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[B-169535]

Contracts—Negotiation—Cutoff Date—Same for All Proposers

The failure to establish a common cutoff date for the negotiation of a cost-plus-award-fee contract for the final hardware design and development of the Applications Technology Satellites (ATS) project with the two offerors who had been awarded parallel contracts for the preliminary analysis and feasibility studies of the ATS, and the premature distribution for evaluation of the first final proposal received resulted in defective selective procedures prejudicial to the contractor denied the opportunity to compete on an equal time basis and possibly overcome its price disadvantage, a situation compounded by the premature distribution of the proposal for cost evaluation. Therefore, the proposed award to the offeror advantaged by the longer negotiation period should be reconsidered.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement

The fact that under 10 U.S.C. 2304(g) written or oral discussion should be conducted with all responsible offerors whose proposals are within a competitive range that encompasses both price and technical considerations does not permit the use of any procedure that would disclose information during the negotiation period to the unfair competitive advantage of any proposer.

To the Administrator, National Aeronautics and Space Administration, July 2, 1970:

We refer to your letter of April 9, 1970, requesting that we conduct a review of the events leading to the selection of the General Electric Company (GE) rather than Fairchild Hiller Corporation (Fairchild) to build two (F&G) Applications Technology Satellites (ATS). You ask us to "establish whether there were any improprieties and whether or not established procedures were properly followed in this selection." In addition to your letter of April 9, we have also received a protest from Fairchild Hiller against the proposed award to GE.

Applications Technology Satellites (F&G) is a National Aeronautics and Space Administration (NASA) program for design, development, production, launch, and support of two synchronous communications satellites now scheduled to be launched in early 1973 and 1975, respectively. Each satellite will have a minimum useful life of 2 years and will act as a precisely oriented test bed for the performance of numerous communication experiments. A principal feature of the spacecraft is a 30-foot diameter parabolic antenna that is deployed after the spacecraft is placed in orbit. The antenna is to be capable of providing a good quality TV signal to a small, inexpensive ground receiver. In addition to communications tests, the spacecraft will perform other experiments of scientific and technological significance.

The ATS (F&G) program has been conducted by NASA under the management procedures now outlined in NHB 7121.2 dated August 1968 entitled "Phased Project Planning Guidelines" which are used for the procurement of major research and development projects.

The program started with a phase A competition which in May 1966 resulted in the award of three parallel contracts for preliminary analysis and feasibility studies for ATS (F&G). The three contractors selected were Fairchild, GE, and Lockheed. During phase A the three contractors developed design parameters and other information. NASA also conducted an in-house study (by a Goddard Space Flight Center team) on all the problem areas related to the ATS (F&G) program. At the conclusion of phase A the Goddard team assessed the various studies and arrived at a "Preferred Approach for ATS F&G" dated November 20, 1967, which was distributed to the phase A contractors.

Phase B/C solicitation dated February 8, 1968, was distributed to the three contractors with copies of the final reports issued by each of the three contractors on phase A. Bidders were instructed that combined phase B and C would include system design and would be accomplished under two contracts, and that phase D involving final hardware design and development would be performed by a single contractor, "anticipated to be one of the contractors selected for this procurement [phase B/C]; however, NASA reserves the right to bring new contractors into the project at any time it is considered to be in the Government's best interest." The solicitation further stated that the phase D work statement would be "developed largely upon this Phase B and C effort, therefore, pertinent technical data developed in Phase B and C will be made available to the Phase B and C incumbent contractors for consideration in preparation of their final Phase D proposals." Finally the solicitation stated as follows:

> The data developed under the proposed contracts will be the property of the Government, except where proprietary rights are agreed to in advance, and may be released to other contractors for follow-on effort, and may also be published for general distribution.

In September 1968, phase B/C contracts were awarded to both GE and Fairchild (Lockheed did not receive a phase B/C contract). Phase B/C called for, among other items, the delivery of phase D proposals. Each phase B/C contract consisted of two parts. Part I was a firm-fixed price contract consisting of the study effort, while part II was on a cost-plus-fixed-fee basis and was to cover the holding period between phases B/C and D.

Phase D proposals were submitted by Fairchild and GE in September 1969, as scheduled. Price proposals were based on estimated costs since a cost-plus-award-fee contract was anticipated. October through December of 1969 was taken up with proposal discussions, fact findings and so on. By the end of December 1969 both competitors submitted revised proposals based on the prior discussions with Goddard.

During this period the NASA Source Evaluation Board, consisting of Goddard and other NASA personnel specifically constituted for evaluating the proposals, had already made preliminary technical ratings of the proposals. On the initial scoring, Fairchild was rated at 699 and GE at 664. After preliminary orals were conducted, the competitors were then rated as follows: Fairchild at 683 and GE at 670. Final ratings were given after Goddard conducted fact finding for about 10 days with each company. These final scores were 687 for GE, and 686 for Fairchild.

On February 4, 1970, a Source Evaluation Board report was submitted to you as the source selection official for this procurement. This detailed report stated in summary that:

> It is the opinion of the Source Evaluation Board that Fairchild Hiller and General Electric proposals are technically equal. Based on the GSFC [Goddard] Technical Evaluation of manhours and materials, the cost difference is minor. Both proposers can execute Phase D in an acceptable manner.

In the meantime, a funding problem arose within NASA necessitating a delay of about 1 year in the launch schedule of the satellites. In a memorandum dated February 5, 1970, your executive officer requested that the two competitors be advised of the funding problem and the need for revised proposals to "maximize any technical, quality, interface, or delivery schedule advantages, as well as economies that can be effected as a result of the changes in funding and launch schedule. Oral and written discussions will be conducted so that all essential terms and conditions * * * have been agreed to." This memorandum was not received by Goddard until after the February 12, 1970, letter mentioned below had been sent to both contractors, although Goddard was immediately advised of the changed situation.

A joint meeting between representatives of Goddard, GE, and Fairchild was held on February 6, 1970, at which time the two competitors were given instructions for submitting their revised proposals. This meeting was confirmed by a letter dated February 12, 1970, from Goddard to both contractors which, according to Goddard officials, contained the information given out at the February 6 meeting.

The February 12th letter requested a revised proposal based on certain funding limitations and on certain launch readiness dates for the F&G satellites. Bidders were also invited to submit an alternate proposal based on the same funding limitations but alternate launch dates. The letter stated that "It is anticipated that the technical aspects of the present proposal will not be altered except as appropriate to reflect schedule revisions." The letter concluded as follows:

It is anticipated that the time from single contractor selection to contract definitization will be approximately four months.

* * * * * * *

The revised proposals are required to be delivered to the GSFC by February 27, 1970, in order to maintain the planned schedule for award of a contract. The contractor should advise the contracting officer by February 16, 1970, of his ability to submit the revised cost proposal as stated above.

On February 16, 1970, Fairchild advised Goddard, "that every effort will be extended to effect submittal of subject revised cost proposals by 27 February 1970." GE replied by telegram on February 16 that "The earliest date that we can guarantee submittal of responsive proposals is March 6, 1970. However, we will strive to better this date."

On February 18, the GE General Manager was at Goddard, and he stated that the additional time (beyond February 27) was required "due to time required by subcontractors and the fact that GE was also submitting a proposal for [another procurement] which was being prepared at the same time." He indicated that nonetheless every effort would be made to have the proposal in by March 4, 1970.

Then, on February 25, 1970, a Fairchild representative called the Goddard contracting officer (Mr. Krenning) to advise him of Fairchild's intention to submit a telegraphic request for an extension from Friday, February 27, 1970, to Monday, March 2, 1970, for the submission of Fairchild's proposal. The Fairchild representative reports he was told that such a request would not be approved because a similar request from GE had already been rejected. As a result of this conversation, the telegram was not sent.

Mr. Krenning confirms the fact that Mr. Flynn of Fairchild orally requested an extension of time but he denies having said that GE had been refused a similar request. Mr. Krenning reports he stated to Mr. Flynn that any written request for an extension would be referred promptly to his superior. He further reports stating to the Fairchild representative that "if it was necessary that they be late, they were going to be whether or not NASA concurred and if it were not necessary, why should we grant an unnecessary delay." Finally, Mr. Krenning states that at the end of this conversation he was convinced that Fairchild would be late.

The record shows that Fairchild's basic and alternate proposals were submitted at 4:00 p.m., on February 27, 1970. Fairchild also submitted a third, optional, proposal on March 4. (This proposal would have required Fairchild to exceed the funding limitation by some $300,000 for fiscal year 1971, but Fairchild stipulated that such excess costs be allowed as deferred charges to later year appropriation.) This proposal was ultimately rejected by your agency.

When the Fairchild representative delivered this March 4 optional proposal to Goddard he learned that GE's proposals had not yet been delivered. The vice president of Fairchild then telephoned the Goddard Director of Administration and Management and asked that Fairchild's proposal not be distributed to personnel for evaluation because of the fact that GE's proposal had not yet been received. The NASA Director advises us, however, that the Fairchild proposal had already been distributed.

The GE proposals were received and distributed for evaluation the early morning of March 6, 1970.

Thereafter, factfinding sessions were conducted at Goddard with Fairchild on March 10 and with GE on March 11 and 12, which resulted in certain refinements to the proposals. As a result of the factfinding with Fairchild, it was required to propose an upward adjustment in cost of $85,722, in its February 27, 1970, proposal.

The Source Evaluation Board then evaluated the revised proposals but made no change in the technical scoring. However, both GE and Fairchild had revised their proposal costs and the Board reevaluated each of the competitor's cost revisions. The Board's report dated April 3, 1970, concluded that the two firms were technically equal, but on an evaluation of contractor-proposed cost it was determined that GE was approximately 2 percent lower than Fairchild.

This Board report was presented orally to you on April 7, 1970. On April 8, 1970, the selection of GE as phase D contractor was announced.

After the announcement of the selection of GE, NASA terminated Fairchild's contract for development of proposals and holding and discontinued funding of Fairchild effective April 16, 1970. The holding period under GE's contract has been extended through July 1970.

We must report that in our review of the award selection process we found that certain irregularities did occur. We have in mind certain events associated with the submissions of revised proposals after February 4, 1970.

In the first place we believe the instructions sent out to the bidders on February 12 were ambiguous. The February 12 letter stated that "It is anticipated that the technical aspects of the present proposals will not be altered except as appropriate to reflect schedule revisions." It appears that this language was used in an attempt to discourage technical changes in the final stages of the negotiations. In so doing, we believe ambiguous instructions were issued which were subject to a variety of interpretations. Furthermore, we find these instructions

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were at variance with the instructions issued on February 5 by NASA Headquarters to "maximize any technical, quality, interface, or delivery schedule advantages, as well as economies that can be effected as a result of the changes in funding and launch schedule. Oral and written discussions will be conducted so that all essential terms and conditions * * * have been agreed to."

However, we are more concerned with another aspect of the final submission of proposals. Your regulation, NASA PR 3.805-1(c), states that a specified date for the close of negotiations should be established and that thereafter proposal revisions generally should not be accepted. We do not find that Goddard complied with this regulation.

As the record shows, Fairchild submitted its revised proposals on February 27, 1970, while GE submitted its proposals on March 6, 1970. We believe that Fairchild had every reason to regard February 27 as a cutoff date for submission of revised proposals. The clear import of the February 12 letter and the contracting officer's remarks to the Fairchild representative on February 25 was that the February 27 submission date could be ignored only at the bidder's peril. The fact that Fairchild submitted an unsolicited, and ultimately unacceptable, proposal on March 4 does not in our opinion take away from the factual situation set out above which, according to Fairchild, led it to believe that the principal proposals should be submitted by February 27. It is reasonable to conclude that Fairchild submitted its March 4 proposal with the hope that it might be considered timely but with no assurance that it would be.

GE, on the other hand, states it had reason to believe that a proposal submitted by March 6, 1970, would be acceptable to Goddard. GE officials have stated to us that, while Goddard personnel had urged GE to meet the specified February 27 date, they gave no indication that a proposal submitted after that date would be unacceptable or otherwise subject to penalty.

A situation prejudical to Fairchild was thus created. Fairchild contends that if it had had an extra week, as did GE, to negotiate with it subcontractors or to develop cost saving methods, it might have reduced its cost proposal in much the same manner as GE did. For example, Fairchild has suggested the use of one of its offsite facilities if it had the extra time to consider the matter. We are not in a position to disagree with Fairchild, since it is a fact that Fairchild prepared its revised proposals within 3 weeks while GE submitted its proposals a week later.

To compound the situation, the Fairchild proposals were distributed for cost evaluation on March 3 and technical evaluation on March 4, or 2 and 3 days before the GE proposals were received. As a result, Fairchild contends that certain cost information in its proposals could have been leaked to GE before the GE proposals were submitted. It is argued by your agency that if a leak did occur during this 2- or 3-day period, and there is no evidence of a leak, it could not have done GE much good anyway by that time. We agree that there is no evidence of a leak. On the other hand it cannot be conclusively stated that there was no leak. A situation was created where a leak which might have affected the results of the competition was possible. And the danger of such a leak existed not only during the 2- or 3-day period referred to, but during the entire week that intervened between submission of the two proposals.

The situation was further compounded by the apparent fact that the officials making the award selection apparently were not aware of the fact that Fairchild's proposals were submitted and distributed for evaluation before GE's proposals were received. In this regard we note the following statement contained in your administrative report to our Office:

> The Board's second report, dated April 3, 1970 (TAB M), was presented orally to the Administrator on April 7, 1970. It contains a minor inconsistency. On page 2 of the summary, it states incorrectly that both proposals were received on March 6, 1970. This oversight is clarified by the more detailed account of the March proposals in the "Report to Chairman Business Management Committee," March 31, 1970, which is attached as a part of the Board report.

The whole problem could have been avoided if Goddard had extended the bid submission date as originally requested by GE in its telegram of February 16, 1970. At the very least the Fairchild proposals should not have been distributed for evaluation until after GE proposals were received. Goddard officials have explained their refusal to grant additional time on the basis of urgency. They also explain that, since they could evaluate only one proposal at a time, they started to evaluate the Fairchild proposals while awaiting receipt of the GE proposals in order to save time. We are not impressed by this explanation. An award was not contemplated for another 4 months and we think that a 1- or 2-week time extension could have been tolerated in the circumstances.

In this connection, we note that back in December 1969, the first revised proposals were also submitted at different times. At that time the GE proposal was submitted before the Fairchild proposal. We understand that no common cutoff date was established at that time; apparently the competitors simply were told to submit their proposals upon completion of their respective factfinding sessions with Goddard. Be that as it may, we do not think the events of the prior submission can justify what occurred with respect to the final submission of proposals.

Your agency takes the position that February 27 cannot be regarded as a cutoff date for negotiations in the case of Fairchild because of the fact that discussions, both written and oral, were held with Fairchild as late as March 13, 1970. Fairchild contends that these March discussions were limited in scope and Fairchild did not feel free to change its proposal except to the extent required by Goddard. The record supports Fairchild's position. The March negotiations were confined to several rather limited matters resulting in an upward adjustment in proposal cost of only about $86,000. We do not regard these negotiations as constituting a full reopening of negotiations with Fairchild.

On the facts of record it is our opinion that the established award selection procedures were not followed and that the procedures which were followed were defective. Under the circumstances, we think that the proposed award to GE should be reconsidered. We recognize that the present posture of the procurement is such that arguments can be made as to the form such reconsideration should take. At this point in time we believe this decision should be made by your agency, taking into consideration the defects in the prior negotiations as set forth in this letter. We would, of course, be pleased to discuss with you such future action as you may think proper, if you wish.

An additional point has been made which we think merits comment. Fairchild has alleged that NASA used the deficiency correction route supposedly required by GAO rulings to coach GE into the adoption of certain elements of Fairchild's design. We have held, in accordance with the provisions of 10 U.S.C. 2304(g), that written or oral discussions should be conducted with all responsible offerors whose proposals are within a competitive range and that competitive range encompasses both price and technical considerations. 47 Comp. Gen. 29, 53 (1967). However, our Office has never approved any procedure whereby information which would give an unfair competitive advantage to any proposer would be disclosed during the negotiation process. We, as you know, informally approved NASA Procurement Regulation Directive No. 69-5, dated March 10, 1969. However, we do not read this regulation as authorizing such a procedure.

We are returning the Source Evaluation Board report as well as the correspondence and minutes of the oral discussions dealing with the various proposals under separate cover.

[B-169813]

Bids—Qualified—Ambiguous Bid

The unsolicited insertion of plant part numbers in the low bid to furnish engine air filters without an express statement that the specifications would be complied with created an ambiguity that may not be resolved by reference to "catalog cut sheets" and other data available to the Government before bid opening, as reliance on this information would afford the bidder an option to affect the responsiveness of the bid—an option detrimental to the competitive bidding system. Therefore, as the contracting officer cannot determine whether the bidder offered a conforming article or that the part numbers were included for the purpose of internal control, the bid is considered a qualified bid and may not be considered for award.

To the Secretary of the Army, July 6, 1970:

By letter, with enclosures, dated June 2, 1970, the General Counsel, Office of the Chief of Engineers, Department of the Army, furnished our Office a report on the protest of American Air Filter Company, Inc. (AAF), against the proposed award of a contract to Filter Products Division, Air-Maze Plant, North American Rockwell (FPD), under invitation for bids No. DACA87-70-B-0005, issued by the Army Engineer Division, Huntsville, Alabama. Award is being withheld pending our consideration of the protest.

The subject invitation covers a requirement for two items of engine combustion air filters described therein as follows:

ITEM TYPE CODE HO2FI
0100 FILTER, ENGINE COMBUSTION AIR (LEFT HAND)

* * * * * * *

ITEM TYPE CODE HO3FI
0200 FILTER, ENGINE COMBUSTION AIR (RIGHT HAND)

By the May 7, 1970, bid opening date, three firms responded: FPD, with a bid in an amount of $156,376; AAF, with a bid in an amount of $198,572; and Alton Iron Works, Inc., with a bid in an amount of $990,000. Upon examination of FPD's bid, it was discovered that immediately beneath the descriptions for items 0100 and 0200 the firm had typed the following respective entries: "Air-Maze Plant Part Number 203134" and "Air-Maze Plant Part Number 203133." In a telegram of May 13 and letter of May 15, 1970, AAF asserts that FPD's bid is nonresponsive on the ground that the part number entries are a qualification of the bid.

In response, the contracting officer urges in his report of May 26, 1970, that AAF's contention is invalid since:

* * * the number placed on the bid appears to be an internal plant control number only and not a qualification. This is explained as follows: The "Air Maze Plant Part #203134" for item 0100 and "Air Maze Plant Part #203133" for item 0200 were compared to Air Maze catalog cut sheets and other data available to the Government prior to the time of bid opening. This Air-Maze data clearly indicates that models of oil bath type filters, that would perform in accordance with the requirements of the IFB and not exceed the space envelope criteria, are identified by a four-position alpha-numeric code. The first two positions are alpha, and the second two positions are numeric. The Air-Maze plant part numbers as indicated on the bid submitted by them contained six positions, all numeric. In evaluating the bid, the Government logically took the position that the Air-Maze plant part numbers as typed by them on their bid were, in fact, for internal control purposes only and that this did not qualify the bid nor in any way attempt to alter the requirements of the IFB. The Air-Maze Division, by letter dated 19 May 1970, indicated that these part numbers typed on the bid

schedule were for their own internal control purposes only and were in no way intended as a qualification or an exception to any portion of the specifications and requirements of the solicitation.

We cannot agree. We have considered the problem presented by FPD's insertions in a number of other cases. See B–152808, January 2, 1964; B–151849, September 10, 1963; B–143084, June 22, 1960. And our decision in B–152808, *supra*, is in all material respects analogous to the present situation. In that decision, we quoted with approval the following comments submitted by a contracting officer in connection with B–151849, *supra:*

> * * * some bidders, when intending to supply material in complete conformance with the specifications, have included their part numbers for their ready reference in the event of an award, while others have included their part numbers for the purpose of offering a similar but materially different item, which might or might not meet the applicable specifications and the needs of the Government. When part numbers are inserted in bids, the Contracting Officer has no way to determine whether the bidder is offering material in complete conformance with the specifications. * * *

The foregoing aptly states the precise difficulty apparent from an examination of FPD's bid, and we must initially conclude, as we did in B–151849, that, in the absence of an express statement by FPD in its bid that the specified plant parts numbers would comply with the specifications, there is an initial ambiguity as to whether FPD agreed to offer an item which would comply with the specifications set forth in the invitation.

Turning now to a consideration of the contracting officer's proposed resolution of the ambiguity, we do not as a general matter object to the contracting officer's asserted reliance on "catalog cut sheets and other data available to the Government prior to the time of bid opening." (We are informally advised that this data was furnished to the procuring activity's engineering division during a courtesy visit by representatives of FPD subsequent to the issuance of the invitation.) We cannot, however, accept the conclusions reached by the contracting officer after an examination of this data. We question the adequacy of the data relied on by the contracting officer to support his inference, quoted above. We are not persuaded that the inference drawn from use of a four-position alpha-numeric code on the catalog sheets, when contrasted with the use of a numeric code in identifying a plant part, removes the ambiguity. In our opinion, it may be inferred with equal validity that FPD's designated plant parts numbers refer to a drawing or other data, which may or may not evidence compliance with the terms of the specifications. In this connection, during a meeting in our Office on June 26, 1970, FPD representatives provided us a copy of a drawing, which illustrates the configuration of the item FPD proposes to furnish. This drawing was prepared prior to bid opening and references the plant parts numbers entered on FPD's bid. We are advised that this drawing was originally given to a preaward survey team on May 22, 1970, and thereafter furnished to the procuring activity.

Failure, as here, to establish conformance of the plant parts numbers to the specifications prior to bid opening leaves unresolved the ambiguity. Furthermore, the apparent reliance by the contracting officer on FPD's post-bid-opening letter of May 19, while, in our opinion, essential to his conclusion, is not proper. As we have indicated in numerous cases, reliance on such information affords the bidder an option to affect the responsiveness of its bid—an option which is detrimental to the competitive bidding system. 36 Comp. Gen. 705 (1967); 37 *id.* 110, 112 (1957).

Accordingly, we are constrained to conclude that FPD's bid is nonresponsive and should not be considered for award.

[B-169414]

Contracts—Specifications—Failure To Furnish Something Required—Addenda Acknowledgment—Legal Relationship of Parties Altered

An amendment to an invitation issued to implement Defense Procurement Circular No. 74 entitled "Subcontractor Cost or Pricing Data and Audit Requirements," that recognized exemptions equivalent to those provided in the so-called Truth in Negotiations Act, is a material amendment, whether or not the impact on price is demonstrable, or the legal obligations imposed are new or being clarified, and the failure to acknowledge the amendment may not be waived as a minor informality under Armed Services Procurement Regulation 2–405, even though the amendment was not received. The amendment altered the legal relationship of the parties, even though not necessarily varying the actual work to be performed, by making the submission of cost or pricing data, and the prime contractor's responsibility for defective subcontractor data mandatory instead of discretionary.

To the Secretary of the Air Force, July 7, 1970:

By letter, with enclosures, dated May 1, 1970, the Chief, Contract Placement Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, furnished our Office a report on the protest of Admiral Systems Corporation against the proposed award of a contract to Zenith Radio Corporation under invitation for bids No. F33657–70–B–0056, a two-step formally advertised solicitation, issued by the AFSC Aeronautical Systems Division (ASD), Wright-Patterson Air Force Base, Ohio.

The subject invitation was issued on January 16, 1970, to sources that had submitted acceptable technical proposals pursuant to letter request for technical proposal No. F33657–70–R–0056 dated July 10, 1969, and amendment 0001 dated August 4, 1969, and requested incremental prices for various quantities of TS–1843A/APX transponder test sets (item 1) and MT–3513A/APX mountings (item 2).

On January 19, 1970, ASD issued amendment 0001 to implement the requirements of Defense Procurement Circular (DPC) No. 74, entitled "Subcontractor Cost or Pricing Data and Audit Requirements." That circular contains the following statements regarding the changes effected:

(a) Provide new requirements for obtaining cost or pricing data from first and lower tier subcontractors at the time of pricing a prime contract. Exemptions equivalent to those provided by P.L. 87–653 are recognized. Also failure to comply may be excused in exceptional cases provided adequate alternate arrangements are made as outlined.

(b) Clarify the application of cost or pricing data requirements to contract modifications netting under $100,000 but based on additive and deductive costs aggregating $100,000 or more.

(c) Provide a guarantee of accuracy—as distinguished from completeness and currency—in cases where only partial cost or pricing data is required.

(d) Conform the Audit and Records clauses under 7–104.42 to the Minshall Bill (P.L. 90–512) amendment to 10 U.S Code 2306(f).

Insofar as is relevant to our consideration here, DPC 74 makes the following changes: Revises paragraph 7-104.29(b) of the Armed Services Procurement Regulation (ASPR) by substituting a clause entitled "PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA—PRICE ADJUSTMENTS (1970 JAN)" for the November 1967 clause; revises ASPR 7–104.41(b) by substituting a clause entitled "AUDIT—PRICE ADJUSTMENTS (1970 JAN)" for the April 1969 clause; revises ASPR 7–104.42(b) by substituting a clause entitled "SUBCONTRACTOR COST OR PRICING DATA—PRICE ADJUSTMENTS (1970 JAN)" for the May 1963 clause. The amendment substituted the foregoing revised clauses for the prior ASPR versions.

By the February 17, 1970, bid opening date, eight sources responded and on the quantity proposed for award Zenith is low, with a bid in a total amount of $3,851,445.65, and Admiral is second low with a bid in a total amount of $3,934,495.

Zenith, however, failed to acknowledge amendment 0001. Upon investigation, it was determined that the amendment was mailed by ASD, and that Zenith did not receive the amendment. The contracting officer proposes to waive Zenith's failure to acknowledge the amendment as a minor informality in accordance with Armed Services Procurement Regulation (ASPR) 2–405.

By letter dated March 25, 1970, counsel for Admiral protested against the proposed action to our Office, focusing specifically on the failure to acknowledge amendment 0001. By letter, with enclosures, dated May 22, 1970, to the contracting officer, Stewart-Warner Corporation also protested against consideration of Zenith's bid for award and, in compliance with its request, the contracting officer has forwarded the protest to our Office for consideration. In accordance with our bid protest procedures, Zenith was afforded an opportunity to comment on the record, and it responded by letter, with enclosures, dated May 25, 1970. Award is being withheld pending our resolution of the protest.

As outlined in its submission of May 13, 1969, counsel for Admiral's basic position is that the DPC 74 revisions added by amendment 0001 materially alter the legal relationship between the Government and the successful contractor and, therefore, could affect the ultimate cost to the Government for the contract items. The materiality of the DPC 74 changes is contested by the Chief, Contract Placement Division, the contracting officer and Zenith. In his report of April 17, 1970, the contracting officer maintains that amendment 0001 revisions "essentially clarify" the application of the cost or pricing data requirements to subcontractors, and he further emphasizes that the prior ASPR provisions were already a part of the invitation. Zenith has also adopted this approach.

Resolution by our Office of the question whether failure to acknowledge an amendment renders a bid nonresponsive is generally based on a determination whether the amendment *could* affect price, quantity, or quality. If resolved, affirmatively, the amendment is material and the bid must be rejected as nonresponsive. 42 Comp. Gen. 490 (1963); 37 *id.* 785 (1958).

Argument with respect to the materiality of amendment 0001 has been concentrated primarily on the "price" facet of this general criteria. The contracting officer maintains that an impact on price is not demonstrable. Reliance is also placed on Zenith's letter of March 23, 1970, to the contracting officer, which acknowledged receipt of the amendment (after bid opening) and denied that it has any effect on price, quantity, or quality, and also the fact that Zenith did not timely receive the amendment. These circumstances, however, are not decisive in resolving the present matter. See, for example, 40 Comp. Gen. 126 (1960); B-164154, July 3, 1968; B-164016, May 28, 1968. Moreover, we are not persuaded that a determination of the likelihood of a subsequent modification is controlling. In this regard, the record includes an opinion dated April 17, 1970, from the Director of Procurement Law, Office of the Staff Judge Advocate, which observes that it is speculative whether the contract will be modified after award and, assuming that a modification is made, whether such modification would render the clauses operable. However, as counsel for Admiral notes, there are numerous terms and provisions of the contract which are material and may or may not become operative during performance of the contract, and counsel's reference to a warranty provision exemplifies this point.

Of more importance, in our view, is the suggestion in the Director's opinion that there is no realistic way of placing a monetary value, if any, on the substitution of the current clauses for those referenced in the unamended invitation. It is also suggested in support of this argument that the revised clauses could be added at the time of a modification to the contract, and the effect on price could be determined at that time. Although Zenith expresses a willingness to cure the failure to acknowledge the amendment by acceptance of the revised clauses prior to award, it similarly maintains in its letter of May 25, 1970, that Admiral has "failed to meet the proof required to show that the amended provisions increased the price or would increase the price of the contract."

To the extent that these contentions suggest that an inability to establish an exact dollar impact attributable to the failure to acknowledge amendment 0001 requires a conclusion that the amendment is not material, we must disagree. We do not believe that, as a general proposition, it would be successfully argued that an exception to provisions fixing the contractual relationship of the parties reasonably could not affect price. We do recognize in this instance that a judgment as to the constructive price impact of the revised clauses is not particularly helpful or meaningful since Zenith's bid as submitted may have included a price contingency for the prior ASPR versions of the clauses. In such circumstances, a conclusion based solely on price impact tends to subordinate the basic inquiry which, as we see it, is whether the revised clauses substituted by amendment 0001 materially altered the legal relationship of the parties. In formulating the inquiry in this manner, it must be emphasized, as we suggested in B-158689, April 28, 1966, that the materiality of a defect, such as the one involved here, is not diminished because it modifies the legal relationship of the parties without necessarily varying the actual work to be performed. See, e.g., 38 Comp. Gen. 532 (1969) (failure to furnish required bid bond); 43 *id.* 206 (1963) (failure to furnish required list of subcontractors). For that matter, the defect may be material even in circumstances where it can be shown that the impact on price is trivial. B-168551, February 3, 1970 (failure to acknowledge amendment adding a wage rate determination); 47 Comp. Gen. 496 (1968) (progress payments). Finally, we note that it has not been implied that the legal relationship established by the contractual provisions implementing Public Law 87-653, the so-called Truth in Negotiations Act, is other than material.

The dispute, then, is whether the revised provisions added by amendment 0001 imposed additional obligations not legally enforceable under the prior provisions. See 48 Comp. Gen. 555, 558, and 559 (1969). The submission by Admiral's counsel, of May 13, 1970, contains an extensive review of the revised clauses vis-a-vis the prior versions. We have examined the contrasts drawn in this submission in light of

Zenith's response to the letter of May 13 and we must conclude that the revised clauses do affect the legal relationship of the parties. In reaching this conclusion, we are of the opinion that the amendment made certain, as a legal proposition, areas which previously were subject to valid question. In this sense, "clarification" (as the revised clauses have been denominated) of legal obligations are no less material than the creation of new legal obligations. To illustrate our conclusion and emphasis, we refer to two changes made by DPC 74 which counsel for Admiral considers critical and Zeneth's responses.

First, with respect to the "PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA—PRICE ADJUSTMENTS" clause, Admiral's counsel notes in the submission of May 13 that:

> * * * Whereas formerly a contractor would only be required to apply the pricing data requirements for contract modifications in excess of $100,000, the amended provisions require the application of the cost or pricing data requirements when the modification involves aggregate increases *and/or decreases* in costs plus applicable profits expected to exceed $100,000. * * *

Zenith suggests, in rebuttal, that "Protestant's reference to the data required for additive and deductive costs is not pertinent as the Contracting Officer had the discretion, before DPC–74, to require such data under the ASPR even if the net dollar change is zero." We agree that the contracting officer could request data when aggregrate increases and/or decreases in costs plus profits were expected to exceed $100,000. See, in this respect, Armed Services Procurement Regulation Manual for Contract Pricing (ASPM No. 1, February 14, 1969), chapter 16, at page 16–1. But the DPC 74 revisions make it mandatory on the contractor to furnish data in this circumstance. Hence, we must conclude that the change dictated by DPC 74 from the stated discretionary authority of the contracting officer to a contract requirement for the submittal of cost or pricing data represented a material change which affects the legal relationship of the contracting parties. In the absence of an acknowledgment by a bidder of an amendment incorporating such change into the solicitation, no authority would exist to award a contract to such a bidder since to do so would result in a contract legally different than the one advertised.

Second, counsel for Admiral observes that the revised "PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-- PRICE ADJUSTMENTS" clause now specifically refers to prospective subcontractors and extends the guarantee of accuracy to estimates submitted by the contractor based on cost or pricing data submitted by a prospective subcontractor not subsequently awarded a contract. Zenith suggests, however, that "the Contracting Officer *as a practical matter generally demanded* prior to DPC–74 that prime contractors be responsible for defective prospective subcontractor data."

Nevertheless, a clear contractual responsibility would exist under amendment 0001. [Italic supplied.]

We view these two aspects of the DPC–74 changes incorporated into amendment 0001 as rendering the amendment significantly material from a legal standpoint. Our Office, which is particularly involved in monitoring the effectiveness of contract cost and pricing provisions, is of the opinion that the failure to acknowledge amendment 0001 may not properly be categorized as a minor informality which may be waived pursuant to ASPR 2–405. The contrary positions advanced are not without merit. However, on balance, we feel that the inviolability of the competitive bidding system dictates the result here, especially when viewed in the light of the well-publicized purposes sought to be achieved by the substantial changes effected by DPC–74.

Accordingly, it is our opinion that Zenith's bid must be considered as nonresponsive and should not be considered for award.

[B–169140]

Contracts—Cost-Plus—Evaluation Factors—Use of Point System

Although an offeror's estimated prices are not the deciding factor in selecting a successful contractor under a cost-reimbursement type contract negotiated pursuant to Armed Services Procurement Regulation (ASPR) 3–805.2, a contracting agency that during the evaluation of proposals received under a request for quotations soliciting the preparation of a Government publication on a cost-plus-a-fixed-fee basis eliminates the 25 points assigned to the factor of reasonableness of cost in the evaluation criteria, is required under ASPR 3–805.1 to continue negotiations with all offerors within a competitive range. Therefore, an award made solely on the basis of technical superiority as being in the best interest of the Government without further negotiations with offerors who have the necessary qualifications to perform the procurement should be canceled.

To the Secretary of the Navy, July 8, 1970:

Reference is made to the letters dated March 19, April 16, and May 14, 1970, from the Naval Supply Systems Command, reference: SUP 0232, furnishing our Office with a report on the protest from Industrial Technological Associates, Incorporated (ITA), under request for quotations (RFQ) N00174–70–Q–3954, issued on December 19, 1969, by the Naval Ordnance Station, Indian Head, Maryland.

The RFQ called for quotations on a cost-plus-a-fixed-fee basis; however, an offer could also be submitted on a time-and-material basis as an alternate. The work was outlined in Enclosure I to the RFQ and Enclosure II gave the evaluation criteria for selection.

Paragraph 2 of Enclosure I provided that for a period of 12 months the contractor shall make available and employ its facilities and personnel at the level of effort established by the quotation in the preparation of joint service explosive ordnance disposal publications. Paragraph 3 of Enclosure I indicated the estimated types and numbers of manuscript by task.

Enclosure II listed the following designated point scores and criteria to be used in evaluation of quotations:

a. Record of past experience and work associated with Explosive Ordnance Disposal Publications.	15 points
b. Record of past performance and evidence of good project organization and management practices.	20 points
c. Qualifications of key personnel and number of personnel available to manage and perform the task.	30 points
d. Adequacy of facilities.	10 points
e. Reasonableness of cost.	25 points

The contracting officer's report states that the criteria for evaluation and the weights assigned to each were developed by a panel of highly qualified explosive ordnance disposal and publications personnel.

Proposals were received from the three companies solicited. A second panel of experienced explosive ordnance and publications personnel evaluated the proposals. The scores resulting from the evaluation of proposals and the estimated prices submitted by offerors were as follows:

Estimated price	Company	Evaluation point score
$475, 896 (CPFF)	John I. Thompson and Company	63. 10
246, 917 (CPFF)	Potomac Research	33. 33
168, 097 (CPFF)	ITA	39. 00
173, 899 (T&M)	ITA	39. 00

The report dated April 16, 1970, from Naval Supply Systems Command states that all of the three firms which responded to the RFQ have the necessary qualifications to perform the tasks involved in this procurement but the three are not equal with regard to quality, timeliness, cost effectiveness, and capacity. It is urged by Navy that since reimbursement for this type of work is made on the basis of cost, it was essential that the firm selected be the most competent and technically qualified. In this regard, Navy advises that John I. Thompson and Company (JITCO) has had approximately 16 years' contract experience in preparing explosive ordnance disposal and related publications while ITA has had approximately 2 years' experience during which time they have been performing one contract placed by the Naval Ordnance Station, Indian Head. The letter of April 16, 1970, goes on to give some cost information and from this information Navy draws the conclusion that, while ITA did improve during the performance of its prior contract, its offers for the present contract were considered "totally" unrealistic in the light of its past performance and the Government's estimate.

The report of April 16, 1970, further states that the evaluation panel considered that offers which varied from the Government's estimate for this procurement by more than 10 percent were unrealistic and unreasonable. It was determined that ITA's offer on a cost-plus-a-fixed-fee basis was 53 percent below the Government's estimate and that ITA's offer on a time and materials basis was 51 percent below the Government's estimate. The prices in the proposals from the other offerors also varied from the Government's estimate by more than 10 percent. The prices in the proposals from ITA and Potomac Research were so far below the Government's estimate that it was determined that any consideration of price would have resulted in their being given a minus score and the price in JITCO's proposal was too high to earn points. We are advised that since none of the offers approached the Government's estimate, all offers were rated as "zero" with respect to the factor of cost. Navy's letter of April 16 concludes that, while the Navy has taken no exception to ITA's claim that such firm is "capable," it was in the best interest of the Government to make the award to the best qualified offeror. As indicated, it is Navy's view that based on past experience with the firms, under contracts then in effect, and the evaluation factors in the solicitation, JITCO was the best qualified, cost and technical capabilities considered, and negotiations were undertaken with that firm only. Navy's report states that in the circumstances it would have served no useful purpose to negotiate with any but the firm considered to be best qualified to perform the required work.

The contracting officer's report states that since it was apparent during negotiations with JITCO that the contract and the effort required lent itself to some additional contractor management of resources, it was determined that an incentive type contract would be most appropriate in this situation.

The report of May 14 presents a breakdown of the number of projects assigned to ITA and the total pages delivered. This breakdown amplifies the cost data in the April 16 report and gives a comparison between the costs incurred by ITA per page in 1968 versus the costs incurred in 1969. Navy has made this comparison for the purpose of refuting ITA's contention that they had improved in the performance of the prior contract. For 1968 the average cost per page was $1,598 and for 1969 the average cost per page was $1,230. Considering ITA's cost per page for 1968 and 1969, it is Navy's view that ITA has not shown improvement to the extent urged by the concern. It is further argued by Navy that considering ITA's cost per page for 1968 and 1969, ITA's estimate of $227.16 per page for the present procurement does not seem realistic.

ITA has advised that it has kept individual cost records for certain tasks under its prior contract; that these records indicate an improvement in ITA's learning curve with resulting increased efficiency; and that ITA's costs decreased during the performance of the latter stages of its prior contract. The Navy did not keep cost records for individual tasks. The cost data furnished to our Office to establish ITA's cost per page under ITA's prior contract is an average cost derived by dividing the total costs incurred by ITA under its prior contract by the number of pages, and it is not shown that even this data was available at the time the award decision was made.

By letter of April 17, 1970, with attachments, counsel for JITCO submitted comments on behalf of that concern. Basically the arguments in that letter are that both ITA and Potomac were not in a competitive range; that the determination not to negotiate with ITA or Potomac was not an abuse of administrative discretion and that the award to JITCO resulted in a valid and binding contract.

The contracting officer made the award to JITCO on February 11, 1970, pursuant to 10 U.S.C. 2304(a)(10). The contract awarded was a cost-plus-incentive-fee type of contract in the total estimated amount of $346,125, comprised of a target cost of $325,000 and a target fee of $21,125. It was provided that in no event would the adjusted fee be greater than $24,375 (7.5 percent of target cost) or less than $17,875 (5.5 percent of target cost).

Armed Services Procurement Regulation (ASPR) 3-805.2 provides as follows regarding the negotiations of cost-reimbursement type contracts:

> 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.

The letter of April 17 from counsel for JITCO states that the above provision reflects the traditional rule that award of a cost-type contract is to be made chiefly on the basis of performance most advantageous to the Government. We agree with this traditional view; however, there is nothing in the cited provision which sanctions a procedure whereby the most advantageous contractor is selected without negotiating with all those offerors submitting proposals within a competitive range. The requirement for negotiating with all offerors within a competitive range is applicable to the situation where a cost-type contract will be awarded. See B–162062, November 9, 1967.

With regard to the nature and extent of negotiations to be conducted with offerors, ASPR 3–805.1, in implementation of 10 U.S.C. 2304(g), requires that "written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered." Also, ASPR 3–805.1(a)(v) requires that "* * * In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award." In connection with what constitutes a competitive range the rule is that a proposal must be considered to be within a competitive range so as to require negotiations unless it is so technically inferior or out of line with regard to price that meaningful negotiations are precluded. We have recognized that the determination of competitive range, particularly as regards technical considerations, is primarily a matter of administrative discretion which will not be disturbed in the absence of a clear showing that such determination was an arbitrary abuse of discretion. See 48 Comp. Gen. 314 (1968).

The criteria for evaluation in the RFQ stated that 25 points were assigned to reasonableness of cost. During the evaluation of proposals it was decided that the factor of price should be considered as "zero" for all offerors differing by more than 10 percent from the Government's estimate and that therefore on a technical basis only JITCO was qualified for negotiations since JITCO's proposal was clearly superior to the other proposals. We find no basis to support this type of reasoning, at least not without giving offerors whose prices were considered too low a chance to attempt to justify the validity of their prices. Navy's reasoning resulted, in effect, in deletion of the price evaluation factor stated in the solicitation.

Giving price 25 points in evaluating proposals for a cost-reimbursement type contract was possibly too much weight for this factor and it may have been for the purpose of attempting to rectify this that Navy decided to eliminate price in evaluating proposals. We realize that the award in this case was of a cost-reimbursement type contract and that therefore an offeror's estimated prices should not be the deciding factor in selecting the successful offeror. However, Navy should have considered that in view of its decision to evaluate proposals on a basis other than as indicated in the RFQ, there should have been a new round of negotiations on this basis.

Navy has argued that the price in ITA's proposal was unrealistic considering ITA's cost in performing its prior contract and the Government's estimate and that therefore price discussions with ITA would have served no useful purpose. In answer to this, ITA's argument was that it had cost data on individual tasks performed in the latter period of its prior contract; that this data indicated that ITA's learning curve improved during performance of its prior contract with a resulting increase in efficiency and that ITA's costs decreased in the latter stages of its prior contract. Navy was given the opportunity of refuting this argument by ITA; however, Navy apparently does not have cost data on individual tasks performed in the latter stages of ITA's prior contract. We do not consider the cost data furnished by Navy which is an average cost over the entire term of ITA's contract as refuting ITA's argument that its costs decreased during the latter portion of its contract.

The Government's estimate by itself does not seem to be a sound basis for rejecting ITA's proposal without negotiations since if there had been negotiations with ITA and certain areas had been clarified, the price offered by that concern might well have been close to the Government's estimate. If being within 10 percent of the Government's estimate was the basis for determining whether to negotiate price with an offeror, JITCO's proposal which was more than 10 percent of the Government's estimate was also out of this range, yet price negotiations were conducted with that concern.

The price in ITA's proposal does bear some relationship to ITA's understanding of the work involved. It could be that Navy felt that the price in ITA's proposal showed such a lack of understanding of the work involved that negotiations with ITA would serve no useful purpose. However, if as we understand it the work to be done was all "original" work, rather than a combination of "original" and "revision" work such as ITA had been performing, its low price may have been due to the failure of the solicitation to make this clear. This, too, probably would have been clarified in negotiations with ITA. Moreover, Navy seems to concede that ITA had the capability to perform the contract for this procurement.

One further observation is that Navy apparently felt it was necessary to protect itself from a cost standpoint and therefore made the award on an incentive-fee basis to give the contractor incentive to reduce cost. This also seems to stem from the failure to negotiate price with ITA.

In the circumstances we do not agree with Navy's position that there was a basis for rejecting ITA's proposal without negotiations and negotiating only with JITCO. Accordingly, we believe that the award to JITCO should be canceled.

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The enclosures forwarded with the letter of March 19, 1970, are returned as requested.

[B-168691]

Pay—Rear Admirals, Etc.—Officers Serving as Judge Advocate Generals—Assigned Not Detailed

The legislative history of Public Law 90-179, which authorized detailing two officers—a Navy officer (10 U.S.C. 5149(b) and a Marine officer (10 U.S.C. 5149 (c))—as Assistant Judge Advocate Generals of the Navy, entitled to the rank and grade of rear admiral (lower half) or brigadier general while so serving, unless entitled to a higher rank or grade under another provision of law, evidencing no intent that a captain or officer of lesser rank receive the pay of a rear admiral (lower half) or brigadier general, as appropriate, the two Navy captains not detailed but assigned as Assistant Judge Advocate Generals to avoid creating entitlement to flag rank within the meaning of 10 U.S.C. 5149(b), having been denied the grade of rear admiral (lower half) and its benefits, may not be paid under 37 U.S.C. 202(1) at that grade.

To Lieutenant G. R. Swack, Department of the Navy, July 13, 1970:

Further reference is made to your letter dated October 7, 1969, forwarded here by second endorsement dated December 22, 1969, of the Director, Navy Military Pay System, requesting an advance decision as to whether Captain S. H. Sharratt and Captain Richard J. Selman may be paid the pay authorized for rear admiral (lower half) retroactive to July 16, 1968, and August 20, 1968, respectively. Your request has been assigned submission No. DO-N-1063 by the Department of Defense Military Pay and Allowance Committee.

Your request was accompanied by comments dated November 5, 1969, of the Judge Advocate of the Navy, and a statement dated December 1, 1969, by the Chief of Naval Personnel, commenting upon the question presented. There has also been forwarded for our consideration a memorandum from the Acting Judge Advocate General of the Navy dated May 27, 1970, enclosing a copy of letter dated April 14, 1970, from Senator Sam J. Ervin, Jr., relating to the status of Captains Sharratt and Selman.

By BUPERS Order 125011(1), dated July 24, 1968, confirming verbal instructions of July 16, 1968, Captain George S. H. Sharratt, JAGC, USN, was ordered to report immediately to the Judge Advocate General of the Navy for duty as Assistant Judge Advocate General for Civil Law. By BUPERS Order 113880(1), dated August 20, 1968, Captain Richard J. Selman, JAGC, USN, was ordered to report to the Judge Advocate General of the Navy for duty as Assistant Judge Advocate General for Military Law and for additional duty as officer in charge, Navy Appellate Review Activity, Office of the Judge Advocate General, Washington, D.C.

In his statement of December 1, 1969, the Chief of Naval Personnel stated that it was his specific intent not to detail the officers here involved so as to create entitlement to flag rank within the meaning of 10 U.S.C. 5149(b) and indicated that such a detail would necessitate approval by the Secretary of the Navy.

In view of NAVCOMPT Instruction 7220.44, Change Transmittal 27, dated August 30, 1969, to the Department of Defense Military Pay and Allowance Entitlements Manual (paragraph 10214b(2) of Change 15, dated January 5, 1970), which provides that an officer is entitled to the basic pay of rear admiral (lower half) or brigadier general when "detailed" as Assistant Judge Advocate General, you express doubt as to whether payment in the grade of rear admiral may be made to Captain Sharratt and Captain Selman retroactive to the dates of their orders inasmuch as the regulations at the time of the "initial details to this duty" as Assistant Judge Advocate Generals did not provide for payment in those positions in the rank of rear admiral, "although P.L. 90–179 of December 8, 1967, 80 [81] Stat. 547 [548], did so provide."

The act of December 8, 1967, which established the Judge Advocate General's Corps in the Navy, amended 10 U.S.C. 5149 to permit, in addition to a Deputy Judge Advocate General, the detailing of two officers "as Assistant Judge Advocate General of the Navy." As pertains to the present question, section 5149 provides as follows:

> (b) An officer of the Judge Advocate General's Corps who has the qualifications prescribed for the Judge Advocate General in section 5148(b) of this title may be detailed as Assistant Judge Advocate General of the Navy. While so serving he is entitled to the rank and grade of rear admiral (lower half), unless entitled to a higher rank or grade under another provision of law. An officer who is retired while serving as Assistant Judge Advocate General of the Navy under this subsection or who, after serving at least twelve months as Assistant Judge Advocate General of the Navy, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the rank and grade of rear admiral (lower half). If he is retired as a rear admiral, he is entitled to retired pay in the lower half of that grade, unless entitled to higher pay under another provision of law.
>
> (c) A judge advocate of the Marine Corps who has the qualifications prescribed for the Judge Advocate General in section 5148(b) of this title may be detailed as Assistant Judge Advocate General of the Navy. While so serving he is entitled to the rank and grade of brigadier general, unless entitled to a higher rank or grade under another provision of law. An officer who is retired while serving as Assistant Judge Advocate General of the Navy under this subsection or who, after serving at least twelve months as Assistant Judge Advocate General of the Navy, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the rank and grade of brigadier general. If he is retired as a brigadier general, he is entitled to the retired pay of that grade, unless entitled to higher pay under another provision of law.

In addition, the act of December 8, 1967, added to 37 U.S.C. 202 a new subsection (k) (redesignated as subsection (*l*) by section 3(2) of the act of October 22, 1968, Public Law 90–623, 82 Stat. 1312, 1314), as follows:

> Unless appointed to a higher grade under another provision of law, an officer of the Navy or Marine Corps serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate.

The legislative history of Public Law 91–179 (10 U.S.C. 5149 (b) and (c) and 37 U.S.C. 202(l)) shows that the language finally enacted was the result of several amendments and changes of proposed language and we have carefully considered the explanations and discussions of those amendments and changes in conjunction with the language of the law as finally enacted but we are unable to ascertain an intent that any captain or officer of lesser rank should be paid the pay of a rear admiral (lower half).

Prior to enactment of the act of December 8, 1967, 10 U.S.C. 5149 (a) merely provided that an officer of the line of the Navy or the Marine Corps "may be detailed" as an Assistant Judge Advocate General of the Navy. That subsection also provided that "While so serving" such an officer is entitled to the highest pay of his rank. Additional pay provisions were included in 37 U.S.C. 202(i).

When H.R. 12910, a bill to establish a Judge Advocate General's Corps in the Navy, was first introduced (September 14, 1967), no substantial change was proposed in the language relating to an Assistant Judge Advocate General except that an officer "shall be detailed" as Assistant Judge Advocate General of the Navy and the special pay provision was omitted. Also (in section 7 of the bill) it was proposed to amend the language of 37 U.S.C. 202 to remove the special pay provisions for an officer detailed as Assistant Judge Advocate General of the Navy.

As passed by the House of Representatives, H.R. 12910 had been completely revised insofar as Assistant Judge Advocate Generals of the Navy are concerned. At that time the bill would have enacted 10 U.S.C. 5149(b) providing that a Judge Advocate of the Navy "shall be detailed" as Assistant Judge Advocate General of the Navy. "While so serving, he is entitled to the rank and grade of rear admiral (lower half)" unless entitled to a higher rank under another provision of law. That subsection also would have provided special retirement rights for an officer "retired while serving as an Assistant Judge Advocate General of the Navy under this subsection" or retired after he had served in that capacity.

It was proposed also to enact 10 U.S.C. 5149(c) which would have provided that a Judge Advocate of the Marine Corps "shall be detailed" as Assistant Judge Advocate General of the Navy. "While so serving" such an officer would have been entitled to the rank and grade of brigadier general and special retirement rights like those provided in 10 U.S.C. 5149(b) were included. Section 7 of the bill would have added subsection (k) to 37 U.S.C. 202 which would have provided that an officer "serving" as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate.

Hence, as the proposal passed the House, it provided that one officer of the Navy and one officer of the Marine Corps "shall be detailed" as Assistant Judge Advocate General of the Navy. Those officers, "While so serving," would have been entitled to the rank and grade of rear admiral (lower half) or brigadier general, as appropriate, and while "serving" as Assistant Judge Advocate General of the Navy they would have been entitled to basic pay of a rear admiral (lower half) or brigadier general, as appropriate.

Nowhere in the proposal, or in its legislative history, to this point, do we find any suggestion that a position of Assistant Judge Advocate General of the Navy, except as specifically stated, was proposed. Neither do we find that the special pay provisions proposed for inclusion in 37 U.S.C. 202(k) for an officer serving as Assistant Judge Advocate General of the Navy were intended to apply to an officer other than one detailed under the authority provided in the proposed 10 U.S.C. 5149(b) or (c).

When the bill was considered by the Armed Services Committee of the Senate it was amended so as to omit 10 U.S.C. 5149(c) and the language of 10 U.S.C. 5149(b) was adjusted so as to provide for only one Assistant Judge Advocate General of the Navy—"A Judge Advocate of the Navy or Marine Corps * * * shall be detailed" as Assistant Judge Advocate General of the Navy. No substantial change in language was made in the provisions relating to the rank or grade or the retirement rights of an Assistant Judge Advocate General of the Navy. Also, no change in language was made in the provisions with respect to pay for a person so serving. See S. Rept. No. 748, 90th Cong., to accompany H.R. 12910.

On the floor of the Senate, on the motion of Senator Ervin, the bill was amended to include 10 U.S.C. 5149(b) and (c) exactly as those sections were passed by the House except that the word "may" was substituted for the word "shall" in the first sentence of each section. Senator Ervin explained the amendments (113 Cong. Rec. 32764), as follows:

Mr. President, as referred to the committee this bill proposed to establish two new statutory positions of Assistant Judge Advocate General of the Navy. One of these positions would have been filled by a Navy officer with the rank and grade of rear admiral, lower half, and the other would have been filled by a Marine Corps officer with the rank and grade of brigadier general.

The Committee on Armed Services consolidated these two positions into one and provided that the occupant could be either a Navy officer in the grade of rear admiral, lower half, or a Marine Corps officer in the grade of brigadier general. The committee decided not to increase the number of flag officers in the Navy or general officers in the Marine Corps whose confirmations it would recommend to the Senate. Accordingly, the one additional flag or general officer involved in the committee version of the bill would have caused the Navy or the Marine Corps to accommodate this additional flag or general officer within the limitations now applicable.

After the committee's action the line officers of the Navy and the Marine Corps protested their inability to accommodate an additional uniformed lawyer as a rear admiral or a brigadier general and I have agreed to sponsor an amendment that establishes the two new statutory positions of Assistant Judge Advocate General of the Navy on a permissive basis instead of requiring that they be filled by a flag officer of the Navy or a general officer of the Marine Corps. If those in power in the Navy and the Marine Corps are later persuaded that additional flag or general officer positions should be filled by uniformed lawyers, the authority for flag and general officer grade for the occupants of these offices will exist.

* * * * * * *

Mr. President, the purpose of the amendments which I have offered is to make the assignment of a flag officer or general officer to the positions of Assistant Judge Advocate General of the Navy, which are created by the bill, permissive rather than mandatory; and it is merely to take care of the present objection of the Navy that it is unable to subtract from present authorized flag officers and general officers for these posts. The amendments would make it permissive rather than mandatory.

It is noted that Senator Ervin said that he had agreed to sponsor an amendment that establishes the two new statutory positions of Assistant Judge Advocate General of the Navy on a permissive basis instead of requiring that they be filled with flag or general officers and later he indicated that the bill creates positions of Assistant Judge Advocate General of the Navy. However, no specific language other than that contained in 10 U.S.C. 5149 (b) and (c) was proposed and each of those subsections contains mandatory language that an officer detailed under those provisions shall have either flag or brigadier general rank and grade.

Because of the changes made in the bill by the Senate it had to receive further consideration by the House of Representatives. The discussion on the floor of the House during that consideration is found on pages H15565–6 of the Congressional Record for November 20, 1967 (113 Cong. Rec. 33209). That discussion includes the following statement by Congressman Philbin explaining why further House action was necessary:

Under the language of the bill prior to its amendment the Secretary of the Navy would have been required to detail two Assistant Judge Advocate Generals and the Senate committee advised that if this were done the Stennis ceiling would not be raised, and that the flag and general officers filling the two billets would have to be charged against the total number of flag and general officers already authorized under the Stennis ceiling for the Navy and the Marine Corps. Both the Navy and the Marine Corps took the position that they could not absorb at this time within their current flag- and general-officer allocations the two Assistant Judge Advocate General billets. Consequently the language was changed to enable the Navy and Marine Corps to have some flexibility in this regard.

Later in the discussion in answer to a question whether the bill would be permissive for the establishment of a Judge Advocate General's Corps, Mr. Philbin replied:

No; it is permissive only to the rank of the two officers to be added to the Corps when it is organized, and they shall be of flag rank as well as a lower, lesser rank, presumably captains.

The Senate amendments were concurred in and the two subsections were enacted as quoted above.

The Judge Advocate General of the Navy in his comments of November 5, 1969, which accompanied your request for decision, and the Acting Judge Advocate General in his memorandum of May 27, 1970, recently received, take the position that 10 U.S.C. 5149(b) and (c) created two statutory positions as Assistant Judge Advocate General of the Navy to be filled by officers with no restrictions whatsoever as to their rank, grade, or branch of the Naval service. Certainly that conclusion cannot be based on any specific provisions in those two subsections and even if it could be admitted that those two subsections, plus their legislative history, warrant that conclusion, no progress would be apparent in solving the pay rights of those officers.

For example, if a captain in the Navy is assigned, as Captain Sharratt appears to have been, to act as Assistant Judge Advocate General of the Navy, he is either detailed under 10 U.S.C. 5149(b) or he is not. If he is detailed under that subsection it is specifically provided that he is entitled to the rank of rear admiral (lower half) while so serving. If he is not detailed under that subsection and if we admit, for the sake of argument, that his detail nevertheless makes him an Assistant Judge Advocate General of the Navy, what are his rights? If he occupies a position of Assistant Judge Advocate General that was created by statute, as the Judge Advocate General contends, that statute must be 10 U.S.C. 5149(b) (no other has been suggested). An officer who is retired while serving as Assistant Judge Advocate General of the Navy under that subsection may be retired in the grade of rear admiral (lower half) with retired pay based on that grade.

On the other hand, we have found nothing in the law or its legislative history of any intent to authorize retirement for an Assistant Judge Advocate General of the Navy in a grade higher than the one in which he served on active duty or to authorize retired pay based on such a higher grade.

When the provisions now contained in 37 U.S.C. 202(*l*) were inserted in H. R. 12910 (proposed as 37 U.S.C. 202(k)) they would have fixed the active duty pay and would have been applicable only to those officers detailed as Assistant Judge Advocate General of the Navy under the proposed specific statutory authority providing for such details. In other words, those provisions would have authorized the pay of a rear admiral (lower half) or a brigadier general, as appropriate, for an officer detailed as Assistant Judge Advocate General of the Navy and who, because of that detail and while so serving, was entitled to the grade of rear admiral (lower half) or brigadier general.

Those provisions are applicable at the present time to an officer so detailed and serving and it is our view that they do not extend to captains, or officers of lesser grade, who have been administratively assigned as Assistant Judge Advocate General of the Navy and who have been denied the grade of rear admiral (lower half) or brigadier general. The matter is entirely too doubtful for this Office to conclude that Congress intended that the pay provisions of 37 U.S.C. 202(*l*) should apply to officers so administratively assigned but at the same time intended to deny them the benefits specifically provided by 10 U.S.C. 5149(b) or (c) as to rank and grade for an officer "detailed" to so serve.

After most careful consideration of all the information presented and without considering whether it is appropriate to detail two Navy officers to serve as Assistant Judge Advocate General of the Navy (instead of one Navy officer and one Marine Corps officer), we must conclude that neither of the officers involved is entitled to the pay of a rear admiral (lower half) under the provisions of 37 U.S.C. 202(*l*) on the basis of the present record.

[B-167926]

Sales—Property Descriptions—Rule

The rule to be derived from past decisions of the Comptroller General relating to claims for alleged misdescription of surplus property where no guarantee provisions were incorporated in the invitation is that the holding authority, including the property disposal officer, should be held to the use of the best information available, the accuracy of which may be relied on if not internally inconsistent. but if the information is contradictory or inconsistent, the holding activity has the duty to select on some reasonable basis the descriptive information to be used. If no information is available, the holding activity has the duty to develop a description of the property on a reasonable basis, taking into consideration the circumstances and effort in relation to the probable value. Errors in judgment or typographical errors by the holding activity would not *per se* violate the rule.

Sales—Disclaimer of Warranty—Erroneous Description—Relief Generally

Under invitation for bids to dispose of surplus property on an "as is" and "where is" basis, bidders advised that the estimated weight of the items offered were not guaranteed and urged to inspect the property are not entitled to a price adjustment for weight shortages if the descriptive information used by the holding activity was the best available, or if not available, the weight estimate was based on a visual inspection of the property because it would not have been feasible to weigh the individual items. However, relief may be granted where the contracting officer had actual or constructive notice of the misdescription before award, or the holding activity unexplainedly almost tripled the weight which had been accurately shown in a rough draft of the sales writeup.

To the Director, Defense Supply Agency, July 15, 1970:

Reference is made to the letters of April 9, 1970, and May 1, 1970, with attachments, from the Assistant Counsel, Defense Supply Agency (DSA), reference: DSAH-G, concerning our decision B-167926, January 15, 1970, and certain claims received by your agency for alleged misdescription of surplus items sold where there is no recourse under the "guarantee" provisions. It is suggested that our decisions B–160014, October 27, 1966, and B–166611, May 15, 1969, may be inconsistent with B–167926, January 15, 1970.

The decision, B–160014, October 27, 1966, concerned a claim for an alleged misdescription of an item in a surplus sales invitation. A subitem of the item stated that the handle socket of certain hard tools were sliding T-type, ¼-inch drive. The handle sockets were actually 9⁄32-inch drive. It was found that the description was taken from the best available information as set out in the turn-in document from the holding activity and there was no indication in the record before our Office of bad faith on the part of Government employees drawing the invitation or that such employees had any information that the subitem was other than as described in the invitation. The "Guaranteed Descriptions" clause was not included with the "Sale By Reference" conditions incorporated in that invitation. Since the sale was on an "as is" and "where is" basis, it was concluded that there was no warranty and that the rule of *caveat emptor* prevailed.

In B–166611, May 15, 1969, an automobile was described as a sedan, 1965 Dodge—6, 2-door, and the serial number of the car was set forth in the purchase description. The vehicle was actually a 1964 Dodge, the misdescription in the invitation resulting from a typographical error by the reporting agency. No guarantee provisions were incorporated as terms and conditions of that sale. The contention was that the catalog description was not based on the best available information. Our Office rejected this argument since the sales officer based the description on the best and sole information available to him, that furnished by the reporting agency.

The administrative reports refer to language in B–160014, October 27, 1966, which states that "* * * Sales personnel generally rely upon the records certified to them by the holding activities in preparing the property descriptions which are inserted in disposal invitations and are under no duty to make any inspection of items themselves in preparing for the sale. Relief can only be granted where the misdescription is the result of some act on the part of the sales personnel themselves. The rule of *caveat emptor* applies with respect to misdescriptions resulting from the fault of employees of the holding activities * * *."

In B–166611, May 15, 1969, we said:

> * * * In surplus sales the officials of the Government are required only to act in good faith, which the sales officer did. * * *

In B–167926, January 15, 1970, the turn-in document contained inconsistent descriptive language. Only the more favorable language was included in the purchase description. In that case it was held that the property disposal officer could not simply select the more favorable information but had to carefully evaluate the situation to insure that the selection of one part of the description over another inconsistent part was based on the best available information.

In B-151239, May 31, 1963, the property disposal officer knowingly changed the description of the property shown in the turn-in document. In B-151239, which was cited in B-167926, it was also found that the property disposal officer did not fulfill his duty.

We think the rule to be derived from the foregoing cases is that the holding activity which includes the property disposal officer, should be held to the use of the best information available to it. Where the information is contradictory or inconsistent the holding activity has a duty to select the descriptive information to be used on some reasonable basis. However, where the description of the item available to the holding activity is not internally inconsistent, it has a right to rely on the accuracy of the information. Where no information is available, the holding activity has a duty to develop a description of the property on a reasonable basis taking into consideration the circumstances and the effort justified in relation to the probable value. Errors in judgment or typographical errors by the holding activity would not *per se* violate the standard. We believe that our holdings on the point are consistent with this rule.

The five factual situations presented for our consideration are set out individually below.

The Capco Alloy Steel Company's (Capco) claim concerned a shortage in the estimated total weight of item No. 11, contract No. 44-0048-097, which was described as follows:

> TUBING: 2-¼" outside dimension, corrosion resisting steel. FSN 4710-278-9453. Outside, Area E—Unpacked—Unused—Fair Condition. Total cost $2085. Est. Total wt. 3400 Lbs. 778 FEET.

The above-quoted description of item No. 11 appeared in invitation for bids No. 44-0048, which incorporated by reference the instructions, terms, and conditions, in the "Sale By Reference" pamphlet of March 1969. This pamphlet provided that the sale was on an "as is" and "where is" basis, that the description of the property was based on the best information available and the bidder was urged to inspect the property. It was further provided that the estimated total weight of the property was not guaranteed.

Subparagraph (a)(1) of clause 27 in the "Sale By Reference," March 1969 pamphlet provided that the contract price would not be adjusted or property deleted from the contract pursuant to the "GUARANTEED DESCRIPTIONS" clause unless the purchaser furnished the sales contracting officer written notice within 20 calendar days of removal of the property that he considered the property to have been misdescribed; further, the property must be held sufficiently intact to permit identification by the Government.

Capco paid $0.7869151 per foot for the 778 feet of tubing and removed the item on November 20, 1969. By letter of November 24, 1969, subsequent to the removal of the property, Capco advised the procuring activity that the item delivered consisted of 1,093 pounds and a request was made for a price decrease of $415.26.

The turn-in document to the holding activity indicated that the total weight of the property was 3,400 pounds. This information was used by personnel at the holding activity to prepare the property list which was submitted to the sales office. The descriptions in the property list were used in the invitation for bids.

The facts of the Capco claim indicate that the purchase description was taken from the turn-in document without any changes by the selling activity. This case falls within the general rule that relief is denied where the selling activity acts in good faith on the basis of the best available information. Therefore, since there was no warranty with the respect to the weight of the property, Capco's claim must be denied.

The claim of Western Alloy Metals Corporation (Western) concerns a shortage in the estimated total weight of items Nos. 105 through 116 under invitation for bids No. 44–9130, issued by the Defense Surplus Sales Office, Oakland, California. Item No. 105 was described as follows:

BATTERY, STORAGE, Nickel, alkaline, 30 cell, 11 plate, Edision, Model 30C5.
Total cost $2956
Est. Total wt. 4200 lbs. 2 EACH
Article : Dangerous Property Applicable.

Items Nos. 106 through 115 were described as "same as" item No. 105. Item No. 116 was described as follows:

116 BATTERY, STORAGE: Edision, consisting of:
2 Ea.—Model 10D6A, 6 cell
1 Ea.—Model unknown, 6 cell, dimensions: 26¼" x 13" x 23".
1 Ea.—Model unknown, 30 cell, dimensions: 36½" x 31½" x 21¼".
Outside Lot 505–33—Unpacked—Used—Poor Condition
Total cost $2200
Est. Total wt. 4800 lbs. 1 LOT
Article EQ: Dangerous Property Applicable.

The estimated weight of the total quantity described in items Nos. 105 through 116 was 51,000 pounds. Western was the high bidder at $5,403 and award was made to that concern on May 23, 1969.

On June 27, 1969, subsequent to removal of the property, a representative of Western advised the contracting officer by telephone of a shortage in weight in items Nos. 105 through 116 and of Western's intention to file a claim. By letter of November 4, 1969, Western advised the contracting officer that there was a shortage of 23,560 pounds and a refund of $2,905.64 was requested. The batteries were removed from Government control on June 25, 1969. Western filed its written claim for relief on November 4, 1969.

Spaces in the turn-in document for describing the type of container, the total weight, the number of containers, and the total cube were left blank. The report from the sales contracting officer states that the writer of the sales description estimated the total weight from visual inspection and these weights were included in the property listing referred to the sales office. The sales office apparently relied on this listing in including the purchase description in the invitation.

The invitation which is the subject of Western's claim incorporated the instructions terms and conditions contained in the "Sale By Reference" pamphlet of April 1968. The provisions in this pamphlet that the sale was on an "as is" and "where is" basis; that the description of the property was based on the best information available and urging the bidder to inspect the property were the same as the provisions in the March 1969 "Sale By Reference" pamphlet. The April 1968 pamphlet stated that the estimated total weight was not guaranteed. Paragraph (a) (1) of clause 27 in the April 1968 "Sale By Reference" pamphlet is the same as the corresponding clause in the March 1969 "Sale By Reference" pamphlet, summarized above.

The facts of Western's claim indicate that the misdescription was due to a visual inspection by the writer of the purchase description who was part of the holding activity. The sales office described the property in accordance with the information reported to it by the holding activity. We have been advised that in view of the mix of batteries it would have been necessary to individually weigh the batteries to insure that the weight was accurate; that this was not feasible; that, therefore, a visual inspection was made and the weight was described as an estimate. In our opinion the holding activity acted reasonably in the circumstances; consequently, there is no basis for granting relief to Western.

The letter of May 1, 1970, from your agency, presents claims from Ashland Metals under two separate contracts—contracts Nos. 16–0061–116 and 25–0066–115.

Contract No. 16–0061–116 was awarded to Ashland Metals for item No. 103, contained in sales invitation No. 16–0061, issued by the Defense Surplus Sales Office, Newport, Rhode Island. This item was described as follows:

103. CABLE, POWER ELECTRICAL: Shipboard, consisting of:
1790 Feet—(on 4 reels). Type MDGT–30, 30 conductor, AWG–3 conductor, 600 volts, O/D 2.750, FSN 6145–184–2526.
Inside—Unused—Good Condition
Total cost $11,195
Est. total wt. 25,000 lbs.
Est. Shipping Dim. F/Reels: 75" dia. x 48" W 1 LOT

Ashland Metals purchased the above item for $6,550 on a lot basis and subsequent to removal of the property filed a claim for refund of $1,167.99 based on the assertion that the actual weight of the property delivered was 4,458 pounds less than the estimated total weight stated in the purchase description. The turn-in documents list the property under the federal stock number and the property disposal officer has advised that the Federal Stock Catalog was used to describe the property. The gross weight of the property was estimated by personnel in the disposal office. A memorandum dated March 30, 1970, from the Disposal Division, Boston Naval Shipyard Annex, states as follows with respect to the estimated weight:

> 1. Forwarded. This material was written "as a lot," with description as a usable item. The footage was exact, the weight on the referral was an *estimate*, and for *shipping purposes only;* (not part of the description).

The invitation incorporated by reference the terms and conditions contained in the "Sale by Reference, March 1969" pamphlet. These terms and conditions are the same as those described with reference to Capco's claim.

In Ashland Metals' claim under contract No. 16–0061–116, an inaccurate estimate was made by disposal office personnel. This was a sale by "lot" and Ashland Metals alleged the shortage prior to the removal of all of the property. Our examination shows that for item No. 103 the firm submitted a total bid of $6,550 for the "lot" with no unit price inserted. There is no evidence of unreasonable action by the holding activity and the selling activity relied on information furnished to it by the holding activity. Therefore, there is no basis for granting relief under this contract.

The claim under contract No. 25–0066–115 awarded by the Defense Surplus Sales Office, Norfolk, Virginia, concerns the following purchase description of item No. 61 contained in sales invitation No. 25–0066:

> CABLE, ELECTRIC, NAVY DEGAUSSING: General Cable Corp., Spec. N15–C–1J, Type MDGA–19(23); 19 conductors copper stranded no. 7 Awg. AC, 600 volts, felt asbestos and varnished cambric insulation and a compound impregnated rayon braid over each conductor. The conductors are cabled under a binder. Type MDGA has an impervious sheath and a painted metal armor braid over the binder.
> Est. 45,853 feet on 55 reels. FSN 6145–191–1982.
> Outside—Packed Unused—Good Condition
> Total cost $64,194
> Est. total wt. 320,971 lbs. 1 LOT

Ashland Metals was the high bidder for the above property at $43,752.31. During removal of the property Ashland alleged a shortage in the estimated total weight and a letter dated March 5, 1970, from Ashland Metals confirmed this assertion. After complete removal Ashland Metals filed a claim for $24,033.56 based on the assertion that the actual weight of the property delivered was some 176,000 pounds less than the advertised estimated total weight.

A memorandum prepared by the Property Sales Specialist dated March 26, 1970, indicates that an inspection was made of the remaining portion of item No. 61 after being advised of Ashland Metal's assertion. One reel was selected as representative of the largest and heaviest of the lot. A computation was made taking into consideration that some of the reels were smaller than the largest selected and it was found that the total weight was 114,632 pounds consisting of 73,382 pounds of cable (45,853 feet of cable at 2.5 pounds per foot) and 41,250 pounds as the weight of the reels (55 reels at 750 pounds per reel).

The sales contracting officer's report gives the following details regarding the misdescription of item No. 61:

9. The NSC Disposal Division Memorandum of 26 March 1970 advises the estimated total weight of the cable was arrived at by obtaining the weight from one reel and multiplying by 55, the total number of reels. This method of estimating weight was incorrect in view of the footage listing by reel available at the time. The estimated footage was obtained from the markings on each reel and listed on the tally sheet. The description written by a NSC Disposal technician on Material Identification form dated 3/3/69 is identical with the typewritten referral listing and IFB description. The warehouseman that estimated the total weight should have been aware of the different footage on each reel as he compiled the listing.

Ashland Metals alleges its bid price was computed on a pound basis. In this regard the sales contracting officer's report states that a prudent businessman would have been able to ascertain that the cable weighed approximately 2.5 pounds per foot and with the purchase description estimate of 45,853 feet of cable on 55 reels, Ashland Metals should have concluded that the estimated total weight stated in the purchase description was incorrect.

Enclosed with DSA's report on Ashland metals' claim under this contract is an extract from a publication by National Electric on "Shipboard Cables." Page 12 of this publication gives information regarding type MDGA-19(23) multiple conductor, degaussing, armored cable, which is the type of cable described in item No. 61. The publication states that the approximate net weight per 1,000 feet is 2,516 pounds which comes to approximately 2.5 pounds per foot of cable. DSA's report of May 1, 1970, states that prior to bid opening a sales office representative established the current market appraisal of item No. 61 based on an average weight of 2½ pounds per foot of cable for 45,853 feet for a total of 114,632 pounds and that this information should have been reported to the contracting officer. The administrative report further advises that prior to award the contracting officer had item No. 61 inspected to verify the accuracy of the description of this item. The letter of May 1, 1970, recommends that an adjustment be authorized for item No. 61.

Regarding Ashland Metals' request for relief under contract No. 25-0066-115, we find that on item No. 61 a total bid of $43,752.31 for the "lot" was submitted with no unit price inserted. While certain publications may have indicated the weight per foot of cable, there has been no showing that Ashland Metals was actually aware that the purchase description was erroneous. Moreover, we will not impute the knowledge of the publications regarding the weight of cables to Ashland Metals in the absence of a showing that Ashland Metals was more than an occasional purchaser of cable to be used as scrap. In view of the statement in the report that the sales office had information available which indicated that the estimated weight in the purchase description for item No. 61 was erroneous which should have been submitted to the contracting officer and the further statement that the contracting officer had the item inspected prior to award, we find that the circumstances here justify the conclusion that the contracting officer had actual or constructive knowledge of the misdescription prior to award. Therefore, Ashland Metals may be granted an adjustment in the purchase price for item No. 61 as administratively recommended.

The claim of Commercial Metals Company (Commercial) involves a shortage in the estimated total weight of item No. 170 described in invitation for bids No. 44–0038, issued by the Defense Surplus Sales Office, Oakland, California, as telephone cable having an estimated total weight of 40,000 pounds. The purchase description stated that the sale was on a "lot" basis.

Commercial's bid for item No. 170 of $6,824.89, was high and an award was made to that concern on October 16, 1969. By letter of November 11, 1969, Commercial advised the contracting officer that the actual weight of item No. 170 was 19,400 pounds which is about one-half of the estimated total weight stated in the description and rescission of the contract for that item was requested. Commercial refused delivery and defaulted on its contract for item No. 170. In accordance with the "Default" provision of the "Sale by Reference" pamphlet, March 1969, incorporated by reference in the invitation, the contracting officer retained 20 percent of the purchase price. A claim has been made for refund of this 20 percent. The other pertinent terms and conditions in the "Sale by Reference" pamphlet, March 1969, are the same as those described in reference to Capco's claim.

A memorandum dated February 18, 1970, prepared by the Property Sales Specialist states that an inspection was made of the property covered by item No. 170 and the description in the invitation was found to be accurate except for the estimated weight. The memorandum states that a review of the rough draft of standard sales writeup data showed the gross weight to be 13,580 pounds; however, this had been changed by the holding activity to read 40,000 pounds. The administrative report advises that the estimated weight of 40,000 pounds was put into the invitation based on information furnished by the holding activity. An investigation was made with respect to the accuracy of the estimated weight for item No. 170; however, personnel at the holding activity could not account for the change.

In Commercial's case the estimated weight was accurately reflected in the sales writeup data furnished to the holding activity but for some unaccountable reason was changed by the holding activity and based on the information submitted to the sales activity an inaccurate but apparently more favorable description was put in the invitation. We find that the unexplained departure from the description provided departs from the rule of reasonableness stated earlier. Consequently, we find that the facts of Commercial's claim constitute a basis for granting relief.

The letter of April 9, 1970, mentions a solution to the problem where the actual weight turns out to be less than the estimated weight shown in the purchase description. It is suggested that the weight be made a factual part of the invitation and thus subject to the "guarantee" provisions. It is indicated that wider use of sales by weight are contemplated particularly where the value of the property depends primarily on the weight. We have no objection to such a solution.

[B-169823]

Gratuities—Reenlistment Bonus—Extension of Enlistment—Pay Increase Rate Applicability

A member of the uniformed services who extended a 4-year enlistment on April 14, 1970, under 10 U.S.C. 509 for 26 months effective April 15, 1970, the date of issuance of Executive Order No. 11525, making the new pay rates authorized by Public Law 90–207 and Public Law 91–231, retroactively effective to January 1, 1970, is entitled to have the reenlistment bonus earned under 37 U.S.C. 308(a) computed at the new pay rates as the Defense Department implementation of the Executive order, which restricts the use of the increased rates in the computation of a reenlistment bonus when entitlement occurs after December 31, 1969, but before April 15, 1970, has no application to the member who beginning his extended enlistment on April 15, 1970, is entitled to the computation of the reenlistment bonus under paragraph 10905 of the Defense Military Pay and Allowances Manual.

To the Commanding Officer, Navy Regional Finance Center, July 15, 1970:

Further reference is made to your letter of May 13, 1970 (file reference 310:ECS:rr 7220), requesting an advance decision as to the proper rate of pay to be used in computing reenlistment bonus to be paid to PN2 David W. Naumann, incident to completing his enlistment on April 14, 1970, and the extension of such enlistment on April 15, 1970, in the circumstances disclosed. The request was forwarded here by first endorsement dated June 5, 1970, from the Director, Navy Military Pay System, and has been assigned submission No. DO-II-1081 by the Department of Defense Military Pay and Allowance Committee.

It appears from the agreement to extend enlistment (NAVPERS 601-1A/NAVCOMPT 513), copy of which was enclosed with your letter, that the member's original contract of enlistment (for 4 years effective April 15, 1966) was completed on April 14, 1970, and that he agreed to extend his enlistment under 10 U.S.C. 509 for a period of 26 months effective April 15, 1970.

In the light of paragraph 3 of SECNAVNOTE 7220 dated April 16, 1970, and the provisions of paragraph 10904 of the Department of Defense Military Pay and Allowances Entitlements Manual which you cite, you ask whether the reenlistment bonus should be paid at the old rate (1969) or the new rate (1970) of pay. You say that the member was paid the bonus computed on the lesser rate of pay pending our decision.

In implementing section 8(a) of the act of December 16, 1967, Public Law 90-207, 81 Stat. 649, 654, and the Federal Employees Salary Act of 1970, Public Law 91-231, April 15, 1970, 84 Stat. 195, the President adjusted upward the rates of monthly basic pay for members of the uniformed services, the new rates being set forth in section 1 of Executive Order No. 11525 dated April 15, 1970, effective January 1, 1970. Section 2 of the same Executive order provides as follows:

> Sec. 2. (a) A person who became entitled after December 31, 1969, but before the date of enactment of the Federal Employees Salary Act of 1970, to payment for items such as lump-sum leave, reenlistment and variable reenlistment bonus, continuation pay, any type of separation pay, or six months death gratuity, shall not be entitled to any increase in any such payment by virtue of this order.
> (b) Authority to prescribe other rules for payment of retroactive compensation shall be exercised for the uniformed services by the Secretary of Defense. Entitlement to retroactive pay under such rules shall be subject to the provisions of section 5 of the Federal Employees Salary Act of 1970, and shall conform as nearly as may be practicable to the provisions of Section 7 of the Act of December 16, 1967, 81 Stat. 654.

Pursuant to the quoted section 2(b), the Deputy Secretary of Defense in memorandum for the Assistant Secretary of Defense (Comptroller) dated April 21, 1970, prescribed certain rules implementing the Executive order. Rule 1 of the memorandum states in part that "A person who became entitled, after December 31, 1969, but before April 15, 1970 to payment for items such as * * * reenlistment and variable reenlistment bonus * * * will not be entitled to any increase in any such payment by virtue of that order." The same language is contained in paragraph 3 of SECNAVNOTE 7220 cited in your submission.

A reenlistment bonus is authorized under 37 U.S.C. 308(a) computed, as there indicated, on the basis of the basic pay to which the member was entitled "at the time of discharge or release." Section

308(f) authorizes the Secretary concerned to prescribe regulations for the administration of that section.

Under the provisions of section 509 of Title 10, U.S. Code, as added by section 2(a)(1)(B) of the act of January 2, 1968, Public Law 90–235, 81 Stat. 753, 755, and under regulations of the Secretary concerned, the term of enlistment of a member may be extended with his written consent for not more than 4 years and he has the same rights, etc., that he would have if discharged at the same time from an enlistment not so extended. In implementing the 1968 law, paragraph 10904 of the Department of Defense Military Pay and Allowances Entitlements Manual, provides in pertinent part as follows:

> Compute reenlistment bonus as for actual reenlistment when a member voluntarily extends his enlistment for 2 years or more. This includes combined extensions of enlistment as provided below. When part of a year is involved, compute the bonus by using as a multiplier the total number of years and fractions of years for which the enlistment was extended. * * * Compute at pay rate applicable on day before he began serving on the first extension.

Paragraph 10905 of the same manual provides that:

> Payment of regular reenlistment bonus is normally made on the day the member reenlists. A member who extends his enlistment for 2 years or more is not paid the bonus for the extension until he actually begins serving the extension.

Since the member's original enlistment terminated on April 14, 1970, and since he did not actually begin serving his extended enlistment until April 15, 1970, at which time he became entitled to be paid the bonus as provided in paragraph 10905, DODPM, he may not be considered as becoming entitled to the reenlistment bonus "after December 31, 1969, but before April 15, 1970" for purposes of section 2(a) of Executive Order No. 11525 and the implementing regulations, so as to require computation of the bonus under the 1969 rates of pay. Accordingly, the member is entitled to have his reenlistment bonus computed on the rates of basic pay prescribed in Executive Order No. 11525 which became effective January 1, 1970, and which rates were applicable on the date before (April 14, 1970) he began serving on his first extension.

We note that, on the member's agreement to extend his enlistment, a reenlistment bonus in the amount of $743.60 was paid to him. This amount appears to have been computed on the basis of the 1969 rate of pay of an E–5 with over 4 years' service. Since the member did not complete 4 years' service until midnight April 14, 1970, and since the bonus is required to be computed at the rate applicable on the day before he begins serving on the first extension, it would appear that the bonus should have been computed on the basis of an E–5 with over 3 years' service. The bonus should be recomputed on this basis under the 1970 pay rates.

[B-169542]

Contracts—Unprofitable—Relief

A request for relief under section 17 of the Armed Services Procurement Regulation authorizing extraordinary contractual actions to facilitate the national defense made after contract completion and final payment on the basis the bid underpricing was due to unforeseen production difficulties and misleading vendor quotes is for denial where the occurrence of a mistake "so obvious it was or should have been apparent" is not demonstrated. and the record establishes the price bid was adequately verified and was intended, and only subsequent events resulted in the unprofitable contract. Even assuming the existence of a bona fide mistake, the fact that the price bid greatly exceeded the Government's estimate intended as a funding allocation, or that prior procurements for lesser quantities were priced much higher than a group of bids in the price range of the successful bid did not place the contracting officer on actual or constructive notice of error.

To Witte and Witte, July 16, 1970:

Further reference is made to your letters dated April 8 and 28 and June 10, 1970, with enclosures, requesting rescission of contract No. DAAG25-67-C-1005 between your client San ColMar Industries, Inc. (SCI), and the Department of the Army, on the ground that your client made an error in its bid "so gross that the Government was placed on notice of the error and was bound to point it out to SCI (but did not) when it requested clarification of the bid."

The subject procurement was for 1,512 each of "Plug, Dwg C7305011, Rev. D. for 155 mm Howitzer, MIA1," with an option reserved to the Government for an additional quantity. Bids as follows were received from nine bidders:

BIDDER	UNIT PRICE	OPTION UNIT PRICE
San ColMar Industries, Inc.	$8.00	$7.80
Imco Precision Products	8.20	8.10
Universal Metal Chain Co.	11.11	11.11
Mt. Vernon Welding and Machine	28.20	28.20
Bristol Dynamics, Inc.	29.95	29.95
Continental Fabricators Corp.	31.00	31.00
Argo Development Corp.	32.50	32.50
Stellar Tool and Mfg. Co., Inc.	38.50	38.50
R & Z Precision Industry, Inc.	47.01	47.01

Following a favorable preaward survey and verification of its bid prices in response to a request by the contracting officer, award was made to SCI on November 4, 1966, as the lowest responsive, responsible bidder. On December 29, 1966, the contract quantity was increased by 1,200 units at a price of $7.80 each in accordance with the contract option provision, with no objection from SCI and the contract was subsequently fully performed by SCI and final payment was made.

By letters dated August 11, 1967, before contract completion, and September 3, 1969, substantially after contract completion, SCI requested an adjustment of the contract price under the authority of section 17 of Armed Services Procurement Regulation (ASPR), authorizing extraordinary contractual actions to facilitate the national defense, in the amount of $7.90 per unit for the basic and option quantities of the contract—a total of $21,424.80. The basis for this request generally was that unforeseen production difficulties and misleading vendor quotes had resulted in an underpricing of the SCI bid to that extent.

By decision of the head of the procuring activity dated November 8, 1969, the request for adjustment was denied on the ground that the contractor had not demonstrated, pursuant to ASPR 17-204.3(ii), that it was a mistake "so obvious that it was or should have been apparent to the contracting officer." The decision noted that the contractor's letter of September 3, 1969, stated that its mistake "may not have appeared as apparent to the Contracting Officer." Also, the decision held that "Any mistake which the Contractor may have made was unilateral in nature, for which the Contractor alone must bear the sole responsibility."

It is your contention that the difference between the SCI unit price of $8 each and the Government's estimate of $25 each based on a prior procurement history of $29.80 and $34.72 each was sufficient, notwithstanding two other bids in the same general range as the SCI bid and a written verification by SCI, to put the contracting officer on notice "of the possibility of a gross error in bid." You also point out that the only prior manufacturer of the plug in question bid $28.20 each under the instant invitation. You contend, therefore, that the contracting officer was obliged in seeking verification of the SCI bid to point out these differences and that his failure to do so violated the rule enunciated in *United States* v. *Metro Novelty Manufacturing Co., Inc.*, 125 F. Supp. 713 (1954). That case held that the contracting officer, where error is suspected, is obliged to advise the bidder of all facts and circumstances leading to his suspicion of error.

The facts of record do not establish that a mistake, as such, was made by SCI in its bid inasmuch as it appears that SCI bid exactly as it intended but that subsequent events unforeseen at the time of award resulted in an unprofitable contract. However, assuming the existence of a bona fide mistake on the part of SCI, it is our opinion that the contracting officer was not on actual or constructive notice of possible error and that a binding enforceable contract resulted from acceptance of SCI's bid. In this regard, the Department of the Army has advised us that the estimate of $25 each mentioned in the November 8, 1969, administrative decision was in reality a funding allocation providing for a commitment of funds up to $25 each. The Army also points out that the prior procurement history of $34.72 and $29.80 each represented procurements of 72 and 312 plugs, while the instant procurement called for a total basic quantity of 1,512 units, indicating that lower prices would be bid in view of the substantially larger quantity. Finally, Army takes the position that the existence of three bids in the relatively same price range (i.e., $8., $8.20 and $11.11 each) provided the contracting officer with sufficient basis for assuming that no apparent error existed.

In substantiation of your contention that the contracting officer was on actual or constructive notice of error, you cite our decision B–148325, March 23, 1962, for the proposition that the difference between the SCI bid and the Government estimate provided such notice, and decision B–150902, March 12, 1963, for the proposition that the difference between the SCI bid and prior procurements also provided such notice. Also, you cite *C. N. Monroe Mfg. Co. v. United States*, 143 F. Supp. 449 (1956), and B–144300, November 4, 1960, for the proposition that other bids in the range of the SCI bid did not serve to justify the contracting officer's failure to suspect error.

These precedents, however, are not controlling here. In B–148325, the sole bid received was only 76 percent of the Government estimate for the particular procurement. Here, nine bids were received, the three lowest of which were closely grouped. Further, the Government funding allocation, which was not a procurement estimate, only indicated the upper limit of possible bid prices. We think these particular factors distinguish the cited case from the one involved here.

Similarly, our decision B–150902 involved a sole-source award wherein the same contractor had quoted an identical price on three prior contracts but neglected to take into account on the contract in question a change in specifications resulting in an increase in his costs. We think that situation is significantly different from one, as here, where competition with its unquestioned effect on pricing exists and where prior procurements were for substantially lesser quantities than involved here.

Finally, both *C. N. Monroe Mfg. Co.* and B–144300 involved situations where two bids were significantly out of line with other bids submitted. Here, there were three closely grouped bids which, when compared with the other six bids in a higher price range, were not indicative of patent error. We think that the existence of these three closely grouped bids, coupled with the larger quantity of plugs being procured, reasonably led the contracting officer to the conclusion that no apparent error was evident.

As further justification for the conclusion that the contracting officer should not be held to constructive notice of error, it is noted that SCI apparently did not become aware of its alleged error until April 1967, almost 1½ years after award. Further, we are advised that an identical contract for the same item was awarded by the same contracting officer to another contractor on May 24, 1967, at a unit price of $7.35, and that such contract has been successfully completed without any intimation of financial difficulties.

Since we conclude that no basis exists for charging the contracting officer with actual or constructive notice of SCI's alleged error, no basis exists for challenging the adequacy of the bid verification requested of SCI before the award was made. Accordingly, your request for relief must be denied. See 47 Comp. Gen. 732 (1968).

[B-170217]

Bids—Late—Telegraphic Modifications—Inconsistent Provisions

Where the invitation for bids provided for consideration of a late bid modification only if the delay was due to Western Union and paragraph 2-303.4 of the Armed Services Procurement Regulation, in effect at the time, provided for consideration only if the late receipt of a modification was caused by Government mishandling, the inconsistency of the provisions was prejudicial to bidders and detrimental to the competitive bidding system. Therefore, a contract award made on the basis of the regulation to the low bidder at its reduced telegraphic price pursuant to paragraph 2-305 of the regulation, although the second low bidder s telegraphic modified bid price was lower, both modifications having been timely received by Western Union but not delivered until after bid opening, should be canceled and the procurement resolicited only from the two involved concerns.

To the Secretary of the Navy, July 17, 1970:

Reference is made to the letter with enclosures dated July 2, 1970, from the Naval Facilities Engineering Command, reference: 0211E/RSL:kam, requesting our decision on the protest from Howard Ferriell & Sons, Incorporated (Ferriell) against the award of a contract to Ja-Mar Painting Company, Incorporated (Ja-Mar).

Invitation for bids No. N62467-70-B-6622 was issued on May 5, 1970, by the Naval Air Station, Memphis (NAS, Memphis), Millington, Tennessee, for interior and exterior painting of family housing at the installation with the bid opening scheduled for 2:00 p.m. c.d.t., June 1, 1970. Bids were opened as scheduled and the bid of Ja-Mar at $74,856.50 was low. The bid of Ferriell at $80,685 was the second low bid.

At 8:00 a.m. on June 2, 1970, subsequent to bid opening, the Officer in Charge of Construction (OICC) received two telegraphic modifications. One modification was from Ja-Mar decreasing its bid price by 6 percent. This telegram from Miami, Florida, arrived at the Western Union office located at NAS, Memphis, at 8:01 a.m. on June 1, 1970, but was not transmitted to the Communications Center at the Naval Air Station until 2:55 p.m., June 1, 1970, which was after bid opening. The other modification from Ferriell, which reduced its price to $63,933, was sent from Louisville, Kentucky, and arrived at the Western Union office located at NAS, Memphis, at 10:30 a.m., June 1, 1970. This message also arrived at the NAS Communications Center after bid opening at 2:55 p.m., on June 1, 1970. As indicated both of the modifications were received by the OICC at 8:00 a.m. on June 2, 1970.

Paragraph 4 entitled "Late Bids and Modifications or Withdrawals" of the invitation provided in effect that late telegraphic modifications would be considered if the late receipt was due to delay by the telegraph company for which the bidder was not responsible.

Armed Services Procurement Regulation (ASPR) 2–303.4, the ASPR provision in effect at the time the solicitation was issued, provides that a late telegraphic bid received before award shall not be considered for award, regardless of the cause of the late receipt, including delays caused by the telegraph company, except for delays due to mishandling on the part of the Government in its transmittal to the office designated in the invitation for bids for the receipt of bids, as provided for bids submitted by mail. The import of this regulation is that late telegraphic modifications are not to be considered unless it is shown that the delay was due to mishandling by the Government at the installation.

On June 9, 1970, the OICC rejected the telegraphic modification of Ferriell since it was not received until after bid opening, and an award was made to Ja-Mar on the same date. The award to Ja-Mar was in the amount of $70,365.11 which includes the reduction in Ja-Mar's telegraphic modification. The authority for considering Ja-Mar's modification is ASPR 2–305 which provides that a late modification of the otherwise successful bid shall be opened at any time it is received; and if in the judgment of the contracting officer it makes the terms of the bid more favorable to the Government it shall be considered.

The letter of July 2, 1970, from Naval Facilities Engineering Command advises that the OICC has verified with the telegraph company that Ferriell's telegram would have arrived in time for bid opening but for delays of the telegraph company in handling the message.

The situation presented to our Office is one where the OICC acted in accordance with the applicable provision in the regulation regarding late telegraphic modifications but not in accordance with the provision in the invitation which was inconsistent with the regulation.

We recognize that bidders normally compute their bids on the basis of the terms and conditions stated in the invitation, and will otherwise rely on these provisions and that it is a serious matter to vary or disregard any of the stated terms and conditions of the solicitation after bids have been opened. In 17 Comp. Gen. 554 (1938) it was stated that to permit public officers to permit bidders to vary their proposals after bids are opened would soon reduce to a farce the whole procedure of letting contracts on an open competitive basis. Changing the ground rules upon which bidders are requested to bid after opening of bids is subject to the same criticism.

In our opinion, not to give effect to the provision in the invitation regarding the consideration of late telegraphic modifications would be a serious matter and could be considered as being prejudicial to Ferriell since if Ferriell knew that late telegraphic modifications would not be considered except in the mishandling situation, this bidder might well have hand carried the modification to the bid opening room.

Considering the inconsistency between ASPR and the invitation and since a result prejudicial to either Ja-Mar or Ferriell cannot be avoided if it were decided that either the regulation or the provision in the invitation should be considered as controlling, we find that the contract with Ja-Mar should be terminated, and that there should be a resolicitation of this procurement, limited, however, to these two firms. In this regard we are advised that if the contract with Ja-Mar were terminated, it is estimated the Government would incur termination charges of approximately $1,000.

[B-169998]

Travel Expenses—Temporary Duty—Return to Official Station on Workdays

An employee ordered to temporary duty at a point 100 miles from his residence which is located near his permanent headquarters who, although his orders do not so provide, voluntarily returns to his residence on workdays after the close of business, as well as on nonworkdays, may be reimbursed travel expenses for the days he returns to his home in an amount not to exceed the expenses allowable had he remained at his temporary duty station, even though section 6.4 of the Standardized Government Travel Regulations makes no reference to return to headquarters on workdays while on temporary duty, as there is no reason why the rule applicable to nonworkdays may not be extended to voluntary returns on workdays after the close of business if not specifically prohibited.

To Lieutenant W. E. Kennedy, Department of the Navy, July 20, 1970:

Your letter of February 4, 1970, references MT:WEK:ab, concerns the proper computation of travel expenses for Mr. Richard K. Lawson while on temporary duty during the period July 22 through October 10, 1969.

The record shows that Mr. Lawson was ordered on temporary duty for approximately 77 days at a point 100 miles from his residence which was near his permanent headquarters. His orders were silent with respect to his return to headquarters on nonworkdays or on workdays. However, the record does contain a copy of a letter addressed to Mr. Lawson to the effect that daily commuting by privately owned automobile between headquarters area and the temporary duty area could be authorized on a mileage basis if approved in advance in writing by the proper official who would be responsible for car pooling to the maximum extent possible (two other employees were assigned to similar temporary duty).

Section 6.4, Standardized Government Travel Regulations, provides as follows:

> *Return to official station.*—At the discretion of the administrative officials a traveler may be required to return to his official station for nonworkdays. In cases of voluntary return of a traveler for nonworkdays to his official station, or his place of abode from which he commutes daily to his official station, the maximum reimbursement allowable for the round-trip transportation and per diem en route will be the travel expense which would have been allowable had the traveler remained at his temporary duty station.

Paragraph C10158 of the Joint Travel Regulations concerning voluntary return to permanent duty station which apparently was based upon the foregoing regulation does not contain the phrase "nonworkdays." However, the examples given in connection therewith involve nonworkdays.

In accordance with the above regulation an employee who voluntarily returns to his residence on nonworkdays is entitled to mileage and per diem while traveling, not to exceed the per diem to which he would have been entitled had he remained at his temporary duty point, whichever is less. See B–151837, July 22, 1963; B–129185, March 28, 1957.

With respect to Mr. Lawson's return to his residence on various workdays after the close of business we note that the Standardized Government Travel Regulations make no mention thereof. While the Joint Travel Regulations (C10158) could be interpreted to embrace workdays as well as nonworkdays it may be that such was not intended. In any event and since Mr. Lawson was not specifically prohibited from receiving any form of reimbursement because of his voluntary return to his residence on workdays we see no reason why the rule applicable to voluntary return on nonworkdays may not be extended to voluntary return on workdays after the close of business.

The voucher and related papers are returned herewith for handling in accordance with the foregoing. In the computation of the amount due, each round trip to the employees' residence should be computed as a separate item.

[B-170176]

Compensation—Severance Pay—Eligibility—Retired Members of the Uniformed Services

Upon reduction in force as a civilian employee of the United States, a retired member of the uniformed services may not be paid severance pay as the 1965 authorizing act (5 U.S.C. 5595) excludes the payment of severance pay to a person subject to the Civil Service Retirement Act or any other retirement law or system applicable to Federal officers or employees or members of the uniformed services who at the time of separation have fulfilled the requirements for immediate annuity—a term including retired pay—and the prohibition against payment of severance pay is applicable without regard to when a member first becomes entitled to military retired pay, or whether he is eligible under the Dual Compensation Act of 1964 (5 U.S.C. 5531–5534) to receive military retired pay concurrently in whole or in part with the compensation of his civilian office or position.

Compensation—Severance Pay—Overpayments

Erroneous payments of severance pay made under 5 U.S.C. 5595 to retired members of the uniformed services, who employed as civilians by the United States were reduced in force, may be waived under the provisions of the act of October 21, 1968, Public Law 90–616.

To Lieutenant Colonel G. W. Griffin, Department of the Army, July 20, 1970:

Your letter of April 16, 1970, requests decisions on several questions relating to the entitlement of retired members of the uniformed services to severance pay incident to separation from employment as civilian employees of the United States by reason of reduction in force.

Section 9 of the act of October 29, 1965, Public Law 89–301, 79 Stat. 1118–1120, 5 U.S.C. 5595, provided that, under regulations prescribed by the President or his designee, with certain exceptions each civilian officer or employee of the executive branch of the United States who is involuntarily separated from employment not for cause, misconduct, delinquency, or inefficiency, after having been employed currently for a continuous period of at least 12 months, shall be paid severance pay in regular pay periods in amounts there prescribed. Subsection (b) of that section provided that section 9 thereof does not apply to—

> (4) an officer or employee who is subject to the Civil Service Retirement Act, as amended, or any other retirement law or retirement system applicable to Federal officers or employees or members of the uniformed services, and who, at the time of separation from the service, has fulfilled the requirements for immediate annuity under any such law or system;

Section 9 of Public Law 89–301 is now codified in 5 U.S.C. 5595.

Federal Personnel Manual Supplement 990–2, Book 550, Subchapter 7, paragraph 87–3b(7) (c) (v), reads:

> The law does not authorize severance pay for an employee who, at the time of separation from the service, has fulfilled the requirements for immediate annuity under subchapter III of chapter 83 of title 5, United States Code, or any other retirement law or retirement system applicable to Federal employees or members of the uniformed services. Because entitlement to a discontinued service annuity or disability annuity (including one based on a finding of disability after

separation) vests at the date of separation, entitlement to such annuity bars entitlement to severance pay.

You say that you have paid the first installment totaling $14,083.03 of severance pay to 41 employees who are receiving military retired pay and that you have suspended the remaining payments totaling $26,007.40 pending our decision as to whether they are entitled to severance pay. You indicate that each of the former employees concerned had been retired from the armed services prior to entering upon civilian Government employment.

Your basic question is whether a person receiving or entitled to receive retired pay as a member or former member of the uniformed services at the time of separation from civilian employment is entitled to receive severance pay under section 9 of Public Law 89–301, 5 U.S.C. 5595. You also inquire whether entitlement is affected by status as a Regular Army officer, Reserve personnel, or non-Regular officer, warrant officer, or Regular enlisted man; or by having previously been retired from the armed services by completing eligibility requirements for military retirement while employed in a civilian position, or by military retirement for physical disability. If severance pay is not payable, you ask whether the recipients of previous payments are entitled to request waiver of erroneous payment under Public Law 90–616, 82 Stat. 1212, 5 U.S.C. 5584.

It will be noted that the 1965 law excluded from severance pay entitlement any officer or employee who is subject to the Civil Service Retirement Act or any other retirement law or retirement system applicable to Federal officers or employees or members of the uniformed services who at the time of separation has fulfilled the requirements for immediate annuity under any such law or system. While the term "annuity" is not generally used to describe the retired pay received by retired members of the uniformed services, it seems clear that such term is so used in the 1965 law.

We have found nothing in the language of the 1965 law or in its Legislative history which suggests that severance pay is barred only when an individual becomes entitled to military retired pay at the time of his separation from civilian Government employment such as suggested by you. In its report on H. R. 10281, the bill which became the 1965 law, the Senate Committee on Post Office and Civil Service stated that subsection 9(b) of that law excludes certain employees:

(4) Any employee who at the time of separation is receiving or eligible to receive retirement benefits under any Federal civilian or military retirement program.

See S. Rept. No. 910, 89th Cong., 1st sess. 8, 9.

We must conclude, therefore, that any retired member of the uniformed service who is eligible to receive military retired pay under any law providing such pay for members or former members of the uniformed services at the time of his separation from civilian Government employment is not entitled to receive severance pay under section 9 of the 1965 law, now codified in 5 U.S.C. 5595. This is so without regard to the time when he first becomes entitled to military retired pay and without regard to whether he was eligible under the Dual Compensation Act of 1964, now codified in 5 U.S.C. 5531–5534 (mentioned by you) to receive such military retired pay concurrently in whole or in part with the compensation of his civilian office or position.

The distinctions made in the Dual Compensation Act of 1964 and prior dual compensation laws as interpreted by judicial and administrative decisions with respect to total or partial exemptions therefrom based upon military status or amount of retired pay or compensation have no bearing on entitlement to severance pay. Payment on the vouchers forwarded with your request for decision is not authorized and the vouchers and accompanying papers will be retained here.

We see no reason why the erroneous payments of severance pay would not be for consideration under the waiver provisions of the act of October 21, 1968, Public Law 90–616, 82 Stat. 1212.

[B–170013]

Bids—Block Bidding—Prevention

The Quantity Limitation Prohibition Clause intended to prevent block bidding that was included in an invitation for bids to manufacture flight jackets for delivery at several destinations which provided each bidder may submit one quantity *only* at one price for each item bid, and may stipulate the maximum/minimum quantity acceptable for each item or the overall procurement caused no ambiguity in the invitation, and an offer bidding on the first 7,470 for each destination and then including this same quantity with an additional 1,000 for the next increment of 8,470 each and so on until each additional 1,000 added thereon reached the total procurement quantity of 16,470 each, offered more than one price for a quantity and the violation of the clause may not be waived under paragraph 2–405 of the Armed Services Procurement Regulation as an informality.

To Limbaugh, Limbaugh & Russell, July 22, 1970:

Further reference is made to a telegram dated June 9, 1970, from Ralph Edwards Sportswear, Incorporated, and your letter on their behalf dated June 9, 1970, protesting award of contract by the Defense Supply Agency on invitation for bids No. DSA100–70–B–1329.

The solicitation was issued on April 22, 1970, with a scheduled opening date of May 12, 1970. It called for the manufacture and delivery f.o.b. destination of 16,470 each Jacket, Flying, Man's, Leather, Brown.

Attached to the front of the solicitation was DSA Form 299–R, INFORMATION TO BIDDERS, which stated the following: "SEE SECTION H—Clause 172.5 on page 43." Clause 172.5 on page 43 of the invitation provided:

172.5 QUANTITY LIMITATION PROHIBITION (DPSC 1969 MAY)

Each offeror may submit one quantity *only*, at one price for each item. However, if solicitation so authorized, this one quantity may be offered on an FOB Origin and/or FOB Destination basis.

Offerors may stipulate the minimum/maximum quantity acceptable for each item. In addition, offerors may stipulate an overall acceptable minimum/maximum quantity if the solicitation requests offers on two or more items.

Any offer of more than one quantity for each item or any offer for a quantity at more than one price, except as permitted above, will render the offers nonresponsive.

It is reported that four offers were received in response to the invitation. The administrative report contains the following information with regard to Ralph Edwards' offer:

FOB DESTINATION

Unit Price	Total Amount	Min. Qty Bid Upon
$31.00	$231,750.00	7470
30.90	261,722.00	8470
30.80	291,676.00	9470
30.70	321,429.00	10470
30.60	350,982.00	11470
30.42	501,017.40	16470

Not less than 7470 units on any or all destinations or items. Discount terms: 2%—20 calendar days.

By letter dated May 27, 1970, the contracting officer rejected Ralph Edwards' bid concluding that the bid was nonresponsive since it violated the quantity limitation provision set forth in Clause 172.5 (quoted above) by "block bidding." In this regard the contracting officer states in his report dated June 12, 1970, as follows:

* * * Ralph Edwards violated this provision by block bidding, i.e., bidding on the first 7,470 each and then including this same quantity with an additional 1,000 for the next increment of 8,470 each and so on until each additional 1,000 added thereon reaches the total procurement quantity of 16,470 each. The violation of the cause becomes quite apparent by adding the minimum quantity bid upon for each block. This total exceeds the procurement quantity of 16,470 each. Since Ralph Edwards evidently is not bidding on more than the total procurement quantity, it is clear that this firm has offered more than one price for a quantity.

In discussing the validity of the Quantity Limitation Prohibition Clause, we stated at 48 Comp. Gen. 372, 376 (1968):

It does not appear that we would be warranted in taking the position that the testing of the prohibition against block bidding as a possible means of enabling the Defense Personnel Support Center to make more timely awards would be improper, since 10 U.S.C. 2305 contemplates that awards be made with reasonable promptness and it is apparent that the submission of block bids in the past on Government procurements of clothing and textile products has had the effect of causing unreasonable delays in the making of contract awards. Also, the fact that the practice of block bidding may have afforded certain companies, such as Tanenbaum Textile Company, Incorporated, an opportunity to quote less than an average price on relatively small quantities of textiles as compared with the total quantity bid on, would not appear necessarily to justify a conclusion that it would be in the best interests of the Government to allow the practice of block bidding to be continued in these cases.

We find no reason to question the use of the Quantity Limitation Prohibition Clause in this case.

You contend that Ralph Edwards' bidding method is a minor informality or irregularity which should be waived pursuant to paragraph 10 of the Solicitation Instructions and Conditions. A minor informality or irregularity is defined by Armed Services Procurement Regulation 2–405 as "* * * one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids * * *." It is apparent that the type of irregularity contemplated by the regulation does not encompass the situation presented in the instant case. The method of bidding employed by Ralph Edwards is exactly what the Quantity Limitation Prohibition Clause was designed to prevent. We find no basis to question the contracting officer's conclusion that the matter complained of may not be waived as a minor irregularity.

With regard to your allegation that the clause is ambiguous, we quote from the contracting officer's report:

b. Alleged Ambiguity of the Quantity Limitation Prohibition Clause

(1) The attorney for Ralph Edwards claims the clause is ambiguous because the provision which permits an offeror to stipulate a minimum and maximum acceptable quantity for each item contradicts the statement that an offer of only one quantity for any item is proper. The foregoing provisions are not in conflict but actually are and designed to be compatible with each other.

(2) This may be demonstrated by an example from the instant solicitation. The quantity to be delivered to Mechanicsburg Defense Depot is 3,080 each. Under the clause, an offeror may bid only one price for this quantity. However, a particular offeror may not desire an award at this destination if he is to receive less than a certain quantity, e.g., less than 1,500 each. Conversely, another offeror may not desire an award at this destination if he is to receive more than a certain quantity, e.g., more than 1,500 units.

(3) Consequently, each offeror is permitted under the clause to stipulate how much or how little he desires for a particular item or destination. It should be emphasized that the stipulation of a minimum and/or maximum acceptable quantity does not permit an offeror to give more than one price for the quantity involved.

Based on the record before us, we find no basis to conclude that the Quantity Limitation Prohibition Clause caused any ambiguity in this solicitation.

Accordingly, for the reason stated, your protest is denied.

[B–169977]

Bids—Discarding All Bids—Needs of Government Not Properly Stated

An invitation for bids that states the required man-year level of effort to perform engineering services for systems and program definition of a combat systems maintenance training facility at an erroneously fixed rather than an estimated level, fails to show the Government's minimum needs, and, therefore, the successful contractor would be unable to produce the results required in view of the correlation between the level of effort and the ultimate work product The failure to accurately reflect the man-year level of effort required constitutes the compelling reason for canceling the invitation contemplated by paragraph 2-404.1(a) of the Armed Services Procuremet Regulation and for the readvertisement of the procurement. However, cancellation emphasizes the need for effective administrative definition and expression of the Government's requirements during the procurement planning process.

Bids—Competitive System—"Buying in" Prices

Where the low bid price had been confirmed, negating the existence of a mistake, the suspicion of "buying in" does not require rejection of the bid because the low bidder submitted an unprofitable price. Paragraph 1-311(a) of the Armed Services Procurement Regulation in defining "buying in" as the practice of attempting to obtain a contract award by knowingly offering a price or cost estimate less than anticipated costs with the expectation of recovering any losses, either during contract performance or in future "follow-on" contracts, does not provide for bid rejection and, therefore, there is no legal basis upon which an award may be precluded or disturbed because a low bidder submitted an unprofitable price.

To the Wood-Ivey Systems Corporation, July 23, 1970:

We refer to your letter of June 3, 1970, and subsequent correspondence, protesting against the cancellation of invitation for bids (IFB) No. N00039-70-B-0019 (IFB-0019) and the subsequent award of a contract to Vitro Corporation of America under resolicitation No. N00039-70-B-0039 (IFB-0039). Award was made under IFB-0039 on June 30, in accordance with paragraph 2-407.8(b)(2) of the Armed Services Procurement Regulation (ASPR).

The first invitation was issued on March 18, 1970, and covered, insofar as relevant here, engineering services for systems and program definition of a combat systems maintenance training facility (item 1), including the furnishing of certain technical data (item 1AA). Bidders were requested to quote prices on the basis of a firm 20-man-year level of effort for the required services.

By the April 21, 1970, bid opening date, 10 firms responded and your firm was determined to be the low responsive bidder. In accordance with prescribed procedures, a preaward survey was initiated to determine your firm's responsibility. The administrative report dated June 26, 1970, from the Director of Contracts, Naval Electronic Systems Command, indicates that during the course of the preaward survey, Government representatives realized that the 20-man-year level of effort specified in the invitation was erroneous, and that on the basis of its revised *estimate*, 39 man-years of effort would be necessary to fulfill the requirements of the invitation.

On May 26, 1970, the procuring activity canceled IFB-0019 and readvertised under IFB-0039. By letters of the same date, all bidders were advised that IFB-0019 was canceled due to "inadvertent ambiguities in the Schedule." You maintain in your letter of June 3, 1970, that an examination of the changes made by the revised invitation in light of IFB–0019 does not demonstrate the existence of the asserted "inadvertent ambiguities," and that cancellation of the invitation violated the requirements of ASPR 2–404.1.

ASPR 2–404.1(a) recognizes and expresses the basic principle guiding our review of an administrative decision to cancel in the following terms: "The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, *unless there is a compelling reason to reject all bids and cancel the invitation.*" Moreover, the determination of whether there exists a compelling or "cogent" reason for cancellation is a matter primarily within the discretion of the administrative agency and will not be disturbed in the absence of clear proof of abuse of discretion. 47 Comp. Gen. 103 (1967); 39 *id.* 396 (1959). [Italic supplied.]

From our review of the record, we are, however, unable to conclude that the decision to cancel IFB–0019 was an abuse of administrative discretion. While your correspondence notes other changes in the revised invitation (which are also relied on by the procuring activity to support its decision to cancel IFB–0019), we will confine our discussion to the revision designed to remedy the Government's determination that the 20-man-year level of effort was erroneous.

IFB–0039, as issued, deleted any reference to the level of effort required and added the following "Note A" to explain the pricing requirements for items 1 and 1AA:

NOTE A: The bid for Item 1 shall be a lump sum amount to cover entire scope of work as presented by the statement of work WS–W022–02130–M dated 13 February 1970 and Item 1AA Data Requirements.

Subsequently, on June 11, 1970 the procuring activity issued amendment 0001, which extended the bid opening under the revised invitation to June 22, 1970, and added the following sentence to "Note A":

THE GOVERNMENT ESTIMATES, BUT DOES NOT REPRESENT, THE FOREGOING EFFORT TO CONSIST OF APPROXIMATELY 39 (THIRTY-NINE) MAN YEARS OF EFFORT. HOWEVER EACH OFFEROR IS TO ESTIMATE HIS OWN LABOR MIX TO ACHIEVE FULL AND COMPLETE COVERAGE OF THE REQUIREMENTS.

It must be emphasized that in contrast to IFB–0039, as amended, IFB–0019 would not, in our view, have required a successful contractor to expend more than 20 man-years of effort in performance of a contract issued thereunder. This circumstance is particularly significant since there appears to be no question that in services of the nature involved in this procurement, the level of effort expended in meeting the Government's requirements may have a substantial impact on the quality of the successful contractor's product and its resultant acceptability to the Government. As stated in your letter of June 24, 1970:

* * * A paper study of the type defined can be completed for either level of effort; however, the amount of detail analysis and design anticipated is well indicated by the estimated level of effort desired.

Thus, in view of the correlation between the level of effort and the ultimate work product, a provision expressing a fixed level of effort, as opposed to an estimated level, is, in effect, a critical specification requirement. Where, as in the case of the original invitation, a successful contractor's obligation is limited to an erroneous level of effort—that is, a level which will not produce the results required by the Government—there is, in essence, a failure to state the Government's minimum needs.

Under the circumstances, this failure presents a compelling reason for cancellation and readvertisement. However, in reaching this conclusion, we recognize that the necessity for cancellation in this case emphasizes the need for effective administrative definition and expression of the Government's requirements during the procurement planning process. We also agree that the procuring activity's notice of cancellation does not adequately indicate the bases for the action taken. Accordingly, we are bringing these matters to the attention of the Secretary of the Navy for such corrective action as may be warranted to avoid a recurrence of this situation.

With respect to your final contention that Vitro's bid on the resolicitation evidences "buy-in" practices, an examination of the abstracts for bids indicates the following prices for the firms responding to both invitations:

Bidder	IFB-0019	IFB-0039
Wood-Ivey Systems Corporation	$402, 400	$598, 000
Vitro Corporation of America	424, 914	439, 902
Digitron Systems, Inc.	496, 000	539, 520
Logicon, Inc.	605, 400	470, 199
ITT Research Institute	695, 000	1, 362, 132
F&M Systems Division	697, 486	599, 171
Stanwick Corporation	975, 646	775, 996

The Government estimate was $350,000 for IFB-0019 and $500,000 for IFB-0039.

While commenting generally on the implications that may be drawn from the contrasts in the bids received, you maintain specifically that the man-years offered by Vitro are inadequate to meet the Government's requirements. This conclusion is based on the premise, stated in your letter of June 24, 1970, that:

* * * In order to increase the amount of detail in the effort to that desired by the Government (approximately the 39 man-year effort), the WISCO [Wood-Ivey] price for IFB-0039 was increased to $598,000. The price increase was not

strictly proportional to man-year effort since much of the detail work added can be accomplished with lower grade level personnel. Nevertheless, the point is that a substantially higher price results for a 39 man-year effort than for a 20 man-year effort. This fact is not borne out in the other bids.

However, the Director of Contracts' administrative report advises that Vitro has confirmed its bid in all respects, thereby negating the existence of a mistake, and further expresses the opinion that Vitro's bid is "not unreasonably low for the work to be performed."

Acknowledging, of course, the general validity of your premise, and assuming the Director of Contracts' opinion may be incorrect, we are unable to interpose a legal objection to the award of a contract to Vitro. ASPR 1–311(a) offers the following definition of "buying in":

> "Buying in" refers to the practice of attempting to obtain a contract award by knowingly offering a price or cost estimate less than anticipated costs with the expectation of either (i) increasing the contract price or estimated cost during the period of performance through change orders or other means, or (ii) receiving future "follow-on" contracts at prices high enough to recover any losses on the original "buy-in" contract. * * *

And further provides that:

> * * * Where there is reason to believe that "buying in" has occurred, contracting officers shall assure that amounts thereby excluded in the development of the original contract price are not recovered in the pricing of change orders or of follow-on procurements subject to cost analysis.

Since the pertinent regulation does not provide for the rejection of a bid where "buying in" is suspected, we have recognized in a number of decisions that there is no legal basis upon which "an award may be precluded or disturbed merely because the low bidder submitted an unprofitable price." B–169465, June 19, 1970, citing B–150318, March 25, 1963, and B–149551, August 16, 1962.

Accordingly, your protest is denied.

[B–170035]

Contracts—Research and Development—Conflicts of Interest Prohibition

The determination and findings of a conflict of interest in the procurement of the analysis and design services to update obsolescent automatic data processing equipment, and the proposal that the design contract ban the successful contractor from participating in the future procurement of the hardware satisfies the requirement in Department of Defense Directive 5500.10, Rules for the Avoidance or Organizational Conflicts of Interest, that the contractor "agrees to prepare and furnish complete specifications," notwithstanding the design contract does not constitute the whole specifications and the exclusion from the ban of the purchase of data processing equipment to be handled by other than the procuring agency. However, to carry out the intent of the Directive, the ban should extend to the date of award of the first production contract rather than the specific date proposed.

To Arent, Fox, Kintner, Plotkin & Kahn, July 23, 1970:

We refer to your letters of June 12 and 24, 1970, and July 15, 1970, on behalf of Informatics, Inc., protesting the proposed award of a contract pursuant to request for quotations No. DAHC 15–70–Q–0075, issued by the Defense Supply Service—Washington, Washington, D.C.

On April 15, 1970, the Defense Supply Service—Washington received a request from the Office of the Deputy Chief of Staff for Military Operations for analysis and design services to enable the transition of obsolescent automatic data processing equipment used by The Army Operations Center System (TARMOCS) to an updated system designed as TARMOCS II.

On April 27, 1970, the contracting officer decided that the contract should be negotiated pursuant to authority in 10 U.S.C. 2304 (a)(10) and Armed Services Procurement Regulation (ASPR) 3–210.2(viii). On April 28, 1970, the contracting officer made the following decision:

DETERMINATION AND FINDINGS

Conflict of Interest

1. I hereby find that:
   a. The Defense Supply Service-Washington proposes to procure by negotiation Automatic Data Processing Systems Analysis and Design Services to enable the transition of TARMOCS (The Army Operations Center System) to TARMOCS II.
   b. The Systems analysis and Design Services will involve two installations to determine systems specifications and preparation of related documentation.
   c. It is the consensus that a hardware manufacturer engaged in this effort would, in all probability, not have the objectivity required to solve the problems on an unbaised basis.
   d. The proposed study will undoubtedly result in a large hardware procurement in the future.
   e. Inasmuch as the present procurement and future procurements of the hardware will involve a conflict of interest, the ensuing RFQ and contract shall contain a Conflict of Interest clause pursuant to Appendix G of the ASPR. Rule 2.

2. I hereby determine that:
   The successful contractor for the initial procurement shall be barred from bidding on the hardware requirements until 30 April 1971, at which time, it is anticipated that all hardware procurements will be completed.

Request for quotations No. DAHC 15–70–Q–0075 was issued on May 5, 1970, for the required design services and the request contained the following clause:

CONFLICT OF INTEREST. Pursuant to Department of Defense Directive 5500.10, June 1, 1963, Subject: Rules for the Avoidance of Organizational Conflicts of Interest and ASPR 1–113.2, the Contracting Officer has determined that the successful contractor shall be barred from participating, either as prime or subcontractor, in any contract awarded by an agency of the U.S. Government prior to 30 April 1971 relating to the furnishing or manufacturing of items for the The Army Operations Center System II (TARMOCS II). Any contract under this solicitation will contain an Avoidance of Organizational Conflict of Interest clause, substantially as follows:

"Avoidance of Organizational Conflicts of Interest

"The Contractor, and its affiliates, shall be barred until 30 April 1971 from furnishing either as prime or subcontractor, to any agency of the United States Government, any item or component for The Army Operations Center System II (TARMOCS II)."

Shortly after release of the request for proposals a question was raised as to the effect of the Organizational Conflicts of Interest clause on a forthcoming purchase of automatic data processing equipment for the World Wide Military Command and Control System (WWMCCS). The contracting officer concluded there was no way for the successful contractor to affect such purchase and on May 12, 1970, issued the following amendment to the RFQ:

FIRST: The first sentence of the paragraph entitled "Conflict of Interest" on page 1 of the SF 18 is hereby amended by adding the words "with the exception of the WWMCCS ADP equipment update."

SECOND: The first sentence of the paragraph entitled "Avoidance of Organizational Conflicts of Interest" on page 1 of the SF 18 is hereby amended by adding the words "with the exception of the WWMCCS ADP equipment update."

The Government's estimate of the cost of the design work was $91,000. A total of 92 firms were solicited, four responded, and two firms, Informatics and IBM Corporation, were found technically qualified. Negotiations were conducted with both qualified offerors on a firm fixed price basis and a cutoff date for negotiations was set for June 11, 1970, at which time IBM's offer was low as to price.

By letter dated June 12, 1970, you protested on behalf of Informatics, Inc., against an award to IBM Corporation or any other computer manufacturer. The basis for your protest was that a manufacturer could design a system in which only his equipment could be utilized, and that the hardware ban as set forth in the RFQ is inadequate to prevent a manufacturer from designing a restrictive system, waiting until the end of the hardware ban, and then selling the Government the only equipment which can be used under the design. You pointed out that the design contract would be completed in mid-March 1971 and the hardware ban would last only until April 30, 1971. You further protested the exclusion of the WWMCCS equipment purchase from the hardware ban on the theory that if a manufacturer designed a restrictive system for the Army Operations Center, he will be more likely to be given the WWMCCS equipment contract to insure compatibility between the two systems. Your letter of June 24, 1970, to the Secretary of the Army, a copy of which was furnished to our Office, was primarily an expansion of your argument that an equipment manufacturer could bias the results of the design contract and thereafter sell his own equipment upon expiration of the inadequate hardware ban.

The Department of the Army's report of July 9, 1970, to this Office discloses that the equipment purchase for the WWMCCS will be handled by the Air Force, using specifications already in existence, prepared in the Office of the Joint Chiefs of Staff and approved by the Department of Defense. The estimate for vendor selection for the WWMCCS equipment is February 1971, which is prior to the estimated completion date of March 15, 1971, for the design contract in question. The report also advises that each organization participating in the WWMCCS will buy its equipment from the contractor who is successful in the Air Force negotiations, and the only circumstance in which the Army design contract would result in an independent purchase of automatic data processing equipment would be in the event that the WWMCCS is not implemented. In this connection we are advised that the Army's TARMOCS has reached a point of obsolescence and will be updated regardless of whether the WWMCCS is implemented.

The Army's report also points out that even for an independent purchase the successful design contractor will be working on only two of seven parts of the systems specifications set forth in Appendix E of Army Regulation 18–2. The Army does not consider these two parts to be a major portion of the specifications and points out that the two parts of the specifications produced by the design contract will be combined with the other five parts and then reviewed by the U.S. Army Computer Support and Evaluation Command.

With respect to the hardware ban, the report states:

> Finally, the Army has imposed a ban on the successful contractor's participation in a hardware procurement for TARMOCS. Admittedly the ban remains in effect for only a short period of time but the ADP experts in the Army's ADP policy making organization, the Management Information Systems Directorate and the technical ADP personnel in the Headquarters, U.S. Army Command and Control Support Detachment agreed that the time specified was adequate to protect the interests of all.

Your letter of July 15, 1970, and attached brief, commenting on the administrative report, states the issue before our Office is whether the hardware ban included in the RFQ and proposed to be included in the contract complies with ASPR requirements and is appropriate under the circumstances.

Department of Defense Directive 5500.10 of June 1, 1963, as contained in Appendix G of ASPR, provides, insofar as it is pertinent to the instant case, as follows:

2. If a contractor agrees to prepare and furnish complete specifications covering nondevelopment items to be used in competitive procurement, that contractor shall not be allowed to furnish such items, either as a prime or subcontractor, for a reasonable period of time including, at least, the initial procurement.

On the record before us, the question of whether the design contractor "agrees to prepare and furnish complete specifications" must be considered in the context of the possibility of an independent purchase of automatic data processing equipment by the Army for TARMOCS II in the event the WWMCCS is not implemented, since the hardware ban has no effect if the WWMCCS proceeds as scheduled. The two parts of the specifications covered by the instant design contract do not constitute the whole of the Army specifications, but the contracting officer apparently found that the specifications for those two parts were complete enough to produce a conflict of interest between the design contractor and the hardware supplier. In our opinion, this finding is adequately supported by the facts of record. Once the provisions of the Directive have been invoked, however, there remains a question of whether the determination of the extent of the exclusion carries out the intent of the Directive.

We have considered questions involving the applicability of the conflicts of interest provisions of DOD Directive 5500.10 in two recent decisions, 48 Comp. Gen. 702 (1969) and 49 Comp. Gen. 463 (1970). The protestants in each of those cases advocated application of the Directive to successful bidders but in neither case had the contracting officer made a finding that a conflict existed. We held in both cases that the provisions of the Directive were not self executing, but depended upon exercise of judgment or discretion on the part of the contracting officer.

ASPR 1–113.2 points out in subsection (a) that the Directive cannot of itself impose any obligations on the contractor, and such obligations must be imposed by a contract clause designed to carry out the intent of the Directive. Subsection (b) further provides that the contracting officer is responsible for applying the rules in the Directive to contracts under his cognizance. Paragraph 1–113.2(b)(2) states that a clause which excludes a contractor from a subsequent procurement "may run to the date of award of the first production contract or for a stated period."

Although exclusion to the date of award of the first production contract is stated first in order of preference in ASPR 1–113.2(b)(2), the contracting officer chose the second alternative of setting the exclusion for a stated period in the expectation that all hardware procurements will be completed by the expiration of the exclusion. The Army's assigned priority in the WWMCCS phasing schedule makes this a reasonable expectation, since the Army must be prepared to set forth its requirements shortly after April 1, 1971, although it is possible that subsequent changes in plans or programs could delay the procurement and render the exclusion ineffective. The contracting officer was, however, within the bounds of his administrative discretion since the applicable regulation allows him to set the exclusion for a fixed period.

Accordingly, we find no legal basis upon which to object to the actions of the contracting officer and your protest must therefore be denied. We are, however, sending a copy of our decision of today to the Secretary of the Army with a letter suggesting that a modification of the exclusion date from April 30, 1971, to the date of award of the first production contract in accord with ASPR 1–113.2(b)(2) would be a more certain means of carrying out the intent of DOD Directive 5500.10.

[B–169645]

Contracts—Negotiation—Evaluation Factors—Criteria

A request for proposals that failed to include evaluation criteria or indicate the criteria's relative importance because of the erroneous belief these standards were inapplicable to civilian procurement was defective and was not in accordance with sound procurement policy and the public interest. Also the scoring of an offer by comparison with a predetermined score, overlooked that a primary consideration in negotiated procurement is discussion with all offerors in a competitive range and that borderline cases should not automatically be excluded from consideration, and as a result maximum competition was not obtained. The request for proposals should be amended to establish the omitted criteria and offerors permitted to submit additional information or revise proposals, and if within a competitive range, afforded the opportunity for discussion to the extent required by section 1–3.802(c) of the Federal Procurement Regulations.

Contracts—Protests—Filing Before or After Award

Under the procedure in 4 C.F.R. 20.1, a bid protest may be filed with the United States General Accounting Office before as well as after the award of a contract and, therefore, in filing a protest to an award under a request for proposals, the regulation does not require, as a prerequisite to standing or timeliness, that an award should have been made or that an offeror should have been informed of the unacceptability of his proposal.

General Accounting Office—Decisions—"Dictum"

To categorize the views of the United States General Accounting Office concerning areas in an agency's procurement practices brought to light by a protest where revisions are desirable as "dictum"—an abbreviation of obiter dictum which means a remark or opinion uttered by the way—appears futile when it is obvious that any administrative actions taken that are contrary to such stated positions may result in the disallowance of credit in the disbursing officer's account.

To the Secretary of Transportation, July 24, 1970:

Reference is made to a letter dated May 22, 1970, from the Administrator, Federal Railroad Administration, furnishing a report in response to the protest of the Economic Sciences Corporation, Inc. (ESC), against any award under request for proposals (RFP) No. DOT-FR-00027.

The Administrator recommended that the protest be denied as untimely since:

> At the present time no award has been made, nor have those offerors whose proposals were not technically acceptable been so informed. Thus, it would appear that the complainant's protest is untimely, and there is some doubt that he lacks any standing at this time.

In this regard, our bid protest regulations provide at 4 CFR 20.1:

> An interested party wishing to protest the *proposed* award of a contract, or the award of a contract, by any agency of the Federal Government whose accounts are subject to settlement by the U.S. General Accounting Office may do so by addressing a telegram or letter to the Comptroller General of the United States * * *. [Italic supplied.]

The above regulation does not require, as a prerequisite to standing or timeliness, that award be made or that an offeror be informed of the unacceptability of his proposal.

While we have rejected in our decision of today to ESC, ESC's contentions that the statement of work contained in the solicitation is vague and unclear, and that the solicitation is ambiguous as to whether a normal cost-reimbursement contract was to be awarded thereunder, we believe there is certain merit in other portions of the protest.

As indicated in our decision, it appears that the Administrator concluded that ESC was not entitled to a negotiation opportunity inasmuch as its proposal failed to attain the 75 points established for an acceptable proposal, and therefore was not within a competitive range. Although ESC's proposal may, or may not, have been within a competitive range of the two acceptable proposals, we have serious reservations that a decision in such respect based on a comparison of an offeror's score with a predetermined score for acceptability constitutes a proper method of determining which proposals are within a "competitive range," or that such a method is conducive to obtaining the maximum practicable competition contemplated by the statutes and regulations. This would appear to be especially applicable in situations such as the instant procurement in which five offerors with scores ranging from 71.4 to 74.8 were considered outside the competitive range. In this connection, it must be borne in mind that the primary consideration in negotiated procurements is discussions with all offerors within a competitive range, and borderline proposals should not be automatically excluded from consideration if they are reasonably susceptible to being made acceptable by additional or clarifying information. *Cf.* B-167417(2), September 12, 1969.

The protestant's contention, that the RFP is deficient in that it does not disclose the criteria for proposal evaluation and their relative importance, is based upon a series of decisions by our Office in which we have stated that sound procurement policy dictates that offerors be informed of all evaluation factors and of the relative importance or weight of each factor. 49 Comp. Gen. 229 (1969); 48 Comp. Gen. 314, 318 (1968); 47 Comp. Gen. 252, 262–263 (1967); 44 Comp. Gen. 439, 442 (1965); B-167867, January 20, 1970; B-167508, December 8, 1969; B-167473, November 13, 1969; B-166213, July 18, 1969; B-166233, June 17, 1969; B-166052, May 20, 1969. ESC places particular reliance upon our letter to the Secretary of the Air Force, 49 Comp. Gen. 229, in which we observed:

> While we have never held, and do not now intend to do so, that any mathematical formula is required to be used in the evaluation process, we believe that when it is intended that numerical ratings will be employed offerors should be informed of at least the major factors to be considered and the broad scheme of scoring to be employed. Whether or not numerical ratings are to be used, we believe that notice should be given as to any minimum standards which will be required as to any particular element of evaluation, as well as reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other.

RFP No. DOT-FR-00027 did not include the evaluation criteria or an indication of their relative importance, and it may be significant that only two of the 26 proposals received were rated as acceptable under the criteria and weights used by the evaluation personnel. However, it is the administrative position that amendment of the solicitation to include such criteria and their relative importance is not warranted for several reasons. It is argued that the above-quoted portion of our decision 49 Comp. Gen. 229, is merely "dicta." In an analogous situation, we advised the Secretary of the Army that an administrative report furnished this Office had informed us:

> * * * that while the Corps has followed the specific "decisions" in the above-cited cases (presumably in identical factual situations), the views of this Office as expressed in our letter to you and to the Secretary of the Navy concerning the undesirable situations evidenced by those protests have not been followed for the reason that such letters were considered to be "dictum" accompanying the decisions.

The term "dictum" is generally used as an abbreviation of "obiter dictum" which means a remark or opinion uttered by the way. 21 C.J.S.—page 311. We find a distinction as to the effect (for administrative purposes) between the actual decision to a protesting bidder in a particular case and our letter to the head of the agency, concerning areas in the agency's procurement practices brought to light by the protest where revisions are considered desirable, to be somewhat novel. To have the positions of this Office as stated in such letters disregarded by a Federal organization merely by categorizing them as dictum seems particularly futile when it is obvious that administrative actions taken contrary to such stated positions may result in the disallowance of credit in the disbursing officer's accounts. 47 Comp. Gen. 236, 249–250 (1967).

It is also indicated in the administrative report that the failure to disclose evaluation criteria and their relative importance may be objectionable in procurements by the military departments and yet unobjectionable in civilian procurements, because such failure violates a provision of the Armed Services Procurement Regulation (ASPR) which has no counterpart in the Federal Procurement Regulations (FPR). In this connection, it should be noted that our initial decision on the disclosure of evaluation factors preceded formalization of the Armed Services regulations on the disclosure of evaluation factors, and such decisions were, we believe, instrumental to promulgation of regulations on this point. Further, our subsequent decisions to the military departments have emphasized the requirement of ASPR 3–501(a) that "Solicitations shall contain the information necessary to enable a prospective offeror or quoter to prepare a proposal or quotation properly." Virtually the same language appears at FPR 1–3.802 (c). Our letter B-167054(2), January 14, 1970, to the Secretary of Health, Education, and Welfare, illustrates that we regard the same policy of informing offerors of the evaluation factors and their relative weight as applicable to both military and civilian departments.

In further support of the administrative position the Administrator cited several decisions of our Office in which we did not direct contract cancellation or resolicitation, even though the solicitations had not included evaluation criteria or an indication of their relative importance. In this connection, it may be generally stated that our Office directs cancellation of a contract only if the contract is clearly contrary to the public interest or in violation of law. Conversely, we regard the failure to inform offerors of the criteria for evaluation of their proposals and the relative importance of such criteria as not in accordance with sound procurement policy and the public interest, even though there may not be a mandatory requirement of such information in the applicable regulation. We have not regarded such failures as justifying our intervention as a standard procedure without consideration of the practical aspects involved in each individual case.

The instant protest was made before award and our Office has not been informed of any basis upon which to conclude that the delay incident to the observance of proper procedures in this procurement would irreparably injure or affect the public interest. Therefore, we believe that RFP No. DOT–FR–00027 should be amended to inform all offerors of the evaluation criteria applicable to their proposals and of the relative importance of those criteria; that offerors should be permitted to submit additional material or revised proposals in light of such information; that a determination of the technical competitive range thereafter be made; and that consideration then be given to conducting discussions with all offerors within such range, to the extent that such discussions are required by the FPR.

With regard to the "relative importance" of the criteria, the administrative report included a "Proposal Evaluation Form" for the instant procurement, which disclosed the numerical weight attached to each of the seven evaluation criteria. This form was furnished the protestant with the permission of your Department. Thus, only the protestant of all the offerors possesses such information. In view of this circumstance, unique to the instant case, if the same criteria and numerical weights are applicable to the resolicitation the numerical weights should be provided all offerors so they may compete on an equal basis. However, if the evaluation criteria or numerical weights differ upon resolicitation, we believe that offerors need be provided only a reasonable indication of the relative importance of each evaluation criterion.

The file transmitted with the letter of May 22 is returned.

[B–169992]

Property—Public—Private Use—Authority

The lease of land adjacent to the Visitors' Information Center at the John F. Kennedy Center, Florida, for the construction of a nondenominational chapel from funds raised by public subscription is pursuant to Article IV, section 3, clause 2 of the Constitution of the United States a congressional and not an executive function, unless otherwise specifically provided by statute, and the leasing authority in section 203(b)(3) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(b)(3)), does not appear to be intended as specific authority for the execution of the proposed 30-year lease. Therefore, because of the nature of its use, the land within the Federal enclave should not be leased without congressional approval of the chapel construction, and the payment of an annual rental has no significance in considering the lack of specific authority to lease the land.

To the Administrator, National Aeronautics and Space Administration, July 24, 1970:

Reference is made to the letter dated June 4, 1970, from your General Counsel which requests advice as to the adequacy of the rental proposed to be charged, particularly with reference to 40 U.S.C. 303b, over the full 30-year period of a proposed lease to the Chapel of the Astronauts, Inc., a nonprofit Florida corporation. Any comments which we might want to offer on matters other than the rental to be charged were also solicited.

The letter states that the Chapel of the Astronauts, Inc., has requested your agency to lease it a tract of approximately 5.5 acres of land adjacent to the Visitors' Information Center at the John F. Kennedy Center, Flordia. The site was selected because the Center is visited by large numbers of people. It is estimated that the number of visitors may grow to 5 million annually before 1980. The letter states that "the corporation intends to construct a nondenominational chapel thereon using funds raised by public subscription." The period of the lease would be 30 years. If otherwise proper the National Aeronautics and Space Administration is prepared to enter into such a lease under the authority of section 203(b) (3) of the National Aeronautics and Space Act of 1958, as amended, 42 U.S.C. 2473(b) (3).

The letter also states that in order to "establish a fair rent for the purposes of 40 U.S.C. 303b and in order to avoid any implication (whether warranted or not) that the United States, through NASA, is anything other than neutral to the exercise of any particular religion or religion as a whole, NASA has had the site in question appraised by a qualified Corps of Engineers, U.S. Army, appraiser. The appraiser has concluded that a fair rental for the 5.5 acre more or less basic site would be $600.00 per annum." Also in accordance with the requirements of 40 U.S.C. 303b the amount paid would be deposited into the miscellaneous receipts of the Treasury.

Forwarded with the letter were copies of the appraisal and the proposed lease as prepared at the Kennedy Space Center, together with a copy of a memorandum offering your General Counsel's comments with respect to the proposed lease.

The Constitution of the United States provides in Article 4, section 3, clause 2, that:

> The Congress shall have Power to dispose of and make all Needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *

The words "dispose of" vest in Congress the power to lease as well as to sell the lands of the United States. "The disposal must be left to the discretion of Congress." *United States* v. *Gratiot*, 14 Pet. 526, 39 U.S. 526.

In other decisions it also has been uniformly held that the provision confers upon the Congress exclusive jurisdiction to dispose of the land or other property of the United States and that there is no power in the head of an executive department of the Government to take such action without specific legislative authority. See 22 Comp. Gen. 563 (1942) and references therein cited. See particularly 14 Comp. Gen. 169 (1934) as to leases.

It is a sound rule of statutory construction that the intent of Congress as expressed in any part of a statute must be gathered from the reading of the statute as a whole and that the statute should be construed with reference to existing laws. Its operation must be restricted within narrower limits than its words import where the literal meaning embraces cases not intended by the legislative body. 17 Comp. Gen. 736 (1938), 19 *id.* 640 (1940), 20 *id.* 46 (1940); and 21 *id.* 425 and 510 (1941). The authorization in section 203(b)(3) of the National Aeronautics and Space Act of 1958, as amended, for the Administration "* * * to lease to others such real and personal property; * * *" is broadly stated. We have found nothing elsewhere in the act or in its legislative history which would be helpful in determining any limits which Congress might have intended to impose on that authority. However, we have considerable doubts that the authority was intended to extend to a lease for the purposes here under consideration, which include the construction of a substantial building for use by the public as a nondenominational chapel.

The plot which would be leased is a comparatively small one completely surrounded by a large Federal enclave. The site for the building was selected because of its proximity to the Visitors' Information Center which it is anticipated will be visited by millions of people annually. The effect of proceeding with the proposed lease would be to utilize public property to provide to the public a facility completely within a Federal enclave without that facility being authorized by the Congress. The fact that an annual rental would be paid would not be significant in considering this lack of specific authorization. *Cf.* 10 Comp. Gen. 395 (1931), and 11 *id.* 355 (1931) and decisions therein cited.

In view of the above, and while we have no basis to question the adequacy of the proposed rental to be charged if otherwise proper, we do believe that the authority for the entire proposal is so doubtful that specific authorization should be obtained from the Congress before entering into any lease arrangement such as proposed.

[B-170182]

District of Columbia—Employees—Wage Board—Environmental Pay Differential Status

The environmental pay differential for dirty work having been authorized for District of Columbia wage employees by the proper wage fixing authority in accordance with 5 U.S.C. 5341, and in conformity with commercial practices, the differential may be considered basic pay, whether stated separately or included in scheduled rates, for the purposes of computing the wage board overtime and Sunday rates prescribed in 5 U.S.C. 5544, the Civil Service Retirement Deductions authorized in 5 U.S.C. 8334, and for determining the annual rate of pay for the group life insurance provided in Federal Personnel Manual, Supplement 870-1, Subchapter 83-3a, and the differential may be paid to employees while in a leave status.

To the Commissioner of the District of Columbia, July 24, 1970:

This is in reference to letter of June 26, 1970, and enclosures, from Mr. O. F. Maltagliati, Associate Director for District Accounting, Department of Finance and Revenue, requesting a decision on several questions concerning environmental pay for dirty work.

It is stated in the letter that on May 27, 1970 Commissioner's Order No. 70-192 was issued which increased the scheduled rates of pay for District of Columbia wage employees and authorized the Personnel Officer, D.C., to establish, effective the pay period which begins on or after May 31, 1970, an environmental pay differential for dirty work. Pursuant to this authority the Personnel Officer issued transmittal sheet No. 174, approved June 8, 1970, which established the policies for the administration of an environmental pay differential for dirty work, and on June 12, 1970, issued Personnel Bulletin No. 297 PS and LR that established the hourly rate of 17 cents and the jobs for which the environmental pay for dirty work is authorized. It is stated that now the Commissioner is contemplating the issuance of an order that for pay purposes would consider the environmental pay differential to be part of the employee's rate of basic pay. It would then be used to compute overtime, holiday, and Sunday premium pay, retirement deductions, and group life insurance deductions, and would be paid while an employee is in a leave status.

Our decision is requested on the following questions:

Question 1: May the separately stated environmental pay differential be considered as basic pay for the purposes of computing wage board overtime and Sunday rates in section 5544, Title 5, U.S. Code?

Question 2: May the separately stated environmental pay differential be considered as basic pay for the computation of Civil Service Retirement Deductions in section 8334, Title 5, U.S. Code?

Question 3: May the separately stated environmental pay differential be considered as basic pay for the purposes of determining an annual rate of pay for group life insurance purposes in the Federal Personnel Manual, Supplement 870-1, Subchapter S3-3a.

Question 4: May the separately stated environmental pay differential be paid to a wage board employee while he is in a leave status?

Question 5: If questions 1, 2, 3, and 4 are answered in the negative, then could a wage schedule be issued with the scheduled rates of hourly pay increased by the amount of the environmental pay differential and would these scheduled rates then be considered basic pay in questions 1, 2, 3, and 4?

Question 6: If question 5 is answered in the affirmative then could the new scheduled rates of pay be effective retroactively to the pay period which begins on or after May 31, 1970.

The method of setting the pay of employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semi-skilled, or skilled manual-labor occupations is provided in 5 U.S.C. 5341, as follows:

(a) The pay of employees excepted from chapter 51 of this title by section 5102(c)(7) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section 213(f) of title 29, the rates may not be less than the appropriate rates provided for by section 206(a)(1) of title 29.

In B–53383, November 29, 1945, we pointed out that a wage fixing authority in the exercise of its normal function may authorize night differential or other elements of a wage program—not otherwise in contravention of law or established rule applicable to Federal employees—to conform with commercial practices generally without obtaining special authorization therefor. As to whether differentials are basic compensation, we have ruled that the night rate of compensation of an employee occupying a prevailing rate or wage board position is basic compensation (23 Comp. Gen. 962 (1944); 24 *id.* 39 (1944), and 34 *id.* 708 (1955)). Also, that night differential, post differential, and cost-of-living allowances which are saved by Civil Service regulations or by administrative action to employees whose positions are converted from classified to wage board schedule are regarded as "basic compensation." 36 Comp. Gen. 482. We find no basis to reach a contrary decision with respect to an environmental differential for dirty work, whether stated separately or included in the scheduled rates. Accordingly, questions 1 through 4 are answered in the affirmative, and no answer is required for questions 5 and 6.

[B–168626]

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Price Sole Evaluation Factor

In the negotiation of a procurement, the exception in 10 U.S.C. 2304(g) to conducting discussions with all responsible offerors within a competitive range may not be invoked by a contracting officer to make an award to other than the low responsible offeror where price is the sole evaluation factor and, therefore, an award to the second low offeror, the incumbent contractor, without obtaining a Certificate of Competency (COC) on the low offeror, a small business concern considered nonresponsible on factors relating to capacity and credit was illegal and the award should be canceled. No award should have been made unless the Small Business Administration refused to issue a COC or did not respond to the referral within 15 days, or in the alternative if the low proposal was unacceptable without clarification, discussions should have been conducted with all offerors within a competitive range.

To the Secretary of the Army, July 30, 1970:

This concerns the protest by Pacific Shipwrights, Incorporated, against the contract award to Stan Flowers Company, Incorporated, under request for proposals No. DAHC23-70-R-0003 issued by the Oakland Army Terminal for shipwright carpentry services. This protest was the subject of a report dated June 5, 1970, from your Deputy for Procurement.

Request for proposals No. DAHC23-70-R-0003 was issued on December 18, 1969. Four offers were received and opened on January 27, 1970, Pacific submitted the low proposal. Flowers, the incumbent contractor, submitted the second low proposal. The contracting officer acting upon the recommendation of his Advisory Panel determined that only those two proposals were within the competitive range for consideration.

On February 2, 1970, a pre-award survey by the Defense Contract Administration Service (DCAS) was requested on Pacific. The contracting officer also requested the Defense Contracts Audit Agency (DCAA) to review Pacific's accounting system. Based on the negative recommendations of DCAS and DCAA, the contracting officer considered Pacific to be nonresponsible for this procurement. Since Pacific, a small business concern, was determined nonresponsible for reasons relating to capacity and credit, the contracting officer referred that firm to the Small Business Administration (SBA) on February 13, 1970, for the possible issuance of a Certificate of Competency (COC). As the result of conversations on February 19, 1970, with his legal advisor and an SBA official, the contracting officer decided his referral of Pacific for a COC was premature inasmuch as negotiations would probably be required with that offeror concerning two items, acid boxes and transportation, prior to making an actual award. The request for a COC was withdrawn on February 25, 1970.

On February 24, 1970, the Advisory Panel was convened and award was recommended to Flowers as the low responsive responsible offeror. That recommendation was based on the contracting officer's determination that Pacific was not responsible and a price analysis which concluded the offer by Flowers was fair and reasonable. Subsequent to the adjournment of that meeting a voluntary price reduction by letter dated February 20, 1970, was received from Flowers. The Advisory Panel was reconvened and award was again recommended to Flowers at the reduced price since acceptance of the price reduction was considered in the best interest of the Government. The contracting officer adopted that recommendation and award was made to Flowers on February 26, 1970.

We believe the contracting officer acted erroneously and that the award to Flowers was improper. This procurement was negotiated pursuant to the authority contained in 10 U.S.C. 2304(a)(10). That exception to formal advertising was invoked by the contracting officer because of the small number of shipwright carpentry firms in the area. The request for proposals did not require or provide for submission of technical proposals involving novel or different approaches. Rather offerors were required only to submit item and total prices. Further, the request for proposals advised on page a–1, *Evaluation Page:*

> Solicitations will be evaluated on the basis of the sum of the total of those schedules for which price offers are made as follows:

Similar advice was contained on page 9 of the request for proposals and on page 2 of the "Dissemination of Clarifications and Interpretations to Prospective Offerors." Therefore, award under this procurement was to be based on price alone not other factors such as the technical approach offered.

When negotiating a contract over $2,500 pursuant to one of the permissible exceptions contained in 10 U.S.C. 2304, subsection (g) of that statute requires discussions to be held with all responsible offerors within a competitive range. An exception to that mandatory requirement is provided where based upon adequate competition or accurate prior cost experience the acceptance of an initial proposal would result in a fair and reasonable price and offerors have been notified in the request for proposals that such an award may be made. However, that exception does not permit the contracting officer to make award where price is the sole evaluation factor to other than the low responsible offeror. *Cf.* 48 Comp. Gen. 663, 668 (1969). Therefore, award should have been made to Flowers prior to discussions only if Pacific was found not to be a responsible offeror.

In procurements, advertised or negotiated, a contracting officer's determination of nonresponsibility is not final insofar as the capacity or credit of a small business is concerned. As a result the contracting officer's initial unfavorable determination does not warrant ignoring a more favorable proposal of a small business concern either in making award without discussions or when actually conducting discussions. Armed Services Procurement Regulation (ASPR) 1–705.4(c) requires the contracting officer to refer a small business concern to the SBA for the possible issuance of a COC where the proposal of that concern is to be rejected because the concern has been determined to be nonresponsible as to capacity or credit. The negative DCAS survey and the DCAA report upon which the contracting officer relied in making his determination were based on factors directly related to Pacific's capacity and credit to perform the contract. Under these circumstances the contracting officer was required to refer Pacific to the SBA for a COC unless award could not be delayed. The record before this office contains no justification for finding award must have been made without delay and in any case such a determination with the requisite documentation and approval by the chief of the purchasing office was not in fact made. See ASPR 1–705.4(c) (iv). Therefore, no award should have been made in this instance unless the SBA refused to issue Pacific a COC or until 15 days had expired after the referral to SBA. If a COC had been issued any contract was required to be awarded to Pacific. See 15 U.S.C. 637(b) (7) and ASPR 1–705.4(a).

In the alternative if the contracting officer believed Pacific's proposal was unacceptable without clarification, then discussions should have been conducted with all offerors within the competitive range. ASPR 3–805.1(a) (v) states that the contracting officer shall not make award without further discussion where there is some question as to the pricing or technical aspects of a proposal. After conducting such discussions award should have been made to the low responsible offeror meeting the Government's needs. In the event that the low offeror was still a small business concern and determined to be nonresponsible by the contracting officer for reasons of capacity or credit, then at that point the matter should also have been referred to the SBA for a COC. *Cf.* 48 Comp. Gen. 536, 541 (1969).

In any event award to Flowers would be legal only if either the SBA refused to issue a COC to Pacific or failed to act within 15 days, or if after holding discussions Flower's proposal was lower than Pacific's Since the contracting officer's failure to follow the proper procedures was directly contrary to the regulations implementing the Small Business Act of 1953 and the Armed Services Procurement Act of 1948, we believe the award to Flowers was illegal. Accordingly, we concur in your proposed action to cancel the contract.

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