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[B-172819]

Contracts—Labor Stipulations—Nondiscrimination—"Affirmative Action Programs"—Minority Manpower Goals

The award by an Atomic Energy Commission prime contractor, whose invitation for bids to install mechanical, electrical, and HVAC systems had been amended to provide for certification coverage under the Pittsburgh Plan and for the submission of an affirmative action plan embodying goals and timetables of minority utilization, to the bidder who had certified that it was a signatory of the Pittsburgh Plan but did not submit an affirmative action plan rather than to the low bidder who although acknowledging the amendment did not comply with its requirements was proper since the certification will bind the successful bidder to comply with the affirmative action plan conditions imposed in the invitation, and the affirmative action plan objectives could not be waived as minor informalities as it would have been improper after bid opening to afford the low bidder an opportunity to correct the bid deficiency.

Bids—Subcontracts—Bid Forms—Copy Requirements

The failure of the successful bidder under an invitation for bids issued by a Government prime contractor to comply with the requirement that proposals be submitted in triplicate was a minor deviation which properly was waived pursuant to section 1-2.405(a) of the Federal Procurement Regulations. Furthermore, the single copy submitted by the bidder was made available by the prime contractor for examination by any interested party at the time of bid opening.

Contracts—Subcontracts—Specifications—Failure to Furnish Something Required—Information

The requirements in an invitation for bids issued by an Atomic Energy Commission prime contractor for the installation of mechanical, electrical, and HVAC systems to submit a price breakdown for numerous aspects of the work and a plan or schedule for accomplishing the work to include start and completion dates for all major construction, material procurement, need date for Government equipment, a manning table, and a list of lower tier subcontractors—information intended to assure the availability of adequate subcontractor support and not to prevent bid shopping—are not requirements that define or limit the bidder's obligation under the contract since they are requirements that are related to the bidder's ability to perform rather than the bidder's obligation to perform.

Bids—Subcontracts—Applicability of Federal Procurement Rules

While the pime contractor under an Atomic Energy Commission (AEC) operating type contract is not bound by the statutory and regulatory requirements that govern direct procurement by the Government, AEC Procurement Regulation 9-59.002 provides for AEC review of cost-type contractors' procurement systems and methods, as well as review of individual procurement actions and, therefore, there is no basis to question the procurement determinations made under rules applicable to such AEC contracts or under rules governing direct Federal procurements in connection with the evaluation of bids submitted under an invitation for bids issued by an AEC prime contractor for the installation of mechanical, electrical, and HVAC systems.

To the Limbach Company, December 1, 1971:

This is in reply to your letter of April 30, 1971, protesting the rejection of your bid and the award of a subcontract to a higher bidder by the Westinghouse Electric Corporation acting under its prime contract No. AT(11-1)-GEN-14, with the Atomic Energy Commission (AEC).

The invitation requested bids for the installation of mechanical, electrical, and HVAC (heating, ventilation, and air conditioning) systems and for the installation of laboratory furniture and other equipment. Your company submitted the lowest bid covering all of the work specified at $1,477,000 and a bond amount of $7,850. The Dick Corporation (Dick) submitted the second lowest bid at $1,570,000 and a bond amount of $10,990. After obtaining approval from the AEC, Westinghouse accepted the Dick bid.

Your bid was rejected because it was determined to be nonresponsive to the bid conditions in amendment 4 to the solicitation, which set forth affirmative action and equal employment opportunity requirements.

Briefly stated, these bid conditions defined the bidder's obligation for performance of federally funded construction, in that each trade to be utilized was required to be covered either by the requirements of the "Pittsburgh Plan" (an affirmative action program for minority manpower utilization in the construction industry in Allegheny County agreed to between the Black Construction Coalition and certain Pittsburgh Building trade unions and contractors), or by the minimum requirements of a detailed affirmative action plan as described in the bid conditions.

The following specific provisions of the bid conditions contained in amendment 4 are relevant:

Part I.

* * * * * * *

To be eligible for award of a contract under this Invitation for Bids, a bidder who, together with the labor organizations with whom it has collective bargaining agreements, is signatory, either individually or through an association, to the Pittsburgh Plan must execute and submit as part of its bid the following certification, which will be deemed a part of the resulting contract:

_____ certifies that:
(Name of Bidder)

(a) it intends to use the following listed construction trades in the work under the contract, either itself or through subcontractors at any tier _____

_____

_____

(b) the labor organizations with whom it has collective bargaining agreements who are signatories to the Pittsburgh Plan described in (b) above are as follows: _____

_____

_____

(c) the labor organizations with whom it has collective bargaining agreements who are *not* signatories to the Pittsburgh Plan described in (b) above are as follows: _____

_____

_____;

(d) the following is a full list of all present construction work or contracts to which it is a party in any capacity in Allegheny County, Pennsylvania: _____

_____

_____

and (e) it will comply, and require its subcontractors to comply, with all of the terms of the Pittsburgh Plan on all Allegheny County work in any trade for which it or its subcontractors are committed to the Pittsburgh Plan and will be bound by the provisions of Part II of these Bid Conditions on all Allegheny County work for all other trades.

[Signature of authorized representative of bidder.]

* * * * * * *

Part II. A. *Coverage.* The provisions of this Part II shall be applicable to those bidders, contractors and subcontractors in regard to those construction trades for which they:

1. Are not or hereafter cease to be signatories to the Pittsburgh Plan referred to in part I hereof;

2. Are signatories to the Pittsburgh Plan but are not parties to collective bargaining agreements covering that trade;

3. Are signatories to the Pittsburgh Plan but are not parties to collective bargaining agreements with labor organizations who are not or hereafter cease to be signatories to the Pittsburgh Plan; or

4. Are no longer participating in an affirmative action plan acceptable to the Director, OFCC, including the Pittsburgh Plan.

B. *Requirement—An Affirmative Action Plan.* The bidders, contractors and subcontractors described in paragraphs 1 through 4 above will not be eligible for award of a contract under this Invitation for Bids, unless such bidder has submitted as part of its bid, and has had approved by the ___(agency)___ a written affirmative action plan, embodying both (1) goals and timetables of minority manpower utilization,[1] and (2) specific affirmative action steps directed at increasing minority manpower utilization by means of applying good faith efforts to carrying out such steps or is deemed to have submitted such a program pursuant to Section 3 of this Part II. Both the goals and timetables, and the affirmative action steps must meet the requirements of this Part II as set forth below for all trades which are to be utilized on the project, whether subcontracted or not.

I. *Goals and Timetables.* The plan must set forth goals of minority manpower utilization for the bidder and all contractors and subcontractors for those trades not otherwise bound by the provisions of Part I hereof in terms of manhours, within at least the following ranges, for the following time periods, for each trade which will be used on the project upon which the bidder is bidding, within Allegheny County.

(The last quoted paragraph is followed by several pages of goals and timetables.)

* * * * * * *

2. Specific Affirmative Action Steps. The plans for the bidders, contractors and subcontractors must set forth specific affirmative action steps directed at increasing minority manpower utilization, which steps must be at least as extensive and as specific as the following:

(This is followed by 16 specific steps.)

You failed to execute the certification as set out in Part I above, and you also failed to submit an affirmative action plan as required by Part II B. It is the position of AEC that such failures created a situation in which, if awarded the contract, you would not have been bound to perform in accordance with the bid conditions. It was believed that an award to you in such circumstances would have constituted a counter-offer and would have provided you an option either to accept or refuse the contract. On the other hand, you contend that you were bound by the requirements of the bid conditions since your bid acknowledged receipt of this amendment and it was stated in

[1] "Minority" is defined as including Negroes, Spanish-Surnamed Americans, Orientals and American Indians.

your bid that your proposal was prepared accordingly. You also contend that the failure to execute the certification prior to bid opening can be waived since the affirmative action plan provisions of the solicitation as originally issued provided for a compliance review after submission of the bid but prior to award, and since amendment 4 did not eliminate this provision.

In our opinion the information and certification required by Part I may be considered material only to the extent that it would require a bidder as a matter of contractual obligation to comply with the terms of the Pittsburgh Plan if the bidder is a signatory thereto or to comply with the affirmative action requirements in Part II of the bid conditions in the circumstances enumerated above. It is clear, therefore, that amendment 4 defined the limits of the bidders' obligations regarding equal employment opportunity and as such it formed a material part of the bid to which assent was properly required of all bidders at the time of bid opening.

As to whether an obligation to comply with the Pittsburgh Plan would have resulted from the acceptance of your proposal, we are of the opinion that your commitment to comply with the Plan was sufficiently evidenced by your acknowledgment of amendment 4, by the statement that your bid was submitted accordingly, and by the evidence of record that at the time of bid opening you were a signatory of the Pittsburgh Plan. On the other hand, it is not clear that you made an offer to comply with an acceptable affirmative action plan, consisting of goals, timetables and steps as provided in Part II of the bid conditions, for any trade which may not have been committed to the Pittsburgh Plan. The fact that you failed to sign the certification which, in part, would expressly have committed you to comply with the provisions of Part II of the bid conditions, as well as your failure to submit any affirmative action plan created, on the whole, doubt as to whether you intended to meet the bid conditions of Part II, notwithstanding your acknowledgment of the amendment 4 and the statement that your bid was submitted "accordingly." Since in the circumstances it could not be determined from the bid itself whether you intended to comply with the bid conditions in Part II, it would have been improper to afford you an opportunity to decide after bid opening whether to correct the deficiency, and we must therefore conclude that rejection of your bid was required.

You have also questioned whether the second low bid submitted by Dick was responsive, since Dick's bid included affirmative action steps specified in the bid conditions in Part II, but did not spell out goals and timetables for their accomplishment. In view of this deficiency you question whether Dick's bid was any more responsive than your bid, which failed to provide any affirmative action plan.

The basic reason for reaching different conclusions with respect to the responsiveness to the affirmative action plan requirements of your bid and Dick's bid lies in the fact that Dick submitted the *certification* with its bid, which you failed to submit and which specifically provided that it ". . . will be bound by the provisions of Part II of these Bid Conditions [affirmative action plan] on all Allegheny County work for all other [non-Pittsburgh Plan] trades." Since Part II of the Bid Conditions required, as quoted above, that each bidder's goals and timetables be within at least the ranges, and for the time periods, set forth in the bid conditions, it is our opinion that Dick, by its certification, obligated itself to such goals and timetables notwithstanding its failure to include them with its bid. Since Dick did thus obligate itself, the failure to include specific goals and timetables became, not a matter of nonresponsiveness, but a minor informality which could be waived or cured prior to award.

You also object to Dick's failure to comply with the invitation request that proposals be submitted in triplicate. You claim that since Dick submitted only a single copy of its bid you were deprived of the opportunity to determine whether Dick's proposal was responsive as of the bid opening date. In this respect, Westinghouse has stated that the single copy of Dick's bid was made available for examination by any interested party at the time of bid opening. In any event we feel that Dick's failure to submit three copies of its bid was a minor deviation which could properly be waived. See Federal Procurement Regulations 1–2.405(a).

Your protest takes note of the fact that Dick failed to furnish certain information with its bid which was required by the solicitation, and you argue that its bid therefore should have been rejected as nonresponsive.

In this regard, the solicitation required bidders to submit a price breakdown for the following aspects of the work: HVAC system, plumbing, process piping, structural/architectural, electrical-primary power, electrical-controls, and painting. Furthermore, a plan or schedule for accomplishing the work was required to be submitted and was to include:

(1) Start and completion dates for all major construction phases.
(2) Material procurement: Identify order placement and delivery dates for all major equipment, tanks, valves, ductwork, and other controlling items. Such dates must be verifiable by suppliers for these items.
(3) Identification of a need date for each piece of Government Furnished Equipment shown in the Specification.
(4) A manning table identifying superintendents and/or foremen to be assigned to the work, craft manpower to be assigned by calendar week and any shift work planned to meet the completion date.
(5) A list of lower tier subcontractors, which list must be verifiable by Westinghouse.

As a general rule, it has been our position that offers of prospective contractors may not be rejected merely for failure to furnish with its offer information required to establish its qualifications. 39 Comp. Gen. 655, 658 (1960).

In its report to this Office the AEC has taken the position that both the price breakdown and the planning information were requested for the purpose of determining the bidder's qualifications and responsibility. While the requirement for the above information was stated in mandatory terms, it does not appear that this information was intended to operate to define or limit the bidder's obligations under the contract to be awarded. In prior decisions of this Office we have viewed requirements for similar information as being related to the bidder's *ability* to perform rather than the bidder's *obligation* to perform. See B–165689, January 29, 1969, and B–168396, February 2, 1970. While we have upheld the rejection of bids founded upon the failure of bidders to supply listings of lower tier subcontractors, in such cases the listings were required to prevent "bid shopping" and the use of subcontractors other than those listed in the bid was specifically precluded. See, for example, 43 Comp. Gen. 206 (1963) and the standard clause in 41 CFR 5B–2.202–70. However, no such intention is evident from the clause used in the present case. Moreover, AEC advises that the listing of subcontractors in this case was intended to assure availability of adequate subcontractor support for the work, and we believe the solicitation supports this view.

Finally, you question whether Westinghouse was bound by the statutory and regulatory requirements which would govern direct procurement by the Government. In this connection we have recognized, in decisions concerning the same Atomic Energy Commission operating type contracts as is here involved, that the contracting practices and procedures employed by prime contractors of the United States in the award of subcontracts are generally not subject to the statutory and regulatory requirements which would govern direct procurement by the United States. See B–170202, September 1, 1970, and B–169942, July 27, 1970. While the AEC Procurement Regulations (AECPR 9–59.002) provide for AEC review of cost-type contractors' procurement systems and methods, as well as for AEC review of individual procurement actions, we find no basis to question the procurement determinations made in this case under the rules applicable to this type of AEC contract or under the rules governing direct Federal procurements.

For the foregoing reasons, your protest is denied.

[B-173949]

Bids—Evaluation—Government Equipment, Etc.—Rental Evaluation Determination—Separate Facilities Contract

The submission of the signature page of a facilities contract, accompanied by a covering letter and exhibits evidencing the contract provided for use of Government-owned facilities free of charge, with a bid under the small business and labor surplus set-aside portions of an invitation for bomb bodies that contained a Government-owned property clause stating a bidder proposing to use Government propert "*SHALL NOT* include in its offer price any 'Rental Fee' or 'Use Charge' for use of such property" complied with the terms of the clause, notwithstanding written permission to use the facilities was granted after bid opening, since the facilities contract did not require use approval prior to bidding and, therefore, the facilities contract constituted adequate approval for the use of the Government facilities in the possession of the bidder on a rent-free basis.

Contracts—Awards—Labor Surplus Areas—Certificate of Eligibility—Submission With Bid Requirements

Where under the small business and labor surplus set-aside portions of an invitation, the certificate of eligibility for first preference on the basis of the location of a contemplated subcontractor, submitted under the labor surplus area set-aside procedure prescribed by paragraph 1-804.2(b) of the Armed Services Procurement Regulation, was recalled after bid opening—a conclusive Department of Labor determination—upon subsequent approval of the area as one of substantial unemployment, the prospective prime contractor properly was not allowed to utilize its post-bid opening first preference certificate, notwithstanding its small business status, for the recall of the subcontractor's certificate was a denial of certification and, therefore, no valid certificate existed at bid opening time, and since the affirmative action of the small business concern after bid opening to improve its priority may not be accepted, its labor-surplus bid was nonresponsive.

Contracts—Awards—Small Business Concerns—Set-Asides—Price Differential Computation

In evaluating the small business and labor surplus set-aside portions of an invitation for bids prescribing that "the set-aside portion shall be awarded at the highest unit price awarded on the non-set-aside portion, adjusted to reflect transportation and other cost factors which are considered in evaluating bids on the non-set-aside portion," and that "unit price shall include evaluation factors added for the rent-free use of Government property," the adjustment of the award price to reflect the facilities rental represents a cost to the Government and not a hypothetical cost to each bidder to eliminate any competitive advantage, and the award price for the labor surplus area set-aside should be computed to accurately reflect the actual transportation costs to the Government provided no prohibitory price differential results.

To the Secretary of the Navy, December 3, 1971:

Reference is made to letter SUP 0222 dated November 16, 1971, and prior correspondence, from the Deputy Commander, Procurement Management, Naval Supply Systems Command, reporting on the protests of Intercontinental Manufacturing Co. (IMCO), Norris

Industries (Norris) and American Manufacturing Co. of Texas (AMCOT) against the proposed awards of contracts under the small business and labor surplus set-aside portions of invitation for bids (IFB) No. N00104–72–B–0123, issued by the Navy Ships Parts Control Center (SPCC), Mechanicsburg, Pennsylvania.

The IFB, issued on July 8, 1971, covered the procurement of 500-pound bomb bodies and set aside separate quantities of 236,315 each for awards to small business and labor surplus area concerns. For the reasons hereinafter stated, we concur with the determination of the SPCC contracting officer to award the small business set-aside portion of the IFB to AMCOT and to grant Norris first priority negotiation for award of the labor surplus set-aside portion of the IFB. However, we believe that, with respect to the labor surplus set-aside negotiation, SPCC should take into account other factors, discussed below, to determine the ultimate "matching price" tendered to Norris.

Norris (large business and labor surplus area concern) and IMCO (large business and labor surplus area concern) contend that the bid of AMCOT (small business and labor surplus area concern) should be rejected as nonresponsive for failure to submit the required written authorization of the cognizant facilities contracting officer for the use of Government facilities and equipment which the firm intends to utilize in the performance of any resulting contract. The first paragraph of the Government-owned property clause on page 14 of the IFB provided a space for a bidder to indicate whether it planned to use in the performance of the contract any item of Government property, including facilities in its possession. AMCOT indicated in the proper place on page 14 that it required the use of Government property to perform the work. The clause further advised that if bidders propose to use Government property, they "*SHALL NOT* include in its offer price any 'Rental Fee' or 'Use Charge' for use of such property." Paragraph 2(iii) required bidders, such as AMCOT, to submit the following information with their bids:

(iii) the facilities contract or other instrument under which the Government Property is held, together with the written permission of the Contracting Officer having cognizance thereof authorizing its use;

AMCOT did not timely submit the written permission of the cognizant facilities contracting officer, although subsequent to bid opening permission was granted. However, its bid contains the signature page from AMCOT's facilities contract with the Naval Air Systems Command. In addition, the cover letter to the AMCOT bid reads, in pertinent part, as follows:

Our N00019–67–C–9084 Facilities Use Contract grants permission for the rent-free use of the Government-owned facilities, located in our plant, which

we propose to use in the production of the item. Because of various combinations of quantities that may be awarded by use of Schedule "A" and Exhibits A and B, the Contracting Officer may readily determine the amount of rental for total quantity of award to AMCOT. We are enclosing Schedule "A" Facility Lists for Evaluation, which reflects various quantities of bombs and a corresponding rental for those quantities indicated. In addition, as support information for Schedule "A," we are enclosing Exhibits A and B, which list the facilities for quantities as indicated on Schedule "A." Permission authorizing such use of Government-owned facilities is evidenced by the enclosed signature page from our Facilities Use Contract. "*Our contract states that we may use the facilities without charge in the performance of prime contracts with the Government which specifically authorize use without charge.*" Therefore, our bid does not contain any amount for rental payment for the use of those facilities. We have previously been granted authorized use of the facilities, for production under current contracts. The enclosed Exhibits also indicate the percentage of use proposed for this IFB and concurrent use for other contracts. [Italic supplied.]

Section "M" of AMCOT's facilities contract contains the following pertinent language prescribed by paragraph 7–702.12 of the Armed Services Procurement Regulation (ASPR):

USE AND CHARGES (1968 JUNE)
(ASPR 7–702.12) (D–61)
(a) The Contractor may use the Facilities without charge in the performance of:
(i) *Prime contracts with the Government which specifically authorize use without charge,*
(ii) Subcontracts held by the Contractor under Government prime contracts or subcontracts of any tier thereunder if the Contracting Officer having cognizance of the prime contract concerned has authorized use without charge by approving a subcontract specifically authorizing such use or has otherwise authorized such use in writing, and
(iii) Other work with respect to which the Contracting Officer has authorized use without charge in writing. [Italic supplied.]

In implementation of the use and charges clause, the facilities contract contains the following language:

1.1. In addition to the rent-free use authorized by paragraph (a) of General Provision No. 2, entitled, "Use and Charges," the facilities shall be available for the Contractor's use during the period of this contract for the performance of contracts with agencies of the Federal Government and subcontracts thereunder provided that the contractor shall pay rent for such additional availability and right to use in accordance with the charges prescribed by General Provisions No. 2 entitled "Use and Charges."

Our Office had occasion to consider a strikingly similar set of circumstances in B–171469, April 20, 1971. In that case, the Raytheon Company, in response to an IFB containing substantially analogous language as that quoted above, attached to its bid reproduced pages from its facilities contract, which included virtually identical language to that found in AMCOT's facilities contract. Under that factual situation, we held that:

Under the terms of * * * [language practically identical to that contained in the subject IFB] Raytheon's bid must be considered to have complied with such terms by stating that the company planned to use certain Government-owned facilities and that it was authorized to do so under the terms of Facilities Contract No. N00019–68–9051. The facts present here are clearly distinguishable from those in B–154598, *supra*. In that case the rejected bidder's Government facilities contract contained a provision which specifically required the

contractor to obtain written approval to use the facilities prior to bidding on an invitation. Here, Raytheon's facilities contract did not require such additional approval. It is also clear that the contracting officer having cognizance over the facility in question so interpreted the provisions of the facilities contract, since he verified Raytheon's rental computation for use of the property for the purposes of the subject IFB. *Cf.* 38 Comp. Gen. 79 (1958).

Norris characterizes this decision as creating an exception not applicable here to the mandatory submission of written permission to use Government facilities. Norris argues that the IFB here stipulates unequivocally that bids must be based on rent-free use of required Government facilities, whereas the Raytheon *decision* reflects no such stipulation in the IFB there involved. Moreover, it is contended that the Raytheon and AMCOT facilities contracts only authorize use of facilities without permission "provided that the contractor shall pay rent for such additional availability and right to use." Therefore, Norris concludes, since the present IFB requires bids on a rent-free basis, the AMCOT facilities contract did not constitute adequate authorization, as it did under the circumstances of the Raytheon case.

The IFB in the Raytheon case permitted bidders to bid on the basis of rent-free use or on a rental basis for the use of Government property. Raytheon bid on a rent-free use basis. Particularly important here is the fact that both IFB's specially precluded bidders from including in their bid prices any charge for rental covering the Government property which they intended to use. Moreover, nothing in AMCOT's facilities contract required the contractor to obtain written approval to use the facilities on prime Government contracts prior to bidding on any procurement. We find no basis upon which to not apply the rationale of the Raytheon decision to the facts of this case. In consonance therewith, we find that the facilities contract constituted adequate approval for the use of the Government facilities in the possession of AMCOT.

Norris claims that AMCOT's bid "may be nonresponsive for failure to provide accurate and complete information regarding Government facilities to be used." We see no reason, on the record, to discuss this aspect of the protest in depth. It is sufficient to note that SPCC evaluated AMCOT's bid on a common basis with other bids and found it to be reasonable and in accordance with the terms of the IFB.

With respect to the labor surplus set-aside portion of the IFB, section 30.20 sets forth the standard notice of labor surplus area set-aside prescribed by ASPR 1-804.2(b). In pertinent part, that section reads as follows:

> * * * Negotiations for the set-aside portion will be conducted with such bidders in the following order of priority:
>
> Group 1. Certified-eligible concerns with a first preference which are also small business concerns.
>
> Group 2. Other certified-eligible concerns with a first preference.

Group 3. Certified-eligible concerns with a second preference which are also small business concerns.
Group 4. Other certified-eligible concerns with a second preference.
Group 5. Persistent or substantial labor surplus area concerns which are also small business concerns.
Group 6. Other persistent or substantial labor surplus area concerns.
Group 7. Small business concerns which are not labor surplus area concerns.

* * * * * * *

(c) Identification of Areas of Performance. Each bidder desiring to be considered for award as a labor surplus area concern on the set-aside portion of this procurement shall identify in his bid the geographical areas in which he proposes to perform, or cause to be performed, a substantial proportion of the production of the contract. If the Department of Labor classification of any such areas changes after the bidder has submitted his bid, the bidder may change the areas in which he proposes to perform, *provided*, that he so notifies the Contracting Officer before award of the set-aside portion. Priority for negotiation will be based upon the labor surplus classification of the designated production areas as of the time of the proposed award.

(d) Eligibility Based on Certification. Where eligibility for preference is based upon the status of the bidder as a "certified-eligible concern," the bidder shall furnish with his bid evidence of its certification or its first tier subcontractors' certification by the Secretary of Labor.

In accordance with paragraph 30.20(d), both IMCO and AMCOT timely submitted certificates of eligibility for first preference on the basis of the location of their contemplated subcontractor. In addition, AMCOT submitted its own second preference certificate covering its Fort Worth, Texas, plant. Norris submitted a timely first preference certificate with its bid. However, on August 25, 1971, 9 days after bid opening, the Texas Employment Commission, for the Department of Labor, recalled the first preference certificates of the intended subcontractor of AMCOT and IMCO because the issuance of the certificates did not conform to the Department of Labor regulations in 29 CFR, part 8. While IMCO and AMCOT challenge the Department of Labor criteria for entitlement to first preference in the area of their intended subcontractor, the fact remains that the subcontractor was not entitled to the first preference certificate on the date of bid opening since the firm was not located in an area (Cass County, Texas) of substantial unemployment. See 29 CFR 8.7(b); and section 30.20(b)(2)(i) of the IFB. We have no jurisdiction to substitute our judgment for that of the Department of Labor as to labor surplus area designations.

On September 1, 1971, the Department of Labor, in the ordinary course of business, officially designated the Fort Worth, Texas, area as one of substantial unemployment. Whereupon, on September 2, 1971, AMCOT applied for, received and subsequently transmitted to the contracting officer a first preference certificate for its own plant at Fort Worth. The SPCC contracting officer refuses to consider this first preference certificate. He proposes to extend priority negotiation opportunity on the labor surplus set-aside portion of the IFB to eligible firms in the following order: (1) Norris, as a large business with a valid first preference certificate of eligibility; (2) AMCOT,

as a small business with its own second preference certificate submitted with the bid; and (3) IMCO, as a large business with a second preference based on the Department of Labor's permission granted to backdate the subcontractor's invalid first preference certificate.

We have carefully reviewed the extensive legal arguments of AMCOT that SPCC consider AMCOT for first priority negotiation based on its September 2 certificate since it has a small business status and, therefore, allegedly falls into priority group 1, while Norris as a first preference large business falls into priority group 2. We conclude that there is no legal authority for the SPCC contracting officer to allow AMCOT to utilize its post-bid-opening first preference certificate on its Fort Worth plant.

Initially, we note that 29 CFR 8.9(b) provides that certificates of eligibility shall be valid for a period of 6 months or until recalled by the agency or surrendered, whichever is earliest. Citing this provision and IFB section 30.20(c), quoted above, AMCOT distinguishes decisions of our Office wherein we have held that, after bid opening, a bidder could not take affirmative action to upgrade his labor surplus preference eligibility. See, for example, 47 Comp. Gen. 543 (1968). Therefore, AMCOT argues that no such upgrading occurred since AMCOT had a valid first preference on the bid opening date and, in any event, priority for negotiation, in the language of the IFB, "will be based upon the labor surplus classification of the designated production areas as of the time of the proposed award." Also, since the classification change in the Fort Worth area was not initiated by the bidder, AMCOT is permitted a change in the area of performance that does not result in a change in the order of priority from that stated in its bid.

The Department of Labor views the viability of an improperly issued certificate to be other than as asserted by AMCOT. We admit that the language of 29 CFR 8.9(b) would seem to support AMCOT's contention that the first preference certificate of its subcontractor was valid until recalled 9 days after bid opening. However, section VIII of Department of Labor Training and Employment Service Program Letter No. 2558 dated February 27, 1970, providing guidelines to state employment security agencies, in implementation of 29 CFR 8, provides:

> The disapproval of an application for certification, or the recall of a certificate [by the state offices] constitutes a denial of a certificate.* * *

Moreover, Department of Labor Field Memorandum 6–71 of January 8, 1971, which constituted a change to the above program letter, pointed out to Labor field personnel an interpretation of the Solicitor of Labor, as follows:

Of great importance to local ES office operations are two recent interpretations on DMP–4 regulations provided by the Solicitor of Labor. One interpretation states that "a certificate issued contrary to revised regulations constitutes a denial of a certification. It must be recalled to protect the employer from possession and continued use of an invalid document." * * *

Also, correspondence with the contemplated subcontractor of AMCOT and IMCO indicates a consistent position in this regard. In a letter dated October 13, 1971, from the Acting Deputy Manpower Administrator to the Regional Manpower Administrator, Dallas, it was stated:

* * * No formal notification to the firm [contemplated subcontractor] is necessary from this office since a certificate issued contrary to regulations constitutes no certification and, therefore, the recall of such an invalid document is not an issue for appeal.

With respect to the certificate issued to the American Manufacturing Company of Texas on September 2, 1971, Fort Worth, Texas, the firm was eligible to receive its first preference certificate as of September 1, 1971, the date the area was officially designated as one of substantial unemployment. Under the regulations, no predating of this certification is legal. The survey process is uniformly applied to all areas when the official announcement is made, which is the first day of the month following the survey recommendations. There are no exceptions to this rule.

See our decision 50 Comp. Gen. 559, February 16, 1971, wherein we quoted in full the Solicitor of Labor's interpretation referred to in Field Memorandum 6–71.

Therefore, it is our view that, while AMCOT in good faith represented the first preference status of its subcontractor, such status was not legally in existence at bid opening. We do not subscribe to AMCOT's reliance on paragraph 30.20(c) of the labor surplus area terms and provisions to claim first preference eligibility. Our Office has permitted bidders to utilize that paragraph so long as such utilization does not result in an advancement of priority. We view that paragraph as providing a purely procedural method whereby bidders can change the areas of performance should the Department of Labor reclassify an area of performance between bid opening and award. We specifically dispelled the alleged responsibility aspects of the labor surplus area provision in section 30.20(c) of the IFB. See 47 Comp. Gen., *supra*, at page 549, where we stated:

It may be said that the labor surplus area provisions carry a connotation of responsibility rather than responsiveness in that they state that "Priority for negotiation will be based upon the labor surplus class of the designated production areas as of the time of the proposed award." However, we do not regard the quoted language as indicative of responsibility on the basis that evidence of surplus labor area class may be furnished after bid opening but prior to award. In the context of the entire paragraph, which is entitled "Identification of Areas of Performance," the quoted language must be read in the light of the preceding sentence: "If the Department of Labor classification of any such area [the geographic area identified in the bid] changes after the bidder has submitted his bid, the bidder may change the areas in which he proposes to perform, provided, that he so notifies the contracting officer before award of the set-aside portion."

While the change in the classification of Fort Worth did not result from any affirmative action by AMCOT, the issuance of the first preference certificate did so result from action taken by AMCOT. AMCOT's affirmative action in applying for the certificate, if permitted to stand, would clearly displace Norris to its prejudice in the order of priority for negotiations. See B-156374, September 3, 1965. We must conclude that since AMCOT had no valid certificate at bid opening, the consistent holdings of our Office that evidence of a certificate of eligibility cannot be supplied after bid opening should prevail.

We recognize that, by virtue of this conclusion, AMCOT appears to be penalized since it did not, as have others, place itself in a lesser category of preference prior to bidding only to take affirmative action to improve its post-bidding status. But we cannot permit AMCOT to choose its order of priority based on events occurring subsequent to bid opening. See, again, 47 Comp. Gen., *supra*, at page 549, where we advanced the general rule that:

> Hence, under the labor surplus area provisions, a bidder may change his area of performance originally certified if the classification of that area is changed by the Department of Labor but the change must not result in an advancement in priority preference. See B-156374, September 3, 1965. In other words, an authorized change is permitted provided the bidder will perform in the same category stated in his bid, but not if the change would improve his position in order of priority. We therefore regard these provisions as unrelated to responsibility since the bidder is precluded from taking unilateral action affecting his previously stated area of performance and any change, if authorized, is one not affecting his relative position of priority vis-a-vis other bidders.
>
> In view thereof, it is our opinion that the requirement in the invitations and the RFP respecting the submission of evidence of certification as a "certified-eligible concern" is one of responsiveness as to which the critical time is bid opening or the date fixed for receipt of proposals.

Norris contends that the award prices to be offered on both set-asides should not be adjusted to reflect either a facilities rental factor or transportation costs to the Government to other than the actual destinations to which the bomb bodies will be shipped. The contracting officer believes that the proposed set-aside procedures comport strictly with the IFB's small business and labor surplus set-aside notices which state:

> * * * The set-aside portion shall be awarded at the highest unit price awarded on the non-set-aside portion, adjusted to reflect transportation and other cost factors which are considered in evaluating bids on the non-set-aside portion * * *

The details supporting the proposed awards to Norris and AMCOT are as follows:

	NORRIS [Labor surplus set-aside]			
	Facilities Rental		Freight	
	Total	Unit	Total	Unit
Norris	$710, 340. 48		$1, 716, 966. 86	
AMF (non-set-aside awardee)	238, 717. 61		1, 517, 102. 14	
Difference	471, 622. 87	$1. 965	199, 864. 72	$0. 833
Total difference ($1.965 + $.833)		2. 798		
Non-set-aside unit price (AMF)		51. 00		
Less		2. 798		
Set-aside unit price for Norris		48. 202		

	AMCOT [Small business set-aside]			
AMCOT	$425, 830. 58		$701, 389. 41	
AMF (non-set-aside awardee)	238, 717. 61		1, 517, 102. 14	
Difference	187, 112. 97	$0. 78	813, 712. 73	($3. 399)
Total difference ($3.399—$. 78)		2. 619		
Non-set-aside unit price (AMF)		51. 00		
Plus		2. 619		
Set-aside unit price for AMCOT		53. 619		

Norris points out that the purpose for establishing an award price results from, in the case of the labor surplus set-aside, the statutory prohibition against the payment of a price differential for placing contracts in labor surplus areas. With respect to adjustment of the set-aside award price to reflect the facilities rental factor, Norris claims that such factor does not represent a cost to the Government but only a hypothetical cost to each bidder to eliminate any competitive advantage. Norris differentiates between the evaluation of bids based on cost factors and the actual award price on the set-asides. We do not agree. The set-aside notice in section 30.20(b) (4) of the IFB contains the following definition of "unit price":

(4) *"Unit Price"* shall include evaluation factors added for the rent-free use of Government property.

Since the contracting officer proposes to follow the award procedure set out in the IFB as prescribed by ASPR 1–804, we have no basis upon which to interpose objection thereto. Also, while Norris as a facilities contractor may have absorbed various costs of modification, maintenance, etc., the Government has paid for and supplied the property to Norris, which must be characterized as a cost to the Government. The use and amortization of Government property result in additional costs to the Government which must be recognized. See B–153188, March 9, 1965; and 43 Comp. Gen. 327 (1963).

As far as the adjustment of an award price to reflect the lowest or actual transportation costs to the Government, Norris points out that the IFB called for f.o.b. origin prices with freight costs to be paid by the Government. The non-set-aside award made under the IFB to AMF Incorporated requires delivery to four designated bomb-loading plant destinations. However, Norris believes, and SPCC appears to agree, that subequent to the set-aside awards, the Government may very well reduce transportation charges by modifying existing contracts to call for delivery to the nearest bomb-loading facilities.

As stated above, the contracting agencies may not pay a price differential when awarding contracts under the labor surplus area set-aside program. In view thereof, the invitation contains the above-quoted provision in the set-aside notice setting forth the criteria to establish the award price of the set-aside. We understand that the Government will change delivery points (bomb-loading facilities) to reduce its transportation costs. Even though the non-set-aside award reflected four destinations named in the IFB, the delivery schedule calls for initial deliveries by January 5. Thus, it appears that if, as we believe, AMCOT will be eligible for the small business set-aside award and Norris first in line for negotiation under the labor surplus area set-aside, SPCC may be in a position to determine actual destination points. If such is possible, we believe that the award price tendered to Norris should be computed to accurately reflect the actual transportation costs to be incurred by the Government, provided, of course, no prohibited price differential results therefrom.

We are enclosing a copy of a letter from IMCO, received on November 30, 1971, for your Department's consideration and appropriate reply. We believe that the letter relates to matters of procurement policy which are not entirely germane to these protests; that is, the propriety of the established procedures used in determining the reasonable rental values of Government facilities in the possession of contractors under facility contracts.

[B-173953]

Contracts—Awards—Labor Surplus Areas—Certificate of Eligibility—Validity Determination

The untimely submission of a certificate of eligibility—subsequently recalled—under a labor surplus area set-aside by a small business concern, who in contrast to Government-owned facilities operated under contract, owns its facilities and utilizes Government-owned production equipment, properly was considered on the basis of Comptroller General decisions and agency regulations. The determination to exclude the certificate was not erroneous because the contracting officer failed to exercise his independent judgment, or discretion since the solicitation and regulations requiring the certificate to be submitted with an offer were mandatory, and reliance on the Comptroller's decisions was appropriate in view of

31 U.S.C. 1, *et seq.*, authorizing the disallowance of credit in the accounts of fiscal officers for payments under an illegal contract.

Contracts—Government Property—Disposal—Policy to Minimize Ownership

The award of the non-set-aside portion of a labor surplus area procurement for projectiles to a contractor operating a Government-owned facility (GOCO) rather than to a contractor owning his facility and utilizing Government-owned production equipment is not violative of the policy to minimize Government ownership of industrial facilities stated in Department of Defense Directive 4275.5, November 14, 1966, under the heading "Industrial Facility Expansion Policy," for although the award will keep the Government facility in existence, no acquisition, expansion, construction, or use of property to increase production is entailed. Furthermore, the solicitation provided for the participation of GOCO contractors, and the approval of accounting procedures, removes the possibility of a portion of the GOCO contractor's cost being allocated to its cost-reimbursable contract with the Government.

Wage and Price Stabilization—Contract Matters—Prices—Escalation Clause Coverage

The omission of a price escalation clause to reflect the impact of Executive Order 11615, August 15, 1971, which provides for the stabilization of prices, rents, wages, and salaries, from a request for proposals to furnish projectiles that was issued to both Government-owned, contractor operated facilities and privately owned facilities utilizing Government-owned production equipment does not make the solicitation defective. The opportunity during negotiations to propose a contract with an escalation provision having been declined by the protestant because the maximum amount of the escalation would have to be added to the price, it is not appropriate after submission of a proposal to contend an award cannot properly be made on the basis of proposals which, as was the case with the protestant's proposal, did not include an escalation clause.

To Storey, Bryan and Silverstein, December 3, 1971:

Reference is made to two telegrams dated September 10, 1971, from Golden Industries, Inc. (Golden), and to your subsequent correspondence on behalf of Golden protesting against the rejection of a certificate of eligibility submitted by Golden under RFP DAAA 09–71–R–0143 (RFP–0143), issued by the Army Ammunition Procurement and Supply Agency, Joliet, Illinois.

The instant protest, and those of two other firms, arise from the procurement by the Ammunition Procurement and Supply Agency (APSA) of the Army's requirements for 155mm projectiles. It appears from the record that there are only five facilities equipped to manufacture this item:

Scranton Army Ammunition Plant (Chamberlain Manufacturing Corporation)
Louisiana Army Ammunition Plant (Sperry Rand Corporation)
Twin Cities Army Ammunition Plant (Donovan Construction Company)

Chamberlain Manufacturing Corporation, New Bedford, Massachusetts
Golden Industries, Inc., Sylacauga, Alabama.

The Scranton, Louisiana and Twin Cities plants are Government-owned facilities operated in whole or in part by Chamberlain, Sperry Rand and Donovan, respectively. In contrast to these Government-owned, contractor-operated (GOCO) facilities, Chamberlain (New Bedford) and Golden are privately owned facilities which utilize Government-owned production equipment. Golden is the sole small business concern among the five offerors. All five facilities were active in the production of 155mm projectiles during Fiscal Year 1971, in which they were operating under fixed-price contracts for supplies. Additionally, each plant had a cost reimbursable contract to cover the maintenance of equipment and the assignment of the equipment to its contracts.

The referenced solicitation was issued on July 15, 1971, for a supply of these projectiles. Offerors were permitted to submit prices on various quantity ranges of projectiles, one of which was "Range B 980,001 to 1,120,000." In regard to this quantity range, the solicitation provided:

In addition to the quantity of Range B shown above, a like quantity has been set aside for award to a labor surplus area concern.

Section C of RFP-0143 contained the clause "Notice of Labor Surplus Area Set-Aside (1970 JUN)" (ASPR 1-804.2(b)(1)), which established the procedures for the negotiation of the set-aside portion of the procurement. Priority for such negotiations descended through the following 7 groups:

Group 1. Certified-eligible concerns with a first preference which are also small business concerns.
Group 2. Other certified-eligible concerns with a first preference.
Group 3. Certified-eligible concerns with a second preference which are also small business concerns.
Group 4. Other certified-eligible concerns with a second preference.
Group 5. Persistent or substantial labor surplus area concerns which are also small business concerns.
Group 6. Other persistent or substantial labor surplus area concerns.
Group 7. Small business concerns which are not surplus area concerns.

"Certified-eligible concerns with a first preference," by definition under paragraph (b)(2)(i) of the above-cited clause, must have been "certified by the Secretary of Labor in accordance with the 29 CFR 8.7(b) and 8.7(c), with respect to the employment of disadvantaged persons residing within such sections or areas" of unemployment or labor surplus. Paragraph (d) of the clause advised offerors:

Where eligibility for preference is based on the status of the offeror as a "Certified-eligible concern," the offeror shall furnish with his offer evidence of its certification or its first tier subcontractors' certification by the Secretary of Labor.

The solicitation, as amended, established August 30, 1971, as the closing date for receipt of proposals. Golden timely submitted a proposal in which it certified itself to be a small business concern, and indicated that the contract would be performed in, and the items would be furnished from, Sylacauga, Talladega County, Alabama. The cover letter accompanying the proposal stated:

> We wish to note that our company is eligible for the Labor Surplus Set-Aside as well as being a Small Business.

Golden identified three other geographical areas in the blanks provided by paragraph (c) of the "Notice of Labor Surplus Area Set-Aside" clause, thereby indicating the basis for its desire to be considered for award as a labor surplus area concern on the set-aside portion of the procurement. However, apparently through inadvertence, Golden did not furnish a certificate of eligibility with its initial proposal nor otherwise indicate that it was a "certified-eligible" concern based on performance of any work in Talladega County.

Amendments 0011 and 0012 to the solicitation opened negotiations on September 1 and closed negotiations on September 10, 1971. On September 7, Golden submitted to the procuring activity for inclusion with its proposal a certificate of eligibility. The certificate, dated August 27, 1971, certified Golden for the first preference group on the basis of an agreement to hire disadvantaged individuals residing within "Talladega County, Alabama." By letter of September 9, 1971, the procuring contracting officer returned the certificate to Golden with the advice that the failure to submit the certificate prior to the closing date for receipt of proposals precluded its consideration. In support of his conclusion, the procuring contracting officer referred to paragraph (d) of the "Notice of Labor Surplus Area Set-aside" clause, quoted above, and to our decisions, 47 Comp. Gen. 543 (1968) and B–171815, May 28, 1971. We also observe that paragraph 1–804.2 of the Army Materiel Command Procurement Instruction provides:

> A copy of the Department of Labor's certification must be submitted with the offer, in order to qualify for labor surplus area preference. This requirement is one of responsiveness that cannot be supplied or corrected after time for bid opening or date fixed for receipt of proposals.

You then protested to our Office against the contracting officer's action in rejecting the certificate of eligibility.

By letters of October 27 and November 12, 1971, Chamberlain Manufacturing Corporation (Chamberlain), an offeror who has protested to our Office that it would be improper to accept Golden's certificate of eligibility, argued that our Office has consistently held that "submission of the certificate on or before the due date of a bid submission runs to the responsiveness of the submission and a failure to so submit disqualifies the bidder." Additionally, Chamberlain observed that

Talladega County, Alabama, was first designated an area of substantial unemployment in the August 1971 issue of "Area Trends in Employment and Unemployment," published by the U.S. Department of Labor. It is stated on page 1 of that publication:

> For purposes of Federal procurement preference, all changes in the substantial or persistent classifications are effective on September 1, 1971.

Chamberlain contends that for this reason, "the certificate of eligibility was illegal and unenforceable and of no consequence on the date of its issuance with respect to this procurement. * * *." Although award of the non-set-aside portion of the procurement has been made to an offeror other than Golden, award of the set-aside portion has been withheld pending issuance of our decision.

You first contend that the rejection or acceptance of your certificate of eligibility was a matter for the independent judgment of the contracting officer. You state that in rejecting the certificate, the contracting officer abdicated to this Office the responsibility of exercising his discretion, thereby making his decision a nullity. You cite *United States* v. *Mason & Hanger Co.*, 260 U.S. 323 (1922); *Arnold* v. *United States*, 404 F. 2d 953, 186 Ct. Cl. 117; *Schlesinger* v. *United States*, 182 Ct. Cl. 571 (1968).

United States v. *Mason & Hanger*, *supra*, accorded finality to the contracting officer's approval of an item of cost incurred by a contractor whose cost-reimbursement contract provided that such decision "shall govern," 260 U.S. at 325, and that "the statement so made and all payments made thereon shall be final and binding upon both parties * * *." *Id.* We must agree with the administrative position that the above case, which is concerned with the finality of a decision under a "Disputes-type" contractual provision, is distinguishable from the instant case involving the propriety of entering into a proposed contract.

In *Arnold* v. *United States*, *supra*, the court held that salary payments could not validly be withheld under a statute requiring the Secretary of the Air Force or his designee to order withholding, where neither the Secretary nor his designee made the required determination and where the order was issued without any exercise of discretion by the Air Force. In observing that the order was issued solely as a mechanical response to a Certificate of Indebtedness from the Comptroller General, the court emphasized that the statute required a "determination" of indebtedness which "may" be collected by withholding, language which implied the use of independent judgment and the power of choice. 404 F.2d 957–958.

It was held in *Schlesinger* v. *United States*, *supra*, that a clause providing the Government "may" (not "shall" or "must") terminate a contract for default vested in the Government certain administrative

discretion whether to terminate, and a termination effected without consideration of the contractor's circumstances or the availability of a termination for the convenience of the Government constituted an improper abdication of the obligation to exercise that discretion.

The instant case does not involve a situation wherein a statute (*Arnold*) or a contractual provision (*Schlesinger*) requires an official to make a decision which must be the result of independent judgment or choice. Paragraph (d) of the "Notice of Labor Surplus Area Set-Aside" clause, referred to in the contracting officer's letter rejecting the certificate, explicitly states that an offeror claiming status as a "Certified-eligible concern * * * *shall* furnish with his offer evidence of its certification * * *." Paragraph 1–804.2 of the Army Materiel Command Procurement Instruction (AMCPI) provides that a copy of the certificate of eligibility "*must* be submitted with the offer * * *. This requirement is one of responsiveness that *cannot* be supplied or corrected after * * * date fixed for receipt of proposals." In our opinion, the terms of the solicitation (as established by the Armed Services Procurement Regulation) and the AMCPI did not present the contracting officer with a judgmental or discretionary determination; they required rejection of the certificate. [Italic supplied.]

The contracting officer also rejected the certificate in view of our decisions, principally 47 Comp. Gen. 543 (1968), wherein we concluded:

> the requirement in * * * the RFP respecting the submission of evidence of certification as a "certified-eligible" concern is one of responsiveness as to which the critical time is * * * the date fixed for receipt of proposals. *Id.* at 549.

See also B–169260, May 19, 1970, in which we upheld the rejection of a certificate of eligibility possessed by an offeror before the closing date for receipt of proposals but submitted thereafter.

We have stated that:

> Where a bid acceptance is proposed but not yet consummated by a procuring agency, and our Office considers such acceptance undesirable, we may recommend or direct such action as we believe is required by the public policy expressed in applicable statutory enactments to preserve the integrity of the competitive bidding system. However, the sanction for any decision by this Office holding that an accepted bid did not result in a valid contract is our authority under the Budget and Accounting Act, 1921, 31 U.S.C. 1, *et seq.*, to disallow credit in the accounts of the Government's fiscal officers for any payments out of appropriated funds made pursuant to an illegal contract. 44 Comp. Gen. 221, 223 (1964).

In view of the authority vested in this Office, we deem it appropriate for a contracting officer to refer to our decisions in evaluating the propriety of a proposed action leading to award of a contract. The contracting officer's rejection of the certificate was consonant not only with 47 Comp. Gen. 543 (1968), quoted above, but with the terms of the solicitation and the Army Materiel Command Procurement Instructions.

The contracting officer's action is further supported by the fact, brought forth by the Chamberlain protest, that Talladega County, Alabama, had not effectively been designated an area of substantial unemployment as of August 30, the closing date for receipt of proposals. In this regard, it is the position of the Alabama Department of Industrial Relations that the certificate of August 27 was properly issued, since that Department was in possession of information from the Department of Labor that Talladega County was to be designated an area of substantial unemployment. However, in a report dated November 19 we have been advised by the Department of Labor that it considers the certificate invalid and has instructed the State agency to recall the original certificate. In lieu thereof, Golden has been issued a first preference certificate date September 1, 1971. Therefore, not only did Golden fail to submit a certificate on the closing date for receipt of proposals, it also lacked the status of a "certified-eligible" concern at that time.

Under the circumstances set out above, we are unable to conclude that the rejection of Golden's certificate of eligibility was improper.

Your second argument concerns the propriety of participation by GOCO contractors, particularly Sperry Rand Corporation, in the instant procurement. Observing that the Army's reduced requirements will result in awards to only two of the offerors, you contend that the award of the non-set-aside portion to Sperry Rand is violative of the policy to minimize Government ownership of industrial facilities, expressed in paragraphs IV.A. and IV.C.1.a. of Department of Defense Directive 4275 5, November 14, 1966.

The portions of the Directive which you have quoted appear under the heading "INDUSTRIAL FACILITY EXPANSION POLICY." The scope of the expansion policy, as stated in paragraph IV.B. of the Directive:

> * * * covers acquisition, expansion, construction and use of both severable and nonseverable property *to increase* production, maintenance or research and development capability. It includes *replacement and modernization* of buildings, structures and other nonseverables. [Italic supplied.]

While an award to Sperry Rand may keep in existence a GOCO facility, there is no evidence of record that it entails the acquisition, expansion, construction or use of property to *increase* production. It is therefore our opinion that the award does not fall within the provisions you have quoted.

Additionally, the solicitation is replete with references to participation by GOCO contractors in this procurement. On page 27 of RFP-0143, offerors were informed:

> Operating contractors of GOCO facilities may participate in this procurement and such participation shall be based on use of the GOCO facilities.

Amendment 0002 to the solicitation stated: "Participation by GOCO facilities is expected in this solicitation." The amendment then set forth evaluation factors for abnormal maintenance and essential services for the Twin Cities and Louisiana Army Ammunition Plants. Amendment 0004 revised these evaluation factors and set forth similar factors for the Scranton Army Ammunition Plant. The evaluation factors for the Scranton plant were then revised in Amendment 0007.

These repetitive references to GOCO facilities, combined with the extremely limited and well-known field of available producers, provided Golden with notice of the probable nature of its competitors prior to submission of its proposal. Any objection which Golden may have had to participation by GOCO facilities should have been made at that time, rather than after proposals had been submitted and award of the non-set-aside had been made to Sperry Rand. *Cf.* 50 Comp. Gen. 163 (1970).

You further suggest that Sperry Rand may enjoy an unfair competitive advantage through the improper allocation of a portion of its fixed-price contract costs to its cost-reimbursable contracts at Louisiana Army Ammunition Plant. We are advised by the Department of the Army that Sperry Rand has submitted to the Government accounting procedures, rates and costing techniques followed in allocating cost between cost-reimbursable and fixed-price contracts. These procedures were submitted to the Defense Contract Audit Agency (DCAA) for its review and approval. DCAA recommended approval of these procedures subject to certain reservations, which were accepted by Sperry Rand in a subsequent agreement with the Government regarding the proposed method of allocation of costs.

We are further advised by the Department of the Army:

> The agreement provides for DCAA monitorship of the allocations and only those allocations which are in accordance with sound accounting principles and in accordance with the approved procedures will be recognized as legitimate charges against the cost type contract. Any costs disallowed against the cost type contract will not be paid by the Government. The fixed price contract does not include any provision for price adjustment due to disallowances against the cost type contract. Therefore, any such disallowances will be the responsibility of the Contractor.

In view of the fact that Sperry Rand has agreed to cost allocation procedures reviewed and approved by DCAA, we are unable to conclude that Sperry Rand's offer under the instant solicitation reflects improper cost allocations.

Exectuive Order 11615, August 15, 1971, provided for the stabilization of prices, rents, wages and salaries. Your third contention is that the solicitation is defective in that it did not reflect the impact of the Executive order by an amendment providing a price escalation provision.

Section C, page 11 of RFP–0143 advised offerors:

A Firm-Fixed price type contract is desired and will be awarded if, when evaluated, such is determined to be in the best interest of the Government.

In this connection, it is administratively reported:

Based on the above language an offeror could have proposed a contract with escalation on material and/or labor and his proposal would have been considered. During the negotiations * * * the Golden Industries personnel did discuss this matter with the Government negotiation team. They were advised the Government did not desire a contract containing an escalation clause, however, they could submit such a proposal and it would be given consideration. Golden was cautioned, however, that the maximum amount of escalation proposed would be added as an evaluation factor on to their price. After much discussion the Golden Industries representatives indicated they would not seek escalation.

It therefore appears that Golden considered and declined the opportunity to include an escalation clause in its proposal.

Finally, we believe the appropriate time for Golden to have protested this alleged deficiency in the solicitation was before the submission of its proposal. Certainly its failure to do so now precludes it from contending that an award cannot properly be made on the basis of proposals which, as was the case with its proposal, did not include an escalation clause.

In view of the foregoing, your protest is denied.

[B–173129]

Contracts—Specifications—Tests—First Article—Waiver Eligibility Misstated

The low bidder who does not qualify for waiver of first article requirements offered to previous suppliers of fueling at sea probes and receivers but inadvertently entered bid prices in the waiver space and inserted dashes in the area reserved to bidders that were not eligible for first article waiver has not submitted a nonresponsive bid *per se* as dashes have no firm meaning apart from the entire context in which used and an examination of the entire bid demonstrates the entries were erroneous and that the intent was to bid on the basis of first article contractor testing and, although, not for correction as a bid mistake, the error is supported by the fact the lower bidder did not identify prior contracts under which first articles on production samples had been furnished or indicate delivery time advancement in the event of waiver, and inserted subitems not applicable to first article waiver.

Contracts — Specifications — Tests — Government Responsible—Cost as an Evaluation Factor

Since the cost of Government testing under an invitation for bids to furnish fueling at sea probes and receivers is insignificant and cannot be realistically estimated as an evaluation factor, paragraph 1–1903(a)(iii) of the Armed Services Procurement Regulation, which provides that if the Government is to be responsible for first article testing, the cost of such testing shall be an evaluation factor "to the extent that such cost can be realistically estimated," is not applicable.

Contracts—Specifications—Drawings—Amendment Identification

Drawings forwarded to bidders with amendments that were acknowledged were incorporated by reference into the invitation for bids (IFB) and, therefore, the submission of a bid without inquiry as to the drawings is inconsistent with an allegation of nonreceipt at a later date since the time for airing an issue of this nature is prior to bid submission. In any event, the nonreceipt of the drawings does not present a cogent reason for the cancellation of the IFB as the nonreceipt has no bearing on a bidder's obligation to perform in accordance with the specifications.

To Fried, Frank, Harris, Shriver & Kampelman, December 6, 1971:

We refer to your letter of October 26, 1971, and prior correspondence protesting on behalf of the Fueling Division of Parker Hannifin Corporation (Parker) against the award of a contract to either Sunnyhill Manufacturing Company (Sunnyhill) or ABA Industries, Inc. (ABA), under invitation for bids N00024–71–B–7376, issued by the Naval Ship Systems Command (NSSC), Washington, D.C. By letter dated July 30, 1971, Reavis, Pogue, Neal & Rose replied on behalf of Sunnyhill, and by letter dated August 30, 1971, and prior correspondence, ABA has responded.

After a consideration of the submissions of the parties and the administrative reports furnished our Office by letters, with enclosures, dated July 7 and September 22, 1971, from the Deputy Commander for Contracts, NSSC, and letters dated October 21, November 12 and 17, 1971, from the Assistant Counsel, NSSC, we must deny your protest against the proposed award of a contract to Sunnyhill. The issues, circumstances and reasons requiring this conclusion are treated below.

The subject invitation requested bids for furnishing 98 fueling at sea probes with trolleys (item 0001) and 65 fueling at sea receivers with associated data and an option for repair parts. Requirements for at sea testing by the Navy are imposed. In addition, section "J" of the invitation contains the clause entitled "FIRST ARTICLE APPROVAL—CONTRACTOR TESTING (1969 SEP)" prescribed by paragraph 7–104.55(a) of the Armed Services Procurement Regulation (ASPR). Paragraph (b) of the clause requires the furnishing of a first article approval test report within 150 calendar days from the date of contract. Section "D" of the invitation provided for Government waiver of first article requirements for previous suppliers. Paragraph (a) of section "D" listed Parker as the only prospective source eligible for waiver and stated that the Government will waive the first article requirements and associated data items for the offeror listed "but will *not* waive said requirements for any other offeror." With respect to the method of bidding, paragraph (b) thereof advised that:

(b) Offeror(s) listed above may offer on the basis of OFFER A (First Article requirements and said Data Items waived and excluded), or OFFER B (First Article requirements and said Data Items *not* waived but included), or both OFFER A and OFFER B. Offeror(s) *not* listed above should offer on the basis

of OFFER B only as offers by non-listed offeror(s) on the basis of OFFER A will not be considered.

Of the five sources responding to the invitation by the bid opening date, May 17, 1971, Sunnyhill submitted the low bid in the amount of $279,440. ABA bid $290,880, and Parker bid $295,045.

Both Parker and ABA question whether Sunnyhill's bid is responsive on the ground that Sunnyhill bid on an offer "A" basis (waiver of first article contractor testing), which was available only to prior producers. The material portions of the schedule of supplies and services, section "E," together with Sunnyhill's pricing responses thereto, are as follows:

ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
SECTION E: SUPPLIES/ SERVICES AND PRICES					
0001	Fueling at Sea Probes w/Trolleys (S2040-850-5144)				
	For a total Qty—OFFER A	98	Ea	$2, 155. 00	$211, 190. 00
	For a total Qty—OFFER B	98	Ea	—	—
0001AA	Same as Item 0001—Qty 97			2, 043. 20	198, 190. 00
0001AB	Same as Item 0001—Qty 1			13, 000. 00	13, 000. 00
0001AC	DATA (First Article Test Report) (DD Form 1423 Exhibit A) (NSP—$500.00 to be included in price of Item 0001.) OFFER B ONLY			(SEE NOTE A)	
0002	Fueling at Sea Receivers w/Trolley (S2040-850-5146)				
	For a total Qty—OFFER A	65	Ea	1, 050. 00	68, 250. 00
	For a total Qty—OFFER B	65	Ea	—	—
0002AA	Same as Item 0002—Qty 64			1, 066. 40	60, 250. 00
0002AB	Same as Item 0002—Qty 1			8, 000. 00	8, 000. 00
0002AC	DATA (First Article Test Report) (DD Form 1423, Exhibit B) (NSP $250.00 to be included in Item 0002.) OFFER B ONLY			(SEE NOTE A)	
0003	DATA for Items 0001 and 0002 (DD Form 1423, Exhibit C, hereto) (NSP $——— to be included in price of Items 0001 and 0002.)			(SEE NOTE B)	
*	* * *	*	*	*	*
	TOTAL—OFFER A (Exclusive of Items 0004 and 0005)-$				
	TOTAL—OFFER B (Exclusive of Items 0004 and 0005)-$				

(We have been advised that Navy will take appropriate steps to resolve the apparent discrepancies in the unit prices and extended prices for items 0001AA and 0002AA.)

Subsequent to bid opening the contracting agency contacted Sunnyhill and suggested that its bid was nonresponsive because its response to items 0001 and 0002 indicated that it bid on an offer "A" basis. By letter dated May 21, 1971, Sunnyhill advised that its intent was to bid on an offer "B" basis, as demonstrated by an examination of its pricing responses, but that in the haste of preparing its bid, due to the late receipt of drawings, "summary prices were inadvertently shown under offer A." Also, by letter dated June 4, 1971, Sunnyhill submitted quotations received from suppliers to verify its intent. It is now the Command's position that Sunnyhill's bid is responsive.

The evidence offered by Sunnyhill subsequent to bid opening to verify its intent may not, of course, be considered. For, in resolving questions of responsiveness, a bidder's intention must be determined from the bid itself. See 45 Comp. Gen. 221, 222 (1965), and 42 *id.* 502, 504 (1963). Focusing on the fact that Sunnyhill inserted prices for both items 0001 and 0002 opposite offer "A" and dashes opposite offer "B," Parker asserts that the prices indicate an offer "A" bid and the dashes clearly indicate a "no bid" for offer "B," citing 48 Comp. Gen. 757 (1969). The cited case involved the question of whether a bid was nonresponsive by reason of a bidder's insertion of dashes opposite two data items in the bidder's schedule, rather than prices or a clear statement that no charge was intended for the items. It was contended that by inserting the dashes, the bidder had the option to claim it did not intend to be bound to furnish the items, or that it meant to furnish them at no charge, or that it made a mistake and intended to charge for the items. After concluding that under the terms of the invitation the bidder was bound to furnish the data items, we addressed the question of the meaning of the dashes:

> Absent a specific requirement that if an item is to be furnished at no cost it should be [so] stated * * *, we do not think that the Renick bid was nonresponsive *per se* because of the "--" next to the data items.
>
> The entry of a "--" is certainly less clear an indication of intent than either a dollar price entry or a statement like "No charge." But it is a more meaningful expression of intent than a mere blank space. The "--," it seems to us, shows two things. First, the bidder was aware of the necessity to insert *something* next to the item; in other words, the bidder had not overlooked the item. Second, after considering the matter, the bidder decided *not* to insert a price for the item. The affirmative corollary is that the bidder obligated itself to furnish the data without cost to the Government. Therefore, while there is no explicit indication that the data was to be supplied at no cost, the bidder's intent to do so was clear and the failure to state this intent in a more positive fashion did not render the bid nonresponsive.

We agree with counsel for Sunnyhill's rejoinder that the factual differences between that case and this one are critical—as are all factual variations when questions of bid responsiveness are involved. In order

to equate the dashes in Sunnyhill's bid with a "no bid" on the faith of 48 Comp. Gen., *supra*, as you would have us do, it would be necessary to ignore the other entries made on Sunnyhill's bid. We must note that the cited case makes it clear that the conclusions reached there were based on a review and consideration of the entire bid. Moreover, as the quoted portions of the cited case amply demonstrate, dashes have no firm meaning apart from the context in which they are used—the entire context.

Counsel for Sunnyhill urges that an examination of the entire bid demonstrates that the entries are an obvious clerical error. In this connection, counsel suggests that Sunnyhill inverted the dashes and prices in responding to items 0001 and 0002. As you point out, we have held in numerous cases that the mistake in bid correction procedures may not be used to render responsive a bid which is otherwise nonresponsive, citing, *inter alia*, 40 Comp. Gen. 432 (1961); 38 *id.* 819 (1959). Still, the identification of a mistake does not end the inquiry into the responsiveness of Sunnyhill's bid. Given the fact of the mistake, the question remains whether it can be said that Sunnyhill's bid nevertheless evidences a legally enforceable intent to furnish items 0001 and 0002 with first article contractor testing.

Counsel for Sunnyhill has also drawn to our attention a number of decisions of our Office which have recognized the legal enforceability of a bidder's intent and hence the responsiveness of its bid, despite the existence of an error or omission. Of these cases, B–157429, August 19, 1965, is instructive.

In that case, the Government Printing Office issued a par bid invitation for various categories and quantities of business forms. The invitation provided par prices for each of the categories and quantities therein, and bidders were required to enter either a "minus percentage," or "no percentage," a "plus percentage," or a "no bid" in response to each of the categories and quantities therein. The bid in question failed to enter either a plus or minus sign with its percentage bid figures to indicate whether the par prices would be increased or decreased by the percentages. The bidder confirmed its intent to bid minus percentages. The contracting agency's conclusion that this was indeed the bidder's intent was buttressed by the facts that it bid minus percentages on a current contract; that it was normal practice for all bidders to increase percentages progressively as quantities increased, thereby indicating greater discounts for greater quantities; that had the bidder intended to increase the par prices by plus percentages, the larger percentages would normally be applied to the smaller quantities and the lower percentages applied to the higher quantities; that all percentages increased progressively from the lower quantities to the

highest quantities; and that unless the percentages were in fact intended to be minus, the prices would be so excessive that the bidder could not have expected to receive an order.

Upon an examination of the bid, we concluded that:

> * * * the omission of the minus signs did not affect the responsiveness of its bid since the bidder submitted prices based on a percentage of the par prices and otherwise complied with the proposal requirements quoted above. This appears to be a case where the bid as submitted is susceptible of no other interpretation than on a minus percentage basis. To hold otherwise would convert an obvious clerical error to one of nonresponsiveness patently inconsistent with the reported facts. Generally, obvious errors in bid are for correction where there is no doubt that the error was made as alleged. Here, the consistency of the bidding pattern followed by Lewis logically establishes both the existence of the error and the bid actually intended. *Cf.* 38 Comp. Gen. 177; see 41 Comp. Gen. 160; *id.* 192; *id.* 469.

In other words, in the context of this case Sunnyhill's bid is responsive if it can be said that the only reasonable conclusion to be drawn from an examination of its bid is that it intended to bid on the basis of first article contractor testing. *Cf.* 46 Comp. Gen. 77 (1966). In our view, this is the only conclusion to be drawn.

Consistent with an intent to bid on a nonwaiver of first article testing basis, Sunnyhill did not respond to the request of paragraph (c) of section "D" that offer "A" bidders identify prior contracts under which first articles or production samples had been furnished, nor did it indicate an advancement of the stated delivery time in the event of a waiver of first article testing and the related data items, as paragraph (f) requested those bidding on an offer "A" basis to do. While not decisive, the failure to respond to these paragraphs is certainly evidence of a "bidding pattern." Most important, of course, are Sunnyhill's other pricing responses. As counsel for Sunnyhill notes—

> * * * Sunnyhill inserted prices for six separate items not applicable in the case of an Offer A bid:
> (a) Items 0001AB and 0002AB are the first articles of probes and receivers, respectively.
> (b) Items 0001AC and 0002AC are the first article test reports for the probes and receivers respectively.
> (c) Items 0001AA and 0002AA are the remaining 97 and 64 pieces to be supplied in the respective categories after approval of the first article test reports.

Although prices for the subitems discussed above were not required, Sunnyhill's responses are not to be ignored and they further evidence an intent to bid on the basis of nonwaiver of first article contractor testing. The substantially higher unit prices listed for items 0001AB and 0002AB, the first articles, reflect the inclusion of contractor costs associated with first article testing. Significantly, the total of the prices entered in the "Amount" column for items 0001AA and 0001AB, 0002AA and 0002AB equals in each instance the price entered, albeit erroneously, in the "Amount" column adjacent to offer "A." Moreover, the information data costs identified by Sunnyhill in response to items

0001AC and 0002AC, both identified in the schedule as "DATA (First Article Test Report)" are consistent only with a bid on an offer "B" basis.

Taken together Sunnyhill's responses constitute, as counsel for Sunnyhill urges, "clear, unequivocal evidence" of an offer "B," the validity of which, we might add, is reinforced by the absurdity of attempting to bid on an offer "A" basis.

You next contend that the invitation is defective by reason of the Navy's failure to include as an evaluation factor the costs to the Government of shipboard testing of items 0001 and 0002 required by the specification. You assert that these costs would be "in the neighborhood of $25,000," enough, if considered, to displace Sunnyhill's bid. ASPR 1-1903(a)(iii) provides that if the Government is to be responsible for first article testing, the cost of such testing shall be an evaluation factor "to the extent that such cost can be realistically estimated." We find the reply of the Deputy Commander for Contracts, in his letter of July 7, 1971, to be persuasive—

> Nor shall we be long in answering Parker's attempt to make its price low by interjecting an "evaluation factor" not contained in the solicitation and, accordingly, not for consideration in evaluating bids. Parker points out * * * that paragraph 4.4.6 of Ships-P-5543, 4 January 1971, the governing specification, requires the Navy to conduct, at Navy expense, shipboard tests of first article probes and receivers. * * * Parker notes that, since the equipments under procurement are for ship-to-ship refueling at sea, two ships will be required for this testing and states Parker's experience, in tests run on its equipments, that the ships must be assigned for a period of at least 2 or 3 days in order to set up and coordinate the equipment and make preparations for the tests. * * *
>
> Contrary to Parker's contention, the at sea tests would be conducted during normal fleet operations and would not require the assignment of two ships solely for the purpose of the test. In this situation, this Command considers that the cost of this testing is insignificant and cannot be realistically estimated and so was properly not considered for evaluation purposes. Thus, the IFB, properly in this Command's opinion, does not set forth an evaluation factor for such costs. Clearly then they cannot be considered in evaluating bids under the IFB. In this connection we refer to your Office's decisions B-156582, 16 July 1965; 45 Comp. Gen. 433, 435 (1966); 47 Comp. Gen. 233, 235 (1967); B-164694, 31 October 1968.

We note further that you have made no attempt to explain the derivation of the $25,000 estimate. You have, however, referred to the fact that under a prior procurement of the item, a $5,800 evaluation factor for the cost of Government testing was included and you have alleged that testing requirements identical to those contained in the instant invitation were there imposed. By letter, with enclosure, of November 12, 1971, the Assistant Counsel, NSSC, has stated that no similar factor was included in the instant solicitation because under the prior solicitation the Government conducted the first article tests while in this procurement the contractor will be conducting the tests. In any event, assuming that a $5,800 evaluation factor should have been included in the invitation, its omission would not constitute a cogent or compelling reason to cancel because that amount would not

have been sufficient to displace the low bid of Sunnyhill. *Cf.* B–170610, February 9, 1971.

You have also raised a number of asserted deficiencies in the specifications, which you contend require cancellation and readvertisement. You have also questioned whether the specifications and drawings were available to all parties.

We find these issues to be without merit. The Deputy Commander for Contracts in his letter of September 22, 1971, has aptly labeled your objections "belated charges." We have recognized in numerous cases that the time for airing issues of this nature is prior to the submission of bids. For example, see 48 Comp. Gen., *supra;* B–156825, July 26, 1965; B–156025, May 4, 1965; B–151355, June 25, 1963. (We might add that this applies with equal vigor to questions concerning the propriety of the proposed method of bid evaluation.)

We note that amendments 0001 and 0002 to the invitation forwarded to the bidders drawings, which the Deputy Commander for Contracts in his letter of September 22, 1971, terms the "complete set of required bid drawings." These drawings were incorporated by reference into the invitation by section "F" of the invitation. Significantly, both Sunnyhill and ABA acknowledged receipt of amendments 0001 and 0002, and neither has raised any question. While you assert that Parker did not receive all of the drawings, the above amendments were also acknowledged by Parker, and your criticisms of the specifications indicate an acute awareness of what was required. Moreover, the statement which you submitted from another bidder on this procurement that to the best of its knowledge it did not receive drawing No. F61F1463, revision "D," "in its bid package" could be explained by the fact that the drawing in question was sent by amendment. The submission of a bid without inquiry is certainly inconsistent with alleged nonreceipt of drawings at a later stage. In any event, nonreceipt would not present a cogent reason for IFB cancellation since it would not bear on the bidder's obligation to perform in accordance with the specifications. *Cf.* B–169838, B–169839, July 28, 1970.

Insofar as the drawings, which, as you point out, are erroneously identified in section "F" are concerned, such erroneous identification likewise does not impair the successful bidder's obligation to perform in accordance with the requirements of the specifications. In this connection, by letters dated November 12 and 17, 1971, the Assistant Counsel, NSSC, has confirmed that the drawings are correctly identified on the assembly drawings.

We have also reviewed the contracting officer's determination that Sunnyhill is a responsible prospective contractor in light of your general allegation to the contrary and we find no basis to interpose a legal objection to that determination.

[B-173764]

Contracts — Specifications — Ambiguous — Construction of Ambiguity

The contract awarded the low bidder under an invitation for bids soliciting services to clean exhaust ducts for 1 year that was inconsistent as the specifications required two cleanings and the bid schedule four is not a binding contract, notwithstanding the "Order of Precedence" clause prescribed the schedule would prevail in case of an inconsistency since before notice of award was mailed the inconsistency was discovered and the bidder alleged its bid was based on two services per year. Had the discrepancy been discovered after a valid award had been consummated or had the contracting officer had actual or constructive notice of the error, four cleanings would be required, but as the bidder was not afforded an opportunity to prove its alleged error, no valid contract came into being with the mailing of the notice and the purported contract should be rescinded.

To the Secretary of the Air Force, December 7, 1971:

We refer to a letter of September 3, 1971, file SPPM, from the Deputy Chief, Contract Management Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, transmitting the administrative report on the request of Ventilation Cleaning Engineers, Inc. (Ventilation Cleaning), that the contract awarded under invitation for bids No. F20603-71-B-0055, issued April 23, 1971, by the Procurement Division of Wurtsmith Air Force Base, Michigan, be reformed or rescinded. The contract is for cleaning exhaust ducts for 1 year.

The IFB was inconsistent as to how often the services were to be performed. The following statement was made in the bid schedule:

To furnish all plant, labor, equipment, material, appliances, transportation and supervision necessary to Clean Kitchen Exhaust Ducts 4 times in strict accordance with the plans, specifications and subject to the terms and conditions of the contract.

Following the above statement was a list of buildings identified by number where the contract services were to be performed. After each number the numeral "4" was listed to indicate the quantity of job units. However, the technical provisions of the specifications of the IFB contained the following contradictory statement in paragraph TP1-01:

Furnish all plant, labor, equipment, tools, appliances and materials necessary for cleaning kitchen exhausts ducts as listed below in these specifications.

a. Cleaning of kitchen ducts will be accomplished two (2) times. Starting date of each visit shall be approximately 16 November 71, and May 72. Work will be carried to completion as soon as possible thereafter. * * *

Furthermore, paragraph 19, "Order of Precedence," in the solicitation instructions and conditions in the IFB provided:

In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule; (b) Solicitation Instructions and Conditions; (c) General Provisions; (d) other provisions of the contract, whether incorporated by reference or otherwise; and (e) the specifications.

The lowest of four bids opened May 24, 1971, was submitted by Ventilation Cleaning at $2,816. It was accepted by the contracting officer on Friday, June 4, 1971. However, on account of unexplained administrative delays, it was not mailed until Tuesday, June 8. In this regard, paragraph 10(d) of the solicitation instructions states in effect that a binding contract does not come into existence until written award is mailed or otherwise furnished to the successful offeror. On June 7 before the notice of award was mailed to Ventilation Cleaning, the contract administrator discovered the inconsistency in the IFB as to the number of times the work was to be performed and discussed it by telephone with the president of Ventilation Cleaning. The following memorandum of that call was written by the contract administrator:

Call placed to Mr. Williams to discuss inconsistencies in bid schedule and job specifications.

In the telecon, Mr. Williams stated that he had noted the inconsistency in the bid schedule and the specifications and also stated that he felt that 2 services per year would meet the necessary cleaning requirements. It was then asked at what frequency was his bid actually made. Mr. Williams said that his bid was based on 2 services per year. It was then asked that if his bid was based as he stated then why did he show 4 Job prices that were properly extended. He answered that he thought this was how we wanted the services bid. I stated that IAW paragraph 19 of SF33A that the schedule had precedence over the specification in the IFB. Mr. Williams said that if four services were required his price would be higher but if two services is what is needed he would offer a price reduction. I requested he submit a letter with his proposal for price reduction.

In a letter of June 7, 1971, to the contracts administrator, Ventilation Cleaning confirmed the conversation and proposed to perform two cleanings during the year for $2,080. In a letter of June 29, 1971, to the contracting officer, Ventilation Cleaning repeated its proposal that its original bid was based upon performing two cleanings. In a letter of July 20, 1971, the contracting officer ruled that a contract under which Ventilation Cleaning was liable to perform the cleaning services four times during the year resulted from the original bid. The decision was based on the Order of Precedence clause, quoted above, under which the bid schedule is given precedence over the specifications where there are inconsistencies between the two.

In a letter of July 30, 1971, Ventilation Cleaning requested that our Office rescind or reform the contract on the ground that, notwithstanding the contracting officer's determination that four cleanings were required, the proper interpretation of the IFB and the basis on which its bid was based was to require only two cleanings. For reasons set out below, we think that no valid contract resulted from the actions taken in this procurement.

In our opinion the Order of Precedence clause mentioned above requires the conclusion that the bid schedule requirement for four cleanings takes precedence over the specification requirement for only two

cleanings. Thus, if the discrepancy had not been discovered until after a valid award had been consummated, the contracting officer not being on actual or constructive notice of error, Ventilation Cleaning would clearly be bound to the bid schedule requirement for four cleanings. However, the discrepancy was brought to the attention of Ventilation Cleaning before any contract had been consummated and at that time the president of the company alleged that the bid had been predicated on the basis of two rather than four cleanings. This allegation, in our opinion, constituted an allegation of error, before award, the resolution of which by reference to bidder's work papers, etc., was required under the terms of Armed Services Procurement Regulation 2-406 before any valid award could be made. Since Ventilation Cleaning was never afforded the opportunity to prove its alleged error, we conclude that no valid contract came into being with the mailing of the notice of award and that the purported contract which has not been performed should therefore be rescinded.

[B-173715]

Transportation—Dependents—Military Personnel—Changes in Grade or Rank—Ineffective for Entitlement Purposes

An enlisted man married in Honolulu, his home, prior to enlisting in the Army in 1968, where his wife continued to reside when he was assigned to Vietnam in an ineligible grade for dependent travel, who in 1970 prior to the effective date of a permanent station change to Texas was promoted to SP-5, an eligible pay grade for dependent transportation, nevertheless is not entitled to reimbursement for his wife's transoceanic travel, even though his status is similar to that of a member who acquired a dependent overseas since he did not acquire his dependent at his overseas station and did not have at least 12 months remaining on his overseas tour, nor had his dependent been authorized to be present in the vicinity of his overseas station and he, therefore, is regarded as a member "without dependents" within the meaning of AR 55-46, and subject to the restrictions of paragraph M7000-14 of the Joint Travel Regulations.

To Major J. E. Perham, Department of the Army, December 8, 1971:

We again refer to your letter FINCS-A, requesting a decision as to the entitlement of SP-5 Ronald T. Takenaka to reimbursement for his wife's travel from Honolulu, Hawaii, to Los Angeles, California, in the described circumstances. The request was assigned Control No. 71-30 by the Per Diem, Travel and Transportation Allowance Committee.

The circumstances shown are that Mr. Takenaka was married prior to enlisting in the Army on September 24, 1968. Hawaii was his home at time of entry into the Army and his wife continued to reside in Hawaii. When he was assigned to Vietnam he was not in an eligible grade for dependent travel. By orders dated March 27, 1970, he was

transferred from Vietnam to Fort Hood, Texas, as a permanent change of station. Thirty days' leave enroute was authorized.

He departed Vietnam on April 4, 1970, and was promoted to SP–5, a pay grade eligible for transportation of dependents, on April 20, 1970, prior to the effective date of the orders. His wife traveled from Honolulu, Hawaii, to Los Angeles, California, by commercial air, thence to Temple, Texas, by privately owned vehicle during the period April 30 to May 9, 1970. Mr. Takenaka has received a dislocation allowance and was reimbursed on a mileage basis for his wife's travel from Los Angeles to Fort Hood. Your question is whether he is entitled to reimbursement for his wife's transoceanic travel from Honolulu to Los Angeles.

You mention that paragraph 7c(2), Army Regulation 55–46, provides that when a dependent is acquired in an overseas area and overseas transportation is not authorized, travel allowance for the dependent is authorized for land travel from point of entry into the United States to the member's next permanent duty station if he is otherwise eligible. Your doubt, however, arises from the fact that the member was of an ineligible grade when assigned to Vietnam and became eligible for dependent travel after departing his station but prior to the effective date of permanent change-of-station orders. You express the belief that his status changed from a member without dependent to a member with dependent as if the dependent was acquired in an overseas area and question the application of decision reported in 40 Comp. Gen. 577 (1961).

In that decision we held that members who, while assigned to restricted areas, are promoted to grades entitling them to transportation of dependents are entitled to the same transportation benefits upon subsequent permanent change of station to an unrestricted area as personnel who were serving in eligible grades before leaving the United States and that such entitlement exists even though the dependents begin travel from a place to which they had not traveled at Government expense. You point out, however, that in the case there considered, the travel of dependents to the new station in the United States began at a point within the continental United States, and there was not involved any question concerning the return of a dependent from overseas.

Paragraph M7000–14 of the Joint Travel Regulations provides that transoceanic or overseas land travel is not authorized at Government expense when the member is considered to be a member without dependents as defined in paragraph M4300–2, items 3 and 4 of those regulations. Paragraph M4300–2 defines the term "member without dependents" to include those in an ineligible pay grade. Items 3 and 4 of

that paragraph further define the term "member without dependents" to include (3) "the remainder of any tour in which dependents join or are acquired and the member is not considered to be a member with dependents under subparagraph 1," or (4) "whose dependents are not authorized by the appropriate military commander to be present in the vicinity of the member's overseas duty station."

Subparagraph 1 of paragraph M4300, defining the term "member with dependents," includes (item 2) a member in an eligible grade who is joined by or acquires dependents while serving outside the United States provided he has at least 12 months remaining on his overseas tour after arrival or acquisition of dependents, or serves the accompanied tour of duty at that station, whichever is considered to be in the best interests of the Government as determined by the Service concerned. A provision prohibiting transoceanic or overseas land travel for dependents under like circumstances is contained in paragraph V–C–10, Department of Defense Directive 1315.7.

Since Mr. Takenaka reached a pay grade eligible for transportation of dependents while serving overseas prior to the effective date of the orders of March 27, 1970, his situation is similar to that of a member who acquires a dependent while serving overseas. See paragraph 8, AR 55–46. However, he did not acquire his dependent at his overseas station and did not have at least 12 months remaining on his overseas tour. Neither was the dependent authorized by the appropriate commander to be present in the vicinity of the member's overseas duty station. Consequently, he is to be regarded as "without dependents" within the meaning of the regulation and subject to the restrictions of paragraph M7000–14. Therefore, he is not entitled to reimbursement for his wife's transoceanic travel from Honolulu to Los Angeles. He was, however, entitled to reimbursement for her land travel from port of entry in the United States to his new station and to dislocation allowance.

Since payment is not authorized on the voucher for ocean travel, it will be retained here.

[B–173756]

Subsistence—Per Diem—Delays—Rest Stopover

An employee who at the close of a conference at 1600 on Friday remained in Chicago, departing for his permanent duty station in Los Angeles by air 10:05 Saturday, arriving after 4 hours air travel, is entitled to per diem for three-fourths of a day for Saturday since in view of the length of the Friday workday and the fact the return travel by air and the travel to and from the airports would involve 6 hours, the employee prudently determined to remain overnight in Chicago. Paragraph C1051–1 of the Joint Travel Regulations provides that a traveler on official business will exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business, and paragraphs C1051–2 and C10101–7 of the regulations containing many provisions

to meet numerous travel situations are only guidelines for use in determining whether in a particular situation the traveler acted in a reasonable manner.

To Lieutenant Commander L. R. Stilgebouer, Defense Supply Agency, December 9, 1971:

We again refer to your letter of June 17, 1971, DCRC–FA, requesting a decision concerning the entitlement of Mr. W. R. Graham to per diem in the described circumstances. The request was forwarded here by indorsement of July 30, 1971, having been assigned Control No. 71–33 by the Per Diem, Travel and Transportation Allowance Committee.

By Travel Authorization DCRC–M–547, dated March 29, 1971, Mr. Graham was directed to proceed from Los Angeles, California, to Chicago, Illinois, on or about April 14, 1971, for temporary duty for the purpose of attending a Planning and Management Conference on April 15 and 16, 1971, upon completion of which he was to return to Los Angeles. The travel order authorized the use of commercial air and stated that per diem would be in accordance with the Joint Travel Regulations.

The agenda for the conference shows that it was to commence at 0800 hours on April 15, 1971, and was to close with a round table discussion starting at 1300 on April 16, 1971, following lunch. Mr. Graham's travel itinerary shows that he departed Chicago by air at 1005 on Saturday, April 17, 1971, and arrived at Los Angeles at 1220 the same day. Your question is whether Mr. Graham is entitled to per diem for three-fourths of a day ($18.75) for Saturday.

By letter of June 3, 1971, you advised Mr. Graham that, based on the agenda for the conference, it probably ended around 1600 on Friday which allowed two and one-half hours to catch the 1830 flight to Los Angeles, scheduled to arrive in Los Angeles at 2036. You cited paragraphs C1051–2 and C10101–7 of the Joint Travel Regulations and stated that the use of times such as these in constructing travel has been a standard practice and that you believe it is reasonable in the present case. Mr. Graham, however, contends that since he was not required to report at his duty station the next day it was not unreasonable for him to remain in Chicago on Friday night and return to Los Angeles on Saturday.

Your doubt in the matter arises from certain provisions of the Joint Travel Regulations. You state that since paragraph C1051–2 of the regulations provides that "an employee will not be expected to use a carrier the schedule of which requires boarding or leaving the carrier between 2400 hours and 0600 hours," it would seem logically to follow that an employee reasonably would be expected to board or leave a carrier between 0601 and 2359 hours. However, paragraph

C1051–2 further provides that "It is not unreasonable for an employee to depart from a temporary duty station the morning following the completion of temporary duty near the close of business to obviate travel during off-duty hours if he is not required to be at his permanent duty station at an earlier time." That is the sentence on which Mr. Graham relies.

You express the belief that such provision is inconsistent with the general philosophy of the Joint Travel Regulations in that it would pay the employee additional per diem just for his convenience. You say this complicates the determination as to reasonableness and suggest a more explicit definition in the Joint Travel Regulations.

Additionally, you point out that the said paragraph C1051–2 provides that "delay in return travel over a weekend for the purpose of avoiding travel during off-duty hours will not be an acceptable basis for increasing per diem or travel status eligibility." You request comment on your reasoning that if delay for a complete weekend is not acceptable for increasing per diem then a delay for any part of the weekend likewise would not be acceptable. We believe it sufficient to say in this respect that the facts do not establish delay for the purpose of avoiding travel during off-duty hours.

You mention that paragraph C10101–7 of the Joint Travel Regulations provides that "Normally, when short return trips are involved or travel is authorized on carriers with sleeping accommodations, the constructive time of departure will be on the same day as that on which the temporary duty is completed." You say that in your opinion the flight from Chicago to Los Angeles would fall in the category of a "short trip" timewise; if not, it would seem advantageous to disbursing officers to have this reference rewritten to define explicitly the term "short trip."

Paragraph C1051–1 of the Joint Travel Regulations provides that a traveler on official business will exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business. See 31 Comp. Gen. 278 (1952); 39 *id.* 250 (1959) and 46 *id.* 425 (1966).

In conformity with that requirement paragraph C1051–2 of the regulations contains many provisions to meet numerous travel situations. Thus, while it provides that to the extent practicable, management will schedule necessary travel time en route within an employee's regularly scheduled hours of duty, it further provides that "delay in return travel over a weekend for the purpose of avoiding travel during off-duty hours will not be an acceptable basis for increasing per diem or travel status eligibility." In addition, paragraph C10101–7 of the regulations provides that when, for personal reasons, an

employee does not return immediately to his permanent station after completion of a period of temporary duty, per diem will be computed on the basis of the time he reasonably could have left the temporary duty point and arrived at his permanent duty station. Where short return trips are involved or travel is authorized on carriers with sleeping accommodations, the constructive time of departure will be the same day as that on which the temporary duty is completed except that travel between 2400 and 0600 hours is not required.

We believe the above provisions were intended only as guidelines for use in determining whether in a particular situation the traveler acted in a reasonable manner.

In this particular case, as previously indicated, the employee could have departed from Chicago at 1830 and arrived in Los Angeles at 2036. We assume the latter time to be Pacific Standard Time and that the elapsed time for travel between Chicago and Los Angeles would be 4 hours. To this would be added at least 1 hour to travel to the airport in Chicago and 1 hour to travel from the airport in Los Angeles to the employee's home or a total of approximately 6 hours.

In view of the length of the employee's work day we do not believe it was unreasonable for him to spend the night in Chicago and then travel on to Los Angeles the next day in the manner shown on the voucher.

The supplemental voucher forwarded here is returned and may be processed for payment if otherwise correct.

[B-174213]

Taxes—State—Government Immunity—Vehicle Parking Tax

The 25 percent tax imposed on rents charged for occupancy of parking space in parking stations which was paid by an employee for parking a Government vehicle while on official business may not be reimbursed to the employee as the incidence of the tax falls directly on the Government as lessee and under its constitutional prerogative, the Government is entitled to rent or lease parking space free from the payment of the tax and the employee was not required to pay the tax. The Municipal Code imposing the tax exempts the United States if payment is made by Government check, but it is not feasible for an employee operating a Government vehicle on official business to pay for parking by Government check. However, since the Government's immunity does not extend to an employee when he operates his own vehicle on official business, he may be reimbursed the tax under 5 U.S.C. 5704 as part of the parking cost.

To W. P. Helmer, United States Department of Agriculture, December 10, 1971:

Your letter of August 31, 1971, with enclosures (your reference 6540), requests an advance decision as to whether you may certify for payment a voucher in favor of A. R. Groncki in the amount of $0.25. The voucher covers the 25 percent tax on rents charged for

occupancy of parking space in parking stations in the city and county of San Francisco, which tax was charged to and paid by Mr. Groncki on rent paid for parking a Government-owned vehicle while on official business.

The tax in question is imposed by Article 9 of Part III of the San Francisco Municipal Code. Section 602 of Article 9 imposes—with certain exceptions not here applicable—a tax of 25 percent of the rent for every occupancy of parking space in a parking station in San Francisco City and County. Section 603 states that every occupant occupying parking space shall be liable for payment of the tax imposed on the rent for the occupancy of the parking space. Section 603 also provides that the tax liability is not extinguished until the tax has been paid by the occupant to the city and county, except that a receipt from an authorized operator pursuant to section 604 of Article 9 shall be sufficient to relieve the occupant from further liability for the tax to which the receipt refers. Section 601(a), in effect, specifically exempts the United States—among others—from payment of the tax.

You state that in administering the tax in question the city grants an exemption to the Government only when the payment for parking is made by Government check. You further state that when Government employees operate their personal or Government-owned vehicles on official business, it is not feasible to pay for parking by Government check.

Concerning the payment of State or local sales taxes generally, our Office has consistently held that the question of whether the United States is required to pay for an item procured or leased in a State at a price inclusive of such tax rests upon a determination of whether the incidence of the tax is on the vendor (or lessor) or on the vendee (or lessee). Where the incidence of the tax is on the vendor (or lessor), the United States has no right—apart from that given it by the taxing statute or regulations promulgated thereunder—to purchase or lease items within the territorial jurisdiction of the taxing jurisdiction on a tax-free basis. On the other hand, where the incidence of the tax is on the vendee (or lessee), the United States in purchasing or leasing items for official use is entitled under its constitutional prerogative to make purchases or to lease free from such sales taxes. See for example, 49 Comp. Gen. 204 (1969).

Also, we have held, in effect, that a parking tax is not applicable to vehicles owned by the Federal Government. See 38 Comp. Gen. 258 (1958); 34 *id.* 417 (1955); 26 *id.* 397 (1946); 18 *id.* 151 (1938). These decisions were based on the rationale set forth above. *Cf.* 46 Comp. Gen. 624 (1967). We have further held that since a parking tax cannot

legally be imposed against the principal—the Federal Government—it likewise cannot be imposed upon the agent—the employee driving the Government vehicle. See B–136911, June 5, 1961; and 41 Comp. Gen. 328 (1961).

It is clear from the above cited sections of the San Francisco Municipal Code that the tax here involved is imposed on the rent paid for the occupancy, i.e., the use or possession, of parking space in a parking station in the county or city of San Francisco. Since the tax is on the occupancy of the parking space, it is clear when the space is rented or leased for use of a Government-owned vehicle on official business, the incidence of the tax falls directly on the Government. Hence, we must conclude that in renting or leasing parking space for a Government-owned vehicle being used on official business, the United States is entitled under its constitutional prerogative to rent or lease such space free from the payment of this tax and to recover any amount of such tax which may have been paid by it whether the payment for the parking is made by Government check or otherwise. Further, for the reason stated above, a Government employee driving a Government-owned vehicle on official business cannot be required to pay a tax imposed on the rent paid by the United States for the occupancy of a parking space by a Government-owned vehicle. Although not controlling here, we might point out that to hold otherwise would make almost meaningless the provision of section 601(a) of Article 9, which, in effect, specifically excepts the United States from the liability of paying such tax.

Of course the immunity from parking taxes or taxes on parking rentals—incident to the parking of Government-owned vehicles—which may attach to the United States, does not extend to a Government employee operating his personally owned vehicle on official business. There is, however, a specific statute which authorizes reimbursement of parking fees to Federal employees incident to the use of privately owned motor vehicles on official business, namely, section 4 of the Travel Expense Act of 1949, as amended, 5 U.S.C. 5704. Insofar as an employee using a privately owned motor vehicle is concerned, if he is required to pay a tax on the amount of the parking fee, the tax would be part of the parking cost and he may be reimbursed such cost under the authority of 5 U.S.C. 5704, if otherwise proper. See 41 Comp. Gen. 328; and 44 Comp. Gen. 578 (1965).

Accordingly, since the instant voucher in favor of A. R. Groncki covers the tax paid on the occupancy of parking space for a Government-owned vehicle being used on official business, it may not be certified for payment and hence, such voucher will be retained in our files.

[B-174366]

Wage and Price Stabilization—Contract Matters—Prices—Certification

The failure of the low bidder to sign and submit with its bids the price certification attached to three solicitations issued for printing and binding services may not be waived as a minor informality. The certification addendum bound the bidder to reduce, at the time of billing, any prices offered in the bid which did not conform to the requirements of Executive Order 11615, dated August 15, 1971, issued under the authority of the Economic Stabilization Act of 1970 for the purpose of stabilizing prices, rents, wages and salaries in order to stabilize the economy, reduce inflation, and minimize unemployment, and, therefore, the bids submitted were nonresponsive under the rule that if an addendum to an invitation affects price, quantity or quality, it concerns material matters that may not be waived even to effect a savings for the Government.

To the National Graphics Corporation, December 10, 1971:

Reference is made to your letter of October 18, 1971, with enclosures, protesting against the rejection of your bids for printing and binding services submitted during September 1971 under Jacket Number 418-054, 418-076 and 443-262, issued by the U.S. Government Printing Office (GPO).

Under the authority of the Economic Stabilization Act of 1970 (Public Law 91-379, 84 Stat. 799, 12 U.S.C. 1904 note), as amended, Executive Order 11615, dated August 15, 1971, was issued for the purpose of stabilizing prices, rents, wages, and salaries in order to stabilize the economy, reduce inflation and minimize unemployment. In implementing the policies of Executive Order 11615, GPO attached to the above solicitations the following provision:

NOTICE

Bidder must sign and submit the following Price Certification with their bid. BIDS WHICH DO NOT CONTAIN THE REQUIRED CERTIFICATION WILL BE CONSIDERED NON-RESPONSIVE AND WILL BE REJECTED.

Price Certification (a) By submission of this bid (offer) bidder (offeror) certifies that he is in compliance and will continue to comply with the requirements of Executive Order 11615, August 15, 1971, for the duration thereof, and further certifies that the prices bid (offered) herein either conform to the requirements of Executive Order 11615 or shall be reduced accordingly at the time of any billings that are made during the effective period of the Executive Order.

(b) Prior to the payment of invoices under this contract, the contractor shall place on each invoice submitted the following certification:

"I hereby certify that amounts invoiced herein do not exceed the lower of (i) the contract price, or (ii) maximum levels established in accordance with Executive Order 11615 dated August 15, 1971."

(c) The contractor agrees to insert the substance of this clause, including this paragraph (c) in all subcontracts for supplies or services issued under this contract.

Contractor (signed)

We note that the Federal Procurement Regulations (FPR), which GPO uses as a guide on matters not covered by its own regulations, also implemented Executive Order 11615 by requiring a price certification, similar to the above certification, in solicitations subject to

the order. See section 1–1.321 added by FPR Temporary Regulation 22, September 9, 1971. As in the case of the above GPO provision, FPR 1–1.321–3(c) provided that where invitations for bids include the certification requirement and bidders declined to comply with the certification, their bids would be deemed to be nonresponsive.

When the bids for each procurement were opened it was discovered that your firm was the low bidder on all three solicitations, but you had failed to sign the price certification in each of your bids. Consequently, your bids were declared nonresponsive and award was made to the next low bidders.

It is your contention that on previous occasions when you submitted bids to GPO you were required only to execute two copies of the Bid and Acceptance form (GPO Form 183). You admit that you overlooked the necessity for signing the price certification in each of your bids under the subject procurements. However, you point out that the information contained in the above notice was substantially the same as that contained in a GPO letter dated September 1, 1971, concerning implementation of Executive Order 11615, and in view of the signature line being captioned "Contractor," in contrast to the signature line of the Bid and Acceptance form which was captioned "bidder," you assumed that the certification was to be signed only after you had received the award and had become the contractor. Also, you state that while your bids may be technically nonresponsive, the total of your bid prices for the three solicitations was $4,500 lower than the next lowest bidder on the three solicitations and your failure to sign the certification should be waived as a minor informality.

We are advised that the language requiring bidders to sign and submit the price certification with their bids, or have their bids declared nonresponsive, was deemed necessary because (1) the regular GPO solicitation package requires only the signing and return of the Bid and Acceptance form, and (2) the only documents that the form incorporates by reference are the specifications and certain standard preprinted contract provisions and stipulations not relevant in the present case. Without the requirement for execution and return of the certification, the certification provisions would not be binding on the bidder since such provisions were not otherwise incorporated into the solicitation. Thus, the mere attachment of the certification to the bid papers without the requirement for its execution and return would not bind the contractor to the terms contained therein.

As a general rule, if an addendum to an invitation affects price, quantity or quality, it concerns material matters which may not be waived, and failure by a bidder to acknowledge its receipt in the manner required by the invitation renders the bid nonresponsive. 37 Comp. Gen. 785 (1958). The basis for such rule is that a bidder would other-

wise have an option to decide after bid opening to become eligible for the award by coming forth with evidence outside the bid itself establishing that the addendum had been considered, or to avoid award by remaining silent. Here, the certification clearly related to price inasmuch as it bound the bidder to reduce, at the time of billing, any prices offered in the bid which did not conform to the requirements of Executive Order 11615. Therefore, we cannot conclude that your failure to sign the price certification was a minor informality which could be waived, or that GPO's determination that your three bids were nonresponsive in such respect was erroneous. Although, awards to your firm might have realized a saving to the Government, it has been our consistent position that strict maintenance of the established principles of competitive procurement by Government agencies is infinitely more in the public interest than for the Government to obtain a pecuniary advantage in a particular case by violation of the rules. 43 Comp. Gen. 268 (1963).

In regard to your statement that the signature line of the certification was designated "Contractor" and was misleading, we can only point out that the first line of the Notice, as quoted above, clearly states that the bidder must sign and submit the price certification with his bid. In this connection, the record does not indicate that any other bidder was confused by the use of the term "Contractor" under the signature line. In any event, in view of the express warning that a bid not containing the required certification would be considered nonresponsive, it appears that a prudent course of action would have required that any uncertainties on your part in the matter be resolved prior to the submission of your bids.

For the above reasons, your protest must be denied.

[B-173181]

Bids—Two-Step Procurement—First-Step—Purpose

Since the only offeror in addition to the incumbent contractor responding to the request for technical proposals under a two-step procurement for the installation of a telecommunications system overseas, who in answering the questions posed after the evaluation of offers indicated the risk incident to the site could not be assumed without surveying the site, was erroneously determined to be nonresponsive and was improperly denied an opportunity to participate in the second-step inviting prices notwithstanding by then the site had been surveyed, the contracting officer's subsequent determination to make the procurement competitive and permit the rejected offeror to submit a technically acceptable proposal was in line with the first step's intended purpose of fostering competition, and the offeror should be allowed to compete in the second step as a sole source award to the incumbent contractor would not be justified.

To the Secretary of the Army, December 20, 1971:

We refer to letters AMCGC-P of September 15 and October 18, 1971, from the Deputy General Counsel, forwarding a report on the

Philco-Ford Corporation protest against award of a contract to any other firm under request for technical proposals No. DAAB07-71-B-0340, issued by the United States Army Electronics Command (ECOM), Fort Monmouth, New Jersey.

This two-step formally advertised procurement covers services and materials for the installation of an integrated microwave line-of-sight telecommunications system in Germany. Step one requires a technical proposal to be submitted by each offeror for technical evaluation as to the acceptability of the offeror's approach to the stated requirements. Step two calls for the submission of a bid price by all offerors whose proposals have been determined to be technically acceptable. The request for technical proposals was issued on March 26, 1971, and proposals were to be submitted by April 26. Of the 33 firms solicited, only the Federal Electric Corporation (FEC)—the incumbent contractor—and Philco-Ford submitted proposals. After evaluation of these two proposals, ECOM gave each offeror a separate set of questions to be answered for clarification purposes and returned to ECOM by May 24. FEC was given 139 questions on May 18 at ECOM. At that time, FEC reviewed the questions and requested various clarifications. Seven questions were deleted by ECOM as a result thereof. Philco-Ford was furnished 284 questions on May 17. The procuring agency reports that there was some discussion of the questions at this time, although the discussion was not extensive and, in the main, related to Philco-Ford's surprise at being given so many questions.

Both offerors timely returned their answers to ECOM. Thereafter, the proposal of FEC was judged acceptable. The answers submitted by Philco-Ford, however, indicated that Philco-Ford would not assume without a site survey the risk prescribed by step one for inaccuracies or omissions in the site report data furnished with the solicitation. Philco-Ford had requested of the contracting officer on May 18 that it be allowed an extension of 4 weeks for the submission of its answers in order to conduct a site survey in Germany. The contracting officer denied this request on May 20 as untimely. Consequently, on May 26, the contracting officer notified Philco-Ford that its proposal has been found nonresponsive for failure to conform to an essential requirement of the solicitation by not assuming the risks contemplated therein. Subsequently, on May 28, 1971, the Philco-Ford proposal was determined to be unacceptable. Thereafter, Philco-Ford protested to our Office.

Because Philco-Ford was no longer considered eligible, negotiations were entered into with FEC, the only remaining acceptable offeror, pursuant to paragraph 3-210.2 of the Armed Services Procurement Regulation (ASPR). ECOM submitted to FEC a request for proposal

contemplating a fixed-price incentive-fee contract. FEC submitted its proposal. An audit of the proposal was made and the cost and pricing data in the proposal were reviewed by the Government. Negotiations between ECOM and FEC were conducted from June 12 to June 16, at which time a final price for the contract was ultimately agreed upon by the parties. However, no contract award was made.

While price negotiations with FEC were being conducted, the Philco-Ford protest was also being studied by the ECOM legal office, with particular attention to the allegation by Philco-Ford that a site survey was necessary in order to answer some of the 284 questions. It was Philco-Ford's contention that many of the questions required detailed technical information available only to Government program representatives and the on-site incumbent contractor. Further, it was alleged that the information requested grossly exceeded the scope of the "general and local site conditions" as set forth in the solicitation and that, therefore, satisfactory answers could be given to the procuring activity only after a site survey. Review by ECOM engineers found that 13 of these questions did, in fact, require a site survey, and in view of this determination, it was decided that the Philco-Ford proposal had been erroneously determined to be nonresponsive for failure to comply with the solicitation.

Toward the end of this review period of Philco-Ford's allegation, more specifically on July 21, 1971, Philco-Ford was advised telephonically by ECOM for the first time that its proposal had been found to be technically unacceptable in May. The original technical evaluation had been based upon the following scoring criteria: 60 points or better—technically aceptable; 59–50 points—susceptible of being made acceptable; 49 points and below—technically unacceptable and excluded from further negotiation. Although Philco-Ford's proposal had been evaluated initially at below 50 points, a managerial decision was made during the review period to consider the proposal as susceptible of being made acceptable. The motivating factor behind this decision was the desire to maintain the competitive aspects of the procurement by eliminating the necessity of making the procurement on a sole source basis. By ECOM letter of July 22, Philco-Ford was advised that notwithstanding the determination that its proposal was technically unacceptable, it would be given the opportunity to meet with ECOM personnel on July 29 to further discuss and possibly clarify its proposal.

At the July 29 meeting, it was agreed that 13 of the 284 original questions were inappropriate in that a site survey would be needed to answer them. As to the other 271 questions, Philco-Ford's response of May 24 had satisfactorily answered all but approximately 23. Philco-

Ford was now given until August 2 to clarify its responses to these questions. After a review of the August 2 responses, Philco-Ford conducted a site survey and was given a further opportunity to clarify a few remaining areas of its proposal because it was now almost technically acceptable. This final clarification was submitted on August 30, and on September 1 Philco-Ford's proposal was determined to be technically acceptable. The contracting officer subsequently proposed issuing the second-step invitation requesting bid prices from both FEC and Philco-Ford. However, in the administrative report of October 18, 1971, it was recommended that the procurement be limited to FEC because of the earlier determination that Philco-Ford was technically unacceptable.

The propriety of issuing an invitation to Philco-Ford is questioned by FEC. It is first contended that the original rejection of Philco-Ford's proposal on the bases that it was both nonresponsive and technically unacceptable was correct and that the later discussions leading to the determination that Philco-Ford should be allowed to take part in the second step of the procurement were improper. It is further contended that Philco-Ford was given the opportunity to repropose on a number of occasions, to conduct a site survey in August, and in effect thereby to alter its proposal to an extent and in a manner not accorded FEC, thus leading to the conclusion that FEC did not receive equal treatment from the procuring agency. It is also alleged that deletion of the 13 questions did not cause Philco-Ford to assume the risks contemplated by the first step, but rather the causation for this was the site survey which Philco-Ford was allowed to conduct in August, after it had apparently foregone its right to make such a survey by submitting its original proposal without requesting permission to make the survey. FEC concludes that the questions put Philco-Ford on notice that it had misconstrued the site conditions and data and that having realized its error that firm would under no circumstances have assumed the risk for errors in such data without first having conducted a site survey. Finally, it is alleged that allowing Philco-Ford to participate in the second step would be irreparably detrimental to FEC because it is likely that the prices FEC used in computing its final negotiated price have been divulged so that Philco-Ford will be able to ascertain FEC's negotiated price. Consequently, under the second step FEC will be forced to bid against itself as well as Philco-Ford.

We believe that the contracting officer incorrectly determined that Philco-Ford's May 18 request for an extension of the time period for submitting its answers so as to be able to conduct a site survey in Germany should be denied. Having regard for the time necessary to make a site inspection, to examine data concerning the work, and to prepare

estimates from the plans and specifications, the allotment of a greater amount of time than that provided for the development of proposals was necessary in order to permit sources other than the incumbent to compete on the procurement. A period of 30 days was allotted for the preparation of proposals. Philco-Ford alleges that this period was further shortened because it received the solicitation on April 1, 1971, and not on the March 26 issuance date. We note that within this 25–30 day period a proposer who was unfamilier with the site would have had to review the solicitation and associated data in order to determine whether or not a site survey would be necessary. The proposer would also, most assuredly, have found it advisable to attend the pre-invitation conference which was held on April 8, 1971. Should the need for a site survey then be determined to exist, a 1 week notification to the STRATCOM–EUROPE representative prior to that proposer's arrival in Germany was required. And even after time had been allotted for the actual making of a site survey, the data gleaned therefrom had to be refined and assimilated and incorporated in developing the proposal to be submitted. Further, amendments to the solicitation were issued on April 14 and 16. Not only did the circumstances create a situation which in essence negated the possibility for any meaningful site survey, but they also created a noncompetitive aura, considering that one proposer was not familiar with the actual site conditions, whereas the other was the on-site incumbent contractor and thus had all the information necessary for intelligent bidding on the procurement.

Consequently, Philco-Ford, in view of the short period allotted for the development and submission of its proposals and in view of the optional nature of the site survey, determined to forego the survey because of the apparent adequacy of the Government-provided data and to concentrate upon development of a responsive proposal. It was not until the receipt of the 284 questions that Philco-Ford determined an acceptable technical proposal could be submitted only with the aid of a site survey. In view of the fact that the site survey was needed to adequately answer the questions given Philco-Ford by ECOM, in view of the fact that further amendments to the solicitation were issued May 18 and 19, respectively, without change in the requirement for submission of amended technical proposals by May 24, and in view of the need to actually place the procurement on a competitive footing, the time extension requested by Philco-Ford to permit a site survey should have been granted. Had this been done, Philco-Ford probably would not have submitted a nonresponsive proposal refusing to assume the risks for errors or discrepancies in the Government-provided data. Further, that a site survey was necessary and beneficial is made

evident by the fact that after Philco-Ford made the site survey, Philco-Ford easily was able to make its proposal acceptable.

We note that the two-step procedure was initiated and intended to extend the benefits of competitive advertising to procurements which previously were negotiated. While the second step of this procedure is conducted in accordance with the rather rigid rules of formal advertising procedures (ASPR 2–503.2), the first step, in furtherance of the goal of maximized competition, contemplates the qualification of as many sources as possible. This goal must be balanced, of course, with the need of the procuring activity to fulfill its requirements within given time limits. Thus, we have held that under certain circumstances during the first step, the request of and acceptance by the contracting officer of a new or amended technical proposal from a proposer after the expiration of the date for submission of proposals and after that proposer's original proposal had been rejected as unacceptable was proper and consistent with the philosophy of two-step procurement procedures. See B–160324, April 5 and February 16, 1967. Here, the contracting officer's decision to make the present procurement competitive by allowing Philco-Ford the opportunity to submit a technically acceptable proposal was in line with the first step's intended purpose of fostering competition. That such action was necessary to place Philco-Ford on an equal footing with FEC—the incumbent contractor—is a sufficient answer to the charges of unequal treatment and favoritism.

As to the allegation that FEC's prices have been divulged because of its negotiations with the Government and that to allow issuance of the second step would be unfair and highly detrimental to FEC, we note that ASPR 3–507.2 forbids, after receipt by the Government, the dissemination of any information contained in any proposal or quotation to the public or to anyone within the Government not having a legitimate interest therein. We realize there is a possibility that some information about FEC's pricing may have "leaked" from commercial sources. If so, this is unfortunate, but it is not in our opinion a sufficient justification to make award to FEC on a sole source basis.

For the foregoing reasons, Philco-Ford should be allowed to compete in the second step of the procurement.

[B–174083]

Bidders—Qualifications—State, Etc., Licensing Requirements

The failure of the low bidder under a solicitation for security guard services to meet the State and local licensing and registration requirements of the

invitation for bids prior to award does not affect the legality of the contract as the matter is one between bidder and State and local authorities and is not a factor controlling bidder eligibility to obtain Government contracts. Upon determination that a license or permit is a prerequisite to being legally capable of performing for the Federal Government within its boundaries, a State or local authority may enforce the requirements if not in conflict with Federal policies or laws, or the execution of Federal powers. However, in the event of enforcement of State or local licensing requirements, should a contractor not perform, he may be found in default and the contract terminated with prejudice.

To Collins and Abramson, December 21, 1971:

Reference is made to your letter dated September 13, 1971, protesting the award of a contract to H. L. Yoh Company, Division of Day & Zimmerman, Inc. (Yoh), under invitation for bids (IFB) DABE03-71-B-0107, issued at Fort Sheridan, Illinois.

The invitation was issued for the procurement of security guard services at three missile sites. Each site was listed as a line item on the bidding schedule. Pinkerton Security Services, Inc., was low bidder on line item 1, which represented a site in Wisconsin. Yoh was low bidder on line items 2 and 3, which represented sites in Minnesota. The solicitation contained a clause concerning licensing and registration which provided as follows:

Licensing and Registration. The contractor and each of his employees provided under this contract shall meet state and local requirements for the type services required by this contract.

The State of Minnesota, by Minnesota Statute 326.331, prohibits any person to engage within the State in the business of protective agent for fee or reward unless previously licensed by the State. The basis for your protest is the uncontested fact that Yoh did not possess a Minnesota State Certificate to perform security guard services within the State at the time of its bid, nor at the time of contract award. You contend that since Yoh did not comply with Minnesota law, it could not comply with the provisions of the IFB, and, therefore, should not have been awarded the contract for guard services in Minnesota.

It is well established by the decisions of this Office that failure to submit permits or licenses by the time of award or at the very latest by the time of contract performance, plus any lead time which may be necessary in the particular case, shall affect the responsibility of a contractor in cases where the permit or license is a requirement of the Federal Government. See 34 Comp. Gen. 175 (1954), wherein a permit from the Interstate Commerce Commission was required; 39 Comp. Gen. 655 (1960), wherein operating authority from the Federal Aviation Administration was required; and 46 Comp. Gen.

326 (1966) wherein a license from the Atomic Energy Commission was required.

With respect to the effect of a State law requiring a license or permit as a prerequisite to performing the type of services required by a Federal contract, in our decision B–125577, October 11, 1955, we considered an IFB for a Federal construction contract to be performed in Tennessee, under which the contractor was to obtain all licenses and permits required for the prosecution of the work. We held therein that:

> State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be.
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> No Government contracting officer is competent to pass upon the question whether a particular local license or permit is legally required for the prosecution of Federal work, and for this very reason the matter is made the responsibility of the contractor. No statute has been brought to our attention which would authorize the inclusion of a condition in Federal contracts or bid invitations that local permits or licenses must be obtained, regardless of their necessity as applied to the work to be done. Accordingly, we are of the opinion that the obtaining of a general contractor's license for performing Government work in Tennessee is a matter which must be settled between the local authorities and the contractors, either by agreement or by judicial determination.

In a later decision we considered the position of Government counsel, who cited our opinion in B–125577, *supra*, and contended that where IFB provisions required a successful bidder to comply with State laws, the contracting officer was in error in interpreting such a requirement as a basis for rejection of a low bid because it was not accompanied by a State permit. Nevertheless, Government counsel contended that the low bid was properly rejected, since there was not enough time from the time of award for the low bidder to comply with State law prior to commencement of performance pursuant to the contract work schedule. It was the opinion of this Office that the low bid was improperly rejected under this proposed rationale as well, because State and local requirements may not be regarded as controlling the eligibility of bidders to obtain Government contracts. B–165274, May 8, 1969.

If a State determines that under its laws a bidder on a Federal contract must have a license or a permit as a prerequisite to its being legally capable of performing the required services for the Federal Government within the State's boundaries, the State may enforce its

requirements against the bidder, provided the application of the State's law is not opposed to or in conflict with Federal policies or laws, or does not in any way interfere with the execution of Federal powers. See *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956); *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963); *Charles Paul* v. *United States*, 371 U.S. 245 (1963). In those instances where the requirements of a State law do not violate this proviso, the State may proceed to enforce its requirements against a contractor who failed to comply. However, if as a result of enforcement by the State the contractor chooses not to perform the contract or is prohibited from doing so by an injunction won by the State, the contractor may be found in default and the contract terminated to its prejudice.

In the instant case, the Minnesota law requires a license before commencement of services as a protective agent, but whether this law is applicable to the particular work to be done under this Federal contract is a decision to be made by State authorities. The record evidences that Yoh filed an application for such a license on September 9, and a license was granted on October 19. However, the record does not evidence that Minnesota authorities have determined that the license is necessary for the services to be performed by Yoh, and it does not appear that such a determination will be made now that a license has been issued to Yoh.

Under the circumstances we are unable to conclude that Yoh's failure to obtain a license prior to performance precluded it from being awarded a valid contract, or that any legal basis exists for objecting to the award made to Yoh.

Accordingly, your protest is denied.

[B-169366]

Pay—Absence Without Leave—Civil Arrest—Confinement—Trial and Appellate Review

An Army sergeant while confined by United States Military authorities in a Naval Correctional Center in Japan for the Japanese Government during the period of his trial and appellate review on the charge of murder who performed normal prison-type duties, none of which were his military specialty or equal to the normal duties of his grade, is not entitled to pay and allowances for the period of confinement as Army Regulations, although authorizing the employment of prisoners in a variety of capacities, prohibits payment while so employed, and Rule 8, Table 1-3-2, Department of Defense Military Pay and Allowances Entitlements Manual, provides that when confined for a foreign civil offense for which a member has been charged or indicted by a foreign court, he is not

entitled to pay and allowances except for a period of leave and BAQ under paragraph 10312 of the Manual, unless the absence is excused as unavoidable.

To Major H. A. MacCallum, Department of the Army, December 29, 1971:

Further reference is made to your letter dated August 19, 1971, which was forwarded here by letter dated November 9, 1971, of the Office of the Comptroller of the Army, DACA–FIS–PP, requesting an advance decision as to the propriety of payment of pay and allowances to a sergeant while he was confined by United States military authorities at the Naval Correctional Center, Yokosuka, Japan, for the Japanese Government during the period of his trial and appellate review on the charge of murder. Your request has been assigned Control No. DO–A–1136 by the Department of Defense Military Pay and Allowance Committee.

You say that the sergeant was indicted by the Japanese Government for murder on February 14, 1970, and sentenced to 12 years at hard labor on February 19, 1971. The Japanese legal authorities allowed him to remain in custody of the U.S. Forces during the period of his trial and appellate review, in lieu of confining him in a Japanese facility. We understand that he is now confined in a Japanese facility serving a 12-year sentence for murder.

During the period that the sergeant was confined by the United States authorities he performed normal prisoner-type duties, none of which could be construed as being within his military specialty or equal to normal duties of his grade. The Naval Correctional Center reported that after an indoctrination period from April 28, 1970, to May 6, 1970, he worked at numerous tasks within the Center from May 6, 1970, to December 14, 1970, including painting, gardening and carpentering, and that from December 15, 1970, he operated the correctional center laundry for the prisoners. None of these duties could be construed as performing services in his military specialties. Since you feel that there is a definite difference between performing duties normally required of a prisoner and being usefully employed in the individual's military specialty, you request a decision as to whether he may be paid pay and allowances during the period of his confinement at the Naval Correctional Center.

Your doubt arises from the fact that two Navy prisoners and one Marine prisoner whose situations are similar to the sergeant's are in a pay status since their respective commanders have certified that they are usefully employed in accordance with paragraph 5c,

COMNAVFORJAPAN Instruction 1640.7B, dated October 15, 1969. That Instruction provides that upon determination by the commanding officer that a member, other than a normal confinee, who is detained within the brig compound, but is in fact usefully employed and can be regarded as performing duties of his rate, is eligible for pay and allowances.

In decision 36 Comp. Gen. 173 (1956) we held that a member of the uniformed services who is (1) arrested by the Japanese civil authorities because of an alleged commission of a civil offense, (2) released to the custody of the U.S. military authorities on condition that he will be made available for trial by the Japanese court upon the request of the Japanese, (3) confined by the U.S. military authorities pending release to the Japanese for trial, and (4) tried and convicted by the Japanese court, must be regarded as absent without leave during the period of his pretrial confinement by the military authorities and is not entitled to pay for such period unless the absence is excused as unavoidable.

In our decision B–132595, August 26, 1957, we held that while a member of the uniformed services who is restricted to his base, in a sense, is being confined by the military authorities, the term "confinement" was used in 36 Comp. Gen. 173 (1956) as having reference generally to periods of actual incarceration and does not include periods when the member is in a duty status while awaiting civil trial even though his area of movement is restricted during such periods. In 37 Comp. Gen. 228 (1957), cited as reference (c) in the instruction referred to above, we held that a Navy enlisted man with the rate of Yeoman 3rd Class, who, after expiration of his enlistment and while restricted to his station awaiting appellate review of his court martial sentence was assigned to the post control office to "perform duties of his rate," was entitled to pay and allowances if such duty was directed by competent authority and the assignment could be regarded as a restoration to duty.

Our decision B–169366, dated April 8, 1970, cited by you, involved an Army enlisted member, who, while on leave from his duty station in Germany, was apprehended in Spain and sentenced to 6 years confinement. He was released to United States Naval authorities at Rota, Spain, pending his appeal for a pardon, relieved from attachment to the German field station and attached to the U.S. Naval Station, Rota, Spain, for administrative purposes. It was stated that he was performing military duties at Rota, Spain.

We said that while some question arises as to how an enlisted man of the Army could be discharging the obligations of his enlistment contract while attached to a naval installation, the mission of the unit to which he was assigned before going to Spain, as well as his military grade, might warrant a conclusion that assignment to the naval installation was for the convenience of the Government, provided the Navy had received a benefit from his service commensurate with his grade and military specialty as distinguished from those duties normally required of a military prisoner. We held that, except for any periods of actual confinement by the military authorities, the member might be allowed pay and allowances for any periods during which he rendered military duty appropriate to his grade of private first class.

Paragraph 10316a, Department of Defense Military Pay and Allowances Entitlements Manual, provides that pay and allowances accrue to a member in military confinement except, among other situations, when confined by military authorities for civil authorities. Rule 8, Table 1–3–2, DODPM, provides that when a member is absent from duty in confinement by military authorities for a foreign civil offense, and has been charged or indicted by the foreign court, he is not entitled to pay and allowances except for that part of the period that is covered by leave and BAQ under paragraph 10312, unless the absence is excused as unavoidable.

Paragraph 3–3*c*(2), Army Regulations 190–4, provides that prisoners will be employed in the manner prescribed in the Army Regulations governing the particular type of confinement facility in which they are confined. Paragraph 3–3*c*(5) provides that prisoners may be employed in work assignments in exchanges, clubs, or comparable work in other service-regulated activities on a military installation, provided such employment does not violate practices prohibited by the regulation, and may be used to perform local maintenance and management of facilities (AR 37–100) and major construction activities in accordance with AR 420–13, subject to prescribed restrictions.

Paragraph 15*a*, Army Regulations 420–13, provides that military prisoners in confinement may be used on real property maintenance activity work on the installation on which the confinement facility is located, such as maintenance and repair of buildings, structures, plants and systems, the operation of utilities, plants and systems and the furnishing of essential services. It is also provided that no compensation will be paid for or to military prisoners so employed.

It is our view that during the period the sergeant was confined in the Naval Correctional facility he was not in a duty status performing the duties of his grade but was performing local maintenance and management work such as may be required of prisoners. Accordingly, he is not entitled to pay and allowances during the period of such confinement.

There being no authority for payment of the vouchers forwarded with your letter, they will be retained here.

[B–173920]

Pay—Retired—Increases—Cost-of-Living Increases—Basic Pay Increases and Wage Freeze Effect

When in the adjustment of retired or retainer pay under 10 U.S.C. 1401a to reflect the Consumer Price Index cost-of-living increase effective June 1, 1971, a higher retired rate results for members retired on or prior to September 30, 1971, computed at the rates in Executive Order 11577, dated January 1, 1971, than for members retiring on or after October 1, 1971, whose retired pay is for computation at the rates in Public Law 92–129, effective October 1, 1971, because of the new rates prescribed by the public law and the exemption of military personnel placed in a retired status during the wage/price freeze period imposed by Executive Order 11615, dated August 15, 1971, issued under the Economic Stabilization Act of 1970, pursuant to 10 U.S.C. 1401a(e), the pay of a member retired after September 30, 1971, may not be less than if he had retired on that date.

Pay—Retired—Increases—Cost-of-Living Increases—Active Duty Recall

Since the rates of basic pay prescribed in Public Law 92–129 are the applicable rates for the purpose of adjusting retired pay under 10 U.S.C. 1401a for members who retired on or after October 1, 1971, members of the armed services who served on active duty after retirement and are entitled to the recomputation of their pay pursuant to 10 U.S.C. 1402(a) and to a partial cost-of-living increase adjustment under 10 U.S.C. 1401a(c) and (d), are subject for the purposes of footnote 1 of section 1402(a), to the starting date of October 1, 1971, in determining their basic pay after a continuous period of at least 2 years service, or to the basic pay rates prescribed by Public Law 92–129 if released on or after October 1, 1971, as these rates replaced the rates prescribed by Executive Order 11577, effective January 1, 1971.

To the Secretary of Defense, December 29, 1971:

Further reference is made to letter of November 1, 1971, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to the rules which should be applied in the computation of retired pay of members of the Armed Forces under sections 1401 and 1402 of Title 10, U.S. Code, in view of the enactment of Public Law 92–129, and the imposition of the wage-price freeze under Executive Orders 11577 and 11627. The questions are discussed in Department of De-

fense Military Pay and Allowance Committee Action No. 459, enclosed with that letter and in a comprehensive memorandum prepared by the Marine Corps which was submitted subsequently.

The questions presented are as follows:

1. In view of the enactment of Public Law 92-129, approved 28 September 1971, and the imposition of a wage/price freeze by Executive Order 11615 of 15 August 1971, what rules should be applied in adjusting retired pay or retainer pay under 10 U.S.C. 1401a in the circumstances hereinafter discussed?
2. In view of the enactment of Public Law 92-129 and the imposition of a wage/price freeze by Executive Order 11615, what rules should be applied in recomputing retired pay or retainer pay under 10 U.S.C. 1402(a) in the circumstances hereinafter discussed?

Section 201 of Title II of the act of September 28, 1971, Public Law 92-129, 85 Stat. 355, amended 37 U.S.C. 203(a) to provide for increases in rates of basic pay for certain members of the uniformed services. The basic pay rates were actually changed only for members with short periods of service or in the lower enlisted grades and the rates prescribed in Public Law 92-129 for "career" members generally are the same as the rates prescribed in Executive Order 11577 dated January 8, 1971, which became effective January 1, 1971. Under the Provisions of section 209 of Public Law 92-129 the new pay rates were to become effective on October 1, 1971. On October 1, 1971, however, as pointed out in the committee action, the Cost of Living Council ruled that all the increases in pay and allowances authorized for military personnel by Public Law 92-129 were subject to the wage-price freeze imposed by Executive Order 11615 dated August 15, 1971.

The committee action states that the enactment of Public Law 92-129 and the attendant wage-price freeze has created a need to establish precisely the meaning and intent of certain language contained in 10 U.S.C. 1401a and 10 U.S.C. 1402(a), pertaining to adjusting and recomputing retired pay.

By Executive Order 11615 dated August 15, 1971, issued under the Economic Stabilization Act of 1970, Public Law 91-379, 84 Stat. 799, as amended, 12 U.S.C. 1904 note, the President stabilized prices, rents, wages, and salaries for a period of 90 days from that date. The order established a Cost of Living Council and delegated to it broad authority to act for the President in carrying out its provisions. The Cost of Living Council delegated to the Director, Office of Emergency Preparedness, responsibility and authority to implement, administer, monitor, and enforce the stabilization of prices, rents, wages, and salaries as directed by the Executive order.

Under the above cited authority, the Cost of Living Council determined, as set forth in paragraph 502(16) of Economic Stabilization Circular No. 101, 36 FR 18739, 18744, September 21, 1971, with certain exceptions that "Military pay is subject to the terms and conditions of the President's freeze on wages." Concerning members of the uniformed services placed in a retired status during the freeze period, a further determination was made by the Council in the same paragraph that "In addition, benefits for military personnel placed in a retired status during the freeze period will be computed and paid as if the freeze were not in effect on the date of their establishing that status." It appears that on October 1, 1971, the Council specifically determined that "Military pay and benefit increases authorized by Public Law 92–129 may not be implemented during the freeze."

It was further determined by the Council that "Pay and benefit increases authorized under statutes enacted prior to Public Law 92-129 for personnel exempted under OEP Economic Stabilization Circular No. 101, paragraph 502(16), are not affected by this ruling and may be paid to exempted personnel." See paragraph 502(26) of Economic Stabilization Circular No. 102, 36 FR 20482, 20490, October 22, 1971. In a press release dated November 12, 1971, the Director of the Cost of Living Council announced that the Cost of Living Council had decided that pay for Federal employees and the military services will not be subject to general post-freeze wage controls. The freeze covered the period August 15 to November 13, 1971.

It is our view that, under the above determinations by the Cost of Living Council, members of the uniformed services who retired during the wage-price freeze are entitled to have their retired or retainer pay computed on the basis of the rates of basic pay which would be applicable in computing their active duty pay at the time of their retirement in the absence of the wage freeze. In other words, insofar as the wage-price freeze is concerned, a member initially retiring on or prior to September 30, 1971, would have his retired pay computed at the rates of basic pay prescribed in Executive Order 11577 effective January 1, 1971, and a member initially retiring on or after October 1, 1971, would have his retired pay computed on the rates set forth in Public Law 92–129. This is so notwithstanding that the pay rates set forth in the basic pay schedule which, by its terms, was effective October 1, 1971, are, in large part, the same rates that were in the schedule in effect on September 30, 1971. This basis will be applied in adjusting and recomputing retired or retainer pay

under section 1401a and 1402(a) of Title 10, in the circumstances discussed below.

Section 1401a of Title 10, U.S. Code, provides for adjustment of retired and retainer pay based on increases in the cost of living as reflected by the Consumer Price Index published by the Bureau of Labor Statistics. Section 1402(a) of Title 10 provides for recomputation of retired pay to reflect active duty performed after retirement.

Subsections (b), (c), (d), and (e), of section 1401a (as amended, effective October 31, 1969, by Public Law 91–179), are as follows:

(b) The Secretary of Defense shall determine monthly the percent by which the index has increased over that used as the basis (base index) for the most recent adjustment of retired pay and retainer pay under this subsection. If the Secretary determines that, for three consecutive months, the amount of the increase is at least 3 per centum over the base index, the retired pay and retainer pay of members and former members of the armed forces who become entitled to that pay before the first day of the third calendar month beginning after the end of those three months shall except as provided in subsection (c), be increased, effective on that day, by the per centum obtained by adding 1 per centum and the highest per centum of increase in the index during those months, adjusted to the nearest one-tenth of 1 per centum.

(c) Notwithstanding subsection (b), if a member or former member of an armed force becomes entitled to retired pay or retainer pay based on rates of monthly basic pay prescribed by section 203 of title 37 that became effective after the last day of the month of the base index, his retired pay or retainer pay shall be increased on the effective date of the next adjustment of retired pay and retainer pay under subsection (b) only by the percent (adjusted to the nearest one-tenth of 1 percent) that the new base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

(d) If a member or former member of an armed force becomes entitled to retired pay or retainer pay on or after the effective date of an adjustment of retired pay and retainer pay under subsection (b) but before the effective date of the next increase in the rates of monthly basic pay prescribed by section 203 of title 37, his retired pay or retainer pay shall be increased, effective on the date he becomes entitled to that pay, by the percent (adjusted to the nearest one-tenth of 1 percent) that the base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

(e) Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member or former member of an armed force retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay based on the same pay grade, years of service for pay, years of service for retired or retainer pay purposes, and percent of disability, if any, on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based.

It is stated in the committee action that the month currently forming the basis (the "base index" month) for the latest Consumer Price Index (CPI) adjustment in retired and retainer pay under 10 U.S.C. 1401a is March 1971. The latest CPI adjustment took effect on June 1, 1971, and it is stated that all members initially retired on and after June 1, 1971, are entitled to an immediate .6 percent CPI increase

(the percent by which the new base index exceeds the index for December 1970), unless that entitlement has been disturbed by enactment of Public Law 92–129.

While only members in lower grades or with short periods of service benefit financially under the new rates prescribed in Public Law 92–129, members retiring on or after October 1, 1971, are entitled to have their retired or retainer pay computed under the rates of basic pay prescribed by that law.

It is our view that in adjusting retired or retainer pay under section 1401a for members retired on or after October 1, 1971, and prior to the effective date of the next subsequent law or Executive order prescribing a new schedule of basic pay rates, the rates of basic pay prescribed in Public Law 92–129 must be considered the applicable rates "that became effective after the last day of the month of the base index" for purposes of subsection (c). It follows that a member who retires (etc.) on or after October 1, 1971, and becomes entitled to retired or retainer pay based on rates of monthly basic pay that became effective on October 1, 1971 (except for the wage-price freeze) would be entitled under section 1401a(c) to a partial increase in retired pay, computed as therein indicated, at the time of the next CPI adjustment in retired or retainer pay, provided that the effective date of any such adjustment precedes issuance of another authoritative pay schedule fixing new rates of basic pay. For purposes of subsection (d), members retiring on or after October 1, 1971, would not be considered as having been retired "after the effective date of an [CPI] adjustment of retired pay and retainer pay * * * but before the effective date of the next increase in rates of basic pay."

As indicated above, the new rates of basic pay prescribed in Public Law 92–129 had the effect of changing the method of adjusting retired or retainer pay for purposes of subsections (c) and (d) of section 1401a in the case of members retired on or after October 1, 1971, as compared to those members retired on or prior to September 30, 1971. Without applying the provisions of subsection (e) of section 1401a, this could result in situations where persons retiring on or after October 1, 1971, in the same grade and basic pay would receive less than certain individuals in the same circumstances retiring prior to October 1, 1971.

The question is raised in the committee action whether subsection (e) of section 1401a, quoted above, was enacted for use on a one-time basis for the 1967 situation only or whether the subsection is a permanent part of Title 10. Like subsections (c) and (d), subsection (e) of section 1401a was added by section 2 of the act of December 16,

1967, Public Law 90–207, 81 Stat. 652, which became effective October 1, 1967. The legislative history of subsection (e) of section 1401a, as explained on page 19 of Senate Report No. 808 (to accompany H.R. 13510 which became Public Law 90–207 lends some weight to the view that this provision was intended to correct a one-time situation then in existence. However, since the situation is a recurring one and in the light of the specific language in subsection (e) that "Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member * * * retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay * * * on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based," it is our view that the provisions of subsection (e) are an integral part of section 1401a for the purpose of adjusting retired or retainer pay to reflect changes in the Consumer Price Index.

Had Congress intended the provisions of subsection (e) of section 1401a to operate as a one-time basis, there would have been no need or reason to incorporate it as a permanent part of chapter 71 of Title 10. Moreover, when the changes to the CPI law were under consideration, the Department of Defense submitted a proposed amendment suggesting the language of subsection (e) and that such subsection be added after section 1401a(d). See page 28 of the Senate Report No. 808 mentioned above.

Concerning the effect of section 1401a(e) of Title 10, to particular situations, the committee action refers to the special rates of basic pay prescribed for a member who is serving as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force; or Commandant of the Marine Corps. It is stated that Public Law 92–129 prescribes a basic pay rate of $3,000 per month for such members which is the same pay rate prescribed for them in Executive Order 11577 of January 8, 1971, and in Executive Order 11525 of April 15, 1970. It is pointed out that had a member entitled to the special rate of pay retired on December 31, 1970, he would have become entitled to retired pay of $2,250 per month based on the basic pay rates prescribed in Executive Order 11525. He would have simultaneously become entitled to a CPI increase of 2.5 percent under 10 U.S.C. 1401a(d) based on the August 1, 1970, adjustment of retired pay under 10 U.S.C. 1401a(b). It is further stated that on June 1, 1971, he would have received an additional 4.5 percent CPI increase under 10 U.S.C. 1401a(b), and his current rate of retired pay would thus be $2,410.03 per month.

The committee action further states that had the above member retired on September 30, 1971, and if the provisions of 10 U.S.C. 1401a(e) are applicable to him, he would become entitled to adjusted retired pay of $2,410.03 per month, since his retired pay could not be less than it would have been had he become entitled to retired pay on the day before the effective date of the rates of monthly basic pay on which his retired pay is based. It follows, as the committee action states, that under section 1401a(e), the retired pay of such a member who is retired after the effective date of the basic pay rates prescribed in Pubic Law 92–129 cannot be less than the retired pay he would have received if he had retired on September 30, 1971. We concur with the views stated in the committee action in this respect.

The above rules are for application in adjusting retired or retainer pay under 10 U.S.C. 1401a. Question 1 is answered accordingly.

With respect to question 2, 10 U.S.C. 1402(a) provides, in part, that a member of an armed force who has become entitled to retired pay or retainer pay and who thereafter serves on active duty, is entitled upon release from that active duty to recompute his retired or retainer pay on the basis of the rate of basic pay identified in footnote 1 of section 1402a(a), which reads as follows:

[1] For a member who has been eititled, for a continuous period of at least two years, to basic pay under the rates of basic pay in effect upon that release from active duty, compute under those rates. For a member who has been entitled to basic pay for a continuous period of at least two years upon that release from active duty, but who is not covered by the preceding sentence, compute under the rates of basic pay replaced by those in effect upon that release from active duty. For any other member, compute under the rates of basic pay under which the member's retired pay or retainer pay was computed when he entered on that active duty.

Since it has been determined that the rates of basic pay prescribed in Public Law 92–129 are the applicable rates for the purpose of adjusting retired pay under 10 U.S.C. 1401a for members who retire on or after October 1, 1971, and since members covered by 10 U.S.C. 1402(a) are entitled to a partial CPI adjustment under 10 U.S.C. 1401a (c) and (d) (see 50 Comp. Gen. 232 (1970)), it would be inconsistent to adopt a different rule in recomputing retired pay or retainer pay for section 1402(a) members. It is our view that for the purposes of the first sentence of footnote 1 the starting date is October 1, 1971. For purposes of the second sentence of the footnote the basic pay rates prescribed by Public Law 92–129 are the rates in effect at the time of release (on or after October 1, 1971) and the rates prescribed by Executive Order 11577 effective January 1, 1971, are the rates replaced.

The above rules are for application in recomputing retired or retainer pay under 10 U.S.C. 1402(a). Question 2 is answered accordingly.

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Although Dept. of Housing and Urban Development must amend project grants, contracts, and agreements with State agencies entered into prior to Jan. 2, 1971, effective date of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, in order to comply with title II of act which provides for relocation allowances and assistance to persons displaced by Federal and federally assisted programs on or after Jan. 2, 1972, including persons whose displacement was delayed until July 1, 1972, pursuant to sec. 221(b), cost-sharing requirements of sec. 211(a) do not apply since sec. 211(c) providing for amendment of programs to implement relocation assistance does not include sec. 211(a), and pursuant to sec. 220(a), repeal of Housing Act of 1949, as amended, does not affect 100 percent existing Federal liability for relocation costs---------- 267

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ment Reg. 9-59.002 provides for AEC review of cost-type contractor's procurement systems and methods, as well as review of individual procurement actions and, therefore, there is no basis to question procurement determinations made under rules applicable to such AEC contracts or under rules governing direct Federal procurements in connection with evaluation of bids submitted under invitation for bids issued by AEC prime contractor for installation of mechanical, electrical, and HVAC systems 329
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Restrictions not for application
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Product not end component

Procurement by Govt. prime contractor, with approval of contracting officer, of foreign produced scale model of amphibious assault landing craft as aid to perform cost-reinbursement research and development

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contract—model technically superior to domestically offered models and offered at lowest cost, even with 50 percent differential, transportation, and travel expenses added—is not subject to Buy American Act, 41 U.S.C. 10a–d. Even if model were to be considered end product and for public use, restrictions of act would not apply since there is no absolute prohibition against procurement of other than domestic supplies and materials for public use, and as cost of model after applying 50 percent differential prescribed by par. 6–104.4 of Armed Services Procurement Reg. is lowest, award to subcontractor was in public interest---------- 217
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While prime contractor under Atomic Energy Commission (AEC) operating type contract is not bound by statutory and regulatory requirements that govern direct procurement by Govt., AEC Procurement Reg. 9–59.002 provides for AEC review of cost-type contractors' procurement systems and methods, as well as review of individual procurement actions and, therefore, there is no basis to question procurement determinations made under rules applicable to such AEC contracts or under rules governing direct Federal procurements in connection with evaluation of bids submitted under invitation for bids issued by AEC prime contractor for installation of mechanical, electrical, and HVAC systems---------- 329

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Failure of successful bidder under invitation for bids issued by Govt. prime contractor to comply with requirement that proposals be submitted in triplicate was minor deviation which properly was waived pursuant to sec. 1–2.405(a) of Federal Procurement Regs. Furthermore, single copy submitted by bidder was made available by prime contractor for examination by any interested party at time of bid opening------ 329

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Award by Atomic Energy Commission prime contractor, whose invitation for bids to install mechanical, electrical, and HVAC systems had been amended to provide for certification coverage under Pittsburgh Plan and for submission of affirmative action plan embodying goals and timetables of minority utilization, to bidder who had certified that it was signatory of Pittsburgh Plan but did not submit affirmative action plan rather than to low bidder who although acknowledging amendment did not comply with its requirements was proper since certification will bind successful bidder to comply with affirmative action plan conditions

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Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norwegian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d, and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor---------- 195

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Cancellation
Erroneous awards
Bid evaluation error Page

Notwithstanding failure to acknowledge amendment presumably included in bid set to correct drawing number omissions in technical data package list (TDPL) and erroneous listing of some numbers in Military Specification (Milspec) to which telescopes being solicited were to conform, low bid was responsive as issuance of amendment was unnecessary where original invitation, accompanied by aperture cards of drawings, served to bind prospective contractors. Omitted numbers in TDPL were referenced in Milspec, which correctly listed erroneous numbers in specification requirements provision and, therefore, Milspec and cards, standing alone, required bidder compliance. Erroneous award to other than low bidder should be terminated for convenience of Govt. and contract offered to low bidder ---------- 293

Labor surplus areas
Certificate of eligibility
Submission with bid requirement

Where under small business and labor surplus set-aside portions of invitation, certificate of eligibility for first preference on basis of location of contemplated subcontractor, submitted under labor surplus area set-aside procedure prescribed in par. 1–804.2(b) of Armed Services Procurement Reg., was recalled after bid opening—a conclusive Dept. of Labor determination—upon subsequent approval of area as one of substantial unemployment, prospective prime contractor properly was not allowed to utilize its post-bid opening first preference certificate, notwithstanding its small business status, for recall of subcontractor's certificate was denial of certification and, therefore, no valid certificate existed at bid opening time, and since affirmative action of small business concern after bid opening to improve its priority may not be accepted, its labor-surplus bid was nonresponsive ---------- 335

Validity determination

Untimely submission of certificate of eligibility—subsequently recalled—under labor surplus area set-aside by small business concern, who in contrast to Govt-owned facilities operated under contract, owns its facilities and utilizes Govt. owned production equipment, properly was considered on basis of Comp. Gen. decisions and agency regulations. Determination to exclude certificate was not erroneous because contracting officer failed to exercise independent judgment, or discretion since solicitation and regulations requiring certificate to be submitted with offer were mandatory, and reliance of Comptroller's decisions was appropriate in view of 31 U.S.C. 1, *et seq.*, authorizing disallowance of credit in accounts of fiscal officers for payments under illegal contract ---------- 344

Small business concerns
Eligibility
Unacceptable

Determination small business concern was nonresponsible on basis of negative preaward survey evidencing past unsatisfactory performance under both Govt. and private contracts attributable to tenacity and perseverance which, pursuant to sec. 1–1.708–2(a)(5) of Federal Pro-

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Eligibility—Continued
Unacceptable—Continued Page

curement Regs. that concerns deficiencies other than capacity and credit, was forwarded to Small Business Administration (SBA) for issuance of Certificate of Competency (COC) if warranted is upheld where SBA agreed bidder lacked tenacity and perseverance and, in addition, concluded concern was deficient in capacity and issuance of COC was not justified. While factor of tenacity and perseverance is not covered by COC procedure, denial of COC operated as concurrence by SBA in contracting officer's determination award to low bidder was precluded.. 288

Set-asides
Price differential computation

In evaluating small business and labor surplus set-aside portions of invitation for bids prescribing that "set-aside portion shall be awarded at highest unit price awarded on non-set-aside portion, adjusted to reflect transportation and other cost factors which are considered in evaluating bids on non-set-aside portion," and that "unit price shall include evaluation factors added for rent-free use of Govt. property," adjustment of award price to reflect facilities rental represents cost to Govt. and not hypothetical cost to each bidder to eliminate any competitive advantage, and award price for labor surplus area set-aside should be computed to accurately reflect actual transportation costs to Govt. provided no prohibitory price differential results 335

Validity

Contract awarded low bidder under invitation for bids soliciting services to clean exhaust ducts for 1 year that was inconsistent as specifications required two cleanings and bid schedule four is not binding contract, notwithstanding "Order of Precedence" clause prescribed schedule would prevail in case of inconsistency since before notice of award was mailed inconsistency was discovered and bidder alleged its bid was based on two services per year. Had discrepancy been discovered after valid award had been consummated or had contracting officer had actual or constructive notice of error, four cleanings would be required, but as bidder was not afforded opportunity to prove its alleged error, no valid contract came into being with mailing of notice and purported contract should be rescinded 360

Bid procedure. (*See* **Bids**)
Bid shopping. (*See* **Contracts, subcontracts, bid shopping**)
Government property
Disposal
Policy to minimize ownership

Award of non-set-aside portion of labor surplus area procurement for projectiles to contractor operating Govt-owned facility (GOCO) rather than to contractor owning his facility and utilizing Govt-owned production equipment is not violative of policy to minimize Govt. ownership of industrial facilities stated in Dept. of Defense Directive 4275.5, Nov. 14, 1966, under heading "Industrial Facility Expansion Policy," for although award will keep Govt. facility in existence, no acquisition, expansion, construction, or use of property to increase production is entailed. Furthermore, solicitation provided for participation of GOCO

CONTRACTS—Continued
Government property—Continued
Disposal—Continued
Policy to minimize ownership—Continued Page
contractors, and approval of accounting procedures, removes possibility of portion of GOCO contractor's cost being allocated to its cost-reimbursable contract with Govt 344
Labor stipulations
Nondiscrimination
"Affirmative action programs"
Minority manpower goals
Award by Atomic Energy Commission prime contractor, whose invitation for bids to install mechanical, electrical, and HVAC systems had been amended to provide for certification coverage under Pittsburgh Plan and for submission of affirmative action plan embodying goals and timetables of minority utilization, to bidder who had certified that it was signatory of Pittsburgh Plan but did not submit affirmative action plan rather than to low bidder who although acknowledging amendment did not comply with its requirements was proper since certification will bind successful bidder to comply with affirmative action plan conditions imposed in invitation, and affirmative action plan objectives could not be waived as minor informalities as it would have been improper after bid opening to afford low bidder opportunity to correct bid deficiency .. 329
Mistakes
Allegation before award. (*See* **Bids, mistakes**)
Negotiation
Evaluation factors
Factors other than price
Minority subcontracting
Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority owned enterprises, and assignment of numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed 272
Manning requirements
Where manning charts submitted with low offer to furnish mess attendant services indicate understanding of, and ability to fulfill contract requirements, including wage rates, number of workers, and total estimated labor hours, offeror is within competitive range for negotiation, and fact that contract to be awarded may prove unprofitable, although there is no evidence it might, does not justify rejection of otherwise acceptable offer. Evaluation criteria now employed in mess attendant solicitations are intended to advise offerors of exact role manning charts play in evaluation process, and to minimize offers that

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Manning requirements—Continued
Page
quote prices that bear no reasonable relation to manning hours offered, and to preclude acceptance of lowest rate per man-hour, rather than lowest overall proposal 204

Fact that solicitation provided that manning charts whose hours do not approximate Govt's estimates may result in rejection of offer without discussion does not alter conclusion in 51 Comp. Gen. 204 that manning charts do not affect responsiveness of bids or offers as such language is but initial probative evidence of offeror's responsibility, and since manning charts serve as aids in determining responsibility charts cannot be made matter of responsiveness by any language in request for proposals. Furthermore, considering manhours and price separately does not imply there need be no reasonable relation between hours and dollars, and requirement that manhours be consistent with prices connotes test of reasonableness rather than exact requirement for minimum price per manhour, and since manning charts are not exact formula, acceptance of determination offeror is within competitive range is justified 309

Limitation on negotiation
Nonresponsiveness of offer

Request for proposals soliciting offers on "brand name or equal" basis for lease and maintenance of computers that would fit space occupied by IBM computers to be replaced is not restrictive because offer did not meet essential "disk arrangement" specified and, therefore, could not satisfy principal purpose of procurement that "no additional physical space will be required." Drafting of proper "brand name or equal" purchase description is matter primarily within jurisdiction of procurement activity and any particular features required must be presumed to be material and essential to needs of Govt. Although nonresponsiveness of offer may be subject for negotiation since offeror does not intend to make its offer "responsive" and contracting officials adhere to initial requirements, further discussions would be futile 247

Pilot projects
Method of conducting negotiations

In negotiation of pilot procurement for disposal of unserviceable explosive fuses by incineration under request for quotations that placed on contractor responsibility for providing and removing incinerator device, preparation and restoration of site, and incineration of fuses and removal of scrap residue, conclusion of negotiations upon receipt of best and final offers was consistent with par. 3–805.1 of Armed Services Procurement Reg. in absence of requirement to continue negotiations to define operating procedures or equipment design. However, as detonation demonstration for prospective offeror, although not prejudicial, created appearance of favoritism, and pilot project was not specifically detailed, future procurements should insure adequate competition by including as appropriate more definite specifications, demonstrations, and prebid conferences 233

CONTRACTS—Continued
Negotiation—Continued
Request for quotations
Firm offer confirmation Page

In issuing request for quotations, since use of Standard Form 18, which contained inconsistent and misleading provisions, instead of Form 33 was cause for rejection of low proposal on basis of failure to confirm that low quotation was firm offer and failure to submit revised proposal, use of form in absence of substantive reasons, even though authorized by par. 16–102.1(b)(1) of Armed Services Procurement Reg., is not required. To avoid placing prospective contractors in position to "second guess" whether solicitation was requesting quotation or firm offer, Standard Form 33 should be used in future procurements thereby eliminating that prospective contractors go through additional step of confirming that their initial proposals are firm offers 305

Omissions
Price escalation clause

Omission of price escalation clause to reflect impact of E.O. 11615, Aug. 15, 1971, which provides for stabilization of prices, rents, wages, and salaries, from request for proposals to furnish projectiles that was issued to both Govt-owned, contractor operated facilities and privately owned facilities utilizing Govt-owned production equipment does not make solicitation defective. Opportunity during negotiations to propose contract with escalation provision having been declined by protestant because maximum amount of escalation would have to be added to price, it is not appropriate after submission of proposal to content award cannot properly be made on basis of proposals which, as was case with protestant's proposal, did not include escalation clause 344

Sole source basis
Parts, etc.
Initial equipment sole source

Before rejection of unsolicited offers for repair kits for generator on qualified products list (QPL) under solicitation containing qualified components clause, and acceptance on sole source basis of QPL supplier's offer to furnish kits, if time permits, and in view of par. 3–102(c) of Armed Services Procurement Reg. prescribing competition to maximum extent, determination should be made if kit was altered by QPL offeror, or if kits of unsolicited offerors procured from same source used by QPL offeror, automatically qualified kits under applicable military specifications. If it cannot be determined that parts in kits have been altered or enhanced, or if examination is not practical, award may be made to QPL offeror and unsolicited offerors advised of kit parts requiring qualification testing for future procurements of kits 323

Payments
Past due accounts
Interest

The rule of long standing that interest may not be paid by Govt. in absence of express statutory provision or lawful contract will no longer be followed since there is no statute prohibiting payment of interest under contractual provisions, and such provisions will not violate so-called Antideficiency Act (31 U.S.C. 665), provided sufficient funds are reserved under appropriation financing contract to cover interest cost. Therefore, appropriate regulations may be promulgated to authorize inclusion in future contracts of provisions for payment of interest for

CONTRACTS—Continued
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period of delay in payment occasioned by fact disputed claim under contract required contractor to pursue his administrative remedies, or litigate, before amount owing could be determined. 22 Comp. Gen. 772, overruled---- 251
Protests
Resolution
Award notwithstanding protest
Where contracting officer is aware prior to award that bidder considered its total bid and not unit prices to be correct, and he determined that errors in unit prices were not for correction, protest was "resolved" prior to award within contemplation of par. 2-407.8 of Armed Services Procurement Reg. since it does not appear that any different result would have, or should have, obtained if award had been delayed---- 283
Timeliness
Nonresponsiveness of low bid to requirements in invitation to increase electrical capacity at Govt. Printing Office that switchboard to be installed in new substation and circuit breakers be product of same manufacturer, and that switchboard accept breakers in use was not remedied by assurance of compliance in bidder's accompanying letter and its supplier's descriptive literature where bidder before bid opening failed to seek interpretation of specifications alleged to be restrictive and nonresponsiveness of descriptive literature is not bid ambiguity to be construed as binding bidder to perform according to specifications. Moreover, "same manufacturer" requirement based on determination of less risk to malfunctioning of equipment—which was drafted into specifications to reflect minimum needs of Govt.—and determination of bidder noncompliance are primarily responsibility of contracting agency---- 315
Specifications
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General Accounting Office function
Rejection of low bid for procurement of electric generating set on basis of second low bidder's allegation of nonconformity with particular features of brand name or equal purchase description was correct, even though before rejection allegations should have been investigated and low bidder given opportunity to answer allegations in order not to adversely affect integrity of competitive system. However, invitation was defective for according to USGAO engineer low bid was in conformance with specifications on "or equal" basis and, therefore, particular features listed in invitation overstated Govt's needs and restricted competition. Where needs can be stated with precise specificity, procurements should be effected under purchase descriptions and not under "brand name or equal" technique---- 237
Ambiguous
Construction of ambiguity
Contract awarded low bidder under invitation for bids soliciting services to clean exhaust ducts for 1 year that was inconsistent as specifications required two cleanings and bid schedule four is not binding contract, notwithstanding "Order of Precedence" clause prescribed schedule

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Specifications—Continued
Ambiguous—Continued
Construction of ambiguity—Continued Page
would prevail in case of inconsistency since before notice of award was mailed inconsistency was discovered and bidder alleged its bid was based on two services per year. Had discrepancy been discovered after valid award had been consummated or had contracting officer had actual or constructive notice of error, four cleanings would be required, but as bidder was not afforded opportunity to prove its alleged error, no valid contract came into being with mailing of notice and purported contract should be rescinded---- 360
Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)
Conformability of equipment, etc. offered
Technical deficiencies
Administrative determination conclusiveness
Request for proposals soliciting offers on "brand name or equal" basis for lease and maintenance of computers that would fit space occupied by IBM computers to be replaced is not restrictive because offer did not meet essential "disk arrangement" specified and, therefore, could not satisfy principal purpose of procurement that "no additional physical space will be required." Drafting of proper "brand name or equal" purchase description is matter primarily within jurisdiction of procurement activity and any particular features required must be presumed to be material and essential to needs of Govt. Although nonresponsiveness of offer may be subject for negotiation since offeror does not intend to make its offer "responsive" and contracting officials adhere to initial requirements, further discussions would be futile---- 247
Defective
Brand name or equal product requirement
Rejection of low bid for procurement of electric generating set on basis of second low bidder's allegation of nonconformity with particular features of brand name or equal purchase description was correct, even though before rejection allegations should have been investigated and low bidder given opportunity to answer allegations in order not to adversely affect integrity of competitive system. However, invitation was defective for according to USGAO engineer low bid was in conformance with specifications on "or equal" basis and, therefore, particular features listed in invitation overstated Govt's needs and restricted competition. Where needs can be stated with precise specificity, procurements should be effected under purchase descriptions and not under "brand name or equal" technique---- 237
Demonstrations as aid to bidders, etc.
Propriety
In negotiation of pilot procurement for disposal of unserviceable explosive fuses by incineration under request for quotations that placed on contractor responsibility for providing and removing incinerator device, preparation and restoration of site, and incineration of fuses and removal of scrap residue, conclusion of negotiations upon receipt of best and final offers was consistent with par. 3–805.1 of Armed Services Procurement Reg. in absence of requirement to continue negotiations to define operating procedures or equipment design. However, as detonation demonstration for prospective offeror, although not prejudi-

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Demonstrations as aid to bidders, etc.—Continued
Propriety—Continued Page
cial, created appearance of favoritism, and pilot project was not specifically detailed, future procurements should insure adequate competition by including as appropriate more definite specifications, demonstrations, and prebid conferences 233
Deviations
Descriptive literature
Bid rejection
Nonresponsiveness of low bid to requirements in invitation to increase electrical capacity at Govt. Printing Office that switchboard to be installed in new substation and circuit breakers be product of same manufacturer, and that switchboard accept breakers in use was not remedied by assurance of compliance in bidder's accompanying letter and its supplier's descriptive literature where bidder before bid opening failed to seek interpretation of specifications alleged to be restrictive and nonresponsiveness of descriptive literature is not bid ambiguity to be construed as binding bidder to perform according to specifications. Moreover, "same manufacturer" requirement based on determination of less risk to malfunctioning of equipment—which was drafted into specifications to reflect minimum needs of Govt.—and determination of bidder noncompliance are primarily responsibility of contracting agency 315
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First article waiver eligibility misstated
Low bidder who does not qualify for waiver of first article requirements offered to previous suppliers of fueling at sea probes and receivers but inadvertently entered bid prices in waiver space and inserted dashes in area reserved to bidders that were not eligible for first article waiver has not submitted nonresponsive bid *per se* as dashes have no firm meaning apart from entire context in which used and examination of entired bid demonstrates entries were erroneous and intent was to bid on basis of first article contractor testing and, although, not for correction as bid mistake, error is supported by fact low bidder did not identify prior contracts under which first articles on production samples had been furnished or indicate delivery time advancement in event of waiver, and inserted subitems not applicable to first article waiver 352
Drawings
Amendment identification
Drawings forwarded to bidders with amendments that were acknowledged were incorporated by reference into invitation for bids (IFB) and, therefore, submission of bid without inquiry as to drawings is inconsistent with allegation of nonreceipt at later date since time for airing issue of this nature is prior to bid submission. In any event, nonreceipt of drawings does not present cogent reason for cancellation of IFB as nonreceipt has no bearing on bidder's obligation to perform in accordance with specifications 352

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Specifications—Continued
Failure to furnish something required
Addenda acknowledgment
Addenda in bid package Page

Notwithstanding failure to acknowledge amendment presumably included in bid set to correct drawing number omissions in technical data package list (TDPL) and erroneous listing of some numbers in Military Specification (Milspec) to which telescopes being solicited were to conform, low bid was responsive as issuance of amendment was unnecessary where original invitation, accompanied by aperture cards of drawings, served to bind prospective contractors. Omitted numbers in TDPL were referenced in Milspec, which correctly listed erroneous numbers in specification requirements provision and, therefore, Milspec and cards, standing alone, required bidder compliance. Erroneous award to other than low bidder should be terminated for convenience of Govt. and contract offered to low bidder 293

Price stabilization certification

Failure of low bidder to sign and submit with its bids price certification attached to three solicitations issued for printing and binding services may not be waived as minor informality. Certification addendum bound bidder to reduce, at time of billing, any prices offered in bid which did not conform to requirements of E.O. 11615, dated Aug. 15, 1971, issued under authority of Economic Stabilization Act of 1970 for purpose of stabilizing prices, rents, wages and salaries in order to stabilize economy, reduce inflation, and minimize unemployment, and, therefore, bids submitted were nonresponsive under rule that if addendum to invitation affects price, quantity or quality, it concerns material matters that may not be waived even to effect savings for Govt. 370

Information

Minority manpower utilization

Award by Atomic Energy Commission prime contractor, whose invitation for bids to install mechanical, electrical, and HVAC systems had been amended to provide for certification coverage under Pittsburgh Plan and for submission of affirmative action plan embodying goals and timetables of minority utilization, to bidder who had certified that it was signatory of Pittsburgh Plan but did not submit affirmative action plan rather than to low bidder who although acknowledging amendment did not comply with its requirements was proper since certification will bind successful bidder to comply with affirmative action plan conditions imposed in invitation, and affirmative action plan objectives could not be waived as minor informalities as it would have been improper after bid opening to afford low bidder opportunity to correct bid deficiency.. 329

Place of contract performance

Failure of low bidder to state exact place of contract performance, information required under invitation for bids to furnish service caps that was restricted to small business firms on Qualified Manufacturers List (QML) for item prior to bid opening, may not be corrected or waived as minor deviation as information is material to maintaining QML procedures established for procurement of military clothing in order to permit prompt determination that bidder is established and reputable manufacturer with sufficient capacity and credit to perform contract

CONTRACTS—Continued
Specifications—Continued
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License approval
Failure of low bidder under solicitation for security guard services to meet State and local licensing and registration requirements of invitation for bids prior to award does not affect legality of contract as matter is one between bidder and State and local authorities and is not factor controlling bidder eligibility to obtain Govt. contracts. Upon determination that license or permit is prerequisite to being legally capable of performing for Federal Govt. within its boundaries, State or local authority may enforce requirements if not in conflict with Federal policies or laws, or execution of Federal powers. However, in event of enforcement of State or local licensing requirements, should contractor not perform, he may be found in default and contract terminated with prejudice---------- 377
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Evidenciary value
Low bid on indefinite type contract that failed to quote separate prices on supply and service sub-line items—identified as 0001AA through 0001AE—to accompany electric counters—0001—solicited under invitation that scheduled sub-line items pursuant to par. 20-304.2 (b) of Armed Services Procurement Reg. as alphabetical suffixes of basic contract item, and requested bidders to quote prices on "Total Item" and not on sub-line item quantities may be considered for contract award as bidder would be obligated to furnish all listed requirements of schedule at price quoted for basic item, notwithstanding confusing "shorthand references" to subitems—references that should be avoided in future procurements. Furthermore, fact that other bidders construed invitation as requiring separate prices for subitems is extraneous evidence that may not be considered---------- 255
Qualified products
Parts for qualified product
Before rejection of unsolicited offers for repair kits for generator on qualified products list (QPL) under solicitation containing qualified components clause, and acceptance on sole source basis of QPL supplier's offer to furnish kits, if time permits, and in view of par. 3-102(c) of Armed Services Procurement Reg. prescribing competition to maximum extent, determination should be made if kit was altered by QPL offeror, or if kits of unsolicited offerors procured from same source used by QPL offeror, automatically qualified kits under applicable military specifications. If it cannot be determined that parts in kits have been altered or enhanced, or if examination is not practical, award may be made to QPL offeror and unsolicited offerors advised of kit parts requiring qualification testing for future procurements of kits---------- 323

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Restrictive
Particular make
Administrative determination Page

Request for proposals soliciting offers on "brand name or equal" basis for lease and maintenance of computers that would fit space occupied by IBM computers to be replaced is not restrictive because offer did not meet essential "disk arrangement" specified and, therefore, could not satisfy principal purpose of procurement that "no additional physical space will be required." Drafting of proper "brand name or equal" purchase description is matter primarily within jurisdiction of procurement activity and any particular features required must be presumed to be material and essential to needs of Govt. Although nonresponsiveness of offer may be subject for negotiation since offeror does not intend to make its offer "responsive" and contracting officials adhere to initial requirements, further discussions would be futile---------- 247

"Or equal" product acceptability

Rejection of low bid for procurement of electric generating set on basis of second low bidder's allegation of nonconformity with particular features of brand name or equal purchase description was correct, even though before rejection allegations should have been investigated and low bidder given opportunity to answer allegations in order not to adversely affect integrity of competitive system. However, invitation was defective for according to USGAO engineer low bid was in conformance with specifications on "or equal" basis and, therefore, particular features listed in invitation overstated Govt.'s needs and restricted competition. Where needs can be stated with precise specificity, procurements should be effected under purchase descriptions and not under "brand name or equal" technique---------- 237

"Same manufacturer" requirement for all items

Nonresponsiveness of low bid to requirements in invitation to increase electrical capacity at Govt. Printing Office that switchboard to be installed in new substation and circuit breakers be product of same manufacturer, and that switchboard accept breakers in use was not remedied by assurance of compliance in bidder's accompanying letter and its supplier's descriptive literature where bidder before bid opening failed to seek interpretation of specifications alleged to be restrictive and nonresponsiveness of descriptive literature is not bid ambiguity to be construed as binding bidder to perform according to specifications. Moreover, "same manufacturer" requirement based on determination of less risk to malfunctioning of equipment—which was drafted into specifications to reflect minimum needs of Govt.—and determination of bidder noncompliance are primarily responsibility of contracting agency---------- 315

Standard forms. (*See* Forms, standard forms)
Tests
First article
Waiver eligibility misstated

Low bidder who does not qualify for waiver of first article requirements offered to previous suppliers of fueling at sea probes and receivers but inadvertently entered bid prices in waiver space and inserted dashes in area reserved to bidders that were not eligible for first article waiver

CONTRACTS—Continued
Specifications—Continued
Tests—Continued
First article—Continued
Waiver eligibility misstated—Continued Page

has not submitted nonresponsive bid *per se* as dashes have no firm meaning apart from entire context in which used and examination of entire bid demonstrates entries were erroneous and intent was to bid on basis of first article contractor testing and, although, not for correction as bid mistake, error is supported by fact low bidder did not identify prior contracts under which first articles on production samples had been furnished or indicate delivery time advancement in event of waiver, and inserted subitems not applicable to first article waiver---------- 352

Government responsible
Cost as an evaluation factor

Since cost of Govt. testing under invitation for bids to furnish fueling at sea probes and receivers is insignificant and cannot be realistically estimated as evaluation factor, par. 1–1903(a)(iii) of Armed Services Procurement Reg., which provides that if Govt. is to be responsible for first article testing, cost of such testing shall be evaluation factor "to the extent that such cost can be realistically estimated," is not applicable. 352

Subcontracts
Bid shopping
Listing of subcontractors

Although failure to complete subcontractor listing form submitted with low bid for conversion of Federal buildings for categories of curtain wall construction—fabricator and erection, terms not shown in specifications—may be waived under 41 CFR 5B–2.202–70(a) for "erection" category as it constitutes less than 3½ percent of project cost computed on basis of reasonable estimate of costs, failure may not be waived for "fabricator" category that exceeds allowable percentage because specifications referred to category as "insulated metal siding," as bidder was obligated before bidding to clarify any doubt concerning required subcontractor listing and, therefore, bid must be rejected. However, since problem of subcontractor listing categories not conforming to specifications is recurring one, future subcontractor listing categories should utilize specification identifications---------- 264

Minority subcontracting

Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority owned enterprises, and assignment of numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed---------- 272

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Specifications
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Information Page

Requirements in invitation for bids issued by Atomic Energy Commission prime contractor for installation of mechanical, electrical, and HVAC systems to submit price breakdown for numerous aspects of work and plan or schedule for accomplishing work to include start and completion dates for all major construction, material procurement, need date for Govt. equipment, manning table, and list of lower tier subcontractors—information intended to assure availability of adequate subcontractor support and not to prevent bid shopping—are not requirements that define or limit bidder's obligation under contract since they are requirements that are related to bidder's ability to perform rather than bidder's obligation to perform ---------- 329

Unprofitable
Rule

Where manning charts submitted with low offer to furnish mess attendant services indicate understanding of, and ability to fulfill contract requirements, including wage rates, number of workers, and total estimated labor hours, offeror is within competitive range for negotiation, and fact that contract to be awarded may prove unprofitable, although there is no evidence it might, does not justify rejection of otherwise acceptable offer. Evaluation criteria now employed in mess attendant solicitations are intended to advise offerors of exact role manning charts play in evaluation process, and to minimize offers that quote prices that bear no reasonable relation to manning hours offered, and to preclude acceptance of lowest rate per man-hour, rather than lowest overall proposal ---------- 204

CUSTOMS
Duties
Exemption
Foreign contractor

Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norwegian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d, and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor ---------- 195

DEBT COLLECTIONS
Military personnel
Involuntary collection
Authority Page

Although involuntary collection from current pay of officers and enlisted men of military department who while assigned to Dept. of Defense agency are held pecuniarily liable for loss, damage, or destruction of Govt. property, even though not accountable for property, is not authorized absent specific statutory authority for setoff since property was not under control of service having jurisdiction of member charged, pursuant to 37 U.S.C. 1007(c) and 1007(e), only pertaining to enlisted members of Army and Air Force, Secretary concerned may promulgate regulations to provide for determination of member's liability, relying on reporting of instrumentality whose property is involved, and for involuntary collection of indebtedness from current pay of member, or may cancel indebtedness pursuant to 10 U.S.C. 4837(d) and 9837(d)--- 226

DEFENSE DEPARTMENT
Industrial facilities
Disposal

Award of non-set-aside portion of labor surplus area procurement for projectiles to contractor operating Govt.-owned facility (GOCO) rather than to contractor owning his facility and utilizing Govt.-owned production equipment is not violative of policy to minimize Govt. ownership of industrial facilities stated in Dept. of Defense Directive 4275.5, Nov. 14, 1966, under heading "Industrial Facility Expansion Policy," for although award will keep Govt. facility in existence, no acquisition, expansion, construction, or use of property to increase production is entailed. Furthermore, solicitation provided for participation of GOCO contractors, and approval of accounting procedures, removes possibility of portion of GOCO contractor's cost being allocated to its cost-reimbursable contract with Govt---------- 344

DEPARTMENTS AND ESTABLISHMENTS
Management
General Accounting Office recommendation compliance

Recommendation for corrective procurement action in decision of Comptroller General, copy of which was furnished congressional committees named in sec. 232 of Legislative Reorganization Act of 1970, requires, pursuant to sec. 236, contracting agency involved to submit written statements of action taken on recommendation to House and Senate Committees on Govt. Operations not later than 60 days after date of recommendation, and to Committees on Appropriations in connection with first request for appropriations made more than 60 days after date of recommendation---------- 293

DETAILS
Military personnel
Civilian duty
Travel funds advanced recovery

Unaccounted travel funds advanced by Federal Aviation Administration to members of Armed Forces detailed to Dept. of Transportation as "Sky Marshals" to prevent air piracy, and who subsequently retired, may be recovered from retired pay of members indebted for outstanding travel funds advanced, pursuant to 5 U.S.C. 5514, notwithstanding

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Military personnel—Continued
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Loss sustained by Employees Credit Union on note insured under Title I of National Housing Act (12 U.S.C. 1701, *et seq.*), note which when payments were reduced extended maturity of loan beyond 5 years and 32 days prescribed by act, is reimbursable if time extension of original note is not considered a violation of maturity date limitation but as a refinancing of loan within purview of sec. 2(b) of act. Therefore, upon reconsideration if it is determined a refinancing rather than a violation of maturity limitation was involved, payment of loss may be certified upon waiver pursuant to sec. 2(e) of act of any noncompliance with regulations applicable to refinancing---------- 222

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As correction of military records pursuant to 10 U.S.C. 1552 is final and conclusive on all officers of U.S., except when procured by fraud, conclusion of Board for Correction of Military Records for Coast Guard that former Reserve member was not fit for duty on Nov. 19, 1969; that Notice of Eligibility for Disability Benefits issued on that date when he was released from hospitalization occasioned by injury suffered while participating in official volley ball game should not have been cancelled, even though he subsequently attended drills, and that he was disabled until discharged on Apr. 5, 1971, when he was found unfit for duty, entitles former reservist to payment of pay and allowances, less drill pay, from Nov. 20, 1969, through Apr. 5, 1971, date of discharge, computed from Apr. 15, 1970, at increased rates established by E.O. 11525, and from Jan. 1, 1971, to date of discharge, at rates established by E.O. 11577 ---------- 191

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Under request for proposals for institutional support services at George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for formal scoring of subcriteria that included subcontracting with small business concerns or minority owned enterprises, and assignment of numerical value to cost estimates, selection of offeror that ranked behind its competitors on basis of subcontracting with inexperienced minority custodial firm is within authority of Source Selection Official, in absence of statutory or regulatory direction, even though selection was departure from sound procurement policy from competitive standpoint since official should have informed offerors when relative importance of minority subcontracting factor was changed ---------- 272

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As correction of military records pursuant to 10 U.S.C. 1552 is final and conclusive on all officers of U.S., except when procured by fraud, conclusion of Board for Correction of Military Records for Coast Guard that former Reserve member was not fit for duty on Nov. 19, 1969; that Notice of Eligibility for Disability Benefits issued on that date when he was released from hospitalization occasioned by injury suffered while participating in official volley ball game should not have been cancelled, even though he subsequently attended drills, and that he was disabled until discharged on Apr. 5, 1971, when he was found unfit for duty, entitles former reservist to payment of pay and allowances, less drill pay, from Nov. 20, 1969, through Apr. 5, 1971, date of discharge, computed from Apr. 15, 1970, at increased rates established by E.O. 11525, and from Jan. 1, 1971, to date of discharge, at rates established by E.O. 11577..... 191

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Retired Air Force major employed by two Govt. agencies as civilian consultant under excepted appointments—Intermittent—1-year appointment in fiscal year 1969, which was extended for year, and another appointment in fiscal year 1970 with no time limitation, would if only one appointment were involved be entitled pursuant to Dual Compensation Act of 1964, 5 U.S.C. 5532, to exemption from reduction of retired pay for no more than first 30-day period for which he received compensation as expert regardless of fiscal year in which appointment was made or services performed. However, where two or more appointments are involved, exemption applies to first 30 days of work in each fiscal year during which retired officer received civilian pay, but officer having worked less than 30 days under both appointments in each fiscal year is not subject to reduction of retired pay..... 189

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Reserve officer with more than 20 years of active service in National Guard and Army Reserve discharged to accept commission with Public Health Service (PHS), who when 60 years of age was granted military retired pay concurrently with active duty pay and allowances from PHS, upon mandatory retirement from PHS under 42 U.S.C. 212(a)(1) was not entitled to credit for Reserve duty in computation of PHS retired pay in absence of statute authorizing dual benefits for same service. Since officer is entitled to greater benefit if Reserve duty is used to increase PHS retired pay, he is considered to have surrendered his Army Reserve retired status and he is indebted for Army retired pay received concurrently with PHS retired pay, notwithstanding payments were made in error and received in good faith ---------- 298

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Election by Army Reserve officer retired for age under 10 U.S.C. 1331 not to participate in Retired Serviceman's Family Protection Plan, 10 U.S.C. 1441–1446, does not affect validity of his election to come under plan in connection with his retirement from Public Health Service (PHS), where he served as commissioned officer on active duty following discharge from Army Reserve. Since officer had in effect valid election to participate in plan at time of retirement from PHS, and there was implied surrender by him of his military retired pay at that time, deductions made from his PHS retired pay based solely on that retired pay were proper..... 298

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Reserve officer with more than 20 years of active service in National Guard and Army Reserve discharged to accept commission with Public Health Service (PHS), who when 60 years of age was granted military retired pay concurrently with active duty pay and allowances from PHS, upon mandatory retirement from PHS under 42 U.S.C. 212(a)(1) was not entitled to credit for Reserve duty in computation of PHS retired pay in absence of statute authorizing dual benefits for same service. Since officer is entitled to greater benefit if Reserve duty is use to increase PHS retired pay, he is considered to have surrendered his Army Reserve retired status and he is indebted for Army retired pay received concurrently with PHS retired pay, notwithstanding payments were made in error and received in good faith..... 298

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Administrative delays—Continued
Claims barred—Continued Page

ments involved are barred and may not be considered for payment. A cause of action for transportation charges against U.S. accrues under sec. 322 upon completion of transportation service and statute of limitation begins to run from date of delivery to consignee, and filing of a claim with some other agency of Govt. does not satisfy requirements of act. Where running of 3-year period is imminent, claims may be filed directly with Transportation Division of GAO 201

SUBSISTENCE
Per diem
Delays
Rest stopover

Employee who at close of conference at 1600 on Friday remained in Chicago, departing for permanent duty station in Los Angeles by air 10:05 Saturday, arriving after 4 hours air travel, is entitled to per diem for three-fourths of day for Saturday since in view of length of Friday workday and fact return travel by air and travel to and from airports would involve 6 hours, employee prudently determined to remain overnight in Chicago. Par. C1051–1 of Joint Travel Regs. provides that traveler on official business will exercise same care in incurring expenses that prudent person would exercise if traveling on personal business, and pars. C1051–2 and C10101–7 of regulations containing many provisions to meet numerous travel situations are only guidelines for use in determining whether in particular situation traveler acted in reasonable manner 364

Military personnel
Temporary duty
En route to new duty station
Permanent unit at temporary duty station

Chief petty officer who incident to permanent duty station change from Memphis, Tennessee, to Patrol Squardon Eight at Brunswick, Me., is ordered to report on Apr. 29, 1971 for 19 weeks of instruction on temporary duty with Squadron Thirty at Patuxent River, Md., is entitled to per diem for entire period of temporary duty, notwithstanding unit to which assigned at his new permanent duty station was located at Patuxent River until June 30, 1971, since par. M4201–4 of Jt. Trav. Regs. prohibiting payment of per diem within limits of permanent duty station has no application as officer was not member of Squadron Eight until he reported to Brunswick and, therefore, his travel status and per diem entitlement were not affected because his temporary duty station was for part of time old permanent station of Squadron 215

SUBVERSIVE ACTIVITIES PROHIBITION
Training Government employees overseas

In making determination whether prohibition in 5 U.S.C. 4107(a) against training of employees by, in, or through non-Govt. facility which teaches or advocates overthrow of Govt. of U.S. by force or violence; or by or through individual whose loyalty is in doubt applies to foreign organizations and individuals in foreign areas, DOD may

SUBVERSIVE ACTIVITIES PROHIBITION—Continued
Training Government employees overseas—Continued Page
delegate authority granted agency heads by E.O. 11348, dated Apr. 20, 1967, to determine eligibility of foreign government or international organization to provide training to major theatre or local commander, subject to consultation with Dept. of State and other appropriate Federal agencies in area, and may also provide that eligibility of non-citizens may be determined from security files in local or theatre level since applying procedures in 5 CFR 410.504 to determine security eligibility in the U.S. would be ineffective 199
TAXES
State
Government immunity
Vehicle parking tax
The 25 percent tax imposed on rents charged for occupancy of parking space in parking stations which was paid by employee for parking Govt. vehicle while on official business may not be reimbursed to employee as incidence of tax falls directly on Govt. as lessee and under its constitutional prerogative, Govt. is entitled to rent or lease parking space free from payment of tax and employee was not required to pay tax. Municipal Code imposing tax exempts U.S. if payment is made by Govt. check, but it is not feasible for employee operating Govt. vehicle on official business to pay for parking by Govt. check. However, since Govt.'s immunity does not extend to employee when he operates his own vehicle on official business, he may be reimbursed tax under 5 U.S.C. 5704 as part of parking cost 367
TRANSPORTATION
Bills
Time-barred claims
Claims for transporting shipments under Govt. Bs/L that were not presented for payment to U.S. GAO within 3 years of dates on which claims accrued pursuant to sec. 322 of the Transportation Act of 1940, as amended (49 U.S.C. 66), by reason of delayed handling in departments involved are barred and may not be considered for payment. A cause of action for transportation charges against U.S. accrues under sec. 322 upon completion of transportation service and statute of limitation begins to run from date of delivery to consignee, and filing of a claim with some other agency of Govt. does not satisfy requirements of act. Where running of 3-year period is imminent, claims may be filed directly with Transportation Division of GAO 201
Dependents
Military personnel
Changes in grade or rank
Ineffective for entitlement purposes
Enlisted man married in Honolulu, his home, prior to enlisting in Army in 1968, where wife continued to reside when he was assigned to Vietnam in ineligible grade for dependent travel, who in 1970 prior to effective date of permanent station change to Texas was promoted to SP–5, eligible pay grade for dependent transportation, nevertheless is not entitled to reimbursement for wife's transoceanic travel, even though his status is similar to that of member who acquired dependent overseas

TRANSPORTATION—Continued
Dependents—Continued
Military personnel—Continued
Changes in grade or rank—Continued
Ineffective for entitlement purposes—Continued Page

since he did not acquire dependent at overseas station and did not have at least 12 months remaining on his overseas tour, nor had dependent been authorized to be present in vicinity of his overseas station and he, therefore, is regarded as member "without dependents" within meaning of AR 55–46, and subject to restrictions of par. M7000–14 of Joint Travel Regs 362

Rates
Exclusive use of vehicle
Applicability
Basis for determination

On shipments of electronic and other equipment, exceptions taken to line-haul charges derived from a sec. 22 tender (49 U.S.C. 22 and 317(b)), computed on basis of constructive weight, determined by multiplying 7 pounds per cubic foot by cubic capacity of an exclusively used 40-foot van—even though van was only size available to carrier and was not filled to capacity, or that exclusive use had not been requested—and to unrequested specialized handling charges will be reconsidered. Exceptions that were based on applying sliding scale of volume minimum weights and table of rates contained in tender, will be removed if it can be shown seals had been attached to vehicle by shipper, or exclusive use of vehicle had been ordered and furnished, and exceptions to accessorial charges will be allowed upon proof of authenticity 208

TRAVEL EXPENSES
Advances
Unexpended amounts refund
Military personnel detailed to civilian agency

Unaccounted travel funds advanced by Federal Aviation Administration to members of Armed Forces detailed to Dept. of Transportation as "Sky Marshals" to prevent air piracy, and who subsequently retired, may be recovered from retired pay of members indebted for outstanding travel funds advanced, pursuant to 5 U.S.C. 5514, notwithstanding debt arose in other than military department, as detailed member remains member of Armed Forces subject to recall to duty, and since his paramount obligation is to military, his pay and allowances are subject to military laws and regulations, and indebtness of each individual should be referred to appropriate military department for collection 303

Prudent person rule

Employee who at close of conference at 1600 on Friday remained in Chicago, departing for permanent duty station in Los Angeles by air 10:05 Saturday, arriving after 4 hours air travel, is entitled to per diem for three-fourths of day for Saturday since in view of length of Friday workday and fact return travel by air and travel to and from airports would involve 6 hours, employee prudently determined to remain overnight in Chicago. Par. C1051–1 of Joint Travel Regs. provides that traveler on official business will exercise same care in incurring expenses that prudent person would exercise if traveling on personal business,

TRAVEL EXPENSES—Continued
Prudent person rule—Continued Page
and pars. C1051-2 and C10101-7 of regulations containing many provisions to meet numerous travel situations are only guidelines for use in determining whether in particular situation traveler acted in reasonable manner---------- 364
WAGE AND PRICE STABILIZATION
Additional customs duty
Product exempt from Buy American Act
Procurement of tire chain assemblies having been included in items covered by U.S.-Norway Memorandum of Understanding Relating to Procurement of Defense Articles and Services (MOU), invitation for bids on item properly included notice of potential Norwegian source competition and duty-free Norwegian end product clauses. Therefore, contracting officer upon finding low bid of Norwegian firm acceptable is required under MOU agreement to request waiver of Buy American Act restrictions as being in public interest pursuant to 41 U.S.C. 10d, and since waiver will have no impact on Balance of Payments, and exempts import duty as evaluation factor, thus exempting additional 10 percent levy imposed by Presidential Proclamation 4074 of Aug. 15, 1971, upon issuance of waiver, award may be made to low Norwegian bidder, if responsible, prospective contractor---------- 195
Contract matters
Prices
Certification
Failure of low bidder to sign and submit with its bids price certification attached to three solicitations issued for printing and binding services may not be waived as minor informality. Certification addendum bound bidder to reduce, at time of billing, any prices offered in bid which did not conform to requirements of E.O. 11615, dated Aug. 15, 1971, issued under authority of Economic Stabilization Act of 1970 for purpose of stabilizing prices, rents, wages and salaries in order to stabilize economy, reduce inflation, and minimize unemployment, and, therefore, bids submitted were nonresponsive under rule that if addendum to invitation affects price, quantity or quality, it concerns material matters that may not be waived even to effect savings for Govt---------- 370
Escalation clause coverage
Omission of price escalation clause to reflect impact of E.O. 11615, Aug. 15, 1971, which provides for stabilization of prices, rents, wages, and salaries, from request for proposals to furnish projectiles that was issued to both Govt-owned, contractor operated facilities and privately owned facilities utilizing Govt-owned production equipment does not make solicitation defective. Opportunity during negotiations to propose contract with escalation provision having been declined by protestant because maximum amount of escalation would have to be added to price, it is not appropriate after submission of proposal to contend award cannot properly be made on basis of proposals which, as was case with protestant's proposal, did not include escalation clause---------- 344

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WAGE AND PRICE STABILIZATION—Continued
Military personnel
Pay increases Page

When in adjustment of retired or retainer pay under 10 U.S.C. 1401a to reflect Consumer Price Index cost-of-living increase effective June 1, 1971, higher retired rate results for members retired on or prior to Sept. 30, 1971, computed at rates in E.O. 11577, dated Jan. 1, 1971, than for members retiring on or after Oct. 1, 1971, whose retired pay is for computation at rates in Pub. L. 92–129, effective Oct. 1, 1971, because of new rates prescribed by public law and exemption of military personnel placed in retired status during wage/price freeze period imposed by E.O. 11615, dated Aug. 15, 1971, issued under Economic Stabilization Act of 1970, pursuant to 10 U.S.C. 1401a(e), pay of member retired after Sept. 30, 1971, may not be less than if he had retired on that date 384

WORDS AND PHRASES
"Dependent child"

Term "dependent" as used in sec. 105 of Civil Functions Appropriation Act, 1954, as amended (2 C.Z. Code 232), which authorizes payment to Canal Zone Govt. of unrecoverable costs from employees of U.S. and their dependents for education and hospital and medical care furnished, in absence of statutory or valid regulatory definition of phrase "dependent child," may be construed in accordance with definition in Black's Law Dictionary and, therefore, "dependent child" need not mean child under age of 21. However, as statement on invoice for medical services furnished daughter of Federal employee that she is "full-time student under 23 years of age" does not automatically establish dependency, and amount billed is not represented as unrecovered costs from employee or dependent, as required by statute, invoice may not be certified for payment 252

"Second guess"

In issuing request for quotations, since use of Standa d Form 18, which contained inconsistent and misleading provisions, instead of Form 33 was cause for rejection of low proposal on basis of failure to confirm that low quotation was firm offer and failure to submit revised proposal, use of form in absence of substantive reasons, even though authorized by par. 16–102.1(b)(1) of Armed Services Procurement Reg., is not required. To avoid placing prospective contractors in position to "second guess" whether solicitation was requesting quotation or firm offer, Standard Form 33 should be used in future procurements thereby eliminating that prospective contractors go through additional step of confirming that their initial proposals are firm offers 305

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