pay for duty involving parachute jumping and demolition of explosives in the circumstances described in your letter. Your request has been assigned Submission No. DO–N–1100 by the Department of Defense Military Pay and Allowance Committee.

You say that the officers, who have served in operational SEAL billets, are now assigned to staff billets in the Washington area at headquarters level, which billets are in direct support of the SEAL mission.

You described the duties of Commander Barnes in carrying out the mission of the Special Warfare Branch, Office of the Chief of Naval Operations, and stated that to properly maintain liaison with the operating units and to remain current with operational readiness and training of Special Warfare Forces, it is necessary for him to participate in field training exercises, including parachuting and demolitions on a regular basis. You gave as an example of such participation an occasion in February 1970 when he joined SEAL Team Two in training evaluations at Suffolk and Little Creek, Virginia.

You stated that Lieutenant Van Heertum is Special Warfare/EOD Projects Officer in the Mine Warfare Division, Headquarters Naval

Ordnance Systems Command, whose mission is to exercise guidance to the lead laboratories in the prosecution of Swimmer Weapons System and Explosive Ordnance Disposal Equipments. In carrying out that mission, he must evaluate items developed under the program under operational conditions. You say that he participated in such evaluation during training exercises conducted by UDT-21 and SEAL Team Two held in February and May 1970 at Suffolk Municipal Airport, Suffolk, Virginia.

You asked whether payment for parachute duty in addition to payment of demolition duty may be made in the situations described above, provided all other requirements are met.

Section 301, Title 37, United States Code, provides in pertinent part that:

(a) Subject to regulations prescribed by the President, a member of a uniformed service who is entitled to basic pay is also entitled to incentive pay, in the amount set forth in subsection (b) or (c) of this section, for the performance of hazardous duty required by orders. For the purposes of this subsection, "hazardous duty" means duty—

* * * * * * *

(6) involving parachute jumping as an essential part of military duty;

* * * * * * *

(8) involving the demolition of explosives as a primary duty, including training for that duty;

* * * * * * *

(e) A member is entitled to not more than two payments of incentive pay, authorized by this section, for a period of time during which he qualifies for more than one payment of that pay.

Executive Order No. 11157, June 22, 1964, as amended, provides in pertinent part as follows:

Sec. 108. (a) As used in section 301(a) of title 37 of the United States Code, the term "duty involving parachute jumping as an essential part of military duty" shall be construed to mean duty performed by members who, under such regulations as the Secretary concerned may prescribe, have received a rating as a parachutist or parachute rigger, or are undergoing training for such a rating, and who are required by competent orders to engage in parachute jumping from an aircraft in aerial flight.

* * * * * * *

Sec. 109. As used in section 301(a) of title 37 of the United States Code—

* * * * * * *

(b) The term "duty involving the demolition of explosives" shall be construed to mean duty performed by members who, pursuant to competent orders and as a primary duty assignment (1) demolish by the use of explosives underwater objects, obstacles, or explosives, or recover and render harmless, by disarming or demolition, explosives which have failed to function as intended or which have become a potential hazard; (2) participate as students or instructors in instructional training, including that in the field or fleet, for the duties described in clause (1) hereof, provided that live explosives are used in such training; (3) participate in proficiency training, including that in the field or fleet, for the maintenance of skill in the duties described in clause (1) hereof, provided

that live explosives are used in such training; or (4) experiment with or develop tools, equipment, or procedures for the demolition and rendering harmless of explosives, provided that live explosives are used.

* * * * * * *

Sec. 112. Under such regulations as the Secretary concerned may prescribe, a member who performs multiple hazardous duties under competent orders may be paid not more than two payments of incentive pay for a period of time during which he qualifies for more than one such payment. Dual payments of incentive pay shall be limited to those members who are required by competent orders to perform specific multiple hazardous duties in order to carry out their assigned missions.

Sec. 113. The Secretaries concerned are hereby authorized to prescribe such supplementary regulations not inconsistent herewith as they may deem necessary or desirable for carrying out these regulations, and such supplementary regulations shall be uniform for all the services to the fullest extent practicable.

Paragraph 20305, Department of Defense Military Pay and Allowances Entitlements Manual, provides in pertinent part that:

Members who qualify for incentive pay for more than one type of hazardous duty may receive no more than two payments for the same period. Dual incentive pay is limited to those members required by orders to perform specific multiple hazardous duties necessary for successful accomplishment of the mission of the unit to which assigned. A member who is under competent orders to perform more than one hazardous duty, but is entitled to only one type of incentive pay, may receive payment for the hazardous duty for which the higher rate of incentive pay is authorized, even though that hazardous duty is not the primary duty of his current assignment.

* * * * * * *

b. Types of Duties That Qualify Members for Dual Payment of Incentive Pay:
(1) Members assigned to pararescue units, who are required to perform parachute jumping in addition to and in connection with explosive ordnance demolition duties.

While it appears that both Commander Barnes and Lieutenant Van Heertum are former members of SEAL teams and are trained in parachute jumping and demolition of explosives, it is not established that at their present staff billets they are required by competent orders to perform either of those hazardous duties for the successful accomplishment of the missions of the units to which they are assigned. We understand that the proper performance of their present duty assignments requires knowledge of and experience in parachuting and demolition of explosives, and that to properly evaluate the training programs and equipment items developed in those assignments they may be required to observe actual training exercises of special warfare forces. However, the extent of their participation is not shown.

It is clear from the quoted provisions of law and regulations that in order to be entitled to dual hazardous duty incentive payments, a member must be actually involved in the performance of two or more hazardous duties required to accomplish the mission of his unit, any one of which hazardous duties would place him in a status entitling him to incentive pay for that duty. See 43 Comp. Gen. 667 (1964); 44 *id.* 426 (1965); 47 *id.* 728 (1968).

In order to be entitled to incentive pay for hazardous duty involving jumping as an essential part of military duty, the member involved must be in a jump status and be required by competent orders to engage in parachute jumping from an aircraft in aerial flight. In order to be entitled to incentive pay for hazardous duty involving the demolition of explosives, the member must be required by competent orders, and as a primary duty assignment, to demolish by explosives and actually perform such other duty as will meet all the stipulated requirements of the law and regulations.

We do not view the duties of the staff billets to which the officers are assigned as qualifying them for incentive pay for any type of hazardous duty. In order for them to be entitled to hazardous duty pay in connection with duty performed with an operational SEAL team, to evaluate training procedures and the effectiveness of equipment, it would be necessary for them to be "assigned" to the team and actually perform hazardous duties pursuant to competent orders requiring parachute jumping and demolition of explosives. Mere evaluation or observation of the operational SEAL team activities would not qualify them for such pay; and in the absence of proper orders, any parachute jumping or demolition of explosives actually performed by the officers would not entitle them to additional pay.

Your question is answered accordingly.

[B-171273]

Pay—Retired—Retention After Age and Service Qualifications—Service Credits—Basis for Retention

The retention beyond age 60 of an Air Force sergeant under paragraph 14o(2) of the Air National Guard Regulation 39–10 to permit him to complete 26 years of military service for pay purposes in recognition of "long and distinguished military service" would not satisfy the requirement of 10 U.S.C. 676 that the Secretary concerned order a retention in service for the purpose of acquiring additional service credits only if the services are a military requirement; and the sergeant retired under 10 U.S.C. 1331 and 1401, and authorized retired pay on the basis of "with over 22 but less than 26 years" of non-Regular service, therefore, is not eligible for retired pay computed at the pay rate of over 26 years of military service.

To Major N. C. Alcock, Department of the Air Force, December 22, 1970:

Further reference is made to your letter dated October 13, 1970, which was forwarded here by letter dated November 9, 1970, from Headquarters, United States Air Force, requesting an advance decision as to the propriety of payment of a voucher in the amount of $115.37 in favor of Master Sergeant Victor Caballero, 454 48 5424, USAF, retired, representing additional retired pay for the period from March 1, 1970, to August 31, 1970. Your submission has been

assigned Air Force Request No. DO–AF–1102 by the Department of Defense Military Pay and Allowance Committee.

On December 10, 1969, the Commander, 149th Tactical Fighter Group, Air National Guard, Kelly Air Force Base, Texas, requested that a 30-day waiver be granted to Sergeant Caballero, under the provisions of paragraph 14o(2) of Air National Guard Regulation 39–10, allowing him to be retained beyond age 60 to permit him to complete 26 years of military service for pay purposes. He stated that Sergeant Caballero would be 60 years of age on January 23, 1970, and that since the latter would complete 26 years of military service on February 11, 1970, he should be discharged on that date. The request for waiver was made for the reason that it was felt "special consideration should be given in this case." By first endorsement dated December 22, 1969, the Adjutant General of Texas recommended favorable consideration of the request for waiver "in view of this individual's long and distinguished military service as a Guardsman/Air Technician."

On January 15, 1970, Sergeant Cabellero made application for retired pay for non-Regular service under the provisions of 10 U.S.C. 1331, effective March 1, 1970. You say that he was retained past age 60. It is not shown that such retention was by order of the Secretary of the Air Force, the Chief, National Guard Bureau, or any other officer having authority to order such a retention pursuant to 10 U.S.C. 676.

Retirement pay order, Reserve Order EL–426, dated July 9, 1970, issued by Headquarters, Air Reserve Personnel Center, Denver, Colorado, provided that effective February 28, 1970, Sergeant Caballero was placed on the United States Air Force Retired List and authorized retired pay under 10 U.S.C. 1331 and 1401, effective March 1, 1970, in the grade of master sergeant. He was credited with 25 years 11 month 10 days of service for basic pay and 10.11 years of service under 10 U.S.C. 1333 for the purpose of computing his retired pay.

Sergeant Caballero has apparently been paid retired pay computed on the basis of the monthly basic pay of the grade of master sergeant with over 22 but less than 26 years of service. The voucher forwarded with your letter representing retired pay "withheld pending longevity determination" apparently is for the difference between retired pay received and that which would be due if his retired pay may be computed on the basis of the monthly basic pay of a master sergeant with over 26 years of service. You express doubt as to whether retention in this case was in accordance with the above-cited regulations and whether Sergeant Caballero is eligible for retired pay computed at the pay rate of over 26 years of military service "on the basis of the waiver granted by the National Guard Bureau."

Chapter 67, Title 10, U.S. Code, authorizes payment of retired pay for non-Regular service, upon application, to a person who is at least 60 years of age and has performed at least 20 years of qualifying service as specified in that chapter. Section 676, Title 10, U.S. Code, provides:

> Any person who has qualified for retired pay under chapter 67 of this title may, with his consent and by order of the Secretary concerned, be retained on active duty, or in service in a reserve component other than that listed in section 1332(b) of this title. A member so retained shall be credited with that service for all purposes.

Paragraph 14, Air National Guard Regulation 39–10, provides in pertinent part as follows:

> 14. Convenience of the Government. All discharge criteria outlined below are considered to be within the term "convenience of the Government." However, the term "convenience of the Government," when cited in administrative actions as reason for discharge, *must* be followed by the specific reason for discharge, as determined by the appropriate subparagraph, below:
>
> * * * * * * *
>
> "o. Attainment of age 60, except for the following circumstances:
>
> * * * * * * *
>
> (2) An airman who has received approval from the Chief, National Guard Bureau, for retention before his 60th birthday when he will become eligible for retired pay, may be retained until his 62d birthday, provided that he is otherwise qualified. Request for waiver will be based upon military requirements and will be submitted through ANG channels to the National Guard Bureau (NG–AFPMA) at least 90 days before airman's 60th birthday.

In our decision 38 Comp. Gen. 146 (1958) in answer to question 5(c) as to what would be the requisites of an order of the Secretary concerned which would accomplish a valid retention under 10 U.S.C. 676, we said "We think that the several Secretaries may control the performance of service by members after attaining age 60 by any method they may deem appropriate, whether by general directives or otherwise." Our answer was intended to go no further than to say that individual orders were not required, that general Secretarial orders, such as an order authorizing or directing the retention of specialists of a certain class, for example, would meet the requirements of the statute.

In our decision 38 Comp. Gen. 647 (1959) we stated that unless it reasonably may be concluded in any case that the member was "retained" under an order, instruction, or regulation issued by the Secretary, service performed by the member after becoming qualified for retirement pay is not within the scope of 10 U.S.C. 676. We have long held the view that the statute was intended to have a limited application to permit additional service in those cases in which, because of some special qualification, ability, or situation, the Secretary concerned orders the member's retention. See 41 Comp. Gen. 375 (1961). In line with that view, the above-quoted regulations contemplate a retention under section 676 only in situations where "military requirements" suggest the advisability of such action. We have found nothing which

would indicate that the Congress intended such retention after age 60 might be ordered merely because the member requested an extension or for the specific purpose of increasing a member's retired pay as a reward for "long and distinguished military service."

Paragraph 22 of Air National Guard Regulation 35–01 provides that placement of members of the Air National Guard on the United States Air Force Retired List will be in accordance with Air Force Manual 35–7. Paragraph 9–7 of the latter regulations provides that:

> Authority to approve applications for retired pay benefits under this chapter is vested in the Secretary of the Air Force. ARPC has been delegated approval authority for members not on extended active duty and for individuals who do not have military status. When application is prepared and forwarded as shown in table 9–3, AFPMARB or ARPC will notify the applicant if he does not meet the eligibility requirements in this chapter, or publish orders placing him on the USAF Retired List and certify him to AFAFC for retired pay.

The right to non-Regular retired pay does not accrue until application for such pay is made by the member and the right to such pay accrues, subject to the provisions of 5 U.S.C. 8301, from the date of qualification unless the application specifies a later date. See 38 Comp. Gen. 146 (1958), answer to question 4. However, military service subsequent to date of qualification may not be credited in the computation of the member's retired pay unless he was validly retained under the provisions of 10 U.S.C. 676. While the retirement order of July 9, 1970, directed that Sergeant Caballero's name be placed on the retired list effective March 1, 1970, in accordance with his request, there is no indication that he was retained "in service in a Reserve component" pursuant to 10 U.S.C. 676, nor is it shown that the Air Reserve Personnel Center has authority to order such retention. It is not shown that a waiver was granted to him by the National Guard Bureau "based upon military requirements." Paragraph 14o(2), ANGR 39–10, alone is not an "order of the Secretary concerned" such as would satisfy the requirements of 10 U.S.C. 676 in an individual case.

Accordingly, in the absence of evidence that Sergeant Caballero received approval from the Chief, National Guard Bureau for retention beyond his 60th birthday pursuant to 10 U.S.C. 676 in accordance with the regulations, there is no authority for counting service after January 22, 1970, for basic pay purposes in the computation of his retired pay. There being no present authority for payment on the voucher, it will be retained here.

[B–171458]

Transportation—Household Effects—Military Personnel—Release From Active Duty—To Other Than Selected Home

A member of the uniformed services who was retired at his last duty station in Europe, and incident to selecting Australia as his future home has his house-

hold effects crated and temporarily stored at Government expense at the old duty station to which he shortly returned from Australia and then had his goods redelivered to his quarters, is pursuant to paragraph M8100 of the Joint Travel Regulations indebted for the charges erroneously paid by the Government. However, since the temporary storage costs are the member's responsibility, he is entitled under paragraph M8260-1 of the regulations incident to the retirement orders to the shipment of his effects to the United States within prescribed weight and 1-year period limitations, any excess cost over the cost that would have been incurred in shipment of the effects to the home of selection in Australia to be paid by the member.

To the Secretary of the Army, December 22, 1970:

By letter of November 25, 1970, the Assistant Secretary of the Army requested a decision as to the entitlement of a member of the uniformed services to ship his household effects to a location other than his home of selection under the described circumstances. The request was assigned Control No. 70–54 by the Per Diem, Travel and Transportation Allowance Committee.

The circumstances are that the member was retired on February 1, 1970, while stationed in Verona, Italy. He named Sydney, Australia, as his home of selection and traveled to that place with his dependents at Government expense. Shortly thereafter, for personal reasons, he decided not to remain in Australia and returned to Verona, Italy, at personal expense. Upon departure from Verona, incident to the travel to his selected home, the member had his household effects packed, crated, and placed in temporary storage at Government expense. Upon return to Verona and before shipment had commenced, the member canceled his request for shipment and had his household goods returned to his quarters in Verona at Government expense including unpacking and uncrating. He now requests authority to ship his household goods to the United States.

The Assistant Secretary says the following questions have arisen in connection with this case:

1. Did the member exhaust his entitlement to shipment of household goods by the redelivery of household goods to him at point of origin?
2. If reply to question 1 is in the negative, may the member be permitted, within the time limit and under the conditions prescribed in JTR par. M8260-1, to ship his household goods to the United States?
3. If reply to question 2 is in the affirmative, is the member required to reimburse the Government for all costs incident to pickup, storage, and redelivery of household goods at Verona?
4. If reply to question 1 is in the affirmative, may the member regain his shipping rights by reimbursing the Government for all costs of accessorial services and temporary storage experienced to date?

The transportation of household goods of members of the uniformed services is authorized by 37 U.S. Code 406. That section provides that in connection with a change of station a member shall be entitled to transportation, including packing, crating, drayage, temporary storage, and unpacking of baggage and household effects to and from locations as may be prescribed by the Secretaries. The movement from last duty station to home is considered a change of permanent station

for the purpose of those provisions. This entitlement is subject to regulations prescribed by the Secretaries concerned. Those regulations are contained in Volume 1 of the Joint Travel Regulations.

As provided in the law, paragraph M8100 of the Joint Travel Regulations authorizes temporary storage only in connection with a shipment of permanent change-of-station weight allowance of household goods. It further provides that temporary storage is not authorized in connection with an intracity movement of household goods and that the member will bear all costs of temporary storage when household goods placed therein pursuant to permanent change-of-station orders are not shipped under such orders. It long has been held that the statute and regulations do not authorize temporary storage as a service separate and distinct from transportation, but merely as an incident of transportation. See 34 Comp. Gen. 45 (1954).

Since the member here involved did not ship his household effects under his retirement orders but merely had them placed in temporary storage from which they were returned to his quarters in the same city, there was no authority for payment of any of the charges incurred and such payment was erroneous. Therefore, the amount paid should be collected from the member.

Section 406(g) of Title 37 U.S. Code, provides that under regulations prescribed by the Secretaries, a member who is retired is entitled to transportation for his dependents, baggage, and household effects to the home selected by him for his own travel under section 404(c) of that title. That section also provides that baggage and household effects may be shipped to a location other than the home selected by the member and that in any such case in which the costs are in excess of those which would have been incurred if shipment had been made to his selected home, the member shall pay that excess cost.

Based on that provision of law, paragraph M8260–1 of the Joint Travel Regulations authorizes shipment of household goods to a place other than the member's home of selection or part to such home and part to some other place, provided that the member shall bear all costs in excess of the costs of shipment in one lot to his home of selection.

Since, under the governing regulations, the costs incident to the temporary storage of the effects are the responsibility of the member, it is concluded that there has been no shipment of household effects incident to the orders directing his retirement.

Therefore, the member's household goods, within prescribed weight limitations and within 1 year of his retirement, may be shipped to a point in the United States. Any excess cost incurred in such shipment over the cost which would have been incurred in shipment to Sydney, Australia, is for payment by the member.

The questions presented are answered accordingly.

[B-166302]

Claims—Assignments—Fraud Perpetrated by Assignor—Government's Liability

Since under the Assignment of Claims Act of 1940, as amended, the Government is not an insurer as to fraudulent schemes devised by an assignor against an assignee, nor is the Government required to involve an assignee in matters of contract administration, a claim for the amount of fictitious invoices presented by the assignee of a drayage company performing services for the Government, which were retrieved by the assignor prior to payment, may not be honored as the record presents no grounds to impute negligence to or assert estoppel against the Government, but instead raises doubt as to the validity of the assignee's claim. Although the claim must be rejected, as the jurisdiction of the General Accounting Office to pay claims is based upon the legal liability of the United States, the assignee's right to seek a judicial determination of its claim is not prejudiced.

To Orlow and Orlow, December 28, 1970:

Reference is made to your letter of July 10, 1970, and prior correspondence, wherein you assert on behalf of Produce Factors Corporation (Produce) a claim in the amount of $77,272.60, subject to adjustment, depending upon the method of computing further damages.

The claims arise out of the assignment to Produce of the proceeds of Government contracts held by Terminal Warehouses, Inc. (Terminal). One of the contracts (F28609-68-C-0215) was with McGuire Air Force Base, New Jersey, and covered that installation's requirements for local drayage of household goods of service members in a total estimated amount of $13,519.50, for the period of February 20, 1968, through December 31, 1968.

Your claim also covers miscellaneous purchase orders issued by the United States Army Training Center, Fort Dix, New Jersey, for local drayage provided service members under paragraph 8309-2 of the Joint Travel Regulations. The purchase orders were issued by Fort Dix as the need arose, rather than pursuant to a blanket contract covering the installation's estimated needs for a definite period. The Department of the Air Force and the Department of the Army reports concerning Produce's claim show that the circumstances involved in both situations are substantially the same and, accordingly, we will indicate only factual variances deemed important.

You assert, and we will assume, that Produce is engaged primarily in credit extension and lending operations. See 43 Comp. Gen. 138, 139 (1963), and cases cited therein, which considered the term "financing institution" as used in the Assignment of Claims Act. See, also, 22 Comp. Gen. 44 (1942). It appears that Produce initially made a loan to Terminal in February 1968 on the security of a judgment note. Shortly thereafter, Terminal's president requested additional funds from Produce and offered as security the assignment of proceeds of Government contracts. After Produce satisfied itself as to the existence

of Terminal's contractual relationships with the Government, the assignments were executed. You have advised us that Produce's investigation consisted of a personal visit to Fort Dix and McGuire Air Force Base to verify Terminal's contracts and to ascertain if they were assignable. At these installations, Produce inquired as to the procedure necessary to comply with the Assignment of Claims Act of 1940, as amended, 41 U.S.C. 15.

In connection with the foregoing, section 3477 of the Revised Statutes (31 U.S.C. 203) provides that—

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, * * * shall be absolutely null and void * * *.

An exception to this rule was made by the Assignment of Claims Act of 1940, as amended, which permits the assignment to a "bank, trust company, or other financing institution," of moneys due or to become due under certain contracts aggregating $1,000 or more. The act requires that notice of an assignment, together with a true copy of the instrument of assignment, must be furnished to the Government contracting and disbursing officers.

The record shows that McGuire Air Force Base received and acknowledged the notice of assignment to Produce under contract No. -0215 on March 15, 1968. Similar notice was given to Fort Dix to have moneys due Terminal to be mailed to Produce. In accordance with the arrangement between Terminal and Produce, Terminal would present invoices(in duplicate) to Produce for services performed by Terminal for the Government, together with a personal receipt of service signed by the service member for whom the invoiced services were performed. At the same time, Produce was provided with a schedule listing the invoices to be discounted. Produce would then immediately pay by check 38 percent of the amount shown in the scheduled invoices to Terminal. Thereafter, each invoice was stamped with the following legend:

> This bill is assigned to and payable in Philadelphia funds only to our factors: to whom notice must be given of any merchandise returns or claims for shortage, non-delivery, or for other grounds.
>
> Assignment Acknowledged
> s/ JOEL DREER
> Authorized Signature

The subject invoices and the evidences of receipt of service were then sent by Produce to either the Commercial Transportation Office, McGuire Air Force Base, or the Household Goods Section, Fort Dix. The administrative reports indicate that when invoices for local drayage were received, office personnel would examine the invoices and supporting documentation to determine whether the services were per-

formed. Verified invoices would then be forwarded to the installation's finance office for final processing and payment in accordance with the assignment.

It appears that commencing some time in April of 1968, Terminal began submitting fictitious invoices to Produce which, in accordance with the procedure described above, were discounted and forwarded for collection. However, the president of Terminal managed to retrieve these fictitious invoices before they could be processed by the installation to which they were sent. This was accomplished by telephone calls to the Household Goods Section or the Commercial Transportation Office advising that there were errors in the invoices submitted to the installation, or that the invoices had been forwarded to the wrong installation. The telephone calls would then be followed by personal visits to the office involved to pick up the invoices. This practice went undetected until June 17, 1968, when the scheme was admitted to Produce by Terminal's president.

You advise that during the term of Produce's relationship with Terminal, a total of $79,975.38 was advanced to Terminal as against invoices totaling $89,636.64 assigned to the claimant. Of these invoices, McGuire paid $2,964.96 and Fort Dix paid $9,355.68 and, with adjustments for certain credits due McGuire, payments to Produce total $12,364.04. The difference between the invoices submitted and the amount paid yields the basic amount of the claim. With respect to Fort Dix, $274.05 has not been paid because required evidence of performance has not been submitted. Also, McGuire has withheld $1,032 for reprocurement cost incident to termination of Terminal's contract.

Generally, the position of both the Army and the Air Force is that Produce as an assignee accedes to no greater rights than those possessed by the assignor. It is urged that Produce "stands in the shoes" of Terminal insofar as the United States is concerned and, since no services were performed by Terminal for the benefit of the United States under the fictitious invoices, Produce has no valid claim against the United States. Specific attention is drawn to *Arlington Trust Co.* v. *United States*, 100 F. Supp. 817 (Ct. Cl. 1951), which involved the question of whether an innocent assignee had any right to recover on nonfraudulent elements of the contractor-assignor's termination claim, which claim had been forfeited pursuant to the False Claims Act, 28 U.S.C. 2514. The court concluded that the assignee could recover, to the extent of its interest, upon proof of the amount to which the contractor would have been entitled but for its fraud. See, also, *Chelsea Factors, Inc.* v. *United States*, 149 Ct. Cl. 202, 181 F. Supp. 685. It is suggested that the implication of the court's decision is that as to the fraudulent elements there could be no recovery by the assignee under any circumstances.

You, nevertheless, contend that in general commercial law it has also been held in certain circumstances that the conduct of the debtor or obligor may give rise to an equitable estoppel in favor of the assignee, citing 3 Williston on Contracts, Third Edition, section 432 (1960), and cases noted therein, particularly *Simmons* v. *Smith County Bank*, 83 So. 2d 441 (1955).

Alternatively, you urge that Produce is entitled to recover on a theory of "promissory estoppel." 1 Williston, *supra*, section 140; 1A Corbin on Contracts section 204 (1963); Restatement (Second), Contracts section 90. As outlined in your letter of February 24, 1969, the "promissory estoppel" arises since—

> the acceptance of the assignment under 41 U.S.C. § 15 * * * was the government's promise to pay claimant on the basis of which it should reasonably expect Produce Factors to act by advancing funds to Terminal, and to forebear by not seeking payment from Terminal directly. Claimant's reliance was substantial * * *. Injustice can be avoided only if the promisor makes the promised payment. Since there was benefit to the government this result is fair and equitable. 1A Corbin on Contracts § 203.

In the *Simmons* case, *supra*, the court applied the doctrine of equitable estoppel in view of a *deliberate* concealment from a bank of the operating circumstances of an assignment. However, the *Simmons* case involved two significant elements not present here; namely, knowledge of the particular circumstances of the underlying agreement between the assignor and assignee lender and a *willful* nondisclosure of critical information in light of this knowledge.

With respect to the estoppel theory, you have also cited *Travelers Insurance Company* v. *Tallahassee Bank and Trust Co.*, 133 So. 2d 463 (1961), cert. den., 138 So. 2d 332 (1962), and *Exchange and Savings Bank of Berlin* v. *United States*, 226 F. Supp. 56 (1964). However, in *Travelers*, the insurance company was estopped to deny its liability since the assignee creditor acquired full title to the security involved and a greater duty was imposed on the insurance company than on the Government in the circumstances of this claim. In the *Exchange* case, the issue was whether the Government could validly assert a statute of limitations, not in issue here, as an absolute defense.

It is conceded that the substance of the instant claim is not a subject of the Uniform Commercial Code. The code covers security interests created in existing transactions, and not frauds perpetrated on lenders, such as the Produce-Terminal situation here involved. However, you contend, in essence, that where one of two innocent parties must suffer by a fraud perpetrated by another, the law imposes the loss upon the party who, by his misplaced confidence, has enabled the fraud to be committed. In effect, you are imputing negligence in carrying out an express duty to the Government. We cannot agree with this assertion.

It is a well-established general proposition that the United States is not estopped by the acts of its agents. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408–409 (1916). We recognize that exceptions have been made in certain cases, none of which is, in our opinion, directly in point. Moreover, we believe that the circumstances of record do not present grounds for the successful assertion of an estoppel. See *United States* v. *Hal B. Hayes & Associates, Inc.*, 221 F. Supp. 260, 264 (1963); *United States* v. *Standard Oil Company of California*, 20 F. Supp. 427, 452 (1937).

It is administratively reported that the Government was not in a position to determine that the invoices submitted by Terminal through Produce were fictitious. It is stated that at both installations it was not an uncommon practice for contractors to retrieve invoices on the ground that some error had been committed in their preparation. Thus, it is suggested that no suspicions were aroused, nor would it be reasonable to assume that they should.

You further point out in your letter of September 16, 1969, that the administrative position does not address itself to the fact that every invoice was endorsed in favor of Produce, thereby clearly indicating Produce's interest, and you urge that, in any event:

> Even had there not been such endorsement, the Government would have been held responsible for knowledge that claimant had an interest in those invoices. The nature of the relationship also makes known to the Government that, based upon the processing of prior invoices, the claimant would continue to advance future funds to the contractor. The claimant would continue to rely upon the Government's administering its business in an orderly fashion to the extent that it would advance cash to the contractor. This is an object specifically contemplated by statute and encouraged by the Government.

Here, the Government's obligation under the Assignment of Claims Act is generally to pay the assignee all proceeds *due* the contractor-assignor, and fulfillment of this obligation requires the existence of adequate procedures. *Cf. United States* v. *Mailet*, 294 F. Supp. 761, 767–768 (1968). There is, then, an initial representation that procedures exist for payment, but there is no representation that all invoices, etc., submitted are *properly* for payment. You apparently concede this point and, in any event, reference to *Arlington Trust Co.* and *Chelsea Factors, Inc.*, cited above, confirms this latter point.

Moreover, we must note that the financial institution advancing funds assumes a business risk that its security interest may be impaired. In this connection, there can be no argument that if the invoices had been processed and rejected, Produce's recourse for any resultant loss would be solely against Terminal. The thrust of your argument is that the conduct of the administrative personnel in handling the invoices was so improper that the risk of loss should fall on the United States. Essential to your argument is the suggestion that the particular cir-

cumstances of your underlying agreement with Terminal may be imputed to the Government personnel. It must be conceded, of course, that an assignment in compliance with the act indicates an underlying financial arrangement between the assignor and assignee. But, for example, whether the assignee advances to the contractor the entire amount agreed upon at the time of the assignment, or whether, as occurred here, sums are advanced periodically, is a matter within the control of the parties. Further, nothing in the assignment agreement provides a basis for determining which of the illustrative situations is present. In our view, the question resolves itself into a consideration of whether it was proper to permit Terminal to recover the invoices for any representation that may be suggested from the administrative silence in handling the invoices assumes that return thereof is improper without notifying Produce at the same time. As we have indicated, an affirmative answer to this question is more easily reached if the Government is a guarantor and is charged with knowledge of the underlying agreement between the parties. But it is not, and, as a general matter, in the course of dealing with a contractor, we find nothing in the Assignment of Claims Act which requires the Government to involve the assignee in matters of its contract administration.

The administrative reports maintain that it was not unusual for contractors to request return of invoices. From a perspective that includes knowledge of Terminal's scheme, it is easy to observe that Produce's damage would not have been as great if the invoices had not been returned, but this fact is not determinative of the question of whether the return was improper. The invoices and supporting documentation are the contractor's evidence that the services have been performed, as well as the basis upon which the assignee will eventually be entitled to payment. Thus, as a matter of contract administration, we do not believe that it was unreasonable for the Government personnel to honor the contractor's request for return. Viewed in this light, the *assignor's* endorsement on the invoices is not inconsistent with a right to return such invoices, and we cannot say that the endorsement's demand that notice be given to the assignee of "any merchandise returns or claims for shortage, nondelivery, or for other grounds" was applicable to the situation or, in any event, requires more than such notice as would occur in the normal course of administrative processing.

The administrative reports maintain that Government personnel were not aware of Terminal's scheme, nor is it indicated that they became suspicious of the scheme because of Terminal's repetitious allegations of error. In view of this advice, no basis is presented for concluding that their subsequent conduct gave rise to an estoppel and, in our

opinion, such a determination would require a trial-type investigation, which we are not equipped to conduct.

Moreover, while our discussion has been confined solely to a consideration of the actions of Government personnel during the period in question, we cannot ignore the conduct of Produce during that period, and we must also acknowledge a doubt as to whether such conduct evidences a reasonable diligence in ascertaining the true facts and circumstances. It does not appear that Produce attempted to determine the scope of Terminal's contractual relationships with the Government, and there is no showing that such information was not reasonably accessible. The impact of such conduct is illustrated by the Air Force argument that a consideration of the estimated annual value of McGuire's contract with Terminal in light of the dollar volume of the invoices discounted by Terminal would give rise to the question of "why he, the factor, would be paying invoices amounting to $50 or $60,000 in a period of a few short months on a contract with an estimated annual requirement amounting to $13,000 with an expected outlay of approximately $1,200 a month."

In view of the failure to investigate, reliance by Produce on the Government's normal billing period as justification for continuing to advance funds to Produce is not controlling. In this connection, you have maintained that normally payment for all undisputed invoices was received within 30 to 45 days. The Air Force report takes exception to this point and maintains that in each instance McGuire took advantage of the discount provided in its contract with Terminal for payment within 20 calendar days.

That part of Produce's claim involving the assignment of "miscellaneous purchase orders" at Fort Dix raises the question of the validity of the purported blanket assignment of purchase orders under $1,000 in amount. It is recognized that the Government may elect to honor the assignment of a purchase order by paying the proceeds to the purported assignee. *Maffia* v. *United States*, 143 Ct. Cl. 198, 163 F. Supp. 859, 862 (Ct. Cl. 1958); *Benjamin* v. *United States. Union Minerals & Alloys Corp.*, 162 Ct. Cl. 47, 318 F. 2d 728 (Ct. Cl. 1963). However, in view of the express language of the Assignment of Claims Act, there must be definite commitment on the part of the Government to order services requiring a minimum expenditure of $1,000 in order for payments under the contract to be assignable. 23 Comp. Gen. 989 (1944). Therefore, each purchase order at Fort Dix must be viewed as a separate contract subject to the requirements of the act. The absence of a valid assignment would negate the initial suggestion that the conduct of the Government in implementing the Assignment of Claims Act gives rise to an estoppel.

In summary, any rights which Produce may have must come from the Assignment of Claims Act of 1940 which removed the bar against assignment of claims embodied in sections 3477 and 3737 of the Revised Statutes and authorized assignments to a financing institution of "moneys due or to become due from the United States." There is no provision of the Assignment of Claims Act, or any regulation promulgated thereunder, which would impose an obligation upon the Government to keep an assignee currently apprised of the assignor's performance or management procedures under its contract, and we are unable to conclude that Government personnel were tortiously negligent in their relationships with Produce.

Conversely, the history of the Assignment of Claims Act prior to its amendment by the act of May 15, 1951, 65 Stat. 41, indicates that the Congress intended nothing more than that an assignee should "stand in the shoes" of the assignor; that an assignment could not convey any greater rights to the amounts due under the contract than the contractor possessed; and that an assignee making advances on the strength of the assignment assumed the risk of failure of the contractor to fulfill his contractual obligations. *Hardin County Savings Bank et al.* v. *United States*, 106 Ct. Cl. 577 (1946); 35 Comp. Gen. 149 (1955). Nothing in the act indicates an intent to make the Government an insurer as to fraudulent schemes devised by an assignor as against an assignee.

As its best, the record raises substantial legal doubts as to the validity of Produce's claim. The jurisdiction of our Office in the payment of claims is limited to those claims which are clearly based upon *legal* liability of the United States. *Longwill* v. *United States*, 17 Ct. Cl. 288, 291 (1881); *Charles* v. *United States*, 19 Ct. Cl. 316, 319 (1884).

We see no such liability in the instant case and, in the circumstances, our Office must reject Produce's claim. 33 Comp. Gen. 394 (1954); 46 *id.* 409 (1966). Our action is, however, in no way prejudicial to Produce's right to seek a judicial determination of its claim.

[B–170969]

Checks—Endorsement—Other Than Payee—Tax Refund

The liability for the proceeds of an income tax refund check bearing only the initials of husband and wife still married but separated at the time of endorsement by the husband and deposited in a joint account with his mother, whose initials were similar to the wife's, is for determination by Federal and not State law in the interest of uniformity. Although the use of the initials did not facilitate the forgery and ordinarily the cashing bank would be required to refund one-half of the check, as in the "same name cases," reclamation proceedings against the bank are not required since a joint income tax is treated as the return of a single individual and payment to the husband as one of the joint

obligees extinguished the liability of the Government for the tax overpayment, and the ownership rights of the spouses are for determination by local law in an appropriate proceeding.

To the Commissioner of Internal Revenue, Department of the Treasury, December 28, 1970:

Reference is made to a letter of September 14, 1970, from the Chief Counsel, Internal Revenue Service, requesting reconsideration of our Claims Division settlement of April 22, 1970, to the District Director of Internal Revenue, Los Angeles, California, which authorized payment to Marie Leavenworth of $241.70, representing one-half of the amount of an income tax refund check issued to F. L. & M. Leavenworth on November 2, 1966. The letter states that the Chief Counsel has instructed your Western Region Service Center not to make payment until he has resolved the question of whether the United States has been absolved of liability.

This matter was initially referred to the General Accounting Office by the Check Claims Division, Treasurer of the United States, on December 28, 1967. The record before us shows the following chronology of events. In April 1966, a joint Federal income tax return for the year 1965 was filed by Frank L. and Marie Leavenworth, husband and wife, who were residents of California. In August 1966 the parties separated. On November 2, 1966, a refund check in the amount of $483.40 was issued to the order of F. L. & M. Leavenworth and, on instructions from the husband, was mailed to his mother's address in Long Beach, California. Frank L. Leavenworth admits that he received the check and endorsed it in the names of both payees, and deposited it in a joint account with his mother, which he opened on November 14, 1966, at the Farmers and Merchants Bank of Long Beach, California, in the names of "Frank L. or M. A. Leavenworth." He states that he used the check proceeds to pay joint debts of the marriage, incurred while he and his wife were living together.

Although divorce proceedings had been started and a show cause hearing had been held, the parties were still married at the time when the check was issued and negotiated.

In February 1967, Marie Leavenworth notified Internal Revenue Service that she had not received the refund check and had not endorsed it or authorized its endorsement. Subsequently, she filed a claim for $241.70, one-half of the refund check. She disputed her husband's statements that he had paid any bills on her behalf and asked that he be charged with forgery. The United States Attorney, however, declined to take action against him.

The record further shows that the Farmers and Merchants Bank refused the Treasurer's request for refund of $241.70, one-half of the amount of the check, on the ground that there was nothing on the

face of the check to place the bank on notice of the lack of entitlement of M. A. Leavenworth, the mother of co-payee Frank L. Leavenworth. In reply to a subsequent demand for refund, the bank stated that "the government was remiss by using only initials instead of full names to protect themselves." The Treasurer's Check Claims Division then advised us, on January 6, 1970, of its belief that the bank had obtained title to the check on the basis of the genuine endorsement of F. L. Leavenworth and an authorized endorsement in the name of the bank's depositor, M. Leavenworth, and it added that "had the check been properly drawn in the name of Marie Leavenworth, some basis may have existed for enforcing our demand; and we regard this vital omission as being the proximate cause of the problem, and determinative of the rights of the parties." Accordingly, in the view of the Special Assistant Treasurer, Check Claims Division, the facts did not justify referring the case to the Attorney General for litigation against the bank, and the file was resubmitted to our Claims Division for further consideration of Marie Leavenworth's claim.

By settlement dated April 22, 1970, the Claims Division agreed with the Special Assistant Treasurer that there was no basis for reclamation against the bank "since the check was negotiated by the persons whose initials are the same as shown on the face of the check * * *." Furthermore, the Claims Division advised the District Director of Internal Revenue, Los Angeles, California, that because "the proximate cause of the erroneous negotiation of the item was the failure of the issuing office to draw the check in the full names of the intended payees, Frank L. and Marie Leavenworth, and there is no indication that Marie Leavenworth, co-payee, was at fault in the matter, you are authorized to make settlement with Marie Leavenworth for $241.70, one-half of the amount of the check." As previously noted, the Chief Counsel has requested our review of this determination.

The first questions to be considered are whether the check was properly drawn and whether the indorsee bank is relieved of liability to the United States. It is clear that these questions are governed by Federal law rather than State law. In *Clearfield Trust Company* v. *United States*, 318 U.S. 363 (1943), the Supreme Court held that the rights and duties of the Government on the commercial paper it issues are governed by Federal rather than local law and that, in the absence of an act of Congress, the Federal courts must fashion the governing rules. The reasoning of the Court was as follows (*Id.* at 367):

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. * * *

The need for uniformity is equally applicable to the administration of the internal revenue laws and specifically to the issuance of income tax refund checks. The duty and liability of the United States should be the same regardless of the location of the taxpayer.

The *Clearfield Trust Company* decision also held that presentation of a Government check to the United States for payment with an express guarantee of prior endorsements amounted to a warranty of the genuineness of the signature of the payee, which is breached when the signature is forged, thus giving the Government the right to recover from the guarantor (*Id.* at 368–369). See *National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1944); *United States* v. *People's National Bank of Chicago*, 249 F. 2d 637 (7th Cir. 1957). Moreover, in *Fulton National Bank* v. *United States*, 197 F. 2d 763, 764 (5th Cir. 1952), it was held that a person with the same name as the payee, who accidentally or wrongfully comes into possession of a check, obtains no title to it, and the cashing bank was liable to the United States for payment on the forgery.

Under the principles of the foregoing cases, a *prima facie* case is made for reclamation by the Treasurer against Farmers and Merchants Bank because the bank received payment on the Leavenworth check from the Government on a forged endorsement. However, the bank has available the defense that the Government as drawer is required to bear the loss if its negligence facilitates the forgery. 10 C.J.S. Bills and Notes, § 494, p. 1090. Both the Special Assistant Treasurer and our Claims Division agreed with the bank that the issuance of the check with the initials rather than the full names of the payees facilitated the erroneous negotiation and rendered the bank free of liability for accepting the forged endorsement.

Income tax refund checks have been for many years drawn to payees identified only by their initials and last names. Although the use of initials may have facilitated the forgery here and use of the full names of payees would probably lessen the chance of erroneous negotiations, nevertheless, in the absence of a court decision to the contrary, we are unable to conclude that the use of initials rather than full names constituted negligence or that such use of initials was the proximate cause of the erroneous negotiation in the case before us. The endorsement of the wife's name was made without her authority and was a forgery for which the cashing bank ordinarily would be required to make refund to the Government, just as in the "same name" cases. However, in the view that we take of this claim, as set forth below, we agree that it is not necessary to pursue reclamation proceedings against the bank.

The Chief Counsel's letter further states that, with regard to joint returns permitted under section 6013 of the Internal Revenue Code

of 1954, "it has long been the position of the Internal Revenue Service that the husband and wife jointly and severally represent the person who made any overpayment in tax, and, therefore, that a refund or credit to either person will extinguish the liability of the United States for the overpayment." He concludes that the wife's claim against the Government has been satisfied by payment to the husband, one of the joint and several taxpayers.

A joint income tax return represents a single tax unit and is treated as the return of a single individual. *Helvering* v. *Janney*, 311 U.S. 189 (1940); *Taft* v. *Helvering*, 311 U.S. 195 (1940). In the event of overpayment, the Internal Revenue Service has ruled that both the husband and wife represent the person who made the overpayment within the meaning of section 6042 of the code and, therefore, that the amount of such overpayment may be credited against the separate tax liability of either spouse for a prior year. Revenue Ruling 56–92, March 12, 1956. Compare, however, *Maragon* v. *United States*, 139 Ct. Cl. 544, 153 F. Supp. 365 (Ct. Cl. 1957). Similarly, in *Matter of Illingsworth*, 56–2 U.S.T.C. Par. 10,004, 51 Am. Fed. Tax R. 1512 (D. Ore. 1956), the court rejected the wife's claim that she had become entitled to one-half of the tax refund check upon filing the joint return. The court noted that the Government in making a tax refund makes no attempt to determine what part of the refund should belong to the husband and what part to the wife, but leaves it to the recipients to decide how the refund shall be divided or used. The court, therefore, looked to the earnings of the parties and, since the husband had all of the income and withholding and the wife had none, the husband's trustee in bankruptcy was held entitled to the entire refund.

In accord is the decision of the New Jersey Probate Court, Camden County, in *In re Carson*, 199 A. 2d 407 (1964). The widow claimed part ownership of the tax refund under section 6013 of the Internal Revenue Code, but the court pointed out that the purpose of section 6013 was to equalize the tax burden for married persons in all States, whether community property or not, and that it was not intended to deal with ownership rights between taxpayers, but concerned itself with the efficient and orderly collection of Federal taxes. Since all of the income and withholding were the husband's, the refund belonged to his estate and not to his widow. The opinion concluded (*Id.* at 410):

> In conclusion, it is the finding of this court that the ownership rights to the overpayment of federal income taxes were not changed by the mere filing of a joint return by the executor and the widow of the deceased. The local law of personal property clearly applied and no evidence has been presented before this court which would contradict the assertions and proof that sole ownership of the overpaid funds rested in the deceased * * * and subsequently in his estate on his demise.

The foregoing cases demonstrate that one spouse does not become entitled to any specific part of the tax refund merely by virtue of the filing of a joint return. The respective ownership rights of the spouses in a joint tax refund are left to the parties themselves and, in the event of a dispute, are to be determined by local law in an appropriate proceeding. As the Chief Counsel's letter indicates, the Government is rarely, if ever, in a position to judge the respective rights of joint taxpayers; that is a matter of State law and dependent upon facts not known to the Internal Revenue Service. In the present case, for instance, we have no information as to whether the husband or the wife or both earned the income shown on the joint return, or as to the effect on their rights of a separation agreement or a divorce decree, if any.

A husband and wife filing a joint return are jointly and severally liable for any tax due, and they are joint obligees of any refund due. Although we have not found any Federal cases directly in point, the general rule is well settled that payment to one joint obligee extinguishes the debtor's entire liability (*Cober* v. *Connolly*, 128 P. 2d 519, 142 A.L.R. 367 (Cal. 1942); 2 Williston on Contracts, 3rd Ed., § 343; Restatement of Contracts, § 130) and that payment to one of several joint payees on a negotiable instrument discharges the entire claim (10 C.J.S. Bills and Notes, §§ 194, 455; 142 A.L.R. 371). These rules were applied in *Dewey* v. *Metropolitan Life Ins. Co.*, 152 N.E. 82 (Mass. 1926), to discharge liability on a check payable to joint payees even though the endorsement of one of the payees was not genuine and the other payee received payment, and despite the provision of Massachusetts law (Negotiable Instruments Law, § 41) that all payees must endorse. *Cf. Bello* v. *Union Trust Company*, 267 F. 2d 190 (5th Cir. 1959); and *McElroy* v. *Lynch*, 232 S.W. 2d 507 (Mo. 1950).

We shall assume for purposes of this decision that a Federal court would follow the above-mentioned general rules if presented with a spouse's suit against the Government for a share of a joint income tax refund. Accordingly, we find that the negotiation of the refund check by Frank Leavenworth and his receipt of the proceeds of the check constituted payment by the Government to the single tax unit which discharged the United States from liability for the overpayment of taxes to both Mr. and Mrs. Leavenworth. Any recourse that Mrs. Leavenworth may have is against her husband and not against the United States.

Although State law is not controlling here, we note that under California law all property acquired after marriage by either husband or wife or both is community property over which the husband has management and control, with like absolute power of disposition, other than testamentary, as he has of his separate estate (Deering's Civil

Code Annotated, §§ 164,172) ; that when a divorce is pending his power over community property exists until entry of a final decree (*Vai* v. *Bank of America*, 364 P. 2d 247, 252 (1961)) ; that he has the right, without his wife's consent, to release a note payable to both jointly—if community property—(*Lovetro* v. *Steers*, 234 C.A. 2d 461, 44 Cal. Reptr. 604 (1965)) ; and that the wife may apply to a court of equity to safeguard the community property against her husband's abuse or fraud (*Weinberg* v. *Weinberg*, 432 P. 2d 709 (Cal. 1967) ; 41 C.J.S. Husband and Wife, § 506, p. 1076). We also note that Mrs. Leavenworth was advised by a Special Assistant Treasurer, Treasury Department, on October 18, 1967, to have her claim to the proceeds of the refund check judicially determined in the pending divorce proceeding, but the record does not indicate whether this advice was followed.

In light of the foregoing, we agree that the Claim of Marie Leavenworth against the United States for one-half of the tax refund resulting from the joint return has been satisfied by payment to her husband, and her claim is denied. You may, therefore, instruct the District Director of Internal Revenue for Los Angeles to disregard the authorization in our Claims Division's settlement of April 22, 1970, and to advise Mrs. Leavenworth that her claim has been denied.

[B-168633]

Contracts—Awards—Cancellation—Erroneous Awards—Bid Evaluation Error

The issuance of a stop order pending resolution of a bid protest, and the cancellation of an award to the second low bidder to award a contract to the low bidder whose aggregate firm bid conforming to bid instructions that were overlooked in the evaluation process was displaced by the erroneous application of the unit price rule to estimated data prices, were proper administrative actions, notwithstanding the contract did not provide for stop orders, since the authority to issue stop orders is not dependent on a contract provision but on whether the action is necessary in the interest of the Government, and the procurement subject to the statutory requirement that award be made to the lowest responsive and responsible bidder, the erroneous award which did not involve the exercise of any authorized discretion did not create a binding contract, and cancellation of the award was legally permissible.

Contracts—Performance—Stop Orders

While paragraph 2-407.8(c) of the Armed Services Procurement Regulation provides that a contracting officer seek a mutual agreement with a successful bidder to suspend performance of a contract on a no-cost basis when it appears likely that an award may be invalidated and delay receipt of supplies and services, it does not bar the issuance of a stop order in the event the contractor declines to cooperate with the contracting agency.

Bids—Evaluation—Delivery Provisions—Parcel Post Costs

When a procurement item is shipped by parcel post under Government mailing indicia pursuant to paragraph 19-403.3(a) of the Armed Services Procurement Regulation, transportation costs as a bid evaluation factor are eliminated, even though eventually the contracting agency is required to reimburse the Post Office Department for the postal services.

Bids—Evaluation—Factors Other Than Price—Notice of Factors to Bidders

The use of the phrase "other factors considered" pursuant to paragraph 2-407.1 of the Armed Services Procurement Regulation, implementing 10 U.S.C. 2305, does not authorize the award of contracts under advertised procurements to other than the low, responsive, qualified bidder; and when bids are to be evaluated on some basis in addition to price, it is required that those additional factors and the relative importance to be attached to each factor be clearly stated in the invitation so all bidders are aware of the factors in the preparation of their bids.

To the Bruno-New York Industries Corporation, December 29, 1970:

We refer to your protest by telegram dated April 2, 1970, as supplemented by correspondence from your attorneys, against the cancellation by the Department of the Air Force of your contract F33657-70-C-0551 and the award of another contract for the same requirements to Union Instrument Corporation (Union).

The procurement was advertised under invitation for bids (IFB) F33657-70-B-0013, issued September 8, 1969, by Air Force Systems Command (AFSC), Wright-Patterson Air Force Base, Ohio. The procurement items were Type C-3491/ARN-58 Control Receivers, on which bids were requested on quantities stated in four increments. In addition, bidders were requested to furnish data under Item 2, which read as follows:

Data in accordance with DD Form 1423, designated Exhibit "A" attached hereto and hereby made a part hereof. The price set forth in the DD Form 1423 for the data is exclusive of the data described in paragraphs 2d(1) and (2) of NOTE on pages 14 and 15 thereof.

DD Form 1423, of which there were 10 pages, listed various data items and provided space for entry of certain information on each item. Block 25 called for designation of price group (identification of the particular item by groups as set forth in instructions on the back of the form), and Block 26 called for an estimated total price for each item. An unnumbered block for entry of the sum of all estimated total prices was labeled "Contract Value."

The instructions for completing the form included the following pertinent language:

2. The contractor agrees that, regardless of whether he has made any entries in Items 25 and 26, and regardless of what those entries are, he is obligated to deliver all the data listed hereon, and the price he is to be paid therefor is included in the total price specified in this contract.

3. The estimated prices filed in Item 26 will not be separately used in evaluation of offers.

* * * * * * *

5. Each offeror shall complete Items 25 and 26 in accordance with the following instructions (*this does not apply to advertised contracts or to negotiated contracts under $100,000*).

* * * * * * *

Item 26. Estimated Total Price.

a. For each item of data listed the bidder or offeror shall enter an amount equal to that portion of the total price which is estimated to be attributable to

the production or development for the Government of that item of data. These estimated data prices shall be developed only from those costs which will be incurred as a direct result of the requirement to supply the data, over and above those costs which would otherwise be incurred in performance of the contract if no data were required.

The note on pages 14 and 15 of the IFB, to which Item 2 made reference, was entitled "Data Applicability and Data Pricing," and it advised bidders that the total price of all data or a proper response should be entered on the last page of the DD Form 1423 Exhibit in the "Contract Value" block and that the same entry should be inserted in the "Amount" column of the Schedule data item [Item 2]. Paragraph 2.d.(1) and (2) of the Note provided for negotiation of the price of new and/or revised data incident to certain changes and the price of documentation required for provisioning spare parts at the time of negotiation of the change or the time of establishment of the requirement for spare parts. The data items related to provisioning spare parts were Nos. A015, A016, and A017 on page 6 of DD Form 1423.

On page 17 of the bid schedule, bidders were informed that offers submitted on a basis other than f.o.b. origin would be rejected as nonresponsive. On page 18, bidders were advised that for the purpose of evaluating bids, and for no other purpose, the final destination for the supplies would be considered to be Fort Worth, Texas.

Paragraph I of the GENERAL PROVISIONS on page 38 of the bid schedule provided that when delivery was to be made on other than an f.o.b. destination or a freight prepaid basis, the shipments would be made on Government bills of lading or Government mailing indicia. Subparagraph (b) specifically provided for the use of Government mailing indicia in lieu of Government bills of lading when the weight, cube, and character of the commodity permits movement within the United States postal system. Subparagraph (c) stated an agreement on the part of the contractor that no mailing charge is, or will be, included in the cost/price for postage fees in those instances wherein Government mailing indicia is authorized and used.

Among various forms incorporated in the IFB terms was Standard Form 33A, Solicitation Instructions and Conditions, paragraph 2(c) of which, relating to preparation of offers, reads as follows:

Unit price for each unit offered shall be shown and such price shall include packing unless otherwise specified. A total shall be entered in the Amount column of the Schedule for each item offered. In case of discrepancy between a unit price and extended price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.

Bids were opened on October 8, 1969, as scheduled. Union's bid of $35.05 per unit and $2,025 for Item 2, with first article approval required, was lowest at $9,490.65 on the 213 units procured. Your bid

of $44.65 per unit with no separate charge for Item 2, the cost of which was included in Item 1, and with first article approval *not* required, was second-low at $9,510.45 on the 213 units.

Examination of the Form DD 1423 executed by Union showed that the total of all the prices entered in Block 26 for each of the data items amounted to $2,065, or $40 more than the amount of $2,025 entered by Union in the "Contract Value" block on the last page of Form DD 1423 and also entered as the price of Item 2 in the bid schedule.

The contracting officer, acting on the assumption that the unit price rule quoted above from Standard Form 33A applied to the data items on DD Form 1423, corrected the Contract Value figure on the last page of the form to $2,045 after eliminating the amount of $20 quoted on Item AO17, the price of which is subject to negotiation at the time of establishment of the requirements for spare parts. The correction brought Union's bid price up to $9,510.65 or 20 cents higher than your evaluated price of $9,510.45. Award was therefore made to you as the low bidder on December 3, 1969, and notice of such action was given to Union by letter dated December 4.

In a telegram dated December 11, Union notified the procuring activity of its intent to lodge a formal protest, and copies of its protest letter of the same date were furnished by Union to AFSC and to our Office.

Union's protest letter stated that the December 4 award notice was not received by Union until December 11, following which Union communicated by telephone with the procuring activity and was informed that the bid price had been changed by the contracting officer to correct what was regarded by the procuring activity as a mistake in bid which came under the unit price rule stated in Standard Form 33A. The correction, it was explained, involved changing the price quoted by Union in its bid schedule on Item 2, and also shown on the last page of DD Form 1423 as the "Contract Value," to correspond with the actual total of the estimated prices entered in Block 26 on DD Form 1423 for various data items.

Union protested that the correction was not in order. In this connection, Union maintained that the price quoted for Item 2 in the bid schedule was a firm price, whereas the various figures entered in Block 26 on the DD Form 1423 were only estimates. As support for its position, Union cited the provisions of paragraphs 2 and 3 of the instructions on DD Form 1423 concerning the contractor's obligation to furnish required data at the price included in its bid and precluding the use of the estimated prices in Block 26 for evaluation purposes. Union therefore requested that the contract which had been awarded to you be nullified and that a new contract be issued to Union, as the low responsive and responsible bidder.

In view of Union's protest, the contracting officer wired the following message to you on December 22, 1969:

A formal protest has been lodged against the award on IFB F33657-70-B-0013. You are hereby ordered to stop work on Contract F33657-70-C-0551 until a resolution of subject protest has been made.

Union's protest before this Office was also withdrawn on that date, subject to being reinstated if the final action by the Air Force was unfavorable to that firm.

The contracting officer, after reviewing the terms of the IFB and the instructions on the back of DD Form 1423, which had not been considered in the evaluation of Union's bid, concluded that the estimated data prices should not have been an evaluation factor; that Union's bid was actually lower; and that the award to you was improper. However, in light of information furnished by you, in a telephone conversation of December 21 with the AFSC buyer and confirmed by your letter of January 6, 1970, to the effect that prior to the issuance of the stop work order you had expended $6,000 towards performance of the contract, the contracting officer recommended to the head of the procuring activity that the award not be disturbed. The matter was subsequently submitted to Headquarters United States Air Force (USAF) with a memorandum which stated that you had not begun actual production on the contract.

Headquarters USAF reviewed the procurement; concluded that Union was the lowest bidder and therefore the award to you was illegal; and recommended to the procuring activity that award be given to Union provided Union was determined to be a responsible bidder. Following a favorable preaward survey of Union and a determination that it was a responsible bidder, the contracting officer notified you on March 17, 1970, that you were not the low bidder under the IFB and your contract was therefore canceled. On the same date, contract F33657-70-C-0923 was awarded to Union for the procurement requirement at its correct bid price of $9,490.65.

You complain that the Department of the Air Force has not complied with the procedures prescribed in ASPR with respect to the notice issued to you regarding Union's protest, which did not state the basis for the protest. Further, you claim that the Department had no authority to "bypass" our Office and administratively resolve the protest in view of its filing with our Office. In addition, you state that by failing to solicit your views on the protest and to transmit them to our Office for consideration, the Department violated Armed Services Procurement Regulation (ASPR) 2-407.8(a)(3).

As stated above, Union's protest was withdrawn from our Office on December 22, 1969, and at the time the matter was resolved by cancellation of your contract and issuance of a contract to Union,

there was no protest before our Office for consideration. It should also be noted that ASPR 2-407.8(a)(3), which you cite, was not effective until after Union's protest was administratively resolved, and the regulations applicable to the protest (ASPR 2-407.9(c) as supplemented by the Air Force) did not require the actions which you say the Air Force should have taken. In the circumstances, we are unable to conclude that the Department violated any pertinent regulations in its handling of Union's protest. In any event, it is apparent that you had ample time, after you were notified of Union's protest in the contracting officer's wire of December 22, to inquire into the nature of the protest and to register a protest with the contracting officer or this Office against any administrative decision which would be adverse to your contract.

You raise two questions concerning the responsiveness of Union's bid. First, you state that you bid f.o.b. origin, as required by the IFB, whereas an abstract of bids prepared by a commercial bid service indicates that Union bid on an f.o.b. destination basis. Second, you claim that Union, by filling in Blocks 25 and 26 on the DD Form 1423 contrary to the instructions on the form, caused a bid deviation which should not have been waived, since such action was prejudicial to you.

An examination of a copy of Union's bid discloses no indication that the bid was on an f.o.b. destination basis. In executing paragraph A, F.O.B. Point, on page 17 of the schedule, Union clearly designated its plant at Plainfield, New Jersey, as the f.o.b. delivery point and the place of final inspection and acceptance of the equipment.

As to the effect of Union's completion of Items 25 and 26 on DD Form 1423, the interpretation to be placed on the information so furnished must be based on the wording of the form and the IFB as a whole. 39 Comp. Gen. 17 (1959); *id.* 247 (1959). Under the terms quoted above from DD Form 1423, not only were the entries in Block 26 mere estimates which were not to be considered in the evaluation of bids, but bidders were bound to the price included in the contract for the furnishing of data regardless of the entries in Block 26. Further, the instructions on page 14 and 15 of the IFB requiring that the total price for all data be entered on the last page of DD Form 1423 in the "Contract Value" block and that the same entry be made in the bid schedule for the data item, with which Union complied, left no doubt that it was this price to which the bidder would be held for the furnishing of the required data. The entry by Union, therefore, of prices in Block 26 on DD Form 1423 did not, in our view, constitute a deviation which required a waiver by the contracting officer under the minor deviations and minor informalities provisions of ASPR 2-405.

The unit price provisions in Standard Form 33A, it is to be noted, relate to items in the bid schedule of which more than one unit is to be purchased, and they are invoked when there is a discrepancy between the unit price quoted in the schedule and the total price also quoted in the schedule for the number of units of the item involved. Clearly, such provisions may not be employed to change the price of an item such as Item 2 in the IFB in question, which calls for a lump sum price for the item.

In line with the foregoing, we concur with the ultimate conclusion of the procuring activity that the data price listed in Union's bid and also entered in the "Contract Value" block of the last page of DD Form 1423 was the only price applicable to Item 2 in the bid schedule.

You also place in issue the matter of whether transportation costs were considered in the evaluation of the bids in accordance with the provisions of ASPR 19-301.

The file on this procurement includes a memorandum dated October 9, 1969, which indicates that on that date, one day after the opening of the bids, the contract negotiator conferred with the procuring activity transportation officer in order to determine the transportation costs for the procurement for the purpose of evaluating the bids. After examination of the transportation data and the production schedule in the IFB, the transportation officer determined that the procurement item would be shipped by parcel post under Government mailing indicia, thereby eliminating transportation costs as a bid evaluation factor.

ASPR 19-208.2(c), relating to f.o.b. origin shipments, provides that land methods of transportation by regulated common carrier are the normal means of transportation used by the Government between points in the continental United States and therefore the related provision in ASPR 2-201(a)D(vi) shall be included in f.o.b. origin solicitations to establish the means to be used by the Government in applying transportation costs for evaluation. When the use of other means of transportation in evaluating bids or proposals is appropriate, however, ASPR 19-208.2(c) provides for a corresponding modification to the ASPR 2-201(a)D(vi) provision.

ASPR 19-403.3(a) authorizes the use of parcel post and other classes of mail for deliveries of mailable matter which meets the size, weight, and distance limitations prescribed by the Post Office Department. ASPR 19-403.3(b) authorizes the use of official mailing labels printed "Postage and Fees Paid" by the contractor when parcels are to be mailed under "Postage and Fees Paid" indicia.

Since parcel post under Government mailing indicia was one of the methods of shipment specified in the IFB, and since AFSC elected

to use such method, no common carrier transportation costs were for consideration in the evaluation of the bids. Accordingly, and in the absence of specification of any evaluation factor in the ASPR, or in the Air Force ASPR Supplement, to cover whatever amount the Department of the Air Force might eventually be required to reimburse the Post Office Department for the postal services involved in the procurement under consideration, we are unable to conclude that AFSC improperly excluded transportation as a factor in the evaluation of the bids.

You further urge that your bid was the bid which was most advantageous to the Government, price and other factors considered, the acceptance of which is contemplated by 10 U.S.C. 2305(c) and by ASPR 2–407.1 and 2–407.5. In this regard, you point to the fact that, as the only bidder who quoted on the basis of first article testing not required, your delivery schedule was 4 months earlier than Union's schedule. In addition, you claim that delays to the Government resulting from differences in inspection constitute foreseeable costs or delays which should have been considered under ASPR 2–407.5(i) as justification for award to you.

We have stated that the phrase "other factors considered" as used in 10 U.S.C. 2305, and in the implementing provisions of ASPR 2–407.1 does not authorize and was not intended to authorize the award of contracts under advertised procurements to other than the low, responsive, qualified bidder. Further, it has been consistently held by our Office and by the courts that the rules of competitive advertised bidding and the integrity of the competitive bidding system require that bidders be informed of the basis upon which their bids will be evaluated and the award will be made. Therefore, if bids are to be evaluated on some basis in addition to price, those additional factors and the relative importance to be attached to each factor should be clearly stated in the invitation so that all bidders may be aware thereof in the preparation of their bids. See 42 Comp. Gen. 467 (1963) and court cases and decisions of our Office cited therein. We also call your attention to the provisions of ASPR 1–1903(a)(i)(B), relating to waiver of first article approval requirements, which expressly preclude consideration of an earlier delivery schedule resulting from waiver of first article approval as a factor in evaluation of bids for award. See, also, 41 Comp. Gen. 788 (1962).

You also protest that the contracting officer was without authority to issue a stop work order to you. On this account, you state that there was no stop work order clause in the contract; that you were in production because you had already expended more than $6,000 for labor and material by December 29, 1969, the date you received the stop

work order; and that the issuance of the order violated ASPR 2-407.8(c).

In circumstances such as these, where the validity of a contract awarded under advertised procurement procedures is open to question as the result of a bid protest, the question of whether the contractor should be permitted to continue performance during pendency of the protest is generally for the contracting agency to decide. Further, such decision is not dependent upon the inclusion in the contract of a stop work order or suspension of work clause but upon the interest of the Government as determined by the contracting agency. Moreover, while ASPR 2-407.8(c), which was not issued until December 31, 1969, or 9 days after AFSC had issued the stop work order to you, now provides that the contracting officer should seek a mutual agreement with the successful bidder to suspend performance on a no-cost basis when it appears likely that the award may be invalidated and delay in receipt of supplies or services is not prejudicial to the Government's interest, we do not see anything in the language of ASPR 2-407.8(c) which would bar issuance of a stop work order in the event the contractor declines to cooperate with the contracting agency. We therefore view the issuance of the stop work order as a proper exercise of the discretion vested in AFSC as the contracting agency.

You further charge that the award to you resulted from a mistake of fact on the part of the contracting officer and was "within his discretion," which made the award binding. In this regard, you state that you had no way of knowing why the apparent low bidder did not receive the award and that, since the error was solely the Government's, the Government should be estopped, and is estopped, from denying the validity of the award. In support of this argument, you cite *Levinson* v. *United States et al.*, 258 U.S. 198 (1922), in which the sale of a naval vessel to other than the highest bidder, whose bid had been misplaced and overlooked, was upheld by the United States Supreme Court.

The *Levinson* case, we believe, may be distinguished from the situation under consideration here. In the *Levinson* case, the sale of the vessel was made under a statute which empowered the President to direct a departure from the prescribed manner of sale and his direction to the Secretary of the Navy to sell "for such price as he shall approve." Here the procurement is subject to the statutory requirement that award be made to the lowest responsive and responsible bidder. In addition, the mistake which culminated in the erroneous award to you did not involve the exercise of any authorized discretion on the part of the contracting officer; rather, it resulted from the

failure of the contracting officer to follow the instructions included in the bid papers, which were clear and unambiguous. In such circumstances, we have held that the administrative officers usually are required to cancel the erroneous award, particularly if such may be done without jeopardizing the interest of the United States. B–165186, November 7, 1968, and decisions cited therein; B–164826, August 29, 1968.

The record establishes that upon evaluation of Union's bid in accordance with the provisions of the solicitation, Union was the low responsive bidder. Accordingly, the award to you was contrary to the statutory provisions cited and created no binding contract enforceable against the Government.

While it is unfortunate that the contracting officer made an improper initial evaluation of the bids, nevertheless cancellation of the award to you was legally permissible. Accordingly, we see no legal basis for objection to the subsequent award which was made to Union, who was determined to be responsible as well as responsive. Your protest is therefore denied.

[B–170039]

Contracts—Negotiation—Cutoff Date—Notice Sufficiency

A telegram establishing a cutoff date for negotiations, which instructed three offerors within a competitive range—one whose timely offer under a request for quotations was excessive, the others whose late proposals were considered on the basis of a "Determination that an Otherwise Acceptable Offer is Unreasonable as to Price" — that if no proposal revision is received by cutoff date the lowest offer submitted will be used for evaluation, accomplished the same result as would cancellation and resolicitation of the procurement, and served as adequate notice of the cutoff date for submission of "best and final" offers within the meaning of paragraph 3–805.1(b) of the Armed Services Procurement Regulation, prescribing the method for terminating negotiations, even if the telegram did not refer to the Late Proposals provision of the solicitation or inform offerors that only notices of unacceptability would be furnished between the closing date for negotiations and date of award.

Contracts—Negotiation—Prices—Reduction

The acceptance of a late reduction in price submitted by the low offeror under a request for quotations was in accord with paragraph 3–506(g) of the Armed Services Procurement Regulation that provides "a modification received from an otherwise successful offeror, which is favorable to the Government. shall be considered at any time that such modification is received," and the acceptance was not prejudicial to other offerors.

To the Canoga Electronics Corporation, December 30, 1970:

Further reference is made to your telegram of June 12, 1970, and to your letters of June 17, July 1 and 10, and November 16, 1970, protesting the award of a contract to Datron Systems, Inc. (Datron), under request for quotations (RFQ) No. N00163–70–Q–0923, (RFQ–

0923) issued by the Naval Avionics Facility (NAFI), Indianapolis, Indiana.

The instant procurement was negotiated pursuant to a Determination and Findings by the contracting officer issued on January 19, 1970, supporting negotiation under 10 U.S.C. 2304(a) (2) and Armed Services Procurement Regulation (ASPR) 3-202.2(vi). On February 2, 1970, RFQ No. N00163-70-Q-0923 was issued for two items of UHF tracking antennas and four items of manuals, technical documentation, and engineering drawings, plus an option item for engineering drawings. The solicitation established February 24, 1970, as the closing date for receipt of proposals.

Your firm submitted the only timely proposal, in the amount of $869,185. On February 25, 1970, a telegraphic offer in the amount of $480,875 was received from Datron. Although paragraph 7.20 of the solicitation authorized telegraphic replies, it appears from the present record that there is no basis upon which the Datron offer would have qualified for award under ASPR 3-506(c). On February 27, 1970, the contracting officer issued a "Determination that an Otherwise Acceptable Offer is Unreasonable as to Price" which, after reviewing the offers received, stated:

> The Canoga Electronics Corp. offer exceeds the late offer from Datron Systems, Inc., by $388,310 incl. option item 7, or 80.75%. It is reasonable to expect that a contract can be awarded for $480,875 or less if negotiations are continued and Datron Systems, Inc., is given an opportunity to submit a timely offer.

Upon receipt of your initial timely proposal and Datron's initial late proposal, the contracting officer was confronted with the decision of how to proceed with the procurement. The conduct of negotiated procurements is governed by 10 U.S.C. 2304(g) which provides:

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

Section 7.2 of the instant solicitation advised offerors that the contract may be issued based on initial quotations received, without discussion of such quotations. The only timely proposal, and thus the only one eligible for an award without discussions, was that of your firm in the amount of $869,185. However, the contracting officer was

aware of Datron's late quotation of $480,875. Under these circumstances, we believe it would have been difficult to sustain a determination that acceptance of your initial proposal without discussion "would result in fair and reasonable prices."

Moreover, the contracting officer would have been justified in rejecting your offer pursuant to section 7.2 of RFQ–0923 and resoliciting for the requirement. See B–168000, November 26, 1969, in which we held that it was within the discretion of the contracting agency to have canceled a request for proposals when it could not be established that the price of the sole offeror was fair and reasonable. In this event, the contracting officer would have been obligated to solicit proposals from the maximum number of qualified sources, which included Datron. ASPR 3–101 and 3–102(c). However, rather than canceling RFQ–0923 and issuing a new solicitation for this requirement, which carried a Uniform Material Movement and Issue Priority System (UMMIPS) Priority Designator of "02", the contracting officer sent the following telegram on February 27 to both firms, Canoga and Datron, which he considered qualified sources:

Negotiations are being conducted with all offerors within a competitive price range. You are therefore invited to revise your latest offer as to price. Any such revision may be submitted by telegram and must be received by 4:15 p.m. EST (Uniform Time Act 1966) 3 Mar 70 and reference the solicitation number and this message. If no revision is received by this time your latest offer as to price will be used in evaluation. All terms and conditions of subject RFQ remain unchanged.

It is administratively reported that the purpose of the telegram, as shown by the contracting officer's written determination which preceded it, was to extend the closing date for receipt of proposals so as to permit Datron to submit a timely offer. The same opportunity was given your firm. Since the telegram of February 27 accomplished the same result as a cancellation of RFQ–0923 and a resolicitation, we are unable to conclude that Datron's further participation in the procurement was improper.

By March 3, 1970, Canoga decreased its price to $829,185 and Datron increased its price to $530,559. Additionally, Teledyne Micronetics (Micronetics) made a telephonic offer of $416,150 on March 10, which was confirmed by a written proposal on March 12. The contracting officer issued another "Determination that an Otherwise Acceptable Offer is Unreasonable as to Price" on March 13, 1970, which concluded:

The revised Canoga Electronics offer exceeds the untimely oral offer from Micronetics by $413,035 or 99.25% and the revised Datron Systems offer exceeds the untimely oral offer from Micronetics by $114,409 or 27.5%. It is reasonable to expect that a contract can be awarded for $416,150 or less if negotiations are continued and Micronetics Teledyne is given an opportunity to submit a timely offer.

On the same day, the contracting officer set the following telegram to Micronetics, Datron and Canoga:

Negotiations are being continued with all offerors within a competitive price range. You are therefore invited to revise your latest offer as to price. Any such revision may be submitted by telegram and must be received by 4:15 EST (Uniform Time Act 1966) 19 Mar 70 and reference the solicitation number and this message. If no revision is received by that time your latest offer as to price will be used in evaluation. All terms and conditions of subject RFQ remain unchanged.

The following revised quotations were received March 19:

Canoga	$829,185
Datron	445,559
Micronetics	427,850

Another telegram was sent to all three offerors on March 26, 1970, advising them "Negotiations are being continued with all offerors within a competitive range." The message then described four changes to the specifications for the tracking antennas, and concluded:

If by virtue of the above specification revisions you desire to revise an offer already submitted, such revision may be submitted by telegram and must be received by 4:15 EST (Uniform Time Act 1966) 6 April 70 and reference the solicitation number and this message. If no revision is received by that time your latest offer as to price will be used in evaluation. All other terms and conditions of subject RFQ remain unchanged.

All offerors made timely responses as follows:

Canoga	$813,685
Micronetics	427,850
Datron	345,384

Additional specification changes were issued to all offerors by telegram of April 14, 1970. One of the changes provided that the maximum weight of the tracking antenna would not exceed 150 pounds. The telegram stated:

Negotiations are being continued with all offerors within a competitive range. * * * If by virtue of the above specification revisions you desire to revise an offer already submitted such revision may be submitted by telegraph and must be submitted by 4:15 EST (Uniform Time Act 66) 23 Apr 70 and reference the solicitation number and this message. You must respond to this message by that time in order to be considered for evaluation. * * *.

No response to this telegram was received from Canoga. Datron submitted a quotation of $445,559, which was a repetition of its March 19 price. Micronetics' price of $427,850 remained unchanged. Thus, the price standings on April 23, 1970, were:

Canoga	$813,685
Datron	445,559
Micronetics	427,850

The contracting officer sent the following message to all three offerors on May 4, 1970:

Negotiations are being conducted with all offerors within a competitive price range. Item 6 is cancelled. You are therefore invited to revise your latest offer as to price for items 1, 2, 3, 4, 5, and 7. Any such revision may be submitted by telegram and must be received by 8:00 a.m. EST (Uniform Time Act—66) 12 May 70 and reference the solicitation number and this message. If no revision is received by that time your latest offer as to price will be used in evaluation. The clause in ASPR 2-202.2 is modified to mean a quotation rather than a bid and is applicable. All other terms and conditions of subject RFQ as amended by my telegrams of 26 Mar 70 and 14 April 70 remain unchanged.

Contemporaneously with the transmittal of this message, Canoga inquired of the procuring activity as to the status of the procurement. Canoga's inquiry indicated it had never received the contracting officer's previous telegram of April 14, 1970. Canoga was advised of the contents of the April 14 telegram, to which it responded by telegram of May 8, wherein the opinion was expressed that an antenna assembly of 150 pounds would not be rugged enough to meet the Navy's requirements. However, Canoga stated its prices were not affected by the specification changes. On the same day, Canoga replied to the contracting officer's May 4 telegram by submitting "Canoga's latest prices" for all items except number 6 in the amount of $813,625. The telegram stated "This pricing reflects Canoga's current bid also previous reductions in price * * *."

Since no response was received from Micronetics, under the terms of the contracting officer's telegram of May 4 that firm's price for all work except item 6 remained at $416,150. On May 5, the contracting officer received a message from Datron reducing its price to $345,384. The standing of the offerors on May 12, 1970, was:

Canoga	$813,625
Micronetics	416,150
Datron	345,384

Datron offered a further reduction to $328,364 in a telegram of May 11, which was received after the time specified in the contracting officer's message of May 4. The question of whether Datron's late submission could be considered was then presented. It is the position of the Department of the Navy that the contracting officer's May 4 telegram was intended to, and did effectively, establish 8:00 a.m. EST, May 12, 1970, as the cutoff date for negotiations. Therefore, in the Navy's view, on May 12 the successful offeror was Datron, and acceptance of its late submission was proper under ASPR 3-506(g) which provides in part:

However, a modification received from an otherwise successful offeror which is favorable to the Government shall be considered at any time that such modification is received.

We discuss more fully below your sole contention that the May 4 telegram did not provide adequate notice that May 12 was the cutoff

date for submission of "best and final" offers. Without addressing the merits of your argument at this point, it is clear from the administrative record that the Navy consistently regarded May 12 as the cutoff date for negotiations.

It is related in the administrative report, a copy of which was furnished you, that on May 20, 1970, you called the NAFI buyer for this procurement and inquired whether a further revision of your proposal would be considered. The buyer replied that while he could not prevent you from submitting a revision, the May 4 telegram established a cutoff date for submission of revisions and that your revision would probably be considered late. Despite this advice you submitted a telegraphic revision later that day, stating that a new design approach permitted you to meet the requirement that the antenna assembly weigh less than 150 pounds, and that your "latest offer" for all items except number 6 was $563,340. There is nothing of record indicating that your "new design approach" offered an "important technical or scientific break-through" which would have permitted consideration of your revision under ASPR 3-506(c)(ii). Even if your revision of May 20 had been considered, the offerors would have ranked as follows:

Canoga	$568,340
Micronetics	416,150
Datron	328,364

It appears that at this time the Navy was also considering the deletion of item 7 (an option item) as well as item 6. The offerors' prices (including your offer of May 20) for items 1 through 5 only were:

Canoga	$559,910
Micronetics	373,350
Datron	316,984

You again called the contracting officer on May 22, in which conversation you alleged that you had not been adequately notified that negotiations were being closed on May 12. The contracting officer disagreed and informed you that even if your revision of May 20 had been accepted you would still be the high offeror. Your contentions were again expressed in a telegram of protest to the procuring activity on June 2, 1970.

On June 3, the contracting officer advised you that a reply to your protest would be made by June 10. The administrative report further states:

Since decision had been made on 27 May 70 to award to Datron, as was done, and in an effort to allay Mr. Illeman's unhappiness, [the contracting officer] advised to whom award would be made and in what amount.

In a telegram sent late in the afternoon of June 3, you offered a further reduction in price to $309,940 for all items except number 6 and to $301,510 for items 1 through 5.

By letter of June 5, 1970, the contracting officer notified you that because of the urgent requirement for the supplies, award had been made on that date to Datron in the amount of $316,984 for items 1 through 5. The award was supported by a Determination and Findings setting forth the circumstances of the need for the equipment and showing that the delivery requirements would not be met even by an immediate award to Datron. Your protest was denied by the contracting officer on June 10, and you protested to this Office against the award on June 12, 1970.

As we indicated above, the sole contention of your protest is that the contracting officer's telegram of May 4, 1970, did not adequately inform "all offerors of the specified date and time of the *closing of negotiations* and that any revision to their proposal must be submitted by that date." In view thereof, you contend the award to Datron was invalid and should be set aside. You cite our decisions 48 Comp. Gen. 583 (1969); 48 *id.* 536 (1969); 48 *id.* 449 (1968); and B-165837, March 28, 1969, in support of your contention. [Emphasis in original.]

The method of terminating negotiations is prescribed by ASPR 3-805.1(b), which provides in part:

> * * * Whenever negotiations are conducted wth several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see (a) above) shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals must be submitted by that date. All such offerors shall be informed that any revision received after such date shall be treated as a late proposal in accordance with the "Late Proposals" provisions of the request for proposals. (In the exceptional circumstances where the Secretary concerned authorizes consideration of such a late proposal, resolicitation shall be limited to the selected offerors with whom negotiations have been conducted.) In addition, all such offerors shall also be informed that after the specified date for the closing of negotiation no information other than notice of unacceptability of proposal, if applicable (see 3-508), will be furnished to any offeror until award has been made.

We have held this provision requires that offerors be advised: (1) that negotiations are being conducted; (2) that offerors are being asked for their "best and final" offer, not merely to confirm or reconfirm prior offers; and (3) that any revision must be submitted by the date specified. 48 Comp. Gen. 536, 542 (1969).

The contracting officer's telegram of May 4, 1970, quoted above, unquestionably advised offerors that negotiations were being conducted and set a specific time for the receipt of revisions. The notice

did not inform offerors that after the closing date no information other than notice of unacceptability of proposal would be furnished until award, and the notice did not refer to the "Late Proposals" provision of the solicitation. However, offerors were instructed that "If no *revision* is received by that time *your latest offer as to price will be used in evaluation.*" We note that the telegram invited revisions to proposals rather than confirmation of prior offers. In this respect, the instant case differs from 48 Comp. Gen. 449 (1968) and 48 Comp. Gen. 536 (1969), in which we held telegrams requesting offerors to "confirm" prior offers, in conjunction with other circumstances not present here, were insufficient to provide notice that negotiations were being closed. Further, we believe the statement that "your latest offer as to price will be used in evaluation" placed offerors on notice that unless they submitted a revised price, their last quotation would be evaluated in determining the award of the contract. Thus, we conclude that the May 4 telegram adequately informed offerors of the time for closing of negotiations. [Italic supplied.]

We do not believe our decisions 48 Comp. Gen. 583 (1969) and B–165837, March 28, 1969, require a different conclusion. The deficiency in procedure discussed in 48 Comp. Gen. 583 (1969) was not that the notice establishing a cutoff date for negotiations was inadequate, but that two different cutoff dates were established, with the result that negotiations were being conducted with some offerors after negotiations had been closed with another offeror. This did not occur in the instant case.

In B–165837, March 28, 1969, although the notice given offerors was ineffective to formally close negotiations, it operated to informally close negotiations. We then considered whether the protestant was disadvantaged by two contacts between the agency and the successful offeror which occurred subsequent to the informal closing of negotiations. We denied the protest upon concluding that these contacts did not confer a competitive advantage solely upon the successful offeror. In the instant case, the only contact of the procuring activity with Datron between May 12 and the award of the contract was the acceptance of the late modification to Datron's proposal in which Datron further reduced its price. Since Datron was the low offeror as of May 12, we do not believe the acceptance of the late modification prejudiced the other offerors.

Finally, we note that even if your modification of May 20 had been considered for award, your revised price of $568,340 would not have been the lowest price. Only by considering your second late revision of June 3, which was submitted *after* you had been advised of the

price at which it was decided on May 27 that an award should be made to Datron, did you submit a price revision sufficiently low to make you the low offeror. It is elementary that a price revision submitted under such circumstances is unfair to the offeror whose price has been revealed and, therefore, cannot be the basis of a valid award.

In view of the foregoing, we are unable to conclude that the manner in which the negotiations were conducted was unfair or prejudicial to your company. Accordingly, your protest is denied.

[B-170266]

Bids—Discarding All Bids—Administrative Determination—No Obligation to Accept Any Bids

The rejection of all bids because they failed to conform to the essential requirements of an invitation for a pumping station, which invitation had been revised by six amendments, and the changes and clarifications made in the specifications before readvertising the cancelled invitation, in order to overcome the difficulties of obtaining responsive bids, were proper actions within the responsibility of the administrative officers of the purchasing agency in the absence of clear proof that the exercise of administrative discretion was abused. An invitation for bids does not import any obligation on the Government to accept any of the offers received; and where the bids received are nonresponsive because specifications are inadequate or ambiguous to the extent bidders are prevented from submitting responsive bids, there is cogent reason to discard all bids.

To Sellers, Conner & Cuneo, December 30, 1970:

We refer to a telegram of July 8, 1970, from Baldwin-Lima-Hamilton Corporation (B-L-H) and to your letter of July 14, 1970, protesting the award of a contract to any other bidder under invitation for bids No. DACW64–70–B–0033 issued by the Department of the Army, Galveston District, Corps of Engineers, Galveston, Texas. By telegram dated July 29, 1970, from B-L-H, and your letter dated August 5, 1970, the action of the Galveston District in rejecting all bids received under the above-cited solicitation and cancellation of the solicitation was also protested to our Office.

The subject invitation requested proposals for performing all the work necessary to design, manufacture, shop test, prepare and load for shipment, and to deliver to Port Arthur, Texas, drainage pumping equipment and materials for a pumping station and to provide the services of an erection engineer. The invitation required that descriptive data be furnished for the horizontal pump (paragraph 1.3.1.1 of the Special Provisions), diesel engine (paragraph 1.3.1.2), and chain drive transmissions (paragraph 1.3.1.3). Paragraph 1.3.2.1 required that drawings and descriptive literature be provided for the horizontal pump and stated:

Each bidder shall furnish curves showing the expected performance of the proposed pumps on a constant speed basis using capacity as abscissa and pump brake horsepower, total head, pool-to-pool head and efficiency as ordinates over the entire range of pool-to-pool heads from 18 to zero feet. * * *.

A print of the longitudinal cross section assembly of the pump shall be furnished showing suction piping, propeller housing, propeller, shaft bearings, stuffing box and discharge elbow in sufficient detail to illustrate general internal arrangement, principal parts and materials of construction. It shall be similar to Figure BF-9 in the Hydraulic Institute Standards. All parts should be properly identified and all overall dimensions shall be shown. * * *.

Performance curves of the diesel engine were also required to be furnished (paragraph 1.3.2.2), and paragraph 1.3.2.3 required that drawings be provided for the chain drive showing outline and principal dimensions of the transmission unit including shafts, bearings, couplings, and brake or overrunning clutch. Finally, paragraph 1.3.2.4 required that drawings be provided for the pumping station. It provided that:

Print of one complete pump bay in plan showing the major items of equipment to be furnished. The items shown shall include the horizontal pump with siphon discharge tube, diesel engine, chain drive transmission, shafts, bearings, brake, couplings, and backflow control gates and gate hoists. Layout shall be oriented to show main pump flow from top to bottom of sheet.

Print of a sectional (transverse) drawing of diesel engine, chain drive transmission, drive coupling, and back-flow control gate and gate hoist. Layout shall be oriented to show pump flow from right to left of sheet.

The subject invitation was issued on December 19, 1969, and subsequently revised by six amendments. The bid opening, originally scheduled for February 19, 1970, was rescheduled and four bids were received and opened on April 16, 1970, as follows:

Allis-Chalmers Manufacturing Company	$2,179,350
KSB Pump Company	2,664,110
B–L–H	1,964,255
Fairbanks Morse, Inc.	2,256,822

All bidders were represented at the bid opening and B–L–H was announced as the apparent low bidder.

In accordance with the invitation requirements, B–L–H submitted descriptive literature and data. However, some of the drawings submitted by B–L–H bore restrictive notations. Drawings submitted in accordance with paragraph 1.3.2.4 of the solicitation (pump bay plan and a sectional traverse elevation of the entire pump) and in accordance with paragraph 1.3.2.1 (pump cross-section) bore the following restriction:

On receiving this drawing, the recipient agrees: The drawing and its contents remain the sole property of the Industrial Equipment Division of Baldwin-Lima-Hamilton Corporation, are received in confidence, will be returned upon demand,

will not be reproduced or copied in whole or in part, disclosed to others, or used to the detriment of the Industrial Equipment Division of Baldwin-Lima-Hamilton Corporation.

The drawing submitted in accordance with paragraph 1.3.2.2 (a print showing the outline of the diesel engine and its overall dimensions) was furnished by B–L–H's supplier, Stewart & Stevenson Services, which had the following note stamped on it:

This drawing contains proprietary and confidential information of Stewart & Stevenson Services, Inc. of Houston, Texas, and is loaned in confidence with the understanding that it will not be reproduced nor used for any purpose except that for which it is loaned and it shall be returned on demand.

B–L–H's bid also failed to include a "total head" curve with its pump performance curve as required by paragraph 1.3.2.1 of the specifications.

Immediately after the bid opening, and before the restrictive notes on the B–L–H drawings were noted by the Government, all bids were made available to other bidders for review without restrictions. It is reported that this lasted for approximately 30 minutes. When bidders returned the next day to check the bids of other bidders in more detail, the procurement activity had, by that time, noted the restrictive notes on B–L–H's drawings and refused to permit any further review. In this regard, paragraph 1.2 of the special provisions of the invitation respecting descriptive literature provided in part:

* * * Bidders are cautioned that if a bidder imposes a restriction that any of the required data may not be publicly disclosed, such restriction renders the bid nonresponsive if it prohibits disclosure of sufficient information to permit competing bidders to know the essential nature and type of the product offered or those element of the bid which relate to quantity, prices and delivery terms.

As a result of the review of each other's bids, the three low bidders wrote letters to the Galveston District pointing out discrepancies they had discovered in their competitors' bids.

The second low bidder, Allis-Chalmers, protested to the Galveston District by telegraphic message and letter dated May 8, 1970, the award of a contract to B–L–H. By letters to Galveston District dated April 21 and May 14, 1970, the third low bidder, Fairbanks Morse, protested the award of a contract to either the low or second low bidder. By telegram to the Galveston District dated May 29, 1970, B–L–H protested award to any other bidder.

During this time, bid analysis of the three low bids was also being conducted by the district engineer (contracting officer). The district engineer concluded that while the technical evaluation qualified B–L–H for award, its bid should be rejected as being nonresponsive to the invitation (see paragraph 1.2 of the special provisions, above quoted)

because of the restrictive notes as to disclosure appearing on some of the drawings submitted by it with its bid.

The district engineer determined the bid of Allis-Chalmers to be responsive to the invitation and concluded that several discrepancies noted were minor in nature and were not prejudicial to the other bidders.

The district engineer also determined that the bid of Fairbanks Morse was nonresponsive because it materially deviated from the specification requirements.

By letter dated June 5, 1970, the findings of the district engineer were forwarded to the Office of the Chief of Engineers, via the Division Engineer, Southwestern Division, Corps of Engineers. The division engineer rejected the district engineer's recommendation for rejection of the low bid of B–L–H because of the restrictive notes appearing on some of the drawings. The division engineer concluded that, while several of the drawings submitted with B–L–H's bid bore restrictive notes, other information furnished with the bid provided sufficient information as to enable competing bidders to know the essential nature and type of product offered.

The division engineer also determined that the Government waived any right it may have had to reject the bid because of the restrictive notes on some of the drawings when it allowed all bidders immediately following bid opening, and prior to the Government becoming aware of the restrictive notes, to review all bids.

Thereafter, on July 1, 1970, the Office of the Chief of Engineers made a technical review of the three low bids and concluded that:

1. A review of the proposal submitted by the Baldwin-Lima-Hamilton Corporation indicates the following:

* * * * * * *

b. *Pg. 9, Para. 1.3.2.1.*
(1) The total head-capacity curve required by this paragraph was not furnished. This is a major deviation.
(2) Baldwin-Lima-Hamilton Drawing No. 550–5–00633 has a restrictive note in title block. In accordance with paragraph 1.2 on page 8, this renders the bid nonresponsive.
c. Pg. 9, Para. 1.3.2.2. Stewart and Stevenson Services Drawing No. 16357 has restrictive note stamped on it. The drawings are identical except for the restrictive note with those submitted with the Allis-Chalmers bid.
d. *Pg. 10, Para. 1.3.2.4.* Baldwin-Lima-Hamilton Drawings Nos. 550–4–00372 and 550–4–00373 have a restrictive note in the title block. In accordance with paragraph 1.2 on page 8, this renders the bid nonresponsive.
2. A review of the proposal submitted by the Allis-Chalmers Manufacturing Company indicates the following:

* * * * * * *

b. *Pg. 9, Para. 1.3.2.1.* The total head capacity curve required by this paragraph was not furnished. This is a major deviation.

c. *Pg. 9, Para. 1.3.2.1.* Drawing P-5060-HS-1 is not in accordance with paragraph 11.5.2 on page 2-7 in the specifications, as only one bearing is being provided. This is a major deviation.

3. A review of the proposal submitted by Fairbanks Morse indicates the following:

* * * * * * *

b. *Pg. 9, Para. 1.3.2.1.*

(1) This paragraph requires that all overall dimensions be shown on drawing of longitudinal cross section of pump. No dimensions have been shown on Fairbanks Morse Drawing No. A-KP96670. This is a major deviation.

* * * * * * *

d. *Pg. 10, Para. 1.3.3.3.* Experience on proposed engine is of a different type than that required in the instant case. The total number of hours of operation accumulated on engine over the 17-year period indicates engine has not been used on a continuous basis, but only on an intermittent short time basis. Furthermore, a comparison of the published data on this engine with the curves shown on 8761CH indicates that the maximum bhp at 900 rpm on the curve sheet (the 2 hour in 24 hour rating) is greater than the published peaking rating. As this cannot be, this is considered to be a major deviation.

The high bid of KSB Pump Company contained a major deviation, in that it did not provide information requested on the diesel engine and the chain drive transmission.

As a result of this technical review, the Office of the Chief of Engineers directed that all bids be rejected and suggested that various changes and clarifications be made in the specifications before readvertising. By telegram dated July 21, 1970, addressed to each bidder, the district engineer advised that all bids were being rejected because they failed to conform to the essential requirements of the invitation and that the procurement would be readvertised.

You have contended that the determination that the bid of B-L-H was nonresponsive because of restrictive notations on several of the drawings was improper because it was possible for competing bidders to know the essential nature and type of product B-L-H was offering from other unrestricted drawings and descriptive data submitted with B-L-H's bid. You also state that a statement made by B-L-H in the cover letter which it submitted with its bid, which contained an overall offer to comply, clearly indicated that it had no intention to deviate from the invitation requirements.

You contend further that rejection of all bids and cancellation of the invitation because of alleged technical deficiencies in all bids was erroneous and that award of the contract should be made to B-L-H.

The solicitation which is the subject of your protest has been reissued by the Corps of Engineers under invitation for bids DACW64-71-B-0060 with bid opening set for November 3, 1970. The resolicitation incorporated changes to the original technical provisions of the specifications as well as to the requirements for descriptive literature.

You contend that the elimination in the second invitation of the requirement that the total head curve showing the expected perform-

ance of the proposed pumps be given clearly indicates that it was not an important requirement of the first invitation. Under the first invitation, the Office of the Chief of Engineers had determined that the failure of B–L–H and Allis-Chalmers to include such a figure in their bids was a major deviation from the specifications and such deviation was one of the reasons the invitation was canceled.

It has been administratively reported that in view of the difficulties in obtaining responsive bids, it was decided to make changes for clarification purposes in some of the paragraphs in the solicitation before it was readvertised. In the interest of avoiding future nonresponsive bids, the total capacity total head curve requirement was eliminated in view of the contracting officer's determination that with the other clarifications made in the specifications, especially those concerning the rating of the diesel engine and the requirements for the chain drive transmission, both of which include capacity based upon pool-to-pool head set forth in section 2, paragraph 6 of the specification, the diesel engine rating could be ascertained without reference to a capacity total head curve.

We do not feel that the elimination of the capacity total head curve in the second invitation lends credence to the argument that it was not an important element in the first invitation. Rather, we feel that by modifying the second invitation specifications so that a diesel engine rating could be obtained without reference to a capacity total head curve, such curve being a source of difficulty for several bidders under the first invitation, the elimination of that curve in the second invitation and the inclusion in that invitation of means to enable such information to be obtained otherwise without recourse to a capacity total head curve was proper and justified. The information that a capacity total head curve gives may still be obtained under the terms of the second invitation.

Although the protest is directed to the rejection of the B-L-H bid because of the restrictive notations on some of the drawings B-L-H submitted with its bid, the primary question is whether the procurement activity acted properly when it rejected all bids, canceled the invitation and resolicited the procurement under revised specifications.

It has consistently been held that an invitation for bids does not import any obligation on the Government to accept any of the offers received, and that all bids may be rejected under various circumstances, including those instances when it is determined to be in the best interests of the Government to do so; where the bids received are nonresponsive; or where the specifications are inadequate or ambiguous to such an extent as to prevent a bidder from submitting a responsive bid. 17 Comp. Gen. 554 (1938); 26 *id.* 49 (1946); 37 *id.* 760

(1958). Moreover, under paragraph 10(b) of the solicitation instructions and conditions, the Government expressly reserved the right to reject any and all bids received under the invitation. See 10 U.S.C. 2305(c) to the same effect. Also, paragraphs 2–404.1(b)(i) and (viii) of the Armed Services Procurement Regulation recognize the authority of the contracting officer to reject all bids after opening and prior to award where he determines that the particular invitation includes inadequate or ambiguous specifications or where it is in the best interests of the Government to do so. From the foregoing, it is clear that the rejection of all bids and the readvertising of a procurement is primarily a matter of administrative discretion.

Since the responsibility for making a determination to reject all bids rests with the administrative officers of the purchasing agency, in the absence of clear proof that such discretion was abused, our Office will not object to such action. This is especially true where, as here, the three low bids received were determined to be nonresponsive, and where subsequent changes were made in a new invitation to better assure the submission of responsive bids. Of course, we have repeatedly observed that the rejection of bids after they are opened and each bidder or prospective bidder has learned his competitors' prices is a serious matter and such action should not be taken except for cogent reasons. However, we believe there was a proper basis for the administrative determination regarding the nonresponsiveness of the bids received and the deficiency of the invitation regarding data. Such being the case, we would not be justified in objecting to the action taken. See 39 Comp. Gen. 396, 399 (1959); and B–169342, B–169351, B–169503, June 19, 1970.

In view of the foregoing, your other contentions regarding B-L-H's bid need not be considered, especially since the procurement has now been readvertised under revised specifications.

[B–171344]

Claims—Assignments—Federal Grants-In-Aid—Legality of Assignment

Amounts due or to become due under grants of Federal funds to a medical college for the construction and restoration of facilities authorized by the Public Health Service Act, as amended, may be assigned to a bank pursuant to the Assignment of Claims Act of 1940, as amended, to enable the grantee to obtain interim financing for the purpose of making progress payments to the contractor, as the acceptance of the grant subject to the conditions imposed by the Government created a valid contract within the meaning of the 1940 act, and as the assignment is not forbidden under the grant. However, in accordance with the requirements of the act, the assignment should cover the amount payable under the grants without regard to the status of the account between the college and the bank; and, furthermore, the grantee is not foreclosed from financing the non-Federal share of costs with borrowed funds.

To the New York Medical College, December 30, 1970:

Reference is made to your letter dated November 18, 1970, forwarded by your attorneys, Carter, Ledyard & Milburn, New York, New York, requesting advice as to whether amounts due or to become due under grants of Federal funds for the construction or restoration of teaching facilities for medical, dental, and other health personnel, authorized under the provisions of part B, title VII, of the Public Health Service Act, as amended (42 U.S.C. 293 *et seq.*), may be assigned to a bank, trust company, or other financing institution, pursuant to the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203; 41 U.S.C. 15).

You state that the New York Medical College is the recipient of two grants, accepted by the College on August 27, 1970, and that the grants were awarded in connection with the proposed construction of a medical teaching facility and the proposed renovation of an existing building leased by the College as an administration building. The College will be required to make progress payments to its general contractor on a monthly basis but the grant funds will be disbursed periodically based upon percentage completion of the facilities, and it is estimated that there will be several months between disbursements. In order to provide the College with the funds necessary to make the required monthly payments to its general contractor, the College is negotiating with a major New York City bank for interim loans. The College proposes to assign to the bank the right to receive, as and when disbursed, the proceeds of the grants, or so much thereof as shall equal the then outstanding amount of loans. The bank is seeking the rights and benefits of the Assignment of Claims Act of 1940, as amended, and our opinion is requested as to whether the grants are "claims" or "contracts" within the meaning of the act.

The Assignment of Claims Act of 1940, as amended, permits the assignment of moneys due or to become due under a Government contract providing for payments aggregating $1,000 or more to a bank, trust company, or other financing institution. The act requires that a notice of the assignment be furnished to the Government, and it includes provisions that no claim shall be assigned if it arises under a contract which forbids such assignment; and that, unless otherwise expressly permitted by such contract, any such assignment shall cover all amounts payable under the contract and not already paid. We are not advised of the exact terms of the particular grants, and we have no reason to believe that they forbid an assignment of the proceeds of the grants, or that they permit partial assignments of such proceeds. It would appear that any assignment by the College to a bank should cover the full amount payable under each grant without regard to the status of the account between the College and the bank at any particular time.

441-658 O—71——7

In regard to the question whether the grants to the College are "claims" or "contracts," the regulations of the Public Health Service, Department of Health, Education, and Welfare, concerning grants of the type here involved, are set forth in subpart B of part 57, Title 42, Code of Federal Regulations, sections 57.101 through 57.108. The regulations provide that the grants are to cover percentages of construction costs and that the grants are to be made subject to various terms and conditions. Those terms and conditions include a requirement that the final working drawings and specifications for a project be approved by the Secretary of Health, Education, and Welfare; a requirement that the applicant will perform actual construction work by the lump sum (fixed price) contract method and employ adequate methods of obtaining competitive bidding; a requirement that any laborer or mechanic employed by the construction contractor or subcontractor be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. 276a *et seq.*); and a requirement that the applicant will finance all costs in excess of the estimates approved in the application and provide sufficient funds to meet the non-Federal share of the cost of constructing a facility or of the cost of repairing an existing facility.

It has been our position that the acceptance of a grant of Federal funds which is not unconditional but is subject to conditions which must be met by the grantee creates a valid contract between the United States and the grantee. See 41 Comp. Gen. 134 (1961); 42 *id.* 289 (1962). A similar view was adopted by the United States District Courts in *United States* v. *County School Board, Prince George County, Virginia*, 221 F. Supp. 93 (1963), and *United States* v. *Sumter County School District No. 2*, 232 F. Supp. 945 (1964), wherein it was held that Federal grants authorized by Congress create binding contracts with school districts to which grants are made and which give assurances in applying for the grants.

Unless an assignment of the proceeds of the grants to the New York Medical College is forbidden under the terms of the grants as accepted by the College, it would appear that amounts due or to become due under the grants are assignable under the provisions of the Assignment of Claims Act of 1940, as amended. The applicable regulations of the Department of Health, Education, and Welfare do not place any restriction upon assignment of grant proceeds, and there is nothing in the regulations otherwise to show an intention on the part of the Department to foreclose a grantee from financing the non-Federal share of the cost of the projects involved with the use of borrowed funds.

We hope that the foregoing will serve the purposes of your inquiry in the matter.

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AGRICULTURE DEPARTMENT

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Milk indemnity payments authorized by Pub. L. 90-484 to be made to dairy farmers who are directed to remove milk from commercial markets because milk contained residues of chemicals registered and approved for use by Federal Govt., may not be allowed pursuant to Pub. L. 91-127 when milk is removed as result of farmer's willful failure to follow procedures prescribed by Govt. Where dairy farmer predicates milk indemnity claim on compliance with procedures for use of DDT pesticides on cotton fields sprayed from airplanes, it is not sufficient that it cannot be proved farmer was at fault; but rather to receive indemnity payments for contaminated milk, burden is on farmer to establish that he was not at fault 305

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Fact that bidders are asked to extend their bid acceptance time pursuant to par. 2–404.1(c) of Armed Services Procurement Reg. does not give bidders option to withdraw bids, and bidder who does not extend bid acceptance time must accept contract awarded to him prior to expiration of initial bid acceptance period; and as request for extension of bid acceptance time does not convert formally advertised procurement into negotiated procurement, bidders may not be permitted to revise bid prices when granting extension, for this would be tantamount to permitting them to submit second bid after bid opening contrary to competitive bidding principles 383

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Mandatory requirement to attend prebid conference contained in request for proposals for purpose of explaining extremely complex project may not be considered condition precedent to submission of proposal, as conditions or requirements that tend to restrict competition are unauthorized unless reasonably necessary to accomplish legislative purposes of contract appropriation involved or are expressly authorized by statute. To satisfy maximum competitive requirements of Federal Procurement Regs., prospective offeror who failed to attend conference should be permitted to submit proposal and given copy of prebid transcript. However, date for receipt of proposals having passed, new closing date should be set to enable firm denied opportunity to participate to submit proposal, and responding offerors to revise proposals 355

Price no substitute for competition

Awards made under sales invitation for bids on basis of lots drawn by three bidders who had submitted identical bids because there was no other evidence of collusive bidding, where Justice Dept. had taken no action on report of receipt of identical bids, and bid prices submitted were reasonable, were not proper, even though provisions of DOD Manual 4160.21–M were followed. Although awards will not be disturbed, steps should be taken to obtain in future surplus sales the full and unrestricted competition contemplated by competitive bidding system and to avoid acceptance of reasonable bid prices as substitute for adequate competition; and if circumstances do not permit reasonable determination that price competition was adequate, sale should be resolicited 382

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Use of phrase "other factors considered" pursuant to par. 2–407.1 of Armed Services Procurement Reg., implementing 10 U.S.C. 2305, does not authorize award of contracts under advertised procurements to other than low, responsive, qualified bidder; and when bids are to be evaluated on some basis in addition to price, it is required that those additional factors and relative importance to be attached to each factor be clearly stated in invitation so all bidders are aware of factors in preparation of their bids 447

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Awards made under sales invitation for bids on basis of lots drawn by three bidders who had submitted identical bids because there was no other evidence of collusive bidding, where Justice Dept. had taken no action on report of receipt of identical bids, and bid prices submitted were reasonable, were not proper, even though provisions of DOD Manual 4160.21–M were followed. Although awards will not be disturbed, steps should be taken to obtain in future surplus sales the full and unrestricted competition contemplated by competitive bidding system and to avoid acceptance of reasonable bid prices as substitute for adequate competition; and if circumstances do not permit reasonable determination that price competition was adequate, sale should be resolicited 382

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Ambiguous

Telegraphic modification of bid on Govt. surplus property, which read "Increase Item 13 bid $8900," is ambiguous modification, as it can be interpreted to increase original bid "by" $8900 or "to" $8900; and telegram, therefore, should be disregarded in determining highest bidder on item. Telegraphic bid modification reasonably susceptible of two varying interpretations, one only making bid price high, it would be prejudicial to other bidders to permit bidder who created ambiguity to select after bid opening the interpretation to be adopted---------- 302

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Negotiation matters. (*See* Contracts, negotiation)

Prebid conference effect

Mandatory requirement to attend prebid conference contained in request for proposals for purpose of explaining extremely complex project may not be considered condition precedent to submission of proposal, as conditions or requirements that tend to restrict competition are unauthorized unless reasonably necessary to accomplish legislative purposes of contract appropriation involved or are expressly authorized by statute. To satisfy maximum competitive requirements of Federal Procurement Regs., prospective offeror who failed to attend conference should be permitted to submit proposal and given copy of prebid transcript. However, date for receipt of proposals having passed, new closing date should be set to enable firm denied opportunity to participate to submit proposal, and responding offerors to revise proposals.... 355

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Changes in requirements

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Requirement in par. 2-208(a) of Armed Services Procurement Reg. (ASPR) that amendments to invitations for bids must be sent to everyone to whom invitations had been furnished has reference to amendments issued under competitive system prior to opening of bids; and, therefore, amendment issued after closing date for receipt of technical proposals to only two concerns out of 37 potential suppliers solicited under first step of two-step procurement who had responded to Request for Technical Proposals (RFTP) was proper and in accord with ASPR 3-805.1(e), relative to changes occurring in requirements during negotiations. In fact, if firms who had not responded to RFTP had been furnished copies of amendment and responded, provisions of "Late Proposals and Modifications" clause would be for application..... 346

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Determination to open late bid received on one of two technical proposals submitted under first step of two-step procurement and found acceptable, even though equipment offered did not meet all details of specifications, was proper since delay in delivery of bid received more than 24 hours before bid opening was due to Govt. mishandling. Although bid was accompanied by covering letter and unsolicited descriptive literature at variance with specifications, it is nevertheless responsive bid; for it is inconceivable that low bidder, who had qualified under first step, would disqualify itself in second step and, therefore, deviating material is viewed as attempt to identify which of two accepted first-step proposals was being priced in second step..... 337

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While second step of two-step method of procurement is conducted under principles of formal advertising pursuant to par. 2-503.2 of Armed Services Procurement Reg., first step of procedure, in furtherance of goal of maximized competition, contemplates qualification of as many

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return of single individual and payment to husband as one of joint obligees extinguished liability of Govt. for tax overpayment, and ownership rights of spouses are for determination by local law in appropriate proceedings 441

CLAIMS
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Amounts due or to become due under grants of Federal funds to medical college for construction and restoration of facilities authorized by Public Health Service Act, as amended, may be assigned to bank pursuant to Assignment of Claims Act of 1940, as amended, to enable grantee to obtain interim financing for purpose of making progress payments to contractor, as acceptance of grant subject to conditions imposed by Govt. created valid contract within meaning of 1940 act, and as assignment is not forbidden under grant. However, in accordance with requirements of act, assignment should cover amount payable under grants without regard to status of account between college and bank; and, furthermore, grantee is not foreclosed from financing non-Federal share of costs with borrowed funds 470

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Since under Assignment of Claims Act of 1940, as amended, Govt. is not insurer as to fraudulent schemes devised by assignor against assignee, nor is Govt. required to involve assignee in matters of contract administration, claim for amount of fictitious invoices presented by assignee of drayage company performing services for Govt., which were retrieved by assignor prior to payment, may not be honored as record presents no grounds to impute negligence to or assert estoppel against Govt., but instead raises doubt as to validity of assignee's claim. Although claim must be rejected, as jurisdiction of GAO to pay claims is based upon legal liability of U.S., assignee's right to seek judicial determination of its claim is not prejudiced 434

COAST GUARD PERSONNEL
Service credits
Inactive time

Inactive Naval Reserve cadet or midshipman time served before July 1949 by Regular Coast Guard officer or enlisted man retiring either for years of service under 14 U.S.C. 291, 292, 354, or 355, for age pursuant to 14 U.S.C. 293 or 353, or for disability as provided in ch. 61, Title 10, U.S. Code, is not allowable for purpose of retirement. Sec. 291, in providing for voluntary retirement of commissioned officers after 20 years of service requires such service to have been "active service;" word "service" in secs. 292, 354, and 355, authorizing voluntary retirement for commissioned officers after 30 years, and for enlisted men after 30 or 20 years, has been interpreted since 1948 as "active service;" secs. 293 and 353 in providing for compulsory retirement at age 62 make no reference to years of service; and under 10 U.S.C. 1208 disability retirement is computed on basis of active service 308

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Service credits—Continued

Inactive time—Continued

Although inactive Naval Reserve cadet or midshipman time served before July 1949 by Regular Coast Guard officer or enlisted man retiring either for years of service, for age, or for disability, may not be credited for purpose of retirement, service counts for multiplier credit and in accordance with 14 U.S.C. 423, years of service are to be computed under 10 U.S.C. 1405(4), due to fact that pursuant to 10 U.S.C. 1333 such service is "service (other than active service) in a reserve component of an armed force." However, full-time credit may not be given inactive service in determining multiplier factor under 14 U.S.C. 423 and 10 U.S.C. 1405(4), since service is subject to computation method provided in 10 U.S.C. 1333(4) 308

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COMPENSATION

Increases

Retroactive

Status changes during period

Former General Schedule employees of Post Office Dept. who transferred to higher General Schedule position in another agency between Aug. 12, 1970, date of enactment of Postal Reorganization Act, which provides approximately 8-percent salary increase, and effective date of act, first pay period beginning on or after Apr. 16, 1970, are entitled to have "not less than two-step increase" authorized in 5 U.S.C. 5334(b) for employees who are promoted or transferred, computed on revised General Schedule rate of Post Office Dept.; for in absence of specific language to contrary, rule for application is that retroactive salary increases apply as if increase had been in force and effect at time of change of status of employee 414

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Aliens

Authority in 5 U.S.C. 5584 to waive erroneous payments of compensation made to employees of executive agencies is applicable to non-U.S. citizens employed by U.S. in foreign areas, as term "employee" as used in sec. 5584 means employee as defined in 5 U.S.C. 2105; that is, individual appointed in "civil service," which constitutes all appointive positions in executive, judicial, and legislative branches of Govt., except positions in uniformed services (5 U.S.C. 2101(1)). Therefore, Philippine citizen, properly appointed to position in executive branch to perform Federal function supervised by Federal employee, is employee under 5 U.S.C. 5584 and entitled to waiver of erroneous compensation payments without regard to fact employment is under labor agreement with Philippine Govt 329

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Postal service Page

Rates

Highest previous rate

Postal Reorganization Act increases

Increase in rates of basic compensation authorized by Postal Reorganization Act, approved Aug. 12, 1970, to take "effect on the first day of the first pay period which begins on or after April 16, 1970," and to provide 108 percent of compensation rates in effect prior to enactment of act, may be extended by regulation to employees who transferred to Post Office Dept. prior to Aug. 12, 1970, without regard to "highest previous salary rule" stated in sec. 531.203(c) of Civil Service Regs. issued pursuant to 5 U.S.C. 5334(a) and 5338, thus preserving salary rates of transferred employees in accord with those salary increase acts that over the years contained provisions to overcome restrictions of "highest previous salary rule"—rule that continues to apply to employees transferred on and after Aug. 12, 1970 253

Rates

Highest previous rate

Retroactive salary increases

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Wage board employees

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When employee's wage board position is changed by agency action to General Schedule while he is working night shift, basic rate of pay preserved to employee under sec. 539.203 of Civil Service Regs. includes night differential, as it is "rate of pay fixed by * * * administrative action" within contemplation of sec. 539.202(c), defining "rate of basic pay." Inclusion of night differential in establishing employee's General Schedule rate of pay does not preclude receipt of prescribed 10 percent night differential so long as he remains on night shift, but differential is not to be included in employee's retirement and life insurance base 332

Increases

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Bid evaluation error
Issuance of stop order pending resolution of bid protest, and cancellation of awa rd to second low bidder to award contract to low bidder whose aggregate firm bid conforming to bid instructions that were overlooked in evaluation process was displaced by erroneous application of unit price rule to estimated data prices, were proper administrative actions, notwithstanding contract did not provide for stop orders, since authority to issue stop orders is not dependent on contract provision but on whether action is necessary in interest of Govt., and procurement subject to statutory requirement that award be made to lowest responsive and responsible bidder, erroneous award which did not involve exercise of any authorized discretion did not create binding contract, and cancellation of award was legally permissible---------- 447
Delayed awards
After bid acceptance period
Where second low bidder, during period for accepting its bid, filed protest with U.S. GAO as to unacceptability of low bid, consideration of its bid submitted under invitation for bids on electronic equipment is

CONTRACTS—Continued
Awards—Continued Page
Delayed awards—Continued
After bid acceptance period—Continued
not precluded because bid acceptance period was extended only after acceptance date had expired, since filing of protest tolled expiration of bid acceptance period until after resolution of protest. As no other bidder is eligible for award, integrity of competitive system is not involved; and, therefore, there is no "compelling reason" to reject second low bid. However, in future procurements should award be delayed until after expiration of bid acceptance period, procedures prescribed in secs. 1–2.404–1(c) and 1–2.407–8(b)(2) of Federal Procurement Regs. should be followed 357
Small business concerns
Set-asides
Competition sufficiency
Determination not to set aside any portion of procurement, which was made after consulting with small business representative, because most recent set-aside for same item had failed to generate sufficient competition, was within policy stated in par. 1–802 of Armed Services Procurement Reg., and within ambit of sound administrative discretion; and absent showing of abuse in exercise of that discretion, there is no basis for U.S. GAO to object to failure to set aside procurement 383
Bids, generally. (*See* **Bids**)
Buy American Act
Foreign products
Nonavailability determination
Award to high bidder offering surgical steel blade manufactured in U.S. from imported stainless steel, based on erroneous determination item is domestic source end product as defined in par. 6–101(a) of Armed Services Procurement Reg. under rule in ASPR 6–001(d) relating to nonavailability of domestic steel, rather than award to low bidder proposing to use similar steel and manufacture blade abroad considered foreign end product—will not be disturbed, as award was made under mistaken belief held by all participants that only use of imported steel was authorized, notwithstanding availability of domestic carbon steel. Furthermore, adding 50-percent differential prescribed by ASPR 6–104.4(b) displaces low bid 239
Cost-plus
"Cost-plus-award fee" method of contracting
Where in evaluation of management, financial, and technical factors offered under request for quotations for operation overseas of communications system, offerors are found equally qualified technically on basis of normalizing results of numerical scoring system used by Source Selection Evaluation Board and analysis of Board's evaluation by Source Selection Advisory Council using its independent scoring and weighting—referred to as "no gain technique"—and on basis of reevaluating manpower proposals, award of cost-plus-award fee contract to lowest offeror was proper, and award is unaffected by Advisory Council's deviation, with permission, from evaluation guidelines in Army Command Pamphlet 715–3, and by changes in scoring made between evaluations, since relative weights of evaluation criteria were preserved 390

CONTRACTS—Continued
Cost-plus—Continued Page
Evaluation factors
"Realism" of costs and technical approach
In award of cost-reimbursement contracts, procurement personnel are required to exercise informed judgments as to whether submitted proposals are realistic concerning proposed costs and technical approach, and such judgments must properly be left to administrative discretion of contracting agencies involved, since they are in best position to assess "realism" of costs and technical approaches, and must bear major criticism for any difficulties or expenses experienced by reason of defective cost analysis. Should Govt. fail to adequately measure "realism" of low quantum of costs, definition of "reasonable" cost to mean low cost *per se* on comparative basis would be improper for award purposes-- 390
Data, rights, etc.
Disclosure
Restrictive markings
Timely request
Cancellation of invitation to furnish repair parts for naval vessel propeller system, invitation accompanied by drawings submitted individually over long period of time in connection with procurement of system, and proposed sole source purchase of parts from supplier of system on basis restrictive legend requested on drawings was made within 6 months of final delivery of data package, goes beyond authority of contracting officer under par. 9-202.3(d)(1) of Armed Services Procurement Reg., which in providing that data received without restrictive legend if not alleged to be proprietary within 6 months of delivery is considered to have been furnished with unlimited rights, requires time limitation to be applied to each data submission, and request having been untimely received, cancellation of invitation was not justified----- 271
Status of information furnished
Where restrictive legend was not attached to drawings at time of initial transfer to Govt. and legend had not been authorized within 6 months of submission of data as provided by par. 9-202.3(d)(1) of Armed Services Procurement Reg., Govt. in partially publishing drawings violated no contractual restriction, nor is Govt. liable on basis contractor furnishing drawings had obligation as licensee to protect trade secrets of licensor. However, restrictive legend could be authorized for unpublished drawings by obtaining deviation pursuant to ASPR 9-202.3(a) to 6 months' time limitation in ASPR 9-202.3(d)(1) for attaching restrictive legend---------- 271
Disputes
Conflict between administrative report and contractor's allegations
Where there is dispute between contracting officer and proposed contractor relative to matters that are not part of written record, in accordance with policy of U.S. GAO, dispute must be resolved in favor of contracting officer, as GAO is unable to resolve questions of credibility apart from written record and must therefore defer to administrative agency---------- 28

CONTRACTS—Continued

Increased costs Page

Additional work or quantities

Disallowance of claim

Claim submitted for consideration under settlement authority in 31 U.S.C. 71 for additional compensation to cover required correction in printing of technical publication, which had been disallowed by contracting officer and appeal to disallowance denied by administrative officer, may not be paid on basis prior uncorrected orders had been accepted, where record shows contractor agreed to correct error without cost to Govt., and supplemental agreement providing charge for work—insertion of fold-ins in publication in indicated sequence—has reference to future orders. Furthermore, alleged subsequent oral agreement may not be considered, as review is restricted to record before contracting agency at time the head of agency rendered decision..... 369

Mail transportation. (*See* **Post Office Department, mails, transportation**)

Negotiation

Audit requirements

Failure to audit fourth and final round of proposals under solicitation for class destroyers did not violate pars. 3–101, 3–807.2(a), and 3–809(b)(1) of Armed Services Procurement Reg. (ASPR), where not only were proposed prices in each of first three rounds of negotiations audited and found to be based on sound business judgment, but ASPR provisions do not require audit of proposals on each and every round of negotiated procurement, and par. 3–809(b)(1) provides that audits may be waived whenever it is clear that information already available is adequate for proposed procurement, and determination of "adequate" is within discretion of procuring activity and will not be questioned unless clearly erroneous..... 418

Bidder qualification. (*See* **Bidders, qualifications**)

Cost, etc., data

"Realism" of cost *v.* "reasonable" cost

In award of cost-reimbursement contracts, procurement personnel are required to exercise informed judgments as to whether submitted proposals are realistic concerning proposed costs and technical approach, and such judgments must properly be left to administrative discretion of contracting agencies involved, since they are in best position to assess "realism" of costs and technical approaches, and must bear major criticism for any difficulties or expenses experienced by reason of defective cost analysis. Should Govt. fail to adequately measure "realism" of low quantum of costs, definition of "reasonable" cost to mean low cost *per se* on comparative basis would be improper for award purposes... 390

Cutoff date

Notice sufficiency

A telegram establishing cutoff date for negotiations, which instructed three offerors within competitive range—one whose timely offer under request for quotations was excessive, others whose late proposals were considered on basis of "Determination that an Otherwise Acceptable Offer is Unreasonable as to Price"—that if no proposal revision is received by cutoff date, lowest offer submitted will be used for evaluation, accomplished same result as would cancellation and resolicitation of procurement, and served as adequate notice of cutoff date for sub-

CONTRACTS—Continued
Negotiation—Continued Page
Cutoff date—Continued
Notice sufficiency—Continued
mission of "best and final" offers within meaning of par. 3–805.1(b) of Armed Services Procurement Reg., prescribing method for terminating negotiations, even if telegram did not refer to Late Proposals provision of solicitation or inform offerors that only notices of unacceptability would be furnished between closing date for negotiations and date of award 456
Evaluation factors
Inflation and escalation recovery costs
Award under solicitation for class destroyers that provided for inclusion in price evaluation of inflation and escalation recovery factors, to offeror whose high initial target cost was reduced by evaluating estimated escalation recovery costs as greater than estimated inflation costs rather than to low base cost offeror displaced by inclusion in evaluation of estimated inflation costs that exceeded estimated escalation recovery factors, and of higher target profits, was proper. Award on basis of initial low target costs is not required where Govt. is protected from possibility of offerors manipulating inflation and escalation recovery factors, and recouping losses under reset provision of contract 418
Point rating
Criteria factors
Where in evaluation of management, financial, and technical factors offered under request for quotations for operation overseas of communication system, offerors are found equally qualified technically on basis of normalizing results of numerical scoring system used by Source Selection Evaluation Board and analysis of Board's evaluation by Source Selection Advisory Council using its independent scoring and weighting—referred to as "no gain technique"—and on basis of reevaluating manpower proposals, award of cost-plus-award fee contract to lowest offeror was proper, and award is unaffected by Advisory Council's deviation, with permission, from evaluation guidelines in Army Command Pamphlet 715–3, and by changes in scoring made between evaluations, since relative weights of evaluation criteria were preserved 390
Although offerors under request for quotations should be informed of relative weight or importance attached to each evaluation factor, there is no requirement to disclose precise numerical weights to be used in evaluation process. If offeror is in doubt as to relative importance of evaluation criteria to be used, time for resolution of matter is before closing date set for receipt of quotations 390
In second evaluation of offers to operate communication system overseas, application of bonus and penalty points in weighting system, points not provided for in request for quotations, does not constitute substantive change that should have been furnished to all offerors by means of amendment, as purpose of weighting system was to enable Source Selection Advisory Council to apply its independent judgment to evaluation criteria considered by Source Selection Evaluation Board, and inclusion of additional points was in accord with procedures established prior to receipt of quotations 390

CONTRACTS—Continued Page

Evaluation factors—Continued

Cutoff date—Continued

Superior product offered

Under solicitation issued pursuant to 10 U.S.C. 2304(a)(11), inviting proposals on cost-plus-a-fixed-fee basis for research and development services to maintain wind tunnel, award on basis of price alone was justified where both offers received were technically acceptable, as concepts in pars. 3–805.2 and 4–106.5(a) of Armed Services Procurement Reg. that price alone is not controlling factor relate to situations where favored offeror is significantly superior in technical ability and resources. Although award was not illegal because of failure to continue discussions with all offerors in competitive range when amendment changed "initial proposal" requirements of solicitation and to request "best and final" offers, and failure to specify all evaluation factors, such deficiencies should be avoided in future negotiated procurements..... 246

Prebid conference requirement

Mandatory requirement to attend prebid conference contained in request for proposals for purpose of explaining extremely complex project may not be considered condition precedent to submission of proposal, as conditions or requirements that tend to restrict competition are unauthorized unless reasonably necessary to accomplish legislative purposes of contract appropriation involved or are expressly authorized by statute. To satisfy maximum competitive requirements of Federal Procurement Regs., prospective offeror who failed to attend conference should be permitted to submit proposal and given copy of prebid transcript. However, date for receipt of proposals having passed, new closing date should be set to enable firm denied opportunity to participate to submit proposal, and responding offerors to revise proposals..... 355

Prices

Audit requirement

Failure to audit fourth and final round of proposals under solicitation for class destroyers did not violate pars. 3–101, 3–807.2(a), and 3–809 (b)(1) of Armed Services Procurement Reg. (ASPR), where not only were proposed prices in each of first three rounds of negotiations audited and found to be based on sound business judgment, but ASPR provisions do not require audit of proposals on each and every round of negotiated procurement, and par. 3–809(b)(1) provides that audits may be waived whenever it is clear that information already available is adequate for proposed procurement, and determination of "adequate" is within discretion of procuring activity and will not be questioned unless clearly erroneous..... 418

Reduction

Acceptance of late reduction in price submitted by low offeror under request for quotations was in accord with par. 3–506(g) of Armed Services Procurement Reg. that provides "a modification received from an otherwise successful offeror, which is favorable to the Government, shall be considered at any time that such modification is received," and acceptance was not prejudicial to other offerors..... 456

CONTRACTS—Continued Page
Negotiation—Continued
Sole source basis
Authority
Offeror who was granted court injunction to prevent opening of bids and award of contract under two-step procurement, and who protested use of two-step method to obtain ship's hull side blast-cleaning unit, stating Navy was required pursuant to pars. 3–108 and 3–214 of Armed Services Procurement Reg. to negotiate sole source contract with it as developer of unit, has no basis for objection. Secretary only has authority to determine that sole source procurement to avoid duplication of investment and effort is justified, and evidence did not warrant invoking his authority; and as conditions prescribed in par. 2–502(a) of regulation for use of two-step method of procurement existed, determination to use this method was within cognizance of procurement officers.... 346
Payments
Withholding
Protect interests of United States
Withholding 10 percent from progress payments due on each job order until expiration of 60-day guarantee period prescribed in Master Contract for Repair and Alteration of Vessels is not required where work is performed in accordance with contract terms and redelivered ship accepted by Govt. Express warranty clauses in contract neither excuse nor suspend obligation to make payment after contractor completes work under each job order, nor does payment clause require expiration of warranty period before payment is made; and neither of clauses prescribe additional work, but rather affix liability in monetary terms or through corrective action by contractor for prior acts or omissions for 60 days after completion of work covered by job order..... 263
Performance
Stop orders
Issuance of stop order pending resolution of bid protest, and cancellation of award to second low bidder to award contract to low bidder whose aggregate firm bid conforming to bid instructions that were overlooked in evaluation process was displaced by erroneous application of unit price rule to estimated data prices, were proper administrative actions, notwithstanding contract did not provide for stop orders, since authority to issue stop orders is not dependent on contract provision but on whether action is necessary in interest of Govt., and procurement subject to statutory requirement that award be made to lowest responsive and responsible bidder, erroneous award which did not involve exercise of any authorized discretion did not create binding contract, and cancellation of award was legally permissible..... 447
While par. 2–407.8(c) of Armed Services Procurement Reg. provides that contracting officer seek mutual agreement with successful bidder to suspend performance of contract on no-cost basis when it appears likely that award may be invalidated and delay receipt of supplies and services, it does not bar issuance of stop order in event contractor declines to cooperate with contracting agency..... 447

CONTRACTS—Continued

Proprietary, etc., items. (*See* **Contracts, data, rights, etc.**) Page

Protests

Tolling of bid acceptance period

Where second low bidder, during period for accepting its bid, filed protest with U.S. GAO as to unacceptability of low bid, consideration of its bid submitted under invitation for bids on electronic equipment is not precluded because bid acceptance period was extended only after acceptance date had expired, since filing of protest tolled expiration of bid acceptance period until after resolution of protest. As no other bidder is eligible for award, integrity of competitive system is not involved; and, therefore, there is no "compelling reason" to reject second low bid. However, in future procurements should award be delayed until after expiration of bid acceptance period, procedures prescribed in secs. 1–2.404–1(c) and 1–2.407–8(b)(2) of Federal Procurement Regs. should be followed 357

Requests for quotations

Evaluation factors

Disclosure

Although offerors under request for quotations should be informed of relative weight or importance attached to each evaluation factor, there is no requirement to disclose precise numerical weights to be used in evaluation process. If offeror is in doubt as to relative importance of evaluation criteria to be used, time for resolution of matter is before closing date set for receipt of quotations 390

In second evaluation of offers to operate communication system overseas, application of bonus and penalty points in weighting system, points not provided for in request for quotations, does not constitute substantive change that should have been furnished to all offerors by means of amendment, as purpose of weighting system was to enable Source Selection Advisory Council to apply its independent judgment to evaluation criteria considered by Source Selection Evaluation Board, and inclusion of additional points was in accord with procedures established prior to receipt of quotations 390

Research and development

Price factor

Under solicitation issued pursuant to 10 U.S.C. 2304(a)(11), inviting proposals on cost-plus-a-fixed-fee basis for research and development services to maintain wind tunnel, award on basis of price alone was justified where both offers received were technically acceptable, as concepts in pars. 3–805.2 and 4–106.5(a) of Armed Services Procurement Reg. that price alone is not controlling factor relate to situations where favored offeror is significantly superior in technical ability and resources. Although award was not illegal because of failure to continue discussions with all offerors in competitive range when amendment changed "initial proposal" requirements of solicitation and to request "best and final" offers, and failure to specify all evaluation factors, such deficiencies should be avoided in future negotiated procurements 246

Sales, generally. (*See* **Sales**)

Small business concerns awards. (*See* **Contracts, awards, small business concerns**)

CONTRACTS—Continued

Specifications Page

Amendments

Furnishing requirement

Requirement in par. 2-208(a) of Armed Services Procurement Reg. (ASPR) that amendments to invitations for bids must be sent to everyone to whom invitations had been furnished has reference to amendments issued under competitive system prior to opening of bids; and, therefore, amendment issued after closing date for receipt of technical proposals to only two concerns out of 37 potential suppliers solicited under first step of two-step procurement who had responded to Request for Technical Prosposals (RFTP) was proper and in accord with ASPR 3-805.1(e), relative to changes occurring in requirements during negotiations. In fact, if firms who had not responded to RFTP had been furnished copies of amendment and responded, provisions of "Late Proposals and Modifications" clause would be for application 346

Descriptive data

Voluntary submission

Nonconformance to specifications

Determination to open late bid received on one of two technical proposals submitted under first step of two-step procurement and found acceptable, even though equipment offered did not meet all details of specifications, was proper since delay in delivery of bid received more than 24 hours before bid opening was due to Govt. mishandling. Although bid was accompanied by covering letter and unsolicited descriptive literature at variance with specifications, it is nevertheless responsive bid; for it is inconceivable that low bidder, who had qualified under first step, would disqualify itself in second step and, therefore, deviating material is viewed as attempt to identify which of two accepted first-step proposals was being priced in second step 337

Subcontracts

Bid shopping

Listing of subcontractors

Omission of addresses of subcontractors listed by prime contractor in bid submission is minor informality that may be waived under sec. 1-2.405 of Federal Procurement Regs. when contracting agency can independently determine omitted addresses from readily available information—contractor register, telephone directories, agency records—as well as from personal knowledge. Since incompleteness of bid did not result in ambiguity that requires clarification by bidder, no possibility of bid shopping exists, nor is bid nonresponsive on basis bidder was given "two bites at the apple." Extent to which contracting agency will extend its search for similarly named firms is discretionary matter; and if discretion is abused, protest could be filed with U.S. GAO 295

DEBT COLLECTIONS

Waiver

Civilian employees

Compensation overpayments

Aliens

Authority in 5 U.S.C. 5584 to waive erroneous payments of compensation made to employees of executive agencies is applicable to non-U.S. citizens employed by U.S. in foreign areas, as term "employee" as used

DEBT COLLECTIONS—Continued
Waiver—Continued Page
Civilian employees—Continued
Compensation overpayments—Continued
Aliens—Continued
in sec. 5584 means employee as defined in 5 U.S.C. 2105; that is, individual appointed in "civil service," which constitutes all appointive positions in executive, judicial, and legislative branches of Govt., except positions in uniformed services (5 U.S.C. 2101(1)). Therefore, Philippine citizen, properly appointed to position in executive branch to perform Federal function supervised by Federal employee, is employee under 5 U.S.C. 5584 and entitled to waiver of erroneous compensation payments without regard to fact employment is under labor agreement with Philippine Govt. 329

EVIDENCE
Sufficiency
Burden of proof
Milk indemnity payments authorized by Pub. L. 90–484 to be made to dairy farmers who are directed to remove milk from commercial markets because milk contained residues of chemicals registered and approved for use by Federal Govt., may not be allowed pursuant to Pub. L. 91–127 when milk is removed as result of farmer's willful failure to follow procedures prescribed by Govt. Where dairy farmer predicates milk indemnity claim on compliance with procedures for use of DDT pesticides on cotton fields sprayed from airplanes, it is not sufficient that it cannot be proved farmer was at fault; but rather to receive indemnity payments for contaminated milk, burden is on farmer to establish that he was not at fault. 305

FAMILY ALLOWANCES
Separation
Type 2
Ship duty
Ashore effect
Navy members who travel during 48 hours of liberty, 72 hours if holiday is involved, from place of ship overhaul to home port of ship to visit dependents and return at Govt. expense pursuant to Pub. L. 91–210, do not forfeit entitlement to $30 per month Family Separation Allowance, type II, authorized in 37 U.S.C. 427(b) for members separated from their dependents while on board ship for continuous period of more than 30 days. The legislative history of Pub. L. 91–210, enacted as beneficial legislation to permit members to travel at Govt. expense from place of vessel overhaul to home port to visit dependents, evidences no intent to deprive member of other benefits by reason of short visit with dependents on usual type of Navy liberty. 334

FUNDS
Federal grants, etc., to other than States
Contract status
Amounts due or to become due under grants of Federal funds to medical college for construction and restoration of facilities authorized by Public Health Service Act, as amended, may be assigned to bank pursuant to Assignment of Claims Act of 1940, as amended, to enable grantee to obtain interim financing for purpose of making progress

FUNDS—Continued

Federal grants, etc., to other than States—Continued Page

Contract status—Continued

payments to contractor, as acceptance of grant subject to conditions imposed by Govt. created valid contract within meaning of 1940 act, and as assignment is not forbidden under grant. However, in accordance with requirements of act, assignment should cover amount payable under grants without regard to status of account between college and banks; and, furthermore, grantee is not foreclosed from financing non-Federal share of costs with borrowed funds 470

Revolving

Funds in the nature of a revolving fund

Special deposit accounts established under 40 U.S.C. 174k(b) and 174j–4, with Treasurer of U.S. by Architect of Capitol as manager of House and Senate restaurants, constitute permanent indefinite appropriations for use similar to revolving fund in view of fact the funds otherwise would be for deposit as miscellaneous receipts; and funds do not lose their identity as appropriated funds, because funds appropriated for contingent expenses of House and Senate are deposited and disbursed from accounts. Therefore, since restaurant employees are paid from funds considered appropriated funds, restriction in Pub. L. 91–144, against payment of compensation from appropriated funds to other than U.S. citizens, prohibits employment of aliens by restaurants. Overrules B–43917, Aug. 30, 1944, relative to special deposit accounts; but pursuant to 5 U.S.C. 5533, restaurant employees are now exempt from dual compensation prohibition 323

GENERAL ACCOUNTING OFFICE

Jurisdiction

Claims

Finality of determination

Since under Assignment of Claims Act of 1940, as amended, Govt. is not insurer as to fraudulent schemes devised by assignor against assignee, nor is Govt. required to involve assignee in matters of contract administration, claim for amount of fictitious invoices presented by assignee of drayage company performing services for Govt., which were retrieved by assignor prior to payment, may not be honored as record presents no grounds to impute negligence to or assert estoppel against Govt., but but instead raises doubt as to validity of assignee's claim. Although claim must be rejected, as jurisdiction of GAO to pay claims is based upon legal liability of U.S., assignee's right to seek judicial determination of its claim is not prejudiced 434

Settlements

Review

Claim submitted for consideration under settlement authority in 31 U.S.C. 71 for additional compensation to cover required correction in printing of technical publication, which had been disallowed by contracting officer and appeal to disallowance denied by administrative officer, may not be paid on basis prior uncorrected orders had been accepted, where record shows contractor agreed to correct error without cost to Govt., and supplemental agreement providing charge for work—insertion of fold-ins in publication in indicated sequence—has reference to future orders. Furthermore, alleged subsequent oral agreement may not be considered, as review is restricted to record before contracting agency at time the head of agency rendered decision 369

HUSBAND AND WIFE Page

Separation agreements

Tax refund

Liability for proceeds of income tax refund check bearing only initials of husband and wife still married but separated at time of endorsement by husband and deposited in joint account with his mother, whose initials were similar to wife's, is for determination by Federal and not State law in interest of uniformity. Although use of initials did not facilitate forgery and ordinarily cashing bank would be required to refund one-half of check, as in "same name cases," reclamation proceedings against bank are not required since joint income tax is treated as return of single individual and payment to husband as one of joint obligees extinguished liability of Govt. for tax overpayment, and ownership rights of spouses are for determination by local law in appropriate proceedings 441

LEAVES OF ABSENCE

Military personnel

Excess leave accrual

"Continuous period" interruptions

Hostile fire pay area duty

Right of member of uniformed services to accumulate 90 days' leave under 10 U.S.C. 701(f) while serving on board ship which operates in designated fire area for continuous period of at least 120 days, during which time he is entitled to special pay authorized in 37 U.S.C. 310(a), is not affected by fact that ship to which assigned operates in and out of designated hostile fire area. Since crewmembers qualify for hostile fire pay for each month of 4-month period of duty in hostile fire area, "continuous period" requirement in sec. 701(f) for accruing excess leave is satisfied, provided absence during any part of 120 days from designated area is for periods of less than calendar month 330

MILITARY PERSONNEL

Allowances

Family. (*See* **Family Allowances**)

Automobiles

Transportation. (*See* **Transportation automobiles**)

Coast Guard. (*See* **Coast Guard**)

Dependents

Transportation. (*See* **Transportation, dependents, military personnel**)

Disability retired pay. (*See* **Pay, retired, disability**)

Dual benefits

Acceptability

Navy members who travel during 48 hours of liberty, 72 hours if holiday is involved, from place of ship overhaul to home port of ship to visit dependents and return at Govt. expense pursuant to Pub. L. 91–210, do not forfeit entitlement to $30 per month Family Separation Allowance, type II, authorized in 37 U.S.C. 427(b) for members separated from their dependents while on board ship for continuous period of more than 30 days. The legislative history of Pub. L. 91–210, enacted as beneficial legislation to permit members to travel at Govt. expense from place of vessel overhaul to home port to visit dependents, evidences no intent to deprive member of other benefits by reason of short visit with dependents on usual type of Navy liberty 334

MILITARY PERSONNEL—Continued Page

Household effects

Storage. (*See* **Storage, household effects, military personnel**)

Transportation. (*See* **Transportation, household effects, military personnel**)

Leaves of absence. (*See* **Leaves of Absence, military personnel**)

Missing, interned, etc., persons

Housetrailer transportation

Transportation of housetrailer at Govt. expense for dependents of member of uniformed services in missing status, as defined in 37 U.S.C. 551(2), may not be provided in absence of specific authority. 37 U.S.C. 554, in authorizing transportation of dependents and household and personal effects of members in missing status, does not expressly provide for transportation of housetrailer or mobile home—and words "personal effects" as used in section may not be construed as including housetrailer—and 37 U.S.C. 409, in providing for trailer allowance in lieu of transportation of baggage and household goods, and payment of dislocation allowance, restricts entitlement to member, or in case of death to dependents, and makes no provision for payment in event member is in missing status 317

Pay. (*See* **Pay**)

Per diem. (*See* **Subsistence, per diem**)

Service credits. (*See* **Pay, service credits**)

Ship assignments

Ships inactivated away from home port

Transportation benefits

Transportation benefits prescribed by Pub. L. 91–210, approved Mar. 13, 1970, 37 U.S.C. 406b, for members of uniformed services permanently attached to ships being overhauled away from home port, whose dependents reside at home port, may not be extended to personnel of ships being inactivated away from home port to authorize reimbursement for round trip travel to visit dependents residing at home port. Although act does not define "overhaul," and its meaning is not reflected in legislative history of act, since Navy's definition of "overhaul" does not include inactivation of ship, benefits of act may not be extended to personnel of ships being inactivated away from home port. However, no exception will be taken to payments already made 320

Station allowances. (*See* **Station Allowances**)

OFFICERS AND EMPLOYEES

Compensation. (*See* **Compensation**)

Service agreements

Manpower shortage category

Agreements which appointees to manpower shortage positions execute pursuant to 5 U.S.C. 5723(b), to remain in service of agency to which appointed or assigned for 12 months unless separated for reasons beyond their control which are acceptable to agency, should be revised to require only that employee remain in Govt. service, as language of sec. 5723(b) is substantially same as sec. 5724(i), which has been construed in *Finn* v. *U.S.*, Ct. Cl. No. 396–69, decided July 15, 1970, to require only that employee agree to remain "in the Government service" for period of 12 months rather than in service of particular agency 374

OFFICERS AND EMPLOYEES—Continued

Page

Severance pay

Eligibility

Employee on military duty

Fact that civilian Air Force technician was on required active military duty in Air Force Reserve when installation was transferred does not disqualify him for severance pay, as employee has restoration rights to civilian position at place where office has been relocated, or he may decline transfer and become eligible for severance pay on basis of being involuntarily separated from civil service. Employee declining transfer should be given paper restoration to establish pay scale and involuntary separation made of record, date of restoration to be date employee applied for restoration, and involuntary separation date, date he informed agency he would not accept reassignment 300

Status

Aliens

Authority in 5 U.S.C. 5584 to waive erroneous payments of compensation made to employees of executive agencies is applicable to non-U.S. citizens employed by U.S. in foreign areas, as term "employee" as used in sec. 5584 means employee as defined in 5 U.S.C. 2105; that is, individual appointed in "civil service," which constitutes all appointive positions in executive, judicial, and legislative branches of Govt., except positions in uniformed services (5 U.S.C. 2101(1)). Therefore, Philippine citizen, properly appointed to position in executive branch to perform Federal function supervised by Federal employee, is employee under 5 U.S.C. 5584 and entitled to waiver of erroneous compensation payments without regard to fact employment is under labor agreement with Philippine Govt 329

Transfers

Service agreements

Government *v.* particular agency service

In view of *Finn* v. *U.S.*, Ct. Cl. No. 396–69, decided July 15, 1970, to effect that Govt. agency does not have authority under 5 U.S.C. 5724(i) to require employee to sign agreement to remain in service of agency for 12 months following effective date of transfer, holding in 46 Comp. Gen. 738 that agreements executed under sec. 5724(i) require an employee to remain with particular agency rather than "in the Government service" no longer is for application, with exception of last paragraph concerning taking of appropriate collection action if employee fails to remain in Govt. service for 12 months 374

Travel expenses. (*See* **Travel Expenses**)

Wage board

Compensation. (*See* **Compensation, wage board employees**)

PAY

Additional

Hazardous duty

Assignment status

Officers of uniformed services trained in parachute jumping and demolition of explosives, who incident to staff billet assignments evaluate training programs and equipment, entailing observation of actual training exercises by special warfare forces, are not entitled to dual hazardous duty incentive pay provided in 37 U.S.C. 301 unless they

PAY—Continued Page

Additional—Continued

Hazardous duty—Continued

Assignment status—Continued

are assigned to operational team and actually perform parachute jumping in jump status or perform demolition duty as primary assignment. Mere evaluation or observation of operational team activities does not qualify officers for incentive pay; and in absence of proper orders, any parachute jumping or demolition of explosives actually performed by officers would not entitle them to additional pay 425

Retired

Computation

Multiplier credit

Although inactive Naval Reserve cadet or midshipman time served before July 1949 by Regular Coast Guard officer or enlisted man retiring either for years of service, for age, or for disability, may not be credited for purpose of retirement, service counts for multiplier credit and in accordance with 14 U.S.C. 423, years of service are to be computed under 10 U.S.C. 1405(4), due to fact that pursuant to 10 U.S.C. 1333 such service is "service (other than active service) in a reserve component of an armed force." However, full-time credit may not be given inactive service in determining multiplier factor under 14 U.S.C. 423 and 10 U.S.C. 1405(4), since service is subject to computation method provided in 10 U.S.C. 1333(4) 308

Disability

Disability found prior to eligibility for promotion

Where disability retirement orders of Air Force major carried out recommendations of Physical Evaluation Board who had found officer permanently disabled and unfit to perform duties of office, promotion of officer to temporary grade of lieutenant colonel within 3 months prior to effective date of retirement was without effect and inconsistent with governing Air Force regulations; and since officer's disability was not discovered as result of physical examination for promotion to bring promotion within purview of 10 U.S.C. 1372(4) and entitle him to retire at higher grade, there is no authority for payment of retired pay to officer computed on grade of lieutenant colonel 314

Foreign residence effect

Air Force master sergeant retired under 10 U.S.C. 8914 with over 20 years of service, who during those years retained Canadian citizenship and returned to Canada to reside when he retired, is entitled to be retired with retired pay as authorized in Formula C, 10 U.S.C. 8991. Member, permitted to enlist as alien and to be sworn in without restrictions pursuant to 10 U.S.C. 8253(c), was accepted without restrictions and became "regular enlisted member of Air Force" within purview of 10 U.S.C. 8914, entitled upon retirement to be member of Air Force Reserve with obligation to perform active duty until service credits equal 30 years of both active and inactive service; and, therefore, so long as allegiance status remains unchanged, Canadian residency does not constitute bar to receipt of retired pay 269

PAY—Continued

Retired—Continued Page

Increases

Entitlement

Air Force officer subject to mandatory retirement on Jan. 8, 1970, under 10 U.S.C. 8921, and pursuant to Uniform Retirement Date Act, 5 U.S.C. 8301, scheduled to retire Feb. 1, 1970, who was continued on active duty until May 25, 1970, to determine his eligibility for disability retirement under 10 U.S.C. 1201, is not entitled to retired pay computed at increased pay rates prescribed by E. O. No. 11525, dated Apr. 15, 1970, for members on active duty Jan. 1, 1970, in view of restrictions by Secretary of Defense to effect retroactive pay increases do not apply to persons who became entitled to retired or retainer pay after Dec. 31, 1969, but before Apr. 15, 1970, prohibition that relates to officer's Jan. 8, 1970, mandatory retirement date. However, for active duty performed before or after Jan. 8, officer is entitled to active duty pay computed at increased rates prescribed in Executive order..... 258

Air Force officer whose mandatory retirement date under 10 U.S.C. 8916 was Apr. 11, 1970, and pursuant to Uniform Retirement Date Act, 5 U.S.C. 8301, he is retired on May 1, 1970—date that may not be considered because of restrictive provisions of 5 U.S.C. 8301(b), in applying E. O. No. 11525, dated Apr. 15, 1970, which retroactively prescribes pay increases authorized by act of Dec. 16, 1967, and Federal Employees Salary Act of Apr. 15, 1970—is subject to restrictions imposed by Secretary of Defense in implementing order to effect retroactive pay increases do not apply to persons who became entitled to retired or retainer pay after Dec. 31, 1969, but before Apr. 15, 1970, and, therefore, officer's retired pay is for computation on basis of active duty pay rate in effect on Apr. 11, 1970, date of his mandatory retirement; but he is entitled for active duty performed after Dec. 31, 1969, to higher pay rate provided by Executive order..... 258

Retention after age and service qualifications

Service credits

Basis for retention

Retention beyond age 60 of Air Force sergeant under par. 14o(2) of Air National Guard Regulation 39–10 to permit him to complete 26 years of military service for pay purposes in recognition of "long and distinguished military service" would not satisfy requirements of 10 U.S.C. 676 that Secretary concerned order retention in service for purpose of acquiring additional service credits only if services are military requirement; and sergeant retired under 10 U.S.C. 1331 and 1401, and authorized retired pay on basis of "with over 22 but less than 26 years" of non-Regular service, therefore, is not eligible for retired pay computed at pay rate of over 26 years of military service..... 428

Saved

Temporary promotions

Upon acceptance of permanent appointment pursuant to 10 U.S.C. 5579 as ensign in Medical Service Corps, Regular Navy, and termination of temporarily held rank of lieutenant (jg) to which appointed subsequent to serving under permanent appointment as line ensign, officer is not entitled to saved pay, for not having suffered reduction in pay "because of his former permanent status"—also that of ensign—he is

PAY—Continued
Saved—Continued Page
Temporary promotions—Continued
unable to meet criteria in 10 U.S.C. 5579(d) for eligibility to have higher pay and allowances received under temporary appointment as lieutenant (jg) saved to him 279
Service credits
Inactive time
Coast Guard military personnel
Inactive Naval Reserve cadet or midshipman time served before July 1949 by Regular Coast Guard officer or enlisted man retiring either for years of service under 14 U.S.C. 291, 292, 354, or 355, for age pursuant to 14 U.S.C. 293 or 353, or for disability as provided in ch. 61, Title 10, U.S. Code, is not allowable for purpose of retirement. Sec. 291, in providing for voluntary retirement of commissioned officers after 20 years of service requires such service to have been "active service;" word "service" in secs. 292, 354, and 355, authorizing voluntary retirement for commissioned officers after 30 years, and for enlisted men after 30 or 20 years, has been interpreted since 1948 as "active service;" secs. 293 and 353 in providing for compulsory retirement at age 62 make no reference to years of service; and under 10 U.S.C. 1208 disability retirement is computed on basis of active service 308
Although inactive Naval Reserve cadet or midshipman time served before July 1949 by Regular Coast Guard officer or enlisted man retiring either for years of service, for age, or for disability, may not be credited for purpose of retirement, service counts for multiplier credit and in accordance with 14 U.S.C. 423, years of service are to be computed under 10 U.S.C. 1405(4), due to fact that pursuant to 10 U.S.C. 1333 such service is "service (other than active service) in a reserve component of an armed force." However, full-time credit may not be given inactive service in determining multiplier factor under 14 U.S.C. 423 and 10 U.S.C. 1405(4), since service is subject to computation method provided in 10 U.S.C. 1333(4) 308
In crediting inactive Naval Reserve cadet or midshipman service performed before July 1949 by Regular Coast Guard officer or enlisted man for retirement purposes, there is no distinction to be drawn between status of "Cadet, MMR, USNR," or "Midshipman, MMR, USNR," inasmuch as persons having either status are regarded as members of U.S. Naval Reserve 308
PAYMENTS
Contracts. (*See* **Contracts, payments**)
POST OFFICE DEPARTMENT
Employees
Transfers
During retroactive period of compensation increases
Former General Schedule employees of Post Office Dept. who transferred to higher General Schedule position in another agency between Aug. 12, 1970, date of enactment of Postal Reorganization Act, which provides approximately 8-percent salary increase, and effective date of act, first pay period beginning on or after Apr. 16, 1970, are entitled to have "not less than two-step increase" authorized in 5 U.S.C. 5334(b) for employees who are promoted or transferred, computed on revised

POST OFFICE DEPARTMENT—Continued Page

Employees—Continued

Transfers—Continued

During retroactive period of compensation increases—Continued

General Schedule rate of Post Office Dept. for in absence of specific language to contrary, rule for application is that retroactive salary increases apply as if increase had been in force and effect at time of change of status of employee---- 414

Where agency has policy to extend benefit of highest previous rate rule prescribed in 5 U.S.C. 5334(a), salary of employee who left Post Office Dept. during retroactive period between enactment of Postal Reorganization Act and its effective date may be adjusted to reflect increase authorized by act; and where agency does not have established policy, but did give employee benefit of last Post Office Dept. rate, it is within agency's discretion whether or not to adjust employee's salary to reflect increase in Post Office rate. However, sec. 531.203(d)(4) of Civil Service Commission Regs. relating to general increases in General Schedule and not to special increases, employee who was not on rolls at time of enactment of Reorganization Act may not be given benefit of increased rate for purposes of "highest previous rate" rule---- 414

Mails

Transportation

Emergency contracts

Authority in 49 U.S.C. 1375(h) to use air taxi mail service contracts in event of emergency caused by flood, fire, or other calamitous visitation may not be exercised upon occurrence of any unforeseen event which renders normal mail transportation facilities unavailable, such as sudden loss of RPO train schedule, or unexpected closing of airport runway causing certified air carriers to temporarily suspend service at airport; for under the "ejusdem generis" rule of construction, general words calamitous visitation" are restricted by particular terms "flood or fire," and term "calamity" supposes continuous state produced by natural causes. Nonconforming existing contracts should be terminated as soon as practicable, and any temporary arrangements made under Postal Reorganization Act should be terminated when emergency ceases---- 255

POSTAL SERVICE, UNITED STATES

Postal Reorganization Act

Employee salary increases

"Highest previous salary rule." (*See* **Compensation, postal service, rates, highest previous rate, Postal Reorganization Act increases**)

SALES

Bids

Identical

Awards made under sales invitation for bids on basis of lots drawn by three bidders who had submitted identical bids because there was no other evidence of collusive bidding, where Justice Dept. had taken no action on report of receipt of identical bids, and bid prices submitted were reasonable, were not proper, even though provisions of DOD Manual 4160.21–M were followed. Although awards will not be disturbed, steps should be taken to obtain in future surplus sales the full and unrestricted competition contemplated by competitive bidding system and to avoid acceptance of reasonable bid prices as substitute for adequate competition; and if circumstances do not permit reasonable determination that price competition was adequate, sale should be resolicited---- 382

STATES Page

Municipalities

Services to Federal Government

Payment based on *quantum* of services

Reasonable charge by political subdivision based on *quantum* of direct service furnished, and which is applied equally to all property tax-exempt entities, need not be considered tax against U.S., even though services are furnished to taxpayers without direct charge, provided political subdivision is not required by law to furnish service involved without direct charge to all located within its boundaries, such as fire and police protection---------- 343

Service charge *v.* tax

Service charge levied on each ton of refuse deposited at county incinerator by Federal agencies or their contractors, which is not imposed on residents or nonfederal tax-exempt users including State agencies, where cost of operation and maintenance of incinerator is borne by general tax revenues and county's authority to levy tax is doubtful, is in nature of tax to which U.S. is immune; and placement of U.S. in separate category from other property tax-exempt entities for purpose of imposing charge is unreasonable and discriminatory classification on the part of county and, therefore, payment of charge is unauthorized. However, payment of charge may continue to be made under contracts including charge and providing for refund upon resolution of matter---------- 343

STATION ALLOWANCES

Military personnel

Excess living costs outside United States, etc.

Dependents' absences

When member of uniformed services remains at permanent duty station outside U.S. while one or more of dependents returns to U.S. for visit, cost-of-living allowance adjustment required by par. M4301-3c(1), items 1, 2, and 3 of Joint Travel Regs. may be waived if absence is for 30 days or less, and paragraph amended accordingly. 37 U.S.C. 405, which authorizes consideration of cost-of-living element in prescribing payment of per diem, indicates no requirement to adjust cost-of-living allowances during absence of member's dependents for short periods; and waiver of adjustment would be in harmony with regulations implementing cost-of living allowances provided by sec. 221 of Overseas Differential and Allowances Act, 5 U.S.C. 5924, for civilian employees of Govt--------- 386

STATUTORY CONSTRUCTION

General and special words

Authority in 49 U.S.C. 1375(h) to use air taxi mail service contracts in event of emergency caused by flood, fire, or other calamitous visitation may not be exercised upon occurrence of any unforeseen event which renders normal mail transportation facilities unavailable, such as sudden loss of RPO train schedule, or unexpected closing of airport runway causing certified air carriers to temporarily suspend service at airport; for under the "ejusdem generis" rule of construction, general words "calamitous visitation" are restricted by particular terms "flood or fire," and term "calamity" supposes continuous state produced by natural causes. Nonconforming existing contracts should be terminated as soon as practicable, and any temporary arrangements made under Postal Reorganization Act should be terminated when emergency ceases---------- 255

STORAGE Page

Household effects

Military personnel

Temporary storage

Release from active duty

Member of uniformed services who was retired at last duty station in Europe, and incident to selecting Australia as future home had household effects crated and temporarily stored at Govt. expense at old duty station to which he shortly returned from Australia and then had goods redelivered to quarters, is pursuant to par. M8100 of Joint Travel Regs. indebted for charges erroneously paid by Govt. However, since temporary storage costs are member's responsibility, he is entitled under par. M8260–1 of regulations incident to retirement orders to shipment of effects to U.S. within prescribed weight and 1-year period limitations, any excess cost over cost that would have been incurred in shipment of effects to home of selection in Australia to be paid by member. 431

SUBSISTENCE

Per diem

Temporary duty

Aboard submarines, vessels, etc.

Civilian employees periodically assigned to perform temporary duty aboard Govt. vessels to conduct oceanographic and hydrographic surveys, who are at sea 25 to 28 days and in port 5 to 7 days and are paid per diem in accordance with par. C8101–2d of Vol. 2 of Joint Travel Regs., may not be required to occupy quarters aboard vessel during periods exceeding 3 days in port, nor may per diem be reduced because of availability of quarters aboard ship in absence of actual use of quarters, or determination by proper authority under par. C1057–3 that exigencies of service require that employees occupy quarters aboard vessel while in port. 388

TAXES

Federal

Joint returns

Status

Liability for proceeds of income tax refund check bearing only initials of husband and wife still married but separated at time of endorsement by husband and deposited in joint account with his mother, whose initials were similar to wife's, is for determination by Federal and not State law in interest of uniformity. Although use of initials did not facilitate forgery and ordinarily cashing bank would be required to refund one-half of check, as in "same name cases," reclamation proceedings against bank are not required since joint income tax is treated as return of single individual and payment to husband as one of joint obligees extinguished liability of Govt. for tax overpayment, and ownership rights of spouses are for determination by local law in appropriate proceedings. 441

State

Constitutionality

Assessment *v.* service charge

Service charge levied on each ton of refuse deposited at county incinerator by Federal agencies or their contractors, which is not imposed on residents or nonfederal tax-exempt users including State agencies, where cost of operation and maintenance of incinerator is borne by

TAXES—Continued Page
State—Continued
Constitutionality—Continued
Assessment *v.* service charge—Continued
general tax revenues and county's authority to levy tax is doubtful, is in nature of tax to which U.S. is immune; and placement of U.S. in separate category from other property tax-exempt entities for purpose of imposing charge is unreasonable and discriminatory classification on the part of county and, therefore, payment of charge is unauthorized. However, payment of charge may continue to be made under contracts including charge and providing for refund upon resolution of matter---------- 343
Reasonable charge by political subdivision based on *quantum* of direct service furnished, and which is applied equally to all property tax-exempt entities, need not be considered tax against U.S., even though services are furnished to taxpayers without direct charge, provided political subdivision is not required by law to furnish service involved without direct charge to all located within its boundaries, such as fire and police protection---------- 343
TRANSPORTATION
Automobiles
Military personnel
Advance shipments
Shipment of privately owned vehicles prior to receipt of permanent change-of-station orders by members of uniformed services may be authorized on basis the phrase "ordered to make a change of permanent station" in 10 U.S.C. 2634(a), authority for transportation of motor vehicles, is identical to phrase used in 37 U.S.C. 406(a) to authorize transportation of member's dependents, pursuant to which par. M7000, item 8, of Joint Travel Regs. (JTR) provides for transportation of dependents in advance of orders when supported by certificate by appropriate authority stating that member was advised prior to issuance of change-of-station orders that such orders would issue. Accordingly, JTR may be amended to authorize advance shipment of motor vehicles under same circumstances as is provided by par. M7000, for advance transportation of dependents---------- 376
Dependents
Military personnel
Debarment from station
Restriction removed prior to member's arrival
Air Force officer whose dependents incident to his permanent change of station from overseas to restricted area within U.S. are moved to selected home, upon learning when he arrived at restricted duty station that restriction had been removed prior to his transfer, is entitled under authority of par. M7005–4, item 4, of Joint Travel Regs. to monetary allowance in lieu of transportation for travel of dependents from home selected to new duty station on basis officer was on duty at new station when restriction on travel of dependents was removed. Similar claims made before or after this decision may be paid---------- 366
Missing, interned, etc., members
Dependents of member of uniformed services in missing status as defined in 37 U.S.C. 551(2), who have been furnished transportation for themselves and their household and personal effects incident to

TRANSPORTATION—Continued Page

Dependents—Continued

Military personnel—Continued

Missing, interned, etc., members—Continued

member's entry into missing status, may not again be furnished transportation while member's status remains unchanged, 37 U.S.C. 554 requiring change of status for entitlement to transportation; and change from one classification to another within "missing status" category, defined as missing; missing in action; interned in foreign country; captured, beleaguered, or beseiged by hostile force; or detained in foreign country against member's will, does not constitute change within meaning of sec. 554, and therefore regulations may not be promulgated to authorize additional transportation incident to missing status..... 291

More than one movement

When status of member of uniformed services is changed from one to other of three categories specified in 37 U.S.C. 554—dead, injured, or absent for period of more than 29 days in missing status—transportation of dependents and of household and personal effects may be furnished incident to each change in status of member in accordance with 35 Comp. Gen. 399 (1956)..... 291

Household effects

Military personnel

Release from active duty

To other than selected home

Member of uniformed services who was retired at last duty station in Europe, and incident to selecting Australia as future home had household effects crated and temporarily stored at Govt. expense at old duty station to which he shortly returned from Australia and then had goods redelivered to quarters, is pursuant to par. M8100 of Joint Travel Regs. indebted for charges erroneously paid by Govt. However, since temporary storage costs are member's responsibility, he is entitled under par. M8260–1 of regulations incident to retirement orders to shipment of effects to U.S. within prescribed weight and 1-year period limitations, any excess cost over cost that would have been incurred in shipment of effects to home of selection in Australia to be paid by member..... 431

Trailer shipment

Missing, interned, etc., persons

Transportation of housetrailer at Govt. expense for dependents of member of uniformed services in missing status, as defined in 37 U.S.C. 551(2), may not be provided in absence of specific authority. 37 U.S.C. 554, in authorizing transportation of dependents and household and personal effects of members in missing status, does not expressly provide for transportation of housetrailer or mobile home—and words "personal effects" as used in section may not be construed as including housetrailer—and 37 U.S.C. 409, in providing for trailer allowance in lieu of transportation of baggage and household goods, and payment of dislocation allowance, restricts entitlement to member, or in case of death to dependents, and makes no provision for payment in event member is in missing status..... 317

TRANSPORTATION—Continued

Military personnel Page

Missing, interned, etc., members

Status of benefits

Dependents of member of uniformed services in missing status as defined in 37 U.S.C. 551(2), who have been furnished transportation for themselves and their household and personal effects incident to member's entry into missing status, may not again be furnished transportation while member's status remains unchanged, 37 U.S.C. 554 requiring change of status for entitlement to transportation; and change from one classification to another within "missing status" category, defined as missing; missing in action; interned in foreign country; captured, beleaguered, or besieged by hostile force; or detained in foreign country against member's will, does not constitute change within meaning of sec. 554, and therefore regulations may not be promulgated to authorize additional transportation incident to missing status 291

TRAVEL EXPENSES

First duty station

Manpower shortage

Service agreement

Agreements which appointees to manpower shortage positions execute pursuant to 5 U.S.C. 5723(b), to remain in service of agency to which appointed or assigned for 12 months unless separated for reasons beyond their control which are acceptable to agency, should be revised to require only that employee remain in Govt. service, as language of sec. 5723(b) is substantially same as sec. 5724(i), which has been construed in *Finn* v. *U.S.*, Ct. Cl. No. 396–69, decided July 15, 1970, to require only that employee agree to remain "in the Government service" for period of 12 months rather than in service of particular agency 374

Military personnel

Ship assignments

Ship overhaul *v.* inactivation away from home port

Transportation benefits prescribed by Pub. L. 91–210, approved Mar. 13, 1970, 37 U.S.C. 406b, for members of uniformed services permanently attached to ships being overhauled away from home port, whose dependents reside at home port, may not be extended to personnel of ships being inactivated away from home port to authorize reimbursement for round trip travel to visit dependents residing at home port. Although act does not define "overhaul," and its meaning is not reflected in legislative history of act, since Navy's definition of "overhaul" does not include inactivation of ship, benefits of act may not be extended to personnel of ships being inactivated away from home port. However, no exception will be taken to payments already made 320

WORDS AND PHRASES

"Ejusdem generis"

Authority in 49 U.S.C. 1375(h) to use air taxi mail service contracts in event of emergency caused by flood, fire, or other calamitous visitation may not be exercised upon occurrence of any unforeseen event which renders normal mail transportation facilities unavailable, such as sudden loss of RPO train schedule, or unexpected closing of airport runway causing certified air carriers to temporarily suspend service at airport; for under the "ejusdem generis" rule of construction, general words "calamitous visitation" are restricted by particular terms "flood or fire" and term "calamity" supposes continuous state produced by

WORDS AND PHRASES—Continued Page

"Ejusdem generis"—Continued

natural causes. Nonconforming existing contracts should be terminated as soon as practicable, and any temporary arrangements made under Postal Reorganization Act should be terminated when emergency ceases. 255

"Employee"

Authority in 5 U.S.C. 5584 to waive erroneous payments of compensation made to employees of executive agencies is applicable to non-U.S. citizens employed by U.S. in foreign areas, as term "employee" as used in sec. 5584 means employee as defined in 5 U.S.C. 2105; that is, individual appointed in "civil service," which constitutes all appointive positions in executive, judicial, and legislative branches of Govt., except positions in uniformed services (5 U.S.C. 2101(1)). Therefore Philippine citizen, properly appointed to position in executive branch to perform Federal function supervised by Federal employee, is employee under 5 U.S.C. 5584 and entitled to waiver of erroneous compensation payments without regard to fact employment is under labor agreement with Philippine Govt. 329

"No gain technique"

Where in evaluation of management, financial, and technical factors offered under request for quotations for operation overseas of communiccation system, offerors are found equally qualified technically on basis of normalizing results of numerical scoring system used by Source Selection Evaluation Board and analysis of Board's evaluation by Source Selection Advisory Council using its independent scoring and weighting—referred to as "no gain technique"—and on basis of reevaluating manpower proposals, award of cost-plus-award fee contract to lowest offeror was proper, and award is unaffected by Advisory Council's deviation, with permission, from evaluation guidelines in Army Command Pamphlet 715-3, and by changes in scoring made between evaluations, since relative weights of evaluation criteria were preserved 390

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