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TABLE OF DECISION NUMBERS

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

[B-174903]

Airports—Federal Aid—Development Projects—Land Title

A grant under the Airport and Airway Development Act of 1970 (49 U.S. Code 1701 *et seq.*) to fund an air station in Guam for both civil and military use pursuant to a joint-use agreement between the Department of the Navy and the Territory of Guam where the landing area is owned by the United States Government, excluded by the act from sponsoring an airport development, which pursuant to section 16(c)(1) of the act may only be approved if a "public agency" holds good title to the landing area, may be approved by the Secretary of Transportation, provided he determines the grant will effectuate the purpose of the act, on the basis the joint-use agreement will give Guam "good title" and, moreover, legislation has been introduced to clarify grant assistance where the landing area is owned by the United States.

To the Secretary of Transportation, April 4, 1972:

Reference is made to the letter dated January 7, 1972, from the General Counsel of the Federal Aviation Administration (FAA) requesting our opinion concerning a proposed grant under the Airport and Airway Development Act of 1970 (AADA) approved May 21, 1970, Public Law 91-258, 84 Stat. 219, 49 U.S.C. 1701 *et seq.*

The proposed grant would fund a project to be sponsored by the Territory of Guam for the development of Agana Naval Air Station, located on the island of Guam, which would be made available for joint civil and military use pursuant to the terms of a proposed joint-use agreement between the Department of the Navy and the Government of Guam. The General Counsel states:

> The Government of Guam owns the land adjacent to the airport which will be the site of the proposed development. The landing area at Agana Naval Air Station is owned by the United States Government. The Joint Use Agreement provides that Navy will issue Aviation Facility Licenses limited to the following operations: a. Scheduled passenger and cargo operations approved by the CAB; b. Non-scheduled operational and charter operations in aircraft of U.S. registry; c. Scheduled and non-scheduled air taxi operations in aircraft of U.S. registry; and d. General aviation in trans-Pacific operations in aircraft of U.S. registry. Other civil aircraft operations such as non-trans-Pacific general aviation operations may be permitted at the election of the Navy. Landing fees collected by Guam for civil operations in accordance with Navy regulations shall be paid to the Treasurer of the United States. Guam will be permited to clear the approaches and to enter the landing area for maintenance purposes when determined necessary for civil operations and it is not feasible for the Navy to do the work. The Navy will determine the hours of operation for the airport. The agreement is to run for 30 years subject to certain rights of termination granted to the parties.

The AADA authorizes the Secretary of Transportation to develop a system of public airports by granting funds for projects sponsored by public agencies. Section 11(11) of the AADA, 49 U.S.C. 1711(11), defines "public agency" to include, *inter alia*, a State, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or any agency of any of the foregoing. Section 16(c)(1), 49 U.S.C. 1716(c)(1), provides, in part:

No airport development project may be approved by the Secretary with respect to any airport *unless a public agency holds good title, satisfactory to the Secretary*, to the landing area of the airport or the site thereof, or gives assurance satisfactory to the Secretary that good title will be acquired. [Italic supplied.]

The General Counsel comments upon this statutory provision as follows:

Significantly, the U.S. Government or an agency thereof is not considered to be a public agency for purposes of AADA. The Federal Airport Act, P.L. 70-377, 60 Stat. 170 repealed [by] P.L. 91-258 § 52(a), was the basis for a similar grant program for airport development in which a public agency was defined as including "the U.S. Government or an agency thereof" (P.L. 70-377 § 2(7), 60 Stat. 170).

The Congress in enacting the AADA of 1970 struck the reference to the U.S. Government or agency thereof in the definition of "public agency," (AADA § 11(11), 49 U.S.C. 1711(11)), because it was intended that the U.S. or an agency thereof no longer be eligible to act as a "sponsor" for a project for airport development (House Conference Report 91-1074, p. 32). Both the old and new airport acts defined "sponsor" in terms of "public agency."

As a concomitant to the change in sponsor eligibility, the altered definition of public agency also affects the provision requiring a public agency to hold good title satisfactory to the Secretary. The result is that airports at which the landing area (as defined in AADA, § 11(6), 49 U.S.C. 1711(6)) is owned by the United States may no longer be considered eligible for grant assistance under AADA because the United States is no longer a "public agency." This result, albeit consistent with the deletion of the U.S. as an eligible sponsor, works perhaps unintended consequences upon the program for the development of military airports for joint military and civil use. * * *

The General Counsel submits in this connection that the Federal Airport Act, the predecessor of the AADA, reflected the intent of Congress to foster joint use of military airports, and that the same intent continues under the AADA. See section 12 of the AADA, particularly subsection e, 49 U.S.C. 1712(e). It is explained that under the authority of the Federal Airport Act, the FAA had given grant assistance to military airports which were subject to joint-use agreements. In such cases, the grant agreement was between the FAA and the civilian party to the joint-use agreement, which served as sponsor for the development project. The title to the landing area remained in the Federal Government, which was recognized as a "public agency" under the predecessor statute. The General Counsel recites the FAA interpretation of the good title requirement applied under the Federal Airport Act as follows:

The FAA has to date considered "good title" as requiring a fee interest but one short of fee simple absolute. The FAA has not, in the context of a joint use agreement, had to consider whether a lease-hold interest or mere licenses in the landing area were good title for purposes of the Federal Airport Act. The agency has accepted a lease-hold as a sufficient property interest for a sponsor (14 CFR 151.25(c)(2)), provided, however, that the sponsor's lessor is a public agency with

"Title free and clear of any reversionary interest, lien, easement, lease, or other encumberance that, in the opinion of the Administrator, would create an undue risk that it might deprive the sponsor of possession or control, interfere with its use for public airport purposes, or make it impossible for the sponsor

to carry out the agreements and covenants in the application." 14 CFR 151.25(c)(1). * * * [Underlining by the General Counsel.]

While the term "public agency" as used in the above-cited regulation is not defined therein, the General Counsel obviously interprets it with reference to the applicable statutory definition.

The FAA is willing to consider whether a joint-use agreement, particularly the proposed agreement between the Department of the Navy and the Territory of Guam, vests such good title to the landing area in a public agency as may be acceptable to the Secretary. We are asked whether certification of a voucher to pay the Federal share of development of a joint-use airport in which a public agency holds only such interest as provided in the Agana joint-use agreement would be objectionable.

The General Counsel states that "the issue for resolution is whether the terms of the proposed joint-use agreement (attached) will vest in Guam 'good title' to the landing area as required by" section 16(c)(1) of the AADA, 49 U.S.C. 1716(c)(1).

Under the AADA sponsors are eligible to receive grants for airport projects or purposes; and the AADA defines the term "sponsor" in terms of "public agency." The reason for excluding the "United States Government or any agency thereof" from the definition of "public agency" was to preclude any agency of the United States from acting as a sponsor of a project so as to be entitled to a grant under the AADA. This is made clear by the actions taken by the Congress in enacting the AADA as disclosed by its legislative history. The bill which became the AADA, as passed by the House, did not include in the definition of "public agency" the "United States Government or any agency thereof." The reason therefor is disclosed by House Report No. 91–601 to be as follows:

> The definition of the term "public agency" contained in existing law is expanded to include any Indian tribe or Pueblo. The definition is otherwise altered by the deletion of reference to the U.S. Government or any agency thereof. Under existing law, the Secretary of the Interior may submit project applications in the case of a project for airport development in, or in close proximity to, a national park, national recreation area, or national monument, or in a national forest, or a special reservation for Government purposes and money in the discretionary fund is made available for approved projects for airport development by the Department of the Interior.
>
> However, those provisions are not incorporated in the reported bill, and therefore, the definition of "public agency" is narrowed as a conforming change. *Under the reported bill the various departments of the executive branch cannot become involved as a sponsor of a project for airport development under the Federal-aid airport program.* Provision is retained as in the case of the existing program for the sponsorship of airport development projects by the Virgin Islands, Guam, and the Commonwealth of Puerto Rico. [Italic supplied.]

The same bill as passed by the Senate was amended to include the "United States Government or any agency thereof" within the defini-

tion of "public agency." The bill then went to conference and the conferees adopted the House definition of "public agency" and the bill was then enacted into law. The Statement of the Managers on the Part of the House appearing in the Conference Report (House Report No. 91-1074) discloses that:

> Section 11(11) of the House bill defined the term "public agency" as a State, Puerto Rico, the Virgin Islands, or Guam, or any agency of any of them; a municipality or other political subdivision; or a tax-supported organization; or an Indian tribe or Pueblo.
>
> Section 201(12) of the Senate amendment contained a similar definition of the same term except that, under the Senate amendment, the term also included the United States Government or any agency thereof.
>
> Section 11(11) of the conference agreement follows the House version and omits any reference to the United States Government or any agency thereof because, under the agreement reached by the conferees, *no United States agency can act as a sponsor of a project for airport development under the Airport and Airway Development Act of 1970. It was necessary to omit the reference to United States agencies in this definition because the definition of the term "sponsor" uses the term "public agency."*
>
> * * * * * * *
>
> Section 206(b) of the Senate amendment provided that nothing in the Senate amendment would authorize the submission of a project application by the United States or any agency thereof, except in the case of a project in Puerto Rico, the Virgin Islands, Guam, or in, or in close proximity to, a national park, national recreation area, or national monument, or in a national forest, or a special reservation for Government purposes.
>
> The House bill contained no corresponding provision.
>
> In accordance with the agreement reached by the conferees *that no United States agency can act as a sponsor of an airport development project* under the Airport and Airway Development Act of 1970, this provision of the Senate amendment is omitted from the conference agreement. [Italic supplied.]

From the foregoing legislative history it is clear—as indicated above—that the reason for excluding the "United States Government or any agency thereof" from the definition of "public agency" was to preclude a Federal agency from acting as a sponsor of a project for airport development. We found nothing in the legislative history to indicate that in excluding Federal agencies from the definition of "public agency" it was intended that otherwise eligible sponsors would be precluded from receiving grants because the sponsor's entitlement to use the land involved was based on a joint-use agreement, with a military department, title to the land involved remaining in the United States. In fact, as indicated in the letter of FAA's General Counsel it appears from section 12(e) of the AADA that the Congress intended to foster the joint (civil) use of military airports.

Thus, while the matter is not free from doubt, in light of the foregoing we would not question a determination by the Secretary of Transportation in the instant case that the proposed joint-use agreement involved here will give Guam "good title satisfactory to the Secretary" for purposes of the AADA, provided the Secretary determines the grant will effectuate the purposes of the AADA. We note

the introduction on March 7, 1972, of a bill, S. 3302, which would amend section 16(c)(1) of the AADA so as to clarify the effect of the section in cases of grant assistance to airports where the landing area is owned by the United States.

[B-174981]

Appropriations—Obligation—Section 1311, Supplemental Appropriation Act of 1955—Loans—Reporting

Since the requirement of section 1311 of the Supplemental Appropriation Act of 1955, as amended, (31 U.S. Code 200), that the recording of an obligation must be supported by documents applies more readily to one-year or multi-year appropriations, the Small Business Administration whose financial transactions involve loans from the Business Loan and Investment Fund and the Disaster Loan Fund—both revolving funds, appropriations to which remain available until expended—may adopt a reporting system that departs from an exact obligation basis if the specific nature of such reporting is disclosed to all appropriate budgetary authorities. Recognizing the distinctions between loans, reports on guaranty loans may be made on a commitment basis, on a computed basis for obligation estimates, and on direct participation loans, and reports should include obligation statements.

To the Administrator, Small Business Administration, April 7, 1972:

Reference is made to your letter of January 14, 1972, relating to the effect of section 1311 of the Supplemental Appropriation Act, 1955, approved August 26, 1954, ch. 935, 68 Stat. 830, as amended, 31 U.S.C. 200, upon certain reporting procedures of the Small Business Administration (SBA). Section 1311 requires, *inter alia*, that no amount be recorded as an obligation of the United States unless supported by certain documentary evidence; and that statements of obligation furnished by Federal agencies to the Office of Management and Budget, the Congress or congressional committees include only those items supported by such documentary evidence.

You state that the preponderance of SBA's financial transactions involve loan approvals, disbursements and subsequent repayments with respect to the Business Loan and Investment Fund and the Disaster Loan Fund. Both of these are revolving funds, appropriations to which remain available until expended. See 15 U.S.C. 633(c)(1) and (3). For fund control purposes, loan authorizations or approvals are recorded on a commitment basis, i.e., the approval amount is recorded in a memorandum account at the time a loan authorization is approved. The first subsequent entry (other than a change or cancellation of the authorized amount) is either a request for disbursement in the case of a direct or immediate participation loan, where SBA acts as the disbursing agent, or a notification of disbursement in the case of deferred participation or guaranty-type loans. Since SBA does not

act as disbursing agent with respect to loans in the latter category, the agency central accounting system does not reflect transpiring transactions which create obligations as defined in section 1311 and field verifications are necessary in order to determine year-end figures for valid obligations. On the other hand, the central accounting system contains the entries necessary to determine valid obligations arising from direct or immediate participation loans. The verification process for the fiscal year ended June 30, 1971, covered more than 39,000 loans under the cited revolving funds, and resulted in a downward adjustment in obligations arising from loans in both major categories. An adjustment of $153 million related to direct or immediate participation loans disbursed by SBA. A much smaller adjustment resulted with respect to indirect participation or guaranty-type loans, and produced a figure for valid obligations in this category which amounted to less than 2 percent of SBA's total loan portfolio as of June 30, 1971. A cost study revealed that 3,185 man-hours (the equivalent of 1.5 man-years) was expended at an approximate cost of $13,000 in completing the approval verification process for the fiscal year ended June 30, 1971.

You suggest that since revolving funds are controlled on a commitment or reservation basis, the valid obligation figures produced by the verification process have no bearing on agency operations, except to the extent of being an explanation in the form of a footnote to the financial statement. In view of your conclusions as to the limited relevance of the concept of valid obligations reflected in section 1311 to the cited revolving fund operations, and the excessive cost of determining such obligations, you request that SBA be permitted to report its valid obligations on a computed basis.

Section 1311, as amended, 31 U.S.C. 200, provides, in part, as follows:

(a) Requirement; character of evidence.

After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—

* * * * * * *

(2) a valid loan agreement, showing the amount of the loan to be made and the terms of repayment thereof; * * *

* * * * * * *

(b) Report by agency heads in connection with requests for proposed appropriations.

Hereafter, in connection with the submission of all requests for proposed appropriations to the Office of Management and Budget, the head of each Federal agency shall report that any statement of obligations furnished therewith consists of valid obligations as defined in subsection (a) of this section.

(c) Same; certifications and records; retention for audit; prohibition against redelegation of responsibility.

Each report made pursuant to subsection (b) of this section shall be supported by certifications of the officials designated by the head of the agency, and such

certifications shall be supported by records evidencing the amounts which are reported therein as having been obligated. * * *

(d) Restriction ou use of apropriations or funds.

No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law.

(e) Amounts to be included in statements of obligations to Congress.

Any statement of obligation of funds furnished by any agency of the Government to the Congress or any committee thereof shall include only such amounts as may be valid obligations as defined in subsection (a) of this section.

Section 1311 was designed to remedy the then-existing practice of some agencies to avoid the withdrawal and reversion of appropriated funds remaining unexpended at the end of their period of availability by adopting strained and diverse concepts of obligation, thereby making it difficult for the Congress to distinguish those items which truly deserved to be treated as obligations. See H. Rept. No. 2266, 83d Cong., 2d sess. 49–50; 100 Cong. Rec. 11476 (1954). The remedy was accomplished by establishing specific standards for the determination of valid obligations, and by requiring that agency reports of obligations conform to these standards. Subsection (b) of section 1311 as originally enacted reinforced the remedy by requiring in addition that the head of each agency submit annually special reports setting forth the amount of each appropriation or fund remaining obligated but unexpended. 68 Stat. 830. By section 210(a) of the act approved July 8, 1959, Public Law 86–79, 73 Stat. 167, section 1311(b) was amended to its present form, requiring only that agency heads report that any statement of obligations furnished in connection with appropriation requests to the Office of Management and Budget conform to the standards of section 1311(a). The requirement for special reports of obligations was deleted on the ground that such reports had "served their purpose* * * ." H. Rept. No. 366, 86th Cong., 1st sess. 5.

Subsection 1311(a), 31 U.S.C. 200(a), sets forth prerequisites to the *recording* of obligations. Subsections (b) and (e), 31 U.S.C. 200(b), (e), require only that agency submissions which purport to be statements of obligations must conform to the standards of subsection (a). In effect, section 1311 leaves to those authorities to whom agencies submit information concerning the status of appropriations and funds determination of the form and content of such submissions.

We appreciate the difficulties of reporting transactions under the cited revolving funds on an exact obligation basis, and agree that the concepts of obligation under section 1311 apply more readily to 1-year or multiple-year appropriations. The primary purpose of sec-

tion 1311 in the present context is to avoid misunderstandings in the submission of budgetary information. Accordingly, we would have no objection under section 1311 to the adoption by SBA of a reporting system with respect to the cited revolving funds which departs from an exact obligation basis, so long as the specific nature of such reporting system is clearly disclosed to all appropriate budgetary authorities, and provides all information required by them. However, several additional observations seem relevant with respect to the latter point. While excessive details and unnecessary refinements are to be avoided, 2 GAO 8.10(a), agencies are subject to a general duty to make the most complete disclosure of budgetary information practicable under any particular circumstances. 31 U.S.C. 65; *cf.* 2 GAO 8.2, 8.4, 8.5, 8.9, 8.10(b). On this basis, we perceive a significant distinction between deferred participation or guaranty-type transactions under SBA revolving funds, and transactions in which SBA makes direct disbursements. With respect to the former, where the figure for valid obligations can only be determined through a costly field verification process and represented less than 2 percent of the agency's total loan portfolio as of June 30, 1971, we would have no objection to dispensing with reports of obligations, assuming that reports on a commitment basis would be substituted, and that the distinction would be made clear. In the interest of complete disclosure, however, we prefer your specific suggestion that estimates of obligations, on a computed basis, also be reported as to these transactions. This approach would not be inconsistent with section 1311 if it is made clear that such information represents estimates, rather than statements, of obligations. We do not believe that the problems you raise apply with equal force to other transactions under the cited revolving funds, i.e., direct or immediate participation loans by SBA, and also those administrative expenses of the agency for which such revolving funds are available. See 15 U.S.C. 633(c). Clearly the process of verifying these obligations should not involve major difficulties or expense since the necessary information is contained in the agency central accounting system. Accordingly, as to these transactions we do not perceive considerations sufficient to countervail the interest in the fullest possible disclosure, and recommend that reports concerning such transactions continue to include statements of obligations.

Since this proposal, however, will result in a change in the statement of obligations furnished to the Office of Management and Budget in connection with requests for proposed appropriations, we suggest that the proposal be cleared with that office.

[B-174813]

Contracts — Specifications — Ambiguous — Changes, Revisions, Etc.—Explanations, Etc., Requirement

An invitation for bids (IFB) to procure a legal information retrieval data base which, because it did not clearly indicate whether a photocomposition, a Linotron 1010 system, or a master typography program was to be furnished, was an ambiguous IFB that was inadequate to secure the necessary pricing for competitive bid evaluation purposes, and the lack of clarity having generated a number of oral requests for explanations, an amendment pursuant to section 1-2.207(d) of the Federal Procurement Regulations should have been issued. Therefore, the contract awarded should be terminated for the convenience of the Government as the award was not in accord with a reasonable interpretation of the IFB, and the procurement resolicited. Pursuant to Public Law 91-510, the action taken on this recommendation should be sent to the Senate and House Committees on Government Operations within 60 days.

To the Chairman, National Labor Relations Board, April 10, 1972:

We refer to the report dated January 25, 1972, from the Director, Division of Administration, relative to the protests of Autocomp, Inc. (Autocomp), and SDA Corporation (SDA) against the contract awarded to Composition Methods, Inc. (CMI), under an undated, unnumbered invitation for bids (IFB) issued by the National Labor Relations Board (NLRB), Washington, D.C.

While Autocomp and SDA have raised specific grounds of protest, for reasons hereinafter stated, we do not believe it necessary to respond to each contention because we are recommending that the contract awarded to CMI be terminated for convenience of the Government and its needs readvertised under proper terms and conditions.

Pursuant to a waiver granted October 8, 1971, from the Public Printer, the IFB was issued for: (1) the creation and maintenance of a legal information retrieval data base; (2) keyboarding of manuscript and/or processing of papertapes prepared by NLRB; (3) production of a master typography program for input tape or production of a Linotron 1010 control tape; and (4) photocomposition of fully made-up pages of the Decisions and Orders of the NLRB until the Government Printing Office can develop the photocomposition capability to meet NLRB's requirements.

Section 1 of the IFB provided as follows:

> This contract covers National Labor Relations Board requirements for the creation and maintenance of a legal information retrieval data base and production of photocomposed pages, or a Linotron 1010 control tape, or a master typography program input tape, for bound volumes of Decisions and Orders of the National Labor Relations Board (herein called NLRB).

Further, section 3 of the IFB provided:

> Section 3—Award Criteria
>
> .01 Basis of Award:
>
> The Award of this contract will be made in the best interest of the Government and will not be made solely on price; other factors will be considered such

as the bidder's experience in preparing computer files for photocomposition, and his backup composition system in the event the Linotron is not operational. The NLRB representatives may at their option make an onsite inspection of a bidder's plant to aid in evaluation of bids.

.02 Statement of Experience and Qualifications:

(a) The bidders must submit with their bid a statement of experience and qualifications.

(b) To facilitate evaluation of the proposal, each offeror shall submit the information requested in the following sequence:

(1) Relevant experience of proposed staff in the field of data processing, preparation of computer files for photocomposition, and in use of the Linotron.

(2) Samples of similar work produced.

(3) A description of a backup composition system in the event the Linotron is not in operation. If this service is purchased, the contractor must submit a letter from the supplier certifying that the service will be available on short notice.

(4) Offeror's addenda (optional): Any additional pertinent data the offeror may elect to provide should be included in this section.

(a) Cost per thousand input characters for the keyboarding and creation of the standard data file. To include proofreading and corrections necessary to make the file accurate____ $_____ x 4 x 10^0_____

(b) Cost per thousand input characters for processing paper tape provided by NLRB to produce the standard data file to make the file accurate _____ $_____ x 2 x 10^0_____

(c) Cost per thousand input characters to produce through the computer composition program a Linotron 1010 control tape containing fully madeup pages_____ $_____ x 6 x 10^0_____

It is clear from the record that photocomposition work was an immediate requirement of the procurement and that use of the Government Printing Office Linotron 1010 system was not possible until some undisclosed time in the future. Thus, the urgent need expressed in the January 25 report could only be met through a contractor-furnished photocomposition system.

The solicitation pricing schedule, when viewed in the light of the known needs and requirements as expressed in sections 1 and 3, was both ambiguous and inadequate to secure the necessary pricing for competitive bid evaluation purposes. In our opinion, the solicitation lacked the clarity essential to equal competitive bidding. This lack of clarity generated a number of oral requests for explanations of the solicitation terms; and it was only through these requests that bidders learned from the Board of the necessity to price photocomposition work. While most bidders received oral clarifications prior to bid opening—since the information admittedly was necessary for the purposes of bid preparation—a formal amendment should have been issued pursuant to section 1–2.207(d) of the Federal Procurement Regulations. This subsection provides in this regard:

(d) Any information given to a prospective bidder concerning an invitation for bids shall be furnished promptly to all other prospective bidders, as an amendment to the invitation, if such information is necessary to bidders in submitting bids on the invitation or if the lack of such information would be prejudicial to uninformed bidders. No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

Without detailing specific instances of uncertainty, it is clear that participating bidders were confused as to how bids could be submitted and remain responsive to the Board's advertised needs—whether they were for photocomposition, a Linotron 1010 system, or a master typography program. We cannot reach a satisfactory understanding from the IFB itself as to what it was that the Board had submitted to competition. The IFB referred to photocomposition work and to a master typography program, without explaining the Board's desires with respect thereto and without providing for their price evaluation. Nor do we believe that the contract ultimately awarded was in accord with what may be said to constitute a reasonable interpretation of the IFB. Accordingly, it is our view that the contract with CMI should be terminated for the convenience of the Government and the procurement resolicited under proper terms and conditions.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S.C. 1172. In view thereof, your attention is directed to section 236 of the act, 31 U.S.C. 1176, which requires that you submit written statements of the action taken with respect to the recommendation. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

We would appreciate advice of whatever action is taken on our recommendation.

[B-174601]

Contracts—Negotiation—Specifications Unavailable—Descriptive Literature Requirement

Under a request for proposals (RFP), issued pursuant to 10 U.S.C. 2304(a)(10), which authorizes negotiations when it is impracticable to draft specifications, that contained a descriptive clause—insufficient for formal advertising—relating to the design and performance characteristics of the air compressor being solicited, the determination the descriptive literature furnished by the low offeror did not conform, where the information lacking was contained in the RFP, was in effect a determination the proposal was not technically within a competitive range. However, while failure to comply with a descriptive literature clause in an advertised procurement requires bid rejection, this rule does not automatically apply in a negotiated procurement and discussions should have been held with the offeror to determine whether its proposal was technically acceptable.

Contracts—Negotiation—Impracticable to Obtain—Advertising in Lieu of Negotiation

The fact that negotiation is authorized under 10 U.S.C. 2304(a)(10) when it is impracticable to obtain competition, does not exclude advertising a procurement

when it is feasible and practicable to do so, and, therefore, before issuing a request for proposals where available specifications were "primarily performance and design parameters," and available design data was "incomplete, not sufficiently detailed and largely uncoordinated," consideration should have been given to advertising the performance-type specifications and to paragraph 1–1206.2 of the Armed Services Procurement Regulation, which authorizes the use of brand-name-or-equal purchase descriptions when more precise and detailed specifications are not available, since performance-type specifications and formal advertising are not mutually inconsistent.

To the Secretary of the Air Force, April 12, 1972:

Reference is made to the January 12, 1972, letter from the Deputy Chief, Contract Management Division, Dir/Procurement Policy, DCS/S&L, Headquarters, United States Air Force, regarding the protest of RIX Industries against award of a contract under RFP F33615–72–R 0553, by the Aeronautical Systems Division, Air Force Systems Command.

The Solicitation, for one air compressor and accessory items, contained a requirement for descriptive literature to be furnished with proposals. Paragraph D–5 of the RFP stated that the literature "is required to establish, for the purpose of proposal evaluation and award, details of the products the bidder proposes to furnish as to design and performance characteristics." Paragraph D–5 also provided that failure of descriptive literature "to show that the product offered conforms to the specifications and other requirements of this proposal will require rejection."

The four proposals received by the October 15, 1971, closing date were referred for technical evaluation. The evaluator determined that the descriptive literature submitted by RIX did not cover performance characteristics and therefore its proposal could not be evaluated. The contracting officer then rejected the RIX proposal, even though it had submitted the lowest price, and conducted negotiations with the other three offerors. Award was made on November 16, 1971, to the second low offeror.

The protester claims that the descriptive literature it submitted did meet all requirements of the RFP and that the contracting officer's rejection of its proposal was unfair. It also alleges that award was improperly made while its protest was pending.

RIX claims that by indicating "N/A" next to the RFP requirement for a complete technical proposal, including an item by item discussion, the contracting officer "implied prejudice against a technical presentation" and thereby allowed the offeror "to establish the amount and style of data supplied as long as it included 'descriptive literature' * * *." It further contends that the lack of detail in the specification statement of work indicated an "intention * * * to negotiate further with the most responsive bidders." On this basis, it submitted two diagrams, one labeled "cross-section" and the other labeled "installation detail,"

which was found to be insufficient to evaluate performance characteristics of the RIX compressor.

This procurement was negotiated pursuant to 10 U.S.C. 2304(a) (10) because it was impracticable to draft specifications adequate for formal advertising. Armed Services Procurement Regulation (ASPR) 3-805.1, in implementation of 10 U.S.C. 2304(g), provides that in all negotiated procurements, with certain stated exceptions not applicable here, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. The rejection of RIX's proposal was, in effect, a determination that its proposal was not technically within a competitive range because of its failure to comply literally with the descriptive literature clause. While the failure to comply with a proper descriptive literature clause in a formally advertised procurement requires bid rejection, we do not believe the same rule should automatically exclude consideration of a proposal in a negotiated procurement without consideration of the attendant facts and circumstances. See 47 Comp. Gen. 29 (1967). In this connection, we note that much of the basic information lacking in RIX's descriptive literature was included in the line item description and Statement of Work of the RFP to which RIX apparently assented in submitting its proposal. Also, as RIX points out, several provisions of the RFP "played-down" the necessity for extensive technical detail. Furthermore, RIX's proposal price was considerably below the next lowest proposal. In these circumstances, we believe the applicable rules required discussion with RIX to determine whether in fact its proposal was technically acceptable.

We note that the contract was negotiated pursuant to 10 U.S.C. 2304(a) (10) which authorizes procurements without formal advertising when it is found to be impracticable to obtain competition. That finding is by the terms of 10 U.S.C. 2310(b) final. However, we note that 10 U.S.C. 2304(a) makes it clear that formal advertising should be used when that method is feasible and practicable even though negotiation could be justified under one of the 17 exceptions. Negotiation was specifically authorized in this instance because the available specifications were "primarily performance and design parameters" and that available design data were "incomplete, not sufficiently detailed and largely uncoordinated."

We do not read the law on the applicable regulations to preclude advertising on the basis of performance-type specifications. Indeed, we believe that performance-type specifications are not infrequently employed in formally advertised procurements, and ASPR 1-1206.2 specifically contemplates the use of brand-name-or-equal purchase

descriptions in such procurements where more precise and detailed specifications are not available.

One of the serious problems with the instant procurement is that the contracting officer sought to achieve for himself the flexibility of negotiation while at the same time limiting at least one offeror to the relatively inflexible requirements applicable under formal advertising. That approach is improper, unfair to the competitors and, ultimately, contrary to the public interest. You may wish to point out to your contracting officers that the law still requires that formal advertising be used wherever it is feasible and practicable to do so, that performance-type specifications and formal advertising are not mutually inconsistent and, finally, that where negotiation is employed, its flexibility should be used to insure that competition is enhanced rather than limited.

If this procurement had been formally advertised, we would have serious reservations as to the sufficiency of the descriptive literature requirement. We have held that a solicitation requiring descriptive data must clearly establish the nature and extent of the data required with sufficient specificity to put bidders on common notice of what detail is essential. 46 Comp. Gen. 315 (1966). In that case, we said:

> * * * One of the primary deficiencies to be cured by spelling out descriptive literature requirements with particularity arises where * * * a low bidder submits data which he may reasonably believe satisfies a broadly stated requirement for descriptive literature, but which does not in fact provide the information the agency feels it needs to evaluate bids. * * * The recital in the "Descriptive Literature" clause of such general subjects as "performance characteristics," which are listed in the footnote to ASPR 2-205.5(d)(2) as subjects that might require description, does not provide sufficient detail as to what information the agency needs, and therefore does not provide for a common evaluation of bids. * * * 46 Comp. Gen. 315, 317-318 (1966).

With respect to RIX's assertion that its protest was pending at the time of award, we do not believe the contracting officer acted improperly. RIX's telegram of November 3, 1971, to the contracting officer requested "consideration for re-evaluation" of its proposal "*or* submission to the General, Washington, D.C. for review." Its follow-up letter of November 5, 1971, amplified the basis for its request, but made no mention of pursuing a protest beyond the contracting officer. While this correspondence could have been treated as a formal protest, the contracting officer did not act unreasonably in concluding that there was no protest pending after he complied with RIX's request to reconsider the RIX proposal. [Italic supplied.]

While we are concerned over the deficiencies noted above, there is no effective remedy available at this time to cure them. However, we strongly urge that appropriate action be taken to prevent a recurrence in future procurements.

[B-170675]

Compensation—Wage Board Employees—Conversion to Classified Positions—Rate Establishment

Since, in accordance with section 539.203 of the Civil Service Regulations, a wage board employee upon conversion of his position to a General Schedule position is entitled to the inclusion of night differential in setting the General Schedule rate only if he was in receipt of night differential as part of basic pay at the time of position conversion, if an employee's regular night shift tour is worked on a rotational basis or at regularly scheduled anticipated intervals, the night differential may not be prorated and included in fixing his General Schedule rate. However, an employee who works a night shift on an irregular, unanticipated basis and is in receipt of night differential at the time of position conversion may have the night differential treated as part of basic pay in setting the General Schedule rate upon conversion of his wage board position.

Compensation—Wage Board Employees—Overtime—Basic Compensation Determinations

As only employees actually working and being paid for night shift work at the time their wage board positions are converted to General Schedule positions are entitled to the inclusion of night differential as basic pay, employees who work rotating shifts may not in the conversion of wage board rates to General Schedule rates have their compensation converted to three different rates of basic pay—day shift, and second and third shifts at different rates of night differential and, furthermore, the highest previous rate rule is not prescribed in section 539.203 of the Civil Service Regulations for use in the circumstances involved.

Compensation—Wage Board Employees—Conversion to Classified Positions—"Saved" Compensation—Night Differential

The holdings in Civil Service Regulations section 539 and 34 Comp. Gen. 708 that when an employee and his position are brought under the General Schedule in a conversion action and the basic pay for the wage board position, including night differential, exceeds the maximum rate for the General Schedule position plus 10 percent night differential, the employee will be paid the "saved" basic pay of the wage board position, but not the 10 percent night differential authorized, for the General Schedule position remains unaffected by 50 Comp. Gen. 332, which concurs with the view of the Civil Service Commission that when the basic pay for the General Schedule position does not exceed the maximum rate plus 10 percent, the conversion rate will be fixed to guarantee the employee no loss of pay, and if he works a night shift he will be paid night differential.

To the Deputy Administrator, National Aeronautics and Space Administration, April 13, 1972:

We refer further to your letter of December 22, 1971, which concerned the setting of rates of pay upon conversion of positions from wage board to General Schedule.

You state that your agency has encountered a number of problems involving substantial amounts of money in attempting to implement 50 Comp. Gen. 332 (1970). That decision concurred in the view of the Civil Service Commission that basic pay in a wage board position included night differential for the purpose of fixing the rate of pay in the General Schedule position to which the position was converted. Your problems are stated to involve determining under what circumstances a wage board employee would be considered as earning a rate of pay which included night differential for purposes of setting rate

of pay upon conversion of his position to the General Schedule. You are particularly concerned about those situations where the position involves regular night shift rotations or regularly anticipated night work over a period of time.

In making your determinations, you say you take as a guiding principle the statement in 50 Comp. Gen. 332 that the differential for a regular tour of duty at night has consistently been held to be a part of basic pay. You state that you believe 50 Comp. Gen. 332 was intended to mean that a position may include regular tours of night shift worked on a rotational basis or regularly anticipated intervals, and that it excludes tours which are transistory or irregular. Consistent with your understanding, you believe the rule in 50 Comp. Gen. 332 may be implemented by following proration practices along the lines described in FPM Supp. 532–1, section S10–8a(4) for converting a position to the Coordinated Federal Wage System.

As "question 1" you request our approval of the following proration formula:

a. Those employees now working a regularly scheduled night shift would receive a GS basic pay rate equivalent to their Wage Board rate plus the night differential plus whatever GS night differential they are entitled to.

b. Employees on a scheduled rotating shift on a cycle such as two weeks of day shift work and one week of night shift work would receive a GS basic pay rate equivalent to their Wage Board rate plus the night shift differential, prorated over the entire three-week work cycle.

c. Employees not assigned full-time or on rotation but whose night shift work occurs with anticipated frequency or at predetermined intervals, would also receive a GS basic pay rate equivalent to their Wage Board rate plus the night shift differential, prorated over the entire work cycle. This would cover employees who work night shifts regularly within three and six month periods when rocket launchings occur. And it would also cover those employees who over a year, with anticipated frequency, work night shifts to cover other employees' positions during vacation periods.

d. Employees who, on an irregular, unanticipated basis, work a night shift because of an unusual work requirement or fill in for an ill or vacationing employee, would not have the night shift differential treated as part of their basic rate for pay setting upon conversion, even if they were on a night shift of that character at the time of conversion, and they were being paid at that time an hourly night shift differential.

You urge in support of your proposal to use the above-described proration that it (a) avoids the harsh inequities that would result when basic pay rates incorporating night shift differential simply depends upon the happenstance of an employee being on a night shift at the time of conversion; (b) allows a reasonable allocation of the differential over the entire scope of work of a position; and (c) accords with your understanding that it is a position, involving perhaps several work cycles with differing entitlements to premium pay, which is being converted.

Pursuant to the specific provisions of 5 U.S.C. 5334(a) the rate of basic pay to which an employee is entitled is governed by regulations

promulgated by the Civil Service Commission. Each subsection of section 539.203 of the governing regulation, providing for the fixing of rates in the various situations, commences with the words "When the employee is receiving a rate of basic pay * * *." No provision is made for a determination of a rate to be based upon proration such as you propose along lines similar to those provided by regulation for converting a position to the Coordinated Federal Wage System. While we appreciate the merits of your proposal, we do not view the present regulations as authorizing or contemplating a proration such as you suggest. Accordingly "question 1" must be answered in the negative.

Additionally you ask the following:

Question 2

a. If our assumptions are incorrect, then it would appear that only employees actually working and being paid for night shift work at the time of conversion are entitled to inclusion of night differential in their rate of basic pay. If so, would employees working a rotating shift be converted to three different rates of basic pay: one at the day shift rate; one at the second shift rate, including night shift differential; and one at the third shift, including a different night differential?

b. If these employees who would otherwise be converted at the day rate and second shift rates are given the third shift rate based on the highest previous rate, would their increases in salary be counted toward equivalent increases for within grade increases under the General Schedule? For example, three employees WG–14, Step 3, are converted with their positions to GS–9. At time of conversion, they share a rotating shift.

1st shift $5.41 per hour ($11,252)
2nd shift $5.59 per hour ($11,627)
3rd shift $5.64 per hour ($11,731)

All are converted to GS–9, Step 5, $11,866 based on 3rd shift rate. Equivalent increase for GS–9 is $349. Waiting period is 104 weeks.

	Increase
1st shift employee—$11,252–$11,866	$614*
2nd shift employee—$11,627–$11,866	$239
3rd shift employee—11,731–$11,866	$135

*Equivalent increase—new two-year waiting period.

With respect to "question 2," and for the reasons stated in answer to "question 1," only employees actually working and being paid for night shift work at the time of conversion would be entitled to inclusion of night differential in their rate of basic pay. Consistent therewith employees working on a rotating shift would be converted to the rate of basic pay received at time of conversion.

"Question 2b" appears to be premised upon the use of the highest previous rate rule. However, no provision is made in section 539.203 for the use of such rule in circumstances such as set forth in your question.

Question 3

a. Is 50 CG 332 to be considered as retroactive from the date of CSC Regulation 539, as an original construction of a regulation having the force and effect of law?
b. Or is 50 CG 332 to be considered as a modification of 34 CG 708 and therefore effective from November 4, 1970, following 27 CG 686?
c. Or if 50 CG 332 is not a modification of 34 CG 708 but by implication a modification of CSC letter to NASA, dated December 16, 1969, (copy attached) which interprets CSC Regulation 539, is it effective from the date of that letter, 24 CG 688?

Question 4

a. If B–170675 is to be applied retroactively, should it apply to employees who have been separated from the agency?
b. Should Federal and State tax withholdings, Retirement and Group Life Insurance deductions be made from any retroactive pay benefits?

In connection with "question 3" you forwarded a copy of a letter dated December 16, 1969, from the Bureau of Policies and Standards, United States Civil Service Commission, addressed to the Personnel Management Branch, National Aeronautics and Space Administration (NASA). The letter was in response to a question from NASA of what constitutes basic pay for wage employees. After stating that night differential paid to a wage employee is considered basic pay for all purposes, it was explained that:

Under Part 539 of the Commission's regulations and 34 Comp. Gen. 708, when an employee and his position are brought under the General Schedule in a conversion action, and the basic pay for the wage position (including night differential) *exceeds the maximum rate* for the General Schedule position plus 10 percent night differential, the employee will be paid the "saved" basic pay of the wage position; however, he may not be paid the 10 percent night differential authorized for the General Schedule position. When the basic pay for the wage position does not exceed the maximum rate for the General Schedule position plus 10 percent, his pay will be fixed at the lowest rate of the General Schedule grade which, when the 10 percent night differential is added to the General Schedule rate, will guarantee him no loss of pay. In the latter case, if he performs night work, he is entitled to the 10 percent night differential authorized for General Schedule employees. [Italic supplied.]

The above paragraph is a statement of the procedure to be used under section 539 of the regulations and 34 Comp. Gen. 708 (1954). It should be noted that the first sentence concerns only those cases wherein the basic pay for the wage position, including differential, *exceeds the maximum rate* for the General Schedule position plus 10 percent night differential. The question to which 50 Comp. Gen. 332 was addressed related to the step within the General Schedule grade, and whether the night differential should be used in determining the step. The decision concurred in the view of the Civil Service Commission, which view was consistent with the advice furnished NASA in the second and third sentences of the paragraph quoted above from the December 16, 1969, letter. In such circumstances no change was effected by 50 Comp. Gen. 332 and, therefore, "questions 3" and "4" do not require an answer.

[B-175367]

Bids—Evaluation—Factors Other Than Price—Intangible Economic Factors

An invitation for building construction which although it did not spell out specific criteria for the selection of either bid No. 1, providing for completion in 1,095 calendar days, or bid No. 2, completion in 870 days, is a legal invitation, even though it is suggested future construction solicitations identify those factors that will be considered in selecting the shorter or longer completion date, and the award of a contract to the low bidder on the basis of price on the earlier completion date was proper since the invitation provided for award on the basis of price and other factors, and the "other factors"—rental space savings, gain in operating efficiency, and earlier availability of space to accommodate program and staff expansions—are costs that are too intangible to evaluate, as is the provision for the assessment of liquidated damages.

To the Acting Administrator, General Services Administration, April 14, 1972:

By letter, with enclosures, dated March 29, 1972, your General Counsel furnished our Office a report on the protest of The George Hyman Construction Company against the proposed award of a contract to Blake Construction Co., Inc., under invitation for bids No. GS-03B-17070, for construction of the South Portal Building, Washington, D.C. On April 7 and 10, 1972, we received supplemental reports from your Assistant General Counsel, Public Buildings Division.

The following facts are pertinent to our consideration. The invitation, as amended, requested bids on the basis of two different completion dates. Bid No. 1 calls for completion of the building in 1,095 calendar days while bid No. 2 calls for completion in 870 calendar days. Each is subject to liquidated damages at a rate of $2,800 for each day of delay in completion. Insofar as the actual work, including additive and deductive alternates, is concerned, there is no difference between the two schedules. The invitation does not contain an expression of preference for either completion time. Paragraph 13 of the Special Conditions, entitled "BASIS OF AWARD," provides that:

> 13.1 The Government reserves the right to accept the Bid No. 1 or Bid No. 2; the right to accept or reject the bids on the Alternates related to Bid No. 1 and Bid No. 2; and the right to accept or reject the bid on Unit Price—Foundation Pile related to Bid No. 1 and Bid No. 2.

And, paragraph 10(a) of standard form 22 (October 1969 edition) states:

> 10. Award of Contract. (a) Award of contract will be made to that responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the Government, price and other factors considered.

We are informed that neither Hyman nor Blake raised any question concerning the basis to be used by GSA in determining which completion time to accept prior to February 15, 1972, the bid opening date. We were also advised by GSA that none of the three other responding bidders raised any question.

Taking into account the various additive and deductive alternates the General Counsel's letter of March 29, 1972, reports the following prices for Hyman and Blake:

	Bid No. 1 (1,095 days)	Bid No. 2 (870 days)
Blake	$29, 868, 000	$31, 053, 000
Hyman	30, 451, 500	30, 451, 500

Thus, Blake's bid on the longer completion period is $583,500 less than Hyman's bid for both the long and short term completion date. GSA proposes to award the contract on the basis of Blake's bid No. 1.

At the outset, we must observe that no one has urged that the invitation is legally deficient from the standpoint of affording all bidders an equal opportunity to compete on a common basis. As the invitation is structured, a bidder has the opportunity to compete against other bidders for an award under either completion schedule. Most importantly, the request for bids on definite delivery schedules permits a bidder to accurately assess in each instance the impact of performance time on his bid price.

Admittedly, no specific criteria are spelled out for the exercise of the option to award on the basis of bid No. 1 or bid No. 2. It is GSA's position—one shared by Hyman's counsel—that the language of paragraph 10(a) of standard form 22 and the clear language of paragraph 13.1 of the Special Conditions authorize the acceptance of the lowest bid for the shorter completion date if such action is most advantageous to the Government, notwithstanding that the bid is higher than the low bid on the longer completion schedule. Blake's counsel, however, contends that price alone must control since no "other factors" are spelled out. In support of this position, attention is drawn to our decisions requiring the identification of factors other than price if they are to be considered in the evaluation of bids. See, e.g., 50 Comp. Gen. 447, 454 (1970). Delivery time is, of course, an "other factor" and, in order for us to conclude that bidders were not placed on notice that the advantages, if any, of earlier completion would be weighed in determining the most advantageous award, we would have to ignore the option provisions of paragraph 13.1—the purpose of which is to permit an election of alternate delivery schedules. Indeed, the language would be surplusage if counsel for Blake's position were adopted.

Moreover, the failure to identify the considerations which would prompt an election of the earlier completion date does not, in our view, affect the legal sufficiency of the invitation. All bidders were able to prepare their bids in light of the possibility that GSA might elect

either completion date. Further, any questions or objections concerning the specific basis upon which GSA would make the election should have been voiced no later than bid opening.

With respect to the proposed award, Hyman's counsel urges in its submission of March 13, 1972, that an award to Blake would be a gross abuse of discretion because such action would result in a substantial financial loss to the Government. Specifically, it is urged that if GSA elected to accept Hyman's bid on the earlier completion date, the savings in rental payments accruing to GSA by virtue of obtaining the building 7½ months earlier would more than offset the $583,500 price advantage in favor of Blake. To this end, counsel has submitted computations showing rental savings ranging from a maximum of $1,183,943 to a minimum of $720,617.

As an alternative approach to the question, it is urged that the liquidated damages of $2,800 per day reflect GSA's own evaluation of the value of having the space earlier. Using this method of valuing the space, completion 225 days earlier would be worth $630,000, more than enough to offset Blake's price advantage.

GSA, in reply, rejects the proposition that there will be an actual savings in rent or that the liquidated damages are an appropriate measure of the value of the shorter completion date. In this regard, the letter evidences a restrictive view of GSA's discretion in electing the shorter completion date. The General Counsel takes the position that "price and not time was stressed in the IFB as the most important factor in making an award * * * Paragraph 10(a) alerted bidders that the Government would base its award on price, although other factors would be considered." As evidence that time is not controlling, the General Counsel points to the failure of the invitation to specify a preference for the shorter completion time. In addition, we are advised that by requesting separate bids, GSA sought to determine if there would be a premium for a shorter completion date so that if the building were needed sooner, it could decide to award for a shorter period.

Significantly, in judging the value of earlier completion as opposed to Blake's lower price, GSA has confined itself to a consideration of only those factors which it believes now can be quantified with reasonable certainty.

Insofar as rental savings are concerned, a February 21, 1972, memorandum, entitled "Economic Evaluation—South Portal Building—Abbreviated versus Expanded Construction Schedule," from the Director, Space Management Division, Public Buildings Service, states, in pertinent part, that:

Under a prospectus approved by the Senate on September 20, 1966, and by the House on October 6, 1966, the South Portal Building is to be constructed

to conceal the large ventilation tower of the south entrance of the Mall Tunnel of the Inner Loop Freeway and to provide needed office space for the Departmental Headquarters of the Department of Health, Education, and Welfare (HEW).

* * * * * * *

Only the agency space has been considered in this analysis, since service areas and parking spaces are ancillary to the general purpose space which will house agency personnel and would not, therefore, otherwise be required. While this premise might be questioned with respect to the parking area, let it suffice to say that although parking facilities are considered to be necessary in a new structure in order to alleviate congestion, retain employees, etc., in the absence of such facilities, employees simply do without or make other arrangements on a personal basis; therefore, there is no economic impact on the Government whether the parking is available now or seven and one-half months from now.

As previously noted, the South Portal Building will house the Departmental Headquarters of HEW. Under the original prospectus, it was envisioned that the relocation of these headquarters activities from the HEW North Building would free-up sufficient space to permit the cancellation or reassignment of 246,710 square feet of leased space. However, the continually expanding requirements of HEW have necessitated the lease acquisition of increasingly larger blocks of space, including the relatively recent acquisition of the Parklawn Building in Rockville, Maryland. The leasing of this building allowed for the consolidation and expansion of a number of HEW activities and resulted in the cancellation or reassignment of many leased locations previously identified in the South Portal prospectus.

An analysis of the past growth of HEW in the Washington Metropolitan Area indicates that this department is among the three most rapidly expanding agencies of Government in terms of total square footage, averaging a net gain of between 70,000-80,000 square feet per year. Based on pending and/or approved programs, it is anticipated that this trend will not only continue, but accelerate. In view of this, it is anticipated that the completion of the South Portal Building will not result in the cancellation or reassignment of any leased space, for HEW will have a continuing need for this space to meet future program needs. Due to the continually changing and expanding requirements of the HEW, previously formulated housing plans have been negated. Further, pending and/or proposed legislation precludes the development of a realistic housing plan at this time. * * *

Upon completion of the South Portal Building, the Office of the Secretary, HEW, and related staff functions will occupy the 374,000 square feet of agency space, vacating in the process approximately 300,000 square feet of space in the HEW North Building. The 74,000 square feet difference between the area to be occupied and that to be vacated will be utilized to relieve existing overcrowding and to provide for administrative support areas, such as conference rooms, libraries, etc., which are currently lacking. Therefore, a difference in delivery time of the completed building will have no tangible monetary effect on the Office of the Secretary--rather, the additional seven and one-half months would necessitate continued operations in a less than ideal space situation.

Similarly, the 300,000 square feet to be vacated in the HEW North Building will be utilized to relieve conditions in other areas of HEW, to satisfy outstanding requests for space extant at that time, and to provide relief to the United States Information Agency's Voice of America (VOA) operation, also headquartered in the HEW North Building.

With respect to the latter, VOA has been operating under intolerable conditions for a number of years. Unfortunately, the program needs of HEW and VOA have been mutually exclusive insofar as providing necessary expansion space to either activity in that building. The cost of relocating entirely or the cost and inconvenience of a split operation have ruled out both alternatives for VOA in the past, with the only remaining alternative being the hope of eventual relief through relocation of the HEW function to the South Portal Building. At that time it is proposed that VOA be assigned a minimum of 40,000 square feet of the vacated space. Here again, the timing of delivery of the new building and subsequent vacating of space in HEW North is a matter of continued inconvenience to VOA rather than a matter of tangible savings.

As indicated earlier, the balance of the space to be vacated in HEW North Building will be utilized to relieve overcrowding in other components of HEW and to satisfy requests pending at that time. A seven and one-half months' differential would not obviate the need to lease space or result in cancellation of existing leases. With the knowledge that delivery of the new building is imminent, such requirements would simply be held in abeyance.

In summary, it is the position of this office that completion of the South Portal Building in late 1974 or seven and one-half months later would have no appreciable monetary impact on the Government and that the later delivery would only constitute an inconvenience to HEW and VOA rather than necessitate the expenditure of additional funds for leased space. Conversely, the earlier delivery would not result in savings through cancellation of leases or by obviating the need to lease.

In its letter of March 31 and at the conference on April 3, Hyman's counsel asserted that GSA's assessment of the situation was not concurred in by the Department of Health, Education, and Welfare (HEW). We were subsequently furnished a copy of a letter dated April 3, 1972, from the Assistant Secretary for Administration and Management, HEW, to the Commissioner, Public Buildings Service, "strongly urg[ing]" award on the basis of the earlier completion date. The following benefits of such a course of action are advanced: (1) rental savings on the order of $1.25 million resulting from the release of rental space now occupied by HEW and other agencies which will backfill Department-vacated space; (2) elimination of operating inefficiencies caused by dispersal of facilities; (3) anticipated program and staff expansion which will increase overcrowding. By letter dated April 7, 1972, the Assistant General Counsel responded to our informal request for GSA's evaluation of HEW's position as follows:

1. Cost Savings

* * * Management of space is GSA's function and HEW is not familiar with the overall needs of the Government. HEW's analysis based solely on its own situation is not valid. As indicated in * * * [the Director's] analysis, the rate of increase in the amount of leased space under the control of the General Services Administration, approximating some 62 percent during the past four years, would assuredly preclude the release of such space even though vacated by HEW. Therefore, no such savings would accrue to the Government *as a whole*. Secondly, as also indicated in * * * [the Director's] memorandum, it is impossible at this early date to prepare a definitive housing plan for the South Portal Building due to the uncertainty created by new and expanding HEW programs.

2. Operating Efficiencies

While we do not dispute the loss of operating efficiency engendered by overcrowding and split locations, these are intangibles against which a specific cost cannot be accurately assessed. In fact, the matter of inconvenience was recognized in * * * [the] memorandum.

3. Staffing Projections

HEW's comments concerning staffing support, rather than negate, GSA's position relative to the expanding requirements for leased space, the uncertainty surrounding the ultimate housing plan for South Portal, and the unlikelihood of releasing space currently under lease to GSA.

We agree with the foregoing statement especially since the responsibility for the construction of public buildings and the assignment

and reassignment of space is vested in the Administrator of General Services by the Federal Property and Administrative Services Act (40 U.S.C. 490 and 601, *et seq.*). In our view, GSA's position does not, as Hyman's counsel suggests, fail to recognize that there is some value in securing the space at an earlier date. It is simply GSA's position that such value is "intangible" and, therefore, should not be considered.

Recognizing that the selection of the ultimate awardee involves a considerable degree of discretion, we cannot say that GSA's position constitutes an abuse of discretion. GSA's approach to the selection—that is, its unwillingness to rely on cost factors that cannot be determined with reasonable certainty—generally comports with our view. 50 Comp. Gen., *supra;* 47 *id.* 233 (1967); 45 *id.* 59 (1965); *id.* 433 (1966); 36 *id.* 380 (1956); and 35 *id.* 282 (1955).

Similarly, this approach is reflected in GSA's rejection of the liquidated damages rate as a basis for delivery selection. The General Counsel expresses the view that "Reliance on liquidated damages as a measure of the worth to the Government of the 7½ month difference in completion times is not wholly determinative of the real difference in cost of the two contracts." We agree and add that liquidated damages, as such, are inappropriate as a measure of bid evaluation in view of the uncertainty in projecting the timeliness of future contract performance and delivery.

Accordingly, we can find no legal basis for interposing an objection to the proposed award of a contract to Blake. We do, however, suggest that it might be desirable to identify in future construction solicitations those factors that will be considered in selecting the shorter or longer completion dates.

[B-174736]

Bids—Buy American Act—Buy American Certificate—Issuance, Use, Etc.

The acceptance of a volunteer alternate offer on nozzle fin assemblies that contemplated incorporating component parts fabricated from import foreign steel in the domestic end item, for evaluation on the basis of issuing a duty-free certificate, would be unfair to other bidders, even though the purchase qualifies as emergency war material within the contemplation of paragraph 6-603.1 of the Armed Services Procurement Regulation (ASPR), and the Defense Department under ASPR 6 602 may issue duty-free certificates if there is an appropriation savings. Therefore, the request for proposals should be canceled and reissued to require offerors furnishing domestic end items incorporating foreign origin materials to submit alternate offers that evidence the duty for evaluation on an ex-duty basis if a duty-free certificate is issued, and negotiations should be reopened to permit all offerors to submit alternate offers on a duty-free basis.

To the Secretary of the Army, April 19, 1972:

Reference is made to letters, AMCGC–P, dated December 22, 1971, and January 14, 1972, from the Deputy General Counsel, Army Materiel Command, furnishing our Office reports relative to the protest of Hoffman Electronics Corporation (Hoffman) against the method of evaluation employed in evaluating its offer under request for proposal No. (RFP) DAAA21–72–R–0126, issued on October 8, 1971, by Picatinny Arsenal, Dover, New Jersey.

The subject RFP requested offers for nozzle and fin assemblies for use on the 2.75 inch rocket motor. The Government reserved the right to make more than one award for protection of the mobilization base and offers were solicited for quantities of 480,000, 540,000, 600,000, 660,000 and 720,000 each assemblies. Total combined awards were to be 1,200,000 each with the remaining program requirement of 68,000 each to be awarded under the Concurrent Option for Increased Quantity Clause to one of the two successful offerors under the basic solicitation, offering the lower option price. The evaluation of offers was exclusive of the offered option prices.

Preaward evaluation disclosed that regardless of the method of evaluation used with respect to Hoffman's offer, there would be no effect on the evaluated low offer of the FTS Corporation (FTS), Division of Hitco, for the quantity of 720,000. Consequently, an award of that quantity was made to FTS, as well as the additional 68,000 assemblies under the option clause. The evaluation, as determined by automatic data processing, also revealed that the combination of quantities which resulted in the lowest overall evaluated cost to the Government was 720,000 and 480,000 assemblies. It is the latter quantity, yet to be awarded, which is the subject of the instant protest.

In an earlier procurement for the same item, which was canceled because of a decrease in program requirements, as well as in the current solicitation, Hoffman advised the procurement activity that it intended to import foreign steel for fabrication of two component parts to be incorporated in and made a part of the deliverable domestic end item, and that its unit prices were based upon the inclusion of the clause set out in section 7–104.31 of the Armed Services Procurement Regulation (ASPR) "Duty Free Entry for Certain Specified Items (1971 Feb)" in any resulting contract.

Following oral telephonic negotiations on August 30, 1971, between Hoffman and the cognizant procurement personnel, the following memorandum of negotiations was prepared by the contract specialist at Picatinny:

a. *Concerning Import Duty and Duty Free Entry:*

In order that all offers received are treated equal it is the government's request that Hoffman's offered prices should include all duty tax, and the amount of duty listed separately. Then, if after evaluation, and should Hoffman be successful for award, a duty free entry certificate will be authorized with the understanding that the contract price will be reduced by the applicable amount of duty.

In this regard, line six quoted above was changed by striking through "will" and inserting in pen the word "may."

There followed a telegram dated September 30, 1971, from Picatinny to Hoffman which advised:

In the event you desire to submit an offer based on receiving duty free entry for foreign material you should submit an alternate price exclusive of duty and state the duty as a separate amount to permit proper evaluation of your offer.

Hoffman submitted its proposals in letters dated September 11, 1971, and October 15, 1971, for the respective solicitations stating substantially in part as follows:

It is Hoffman's contention that, there being no statutory provision to the contrary, our bid (offer) should be evaluated on the basis of actual or anticipated costs to the appropriation to be charged under this procurement. Accordingly, our offer must be evaluated on the basis of our obtaining the Duty-Free Entry Certificates plus an amount, if any, to cover administrative costs of such certification. The applicable regulations only require a determination of whether administrative costs to the Government warrant issuance of Duty-Free Entry Certificates. Furthermore, there are no regulations or other statutory provisions requiring adding duty as an equalization factor to a bid price which is based upon duty-free entry.

Hoffman's price for this Solicitation is based upon the duty-free entry of foreign material. It is that price, without addition of duty, that should be evaluated for contract award. (See Comptroller General Decision B-168333 dated April 7, 1970.) In the event the Contracting Officer's evaluation be based upon either our nonduty-free entry price or be based upon adding duty to our duty-free entry price for purposes of equalization with other offers, Hoffman hereby submits its protest, prior to award, and requests that such protest be forwarded to the Comptroller General of the United States for his decision.

The Board of Awards convened on November 4, 1971, and recommended that awards be made to FTS for 720,000 units and to Murdock Machine and Engineering Company (Murdock) for the contested 480,000 units as the low evaluated offeror when duty import taxes were included in the evaluation of Hoffman's offer.

The rationale for the Board's action is found in the minutes of its meeting of November 4 where it is stated:

* * * The Board felt that to accept the alternate bid of Hoffman Electronics without resoliciting the other bidders on the basis of duty free entry certificates for foreign items, would be improper and unfair to the other bidders. The Board is conscious of the fact that this is a negotiated solicitation and that it would be possible to resolicit or at least approach the other bidders and possibly receive lower prices based on using foreign material or components on the basis of duty free entry certificates. However, it did not recommend such action be taken as it would be at variance with the public policy enunciated by the President's current freeze order. * * *.

It is further the position of Picatinny and Murdock that with the exception of the duty-free entry Canadian Supplies Clause, ASPR 7–104.32, no other duty-free entry clause was made a part of the solicitation. Consequently, it is argued, offerors must submit offers in accordance with the terms and conditions as written in the solicitation and Hoffman was, in effect, told to include duty in its price pursuant to the clause set out in ASPR 7–103.10(a) "Federal, State, and Local Taxes (1971 Nov)" which was referenced in the solicitation. Also, in view of the change made in the minutes of negotiations quoted above, as well as in the legal memorandum furnished our Office as a part of the administrative report, there appears to be a question in the minds of the cognizant procurement personnel as to the propriety of deciding, prior to award, that duty-free entry certificates would be issued, and to an evaluation of offers on that basis.

The Department of Defense's policy as set out at ASPR 6–602 is to use duty-free entry certificates wherever there is a reasonable assurance that the savings to the military appropriations will outweigh the administrative costs of such certification. Once such a determination is made, to assure that this policy is carried out for emergency purchases of war materials abroad, ASPR 6–603.2(a) states " * * * one or both of the clauses in 6–603.3 *shall* be included in each negotiated contract in excess of $100,000 * * *." Also, 6–603.2(b) indicates that the quoted requirements in 6–603.2(a) are in addition to and independent of the requirements in 6–605 concerning duty-free entry clauses for Canadian supplies. [Italic supplied.]

ASPR 6–603.1, defining emergency purchases of war materials abroad, states in pertinent part:

> 6–603.1 Definition—Any procurement of foreign supplies constitutes "an emergency purchase of war material" if:
> (i) the supplies comprise—
> (A) weapons, munitions, * * *
> * * * * * * *
> (C) supplies, including components or equipment, necessary for the manufacture, production, processing, repair, servicing or operation of supplies within (A) * * * above; and
> (ii) the procurement—
> (A) is made in time of war or during a national emergency; * * *

Under the above criteria this procurement would qualify as an emergency purchase of war material abroad since the imported component of a weapon system is being made under the national emergency declared in 1950, which is still in effect. Since there is no evidence that the administrative cost involved in granting a duty-free entry certificate would outweigh the savings to military appropriations realized by granting such a certificate, a duty-free entry certificate would be appropriate for issuance to the successful offeror importing a foreign component.

Concerning the failure of the RFP to advise all offerors of possible issuance of duty-free entry certificates, as well as the pivotal question of whether duty should be included in evaluating proposals offering imported supplies, our Office in a strikingly similar case (B-146393, October 26, 1961) had occasion to observe:

> Concerning the failure of the Request for Proposal to advise all offerors of possible issuance of duty-free entry certificates, there does not appear to be any requirement of law or regulation for including such advice other than the "Duty-Free Entry-Canadian Supplies" clause set out in ASPR 6-605.2. * * *. Under the provisions of ASPR 6-602 the issuance of duty-free entry certificates to fixed-price contractors is conditioned upon the amount of savings for military appropriations, the cost and burden of issuance, and the degree of supervision which can be exercised over the supplies or materials to be imported. In the instant procurement it would appear to be the position of the contracting agency that a determination to issue duty-free exemption certificates, based upon substantial savings to the appropriation, could only be made on an after-the-fact basis, and that the inclusion of advice relative to such issuance in the Request for Proposal was not considered necessary or proper. While the logic of this conclusion may well be open to question from a management standpoint, we are aware of no provision of law or regulation which requires specific advance notice to offerors of possible issuance of duty-free entry certificates. In view thereof, and of the fact that all bidders are on constructive notice of the provisions of ASPR 6-602, we are unable to conclude that notice of possible issuance of duty-free entry certificates on tungsten ore was required to be included in the Request for Proposal.
>
> With respect to the evaluation of Firth Sterling's offer on an ex-duty basis, the basic purpose of evaluating any bid or offer is, of course, to determine which offer, if accepted, will result in performance of the contract with the least expenditure of appropriated funds and resulting cost to the Government. 37 Comp. Gen. 505. As indicated above, we see no sound basis upon which to question the contracting agency's determination to issue duty-free entry certificates on tungsten ore to be imported by Firth Sterling, and it necessarily follows that the inclusion in its evaluated offer price of all or any part of the import duty which would otherwise have been payable by Firth Sterling would have resulted in an evaluated offer price in excess of either the total charge to military appropriations or the total cost of contract performance to the Government. Under the circumstances, it is our opinion that the contracting agency was justified in evaluating both your offer, which proposed use of duty-free tungsten processed in Canada, and Firth Sterling's offer, which proposed use of tungsten imported from other nondomestic sources, on an ex-duty basis.

Also, in the opinion of our Office, B-168333, April 7, 1970, cited by Hoffman, we stated:

> We believe that absent a statutory or other policy provision to the contrary, a bid should be evaluated on the basis of actual or anticipated costs to the appropriation to be charged under the procurement. In the circumstances applicable here, assuming the Buy American Act did not apply, the duty should not have been added to the Sumter bid for evaluation purposes.

While in a later decision (May 27, 1970) in the above case we found the Balance of Payments Program applied, and under the circumstances there present the protestant's bid could not be accepted, we are still of the view that the rationale of the April 7 decision is for application in the instant procurement since it is agreed that a domestic end item will be offered which is not for immediate or direct overseas shipment, and neither the Buy American Act, 41 U.S.C. 10a, nor the Balance of Payments Program is therefore at issue. It follows that

duty should not be included in the evaluation of offers proposing domestic end items.

Both the Arsenal and Murdock argue that a reference to ASPR 7-103.10(a) in the solicitation clearly advises offerors that duty must be included in their proposals, since that provision indicates duties are to be included in the bid price. We do not agree. The opening statement of that clause provides "*Except as may be otherwise provided in this contract*, the contract price includes all applicable Federal, State, and local taxes and duties." Where, as in the instant case, an offeror submits an alternate proposal in which he clearly indicates that duties are not included in the offered price, it follows that the exception in the clause quoted above would be applicable to any contract resulting from acceptance of such alternate proposal. In view thereof, we cannot agree that ASPR 7-103.10(a) requires the inclusion of duty in all offers. [Italic supplied.]

From the foregoing, it is clear that Hoffman was correct in its assertion that its offer should be evaluated without duty since it was to be issued a duty-free certificate. However, for reasons discussed below, we are also of the opinion that an award cannot at the present be made to either offeror.

Since the commencement of our consideration of this matter, by telegram dated February 15, 1972, Murdock advised our respective offices that it also was quoting on the basis of importing foreign steel, and import duty was included in its quoted price. We have also been informally advised by Murdock that at least one other offeror is believed to have quoted on the basis of using imported foreign steel. Therefore, in order to assure that all offerors will be competing on an equal basis, all offers must be evaluated on the same basis, i.e., with duty, if any, excluded.

In this regard, we are of the view that regardless of the Board's interpretation of the applicable regulations, it should have followed one of the suggested approaches at that time, since the telegraphic advice of September 30, 1971, to Hoffman concerning pricing was not given to other offerors as is required by ASPR 2-208(c). Also, the Board's statement that neither course of action was taken because it would be at variance with the current freeze order, overlooks the explicit instructions given in Defense Procurement Circular (DPC) No. 91, Supplement No. 2, August 30, 1971, which provided in part:

> The following guidance with regard to purchase of foreign-made items is provided:
>
> 1. All provisions of ASPR Section VI continue, to apply. Duty, including the additional 10 percent, shall be evaluated when appropriate. Evaluation of bids and proposals involving Canadian end products shall continue to be handled exactly as prescribed in ASPR 6-103.5 and 6-104.4. Payment of duty by contractors, including the additional 10 percent, shall continue to be waived as provided in ASPR Section VI, Part 6. * * *

In the present procurement for the remaining 480,000 units, we must therefore conclude that the RFP should be canceled, and new offers solicited with such modifications or amendments to the RFP as may be necessary to clearly reflect that offerors furnishing domestic end items which incorporate materials of foregin origin should submit alternate offers evidencing the amount of duty on such materials, and that such offers would be evaluated on an ex-duty basis if it was decided to issue a duty-free entry certificate. Alternatively, negotiations should be reopened for the sole purpose of permitting all offerors to submit alternate offers on a duty-free basis, if they so desire, and such offers should be evaluated consistent with this decision.

The enclosures furnished with the report are returned.

[B-164515]

Compensation—Wage Board Employees—Conversion to Classified Positions—Coordinated Federal Wage System—Rate Establishment

In setting rates of pay for employees whose positions are converted without a change of duties from the Coordinated Federal Wage System to the General Schedule (GS) system in a wage area where a 15 percent cost-of-living allowance is authorized (5 U.S.C. 5941), the allowance is not for consideration in comparing the GS rate range with the wage rate since section 539 of the Civil Service Regulations and not the "highest previous rate" rule in section 531 of the Regulations is for application, as an agency has no discretionary authority in setting such conversion rates. Therefore, a wage board annual rate of $11,377.60 under section 539.203(c) should have been set at GS-9, step 4, $11,517 per annum, and not at GS-9, step 1, $10,470 per annum, plus the 15 percent cost-of-living allowance ($12,040.50), and corrective action, including the retroactive payment of additional compensation, where appropriate, is required.

To Major J. S. Zamparelli, Department of the Air Force, April 20, 1972:

Reference is made to your letter dated December 28, 1971, with enclosures, reference ACF, forwarded here by letter of January 25, 1972, from the Assistant Comptroller for Accounting and Finance (HQ USAF), requesting an advance decision as to whether the Department of the Air Force is employing the proper method in setting rates of pay for those employees whose positions are converted, with no change of duties, from the Coordinated Federal Wage System to the General Schedule system in a wage area where a 15 percent cost-of-living allowance as authorized by 5 U.S.C. 5941 is provided for General Schedule employees.

Under the method employed by the Air Force, the General Schedule rate is used which, when increased by the 15 percent cost-of-living allowance, most closely approximates the wage board rate of the position prior to conversion.

You have submitted, as representative of the question here involved, the case of Mr. Yoshiyuko R. Sakai. The record indicates that prior to the conversion of his position from wage board to General Schedule, Mr. Sakai was compensated at the rate of WB–10, step 3, $5.47 per hour, $11,377.60 per annum. On conversion, his position was established at GS–9, step 1, $10,470 per annum plus 15 percent cost-of-living allowance ($12,040.50).

The foregoing action was questioned by Mr. Thomas Fujikawa, Administrative Assistant to Local Union No. 1186, International Brotherhood of Electrical Workers, in a letter dated September 9, 1971, to the United States Civil Service Commission. In reply thereto the Bureau of Policies and Standards of the Commission, by letter dated October 19, 1971, advised that it was understood that certain positions, apparently as a result of a classification decision, were converted from the Coordinated Federal Wage System to the General Schedule system, and that if this was the case, part 539 of the Civil Service regulations would apply in setting the pay. Applying part 539, it was stated that Mr. Sakai would be entitled, upon conversion to a GS–9 position, to have his pay set at GS–9, step 4, $11,517 per annum. By letter dated December 17, 1971, the Director, Bureau of Policies and Standards of the Commission, brought this matter to the attention of Mr. W. J. Abernethy, Director of Civilian Personnel, Department of the Air Force. It was stated in such letter that:

Mr. Fujikawa presented us with the specific case of a Mr. Yoshiyuko R. Sakai, one of nine employees who were affected similarly. Mr. Sakai before his conversion to a General Schedule position, had an hourly wage rate of $5.47. We understand this is a wage rate based on local prevailing wages, and does not include additional pay of any kind. It is therefore a rate of basic pay as defined by section 539.202(c) of the Civil Service regulations. This rate should then have been converted to an equivalent annual rate by multiplying it by 2080, the number of hours of work in a work year, resulting in an equivalent annual rate of $11,377.60. Under section 539.203(c) of the regulations, Mr. Sakai would have been entitled, upon conversion to a GS–9 position, to have his pay set at GS–9, rate 4, $11,517 a year. However, we understand that Mr. Sakai's pay was set instead at rate 1 of GS–9, $10,470 a year. This apparently resulted from taking the fifteen percent cost-of-living allowance for General Schedule employees in Hawaii into consideration when comparing the General Schedule rate range with Mr. Sakai's wage rate.

It appears that what may have happened in this case is that the Commission's "highest previous rate" rule (section 531.203(c) of the regulations) was applied instead of the Part 539 conversion regulations that should have been used. Under the highest previous rate rule, unlike the Part 539 regulations, an agency is allowed considerable discretion in setting an employee's rate of pay. The Comptroller General has ruled (45 Comp. Gen. 88) that it is appropriate for an agency to take a cost-of-living allowance into consideration when an employee moves from a wage position to a General Schedule position and his pay is set under the agency's discretionary authority under the highest previous rate rule. This does not apply, however, to the setting of pay under the regulations in Part 539, where no such discretion is allowed agencies.

We would appreciate being informed of how this matter is resolved.

As surmised in the above-quoted portion of the Civil Service Commission letter, the file shows that Mr. Sakai's GS rate was established pursuant to regulations set forth in Air Force Manual (AFM) 40–1, section 5211, which supplements Federal Personnel Manual (FPM) Supplement 990–2, and Air Force Supplement S2–4a(2), section 531–8.02 to FPM Supplement 990–2. These are based on part 531 of the Civil Service regulations.

Part 539 of the Commission's regulations provide in pertinent part:

SEC. 539.201 *Applicability.* This subpart applies in fixing the rate of basic pay of each employee initially *brought into a position subject to the General Schedule by converting his position to a position subject to the General Schedule.*

SEC. 539.202 *Definitions.* * * *

* * * * * * *

(c) *Rate of basic pay* means the rate of pay fixed by law or administrative action for the position held by an employee *before any deductions and exclusive of additional pay of any kind.*

SEC. 539.203 *Rate of basic pay in conversion actions.* When an employee occupies a position not subject to the General Schedule and the employee and his position are initially brought under the General Schedule pursuant to a reorganization plan or other legislation, an Executive order, a decision of the Commission under section 5103 of title 5, United States Code, or an action by an agency under authority of section 511.202 of this chapter, the agency shall determine the employee's rate of basic pay as follows:

(a) When the employee is receiving a rate of basic pay below the minimum rate of the grade in which his position is placed, his pay shall be increased to the minimum rate.

(b) When the employee is receiving a rate of basic pay equal to a rate in the grade in which his position is placed, his pay shall be fixed at that rate.

(c) When the employee is receiving a rate of basic pay that falls between two rates of the grade in which his position is placed, his pay shall be fixed at the higher of the two rates. [Italic supplied.]

We agree with the view of the Civil Service Commission that the compensation of the employees here involved should have been fixed under part 539 of the Commission's regulations rather than part 531. Therefore, corrective action should be taken, including the payment of retroactive additional compensation, where appropriate.

The file forwarded with your submission is returned herewith.

[B–174809]

Contracts—Negotiation—Determination and Findings—Finality

Although the written finding, pursuant to 10 U.S.C. 2310(b), by a contracting officer of his determination to negotiate a procurement pursuant to the "public exigency" exception to the use of formal advertising set forth at 10 U.S.C. 2304(a)(2), as implemented by paragraph 3–202.2(vi) of the Armed Services Procurement Regulation, is final under the terms of the statute, the United States General Accounting Office is not precluded from questioning whether the determination based on the findings is proper. To the extent prior decisions citing 10 U.S.C. 2310(b) are contrary to this holding, they should not be followed.

To the Secretary of the Army, April 20, 1972:

Enclosed is a copy of our decision of today concerning the protest of American Optical Corporation against the award of a contract to another firm under RFP DAAA25-72-R-0202, issued at Frankford Arsenal, Philadelphia, Pennsylvania.

Although we have denied the protest, we believe a certain portion of the record warrants further comment.

The supplemental report dated February 28, 1972, from Headquarters, Army Materiel Command, states as the position of that Headquarters, that "a determination and findings under the public exigency exception is final and not subject to question by [our] office." This comment was part of a response to our inquiry concerning the validity of the required "Determination and Findings" (D&F) signed by the contracting officer, wherein he determined to negotiate this procurement pursuant to the "public exigency" exception to the use of formal advertising set forth at 10 U.S.C. 2304(a)(2), and as implemented by ASPR 3-202.2(vi).

We are of the view that Congress intended for finality to attach only to the "findings" contained in such a D&F. In this regard 10 U.S.C. 2310(b) reads as follows:

(b) Each determination or decision under clauses (11)-(16) of section 2304(a), section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title and *a decision to negotiate contracts under clauses* (2), (7), (8), (10), (12), or for property or supplies under clause (11) of section 2304(a), *shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that* (1) are clearly illustrative of the conditions described in clauses (11)-(16) of section 2304(a), (2) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (3) support the findings required by section 2306(g)(1), (4) clearly indicate why advance payments under section 2307(c) would be in the public interest, (5) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest, or (6) *clearly and convincingly establish with respect to the use of clauses* (2), (7), (8), (10), (12), and for property or supplies under clause (11) of section 2304(a), *that formal advertising would not have been feasible and practicable. Such a finding is final* and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies. [Italic supplied.]

In light of the terms of this statute, we are precluded from disturbing the findings upon which the "public exigency" exception to formal advertising is justified. However, the statute does not preclude our questioning whether the determination, based on those findings, is proper.

To the extent that this Office has issued any prior decisions citing 10 U.S.C. 2310(b) as authority for the position urged by Headquarters, Army Materiel Command, those decisions should not be followed.

The file forwarded with the report to our Office on February 4, 1972, by the Deputy General Counsel Headquarters, Army Materiel Command, is returned.

[B-173882]

Leases—Agreement to Execute Lease—Federal Project Status—Relocation Expenses to "Displaced Persons"

Trailer park tenants who were notified to vacate only after the Government signed an agreement to lease the building to be constructed on the vacated land, are "displaced persons" as a result of Federal and federally assisted programs within the contemplation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and the tenants are entitled to relocation expenses and assistance under the act since the lease transaction amounts, in effect, to a Federal lease-construction project, even though the five point criteria established to determine a building is "in existence"—title; design; construction financing; building permit; and a fixed completion date—to assure compliance with the appropriation prohibition concerning the payment of rental on lease agreements for space in buildings erected for the Government, had not been met, the financing arrangement not having been completed as of the date of issuance of the space solicitation.

To the Acting Administrator, General Services Administration, April 21, 1972:

Further reference is made to your letter of August 17, 1971, in which you request our decision as to whether in the circumstances described, the tenants of the Temple Trailer Village, Alexandria, Virginia, are entitled to relocation expenses and assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), Public Law 91-646, 84 Stat. 1894, 42 U.S.C. 4601 note. By letter dated August 31, 1971, Mr. Henry H. Krevor, attorney for a number of the tenants of the trailer park, presented his views on the entitlement of the tenants to relocation assistance under the act. By letter dated September 15, 1971, we requested your views on the points presented by Mr. Krevor. The views of the General Services Administration (GSA) were furnished us by letter dated October 15, 1971, from Mr. Hugh H. Brister, Assistant General Counsel, Public Buildings Division (GSA). In a letter to us dated October 26, 1971, Mr. Krevor commented on Mr. Brister's letter.

As described by GSA the facts giving rise to the question presented are hereinafter set forth. On June 30, 1971, GSA accepted an offer made by the joint venture of Hubert N. Hoffman and the American Trailer Company, Inc., to lease about 480,000 square feet of space in a building located in Alexandria, Virginia. The offer was made in response to a solicitation for offers (SFO) for space in the general area of Alexandria. The space offered by the joint venture is in a building which, you state, meets the criteria prescribed in the SFO for qualifying as a building under construction, although actual con-

struction had not started. The site of the building is a 12½ acre area owned by American Trailer Company, Inc., which for several years has been operated as a mobile home or trailer park identified as Temple Trailer Village. The trailer company entered into a joint venture agreement on October 6, 1967, with Hubert N. Hoffman to develop this 12½ acres, along with an adjoining 12½ acres of land owned by Hoffman, for commercial office buildings and other rental space. The building in which the leased space is offered is in furtherance of that agreement. GSA states that the Government's lease will cover only the office space in the building and that the owner publicly announced that the remaining space in the building will be available for commercial tenants. Mr. Krevor states, however, that that space not being used by the Government for offices, will be used for services to support the Government employees, such as a cafeteria. Prior to GSA's acceptance of the offer, the offeror advised that although construction of the building had not yet started, site preparation work had begun on April 1, 1971. GSA was also informed that the owners of trailers in the Temple Trailer Village were notified in early July that the trailer park would be closed and utilities discontinued after August 31, 1971.

Mr. Krevor, who represents a number of unidentified owners of the trailers parked in the Temple Trailer Village, is seeking relocation assistance and expenses for his clients from GSA, asserting that the Relocation Act is applicable in this situation, since he claims that the building would not be constructed if the Government had not signed a lease therefor. GSA, however, is of the opinion that the tenants of Temple Trailer Village are not entitled to payments of relocation expenses and relocation assistance under the Relocation Act. The purpose of your submission is to resolve this difference of opinion between GSA and the occupants of Temple Trailer Village.

The purpose of title II of the Relocation Act is "to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as the result of programs designed for the benefit of the public as a whole." Section 202 of the Relocation Act, 42 U.S.C. 4622, provides that whenever the acquisition of real property for program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after the effective date of the act, 42 U.S.C. 4623, the head of such agency shall make a payment to such displaced person for his moving and related expenses. Section 203 of the act provides that in addition to payments otherwise authorized by title II, the head of the Federal agency shall make an additional payment which cannot exceed $15,000 "to any displaced person who is displaced from a dwelling

actually owned and occupied by such displaced person for not less than 180 days prior to the initiation of negotiations for the acquisition of the property." Section 204 of the Relocation Act, 42 U.S.C. 4624, which is entitled "Replacement Housing for Tenants and Certain Others," states that "In addition to amounts otherwise authorized by this title, the head of the Federal agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under section 203 which dwelling was actually and lawfully occupied by such displaced person for not less than 90 days prior to the initiation of negotiations for acquisition of such dwelling."

Section 205 of the act, 42 U.S.C. 4625, contains provisions for relocation assistance advisory services.

For the purposes of the Relocation Act the term "displaced person" is defined in section 101(6), 42 U.S.C. 4601(6), as meaning:

> * * * any person who, on or after the effective date of this Act, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; * * *

One of the points of contention between GSA and Mr. Krevor centers on the entitlement of trailer owners to assistance under the Relocation Act. This disagreement revolves around a statement in Mr. Brister's letter to us that the discussion in Mr. Krevor's letter of August 31, 1971, relating to establishing mobile homes as dwellings for entitlement purposes "omits the essential prerequisites for entitlement in section 203 of PL 91-646." GSA reports that the essential prerequisites are set forth on page 10 of House Report No. 91-1656, which states, in pertinent part, as follows:

> To qualify for any payment under this section, a displaced person must move from a dwelling owned and occupied by him for not less than 180 days before initiation of negotiations for the acquisition of the property. The dwelling may be a single family building, a one-family unit in a multi-family building, a unit of a condominium or cooperative housing project, or any other residential unit, *including a mobile home which either is considered to be real property under State law, cannot be moved without substantial damage or unreasonable cost, or is not a decent, safe and sanitary dwelling;* * * * [Italic supplied.]

GSA states:

> In the present case the Government is not acquiring the mobile home "dwelling." The "tenants" have no interest in the land other than a short time right to park for a stated fee. No showing or claim has been made that the trailers are real property or cannot be moved.

In reply Mr. Krevor states that the act does not require that the Government acquire the mobile home, or that the mobile home be real property, or that the owner of the mobile home owns or has any par-

ticular interest, other than lawful occupancy, in the site of the project for which he is displaced. Mr. Krevor adds:

> It is particularly important to note in this regard that the owner of a mobile home who occupies rented space is an owner of a dwelling with respect to the physical facility, and a tenant with respect to the site; and these factors must be taken into account in determining the benefits to which he may be entitled under the Act.
>
> As a practical matter, owners and renters of mobile homes are eligible for assistance under the Act to the same extent as if displaced from traditional housing. * * *

We understand informally from GSA that, in its letter, it was discussing the entitlement of certain trailers under section 203, and that it would probably agree that owners and renters of mobile homes who are "displaced persons" as defined by section 101(6) would be entitled to the benefits of the Relocation Act. In this regard, it appears to us that in the circumstances described in the committee report benefits would be in accordance with section 203 for replacement housing for homeowners, and in those circumstances where the trailers can be moved and relocated, benefits would be payable under section 204 for replacement housing for tenants and certain other homeowners. Relocation assistance advisory services under section 205 would appear to be available in either circumstance.

In regard to whether the benefits of the Relocation Act are applicable to the instant circumstances, it is GSA's position that the wording of Public Law 91-646 makes it clear that the acquiring of title to real property is, generally, the key to its application. GSA states that the Relocation Act is applicable to the Government's leasing transactions only in regard to space acquired by condemnation resulting in displacement of an occupant of such space and—insofar as pertinent here—to lease construction of buildings which have received congressional approval pursuant to the language, first included in the Independent Offices Appropriation Act, 1963, Public Law 87-741, 76 Stat. 728, and included in all succeeding annual GSA appropriation acts, which provides:

> No part of any appropriation contained in this Act shall be used for the payment of rental on lease agreements for the accommodation of Federal agencies in buildings and improvements *which are to be erected by the lessor for such agencies* at an estimated cost of construction in excess of $200,000 or for the payment of the salary of any person who executes such a lease agreement: *Provided*, That the foregoing proviso shall not be applicable to projects for which a prospectus for the lease construction of space has been submitted to and approved by the appropriate Committees of the Congress in the same manner as for public buildings construction projects pursuant to the Public Buildings Act of 1959 [Italic supplied.]

GSA contends that Government lease transactions, aside from space acquired by condemnation and aside from lease construction projects approved by the appropriate congressional committees, are not Federal programs or projects, but rather are construction projects by the

owner for his own purposes. GSA contends that in the Government's normal leasing transactions, the landowner is not deprived of his ownership nor is he displaced, but rather he is voluntarily changing the use of his land.

In support of its position GSA states that it has continuously and unequivocally testified before congressional hearings on proposed relocation assistance bills that the proposed legislation should not be, and was not considered by GSA to be, applicable to Government voluntary leasing transactions. GSA states that it has taken this position because it is concerned not only with the general application of the Relocation Act to lease transactions, but that it was particularly concerned that if title III of the act was deemed to be applicable to space lease transactions, GSA's long established custom and practice of obtaining space by soliciting offers from lessors to obtain the most favorable rental for the Government would have to be revised to reflect the requirement in section 301, 42 U.S.C. 4651, that the Government must pay at least the appraised value of the interest it is obtaining in the land.

The general question as to whether the provisions of the Relocation Act are applicable to Government leasing transactions in any or all cases other than space obtained by condemnation and Government lease-construction projects approved by the appropriate committees of the Congress as provided for in GSA's annual appropriation act is not before us and we express no opinion thereon. Rather, the issue before us is whether—under the facts and circumstances involved here—the tenants of the Temple Trailer Village are "displaced persons" who have moved from real property or have moved their personal property from real property, as the result of the acquisition of such real property, in whole or in part, for a program or project undertaken by a Federal agency, and if so, whether they are entitled to the benefits of the Relocation Act.

Mr. Krevor states that the subject building would not be constructed and his clients would not be displaced if it were not for the agreement with GSA to acquire a long-term leasehold interest in the building when constructed. He states that it is clear that "the developers did not intend to construct a building for their own purposes or for speculation, and that the site owner did not intend to require occupants to move in the absence of a prior agreement with GSA."

Mr. Krevor contends that if GSA had not entered into the lease, the American Trailer Company which owns the land and which is the landlord of the Temple Trailer Village, would not have issued a notice to vacate to the tenants of the village. He further contends that:

> * * * GSA's approval of the lease agreement necessitated and prompted the displacement of the village residents. Clearly, this is Government action within the scope of the Uniform Act, at least in the absence of intervening facts estab-

lishing that immediately prior to the Government's approval of the lease agreement on June 30, 1971, the proposed-lessor had intended to proceed with the prompt erection of the building, irrespective of any lease agreement with GSA.

In further support of his position, Mr. Krevor refers to a statement reported in a local newspaper as well as his own conversations with the President of the American Trailer Company, which owns the land and operates the trailer park, and concludes that the American Trailer Company deliberately failed to give any notices to vacate until GSA had agreed to acquire the leasehold interest, and that the building would not be built in the absence of such agreement. He states that for the purposes of the Relocation Act, the question is not whether prior committee clearance is required to enter into the lease, but rather whether the Government or the developer caused these persons to be displaced.

It is GSA's position that the instant situation constitutes a voluntary lease transaction and that "the fact that the Government needed space and the lessor offered space in its building does not make the construction of the building a Federal project." GSA states that the building was planned for construction by the owner for its (the owner's) own purposes and that such purpose may have been for speculation is of no consequence, since it was the landowner's decision to change the use of his land that caused him to require his tenants to move from the land. GSA further states that "the situation is no different from a lessor requiring a tenant to move to make room for another tenant, which in this case happens to be the Government."

In support of its position, GSA notes that its basic statutory authority in section 210(h)(1) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 490, authorizes the leasing of space necessary for the accommodation of Federal agencies in buildings "which are in existence or to be erected by the lessor for such purposes." They point out that the provision in the appropriation act, quoted above, is clearly limited to buildings which are "to be erected by the lessor for such agencies" and that its authority to lease space in existing buildings has not been affected.

GSA contends that for the purposes of its statutory authority, a building need not be available immediately for occupancy, but rather that the building will qualify as an existing building if the space therein will be available for occupancy when it is needed by the Government. GSA states that:

* * * We believe that for the purposes of our statutory authority a building under construction by an owner for his own purposes, including speculation, with a fixed completion date compatible with the Government's need is certainly considered to be in existence for lease purposes. The percentage of completion or construction progress is immaterial as long as the availability date coincides with the space need. It logically follows, applying the factors of compatibility of availability date and need dates and the building being intended for the own-

er's purposes, that building construction in the physical sense need not have begun in order for a building to be considered "in existence." In this connection GSA developed the 5-point criteria, which are hereinafter listed, for application where construction in the physical sense had not started. We regard these criteria as a valid test and their application as consistent with our statutory authority.

We consider that the well advertised and continuing use of this 5-point concept nationwide by GSA commencing in 1964 without objection establishes through custom and usage its acceptability as an authorized method of space procurement.

In its regulations or instructions and in the subject solicitation, GSA defines buildings "which are to be erected by the lessor for such agencies" to exclude new buildings, or extensions or additions to existing buildings the construction status of which, *on the date of issuance of the solicitation, met all of the following conditions:*

I. Title to the site was vested in the offeror or he possessed such other interest in and dominion and control over the site to enable starting construction.
II. Design was complete.
III. Construction financing fully committed.
IV. A building permit for construction of the entire building, extension or addition had been issued.
V. Actual construction is currently in progress or a firm construction contract with a fixed completion date has been entered into.

As you know, our Office reviewed a number of leases entered into by your agency under the above-mentioned five-point criteria. Essentially, we found that GSA, through discussions and letters, made its space requirements known to private developers interested in constructing buildings that would be leased to the Government. It appears that when first contacted, none of the developers studied had a building under construction (either foundation or structural work) or had met GSA's five conditions under which it classified buildings as being under construction; and that GSA did not issue its solicitations for offers until after it determined to its satisfaction that at least one of the developers had met the five conditions.

Thus, we have some doubt that the manner in which GSA assured itself that the five conditions were met was sufficient to assure compliance with the appropriation provision. Based on all the facts and circumstances disclosed by our review, we are of the opinion that these transactions—at least in those cases where no substantial foundation or structural work had been performed as of the date of the issuance of the SFO—amount, in effect, to Government lease construction projects for the purposes of the Relocation Act.

In any event, in the instant case, it is our view that the proposed building did not meet the five-point criteria as of the date of the GSA solicitation, i.e., as of December 31, 1971, and thus, cannot qualify under GSA's criteria as a building in existence. While it is possible—as alleged by Mr. Krevor—that more than one of the five-point criteria were not met by the builder, it is clear to us that at least item III of

the criteria—which requires construction financing to be fully committed on the date of issuance of the SFO—was not met. The commitment letter dated October 19, 1970, from the United Virginia Bank to the joint venturers states:

> In accordance with our conversation of this date regarding a construction loan, we agree to make you a $17,000,000 construction loan secured by an office building containing approximately 500,000 square feet of net rentable area, to be erected on the property known as Temple Trailer Village, City of Alexandria, Virginia. This commitment is predicated upon the following:
>
> 1. Triple "A" tenant.
> 2. Such other requirements that are normal to our construction loan lending policies and practices.

In our view, this financial arrangement, which is contingent upon the signing of a lease by a Triple "A" tenant, cannot be said to amount to fully committed construction financing. The five-point criteria must be met on the date of issuance of the SFO which would be prior to the Government's signing a lease for the building. In this case, the construction financing would not be, and was not, fully committed until the Triple "A" tenant—here the United States—entered into a lease of the building or at least, an agreement to lease. In this same connection we also note that it was not until after GSA signed the agreement to lease that the owners of the trailers in Temple Trailer Village were, in effect, notified by the lessor to vacate.

Since on the date of issuance of the SFO there was not met at least one of the five conditions prescribed by GSA for considering a proposed building as one not "to be erected by the lessor" for the Government, the proposed building must be considered a "building to be erected by the lessor" for the Government. Thus, it appears to us that the subject transaction amounts, in effect, to a Government lease-construction project for the purposes of the Relocation Act.

It is clear that persons displaced by Federal lease-construction projects are entitled to benefits under the Relocation Act. This is admitted by GSA which has always taken the position that the Relocation Act is applicable to lease-construction projects which are to be constructed at an estimated cost in excess of $200,000 and which have received the approval of the appropriate committees of the Congress as provided for in the various annual GSA appropriations acts. GSA takes this position because it regards the lease construction of buildings approved in the same manner as public buildings project as analogous to the type of lease construction employed by the former Post Office Department and the House Committee report on the Relocation Act regards persons displaced as the result of Post Office lease-construction projects as being entitled to benefits under such act. In discussing the definition of the term "displaced person" it is stated in House Report No. 91–1656 (page 4) that:

It is immaterial whether the real property is acquired before or after the effective date of the bill, or by Federal or State agency; or whether Federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a Federal or Federal financially assisted program or project. For example:

* * * * * * *

(b) Post Office Department witnesses before the committee called attention to the fact that although the Department's construction requirements involve about 1,000 buildings annually, the postal building program, as such, accounts for only a few construction starts each year. Occasionally, the Department acquires the site and transfers it to the successful bidder for construction and lease back to the Department. In most cases, however, building sites are obtained through the Department's leasing authority. Usually, these sites are controlled through an option procedure with title neither vesting in or passing through the Post Office Department. Instead, the option is assigned to a successful bidder who becomes the owner of the land, and the Department's long-term lessor. Some of these sites are for large postal facilities to be constructed in metropolitan areas where the only available and suitable land is occupied by numerous low-income individuals and families, and by small businesses.

It makes no difference to a person required to move because of the development of a postal facility, which method the postal authorities use to obtain the facility, or *who acquires the site or holds the fee title to the property. Since the end product is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is a displaced person entitled to the benefits of legislation.* [Italic supplied.]

Based on this discussion in the committee report, we agree with GSA that lease-construction projects approved by the appropriate congressional committees are Federal projects for the purposes of the Relocation Act.

As indicated above, it is our view that these transactions--including the one involving the Temple Trailer Village--amount, in effect, to Government lease construction projects, notwithstanding that the five points were not complied with. However, as we stated in our decision of March 17, 1972, 51 Comp. Gen. 573, we do not propose to initiate any question (in the context of the issues discussed herein) with respect to payments under existing leases where there was not complete compliance with the five points. Accordingly, since the residents were required to move to make way for a building to be erected on the trailer park property for the primary use of the Federal Government, it is our view that the benefits of the Relocation Act, including payment of relocation expenses thereunder, should be made available to those occupants of Temple Trailer Village who otherwise qualify for such benefits.

[B-173968]

Checks—Payees—Joint—Divorce of Payees

The negotiation of joint income tax refund checks issued in the names of a divorced couple on the basis of a joint income tax return by the claimant's former wife, without his knowledge or permission, did not extinguish the liability of the United States or pass title to the endorsing bank, who therefor is subject to reclamation proceedings, as, absent a statute or court decision to

the contrary, the joint payees may not be considered as one person or entity so that the endorsements of both were required for negotiation of the checks. Moreover, the Uniform Commercial Code requires that all joint payees must endorse and discharge a negotiable instrument; and while the code is not necessarily determinative with respect to Government checks, it should be followed to the maximum extent practicable in the interest of uniformity where it is not inconsistent with Federal interest, law, or court decisions. 50 Comp. Gen. 441 modified.

To the Treasurer of the United States, April 21, 1972:

By letter of July 23, 1971 (your reference 1–PMC), the Special Assistant Treasurer, Check Claims Division, Department of the Treasury referred to our Claims Division the claim of Mr. Alex H. Christie for the proceeds of Treasury checks No. 21,699,117 (for $1,908.04), and No. 21,699,118 (for $3,238.67), dated April 17, 1970, symbol 3123, to the order of Alex H. and Grace Christie.

The subject checks were issued on the basis of a joint income tax return filed in the names of Alex H. and Grace Christie, Route 1, Box 52, Arcata, California. A claim dated September 22, 1970, was received by your office from copayee Alex H. Christie, alleging that the checks were received and negotiated by his formed wife, Grace Christie, without his knowledge or permission. On January 18, 1971, refund of the amounts involved was requested from the endorsers and the case referred by your office to the United States Secret Service for investigation.

The endorsers protested your office's reclamation action, contending that Mrs. Christie had her husband's permission to sign the checks in question. The Secret Service furnished your office a report of their investigation findings, which included copies of the Interlocutory Judgment of Divorce as well as a Property Settlement Agreement. On April 28, 1971, your office wrote Mr. Christie denying his claim, based on the provisions of the Property Settlement Agreement, dated March 1969, which read, in part—

* * * That, except as hereinafter and herein specified and provided, each party hereto is hereby released and absolved from any and all duties, obligations and liabilities for the future acts of the other, and that each of said parties hereby releases the other from any and all liabilities, debts or obligations of any kind, class or character incurred by the other from and after this date, and from any and all claims and demands. * * *

Also, we have been informally advised by a representative of your office that although not so stated in the April 28 letter the denial of Mr. Christie's claim was based, in part, on our decision of December 28, 1970, 50 Comp. Gen. 441. Mr. Christie protested your office's denial of his claim and denies he authorized his former wife to endorse the checks.

Because the decision to deny Mr. Christie's claim was premised upon the effect and interpretation of language included in the Property

Settlement Agreement, the checks and file were forwarded here by the Special Assistant Treasurer for review and decision concerning the merits of the claim.

Our above-cited decision (50 Comp. Gen. 441) involved a claim by a wife for one-half of the proceeds of an income tax refund check (resulting from a joint tax return) which had been negotiated by the husband who endorsed his wife's name on the check without her authority or knowledge. The Internal Revenue Service (IRS) took the position that since under IRS laws a husband and wife who file a joint return are jointly and severally liable for the tax, the husband and wife jointly and severally represent the person entitled to any refund and that a refund or credit to either husband or wife will extinguish the liability of the United States for the refund. In denying the wife's claim we relied, in part, on the position of IRS. In the course of our decision we supported our position by stating that payment to one of several joint payees on a negotiable instrument discharges the entire claim.

We have carefully reconsidered our position that joint payees (husband and wife) of a joint income tax refund check may be considered as one person or entity so that endorsement of the check by one payee and payment of the proceeds thereto extinguishes the liability of the United States.

We are now of the view that absent a statute or court decision to the contrary, joint payees (husband and wife) of a joint income tax refund check may not be considered as one person or entity, so that the endorsement of both is required on the check, for the purposes of negotiation. We base this view, in part, upon certain tax cases which indicate that a husband and wife filing a joint return are not treated as a single unit for all purposes. See for example *Dolan* v. *Commissoner*, 44 T.C. 420 (1965); and *Coerver* v. *Commissioner*, 36 T.C. 252 (1961). Also, in connection with our reconsideration we noted that section 3–116 of the Uniform Commercial Code—which has been adopted in all States but Louisiana—requires that all joint payees must endorse and discharge a negotiable instrument. We are aware, of course, that the rights and duties of the Government on the commercial paper it issues are governed by Federal rather than local law. However, while the Uniform Commercial Code is not necessarily determinative with respect to Government checks, it is our view that the Government should follow that Code to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions. See in this connection, *United States* v. *Heat*, 444 F. 2d 804, 809 (1971) wherein the United States Court of Appeals, Fifth Circuit, stated that:

* * * Although *Clearfield Trust* indicated that the federal Law Merchant, "developed for about a century under the regime of Swift v. Tyson" was "a convenient source of reference for fashioning federal rules applicable to these federal questions," it is evident that the principal fount of general commercial law governing secured transactions is now Article 9 of the Uniform Commercial Code. We perceive no reason why the rights of the United States arising out of secured transactions pursuant to the FHA loan program should be any different than those of other financers of farming operations under the Uniform Commercial Code. We have therefore determined that in fashioning the federal law that is applicable to suits arising from the FHA loan program we shall be guided by the principles set forth in Article 9 and other relevant portions of the Uniform Commercial Code.

Such a course meets the principal reason advanced for requiring a federal rule of decision in these cases, that of uniformity, while at the same time assuring that an individual state's modifications of the Code's scheme cannot be employed to defeat federal rights. Taking this step is not inconsistent with the prior decisions applying federal law to suits arising from the FHA program since, in our judgment, in every case in which federal law has been so applied * * * the same result would have been reached under the Code. * * *

Cf. Clearfield Trust Company v. *United States*, 318 U.S. 363 (1943); *United States* v. *Bank of America National Trust and Savings Association*, 288 F. Supp. 343 (1968), affirmed 438 F. 2d 1213 (1971); and *United States* v. *Philadelphia National Bank*, 304 F. Supp. 955 (1969). Also, our attention has been brought to a number of court cases which either distinguish, overrule or might be considered as having the effect of overruling three of the court cases cited in 50 Comp. Gen. 441, namely, the *Cober*, *Dewey*, and *Bello* cases. See for example *Harry H. White Lumber Co.* v. *Crocker-Citizens National Bank*, 61 Cal. Rptr. 381 (1967); *Indiana Plumbing Supply Co.* v. *Bank of America National Trust and Savings Ass'n.*, 63 Cal. Rptr. 658 (1968); *Glasser* v. *Columbia Federal Savings and Loan Ass'n.*, 197 So. 2d 6 (1967); *Gill Equipment Company* v. *Freedman*, 158 N.E. 2d 863 (1959).

Accordingly, to the extent that anything said in our decision of December 28, 1970, 50 Comp. Gen. 441, is in conflict with the foregoing, or what is set forth below, that decision will no longer be followed:

Therefore, insofar as the instant case is concerned, it will be decided in accordance with decisions of our Office rendered prior to December 28, 1970. In those decisions we have generally held that the endorsement of the names of both payees of a check by one of them is invalid and passes no title to the endorsee in the absence of authority from the other payee. See B–129118, December 4, 1956; and B–155599, December 11, 1964.

In view thereof, it is apparent that Mrs. Christie's action in endorsing her husband's name to the checks involved here constituted an unauthorized endorsement and passed no title to the Bank of America National Trust and Savings Association, unless she had authority from her husband to endorse. Further, considering all the terms and provisions of the property settlement agreement included in the di-

vorce decree, and particularly parts D and G of paragraph 14 of such agreement, it is our view that the property settlement agreement would not preclude or bar the enforcement of any liability of the cashing endorsers on the check. Moreover, the property settlement does not appear to have any direct bearing on the claim, since the claim is one against the United States—which made payment on the forged check and has not been discharged from its obligation for payment on the instrument--and not one against the claimant's former wife.

Under the circumstances the endorsing bank appears liable for the amount of the checks paid out under its guarantee of prior endorsements, unless, of course, it can establish Mrs. Christie's specific authority to endorse for her former husband. In the circumstances, the burden of proof is upon the parties alleging and relying on the purported authority to endorse. The sole evidence of record to support the allegation of such authority consists of a letter containing a statement to the effect that Mrs. Christie informed the bank that she had her husband's permission to sign the checks. Her former husband, in effect, denies he gave her such authority. It seems apparent that the record presented to our Office does not adequately support the allegation of authority.

Accordingly, on the basis of the present record, your office should continue reclamation action against the endorsing bank. If the bank continues to resist reclamation, the matter should be referred to the Department of Justice for appropriate action.

On the present record it is not possible for our Office to determine entitlement to the proceeds of the checks, if reclamation is successful. Although Mr. Christie evidently paid the additional taxes due from his funds in accordance with the property settlement agreement, the apportionment of this tax refund may depend on the extent that both the taxable income and the tax are attributable to the husband and wife individually. As we have pointed out in other decisions in this type case, if in the course of reclamation a claimant's former wife makes refund of the amount of the check to the bank, she and the claimant should be given appropriate advice to the effect that the checks represent the amount refundable as an overpayment on joint income tax returns filed by a husband and wife and that neither has any separate interest in the amount thereof except such as they may elect to take by agreement between themselves or except as may be determined by a court or by the Internal Revenue Service. Upon such a determination, the amount may be disbursed in accordance therewith. In the event the former wife does not make refund and Mr. Christie and the bank agree to a division, disbursement may be in accordance therewith.

Also, insofar as Mr. Christie's rights are concerned, you may wish to advise him of Internal Revenue Ruling 67–431, page 411, Internal Revenue Cumulative Bulletin 1967–2, which indicates that the Internal Revenue Service (IRS) may, if requested (prior to the issuance of a refund check), issue a refund check in the name of one of the two joint signers (husband and wife) of a tax return if it appears that the refund is for taxes attributable to and paid by the one making such request. If reclamation is successful in the instant case and IRS—pursuant to Mr. Christie's request—determines under the circumstances involved that Mr. Christie is entitled to the refund, it appears that a new check could be issued with Mr. Christie as the payee.

Of course, if the bank resists reclamation by your office and the matter goes to litigation, it might be that the judicial proceedings will determine entitlement to the proceeds of the checks.

The checks and your files are returned herewith.

[B–174781]

Quarters Allowance—College Attendance—Government Quarters Not Occupied

Members of the uniformed services without dependents who, between permanent duty stations, attend a civilian school to obtain a baccalaureate degree under permissive travel orders at no expense to the Government, are entitled, pursuant to 37 U.S.C. 403(f), to a basic allowance for quarters if not assigned Government quarters while on such temporary duty, since the "no expense" provision in the travel orders pertains to travel and per diem allowances incident to temporary duty which does not involve public business, and the prohibition in 37 U.S.C. 320, which was the basis for denying the allowance in 39 Comp. Gen. 718, has been removed. Whether the school assignment is regarded as a period of temporary duty or a leave of absence is immaterial, except if the member is not entitled to pay and allowances.

To the Secretary of Defense, April 21, 1972:

Reference is made to letter dated December 15, 1971, from the Assistant Secretary of Defense, requesting a decision whether members of the uniformed services without dependents who, between permanent duty stations, attend a civilian school with the view to obtaining a baccalaureate degree under permissive travel orders (no expense to the Government) are entitled to basic allowance for quarters if not occupying Government quarters. A discussion pertaining to the question is set forth in Committee Action No. 457, Department of Defense Military Pay and Allowance Committee.

In its discussion pertaining to the entitlement of a single officer attending a civilian school under the Operation Bootstrap Program, the Committee refers to our decision 39 Comp. Gen. 718 (1960) in which we held that under the statutory authority then in effect, section 102

of the Deficiency Appropriation Act, 1950, 64 Stat. 288, 37 U.S.C. 320 (subsequently recodified as 37 U.S.C. 403(f)), a member without dependents, attending a civilian college under permissive travel orders, between permanent duty stations, is essentially in a leave of absence status and while in such leave status between permanent duty stations he is not entitled to a basic allowance for quarters. In that decision, we said that the language of section 102 required that the basic allowance for quarters be denied to members without dependents while attending a civilian school between permanent duty stations, whether the period of attendance was regarded as a period of temporary duty or as a period of leave of absence.

The Committee also refers to the amendment of section 403(f) of Title 37, United States Code, by section 1(3), Public Law 90-207, December 16, 1967, 81 Stat. 651, to provide that a member without dependents who is in pay grade E-4 (4 or more years' service), or over, who is not assigned to quarters of the United States while in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, is entitled to a basic allowance for quarters during that period.

Our decision B-164351, dated August 2, 1968, is cited by the Committee as holding that the legislative history of the 1967 amendment to section 403(f) indicates that Congress intended to authorize payment of basic allowance for quarters to members without dependents in a travel or leave status between permanent stations without regard to the travel allowances authorized for the member. The Committee says that applying our interpretation of civilian schooling as leave of absence in the context of section 403(f), as amended, leads to the conclusion that members without dependents—attending a civilian school to obtain a baccalaureate degree, under permissive travel orders and between permanent duty stations—are entitled to a basic allowance for quarters if not occupying Government quarters. It recommended the submission of that question to our office for resolution.

By section 1(3) of Public Law 90-207, December 16, 1967, 81 Stat. 651, section 403(f) of Title 37, United States Code, was amended to authorize the payment of basic allowance for quarters to members of the uniformed services without dependents who are in pay grades E-4 (4 or more years' service) or above, while in a travel or leave status between permanent duty stations, when not assigned to quarters of the United States.

In 45 Comp. Gen. 143 (1965), we considered the case of a member of the uniformed services without dependents who was entitled to

basic pay and otherwise entitled to a basic allowance for quarters at her permanent duty station, and who was assigned on temporary duty to attend a civilian university under permissive orders expressly providing that no expense to the Government be incurred by reason of this temporary duty and directed return to the duty station upon completion of the assignment. We held that the no expense provision in her orders did not deprive her of entitlement to basic allowance for quarters, if no Government quarters were available at the temporary duty location.

Also, in 45 Comp. Gen. 245 (1965) we held that a member with dependents who was attending a university near his permanent station in Alaska under "no expense" permissive orders was entitled to a basic allowance for quarters as a member with dependents if not furnished Government quarters at his permanent station or at the university during the period of his attendance there and was also entitled to housing and cost-of-living allowances if otherwise qualified. We said the "no expense" provision in the travel orders was directed against payment of travel and per diem allowances incident to temporary duty which does not involve public business.

The determining factor in our decision 39 Comp. Gen. 718 (1960) denying basic allowance for quarters to a member without dependents who was permitted to attend a civilian college to complete studies to qualify for a baccalaureate degree prior to reporting to a personnel center for further assignment was not the fact that the member was issued permissive orders which provided that such temporary duty be performed at no expense to the Government. That decision was based on the fact that the member was "in a travel or leave status between permanent stations" within the meaning of section 102 of the Deficiency Appropriation Act, 1950, 37 U.S.C. 320, then in effect, during which period the member was not entitled to a basic allowance for quarters.

Since the prohibition against the payment of a basic allowance for quarters to such members without dependents traveling between permanent stations has been removed, we are of the opinion that, if otherwise qualified, they are entitled to such an allowance if not assigned Government quarters while on such temporary duty. Whether the assignment to attend a civilian school is to be regarded as a period of temporary duty or a leave of absence status is not material in the determination of entitlement to basic allowance for quarters in such circumstances except in cases in which the member is not entitled to pay and allowances while at a civilian school on extended leave during such an assignment. *Cf.* B–172848, July 27, 1971, copy enclosed.

Accordingly, the question presented is answered in the affirmative.

[B-174158]

Transportation—Accessorial Charges—Tariff Interpretation

Computing packing and unpacking services on a shipment of household goods that moved under a Government bill of lading on the actual weight of the shipment, 7,490 pounds, at the rate provided for the 4,000 to 7,999 pound range of the carrier's applicable tender for accessorial services rather than at the lower rate prescribed for 8,000 pounds or more, produced an overcharge which was properly recovered by setoff as the carrier's tender is subject to the tariff of the Movers & Warehousemen's Association of America, Inc. to the effect that the total transportation charge of any shipment shall not exceed the charge computed by use of the lowest weight and applicable rate in the next higher weight bracket for the same distance, if the carrier's tender does not provide an exception or none need be implied to give effect to the tender, for it is what the tender is, not what it should have been, that controls.

To Regent Van and Storage, Inc., April 25, 1972:

With your letter of March 15, 1972, you furnished copies of our settlement certificates in claims No. TK-937297 and No. TK-937298, both dated September 16, 1971, and related papers. In effect you request review of the two settlement certificates, which disallowed your claims per bills RVS No. 177 and RVS No. 156. Both claims involve the same issue and we will use the one disallowed in claim No. TK-937297 in considering the propriety of the settlement action taken in both cases.

In your bill RVS No. 177, you claimed transportation charges of $655.45 for the transportation of a shipment of household goods, weighing 7,490 pounds, from Falls Church, Virginia, to Carmel (Putman), New York, under Government bill of lading F-3088398, issued in December 1969, and payment in that amount was made by the Army Finance Center in January 1970. As a result of our audit, a notice of overcharge (Form 1003) was issued April 21, 1971, requesting that you refund $24.25. When you failed to make the requested refund, the indicated amount was recovered by setoff in payment of your bill No. 48867 in July 1971.

The difference of $24.25 is produced by your use of a maximum packing and unpacking rate of $3 per hundred pounds applied to the actual weight of 7,490 pounds whereas our Transportation Division used a rate of $2 per one hundred pounds applied to a minimum weight of 8,000 pounds. The maximum packing and unpacking charge is set forth in an appendix to item 16, designated "Accessorial Services," of your Tender I.C.C. No. 1. In item 16 it is stated "As provided in GRT 1-V Movers & Warehousemen's Association of America, Inc., and as shown in Appendix 1, herein."

In the table set forth in the appendix, for distances of 500 miles or less and for weights in the 4,000-7,999 pound range, a rate of $3 per one hundred pounds is shown; and for the same distance bracket a

rate of $2 per one hundred pounds is shown for weights of 8,000 pounds or more. It is your position that in this case the actual weight, that is, 7,490 pounds as shown on the Government bill of lading, determines what weight range in the appendix must be used.

In our audit and in the pertinent settlement, it was determined that the scale shown for weights of 8,000 pounds or more was required to be used because such use resulted in a lower charge for a shipment weighing 7,490 pounds. As our Transportation Division pointed out, Rule 12 of Movers' & Warehousemen's Association of America Tariff No. 45, MF-I.C.C. No. 67, provides that the total transportation charge on any shipment shall not exceed the charge computed by use of the lowest weight and applicable rate in the next higher weight bracket for the same distance. Movers' & Warehousemen's Association of America GRT 1-V, referred to in your tender, is subject to the provisions of Tariff No. 45.

You maintain that Rule 12 is not applicable to the provisions relating to the maximum packing and unpacking charges, and you submit a copy of a letter by Carroll Genovese, Executive Secretary of the Association, and also shown as the issuing agent of Tariff No. 45. Mr. Genovese expresses the belief that Rule 12 clearly indicates that the provision for the alternation of charges applies only in the case of the transportation rate sections; i.e., those sections wherein a cross-reference is made to Rule 12. He points to the fact that at the top of each page of the transportation rate section the explanation is made that "Break Point indicates weight at which a lower charge develops by use of lowest weight and applicable rate in the next higher weight bracket. (See Rule 12.)," and he says that nowhere else in the tariff is there any cross-reference to Rule 12 covering alternate charges. He also says that the illustration set forth in Rule 12 of the tariff "itself would suffice in showing the application of the rule as it is intended in the illustration therein."

We do not agree that Rule 12 is limited in its application only to the rate tables shown in the tariff, and we concur in the audit position that without a specific exception to the alternate charge rule in Regent Van and Storage Company Rate Tender I.C.C. No. 1, shipments are subject to Rule 12 of Tariff No. 45. The application of the provisions of Rule 12 in connection with the scale of weights in the appendix to item 16 of Tender I.C.C. No. 1 would be consistent with the general practice observed in determining the applicable charges in tariff rate tables covering various kinds of services, including straight line-haul services.

This computation of applicable charges is also consistent with Rule 4(f) of Interstate Commerce Commission Tariff Circular MF No. 3—

Freight, which states that different rates based on different minimum quantities may be published in tariffs, provided the lowest charge resulting from any such rate applied in connection with its published minimum (or actual quantity shipped, if greater) is made applicable by publishing such rates in the same item or different columns on the same page and "by providing in connection with such items or rate columns a rule to the effect that the lowest charge obtainable under the different rates and minima applicable thereto (or actual quantities, if greater) will be applied."

The language of your Tender No. 1 is unambiguous; it incorporates a reference to GRT 1-V, which, in turn, is subject to Movers' & Warehousemen's Association of America Tariff No. 45. It does not specifically preclude, as do similar tenders of other carriers, recourse to utilization of a higher minimum weight where the actual weight exceeds the so-called "break point." The intention thus manifested is alone the intention to which the law gives effect. *Atlantic Coast Line Railroad Co.* v. *Atlanta Bridge Co.*, 5th Cir., 1932, 57 F. 2d 654. In this case your company and Mr. Genovese would restrict the application of your tender by reading into it the language of an exception which is neither referred to in the tender nor required by necessary implication in order to give effect to the tender provisions. It is what the tender is, not what it should have been, that controls. *Fort Worth and Denver City Ry. Co.* v. *Childress Cotton Oil Co.*, U.S.D.C. Texas, 1942, 48 F. Supp. 937, affirmed 141 F. 2d 558.

We believe that the settlements in question gave proper effect to the maximum packing and unpacking provisions of your Tender No. 1, and, therefore, the disallowances of your claims in settlements TK-937297 and TK-937298 are sustained.

[B-174367]

Contracts—Subcontracts—Administrative Approval

The reevaluation of subcontract offers by the prime contractor under a cost-plus-a-fixed-fee research and development contract for oceanographic sensors required by the National Oceanic and Atmospheric Administration's (NOAA) National Data Buoy Center (NDBC), located at a National Aeronautics and Space Administration (NASA) facility, and an award to other than the subcontractor first selected on the basis of technical superiority was proper, even though the reevaluation at the recommendation of the Government deviated from the initial cost weight criteria, since the relative importance of the criteria was not destroyed, and the direct and substantial involvement of NASA, NOAA, and NDBC in the subcontract award process was warranted in order to protect the Government's interest, which was more than *pro forma* as it will bear the ultimate cost of the subcontract.

To Paul & Gordon, April 26, 1972:

Reference is made to your letter dated April 15, 1972, and prior correspondence, regarding the protest of The Bissett-Berman Cor-

poration (BBC), now known as Plessey Memories, Inc., against the proposed award of a subcontract to EG&G International, Inc. (EG&G), by the Westinghouse Electric Corporation (Westinghouse), prime contractor under contract No. DOT-CG-10,237-A, awarded by the United States Coast Guard, Department of Transportation, and subsequently assigned for the purposes of contract management and administration to the National Aeronautics and Space Administration (NASA), Mississippi Test Facility (MTF).

For the reasons hereinafter stated, the protest of BBC is denied.

The Westinghouse prime contract, a cost-plus-fixed-fee (CPFF) research and development contract, covered the design, construction, test and performance requirements of an improved state-of-the-art oceanographic and meteorological sensor system, for the Engineering Experimental Phase (EEP) of the National Data Buoy Development Project. The project, originally started by the United States Coast Guard, was transferred to the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, to be principally handled by NOAA's National Data Buoy Center (NDBC), located at NASA's MTF. By agreement between NASA and NOAA, MTF performs procurement and contract administration services for NDBC.

Section B.3.0 of the prime contract's statement of work relates that the intent of the project requires the development of a dual source capability for oceanographic sensors for the EEP and its subsequent phases. To this end, Westinghouse was to issue second-source subcontracts to one or more qualified subcontractors for the design, development, fabrication, test and delivery of approximately one-half of the oceanographic sensors to be used while Westinghouse was to design and manufacture the other half. In addition, the subcontract procurement(s) and quantities of each procurement were made subject to approval by the Government. Similarly, article XIV of the Westinghouse contract requires that the second-source subcontract be approved by the contracting officer, while article XVI incorporates by reference into the contract the clause set out at paragraph 7-402.8(a) of the Armed Services Procurement Regulation (ASPR), entitled "Subcontracts (1967 AUG)." This clause requires the approval and consent of the Government prior to the award of any subcontract of the type and dollar amount involved here.

Pursuant to the above requirement in its prime contract, on June 8, 1971, Westinghouse issued a request for proposals (RFP) to secure a second source for the oceanographic sensors, BBC, EG&G and Bendix Corporation submitted proposals by the July 9 closing date. Westinghouse then conducted an initial evaluation and concluded that none of the three proposals received were technically acceptable. Whereupon, by letters dated August 6, Westinghouse conducted written discussions

with all offerors, highlighting the considered deficiencies in the three technical proposals. All offerors submitted timely revisions. Then, Westinghouse, after completing its initial evaluation process, explored with each offeror the type of contract that would be acceptable, requisite terms and conditions, and probable costs. Upon receipt of information necessary to its cost analysis on August 30, Westinghouse conducted a final phase evaluation process. While Westinghouse was conducting its final evaluation, NDBC, assisted by the overall systems engineering contractor (Sperry Rand) for the project, was performing a concurrent evaluation of the three proposals received.

On September 10, Westinghouse recommended BBC as the second source and requested approval from the MTF contracting officer of its proposed selection. The contracting officer referred the recommendation to NDBC, which consulted with NOAA on the matter. However, by telegram of October 14, the contracting officer notified Westinghouse that EG&G offered the best value to the Government and recommended that its position be considered prior to selection of the subcontractor. The record indicates that Bendix has been eliminated from consideration as a potential subcontractor.

Westinghouse, after considering the Government's position, conducted negotiations with EG&G from October 25 through December 15, resulting in an agreement to subcontract on a CPFF basis in the estimated amount of $1,611,210. Westinghouse requested the MTF contracting officer's consent, in accordance with the above-cited subcontracts clause, to place the subcontract with EG&G. By telegram dated April 14, 1972, the NASA Director of Procurement advised our Office that Westinghouse was being authorized and instructed by the MTF contracting officer to award the subcontract to EG&G on April 18, 1972. Prior to the intended award, BBC filed suit on April 17 in the United States District Court for the Central District of California (*Plessey Memories, Inc., a California corporation (formerly known as Bissett-Berman Corporation)* v. *Peter G. Peterson, Secretary of the Department of Commerce, et al.*, Civil Action No. 72-836 WMB), for a temporary restraining order and preliminary injunction against the award of the subcontract to EG&G "until the Comptroller General of the United States has made a decision on plaintiff's protest filed in Comptroller General Case No. B-174367." The court granted a temporary restraining order on the same date.

Since the principal bases of BBC's protest deal with the Westinghouse evaluation of proposals, the Government's partial rejection of that evaluation, and the ultimate recommendation to select EG&G for the subcontract, it is appropriate to give a more detailed narrative on the evaluations conducted by the Government and Westinghouse. The Westinghouse RFP stated an intention to award a firm fixed-price (FFP) contract, but permitted the submission of CPFF proposals.

The instructions section of the RFP informed offerors of the following evaluation scheme:

Evaluation Categories

Proposals will be evaluated against criteria established under the following categories, with each category given the relative weight indicated:

	Percent
A. Technical	50
B. Management	25
C. Facilities	10
D. Personnel and experience	50

Having accomplished the initial evaluation on the above basis the offeror's cost proposal will be evaluated in terms of its credibility and relationship to the technical approach proposed. The intent is to achieve the most beneficial mix of technical excellence and cost-effectiveness.

The initial evaluation conducted by Westinghouse scored the proposals according to major and minor subcriteria identified in the RFP as follows:

	Maximum points	Bissett-Berman	E.G.&G.
A. TECHNICAL:			
1. Performance characteristics	15	10.2	10.6
2. Physical characteristics	4	1.8	3.1
3. Reliability	3	1.4	2.6
4. Applicable existing designs	8	5.4	4.4
5. Growth potential	3	1.1	1.8
6. Quality assurance and inspection	3	2.8	2.2
7. Test program	5	2.4	4.6
8. Field use experience	6	3.7	4.5
9. Logistic support	3	1.6	2.1
Subtotal	50	30.4	35.9
B. MANAGEMENT:			
1. Program plan	5	3.0	2.9
2. Schedule and dollar control	10	5.9	5.5
3. Configuration control	3	1.5	1.0
4. Make/buy-subcontract plan	2	.8	.7
5. Organization	5	3.3	3.4
Subtotal	25	14.5	13.5
C. FACILITIES:			
1. Manufacturing	5	2.9	2.4
2. Test and calibration	5	3.5	5.0
Subtotal	10	6.4	7.4
D. PERSONNEL AND EXPERIENCE:			
1. Performance characteristics	8	6.8	7.2
2. Reliability	1.5	.5	1.2
3. Quality assurance and inspection	1.5	1.0	1.3
4. Test program	2.5	1.9	2.1
5. Logistic support	1.5	.8	1.0
Subtotal	15.0	11.0	12.8
TOTAL	100	62.3	69.6

There follows the Westinghouse description of that portion of its evaluation following the initial evaluation based on the criteria established in the RFP and the resultant point scores:

* * * each of the major categories is broken down into a number of subcategories. A maximum point value was assigned to each subcategory and one or more persons, familiar with the requirements for that function, were assigned to evaluate all proposals for that subcategory. These inputs were then summed to give an indication of the overall performance.

Each of the subcategories * * * reflect either an offer to deliver or reflect on the proposer's ability to deliver and manage the subcontract. All of the subcategories in the Technical Evaluation except A.4, A.6, A.7 and A.8 represent what will be delivered or the offered performance. The four exceptions plus all of the subcategories in the Management, Facilities, and Personnel and Experience categories reflect on the proposer's ability to produce what is promised and to control the subcontract with respect to cost and schedule, i.e. the credibility that the performance offered will be delivered, that the deliveries will be on schedule and that the cost will be within that contracted.

The initial evaluations were converted to relative scores by giving the highest score 100 and the others the percentage of 100 represented by their score and the highest score. The performance and credibility relative scores were all established in the same manner. A weighting factor was established to reflect the relative importance of the subcategories and to normalize the scores to a total of 100. These weighting factors were established by Westinghouse.

* * * the offered Performance evaluation [second evaluation set forth below] was obtained by using the initial evaluation scores A.1, A.2, A.3, A.5 and A.9 * * *. The credibility that performance could or would be attained was obtained by using the initial evaluation scores of A.4, A.8, D.1, D.2, D.3, D.4, D.5 and B.3 * * *. The Schedule evaluation was obtained by assigning relative values to the lateness of the start and completion of deliveries over what was requested in the RFP. The credibility that they would meet the proposed schedule was obtained by using the initial evaluation scores of B.1, B.2, B.4, B.5, C.1 and C.2. The Cost evaluation assigned relative values to the proposed subcontract cost to NOAA. The credibility of the cost was established using the initial evaluations for B.1, B.2, B.4, B.5, C.1, and C.2 plus a factor for the type of contract where an FFP contract lent more credibility to cost than a CPFF type.

The score for each major category of Cost, Schedule and Performance was obtained by multiplying the relative score by the credibility score as a percentage.

PERFORMANCE EVALUATION

		E.G. & G.		BISSETT-BERMAN	
	Percent weight	Relative score	Sub score	Relative score	Sub score
OFFERED:					
Performance characteristics	40	100	40.0	96	38.4
Physical characteristics	5	100	5.0	58	2.9
Reliability	40	100	40.0	54	21.6
Growth potential	10	100	10.0	61	6.1
Logistic support	5	75	3.8	58	2.9
Total	100	--------	98.8	--------	71.9
CREDIBILITY:					
Personnel and experience	25	100	25.0	95	23.8
Reliability program	20	100	20.0	42	8.4
Q.A. program	10	100	10.0	77	7.7
Test program	15	100	16.0	91	13.7
Logistic support	5	77	3.8	62	3.1
Configuration control	5	46	2.3	68	3.4
Existing designs	20	81	16.2	100	20.0
Total	100	--------	92.3	--------	80.1

The adjusted scores, multiplied by assigned weights to compute a final weighted score, were the basis for the Westinghouse recommendation of BBC to NASA as follows:

Criterion	Score	Credibility percentage	Adjusted score	Assigned weight	Weighted score
E.G. &. G:					
Performance	98. 8	92. 3	91. 2	0. 5	45. 6
Schedule	44. 4	84. 2	37. 4	. 75	28. 0
Cost	72. 0	79. 6	57. 3	1. 0	57. 3
Total			185. 9		130. 9
Bissett-Berman:					
Performance	71. 9	80. 1	57. 6	. 5	28. 8
Schedule	31. 8	85. 2	27. 1	. 75	20. 3
Cost	98. 0	92. 6	90. 7	1. 0	90. 7
Total			175. 4		139. 8

The October 14 telegram of the contracting officer, referred to above and quoted below, weighed heavily in the Westinghouse decision to negotiate with EG&G as the successful proposer:

THE TECHNICAL SCHEDULE AND COST EVALUATIONS OF SECOND SOURCE PROPOSALS SUBMITTED IN YOUR TWX OF 14 SEPTEMBER ARE APPROVED. THESE EVALUATIONS ARE EXTREMELY SENSITIVE TO THE RELATIVE WEIGHTS ASSIGNED TO COST SCHEDULE AND TECHNICAL PERFORMANCE. YOUR RECOMMENDATION OF BISSETT BERMAN IS BASED ON THE ASSUMPTION THAT COSTS ARE TWICE AS IMPORTANT TO THE GOVERNMENT AS PERFORMANCE ON THIS PARTICULAR SUBCONTRACT. THE NDBC DOES NOT AGREE WITH THIS ASSUMPTION AND DESIRES THAT PERFORMANCE BE WEIGHTED AT LEAST EQUAL TO COSTS AS A CRITERIA FOR SELECTION. THIS IS IN CONSONANCE WITH PUBLISHED OBJECTIVES FOR THE EEP PROGRAM. BASED ON THE REVISED WEIGHTING FACTORS THE NDBC CONSIDERS THAT EG AND G OFFERS THE BEST VALUE TO THE GOVERNMENT. ACCORDINGLY IT IS RECOMMENDED THAT THIS POSITION BE CONSIDERED IN YOUR SELECTION NEGOTIATION AND AWARD OF THE SECOND SOURCE OCEANOGRAPHIC SENSOR SUBCONTRACTOR.

In further explanation of this telegram and the concurrent evaluation performed by the Government, we quote from a memorandum prepared by the Director, NDBC, recommending EG&G for the award of the subcontract:

* * * While I concur in the technical and basic cost evaluation performed by Westinghouse, I do not agree with the weighting factors used in view of the EEP objectives. Accordingly, I intend to advise Westinghouse to use a cost/performance weighting ratio of 1:1 and to negotiate with EG&G for the "second source" sensors.

* * * * * * *

Upon receipt of subcontractor proposals by Westinghouse, an evaluation board was established there for selection. Concurrently and independently the proposals were evaluated by a team from NDBC, with assistance from Sperry Systems Management Division (SSMD) personnel. This evaluation was directed to gain familiarity with the proposals and to obtain sufficient information to insure that Westinghouse evaluation was fair and objective [and] it concurs closely with the Westinghouse evaluation, which found EG&G considerably superior technically.

* * * * * * *

It is evident that if the choice were made on technical excellance alone, EG&G would be a clear winner, because every technical evaluation made of the two approaches has them clearly ahead. If the choice were made on costs alone, Bisset-Berman would be a clear winner, because they offer a lower cost and a fixed price contract—as compared to EG&G's higher cost Cost Plus Fixed Fee (CPFF) contract. With the weights assigned to cost and performance by Westinghouse, Westinghouse recommended Bisset-Berman for selection.

* * * * * * *

Based on the foregoing, I recommend selection of EG&G for the following reasons:

1. EG&G offers a clearly superior product, more closely in tune with EEP objectives.
2. Although EG&G development costs are greater, the superior technical product justifies the costs when a 1:1 cost/performance weighting ratio is used.
3. EG&G shows a greater potential advance towards ultimate "design goals" than Bissett-Berman.
4. For follow-on procurements, EG&G will offer a product competitive to Westinghouse in both cost and performance, whereas Bissett-Berman will be competitive only in cost.

In general, BBC contends that if the evaluation criteria set forth in the RFP had been followed, BBC would have received the highest score. In support thereof, BBC cites the 7.3 point difference in the raw performance evaluation (initial) favoring EG&G, then adds its cost score adjusted for credibility as the RFP requires, and claims that such evaluation would have made BBC the clear winner. Corollary thereto, BBC argues that it was improper for Westinghouse to deviate from the evaluation criteria of the RFP by conducting a second evaluation involving a total reweighting in utter disregard for the evaluation factors as set forth in the RFP upon which BBC premised its proposal. Furthermore, BBC concludes that the conduct of Westinghouse in its evaluative process, as substantially ratified by the Government, was violative of the Federal norm which is to be applied to the award of subcontracts.

Our decision in 49 Comp. Gen. 668 (1970) defined the scope of review where, as here, a determination to consent and approve of the proposed award of a subcontract by a cost-reimbursement prime contractor of the Government is questioned. In consideration of a contract including a clause, as did the Westinghouse contract, calling for Government approval prior to subcontract award, we expressed the view that approval should not be granted if the award would be prejudicial to the interests of the United States, particularly since the cost of the procurement ultimately will be borne by the Government. We held at page 670, as follows:

The question of whether subcontract approval would be prejudicial to the interests of the United States is one that must be resolved by the responsible contracting officials of the Government after a *thorough* consideration of the particular facts and circumstances of each procurement. 46 Comp. Gen. 142 (1966). Generally, we believe that the frame of reference guiding such determination should be the Federal norm that is embodied in the procurement statutes and implementing regulations. *Cf.* ASPR 23-202. * * *

BBC has referred to decisions of our Office which express the view that sound procurement policy dictates that offerors be informed of all evaluation factors and of the relative importance or weight of each factor. See 49 Comp. Gen. 229 (1969). Implicit in the procurement of goods and services is the necessity for furnishing adequate information to prospective offerors of the Government's needs and requirements and how offerors are to respond to those needs and requirements. See 50 Comp. Gen. 246, 252 (1970).

The Westinghouse RFP clearly apprised offerors of four generalized criteria along with the relative weights of each. In addition, the RFP, particularly in the technical area, weighted at 50 percent, informed offerors of the various subcriteria to be utilized in the evaluation. But the RFP did not reflect the relative importance to be accorded those subcriteria in the evaluation. After the initial evaluation, the RFP called for an evaluation of cost proposals in terms of credibility and relationship to the technical approach proposed. And, the RFP expressed an intent to achieve the most beneficial mix of technical excellence and cost effectiveness.

Westinghouse explained to NASA the rationales behind the second performance evaluation and the credibility evaluations, as follows:

> The "initial evaluation" addressed itself primarily to the performance aspects of *what* would be delivered, e.g. what the offered design was planned to accomplish, how it was to be implemented, how costs and schedules would be controlled, and those factors which would reflect confidence in their ability to perform as they indicated. These factors were addressed in the technical, management, facilities, and personnel and experience categories indicated. The other two requests which the RFP made, *when* will the delivery be made and *how much* will it cost were not addressed in the initial evaluation.
>
> The statement is intended to indicate that after the initial evaluation determined the claim of the offerors against the specifications required, the evaluation would focus on whether what was claimed appeared credible in light of the resource and knowledge displayed, whether any differential in costs proposed was commensurate with the differential performance offered, and whether the costs proposed seemed reasonable in light of the technical approach planned.

BBC argues that the selecting out of 5 of the 9 technical subcriteria (representing a total of 28 points out of the 50 points assigned to the technical portion of the initial evaluation) for a further evaluation with different weights (see chart above) completely restructured the relative weights originally assigned by Westinghouse. By so doing, it is urged that Westinghouse in effect eliminated the three other RFP criteria of management, facilities, and personnel and experience, which comprise 50 percent of the original (RFP) evaluation scheme. Also, it is maintained that even though subcriteria from the so-called eliminated criteria were utilized as credibility multipliers in the second evaluation on performance and in the cost and schedule credibility evaluations, the use of such subcriteria was not as prescribed in the RFP. Further, it is argued that credibility, in accord-

ance with the RFP, should have been applied only to the cost proposals.

We agree that the Westinghouse second performance evaluation deviated in part from the criteria and relative importance thereof stated in the RFP. But we do not characterize the evaluation as so radical a deviation from the requirements of the RFP as to have destroyed the relative importance of the stated criteria. To assure the basic objectives of the EEP program as represented in the RFP, Westinghouse selected out what it felt to be the most important technical subcriteria to arrive at a more accurate evaluation of the proposals submitted on a performance basis. Having thus selected these subcriteria, Westinghouse applied great weight to the performance characteristics and reliability to complete its performance evaluation. Our Office has expressed a favorable view with respect to direct Federal negotiated procurements that, where contracting officials depart from established evaluation criteria and weightings, we will not object so long as there is a sufficient relationship or correlation between the detailed evaluation factors and weights used and the generalized criteria and weights shown in the RFP. See 50 Comp. Gen. 390 (1970). The propriety of the emphasis placed by Westinghouse on performance and reliability cannot be questioned in view of the significance and importance attached to those criteria in the RFP and the Coast Guard literature on the EEP phase of the project.

We agree with BBC that the RFP did not specifically call for a credibility factor to be applied against the technical proposals. But, the Westinghouse explanation, quoted above, we believe, amply supports the propriety of such credibility application as an important adjunct to its evaluation. Since the award of the prime contract was based in part on a credibility evaluation of performance, schedule and cost, Westinghouse might well have been drawing on the Government for evaluation guidance. We have not questioned methods whereby contracting officials introduce factors not specifically listed in negotiated solicitations as a means to introduce a measure of independent judgment into the evaluation process. See 50 Comp. Gen. 390, *supra*, at page 413. Surely, BBC could not reasonably have expected Westinghouse to not use its judgment in assessing, by the application of a credibility factor, the true performance value of the proposals submitted.

We feel that it is relevant to inquire into what prejudice or competitive disadvantage BBC may have suffered from the Westinghouse technical or performance evaluation. While we agree that some deviation from relative importance did occur with respect to the three major criteria other than technical, Westinghouse did utilize all of the personnel and experience subcriteria and one of the management subcriteria as credibility multipliers against the second evaluation.

And, Westinghouse utilized four of the management subcriteria and the two facilities subcriteria as credibility multipliers against the cost evaluation. Furthermore, we note that two of the four technical subcriteria eliminated from the second performance evaluation were utilized as credibilty factors. Also, had Westinghouse carried over those four technical factors into the second performance evaluation, EG&G's technical advantage over BBC would have increased. Moreover, the alleged complete elimination and distortion of the criteria of management, facilities, and personnel and experience did not detract from BBC's score. In this vein, we note that EG&G, taking into account the point scores of those criteria in the initial evaluation, had a net score advantage over BBC.

Returning to the emphasis on reliability and performance in the second performance evaluation, we can see no prejudice to BBC in this regard. BBC was fully apprised of the importance of these subcriteria in the RFP's statement of work, the specifications, and project literature. Moreover, BBC addressed itself to these matters extensively in its initial proposal. Of particular significance is the fact that subsequent to the receipt of its initial proposal, Westinghouse, via written discussions, pinpointed various areas in the performance characteristic and reliability subcriteria where the BBC initial proposal was considered to be deficient or as lacking information. BBC's revised proposal responded to those deficiencies and furnished requested information.

With respect to reliability, BBC contends, as discussed above, that EG&G benefited from making broad performance reliability assumptions while BBC took a more conservative or "worst case" approach. In fact, Westinghouse evaluators surmised that BBC's reliability goals might be understated. Also, Westinghouse took notice of technical design improvements proposed by EG&G in its instant proposal over a proposal submitted about a year ago which factor, it was felt, supported EG&G's reliability projections. Moreover, reliability alone did not give EG&G a consistent technical edge on BBC in all evaluations performed. But, admittedly, reliability of performance did represent a significant 40-percent weight on the second performance evaluation.

BBC states that the Government is attempting to create the impression that the procurement is for sensors that are to be an advancement of the state-of-the-art. BBC disagrees and asserts that the EEP phase of the project requires only that state-of-the-art sensors be procured with some redesign to correct the most prevalent cause of in-service failure. Both Westinghouse and the Government evaluations rewarded EG&G with higher technical scores based on its proposals to increase the state-of-the-art. Therefore, BBC asserts that prejudice inured to it since it did not go beyond the objectives of the program in its proposal and, therefore, it should not have been penalized in the technical evaluation.

We have reviewed the Long Range Development Plan dated January 1970 and Briefing to Industry dated April 15, 1970, on the project and statements of work and technical specifications related to the EEP portion of the project. We believe, based on our review of the record, that the EEP phase did involve research and developmental aspects, such as to justify the importance given by both Westinghouse and the Government to the technical superiority of EG&G. We do not subscribe to the argument that BBC could have reasonably believed that technical excellence and improvement of the state-of-the-art would not be accorded great weight. We believe that the Director, NDBC, the agency responsible for overall management of the project, supports our view, when he states:

> Enclosure (5) clearly shows that the Westinghouse sensor is nearer to the "acceptable" level than to the "design goal" level for EEP oceanographic sensors. Although this sensor promises to be vastly superior to those currently available, it is clear that design goals for oceanographic sensors required for success of the NDBS have not been reached.
>
> It is firmly believed that resources should be utilized to develop approaches which potentially advance technology toward "design goals." In this area, EG&G is clearly superior because they have proposed techniques which are viable for the ultimate sensor. Bissett-Berman, in contrast, proposed a system with inherent deficiencies which would require correction in the ultimate sensor for NDBS.

See, also, page A-3 of the Westinghouse RFP, wherein it is stated:

> It is expected that the offeror's technical proposal, in response to this procurement request, will define in considerable detail the specific hardware proposed to implement the overall performance requirements. It is anticipated that the resultant contract with the successful bidder will invoke not only the performance requirements specified in the procurement (bid) package but may also invoke the specific hardware configuration and performance characteristics defined in the offeror's proposal.
>
> The level of relevant technical detail to which bidders specify their proposed implementation of the selected approach will bear heavily in the proposal evaluation as evidence of the bidders background and capabilities in the Oceanographic Sensor field and of the development status of the proposed approach.

As mentioned above, BBC had an opportunity to address itself to the reliability factor in its initial and revised proposal. However, of particular significance, BBC had to have been aware that not only was reliability important, but, as the record establishes, reliability of the sensors was the overriding technical consideration for the EEP phase of the project. While it is difficult to understand why Westinghouse assigned initially only three out of fifty technical points to reliability, BBC could not have been misled since the RFP did not give the subcriteria weights.

Concluding our review of the Westinghouse evaluation, we observe that all offerors were provided with and received the same evaluation information and each proposal was evaluated according to the same criteria. We found no indications of unfairness or unreasonableness attributable to Westinghouse in its evaluation nor was BBC prejudiced by the evaluation. See 51 Comp. Gen. 397 (1972) where we found no prejudice even though technical evaluators employed supplemental

considerations not easily categorized under generalized criteria set forth in an RFP. Also, see 51 Comp. Gen. 272 (1971), cited by you, where we denied a preaward protest even though special consideration given a factor by the source selection official was not communicated to offerors; and 50 Comp. Gen. 565 (1971), and cases cited therein. The decisions of our Office which BBC cites for the principle that the deviation from the RFP's evaluation scheme should call for corrective action are clearly distinguishable. In those cases, contracting agency actions deprived offerors of any reasonable opportunity to intelligently and fully consider and respond to evaluation factors considered vital to the selection of the contractor. See 51 Comp. Gen. 272, *supra;* 50 *id.* 16 (1970); and 50 *id.* 637 (1971).

The Government's concurrent evaluation closely paralleled the Westinghouse evaluation with respect to the conclusion that EG&G offered a clearly superior product from a performance or technical standpoint. In this regard, Westinghouse advises that, but for BBC's lower cost and price proposals, the firm would have been eliminated from further consideration and—

> The Bissett-Berman proposal, even as amended in response to Westinghouse's letter of August 6, 1971, displayed a lack of knowledge of reliability program requirements, parts selection and use of updated reliability data for determination of failure rates. Indeed Bissett-Berman stated that they did not have in their current employ personnel with sufficient experience and knowledge to implement the required reliability effort. Though personnel could be hired for this function it is of fundamental importance that reliability be built into a system from its inception and that a new employee would have reduced influence on incorporating such reliability into a design process that must be completed in short period to meet schedule requirements.

NOAA and NDBC rejected Westinghouse's weighting of cost to twice that assigned to performance. The NOAA endorsement of the original NDBC rejection states:

> A 2:1 weighting ratio of cost over performance on a developmental contract is not realistic. A 1:1 ratio is OK, but on some kinds of developments even 1:2 is justified.
>
> Westinghouse should be informed of your decision and instructed to make the award to EG&G.

In addition, since schedule was not one of the listed evaluation factors, NOAA and NDBC disregarded schedule in its evaluation. It is interesting to note that BBC did not suffer prejudice thereby because EG&G scored higher in the schedule area.

We agree with NOAA and NDBC that for a research and developmental effort, a 2–1 cost-performance ratio is unrealistic. The decisions of our Office have affirmed determinations of contracting agencies to award research and development contracts to technically superior, but higher priced or cost offerors. And, contracting officials have broad discretion in the award of research and development contracts. See B–172395, July 7, 1971; 46 Comp. Gen. 885 (1967). In fact, the proposed cost to performance ratio employed by Westinghouse appears

contrary to the general concept that where offerors are not substantially equal on a technical basis and price or cost is not the sole evaluation factor, cost or price should not be the controlling factor in the award of research and development contracts. See ASPR 4–106.5 (a). Finally, we believe that the bases upon which the proposed award is to be made preserve the balance of technical excellence and cost effectiveness specifically spelled out in the RFP and bear a realistic relationship to the objectives of the RFP. See 50 Comp. Gen. 565, *supra*, at page 574; and *id.* 390, *supra*, at pages 412–413.

We do not agree that, as BBC asserts, had Westinghouse followed strictly the criteria set forth in the RFP, and accorded cost and performance equal weight, BBC would be the clear winner. BBC's inflexible addition of raw performance score, not adjusted for credibility, and cost scores adjusted for credibility fails to recognize the fact that cost was not specifically weighted in the RFP and a blend of the two factors, consistent with project objectives, was to be the actual basis for award. It is particularly important to note here that Westinghouse, after consideration of the Government's actual priorities, negotiated with and recommended EG&G for the award of the subcontract.

We feel it pertinent to discuss BBC's contention that NASA, NOAA and NDBC "totally misconstrued the function of the subcontract approval clause. The Government's view of that clause * * * is that it permits the Government's 'directing the selection of the subcontractor or . . . issuing a recommendation such as to achieve the same result.'" Citing the statutory authority of 10 U.S.C. 2306(e), which the ASPR subcontract approval clauses implement, BBC argues that the Government's actions in causing Westinghouse to alter its original selection of BBC violated the statutory purpose to prevent fraud and collusion in the award of subcontracts.

We see no impropriety in the correction of the unrealistic weight given cost by Westinghouse since the Government's interest in the award of this subcontract properly involves more than merely a perfunctory approval. This proposed subcontract represents a valuable and necessary implementation of the sensor system portion of the EEP phase of the project. The Director of NDBC explains the value of the second source for oceanographic sensors and the reason why the Government did not award two separate prime contracts, as follows:

> The concept of a dual source for oceanographic sensors grew from the desire to insure competition for future procurements, to provide an alternate source to minimize risk of failure and to provide a vehicle for testing alternate concepts that show nearly equal promise for success. Consideration was given to selecting two contractors and awarding separate prime contracts. However, this would have required an intolerable burden on the Center to provide resources to manage both contracts and to look after the complex interface that would have resulted. Consequently, it was determined that selecting a prime and having him subcontract for all, or at least half, the oceanographic sensors offered the best compromise solution. Ability to select and manage a second source was a requirement considered in selecting a prime contractor.

Furthermore, since the Government will bear the ultimate cost of this subcontract procurement by reason of its cost-reimbursement-type prime contract with Westinghouse, its approval of the subcontract award should not be *pro forma* but based on a careful consideration of the whole record. See 49 Comp. Gen., *supra*, quoted above; 46 *id.* 142, 145 (1966); and ASPR 23-202, referenced in the prime contract, entitled "Consent to Subcontracts," which advises contracting officers to conduct thorough and careful evaluations prior to granting the requisite consent, including "the basis for selecting the proposed subcontractor."

Finally, we believe the Government's actions in a review prior to granting approval of or consent to the award of a subcontract to develop a second source, as here, should exhibit a high degree of thoroughness and care. For the aforegoing reasons, we conclude that the direct and substantial involvement of NASA, NOAA and NDBC in the subcontract award process was warranted to protect the Government's interest.

Upon our review of the entire record, we find no basis upon which to interpose an objection to the approval and consent given by NASA to Westinghouse to place the second-source subcontract with EG&G. See 49 Comp. Gen., *supra;* and B-173188, January 13, 1972.

[B-174654]

Station Allowances—Military Personnel—Excess Living Costs Outside United States, Etc.—Member on Temporary Duty Between Station Changes

An Air Force officer whose orders transferring him from Hawaii to Virginia and providing for the concurrent travel of his dependents are amended to place the officer on terminal temporary duty "Operation Bootstrap" at the University of Southern California at no expense to the Government, may be paid a station housing allowance and cost-of-living allowance for his dependents who continued to reside in Hawaii incident to his temporary assignment for the period of the permissive temporary duty pursuant to paragraph 3-19c, Air Force Manual 36-11, since the officer remained assigned to his overseas station and was expected to return to that station for change-of-station processing after completing his assignment.

To Lieutenant Colonel J. W. Stasiak, Department of the Air Force, April 27, 1972:

Reference is made to your letter of November 2, 1971, requesting a decision as to the propriety of paying station housing allowance and cost-of-living allowance to Major Donald A. Pickering, USAF, under the circumstances presented. The request has been assigned PDTATAC Control No. 71-57, by the Per Diem, Travel and Transportation Allowance Committee.

By Special Orders A-280, dated October 12, 1970, Headquarters, 6499th Special Activities Group (PACAF), APO 96553 San Francisco, California, the officer was reassigned to the 1127th USAF Field Activity Group, Fort Belvoir, Virginia. Concurrent travel of dependents from their residence in Hawaii was authorized. The officer was to report at his new duty station 39 days after departure from the continental United States port of debarkation.

On January 8, 1971, the orders were amended by adding a temporary duty assignment en route to the new duty station. The amendment placed the officer on terminal temporary duty "Operation Bootstrap" at the University of Southern California, Los Angeles, California, for a period of 121 days, to report on February 8, 1971. The temporary duty was to be at no expense to the Government. By indorsement dated April 20, 1971, the officer was notified to report with his dependents at the Honolulu International Airport on June 13, 1971, for air travel to the United States.

The file contains a copy of a message from the Per Diem, Travel and Transportation Allowance Committee, dated December 10, 1970, which stated that the member's attendance at a university in the continental United States under permissive temporary duty orders does not constitute an assignment to military duty and such temporary duty is not for consideration under the provisions of paragraph M3003, Joint Travel Regulations. The view was expressed that payment of station allowances subsequent to the member's departure on temporary duty was not authorized since no expense to the Government may accrue incident to a permissive temporary duty assignment. However, since such a situation is not specifically covered in the regulations, it was recommended that the responsible finance officer submit the claim to our Office for advance decision.

In his letter dated January 12, 1971, Major Pickering requested the continuation of payment of the station housing allowance and cost-of-living allowance for his dependents during the period of his permissive temporary duty from February 3 through June 8, 1971. He said that upon completion of his temporary duty he was to return to his overseas station to complete final processing for his change of station. Pending his return he said his dependents would remain at his current address in Honolulu, Hawaii.

Major Pickering resubmitted his claim by letter dated September 30, 1971, and by letter dated November 2, 1971, you transmitted his request for decision by our Office. You say that station allowances are authorized only if the conditions specified in paragraphs M4305-2 through M4305-6, Joint Travel Regulations, are fulfilled and that the temporary duty assignment was not for consideration under paragraph M3003, Joint Travel Regulations, since it was not an assignment to military duty.

Section 405, Title 37, United States Code, provides generally that the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to a member and his dependents while he is on duty outside of the United States or in Hawaii or Alaska whether or not he is in a travel status.

Paragraph M4301–3a, Joint Travel Regulations, promulgated pursuant to section 405, provides that in the case of a member with dependents, ordered to an oversea duty station, entitlement to housing and cost-of-living allowances begins on the day of arrival of the member or one or more of his dependents to that station. Entitlement terminates on the day prior to day of departure of the member from the overseas station in compliance with permanent change-of-station orders or, when one or more of his dependents remain after the departure of the member, entitlement terminates on the day prior to the day of departure of the last dependent, or the 60th day after effective date of the permanent change-of-station orders, whichever is earlier, unless a longer period is authorized as there provided. The effective date of the orders, when temporary duty is involved will be as determined in paragraph M3003–1b(1), item 2, Joint Travel Regulations.

Paragraph M3003–1b(1), item 2, Joint Travel Regulations, defines "effective date of orders" when orders involve temporary duty at one or more places en route to a permanent duty station, for the purpose of dependent travel and shipment of household goods, as the date of relief (detachment) from the last temporary duty station plus leave, delay, or additional traveltime allowed for travel by a specific mode of transportation, authorized to be taken after such detachment.

Paragraph M4305, Joint Travel Regulations, pertains to entitlement to station allowances to members with dependents, assigned to duty in a restricted area outside the United States to which dependents are not permitted to establish a residence. A member whose dependents remain in the vicinity of the old station outside the United States when he is assigned to duty in a restricted area outside the United States, or who move to a designated place during that period, is entitled to station allowances as designated therein.

Paragraph M6453 of the regulations provides that an order permitting a member to travel as distinguished from directing a member to travel does not entitle him to expenses of travel.

Chapter 4, Air Force Manual 213–1, in effect during the period involved, outlines the terminal permissive temporary duty aspects of "Operation Bootstrap." Paragraph 4–5 provides that the necessary traveltime to and from the school will be allowed as assigned time in addition to the period of temporary duty study. Travel will be performed at no expense to the Government on permissive orders in accordance with paragraph M6453, Joint Travel Regulations.

Paragraph 3–19c, Air Force Manual 36–11, provides that the oversea major commands may approve requests of oversea officers for terminal "Operation Bootstrap" temporary duty in the oversea area or in the continental United States. While attending school, the officer will remain assigned to the major command concerned. It provides further that upon approval of the temporary duty, the major command will notify the United States Air Force Military Pay Center of the expected termination of the temporary duty and request a continental United States assignment for the officer before publishing the orders (TDY en route to PCS).

This regulation supports the officer's statement that he remained assigned to his overseas station while on temporary duty under "Operation Bootstrap" and was expected to return to such station for change-of-station processing after completing that assignment.

We have held that station allowances outside the United States arise by virtue of a permanent duty assignment outside the 48 contiguous States or in Hawaii or Alaska. 41 Comp. Gen. 144 (1961). Also, we held that a member with dependents who resided in non-Government quarters at his assigned station in Alaska while he attended a nearby university under orders which placed him on permissive temporary duty for 125 days at no expense to the Government was entitled to housing and cost-of-living allowances for the period during which he was absent from his permanent duty assignment on temporary duty even though such temporary duty was not regarded as official business and no travel allowances were authorized. 45 Comp. Gen. 245 (1965).

While Major Pickering was not entitled to travel and temporary duty allowances incident to the permissive assignment at the University of Southern California, we are of the opinion that he remained assigned to the 6499th Special Activities Group, (PACAF), APO 96553, San Francisco, California, until the completion of his temporary duty at which time he commenced travel to his new duty station. During the period he was on permissive temporary duty, his dependents continued to reside in Hawaii incident to his overseas assignment.

Accordingly, Major Pickering is entitled to the housing and cost-of living allowances for the period involved, these being permanent station allowances. The military pay order dated September 30, 1971, and enclosures are returned herewith, payment being authorized, if otherwise correct.

[B–174867]

Bids—Evaluation—Government Equipment, Etc.—Layaway and Maintenance Costs

In the evaluation of offers to supply metal parts for projectiles submitted under a request for proposals (RFP) issued pursuant to 10 U.S.C. 2304(a)(16), permitting the negotiation of contracts in the interests of national defense and

industrial mobilization, by producers who operate Government-owned facilities or privately owned plants utilizing Government equipment, the exclusion of layaway, maintenance, and space rental costs for idle plants or equipment was proper since the scope of the layaway and maintenance works for all offerors had not been established. Furthermore, there is no legal basis to disturb the contracts awarded prior to the resolution of the protest, as provided by paragraph 2-407.8(b)(3), since the objectionable provision for evaluating abnormal maintenance costs was removed from the RFP, and the record evidences the negotiations conducted were within the authority of 10 U.S.C. 2304(a)(16), and that the delivery schedules were designed to be equitable.

To the Chamberlain Manufacturing Corporation, April 28, 1972:

Further reference is made to your telefax dated December 30, 1971, and your letter of January 4, 1972, protesting against the terms of request for proposals DAAA09-72-R-0054 (RFP-0054), issued by the Army Munitions Command, Joliet, Illinois. Although you protested before award, the contracting officer determined that delivery would be delayed by the failure to make award promptly and that a prompt award would otherwise be advantageous to the Government. In view thereof, contracts were awarded to Sperry Rand Corporation and Golden Industries, Inc., on March 31, 1972, before resolution of the protest by our Office as is authorized under such circumstances by paragraph 2-407.8(b)(3) of the Armed Services Procurement Regulation (ASPR).

The referenced RFP, issued on December 22, 1971, was restricted to the following base producers of projectiles, 155MM, HE, M107, MPTS:

Louisiana Army Ammunition Plant (LAAP, Sperry Rand Corporation)
Twin Cities Army Ammunition Plant (TCAAP, 155MM line operated by Donovan Construction Company)
Scranton Army Ammunition Plant (SAAP, Chamberlain Manufacturing Corporation)
New Bedford Division, Chamberlain Manufacturing Corporation
Golden Industries, Inc., Sylacauga, Alabama

LAAP, TCAAP and SAAP are Government-owned, contractor-operated (GOCO) facilities, while the New Bedford and Sylacauga plants are privately owned, privately operated (POPO) plants utilizing Government-owned production equipment.

The solicitation, for the supply of metal parts for 1,535,466 projectiles, was issued in teletype form and generally incorporated by reference the provisions of request for proposals DAAA09-71-R-0143 (RFP-0143). RFP-0143, a prior solicitation for identical items, was the subject of our decision 51 Comp. Gen. 344 (1971) to Golden, and B-173953(2) and B-174264, December 13, 1971, to Donovan. You

assert that the instant RFP omits an appropriate evaluation factor, includes an improper evaluation factor, is not within the negotiation authority conferred by 10 U.S.C. 2304(a)(16), contains a delivery schedule designed to assure award to one of the offerors, and contains an unfair "double standard" of evaluation between GOCO and POPO offerors. We shall discuss your contentions in the order in which they are presented in your letter of January 4, 1972.

You observed that the nature of these plants creates a monopsony between them and the Government. If a Government-owned plant is not awarded a production contract, the Government must incur layaway and maintenance costs of the idle plant. In the event that no award is made to a POPO plant, the Government would incur the costs for idle plant space, i.e., space rental. You assert that the Government should have evaluated these costs by deducting them from the metal parts costs proposed under this solicitation by each POPO plant.

The contracting officer is in general agreement with your concept that space rental and other maintenance costs incurred after layaway should be evaluated, provided such costs are meaningful and measurable. ASPR 13-505. However, we are advised that at the time of the instant solicitation, the scope of layaway and maintenance work for all offerors was not established, thereby precluding evaluation of these costs. It is stated in the administrative report:

> It is noted that the entire thrust of the first alleged error in the RFP is founded on protestant's assumption that the Government would continue to consider its New Bedford Plant as a mobilization base, in the event protestant did not receive an award for production at the facility. This assumption infers a clear and concise definition of the need for the New Bedford Plant in the Army's plans for the future, as they relate to mobilization requirements. Because the Contracting Officer, at the time of RFP preparation, could not, with any degree of certainty, anticipate the future needs of military for the end item involved, he could not make a determination as to the scope of the maintenance program that would be required i.e. will the plant be held in a high or low state of readiness. Thus it was impossible for him to assign a meaningful evaluation factor to potential space rental, plus other maintenance costs to be incurred after layaway.

Under the facility contract for your New Bedford Division, we are advised that the Government has the option to place in layaway all or a portion of its equipment in your plant. Rental, in an amount to be negotiated would then be paid by the Government for the space occupied by that equipment. As indicated in the above-quoted portion of the administrative report, at the time of the issuance of the RFP the procuring activity could not determine in what state of readiness your plant would be held in the event it did not receive an award. Thus, the quantity of equipment that might be placed in layaway, and consequently the space rental for that equipment, was not known.

The possibility also existed that the space rental actually negotiated under the facility contract might vary substantially from the evaluation factor used in the solicitation. In the opinion of the procuring activity, the costs of layaway, maintenance and space rental were so uncertain and speculative that an evaluation factor therefor was inappropriate. Under these circumstances, we believe that the exclusion of such an evaluation factor was proper.

When it was issued, the instant solicitation through the incorporation by reference of provisions of RFP-0143, established an abnormal maintenance cost based on historical expenditures for the GOCO plants that would be used as an evaluation factor, but not as a ceiling, should the offeror be awarded a contract. In contrast, POPO plants were required to submit an abnormal maintenance evaluation factor which, if they were awarded the contract, would become a ceiling cost. You protested against the inclusion of this evaluation factor on the basis that it was unreal, conjectural, and did not consider the reasonable assumption that the greater the abnormal maintenance activity in a prior contract period, the less likely such maintenance would be required in a subsequent period. You also contended that the provision creates a "double standard" between GOCO and POPO plants, in that the GOCO contractor is not burdened with a cost ceiling for abnormal maintenance and repair costs, as is the POPO contractor.

The following response to these contentions was made in the administrative report:

> Each contractor, under his facility contract has established a maintenance plan for Government Equipment. For any maintenance required, which is not considered normal, the contractor will bear an amount of costs as established and all costs over this amount will be borne jointly by the contractor and the Government.
>
> The solicitation will be amended to require that all offerors both GOCO as well as POPO offerors shall submit an evaluation factor which is based on those estimates which the contractor projects will be experienced above those normal costs which they must perform in accordance with their established maintenance plan. The evaluation factor reflects the "out of pocket" costs which the Government will bear under the facilities contract during the period of performance of the supply contract. This factor will be revealed to all offerors.
>
> The contractor's proposed unit price for the supply contract will contain an amount which he anticipates he will experience for maintenance under his maintenance plan plus an amount to cover his agreed upon share of abnormal maintenance.
>
> The evaluation factor, as submitted by the offeror, will be used for evaluation purposes and will also be used as a ceiling cost for the Government's share in any resultant contract.

We have been advised by the Department of the Army that the solicitation was amended and the proposals were evaluated as indicated above. We therefore consider your objections to have been met and this aspect of your protest to be moot.

You next assert that the instant procurement was improperly negotiated under the authority of 10 U.S.C. 2304(a)(16), which permits the negotiation of contracts in the interests of national defense or industrial mobilization. You observe that, of the five base producers, two (LAAP and SAAP) were in production at the time the solicitation was issued. You suggest that if the industrial mobilization plans pursuant to the Determination and Findings (D&F) authorizing negotiation of this procurement disclose the intent to add two additional plants to those already in operation, then LAAP and SAAP should not have been solicited. On the other hand, you state, if there is no requirement to retain any plants other than LAAP and SAAP, then negotiation under 10 U.S.C. 2304(a)(16) was improper.

The record shows that the procurement plan for RFP-0054 was to set forth delivery schedules which would permit the greatest number of responses from all five base producers. The solicitations specifically provided that two awards would be made. Although SAAP was solicited for this procurement, as a practical matter it was not expected to (and did not) submit an offer since it was operating at capacity at the time RFP-0054 was issued. Therefore, the two awards would be placed among one active producer (LAAP) and three idle producers (TCAAP, New Bedford and Golden). As we have stated above, awards were made to one active producer (LAAP) and one of the idle plants (Golden).

The procurement plan and the awards made under RFP-0054 appears entirely consistent with the D&F supporting the use of negotiation in this procurement. RFP-0054, as well as its predecessor RFP-0143, were negotiated pursuant to a class D&F executed on April 13, 1971, by the Assistant Secretary of the Army (Installations and Logistics). Among the Findings made therein are the following:

> Procurement by negotiation of the above described property and services from qualified selected suppliers is justified, in order to make vital suppliers available in case of a national emergency, at which time the interest of industrial mobilization would be subserved. Negotiation of these contracts will insure continuous, accelerated production of the specific ammunition, and will also sustain the mobilization base for these items.
>
> Use of formal advertising for procurement of the above described property and services is impracticable, because such method would not assure the placement of contracts with existing or selected mobilization base producers to insure their continued availability to furnish essential supplies, or to expand their capacity to meet current and mobilization requirements, as well as to assure the reliability of the product and production within required delivery dates. Additionally, it would not be practical under such procedures to exclude existing producers in whole or in part from current procurements, for the purpose of establishing capacity in the plants of new producers in order to meet current and planned mobilization requirements.

It appears that the D&F contemplated procurements limited to existing mobilization base producers, to existing and new producers, or to new producers only. In the instant case, both existing and idle producers were solicited. The result of this solicitation and its predecessor, RFP–0143, has been to place three of the five producers comprising the mobilization base into production of these projectiles. In our opinion, the D&F complies with the procurement statute 10 U.S.C. 2304(a)(16), and we see no legal basis to question the D&F, to which finality is accorded by 10 U.S.C. 2310.

RFP–0054 contemplated a total monthly rate of 140,000 units, to be accomplished through two awards, and set forth alternate monthly delivery schedules of 90,000 units (Alternate 1), 70,000 units (Alternate 2), and 50,000 units (Alternate 3). The solicitation advised offerors:

> Offerors may quote on Alternate 3 only. However, if a quote is given on Alternate 2, one must be given on Alternate 3. Likewise, if a quote is given on Alternate 1, one must also be given on Alternates 2 and 3. Failure to comply with these provisions may be cause for rejection of the proposal.

You assert that the open capacity of LAAP prior to RFP–0054 was 50,000 units per month, and that the delivery schedules were "gerrymandered" to create Alternate 3, which coincides with this open capacity. You maintain that the structure of the delivery schedules virtually assured award of Alternate 3 to LAAP and would place it in full capacity production in contravention of 10 U.S.C. 2304(a)(16).

We are advised by the Department of the Army that the "Y-Line" production area at LAAP consists of two lines: one for the production of 155MM HE projectile metal parts and one for 155MM illuminating metal parts. The capacity of the former line is, as you have stated, 50,000 units per month. However, as the result of not obtaining a contract which would have utilized the line for illuminating projectiles, that line, with a monthly capacity of 40,000 units, was idle. LAAP therefore had an open capacity of 90,000 units a month, and the instant award at the monthly rate of 70,000 units still leaves open capacity at LAAP. Furthermore, the record before us indicates that the delivery schedules set forth in the RFP were designed to be equitable to all members of the production base.

LAAP received an award under the instant RFP because its offer was part of a combination of awards, totaling 140,000 units per month, which assured the lowest cost to the Government. The following were the evaluated unit prices for the present procurement:

Quantity	LAAP	Golden	Chamberlain	Donovan
Alternate 1: 987,370:				
Basic	0	$22. 462100	$22. 410000	$22. 570000
Freight	0	. 840481	1. 944873	1. 316136
Maintenance	0	. 273800	. 194000	. 714300
Evaluation	0	$23. 576381	$24. 548873	$24. 600436
Alternate 2: 767,733:				
Basic	$21. 900000	22. 861600	22. 540000	22. 960000
Freight	. 242556	. 840481	1. 944873	1. 316136
Maintenance	. 300000	. 352300	. 250000	. 918300
Data	. 012218	. 000000	. 000000	. 000000
Evaluation	$22. 454774	$24. 054381	$24. 734873	$25. 194436
Alteration 3: 548,096:				
Basic	$21. 600000	$24. 831600	$23. 140000	$23. 570000
Freight	. 242556	. 840481	1. 944873	1. 316136
Maintenance	. 350000	. 493900	. 350000	. 777700
Data	. 017113	. 000000	. 000000	. 000000
Evaluation	$22. 209669	$26. 165981	$25. 434873	$25. 663836

The most advantageous combination was the award of Alternate 1 to Golden and Alternate 3 to LAAP. However, it was determined that Golden could not responsibly undertake production of 90,000 units per month. A comparison of the evaluated prices of the combination of Alternate 1 to New Bedford and Alternate 3 to LAAP with the combination of Alternate 2 to both LAAP and Golden showed that the latter combination resulted in the lowest evaluated price. Therefore, awards were made to LAAP and Golden, with each plant to supply 767,733 units at the rate of 70,000 per month. While LAAP offered the lowest price under Alternate 3 (50,000 units per month), we do not believe the record supports the conclusion that this alternate was the result of "gerrymandering" to favor LAAP, and we note that it in fact received an award under Alternate 2 (70,000 units per month). Therefore, we find no merit in this contention.

The thrust of your final contention, entitled "Procurement Practice, Generally," is that the potential for abuse exists in permitting Sperry Rand to perform both load-assemble-pack operations and metal parts production at the same plant. You express particular concern whether Sperry Rand may be improperly allocating costs under its fixed-price contracts to its cost-reimbursable contracts at the facility. While our Office has examined the propriety of the cost allocations at LAAP, we are not in a position to release our conclusions to you at the present time.

In view of the foregoing, we are aware of no legal basis upon which the awards to Sperry Rand and Golden Industries may be disturbed. Your protest is, therefore, denied.

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