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[B–134739]

Meals—Furnishing—Military Airlift Command Flights—Liability of Government Travelers

The practice of collecting from officers and civilians reimbursement for meals provided them on Military Airlift Command military flights may not be discontinued on the bases the charges for transportation provided to Government travelers on contract charter flights appear to be subject to tariff rates fixed by the Civil Aeronautics Board on substantially the same basis as tariff rates established for commercial flights and, therefore, the cost of in-flight meals could not be identified as a part of the cost of either contract charter flights or private commercial flights, and that the in-flight meals are not extra compensation within the meaning of 5 U.S.C. 5536, since the meals supplied by the Base Mess are chargeable to funds appropriated for the operation of messes and, therefore, collection for the cost of the meals furnished is required by section 810 of the Department of Defense Appropriation Act, 1971.

To the Secretary of the Air Force, February 1, 1972:

Reference is made to the letter of September 7, 1971, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) requesting a decision as to whether the Air Force may discontinue the practice of collecting from officers and civilians reimbursement for meals provided them on Military Airlift Command (MAC) military flights. Section 810 of the Department of Defense Appropriation Act, 1971, Public Law 91–668, 84 Stat. 2031, provides—

> Sec. 810. No appropriation contained in this Act shall be avilable for expenses of operation of messes * * * at which meals are sold to officers or civilians, except under regulations approved by the Secretary of Defense, which shall (except under unusual or extraordinary circumstances) establish rates for such meals sufficient to provide reimbursement of operating expenses and food costs to the appropriations concerned: Provided, That officers and civilians in a travel status receiving a per diem allowance in lieu of subsistence shall be charged at the rate of not less than $2.50 per day: Provided Further, That for the purposes of this section payment for meals at the rates established hereunder may be made in cash or by deduction from the pay of civilian employees. * * *

Section 5536 of Title 5, U.S. Code, provides that—

> An employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance * * * unless specifically authorized by law and the appropriation therefore specifically states that it is for the additional pay or allowance.

The Assistant Secretary states that prior to our decision of September 18, 1963, B–134739, MAC collected payment for meals served to officers and civilians in all military and contract charter flights, but that such practice was discontinued on contract charter flights for the reason that the full price was charged for the flight regardless of whether or not the meal was actually consumed and it was impossible to determine what part of the price of the ticket was spent for food.

The letter points out that officers and civilians flying by commercial carrier are provided with in-flight meals free of charge, while those flying at lower cost to the Government on military aircraft are served

meals for which they are required to reimburse the Government. It is suggested that this situation is not required by the language of the above-quoted statutes.

In support of that view it is suggested that for section 810 to apply it must be found that provision for in-flight meals constitutes operation of a "mess," that is, an organization dining area (whether it be a mess hall, wardroom or field mess), or what "would be a restaurant to a civilian"; and that, if in-flight meals were extra compensation within the meaning of 5 U.S.C. 5536, the current practice (sanctioned by this Office in our decision of September 18, 1963, B–134739) would be illegal.

The letter states that the current practice is discriminatory in that those who fly military aircraft must pay for such meals while the commercial carrier passenger need not pay, with the result that whenever possible officers and civilians might utilize commercial rather than military aircraft, thereby increasing the cost to the Government, and that the administrative costs involved in collecting reimbursement for meals from passengers almost completely offset the money collected.

While in-flight meals may not be consumed in the mess dining room, we understand that such meals are supplied to MAC by the Base Mess, and that the cost thereof (like other meals furnished thereat) is charged to the subsistence appropriations.

It therefore seems clear that the cost of the in-flight meals is an expense of the Base Mess and that the above-quoted appropriation act provision requires the collection of the cost thereof from officers and civilians to whom the meals are furnished by MAC while traveling by that means.

We agree with the suggestion in the Assistant Secretary's letter that in-flight meals are not extra compensation within the meaning of 5 U.S.C. 5536, when supplied without charge on contract charter flights.

Our decision of September 18, 1963, B–134739, which sanctioned the discontinuance of collection for in-flight meals on such flights, noted that previously the Government had procured commercial transportation by formal advertising with the result that the contracts included specific provisions requiring the contractor to serve meals which were described in detail; that it was generally considered that the carriers included the cost of providing such meals in computing their bid prices so that appropriated funds were being expended for the purchase of meals furnished to passengers; and that in order that the Government be reimbursed for the cost of meals furnished officers and civilians, as required by the annual appropriation acts, the Department of the Air Force initiated procedures for collecting for in-flight meals.

The situation changed. Later transportation charges were based upon a minimum rate established by the Civil Aeronautics Board, which traditionally had considered the expense of serving in-flight meals to be an indirect cost appropriate for distribution to all business of the airline. Thus, the rates approved by the Board were identical for the same class of service between the same two points regardless of whether the carrier served meals to passengers, and when meals were served, they served all passengers without regard to whether they paid for their meals, so that it was impossible to compute tariffs so as to pay for transportation but not for food.

Since the charges for transportation provided to Government travelers on contract charter flights appeared to be subject to tariff rates fixed by the Civil Aeronauics Board on substantially the same basis as tariff rates were established for private commercial flights, we concluded that the cost of in-flight meals to the Government could not be identified as a part of the cost of either contract charter flights or private commercial flights.

The meals here involved, however, are furnished by the Government from funds appropriated for the operation of messes. Hence, as already stated, the above-quoted appropriation act provisions require that the costs of such meals be collected from officers and civilians.

The question is answered in the negative.

[B–173302]

Equipment—Automatic Data Processing System—Selection and Purchase—By Other Than General Services Administration—Applicability of General Services Administration Regulations

Federal agencies delegated authority by the General Services Administration (GSA), pursuant to 40 U.S.C. 759(b)(2), to purchase automatic data processing equipment (ADPE) are required to conform to the Federal Property Management Regulation (FPMR) promulgated by GSA to coordinate and provide for the economic and efficient purchase of ADPE systems or units and, therefore, the procurement of ADP equipment by the Army Corps of Engineers delegated authority subject to the provisions of the FPMR, particularly the late proposals and modifications provision—authority redelegated to the District Engineer—is not governed by the Armed Services Procurement Regulation, and the District Engineer vested with all the authority and responsibility usual to the position of contracting officer, with the exception of choosing the successful offeror, having issued a request for proposals that failed to incorporate the late proposal and modification requirement of the FPMR, properly cancelled the request.

To Morgan, Lewis & Bockius, February 1, 1972:

Reference is made to your letter of October 4, 1971, and prior correspondence, on behalf of the UNIVAC Federal Systems Division of the Sperry Rand Corporation, protesting against the rejection of all proposals and cancellation of request for proposals (RFP) DACW31–71–R–0001, issued by the United States Army Corps of Engineers. Al-

though resolicitation of this negotiated procurement is being held in abeyance pending our decision, no attempt will be made to avoid identification of the offerors since such identification is already known to all parties.

On November 21, 1969, several firms were sent copies of the specifications for a computer system and requested to submit proposals. Four firms replied with the submission of proposals which included both technical and initial pricing data. After benchmark tests had been completed, only UNIVAC and the General Electric Company (GE) were found to be technicallly acceptable.

Thereafter, the Director, Management Information Systems (MIS), Department of the Army, requested the General Services Administration (GSA) to delegate to MIS the authority to procure the proposed computer system pursuant to 40 U.S.C. 759(b)(2). In due course, the requested delegation was accomplished subject, however, to certain limitations which, in pertinent part, state:

2. All provisions of the Federal Property Management Regulations shall be followed. In particular:
a. the specific requirements of FPMR 101-32.4 pertaining to procuring and contracting for ADPE shall be adhered to,

* * * * * * *

3. The policies contained in Bureau of the Budget Bulletin 60-6 and Bureau of the Budget Circular A-54, as revised, shall be complied with.
4. Proposals, or modifications thereof, which are received in the office designated in the request for proposals after the time specified for their submission are late proposals. Late proposals shall not be considered unless the contracting officer determines that such action would not unduly delay the procurement and would be in the interest of the Government. Normally, only late offers lower in price, or offering more favorable factors which do not require a technical re-evaluation will be considered. The contracting officer's decision is final and conclusive. Except as otherwise expressly stated in the modification, a late modification, if rejected, shall not be deemed a withdrawal of the offeror's timely proposal.

Authority to negotiate the procurement, subject to the foregoing limitations, was redelegated through the Chief of Engineers to the Baltimore District Engineer. Both these individuals were advised that the United States Army Computer Systems Support Evaluation Command (CSSEC) would evaluate the proposals received. Both were further advised that final offers would be forwarded to MIS which would, after a final review of the proposals, recommend a source to the source selection authority (SSA), in this case the Assistant Secretary of the Army (FM). The Baltimore District Engineer was then to be advised of the selection so that a contract with the selected firm could be executed.

On October 27, 1970, the RFP was issued to UNIVAC and Honeywell Information Systems, Inc. (HIS), GE's successor in interest with respect to this procurement. Both firms responded with proposals which underwent preliminary review by CSSEC. As a consequence of

that review, discussions were held with each offeror. On February 1, 1971, letters summarizing the understandings reached during the respective discussions were sent to each company. These letters also advised that any changes, recommendations and discounts to be offered had to be submitted no later than February 5. Each offeror made timely revisions to its offer.

The revised proposals were sent to CSSEC for evaluation in accordance with a predetermined evaluation formula. HIS made a further price revision of its proposal on March 9 and it too was forwarded to CSSEC for consideration. Subsequently, the SSA approved the selection of UNIVAC for award and on May 21 notification to that effect was given to the Baltimore District Engineer. With respect to that notification, the administrative report states:

> * * * CSSEC sent an unclassified telegram, addressed to Baltimore District, via Fort Holabird, Maryland. The telegram was received at Fort Holabird and placed in an envelope addressed to this office, which was placed in the mails on Saturday, 22 May 1971. The envelope was duly delivered to the Baltimore District Mail Room on Monday, 24 May 1971 and opened by mail handling personnel. The inclosed message was examined and routed by a mail clerk and dispatched by ordinary messenger with a quantity of other ordinary mail, to the Chief, Supply Division. Only after it had passed through a number of hands, with no particular security precautions, was the message delivered to the Chief, Supply Division.

The administrative report states further that on May 25, before the Baltimore District Engineer had become aware of the CSSEC telegram, HIS submitted a modification to its proposal which further reduced its price. Faced with this turn of events, personnel from the Baltimore District Engineer office and CSSEC met to discuss the HIS modification and its later clarifications thereto. Although it was felt that some time would be consumed in reevaluating the HIS proposal, the report states that all CSSEC personnel present felt that consideration of the HIS modification would be in the Government's best interests and that reevaluation would not unduly delay the procurement or require another technical review of either offer.

Shortly thereafter, on June 14, UNIVAC advised the procurement activity by letter that it believed that UNIVAC had been selected for award and that this information had been improperly disclosed to HIS. On a previous occasion, UNIVAC's representatives had also contended that the specific language of the RFP precluded consideration of the HIS modification since it was a late modification and if, in fact, it was considered, such action constituted an auction.

The procurement activity took the UNIVAC position under advisement. After reviewing the RFP, however, it was decided that the solicitation was materially defective for failing to incorporate the required Federal Property Management Regulation (FPMR) clause concerning late proposals and modifications. Consequently, both firms were

notified of the rejection of their proposals and the cancellation of the RFP. This action took place on June 11 and prior to the June 14 submission by UNIVAC which apparently had not as of that time received the cancellation notice. On June 15, UNIVAC protested the cancellation by telegram to the procurement activity and our Office. On June 23, 1971, a new RFP was issued but no date has been established for receipt of proposals in view of the protest.

After sifting through the extensive correspondence from UNIVAC's counsel, we conclude that the issues discussed below are dispositive of the protest.

Does GSA have the authority to promulgate regulations controlling the purchase of computer systems?

While recognizing Public Law 89–306, 79 Stat. 1127, October 30, 1965 (40 U.S.C. 759, *et seq.*), UNIVAC contends that GSA is without authority to promulgate regulations bearing on the purchase of computers or to insist on their use when inconsistent with the Armed Services Procurement Regulation (ASPR). In this connection, UNIVAC notes that 40 U.S.C. 759(g) provides that the authority vested in the Administrator, GSA, is to be exercised subject to the fiscal and policy control exercised by the Office of Management and Budget previously the Bureau of the Budget (BOB). Reference is then made to paragraph 5 of BOB Circular No. A–54, October 14, 1961, which states:

> * * * All ADP equipment acquisition transactions are subject to prevailing policies, laws and regulations governing procurement by Federal Government agencies. * * *

From this statement, UNIVAC extrapolates the above contention and bolsters it with a citation to our decision 47 Comp. Gen. 29, 51–52 (1967), wherein we state:

> * * * However, paragraph 5 of the BOB Circular [A–54] provides that all EDPE acquisition transactions are subject to prevailing policies, laws and regulations governing procurement by agencies.
> * * * While GSA will execute the contract based on the Air Force source selection, selection of the source, under circumstances such as here involved, is in our opinion a part of the procurement process and subject to the requirements of 10 U.S.C. 2304(g) and the applicable provisions of ASPR. * * *

The purpose of Public Law 89–306, *supra*, was to amend the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, June 30, 1949, so as to establish the authority and provide the operational machinery needed for the effective and efficient management of automatic data processing equipment (ADPE). See U.S. Code Cong. & Ad. News (1965), page 3859; 48 Comp. Gen. 462 (1969). In accordance with this purpose, GSA was authorized, *inter alia*, to coordinate

and provide for the economic and efficient purchase of such equipment by Federal agencies. 40 U.S.C. 759(a). It was further empowered to delegate to Federal agencies the authority to purchase ADPE systems or specific units of such equipment. 40 U.S.C. 759(b)(2). Any contention that GSA cannot delegate its purchase authority is, therefore, plainly refuted by the clear language of the statute.

The Administrator, GSA, is authorized by 40 U.S.C. 481(a)(1) to prescribe policies and methods regarding the procurement of personal property by executive agencies. The Department of Defense, however, is exempted from such policies by virtue of a proviso in the section. In addition, 40 U.S.C. 474(3) states that nothing in the Federal Property Act shall impair or affect any authority of any agency named in the Armed Forces Procurement Act of 1947 (Public Law 80–413, 62 Stat. 21, February 19, 1948, 41 U.S.C. 151) and the head of such an agency with respect to the administration of the 1947 act. The Department of the Army is one of the agencies so named.

The relevance and importance of this discussion comes clearly into focus when considered in connection with 40 U.S.C. 759(e) which states:

(e) Inapplicability of other inconsistent provisions of law.
The proviso following paragraph (4) in section 481(a) of this title and the provisions of section 474 of this title shall have no application in the administration of this section. No other provisions of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section.

This provision was obviously intended to give Public Law 89–306 an effect paramount to any other statutory provision inconsistent with it and to specifically remove from the military departments of the Government the ability to exempt their purchase of general purpose, commercially available ADPE from the control and policies of GSA. See 48 Comp. Gen., *supra*.

We need not consider at length the impact of the sentence previously quoted from BOB Circular A–54. Whatever that impact was, it is no longer relevant to this procurement since the quoted statement was deleted when paragraph 5 was extensively revised by BOB Transmittal Memorandum No. 1, of June 27, 1967, some 3 years before the solicitation here in question was issued.

The quoted language from our decision 47 Comp. Gen., *supra*, which involved a consideration of BOB Circular A–54, arose in the context of whether the provisions of 10 U.S.C. 2304(g) were applicable to the source selection there involved. The question, stated more narrowly, was whether discussions had to be held with all offerors within a competitive range. While concluding that 10 U.S.C. 2304(g) and its implementing regulations were applicable to the conduct of negotiations under the circumstances of the case, it is quite evident from the case

language immediately following that quoted above that our conclusion regarding this aspect of the decision was primarily concerned with providing an answer to the narrower question presented, for we said:

> * * * In any event, whether the procurement be considered as being negotiated by the Air Force or GSA, the FPR [Federal Procurement Regulations] and ASPR, as already pointed out, contain identical provisions requiring discussions with offerors within a competitive range.

Viewed from this perspective, our comments respecting the effect of BOB Circular A–54 must be considered dicta since negotiations were required with all offerors in any case. Moreover, since the reference to BOB Circular A–54 found in 47 Comp. Gen., *supra*, was made in a context not applicable to the instant situation, we do not believe that it is decisive here.

It seems clear from the foregoing discussion that GSA is vested with exclusive authority to purchase general purpose ADPE (see 47 Comp. Gen. 275 (1967)) and can promulgate regulations in furtherance of that authority as well as delegate its purchase authority to other agencies. When that authority is delegated, we perceive no legal restriction on GSA's ability to require conformance with its regulations respecting the procurement of ADPE such as FPMR subpart 101–32.4. By virtue of 40 U.S.C. 759(e) and the delegation to the Army, that FPMR subpart in general and FPMR 101–32.408–4 concerning late proposals and modifications, in particular, are applicable to and control the purchase of ADPE by the Army in this instance. FPMR 101–32.408–4 was set out in its entirety as paragraph 4 of the limitations on the authority delegated to the Army and has previously been quoted herein. Its use was mandatory and this fact cannot be obscured by an assertion that it produces a result different from that which ordinarily results when ASPR 3–506, the comparable ASPR provision, is used. The result of its use, even if unusual, has no bearing on whether it must be used in the first place.

We find no basis to sustain UNIVAC's contentions and the question presented must thus be answered in the affirmative.

Does use of FPMR 101–32.408–4 place UNIVAC at a competitive disadvantage or violate good procurement policy?

UNIVAC contends that the use of the FPMR late proposal and modification clause does not maximize competition as required by ASPR 1–300.1 since proposals may be submitted and considered after the time set for the submission of initial offers. It is claimed that offerors are, thus, not competing on a common basis required for competition. After concluding that a late offer under the FPMR clause will not ordinarily be accepted unless it offers a lower price or more favor-

able terms, UNIVAC next contends that the clause necessarily involves an auction technique since acceptance of a late offer indicates to other proposers that their offers are not low in relation to the late offer, assuming of course that they know of the late offer.

UNIVAC concludes further that under the FPMR provision a late offer can be considered and award made without giving any other offeror the opportunity to participate in another round of negotiations. It also notes that the clause conflicts with the ASPR 3-805.1(b) requirement that offerors are to be notified of the specific date for the closing of negotiations; that a rejection of a properly worded late offer may operate to withdraw an otherwise timely submitted proposal; and that the clause's equation of "the best interest of the Government" with a pecuniary savings not only gives the late offeror a distinct competitive advantage but is contrary to holdings of our Office.

Admittedly, the maximization of competition in both formally advertised and negotiated procurements is a goal which our Office can readily accept. However, we perceive nothing in the FPMR clause under discussion which compels the conclusion that it prevents the maximization of competition. Certainly, it cannot be said that offerors are not competing on an equal basis regarding the submission of late offers since all offerors may submit late offers that may, or may not, be considered.

With respect to auctions, our Office has stated that there is nothing inherently illegal about an auction in the context of a competitively negotiated procurement. See 48 Comp. Gen. 536, 541 (1969). As a policy matter, however, use of an auction technique is prescribed by both section 1-3.805-1(b) of the Federal Procurement Regulations (FPR) and ASPR 3-805.1(b). Under either of these provisions, an auction technique is disclosure by the Government to an offeror of the price to be met in order to obtain further consideration or the fact that his price is not low vis-a-vis another offeror. In this case, we are not prepared to conclude, for reasons more fully explained below, that the requisite prejudicial disclosure was in fact made.

Absent a disclosure of price or relative standing, we have held that conducting a preaward survey prior to the close of negotiations does not constitute an auction *per se*, notwithstanding that offerors not being surveyed could infer that their offers were not low. B-171260, April 8, 1971; B-173536, October 22, 1971. Since we do not find from the record that the Government made a disclosure to HIS which was prejudicial to UNIVAC's interests, no prohibited auction technique initiated the submission of the late HIS modification. Similarly, no auction techniques are involved when an offeror believes it necessary to offer a lower revised price because another offeror has submitted a late modification.

In the abstract, there is merit to UNIVAC's observation that the FPMR clause allows for the consideration of a late offer without the necessity of another round of negotiations. Certainly, the language of this FPMR clause seems to lend itself to this result. Whether an award can be made on a late proposal without offering all offerors an opportunity to enter into discussion is another matter and one which is not decisive here since the procurement never reached the "discussion" stage by virtue of the cancellation of the solicitation involved. It has been our long-held position, however, that discussions with one offeror necessitate discussions with all offerors within the competitive range.

To the extent that ASPR 3-805.1(b) requires that offerors be notified of a specific date on which negotiations are to close, it is in conflict with the FPMR clause, the effect of which is to leave discussions open up to the time of contemplated award. This conflict, though, is more apparent than real since the FPMR clause, by virtue of the effect of 40 U.S.C. 759(e), previously discussed, takes precedence over the conflicting ASPR provision. Accordingly, UNIVAC's contention is not well taken although, as a matter of sound procurement policy, we believe that a cutoff date for discussion is a necessary restriction which carries with it an overriding implication of fair dealing.

Assuming, *arguendo*, that a late modification is so worded that its rejection effects a withdrawal of an otherwise timely submitted proposal as UNIVAC contends, we do not see how UNIVAC, or any other offeror, is prejudiced by such likelihood. In the first place, any offeror could offer such a modification, so none is favored over another. Secondly, it is in the Government's interest to require offerors to submit offers which cannot be withdrawn for a stated time. Should the Government decide not to insist on such a firm offer requirement, we know of no impediment that would prevent it from doing so.

Although the FPMR clause can arguably be said to encourage late proposals or modifications offering reductions in price and, thus, to equate the best interests of the Government with obtaining a pecuniary savings, we cannot agree with UNIVAC that the late offeror obtains any lasting competitive advantage under the clause since all offerors are free to submit price reductions at any time prior to award. We are, of course, cognizant of our prior position that an acceptance of a late modification is not justified on the basis of mere pecuniary advantage obtained from a price reduction. See B-167478, October 28, 1969. It is to be noted, however, that this statement and others of similar import have been made in a context requiring the consideration of certain ASPR provisions involving cutoff dates which are not applicable to the present procurement.

In this connection, we believe that cutoff dates are correctly viewed as a device for orderly management of the competitive procurement process. To the extent that a voluntary late modification to a proposal submitted subsequent to the conclusion of discussions disrupts the orderly progress of the procurement, we do not believe it should be considered even though its acceptance might result in a monetary savings to the Government. As an abstract proposition, however, we have no difficulty in equating a substantial pecuniary saving with the Government's best interests. Therefore, where, as here, the FPMR reflects a policy determination recognizing the foregoing equation, we do not feel that an objection on our part is required.

It is our conclusion on this point that while the failure of the FPMR clause to establish a closing date for discussions does not comport with our view of good procurement policy, we cannot say that such omission is patently illegal.

Was the contracting officer authorized to reject all bids and cancel the RFP?

UNIVAC contends that as a result of the various delegations of authority the District Engineer could only conduct negotiations with offerors but could not make a final selection as to which firm would receive the award since final selection authority was retained by the Assistant Secretary of the Army (FM). From this it argues that once the final selection was made, the District Engineer had no authority whatever to reject all offers and cancel the RFP since to do so would be tantamount to reevaluating and setting aside the final selection of UNIVAC made by a higher authority. This, it is maintained, would give the District Engineer a selection capability not delegated to him. Finally, the contention is made that by canceling the procurement the District Engineer "usurped" the authority retained by GSA to declare the "procurement" voidable.

A fair reading of the delegation of authority made to the District Engineer fully supports UNIVAC's view that final selection authority resided with the Assistant Secretary. We do not agree, however, that the lack of final selection authority deprived the contracting officer of the authority to cancel the procurement.

By virtue of the authority delegated to him, the District Engineer could conduct negotiations and, subsequent to a final selection by the Assistant Secretary, enter into a contract binding upon the Government. With the single exception of not being able to choose the successful offeror, the District Engineer was, in our opinion, otherwise vested with all the authority and responsibilities usual to the position of contracting officer. Consequently upon concluding that a mandatory

FPMR clause was not reflected in the RFP and that the procurement was not in conformance with the purchase authority delegated by GSA, the contracting officer had the requisite authority to cancel the RFP. Since the contracting officer acted within the scope of his delegated authority, it follows that there was no usurpation of any right reserved to GSA.

Was there a leak of information to HIS?

UNIVAC contends that the method by which the contracting officer was advised of the offeror selected for award permitted the unauthorized disclosure of that information. To substantiate that the selection choice was in fact "leaked" to HIS, UNIVAC notes that the HIS modification was hand-delivered to the procurement activity on May 25, shortly after the procuring activity became aware of the selection of UNIVAC.

Although both offerors deny any impropriety, the contracting officer contends that both firms apparently were in possession of information which ordinarily would not be available to them because of the negotiated nature of the procurement. He also states that both offerors attempted to secure information from his staff concerning the procurement. With respect to the specific allegation that the UNIVAC selection was "leaked" to HIS, we understand that the contracting officer has denied this assertion.

UNIVAC has presented no direct evidence of a leak but asks us instead to conclude its existence from circumstantial evidence. While such evidence may be sufficient in some instances to prove the matter alleged, we do not feel that the instant case is such a situation. In the first place, while the method of transmitting the advice concerning the source selection could have been more direct, the worst that can be said of it is that it provided an opportunity for more than the usual number of Government personnel to become aware of the actual source selected. That alone does not, of course, prove an improper disclosure.

Secondly, the contracting officer advises that the stated reason for the HIS modification was an "increase in Corps business" and notes that on May 6 HIS received authorization for a substantial follow-on order to a previously awarded contract. UNIVAC does not dispute this assertion. Thus, the HIS modification could well have resulted from an increase in business and not a leak of information as alleged by UNIVAC. In these circumstances, and given the gravity of the allegation, we do not believe that acceptance of the UNIVAC position is warranted.

Accordingly, your protest is denied.

[B-174605]

Bids—Evaluation—Delivery Provisions—Accelerated Delivery—Effect on Option and Government Equipment Rental

Under an invitation for bids to furnish bomb bodies that included an option for additional quantities; that permitted accelerated delivery if scheduled requirements were met; and that provided for first article approval waiver, and consideration of transportation costs and the value of the use of rent-free Government-owned equipment and tooling, an award on the basis of accelerated delivery to the low bidder on the initial quantity properly did not consider the fact that the option price was higher, since the exercise of the option simultaneously with the award was not contemplated and the market would be tested before the option was exercised and, moreover, the bid is not considered to have been nonresponsive because the option delivery rate was based on the accelerated rate, and the rental factor had been computed at the accelerated delivery rate without regard to the extended use of the Government property under a prior contract.

To Robert Sheriffs Moss & Associates, February 1, 1972:

We refer to your telegram of November 24, 1971, and subsequent correspondence, protesting on behalf of AMF Incorporated against the proposed award of a contract to the Marathon LeTourneau Company under invitation for bids No. DAAA09-72-B-0060, issued by the United States Army Ammunition Procurement Supply Agency (APSA), Joliet, Illinois.

The subject invitation covers a requirement for 20,000 750-pound bomb bodies, designated M11783, MPTS, and includes an option for additional quantities up to 300 percent of the basic quantity. With respect to delivery of the basic quantity, the required schedule calls for delivery in four monthly increments of 5,000 each commencing on or before March 31, 1972, and ending on or before June 30, 1972. (This schedule was premised on award of a contract by December 25, 1971, and is subject to extension by the number of calendar days beyond December 25 it takes to make the award.) In addition, the invitation contains the following provision, which in pertinent part authorizes early delivery subject to certain conditions:

> Proposals offering delivery of each quantity within the applicable delivery period specified above will be evaluated equally as regards time of delivery. Proposals offering delivery of a quantity under such terms or conditions that delivery will not clearly fall within the applicable delivery period specified above will be considered nonresponsive and will be rejected. Where an offeror offers an earlier delivery schedule than that called for above, the Government reserves the right to award either in accordance with the REQUIRED schedule or in accordance with the schedule offered by the offeror. If the offeror offers no other delivery schedule, the delivery schedule stated above shall apply. Earlier delivery is acceptable provided that accumulated delivery is equal to or ahead of the required schedule at all times.
>
> * * * * * * *
>
> NOTE: In the event award is made for a quantity less than the total quantity, the delivery schedule will be adjusted proportionately, so that it will be in the same ratio as the reduced quantity bears to the total quantity procured.

Insofar as the option to increase the quantity is concerned, section "J" of the invitation provides as follows:

The Government reserves the right to increase the quantity of Item 0001 by a quantity of up to and including, but not exceeding 300% and at the price quoted below unless a lower unit price is negotiated in consideration of the increased quantities. The Contracting Officer may exercise this option at any time prior to the delivery of 10,000 units by giving written notice to the Contractor. Delivery of the items added by exercise of this option shall continue immediately after, and at the same rate as the delivery of like items called for under the contract unless the parties agree otherwise. Subject to the limitations contained in this paragraph, the Government may exercise this option on one or more occasions.

The section also made the following provision for inserting the unit price and extended amount for the option quantities, either on an f.o.b. origin or destination basis:

OFFERED UNIT PRICE FOR THE OPTION QUANTITIES ARE:

	UNIT PRICE	AMOUNT
F.O.B. Origin:	$————	$————
F.O.B. Destination:	$————	$————

With respect to the evaluation of the option for purposes of award, bidders were advised that:

If the Government elects to exercise an option simultaneously with award, bids or proposals will be evaluated for purposes of award on the basis of the total price for the basic quantity and the option quantity exercised with award.

Only AMF and LeTourneau responded by the bid opening date, November 19, 1971. Both bid on an f.o.b. orgin basis; AMF submitted a bid of $76.99 per unit for both the basic quantity and the option, while LeTourneau bid $74.03 per unit for the basic quantity and $80 per unit for the option quantity.

In a cover letter accompanying its bid dated November 18, 1971, LeTourneau also proposed the following accelerated delivery schedule for the basic quantity: March 1972, 6,500; April 1972, 12,000; May 1972, 1,500. Responding to the option pricing provision quoted above, LeTourneau entered a unit price of $80 and an amount of $4,800,000 in the appropriate spaces adjacent to the printed term "F.O.B. Origin"; in addition, it made the following entry adjacent to the printed term "F.O.B. Destination": "12,000/Month Rate."

In his statement of facts dated December 7, 1971, the contracting officer states that since "no other requirements exist at this time," no exercise of an option simultaneously with award is contemplated. Accordingly, both bids were evaluated solely on the basis of the basic quantity. Taking into consideration waiver of first article approval, transportation and the rent-free use of Government-owned production equipment and tooling, LeTourneau's evaluated bid was determined to be $83.5856 per unit. Applying the same factors to AMF's bid, its evaluated price per unit was determined to be $83.95252. When the unit prices are extended to reflect the basic quantity of 20,000 bomb bodies, LeTourneau's bid is approximately $8,400 lower.

Since LeTourneau's proposed accelerated delivery schedule was determined to be acceptable, the contracting officer proposes to award the contract on the basis of that schedule.

The basic contention advanced in your letter of December 3, 1971, is that LeTourneau's bid is nonresponsive by virtue of its response to the option provisions of the invitation. Basically, it is your position that by entering a "12,000/Month Rate" in response to the option pricing provision, LeTourneau limited the Government's right under the option provision to require delivery of any option quantities "immediately after, and at the same rate as the delivery of like items called for under the contract unless the parties agree otherwise." Following this line of argument, we might add, also leads to the suggestion that the option price quoted is conditioned on a "12,000/Month Rate" of delivery. The contracting officer's reply is that the invitation allows for earlier delivery of the basic quantity and, therefore, the option quantity of "12,000/Month Rate" is consistent with the accelerated delivery schedule offered by LeTourneau. On this latter point, it is APSA's position that since the last full month's delivery rate under LeTourneau's accelerated delivery schedule is 12,000 in April, the establishment of a same rate for the delivery of the option quantity is consistent with the provision that delivery shall be at the same rate.

Assuming the correctness of your position, LeTourneau's bid may, nevertheless, properly be considered. You recognize by citing our decision B-150393, March 21, 1963, that where, as here, a determination not to exercise the option simultaneously with award (which determination is based on the undisputed absence of known requirements in addition to the basic quantity), the failure of a bidder to comply with the terms of an option provision may not render his bid nonresponsive. In the cited case, we considered to be academic the question whether a bidder's reduction of the advertised time in which the Government could exercise an option rendered its bid nonresponsive because the option was not to be considered in evaluation and the bidders were *not required* to quote prices for the option item in question. They were, however, warned that if the option was exercised with award, award could not be made to a bidder who failed to price the option.

As a point of distinction you urge that a bid on the option quantity was mandatory and, therefore, the qualification of the delivery rate renders the bid nonresponsive. We have, however, found nothing in the solicitation which would impose such an obligation and you have drawn attention to none. The invitation places no limit on the price that may be quoted for the option, nor does it prohibit offering an accelerated option delivery schedule. Under these circumstances, we believe that our decision B-166138, April 11, 1969, is dispositive. In that case,

the invitation provided that option quantities would be evaluated for purposes of award only if the Government elected to exercise the option at time of award. There, as here, the invitation contained no limit on the price to be quoted and the option quantity was not to be considered for purposes of award. We concluded that a bidder's failure to submit option prices was immaterial since the option quantities were not to be evaluated, and bidders were not required to submit the same option prices as the basic prices bid, but were free to quote unrealistically high prices, citing B–165799, February 27, 1969.

While in this case LeTourneau has submitted an option price, the same latitude of response afforded the bidder by the invitation under consideration in B–166138, *supra*, is present here. Indeed, its option price, as you urge, may be excessive, but permissibly so. Moreover, in view of the latitude afforded bidders, we see no basis for giving any effect to the fact that LeTourneau proposed a different delivery schedule for the option.

With respect to LeTourneau's option prices, we note that a memorandum dated December 1, 1971, from the contract price analyst states that the proposed option price offered by LeTourneau is not considered reasonable in view of a comparison of the proposed option price to the recommended award price and the last contract awarded. In this regard, we have been advised that APSA will test the market prior to any exercise of the option. Under the present circumstances, we assume that test of the market will demonstrate the desirability of competition for any additional quantities required.

In response to the administrative report furnished our Office by letter dated December 17, 1971, with enclosures, from The Deputy General Counsel, Headquarters, United States Army Material Command, your letter of January 5, 1972, raised an additional issue. You urge, as amplified in your letter of January 13, 1972, that LeTourneau's bid is not in fact the lowest evaluated bid because the Government's computation of the evaluation factor for rent-free use of Government property is in error and that, in any event, LeTourneau's bid is nonresponsive since it failed to provide sufficient information to permit an evaluation of the rental factor.

LeTourneau computed a rental evaluation factor of $4.52 per unit, while AMF's rental evaluation factor was $1.35727 per unit. The contracting officer reports that the evaluated unit prices, inclusive of transportation, are $83.95252 for AMF and $83.5856 for LeTourneau. This yields, he advises, an $8,479.20 evaluated cost difference in favor of LeTourneau but, in terms of "out-of-pocket" costs, LeTourneau's bid is $71,333.80 lower. We also understand that AMF and LeTourneau are the only current producers of the units called for under the invitation; that substantially all of the facilities in both plants are Govern-

ment-owned; and that in terms of monthly rental ($42,984.43 for LeTourneau and $43,432.82 for AMF) both propose to use equivalent facilities.

As you point out, LeTourneau stated in the November 18, 1971, cover letter to its bid that it computed the rental evaluation factor on the basis of the 3-month production period reflected in its proposed accelerated delivery schedule rather than on the production period set forth in the provision entitled "Evaluation Procedure to Eliminate Competitive Advantage from Rent-Free Use of Government Production and Research Property." Paragraph "b" thereof provides that: "For purposes of evaluation only, the proposed production period shall be considered to be 4 months, commencing with the month of January 1972 and ending with the month of April 1972."

In addition to this assertedly erroneous computation, you also contend that LeTourneau erred by including in the quantity to be produced more units than the basic quantity of 20,000 units covered by the instant invitation.

The effect of correction of these asserted errors on the rental evaluation factor added to LeTourneau's bid is stated in your letter of January 5, 1972:

> * * * We have made a computation from the LeTourneau bid, a copy of which is appended to the Administrative Report. That computation, taken from the listing of and the acquisition cost of the Government-owned property held by LeTourneau, as submitted with the bid, is as follows:
>
> | | |
> |---|---|
> | Total acquisition cost of Government-owned Facilities, over 3 to 6 years of age | $2,583,546.47 |
> | Solicitation Instruction Rate at 1.5% | 38,753.20 |
> | Total acquisition cost of Government-owned Facilities over 10 years old | 820,250.06 |
> | Solicitation Instruction Rate at .75% | 6,151.88 |
> | Total acquisition cost of Government-owned Special Tooling | 200,386.00 |
> | Solicitation Instruction Rate at 1% | 2,003.86 |
> | Total acquisition cost of Government-owned Electronic Test Equipment | 7,293.00 |
> | Solicitation Instruction Rate at 2% | 145.86 |
>
> The total rent, (T x R), equals $47,054.80. The Evaluation Factor is, therefore, as follows:
>
> $$\frac{\$47,054.80 \times 4 \text{ [Production Period]}}{20,000 \text{ [Quantity to be Produced]}} = \$9.41$$

At this point, we must observe that your computation demonstrates that the rental factor to be applied to LeTourneau's bid can, with the exception of the quantity to be produced under other contracts during the period, be determined solely from LeTourneau's bid itself. As you are aware, the total quantity of items to be produced during period of production takes into consideration the extent of production under other contracts—a matter that can be determined without recourse to the bidder. Thus, your contention that LeTourneau is nonresponsive

for failure to furnish information sufficient to permit evaluation of the rental factor is founded not on the lack of any essential data but on an assertedly erroneous computation of $4.52 per unit on the basis of that data. This computation may be corrected. Accordingly, the contention is without merit. B–170591, September 28, 1970; B–162071, September 25, 1967.

Parenthetically, we must note that while we have accepted your computation of the total rent charge (TxR) for the purpose of demonstrating that literal application of the evaluation procedure set forth in the invitation results in a decrease in the rental evaluation factor to be applied to LeTourneau, it is clear that the total rent of $47,054.80 is overstated. Specifically, your computation fails to recognize that a large portion of the property listed in LeTourneau's bid is classified as either "Automotive Equipment" or "Other production equipment" and, therefore, subject to different rental rates. The contracting officer's supplemental report indicates that a correct categorization and resultant computation yields a total rent of $42,984.43 per month. (Applying the formula on the basis of this rental charge and taking into consideration LeTourneau's proposed 3-month delivery schedule results in an evaluation factor of $4.52 per unit—the amount stated by LeTourneau in its bid.)

With respect to LeTourneau's other contractual production, we were informally advised on January 13, 1972, by the contracting officer's counsel that under an existing contract LeTourneau must deliver the following quantities in the months indicated: January, 12,000; February, 12,000; March, 8,500. The total quantity to be delivered has been confirmed in the contracting officer's supplemental report of January 25, 1972.

You contend that these items should not be included in the formula because the contract under which they are being produced should have expired in December of 1971 and therefore these items could not be included in the formula but for the 3-month time extension of the contract. Focusing on the requirement of the formula that the "sum of the previously authorized use of the property by the contractor be considered," you maintain that the authorization under the contract was only for the period ending December 31, 1971. We cannot agree. Paragraph 13–502.3(b) of the Armed Services Procurement Regulation (ASPR), as well as the invitation formula, speaks in terms of "one or more existing contracts for which use has been authorized." This language suggests to us that the basic question is whether there is an existing contract. In this regard, you have not questioned the legal efficacy of the contract modification resulting in the time extension and the contracting officer's supplemental report of January 25, 1972, indicates that as consideration for the extension, the Government

became entitled to a 90-day extended period of free maintenance of the facilities by LeTourneau. Given then the existence of the contract and the unquestioned initial authorization for use of the facilities, your argument would suggest the necessity of obtaining a specific authorization apart from the authorization implicit in the modification extending the contract. This refinement is not, however, contemplated by the ASPR. We understand that LeTourneau's consolidated facilities contract contains the clause, entitled "Use and Charges (1971 APR)," prescribed by ASPR 7-702.12. Paragraph (a)(i) thereof provides that the contractor may use the facilities without charge in the performance of "prime contracts with the Government which specifically authorize use without charge." Moreover, we are advised that the existing contract specifically provides that use of the facilities is authorized for the extended period.

Your argument concerning the applicability of production during the extension period under the prior contract relates more to the effect of the extension on the prior award than to award under the instant invitation. If at the time of award of the prior contract the true period of production (as extended) had been known, the evaluation factor at that time would have been greater than the factor actually used. Thus, it might well be that LeTourneau's bid on the prior contract would not have been the low evaluated bid. On the other hand, despite an increase in the evaluation factor, LeTourneau might have remained the low evaluated bidder. We do not think it matters which would have occurred, because it is our opinion that the possible evaluation effect of stretching out the prior procurement should have no bearing upon evaluation of bids in light of existing facts under the current procurement. It is a fact that LeTourneau is authorized to use Government facilities to produce in the months of January, February and March of 1972. Such production fits precisely the terms of the proration formula provided in the invitation. We see no basis for refraining from use of such production in the formula computations required under the invitation.

Evaluation of the bids received on the precise basis of the provisions set out in the invitation establishes LeTourneau as the low bidder. As stated above, we are not persuaded by your reading of the invitation provisions so far as they concern the effect of the extension of LeTourneau's prior contract. However, it is our opinion that any doubt in the matter is overwhelmingly overcome by the fact that with virtually identical amounts of Government facilities being used by both AMF and LeTourneau, there is no relative competitive advantage requiring adjustment.

Accordingly, award should be made to LeTourneau.

[B-140673]

Small Business Administration—Loans—Guaranteed Loan Programs—Default, Etc., by Borrower—Bank's Demand Payment Status

Although under the loan guarantee program conducted pursuant to section 7(a) of the Small Business Act, the Small Business Administration (SBA) has the discretionary power to arrange for a bank to make demand payment (immediate purchase) for the percentage of the loan guaranteed, either upon default of the loan or when the borrower breaches a material covenant of the loan agreement, payment by SBA to a bank under the loan guaranteed program "where SBA officials have knowledge, prior to payment, of the possibility of bank negligence, fraud, or misrepresentation," in order to protect certifying officers would not be in the best interest of the United States and may not be approved. However, SBA may pay an innocent holder of a guaranteed loan note upon default of a borrower since payment will not waive any right of SBA against the bank involved.

To the Administrator, Small Business Administration, February 2, 1972:

Your letter of November 23, 1971, presents to us a question arising incident to the loan guarantee program conducted pursuant to section 7(a) of the Small Business Act, Public Law 85-536, 72 Stat. 384, 387, 15 U.S.C. 636. Your question, in effect, relates to the degree of risk which may be undertaken by the Small Business Administration (SBA) in carrying out its functions under the program.

Under the present loan guarantee program—as distinguished from SBA's prior deferred participation program—when SBA has approved a bank's application for guarantee of a percentage of a loan to a small business concern, the bank may demand payment (immediate purchase) of such percentage as soon as the loan is in default for 60 days, or a material convenant has been breached by the borrower. Participating banks are required to execute certain assurances and procedures for the protection of SBA. The prior deferred participation program was approved by the Comptroller General by letter of October 12, 1959 (B-140673), wherein it was stated that "This power [under section 7] to make loans is broad and vests in the Administrator considerable discretion as to the details for executing the loan arrangements." In view of this discretionary power, we likewise would have no objection to the present loan guarantee program.

You now seek approval of SBA payment (immediate purchase) to a bank under the loan guarantee program, in situations "where SBA officials have knowledge, prior to payment, of the possibility of bank negligence, fraud or misrepresentation." You state that such situations are rare, and that, as always, all investigative and audit procedures would be instituted after payment is made. Your primary motive for seeking our approval of payment under these circumstances is, apparently, to protect certifying officers from liability for payments

made with the knowledge that the stated irregularities may exist. Your letter discloses that pursuant to the provisions of the guarantee agreement the bank must—

> * * * close and disburse each loan in accordance with the terms and conditions of an SBA approved loan authorization; the bank is required to fully protect and preserve the interest of the bank and SBA in the loan; prior to each disbursement, the bank must determine that there has been no unremedied material or adverse change in the financial or any other condition of the borrower which in bank's opinion warrants withholding of the disbursement; immediately after the first disbursement, the bank must furnish SBA with a copy of the executed note and settlement sheet; immediately after each disbursement, SBA must be notified of the amount disbursed; in making written demand that SBA purchase the guaranteed portion of any loan, the bank is deemed to certify that the loan has been disbursed and serviced in compliance with the agreement and that the agreement remains in full force and effect; all loan documents must be assigned and delivered to SBA as a condition of payment by SBA; *and the agreement states that purchase by SBA shall not waive any right of SBA arising from lender's negligence, misconduct or violation of any provision of the guarantee agreement.* [*Italics supplied.*]

In 28 Comp. Gen. 425 (1949), a firmly established policy of this Office was, again, delineated:

> * * * it is axiomatic that in performing his official duties as a certifying officer an employee is duty-bound to act in such a manner and to take all necessary steps to insure adequate protection of the interests of the United States. That duty is an inherent and integeral part of the position of certifying officer, and in functioning as such an officer or employee always should be mindful of that responsibility * * *.

It would be extremely difficult to support the position that a certifying officer who certifies the payment of Government funds, while possessing the knowledge that the *recipient* thereof may be guilty of negligence, fraud or misrepresentation in obtaining such funds, has taken all steps necessary to protect the interests of the Government. Such an officer, in fact, would not be serving the purpose of his employment, and waiver of liability for such conduct would, in our opinion, be unauthorized.

While this Office sanctioned SBA's present practice under the prior deferred participation program of immediate purchase of the agreed portion of the loan prior to determination of compliance by the lending institution involved, it was never contemplated that these payments would be made to such institution in the face of known possibilities that irregularities involving that lending institution may exist. While the cited letter of October 12, 1959, approved those procedures as being within the limits of the Administrator's discretion, it was not intended to imply that this discretion is unlimited.

In view of the above, the request for approval of payment to banks under the circumstances described in your letter of November 23 must be denied.

We understand, however, that there is a secondary market for these SBA percentage guaranteed loans and that banks sell—on the basis of

the SBA guarantee—the notes representing the SBA percentage guaranteed loans to mutual funds, pension funds, etc. Thus, a question has arisen as to whether SBA may pay a holder of an SBA guaranteed loan note—other than the bank making such loan—where SBA has knowledge of the possibility of negligence, fraud, or misrepresentation on the part of such bank, but where the present holder of the note did not participate in and was not aware of such negligence, fraud, or misrepresentation at the time it purchased the note from the bank.

We were informally advised by SBA representatives that the secondary market for SBA guaranteed loan notes would be seriously curtailed if upon default by the borrower SBA failed to make immediate purchase of such note from a holder who did not participate in, and was not aware of, any negligence, fraud, or misrepresentation by the bank at the time such holder purchased the note from the bank.

In our opinion payment to an innocent holder of an SBA guaranteed loan note is clearly distinguishable from payment to a bank which may be guilty of negligence, fraud, or misrepresentation in obtaining the SBA loan guarantee. Therefore, and since it appears that payment by SBA to an innocent holder of an SBA guaranteed note would not waive any right of SBA against the bank involved, arising from the bank's negligence, misconduct, or violation of the guarantee agreement, we would not object to SBA making immediate payment to such holder upon default of the borrower, if otherwise proper.

[B–173681]

Contracts—Performance—Inspection

The "entry into plant" requirement in a request for proposals that would permit Government personnel to observe and consult with the contractor during performance of manufacturing the flyers' helmets solicited by the Defense Supply Agency is an essential requirement and the offer of the manufacturer who developed the helmet that did not extend access to its plant was nonresponsive and properly rejected, for in addition to its license agreement with the manufacturer, the Government not only wanted to test the contractor's ability to manufacture the helmet, but also the adequacy of the specification in mass production. Moreover, the mere allegation of a possible divulgence of trade secrets in violation of a confidential relationship does not warrant the intervention of the United States General Accounting Office in the award process where adequate safeguards exist against the improper disclosure of proprietary information.

To the Contex Corporation, February 7, 1972:

Reference is made to your letter of December 21, 1971, and prior correspondence, protesting against the refusal of the Defense Supply Agency, Defense Personnel Support Center (DPSC), to consider your proposal for award under request for proposals (RFP) No. DSA100–71–R–0876.

For the reasons stated below, the protest of Gentex is denied.

The RFP, as amended, solicited offers for the manufacture and delivery of a total of 9,000 regular and extra large size SPH–4 protective flyers' helmets "In accordance with Limited Production Purchase description LP/P DES 53–70 dated 25 Nov 1970 * * * with deviations listed below." Clause B30.86 of the RFP, *inter alia*, contains an entry into plant clause, quoted below as completed by Gentex:

3. ENTRY INTO PLANT
The contracting officer or any Government personnel designated by him shall be permitted entry into contractor's plant for the purpose of observation and consultation during performance of manufacturing operations.

See letter from Gentex Corporation
Dated 7 April 71, attached hereto
and made a part of this Proposal/Offer.

The April 7 letter, which specifically took exception to the entry into plant clause, reads, in pertinent part, as follows:

This procurement relates to the SPH–4 flier's protective helmet which was developed by Gentex Corporation at its own cost and is the subject of an agreement between Gentex Corporation and the United States Government, bearing date January 28, 1970 and number DAAG 17–70–C–0081, relating to a Technical Data Package ("TDP" hereinafter).
Article II, Paragraph A, expressly provides that the TDP
"will not include any data involving the composition of or the forming of the shell which CONTRACTOR considers to be its trade secrets."
Article I, Paragraph B_1, provides:
"The license herein granted extends only insofar as the inventions covered by said patents and applications form an integral part of said SPH–4 helmet and as such inventions are incorporated in said TDP."

* * * * * * *

Since the sale of the TDP under said contract, Gentex Corporation has made improvements in the method of forming the visor, which improvements and methods are not part of the TDP.
As you know, the maintenance of trade secrets requires that the processes which are the subject of the trade secrets must be maintained as secrets by the owner of the trade secrets. In order to do this, no public inspection of the manufacturing areas in which the processes are being practiced can be permitted. The provision in the proposed contract referred to above would, if accepted, cause Gentex Corporation to lose its trade secrets. This, Gentex cannot consent to do.

During the period between the submission of your qualified offer and the formal rejection thereof, DPSC requested, but failed to obtain, a concession as to those portions of the Gentex plant which would be accessible to Government inspectors other than those portions wherein a finished article inspection and quality contract testing procedure would be performed. Although we note that an interchange of correspondence between Gentex and DPSC, monitored by our Office, resulted in some further access concessions by Gentex, DPSC does not consider such extent of access to the Gentex plant to be an acceptable alternative to that contemplated by the clause. In any event, DPSC formally rejected Gentex's proposal "In view of your refusal to permit free access to the areas of manufacture of this helmet as called for by the clause entitled 'Entry Into Plant' " thereby "not meeting an essential requirement of our * * * [RFP]."

The record establishes that, if Government inspectors utilize the entry into plant clause, trade secrets of Gentex not covered by its license agreement with the Government would be subject to scrutiny. Gentex claims that the expected result of such a detailed inspection of its production techniques and processes would be the compromise of its trade secrets. While not attributing potential willful disclosure of trade secrets to others, Gentex fears dissemination by Government personnel, apparently based on prior experience.

On the other hand, despite these claims, DPSC has consistently maintained its position that, in a production test contract of this type, the right to view and inspect the manufacturing process and technique is essential to the needs of the Government even though Gentex has the ability to manufacture the helmet and notwithstanding the availability of its trade secrets. In this connection, the contracting agency has advised that:

> * * * the applicable specification is untried, and the production test contracts are entered into in order to observe that the item is being manufactured in accordance with the specification requirements and that some other method is not being used. Further, not only that the specification is being followed, but that the specification requirements are proper and attainable utilizing currently accepted industry practices. In other words, that the requirements of the specification can be met under mass production conditions. To insure that these objectives are met, it is considered essential that Government personnel have access to those areas of a contractor's plant where the item is being manufactured in order that all facets of production may be observed. Limiting the Government to examination and testing of the end product would defeat the purpose of the * * * [production test contract] which is considered to be of prime importance. * * *
>
> Observing the actual production will enable technicians to see problems as they arise; determine desirability of changing to a detailed specification or vice versa changing to a performance specification; determine that the requirements are too restrictive or not sufficiently restrictive and many other specification revisions. We are testing not only a contractor's ability to manufacture the helmet, but the adequacy of the specification in mass production, when produced in accordance with specification requirements. * * *

Furthermore, in our decision B–164389, July 18, 1968, to Gentex, we approved the use of a right of entry into plant clause for similar purposes.

We have carefully reviewed the positions of Gentex and DPSC and we must conclude that there is no legal basis upon which we can interpose any objection to the rejection of the Gentex offer.

Initially, we realize that it is the prerogative of Gentex not to subject its proprietary processes and techniques to scrutiny by Government inspectors. Furthermore, we are not unmindful of the risks a manufacturer encounters in attempting to protect its proprietary information. Clearly, Gentex's license agreement with the Government specifically excludes certain proprietary information which might be ascertainable from the type of inspection contemplated by the RFP. However, DPSC has determined that the in-process inspection clause is important to the Government. In that connection, it should be recog-

nized that the provisions of the RFP and procurement regulations and implementations thereof permit the Government to perform such an inspection as is considered necessary to effect the stated objectives under a particular contract. The mere allegation of a possible divulgence of trade secrets in violation of a confidential relationship does not warrant the intervention of our Office in the award process. Moreover, we believe that adequate safeguards exist against the improper disclosure of proprietary information. See 18 U.S.C. 1905; *cf.* 50 Comp. Gen. 271 (1970).

Taking the above into account, we believe that Gentex misstates the issue when, citing its license agreement and possible divulgence of trade secrets, it states that it is improper for the Government to require it to expose its trade secrets under the penalty of the loss of a contract award.

If, as a matter of business prudence, Gentex does not wish to submit to the inspection process, it has every right to refuse to submit an offer on a contract providing for the inspection process. Concommitantly, if the Government considers the inspection process to be essential to a contract, it must be permitted to effect the type of inspection deemed appropriate in consideration of the peculiar nature of the procurement and to refuse to accept an offer that does not conform to its requirements.

Since DPSC considers the use of the entry into plant clause essential, the rejection of the Gentex proposal which takes exception to the clause is proper.

[B–173703]

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Proposal Revisions

The determination by a contracting officer upon reviewing the procurement for a set of water distillation units and associated manuals, drawings, and provisioning list in connection with a protest, that the award to the offeror who reduced the price of the list to become the low offeror was improper because the other offerors within the competitive range were not given an opportunity to review their offers and perhaps modify their prices was in accord with 10 U.S.C. 2304(g). An opportunity to revise or modify a proposal, regardless of whether the opportunity results from action initiated by the Government or offeror, constitutes discussion and, therefore, the award based on a price reduction without discussion with other offerors was improper, but the impropriety does not require the severe remedy of contract cancellation, and the cancellation may be modified to a termination for the convenience of the Government.

To Murray Schaffer, February 7, 1972:

Reference is made to your letter of November 4, 1971, and prior correspondence, on behalf of Mechanical Equipment Co., Inc. (MECO), protesting against the cancellation of contract DSA700–71–C–9173, awarded by the Defense Construction Supply Center, Columbus, Ohio.

The request for proposals (RFP) initiating the procurement solicited offers on a set of water distillation units and associated manuals, drawings and provisioning list. Three offers were timely received and opened on June 10, 1971. Approximately $6,000 separated each of the three offers with MECO's being the lowest. All offerors were considered to be within the competitive range.

On June 15, the buyer for the procurement requested MECO, *inter alia*, to "Please review price for Provisioning List." This request was the result of a comparison of MECO's price of $1,230 for the item with prices of $50 and $100 submitted by the two other offerors, respectively. MECO's reply, which effected a $230 reduction in the price of this item and its total price stated "Review of offer indicates we can accept item 0005, sequence A004, short form provisioning at $1,000.00." Thereafter, MECO's price was determined to be fair and reasonable and it was awarded the contract for $39,200.

After the award had been made, the procurement was reviewed in connection with a protest filed by the second low offeror. Although this protest was ultimately denied, it was noted that two offerors had not been given the opportunity to review their offers and perhaps modify their prices. As a result, the contract awarded to MECO was canceled prior to delivery and acceptance of any unit but after MECO had incurred alleged costs totaling approximately $7,000.

The contracting officer maintains that as all offerors were considered to be within the competitive range, discussions should have been held with all offerors as required by 10 U.S.C. 2304(g) and not just with MECO. The contracting officer further refines the situation by noting that MECO's price reduction cannot be considered a voluntary modification from an otherwise successful offeror under paragraph 3-506(g) of the Armed Services Procurement Regulation (ASPR) since MECO's price was not determined to be fair and reasonable until after the modification was received and, in addition, the price reduction, being the result of a solicitation by the procuring activity, cannot be considered as voluntary.

As recognized in your letter of November 4, the determinative issue is whether the request made to MECO constitutes discussions as that term is used in 10 U.S.C. 2304(g). Our Office has equated discussions with negotiations (see 51 Comp. Gen. 102 (1971)), which have been defined in 47 Comp. Gen. 29 (1967), at page 52, as follows:

> The term "negotiation" generally implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by the parties. 10 U.S.C. 2304(g) implements and clarifies the definition of "negotiate" in 10 U.S.C. 2302 (2) and it is our view that the term "negotiate" must be read in conjunction with 10 U.S.C. 2304(g) to include the solicitation of proposals and the conduct of written or oral discussions, when required, as well as the making and entering into a contract. * * *

We have noted, however, that a series of offers and counteroffers are not denoted in the above statutory provisions and that it does not seem they are essential to compliance with the requirements of those provisions. See B–164688, October 2, 1968. Obviously, once the solid footings of the offer-counteroffer situation is left, the definition of what does or does not constitute negotiation reflects an undesirable vagueness.

We have reviewed several of our more recent decisions bearing on the question of what constitutes discussions and conclude that resolution of the question has depended ultimately on whether an offeror has been afforded an opportunty to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the offeror. Consequently, an offeror's late confirmation as to the receipt of an amendment and its price constituted discussions (50 Comp. Gen. 202 (1970)), as does a requested "clarification," which result in a reduction of offer price (48 Comp. Gen. 663 (1969)) and the submission of revisions in response to an amendment to a solicitation (50 Comp. Gen. 246 (1970)). On the other hand, an explanation by an offeror of the basis for its price reductions without any opportunity to change its proposal was held not to constitute discussions (B–170989, B–170990, November 17, 1971). We believe, therefore, that a determination that certain actions constitute discussions must be made with reference to the opportunity for revision afforded to offerors by those actions. If the opportunity is present, the actions constitute discussions.

Applying this rule to the specific situation at hand, we are of the opinion that MECO's offer of a price reduction, coupled with its acceptance by the Government, provided MECO with the opportunity to change its proposal and, thus, constituted discussions. Since it is our position that discussions with one offeror necessitate discussions with all offerors within the competitive range (see 50 Comp. Gen. 202, *supra*), the contracting officer's contention on this point is well taken and your protest in this regard is denied.

Although we conclude that the contract awarded to MECO was improper, we do not believe that the impropriety was such as to require the severe remedy of outright cancellation of its contract. Accordingly, we are recommending to the Director, Defense Supply Agency, by letter of today, a copy of which is enclosed, that the cancellation be modified to a termination for the convenience of the Government.

[B–173703]

Contracts—Awards—Cancellation—Termination for Convenience in Lieu

The cancellation of a contract award because of the contracting officer's failure to hold discussions with all offerors within a competitive range after holding

discussions with one offeror should be converted to a termination for convenience since the contracting officer did not lack authority to make the award and there is no indication in the record that either the offeror or the procurement activity contracted other than in good faith or with any intent to deprive other offerors of an equal opportunity to compete and, consequently, the contract awarded was not void *ab initio*. The cancellation of a contract is desirable, but for the urgency of the procurement, the costs that would be chargeable against the Government, or similar circumstances relating to the best interests of the Government when a termination for convenience would either be too expensive or not in the Government's best interest.

To the Director, Defense Supply Agency, February 7, 1972:

Enclosed is a copy of our decision of today to Mr. Murray Schaffer, attorney for Mechanical Equipment Co., Inc. (MECO), concerning the protest against the cancellation of MECO's contract DSA700–71–C–9173, awarded by the Defense Construction Supply Center, Columbus, Ohio. The protest was the subject of reports, your reference DSAH–G, dated August 27 and November 23, 1971, from the Assistant Counsel.

We agree that the failure to hold discussions with all offerors within a competitive range after holding discussions with one offeror so situated was an impropriety which might require termination of the resulting contract. Granting, *arguendo*, the necessity of such action in the instant case, we do not believe that the circumstances warrant termination of MECO's contract on a basis other than for the convenience of the Government.

There is no indication in the record that either MECO or the procurement activity contracted other than in good faith or with any intent to deprive other offerors of an equal opportunity to compete. In a formally advertised procurement, a showing of good faith has been a basis for a recommendation by our Office that a contract should be terminated for convenience even though it was awarded to other than the lowest responsive, responsible bidder. See 51 Comp. Gen. 293 (1971). We perceive of no reason why the result here should be any different.

We have, of course, considered what action was required where award had been made subsequent to discussions with one but not all offerors within a competitive range. See 49 Comp. Gen. 625 (1970); 49 *id.* 402 (1969); 48 *id.* 663 (1969); 46 *id.* 191 (1966). In each of these decisions, we concluded that but for urgency, costs chargeable against the Government, or similar circumstances relating to the best interests of the Government, cancellation was desirable. These decisions recognize the existence of binding contracts and that termination for convenience would either be too expensive or not otherwise in the Government's best interests.

Therefore, although the procurement activity's failure to hold discussions with all offerors constituted an irregularity in the procure-

ment which affects the propriety of the contract awarded, we do not believe that the contracting officer lacked authority to make the award in the first instance. Consequently, the contract in question was not void *ab initio* and we therefore view the cancellation as erroneous. That being the case, the cancellation should be converted to a termination for convenience. See *John Reiner & Company* v. *United States*, 325 F. 2d 438, 163 Ct. Cl. 381, certiorari denied 377 U.S. 931 (1964), and *Warren Brothers Roads Company* v. *United States*, 355 F. 2d 612, 173 Ct. Cl. 714. Your advice as to the action taken in this matter would be appreciated.

[B-174783]

Decedents' Estates—Person Causing Death of Decedent—Federal *v.* State Law

A husband who entered a plea of guilty to first degree manslaughter in connection with the death of his wife—a former Federal employee in the State of Ohio—is not entitled to the unpaid compensation due the decedent. The statute and case law of the State which permit payment to the husband would prevail only in the absence of a Federal statute or policy. However, the policy governing payment pursuant to 5 U.S.C. 5582, prescribing the order of precedence for payment of money due a deceased employee, is that payment will not be made to a person otherwise entitled if such person participated in the death of the individual in whose estate he seeks to benefit in the absence of evidence establishing that there was no felonious intent on his part. Furthermore, payment may not be made to the estate of the decedent as there is a surviving minor child who is higher in the order of precedence.

To Russell T. Adrine, February 7, 1972:

Reference is made to your letter dated October 5, 1971, with enclosures, which will be viewed as constituting an appeal from the action of our Claims Division concerning the claim by Mr. Larry J. English, for the unpaid compensation due Mrs. Janice L. English, deceased former employee of the Department of Justice, Federal Bureau of Investigation, Cleveland, Ohio.

The record shows that Mr. English, the decedent's husband, entered a plea of guilty to first degree manslaughter in connection with the death of his wife, Mrs. Janice L. English. By settlement dated September 16, 1971, our Claims Division disallowed a claim you filed in behalf of Mr. English for the unpaid compensation due his wife stating that:

> * * * It uniformly has been held that it is against public policy to permit the payment by the Government of arrears of pay, compensation or other benefits to an heir or beneficiary who feloniously kills the person upon whose death such payments become due.

You have submitted for evidence a copy of *Wadsworth* v. *Siek*, 23 Ohio Misc. 112, 254 NE 2d 738 (1970), wherein it was held that one convicted of manslaughter may share in the estate of the person killed. It is your position that local law is applicable and that on

the strength of the above-cited case, Mr. English is entitled to those funds which were payable to his wife at the time of her death.

It has long been held that such matters as the rights of succession to property and the distribution of an estate are to be determined by local law unless there exists an overriding Federal statute or policy. *Lyeth* v. *Hoey*, 305 U.S. 188, 193 (1938); and *Hines* v. *Davidowitz*, 312 U.S. 52, 53 (1941). Hence, the statute and case law of the State of Ohio, in the absence of an contravening Federal law or policy, would appear to operate to entitle Mr. English to share in the estate of his deceased spouse. Section 2105.19, Revised Code (Ohio); and *Wadsworth* v. *Siek*, *supra*.

It is to be noted, however, that unpaid compensation due an employee at time of death is payable under 5 U.S.C. 5582, which provides in pertinent part as follows:

> (b) In order to facilitate the settlement of the accounts of deceased employees, money due an employee at the time of his death shall be paid to the person or persons surviving at the date of death, in the following order of precedence, and the payment bars recovery by another person of amounts so paid:
>
> First, to the beneficiary or beneficiaries designated by the employee in a writing received in the employing agency before his death.
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee.
>
> Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation.
>
> Fourth, if none of the above, to the parents of the employee or the survivor of them.
>
> Fifth, if none of the above, to the duly appointed legal representative of the estate of the employee.
>
> Sixth, if none of the above, to the person or persons entitled under the laws of the domicile of the employee at the time of his death.

Examination of the legislative history of the act of August 3, 1950, 64 Stat. 395, now codified as 5 U.S.C. 5582, reveals that such statute was promulgated to avoid the inconvenience, delays, and economic hardship frequently attendant when the assets of a decedent's estate are distributed in accordance with the laws of his domicile. See H. Rept. No. 2543, 81st Cong., 2d sess. In view of this, unpaid compensation due a deceased Federal employee is to be paid in accordance with the provisions of 5 U.S.C. 5582 and does not ordinarily become a part of his estate subject to distribution pursuant to a will or the statutes of descent and distribution of the State of his domicile. It is only when there is no eligible person in the first four classes in the order of precedence in the statute that the unpaid compensation of a deceased Federal employee is payable in accordance with State law. See *Metropolitan Life Insurance Company* v. *Thompson*, 368 F. 2d 791 (1966), certiorari denied 388 U.S. 914.

In deciding claims under 5 U.S.C. 5582, it has long been our policy that payment will not be made to the person otherwise entitled if such person has participated in the death of the individual in whose estate

he seeks to benefit in the absence of evidence establishing that there was no felonious intent on his part. In the instant case the record indicates that Mr. English is not eligible to receive payment as the surviving spouse in view of his plea of first degree manslaughter. Also, payment may not be payable to the estate since we have been informed that there is a surviving minor child who is higher in the order of precedence. See B–149373, February 8, 1967, copy enclosed.

Accordingly, the action of our Claims Division denying Mr. English entitlement to the unpaid compensation due his deceased wife is affirmed.

[B–171969]

Transportation—Dependents—Military Personnel—Dependents Acquired After Issuance of Orders

A Navy member who interrupted his travel from Saigon to Philadelphia incident to his transfer to the Fleet Reserve to be married in England is not entitled to his dependent's transoceanic transportation at Government expense under the authority of paragraph M7060 of the Joint Travel Regulations since pursuant to paragraph 4300–2, the member is considered to have been without a dependent at his restricted station and he, therefore, is subject to paragraph M7000–14, prohibiting payment by the Government of the transoceanic or overseas land transportation of his dependent, and to paragraph M7000–17, prohibiting the transportation of dependents at Government expense upon a member's permanent change of station when the presence of the dependents at the member's overseas station was not authorized or approved by the appropriate military overseas commander.

General Accounting Office—Informal Opinion—Not a Legal Precedent

An informal opinion to a Navy member who was not entitled to a decision that erroneously informed him as to his entitlement to the transportation at Government expense of a dependent asquired during his return travel from a restricted overseas area to the United States incident to his transfer to the Fleet Reserve has no legal effect as precedent and should not be used as authority in similar cases.

To the Secretary of the Navy, February 8, 1972:

We refer further to letter dated November 30, 1971, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs), forwarded here by letter of December 3, 1971, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 71–48), regarding the entitlement of Mr. Thomas M. Hughey to transportation of a dependent (wife) at Government expense.

By letter to the Comptroller General of the United States, dated April 19, 1971, Thomas M. Hughey, HMl, USN, 4th Riverine Advisor, Advisory Team #108, APO San Francisco, California 96215, requested advice regarding his entitlement to travel and transportation allowances. He said that on or about August 19, 1971, he was to depart from Saigon, Republic of Vietnam, travel to England where he expected to

be married on August 25, 1971, and with his wife proceed to United States Naval Base Philadelphia, incident to his transfer to the Fleet Reserve, effective September 16, 1971.

The member was informed by Office letter of July 14, 1971, that under paragraph M7060 of the Joint Travel Regulations, "it would appear that you will be entitled to transportation of your dependent from the place of marriage to the new station, provided the marriage is before the effective date of your orders, such entitlement not to exceed the constructive cost to the Government had transportation been provided from the old to the new station." Reference was made to 42 Comp. Gen. 344 (1963) and 42 Comp. Gen. 645 (1963).

The Assistant Secretary of the Navy states that items 14 and 17 were added to paragraph M7000 of the Joint Travel Regulations (change 136, effective April 1, 1964), as an implementation of Department of Defense (DOD) Directive Number 1315.7, April 6, 1963, and that these provisions would appear to deny transportation for Mrs. Hughey except for land travel in the United States, and they would also appear to negate the application of the decisions cited in the letter of July 14, 1971.

The Assistant Secretary says it is assumed that the advisory letter to Mr. Hughey was not intended for use as a precedent in similar cases, but apparently it is being so used in the uniformed services. Therefore, he requests that this Office take action to nullify its effect, if such action is appropriate.

The statutory authority for the transportation of dependents of members of the uniformed services, 37 U.S.C. 406, expressly provides that transportation of dependents at Government expense upon a member's ordered change of permanent station shall be subject to such conditions and limitations, for such grades, ranks, and ratings, and to and from such places as the Secretaries concerned may prescribe.

Paragraph M7060 of the Joint Travel Regulations currently provides as follows:

> Except upon graduation from a service academy (see par. M7068), a member who acquires a dependent subsequent to the date of his departure (detachment) from his old permanent duty station incident to permanent change-of-station orders but on or before the effective date of those orders will be entitled to transportation of such dependent from the place where the dependent is acquired to the new permanent station not to exceed the entitlement from the old to the new permanent duty station. Such entitlement is without regard to whether temporary duty is directed or performed en route or whether either the old or new station is within or outside the United States.

In 42 Comp. Gen. 344, the member who had been stationed at a restricted overseas station returned in July 1961 to the United States where he married and then traveled with his wife to his new permanent station in the United States. We concluded that payment was authorized for his wife's transportation from the place of marriage to

the new station (both in the United States), such entitlement not to exceed the constructive cost to the Government had transportation been provided from the old to the new station. We indicated that the fact that the member's old overseas station was restricted as to dependents' travel would not appear to limit entitlement under the express provisions of paragraph M7060 of the regulations, as it contained no limitation based upon restricted travel to the old station, and travel to the old station was not involved.

In 42 Comp. Gen. 645 we said that our decision in 42 Comp. Gen. 344 was based on the controlling regulations in effect during the period involved.

Effective April 6, 1963, section V.C., DOD Directive No. 1315.7, "Overseas Duty Tours of Military Personnel," provided policy regarding transportation of dependents as follows:

> 6. Military personnel otherwise entitled to transportation of dependents at government expense will not be entitled to such transportation to or from their duty stations outside the United States unless they are authorized by the appropriate military commander to have their dependents present in the vicinity of their duty stations.

Accordingly, items 14 and 17, were added to paragraph M7000, Joint Travel Regulations, effective April 1, 1964. Paragraph M7000–14 provides that transoceanic or overseas land transportation of dependents is not authorized at Government expense upon a permanent change of station when the member is considered to be a member without dependents as defined in items 3 and 4 of paragraph M4300–2 of the regulations. These items further restrict the term "member without dependents" to include (3) the remainder of any tour in which dependents join him 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 a member in an eligible grade (item 1) who is authorized to have his dependents reside at or in the vicinity of his duty station outside the United States and whose dependents do so reside or (item 2) 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.

Paragraph M7000–17 of the regulations provides that transportation of dependents at Government expense upon a permanent change of station may not be provided for travel to the United States when the

presence of the dependents at the overseas station was not authorized or approved by the appropriate military overseas commander.

In decision of December 8, 1971, 51 Comp. Gen. 362, copy enclosed, where a member serving in Vietnam attained a grade eligible for transportation of dependents, we held that he was not entitled to transoceanic travel at Government expense for his wife from Hawaii to the continental United States, in connection with his permanent change of station. This was because he was regarded as a member without dependents under paragraph M4300–2 of the regulations and subject to the restrictions of par. M7000–14, Joint Travel Regulations. See also decision B–169483, April 22, 1970 (par. M7000–17), copy enclosed.

In view of the controlling provisions in effect since April 1, 1964, where a member is considered to be without dependents as provided in paragraph M7000–14, or the presence of his dependents at the overseas station is not authorized or approved by the appropriate commander, as required by paragraph M7000–17, the member is not entitled to dependent overseas transportation under paragraph M7060 of the regulations.

Consequently, a member whose dependent is never approved or authorized to be present at his restricted overseas station, is not entitled to his dependent's transoceanic transportation at Government expense under par. M7060, Joint Travel Regulations, in connection with the member's change of permanent station to an unrestricted station.

In this regard, it may be stated that the informal opinion contained in letter of July 14, 1971, to Mr. Hughey, who was not entitled to a decision, has no legal effect as precedent and should not be used as authority in other similar cases. See 31 Comp. Gen. 614 (1952).

[B–174439]

Sales—Bids—Mistakes—Lot *v.* Unit Price Basis

Notwithstanding a clause in the invitation offering steel bolts for sale on a lot basis provided that in the event a total bid price and unit bid price were not in agreement, "the unit bid price will not be considered," the contracting officer should have requested verification of the bid price prior to award where the bid on an item appraised at $100 was $477.25, and other bids ranged from $7 to $82, since the unit price multiplied by any of the quantities in the lot item did not result in the total price bid, but was correct for the item below the item bid on, and as the Defense Disposal Manual DOD 4160.21–M requires a sales contracting officer to examine all bids for mistakes and to request verification from the bidder in cases of apparent mistake, even though the sales terms indicate otherwise, the contract awarded should be cancelled and the bid deposit refunded. B–173163, dated October 1, 1971, modified.

To the Director, Defense Supply Agency, February 8, 1972:

By letter DSAH–G dated October 29, 1971, the Associate Counsel forwarded for decision by our Office the request of Skyway Air Parts Company, Inc., for rescission of item 171 in sales contract 21–2015–272 because of an error in bid.

Item 171 advertised for sale on a lot basis various lengths and sizes of steel bolts estimated to weigh 627 pounds. The current market appraisal for item 171 was $100. On the bid sheet provided for the submission of bids, Skyways stated that it was bidding on item 171; that its unit price bid was $0.23; and that the total price bid was $477.25. Fourteen other bids on item 171, submitted on a lot basis, ranged from $7 to $82. Award was made to Skyway as the highest responsive bidder on item 171.

Subsequently, Skyway alleged that an error had been made in its bid upon which the contract was based in that the bid on item 171 was intended for item 172. Skyway contended that the contracting officer should have known of the possibility of error since there was no correlation between the units stated in item 171, the unit price and the extended total price. Item 172 offered for sale on a unit basis 2,075 straight adapters. Application of the $0.23 unit price quoted on item 171 to item 172 results in an extended price of $477.25, the total price bid on item 171.

The contracting officer has recommended against rescission of item 171 of the contract on the ground that under the terms of the sale the unit price bid was not for consideration. In that regard, the contracting officer refers to the invitation clause that provided:

> * * * When bids are solicited on a "lot" basis, Bidders should submit a single total price in the Total Price Bid column on the bid sheet. Bidders should not make any entry in the Unit Price Bid column. In the event a Bidder submits a total bid price and also a unit bid price which are not identical, the unit bid price will not be considered.

The Associate Counsel has advised that DSA believes that there was a clear indication of error in the bid and that the contracting officer should have requested verification of the bid prior to award since the unit price multiplied by any of the quantities shown in item 171 would not have resulted in the total price entered by the bidder on the bid sheet. However, in view of our decision B–173163, October 1, 1971, Counsel has submitted the matter for our consideration.

In the cited case, the bidder quoted on a lot item a unit price ($0.022) and an extended price ($203.71) that did not agree. The item description contained two units of measure. Applying the unit price to one unit of measure (length) resulted in an extended price of $50.71. Applying the unit price to the other (weight) resulted in an extended price of $170.50. The other bids on the item ranged from $26 to $162.75. The contracting officer requested the $203.71 bidder to verify its bid. This the bidder did but since it did not furnish evidence of the intended bid, the contracting officer made award to the $162.75 bidder. The $203.71 bidder protested the award.

In the cited decision, it was held that the above-quoted terms of the invitation obviate the necessity of verifying the apparent unit

and total bid price variations and that where the contracting officer did have the bidder verify that the total bid price was correct, the bid should have been accepted as contemplated by the sales invitation without anything more.

Counsel has questioned the decision since in surplus sales bidders do not bid on a sheet preprinted with item numbers, but rather are required to write the item numbers being bid upon on the bid sheet, and it is a common error for bidders to insert the wrong item number on the bid sheet. Therefore, to accept the extended price as controlling without regard to the rest of the information in the bid on the item will result in awards being made to bidders for items they did not intend to bid upon. It is indicated that requesting verification provides the bidder with an opportunity of showing that the wrong item has been bid upon. Further, it is stated that where the bidder is allowed to verify one of the two inconsistent prices as the intended bid without some evidence in the bid that substantially establishes the verified price, the verification is not sufficient to overcome the suspicion of error and would be unfair to other bidders displaced by the verification. In the absence of evidence in the bid substantially establishing the verified price as the intended price, it is suggested that the bid should be disregarded.

Upon further review of the matter, we observe that Defense Disposal Manual DOD 4160.21–M, part 3, chapter X, section A1, requires the sales contracting officer to examine all bids for mistake. Thus, even though the sales terms indicate an intention that the unit price submitted on a lot item not be considered, the contracting officer could not discharge the responsibility imposed by the manual when the unit price quoted is inconsistent with the total price and suggests the possibility of mistake in the bid. Further, the DOD section quoted above requires the contracting officer to request verification from the bidder in cases of apparent mistake. Therefore, we believe that where there is an inconsistency between the unit and extended prices in the bid, the contracting officer has a responsibility to verify the bid.

Further, our Office has held that correction of an erroneous bid will not be permitted when to do so would result in displacement of an ostensible successful bidder. 37 Comp. Gen. 210 (1957). The only exception to this rule is where the error is obvious and the intended prices can be ascertained from the bid form itself without resort to extraneous worksheets or other bid documents. See B–169688, May 27, 1970; B–157914, January 28, 1966; and B–155537, January 7, 1965. Moreover, in 50 Comp. Gen. 497, 499 (1971), it was stated:

> * * * while it is obvious that there is a mistake in either the unit price or the extended price of your bid, we must conclude that the intended bid cannot be ascertained from the bid form itself, since the error could have been in either

the unit or extended total price. Correction to the extent and in the manner requested by you would therefore confer upon you an unfair competitive advantage. While you maintain that the best interests of the Government would be served by acceptance of your higher bid, it is our view that the harm to the competitive bidding system would far offset any pecuniary advantage gained thereby. As we stated in B–166748, May 14, 1969, regardless of the good faith of the bidder making a mistake, correction should be denied in any case in which there exists a reasonable basis for argument that public confidence in the integrity of the competitive bidding system would be adversely affected thereby.

Accordingly, where it cannot be determined from the bid form alone whether the error was in the unit price or the total price, the bid should be disregarded in the consideration of bids.

In view of the foregoing, decision B–173163, *supra*, to the extent inconsistent with the holding herein, will no longer be followed.

Turning to the immediate case, we conclude on the basis of the foregoing principles that there was an apparent error on the face of the Skyway bid and that the contracting officer should have requested verification of the bid prior to award. Having failed in that regard a valid contract for item 171 did not come into existence. Hence, the contract awarded to Skyway should be canceled and its $100 bid deposit should be refunded.

[B–174859]

Contracts—Breach of Contract—By Government—Authority to Determine

The Forest Service has authority to enter into an agreement with a contractor to settle termination costs incident to the Agriculture Board of Contract Appeals ruling that the Government improperly defaulted a contract, but since the Board's holding that the Forest Service breached its obligation to furnish agreed supplies is not supported by the evidence, the damages awarded by the Board for the supposed breach may not be settled. Breach of contract claims are not properly cognizable by Boards of Contract Appeals, and the Department of Agriculture should make an independent analysis of the merits of the claim and a full examination of available defenses, and then determine if a breach occurred under decisions of the courts and/or the United States General Accounting Office, and should provide that in future proceedings, the Board shall not express an opinion or make a finding of contract breach.

Contracts—Damages—Government Liability—Method of Computation

The "total cost" method used by the Court of Claims in computing damages when the Government's responsibility for damages was clearly established, no other method of computing damages was available, and the contractor's bid was considered reasonable is not for application where prior to award the bid of the improperly defaulted contractor was so low the contracting agency believed the contractor would be unable to perform.

To the Secretary of Agriculture, February 8, 1972:

We refer to a report (reference S. Doherty), dated December 28, 1971, from Mr. Merwin W. Kaye, Director, Research & Operations Division, transmitting a proposed settlement of $15,000 on the claims

of Ted C. Frome under Forest Service Contract No. 26–147. The report states that the Agriculture Board of Contract Appeals ruled that the Government improperly defaulted the contract, as well as breached its obligation to furnish the agreed number of "goop" cans to the contractor; that the Board converted the default termination into a termination for the convenience of the Government; that the proposed settlement represents termination for convenience costs of $3,000; and that the remainder of the settlement represents damages for the Government's breach.

The authority of an administrative agency to enter into an agreement with a contractor for the settlement of his claim arising out of the termination of a contract for the convenience of the Government has long been recognized by our Office. B–174568, December 10, 1971; 44 Comp. Gen. 466 (1965). While we have doubts relative to the propriety of the method adopted for determining the amount to which the contractor is entitled, in view of the apparent lack of contractor's records reflecting actual termination expenses and the relatively small amount proposed, this Office will not object to payment of $3,000 by your Department in settlement of the contractor's claim for termination costs.

With respect to the proposal to settle the breach claim for $12,000, such payment is apparently based on the Board's conclusion that the Government's failure to supply 11,000 "goop" cans to the contractor constituted a breach of contract.

We question the authority of the Board to find that the Government breached the subject contract. In this regard, the Supreme Court has stated that breach of contract claims are not properly cognizable by the Boards of Contract Appeals. See *United States* v. *Utah Construction and Mining Co.* 384 U.S. 394 (1966). As noted by the Board in Footnote No. 1 of its opinion, the Board may make findings of fact involving a claim which is not otherwise cognizable by the Board *without expressing an opinion or making a finding on the question of liability.* It therefore appears that the Board's finding of breach in the instant case constituted an unauthorized opinion on the question of the Government's liability, and we are concerned that this opinion may have convinced the Forest Service that it was precluded from independently analyzing the merits of the claim, and may have prevented a full examination of available defenses to the claim by your Department before it conceded liability to the contractor in the claimed amount. Consequently, we recommend that the Board's rules be amended to specifically provide that the Board shall not express an opinion or make a finding that the Department has breached a contract in any future proceeding.

Since the Board's finding of breach was unauthorized, and that question does not appear to have been fully argued before the Board, we do not believe we would be justified in deciding, on the present record, that the Government did, or did not breach the contract. We therefore suggest that an independent analysis be made by your Department setting forth in detail the relevant contractual provisions involved in consideration of the breach claim, the extent to which the Government complied with these provisions, the extent, if any, to which the Government failed to comply with the provisions, and a statement showing why the Government's actions, or lack of actions, with respect to these provisions should be considered a breach of contract under decisions of the courts or this Office. In this connection, the present record indicates it may be desirable that such analysis be prepared by, or include the comments of, the Regional attorney who represented the Department before the Board in the appeal of the contractor.

With respect to the question of whether damage resulted from the alleged breach, the Board found that the contractor was "probably" delayed by the Government's failure to furnish the entire supply of cans. However, it noted that the contractor was not using all the cans that were available to him and that the shortage of cans was partly caused by the failure of the contractor to return empty cans when arriving for new supplies. The only other data in the present record concerning the effect on the contractor's work of the Government's failure to supply 11,000 cans is stated on page 5 of the statement of the Regional Administrative Services Officer that the breach of contract "could perhaps" have caused as much as 6½ days total delay.

In this connection, the Court of Claims has noted that, once a breach of contract has been established, the contractor must still show that damage ensued. See *Commerce International Company, Inc.* v. *United States*, 167 Ct. Cl. 529, 536 (1964). Assuming, for the purpose of discussion, that the Government breached the contract by failing to deliver 11,000 cans to the contractor, we cannot conclude that the record demonstrates that the breach delayed the contractor or that any delay resulted in damage to the contractor. From our review of the record, we believe it is equally reasonable to conclude that the delay was caused by the contractor's failure to use all available cans and to return empty cans when arriving for new supplies.

In view of the foregoing, it is our opinion that the instant claim is for allowance only if the record clearly supports a conclusion that the Government breached its contractual obligation, and if a detailed statement of the circumstances surrounding the delay incurred in furnishing 11,000 cans to the contractor clearly indicates how the alleged breach delayed the contractor, and the extent of such delay. In

this connection it would appear to be both appropriate and necessary that an analysis be prepared by, or include the comments of, the original contracting officer or his successor on these matters.

In this connection, we note that the proposed settlement of the breach claim for 6½ days of Government-caused delay is based on the daily average of the contractor's total costs. The Court of Claims has used the "total cost" method of computing damages when the Government's responsibility for damages was clearly established, no other method of computing damages was available, and the contractor's bid was considered reasonable. See *J. D. Hedin Construction Co., Inc.* v. *United States*, 171 Ct. Cl. 70, 86 (1965). However, in the subject case the record indicates that, before award, Forest Service personnel considered Mr. Frome's bid was so low that he would not be able to perform. Consequently, we question whether this method of computing damages is properly applicable to the circumstances of the subject case.

Since the present record does not contain evidence which, in our opinion, clearly supports a conclusion that the Government breached the contract, or that the contractor has been damaged in the claimed amount by such breach, or that the method of computing damages here was legally proper, we are unable to concur in the $15,000 settlement proposed by your Administration. We will, of course, be glad to consider the matter further if resubmitted in accordance with our observations set out above.

The file forwarded with the report is returned.

[B–174361, B–173622]

Corporations—Corporate Entity—Bid Under Trade Name Acceptability

The fact that the bid of a corporation to furnish guard services was submitted under its trade name does not require rejection of the bid on the basis the corporation lacks legal entity since the recognized principle is that a corporation may conduct business under an assumed name, or under a name differing from its true corporate name, and in the District of Columbia where the corporation is located, a contract executed in an assumed name is valid if unaffected by fraud and, therefore, the bid may be considered as being submitted in the true name of the organization which had a corporate entity at the time of bid opening.

Personal Services—Detective Employment Prohibition—Applicability

A bidder who was authorized to operate as a detective agency at the time its bid was submitted and was under consideration for award, and during part of the period of its performance of interim guard service pending determination of its "legal entity," but who is not now subject to the prohibition against employment by the Government of detective agencies—a prohibition that applies regardless of the actual services performed—since its detective agency license has expired, should not be eliminated from consideration for an award of the proposed service contract, in view of the fact that the bid describing the corporate business of the bidder "as guard service to commercial and residential establishments," with no mention of its detective service was made in good faith.

To the Secretary of Housing and Urban Development, February 9, 1972:

We refer to letters dated November 8, 1971, GMM:PHS:MMS:ECE, and January 6, 1972, GMM:PHS:MMS, from the Associate General Counsel for Housing Management and Property Insurance and Sales, concerning a protest by the law firm of Fried, Frank, Harris, Shriver & Kampelman, attorneys for Intersec, Inc. (Intersec), against the proposed rejection of a bid by International Security Corporation under Solicitation 71–592, issued May 20, 1971, by the Office of Property Disposition, Contracting and Reconditioning Division, of your Department. The procurement involves the furnishing of security guard service at Envoy Towers, Washington, D.C., for a period of one year commencing on the date specified in the notice of award, and it is our understanding that pending award under the IFB the service is being obtained from Intersec under an open market purchase arrangement which commenced June 1, 1971.

On June 3, 1971, bids were opened as scheduled. Cleo Security Services, Inc. (Cleo) was low bidder, and International Security Corporation was second low bidder. On August 3, 1971, however, Cleo was eliminated from consideration for award due to the expiration of the period for acceptance of its bid.

In response to a request by the contracting officer for evidence of its corporate status International Security Corporation furnished a copy of a corporate charter issued on May 13, 1969, to International Enterprises Limited, together with a copy of an amendment dated June 1, 1971, and filed on July 19, 1971, with the Recorder of Deeds for the District of Columbia, changing the corporate name to Intersec, Inc. In addition, the bidder furnished a copy of an annual report filed in the name of International Enterprises Ltd. with the Recorder of Deeds, describing the business as "Provision of Guard Security Service," and a reproduction of a paid bank check dated March 2, 1971, drawn by International Security Corporation to the order of the D.C. Treasurer, which bears the endorsement of the payee. The bid, the charter amendment, the annual report and the check all show 4429 Wisconsin Avenue, N.W., Washington, D.C., as the business address. Further, the signature of Theodore Manousakis over the title "President" appears on the bid and on the corporate charter amendment, the corporation's annual report lists Mr. Manousakis as president of International Enterprises Limited, and the original corporate charter lists Mr. Manousakis as an official and registered agent of International Enterprises Limited.

The contracting officer's proposal to reject the bid is based on the view that in the absence of evidence that International Security Cor-

poration is a legal entity, it is doubtful whether an award based on its bid would result in a binding contract. Intersec's attorneys state, however, that the signature of Mr. Manousakis on the bid would bind Intersec to any contract based on the bid. In this connection, the attorneys state that the name International Security Corporation is the recognized trade name which both International Enterprises Limited and Intersec, Inc., have used in the District of Columbia and that the trade name has been used for operations under a detective agency license issued by the Government of the District of Columbia in the name of International Enterprises Limited for the period November 1, 1970, to October 31, 1971. Our examination of the application for that license reveals that International Security Corporation is shown as a trade name thereon.

In support of their position, the attorneys cite 56 ALR 450 for the universally recognized principle that a corporation may conduct business under an assumed name, or under a name differing from its true corporate name, and *Resnick* v. *Abner B. Cohen Advertising*, 104 A. 2d 254 (1954), and *Sorivi* v. *Baldi*, 48 *id.* 462 (1946), for the proposition that in the District of Columbia a contract executed by a person or corporation in an assumed name will be valid if unaffected by fraud. In 18 Am. Jur. 2d, Corporations, sec. 143, it is noted that according to some cases a corporation, as well as individuals, may have or be known by several names in the transaction of its general business so that it may enforce, as well as be bound by, contracts entered into in an adopted name, other than the regular name under which it was incorporated. It is also noted that a corporation may do business under an assumed name or under a name differing from its true corporate name and that some statutes may expressly permit a corporation to do so.

At 18 C.J.S. 166, it is stated that in the absence of a contrary statute, according to some authorities, a corporation may assume a name by which to do business, even when a name is stated in its charter, and contracts made under such assumed name are binding on both parties.

Reference to Title 29 of the District of Columbia (D.C.) Code, which sets forth the laws governing corporations doing business in Washington, D.C., shows that pursuant to section 103 a corporation, under its new name, has the same rights, powers and privileges and is subject to the same duties, obligations and liabilities as before and may sue and be sued in its new name. There is no provision prohibiting use by a corporation of a trade or assumed name in the conduct of its business. Further, under section 3–401(2), Title 28 of the D.C. Code, a signature by use of a trade or assumed name is recognized as a valid signature in lieu of a written signature for a commercial instrument.

In line with the foregoing, it is our view that the bid submitted in the name of International Security Corporation should be considered as the bid of International Enterprises Limited, which was a corporate entity at the time of bid opening. It is our further view that the subsequent change of the true corporate name of the bidder from International Enterprises Limited to Intersec, Inc., which was duly recorded with the Government of the District of Columbia and involved no interruption of the corporate affairs, has no effect upon the obligations which would be attendant upon acceptance of the bid by the Government. Accordingly, we are unable to concur with the position of the contracting officer that the bid is required to be rejected solely because the name in which it was submitted is a trade name rather than the true name of an existing legal entity.

We are, however, concerned with another factor in this case which we called to your attention in our letter of December 29, 1971. We refer to application of the prohibition in 5 U.S.C. 3108 against employment by the Government of detective agencies, in light of the fact that the bidder was authorized to operate as a detective agency at the time the bid was submitted and was under consideration for award and during part of the period of its performance of interim guard service pending our decision on the "legal entity" issue.

With our letter of December 29 to you we furnished copies of 38 Comp. Gen. 881 (1959) and B–167723, September 12, 1969, in which we held that the statutory prohibition applies to a detective agency regardless of the service performed, or to be performed, for the Government. Pursuant to those decisions, and the other decisions of our Office therein cited, it is our opinion that employment of the bidder in the instant case was precluded until after the expiration on October 31, 1971, of the detective agency license issued in the name of International Enterprises Limited.

However, as to the effect of the erroneous certification in the bid on its qualification for consideration at this time, the description of the corporate business which appeared in the 1971 corporate report of International Enterprises Limited to the Government of the District of Columbia indicates that the corporation regarded its business as the provision of security guard service, and in the amendment to the corporate charter, which changed the corporate name to Intersec, Inc., "security service to commercial and residential establishments" was specifically listed as a purpose of the corporation, but no mention was made of detective services. In light of such factors, we do not believe that the bid is required to be considered as having been submitted in other than good faith. Accordingly, and since the bidder does not now have authority to operate as a detective agency in the District of Columbia, we do not believe that the bid should now be eliminated from

consideration for award of the proposed contract. B-172587, June 21, 1971.

In the circumstances, you are advised that we see no legal basis for objection to acceptance of the bid in the name submitted, provided that Intersec, Inc., is determined to be responsible as well as responsive. We suggest, however, that the notice of award and the contract indicate that the name International Security Corporation is a trade name of Intersec, Inc.

The attorneys for Intersec, Inc., are being furnished a copy of this decision by our letter of today.

[B-174592]

Bids—Mistakes—Verification—Acceptance of Bid Unwarranted

Even though the obvious error of quoting a two-color printing job at one-third the price of the same job printing in one color in response to an invitation for printing a weekly newspaper for the Naval Weapons Center, China Lake, California, was verified as correct by the low bidder, the bid should not have been accepted for acceptance gave the ostensible low bidder an option to withdraw its bid, request a bid correction, or insist upon the correctness of its bid despite the ridiculously low price quoted on the two-color job, and the preservation of fairness in the competitive system precludes giving a bidder the right to make such an election after the results of the bidding are known. Although correction of the erroneous item displaced the low bid, since the only other bidder was nonresponsive, the directed cancellation was withdrawn in B-174592, April 27, 1972, as being in the best interests of the Government.

To the Secretary of the Navy, February 10, 1972:

Reference is made to the letter of December 28, 1971, from the Deputy Commander, Procurement Management, Naval Supply Systems Command, SUP 0222, regarding the protest of an award of a contract to Hubbard Printing, Incorporated, under solicitation No. N00123-72-B-0113, issued by the Naval Regional Procurement Office, Los Angeles, California.

The invitation was for the printing of a weekly newspaper for the Naval Weapons Center, China Lake, California, for a period of 3 years. The first six items of the IFB were for printing in black or one color only. The next several items were for printing with an additional color, and appeared under the following statement:

> Print with one additional color ink by page units. A maximum of three (3) two-color ink issues may be printed per year.

Two bids were received, one from Hubbard, and one from Speedprinters. Hubbard's bid prices for the two-color printing items were significantly lower than Speedprinters', and were also lower than its prices for one color printing. For example, Hubbard's bid for a four-page edition was $457.50 in one color and only $150 in two colors. Because of this disparity, the contracting officer asked Hubbard to verify

its bid. Hubbard did so, and also reduced its prices for certain items, thereby reducing its overall bid. The contracting officer evaluated the Speedprinters bid at $98,107.40; Hubbard's bid was evaluated at $93,906.56 prior to verification and at $92,626.66 after verification and price reduction. Award was then made to Hubbard, and Speedprinters filed its protest.

Speedprinters claims that the contracting officer incorrectly interpreted Hubbard's bid in that Hubbard's bids for the two-color items are meant as additional charges to the basic bids entered for the one-color items, and not as the total bid price for the items. Using the example mentioned above, the protestor alleges that Hubbard's actual bid for a four-page edition is $457.50 plus $150, or $607.50, and should have been so evaluated. Speedprinters states that it is unreasonable for a one-color edition to be bid at $457.50 and a two-color edition at a much lower figure.

In this respect, the administrative report indicates that previous solicitation for these printing services did ask only for an "additional charge for second color," and that Hubbard was the successful bidder on that IFB.

We agreed that it is not reasonable to expect a two-color printing job to cost only one-third the price of the same job printed in one color, and we think the wording in the earlier solicitation supports the view that Hubbard probably entered its bids in the new solicitation on the basis of the wording in the earlier one. This was an obvious error on the face of the bid, and the contracting officer would have been remiss had he not sought verification. Under these circumstances, however, it does not follow that the bid, even after verification, may be accepted.

In 39 Comp. Gen. 185 (1959), we held that an obviously erroneous bid cannot be accepted as the intended bid although the bid price is verified after opening. We noted that any other view would give the ostensible low bidder an option to either withdraw its bid, request a correction in its bid, or insist upon the correctness of its bid despite ridiculously low prices. We stated at page 187 that "the competitive bidding system would be adversely affected by considering such extremely low unit prices in the absence of convincing evidence that the bid as submitted was as originally intended."

In B–147397, October 24, 1961, we considered a situation very similar to the instant case. The solicitation there was for the constructing and leasing of postal facilities and called for bidders to quote an annual rental on the basis of both maintenance of the premises as a Government obligation and maintenance as an obligation of the lessor. The apparent low bidder on the basis of lessor maintenance quoted a rental that was $210,000 less for lessor maintenance than for Government maintenance. After opening, the bidder first alleged that the two

bids were reversed. Four days later, the bidder claimed the amount bid for lessor maintenance was correct and that only the quotation for Government maintenance was incorrect. Had the bids been reversed, neither would have been low. We stated that:

> The bidder has placed himself in a position, whether intentionally or not, where after the opening of the bids he had the option of requesting that the bid prices on the two schedules be reversed which the Government, under the circumstances, could hardly have logically denied, or claiming that the prices shown on either one of the two schedules was correct and the other was erroneous. A bidder may not be permitted to stand on its apparently erroneous bid and make a contract to which it would not have been entitled but for the error. The preservation of fairness in the competitive bid system precludes giving a bidder the right to make such an election after the results of the bidding are known. 35 Comp. Gen. 33; 37 *id.* 579; and 39 *id.* 185.

We advised that both bids should be disregarded.

We think these cases are controlling in this procurement. Because of the obvious error in its bid, Hubbard plainly had a choice of claiming its two-color quotations were misinterpreted or that the absurdly low bid was actually correct. While it states, in its December 14, 1971 letter to the contracting officer, that its bid was correct as submitted, the only evidence offered is its statement that in submitting the bid, it "took into consideration the lengthy relationship we have had with the NWC newspaper and the fact that color was only called for three times a year." In our view, this fails to convincingly establish that Hubbard's two-color bids were those originally intended.

Applying the applicable unit prices in Hubbard's bid as additional charges for color, we compute an increase of $6,535 which would make Speedprinters' bid low. Accordingly, we conclude that award to Hubbard was improper and should be cancelled.

[B-174647]

Contracts—Specifications—Failure to Furnish Something Required—Addenda Acknowledgment—Wage Determinations

The general rule that the failure of a bidder to acknowledge receipt of an amendment which could affect the price, quality, or quantity of the procurement being solicited, renders a bid nonresponsive because the bidder would have an option to decide after bid opening to become eligible for award by furnishing extraneous evidence that the addenum had been considered or to avoid award by remaining silent, is for application to the low bid for construction of a prefabricated metal building as the unacknowledged amendment incorporated a wage determination that affected the contract price, notwithstanding that Executive Order 11615, dated August 15, 1971, concerning stabilization of prices, rents, wages and salaries was in effect, since the Executive order does not obviate implementation of the rates in the wage determination and, therefore, the failure to acknowledge the amendment may not be waived.

To George W. Krog, February 10, 1972:

Reference is made to your telegram of December 1, 1971, and subsequent correspondence on behalf of John R. Lavis General Contractor,

Incorporated, in which you protest rejection of your client's bid and award of a contract to any other bidder under invitation for bids (IFB) No. F29651–72–B–0065, issued by Holloman Air Force Base, New Mexico.

The solicitation, for the construction of a prefabricated metal building, was issued October 8, 1971. Standard Form 19–A of the IFB included the Davis-Bacon Act requirement that wages be paid in accordance with "wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof." However, instead of a wage determination, the following statement was attached:

> Wage determination *not available* for this project at this time. Invitation for bid will be modified when wage determination is received.

Amendment MO–1, incorporating wage determination No. AM–3683, was subsequently issued on October 28, 1971. It stated that failure to acknowledge the amendment prior to opening might result in rejection of the offer. At bid opening on November 8, 1971, it was discovered that your client had failed to acknowledge the amendment, and although Lavis was the apparent low bidder, its bid was rejected. You then protested, and award has been held up pending resolution of this protest.

The general rule is that the failure of a bidder to acknowledge receipt of an amendment which could affect the price, quality or quantity of the procurement renders the bid nonresponsive. 37 Comp. Gen. 785 (1958). The basis for this rule is that generally the bidder would have an option to decide after bid opening to become eligible for award by furnishing extraneous evidence that the addendum had been considered or to avoid award by remaining silent. See 41 Comp. Gen. 550 (1962) and decisions cited therein.

You urge, however, that Lavis' failure to acknowledge the amendment was a minor informality which may be waived under Armed Services Procurement Regulation 2.405. That section allows for correction or waiver of minor informalities and irregularities when it would not be prejudicial to other bidders, and specifically allows waiver of a failure to acknowledge receipt of an amendment if:

> (1) The bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the invitation for bid and the bidder submitted a bid thereon, or
> (2) The amendment clearly would have no effect or merely a trivial or negligible effect on price, and no effect on quality, quantity, or delivery, or the relative standing of bidders * * *.

This point was carefully considered in several of our prior decisions which involved situations nearly identical to that in the instant case. In B–157832, November 9, 1965, we stated:

> Since the wage rates payable under a contract directly affect the contract price, there can be no question that the IFB provision requiring the payment

of minimum wages to be prescribed by the Secretary of Labor was a material requirement of the IFB as amended. As stated previously, the requirements of the Davis-Bacon Act were met when the amendment furnishing the minimum wage schedule was issued, the purpose of the Act being to make definite and certain at the time of the contract award the contract price and the minimum wages to be paid thereunder. 17 Comp. Gen. 471, 473. In such circumstances, it is our view that a bidder who failed to indicate by acknowledgment of the amendment or otherwise that he had considered the wage schedule could not, without his consent, be required to pay wage rates which were prescribed therein but which were not specified in the original IFB, notwithstanding that he might already be paying the same or higher wage rates to his employees under agreements with labor unions or other arrangements. Accordingly, in our opinion, the deviation was material and not subject to waiver under the procurement regulation. B–138242, January 2, 1959. Furthermore, to afford you an opportunity after bid opening to become eligible for award by agreeing to abide by the wage schedule would be unfair to the other bidders whose bids conformed to the requirements of the amended IFB and would be contrary to the purpose of the public procurement statutes. B–149315, August 28, 1962; B–146354, November 27, 1961.

See also B–157894, November 30, 1965; B–160257, December 15, 1966; B–171062, December 17, 1970.

You claim that the amendment did not affect the applicable wage rates because Executive Order 11615, dated August 15, 1971, concerning stabilization of prices, rents, wages, and salaries, was in effect and referenced in the IFB. However, the contracting officer reports that wage determination AM–3683 contained approximately 17 increases over the previous wage determination dated May 27, 1971. We do not believe that the existence of the Executive Order necessarily obviates implementation of the rates in the wage determination. Within the limitations of the freeze the contractor should be obligated to pay not less than the wage rates specified in the determination. He could be so obligated under his bid only if receipt of the amendment was acknowledged prior to bid opening.

In your letter of November 22, 1971, to the contracting officer, you rely on our decision in 40 Comp. Gen. 48 (1960). That case involved an addendum which contained wage rates and which was physically attached to the specifications prior to issuance of the IFB and delivered to the bidder as a part of the total bid package. We concluded that the bidder must have had actual knowledge of the addendum and that by submitting a bid on the basis of the bidding documents which included the addendum, he had agreed, in effect, to pay the minimum wages set forth in the addendum. We held that in those circumstances the bidder had manifested his assent to the terms of the addendum prior to bid opening and that the failure to otherwise formally acknowledge the addendum could be waived. That decision is not applicable here, since the wage amendment was issued separately at a later date and your client did not in any way manifest assent to be bound thereby prior to bid opening. See B–160257, December 15, 1966.

As we stated in B–171062, December 17, 1970:

* * * the controlling consideration in this and similar cases is that where a bidder fails to acknowledge an amendment of substance, his bid is nonresponsive because acceptance of the bid in the form it exists at the time of opening would not result in a contract containing a statement of the minimum wage rates to be paid as required by the Davis-Bacon Act, 40 U.S.C. 276a. See B–169581, May 8, 1970.

For the foregoing reasons, we must concur with the contracting officer's decision to reject your client's bid and your protest is accordingly denied.

[B–174608]

Bids—Mistakes—Correction—Still Lowest Bid

An error in addition of the subcontract column on the final summary and estimate sheet of a bid submitted under an invitation issued for the construction of a Veterans Administration hospital addition may be corrected and the bid still the low bid considered for award, notwithstanding that although the preliminary estimate sheets were initialed and dated to indicate when and by whom prepared and checked, the final summary and estimate sheet does not contain such information since the documentary evidence submitted to prove error indicates the figures inserted in the final summary and estimate sheet, particularly the erased and reentered figures, represent actual subbids or estimates and substantiate the entries were made before bid submission, and the evidence establishing both the mistake and the actual bid intended meets the requirements for correction of an error in bid price prior to award.

To the Administrator, Veterans Administration, February 11, 1972:

Reference is made to letter 134G dated December 21, 1971, with enclosures, from the Director, Supply Service, Department of Medicine and Surgery, furnishing a report relative to the protest of Robert E. McKee, Inc., against the correction of the bid submitted by the Donovan Construction Company of Minnesota, under an invitation for bids covering specification No. 6912R–AE, project No. 02–5140.

The invitation, issued by W. C. Kruger and Associates and Elmo K. Lathrop and Associates, a joint venture, on behalf of the Veterans Administration, requested bids, to be opened November 24, 1971, for furnishing materials and labor and performing all work necessary for the construction of a 328-bed addition at the Veterans Administration Hospital, Phoenix, Arizona. The abstract of bids shows that six bids were received ranging from $17,520,000 to $20,046,000. The lowest bid was submitted by the Donovan Construction Company. The Government's estimate for the work was $19,834,000.

On November 26, 1971, the Office of Construction received a telegram from Donovan alleging that an error in addition in the amount of $450,000 had been made in adding the subcontract column on the final summary and adjustment sheet used in preparation of its bid. On November 30, 1971, Donovan was requested to submit all supporting evidence and on December 7, 1971, Donovan submitted all the

original worksheets, including the final summary and adjustment sheet. Also submitted were the affidavits of eleven employees who jointly prepared the worksheets. The final summary and adjustment sheet shows in the subcontract column the prices quoted by various subcontractors, as well as prices for various items of work to be accomplished by the prime contractor, Donovan. The total of these prices is shown on the sheet as being $15,415,540 although the correct arithmetical total for the prices is $15,865,540, a difference of $450,000. In its telegram of November 24, 1971, Donovan requested that its bid price for the work be increased by $450,000 to $17,970,000.

It is Donovan's contention that the error on its final summary and adjustment sheet was made by one of its estimators, Mr. William F. Willoughby. In an affidavit dated January 20, 1972, Mr. Willoughby states that late in the afternoon on November 23, 1971, the day before bid opening, he was requested, among other things, to re-add the various columns for material, labor and subcontract costs on the final summary and adjustment sheet and that in so doing he inexplicably made a $450,000 error in his addition of the subcontract column, erasing the total previously written at the foot of that column and inserting the figure of $15,415,540 in its place. The affidavit further states that this mistake was carried through the various calculations made thereafter so that the Donovan bid as submitted was $450,000 lower than actually intended.

In his report of December 21, 1971, in which it is recommended that Donovan not be permitted to correct its bid price, the Director, Supply Service, stated that the laboratory report received from the Director, Investigation and Security Service, confirms the contracting officer's findings that "numerous alterations" were made by Donovan's employees on the final summary and adjustment sheet. The report further states that while the preliminary estimate sheets have initials and dates indicating when and by whom they were prepared and checked, the final summary and estimate sheet does not contain such information. In view of the omission of the foregoing information from the final summary and adjustment sheet, the Director concludes that it cannot be established with any certainty when the erasures on the final summary and adjustment sheet were made and that for this reason he does not believe that the facts in this case are sufficiently clear to establish specifically what bid was intended by Donovan.

In further support of the recommendation that Donovan not be permitted to correct its bid, the report refers to a prior invitation for the subject work which was canceled because of funding problems. Upon resolicitation, the project was redesigned to include an automatic transport system to cost an additional $1,500,000 to $2,000,000.

The report states in this regard that while the worksheets show that Donovan estimated the cost of the automatic transport system to be $1,800,000, the firm increased its previous total bid price by only $855,000, whereas McKee increased its previous total bid price by $1,386,000. In this connection, however, it should be noted that but for the $450,000 error in addition claimed to have been made by Donovan, its current total bid price would have been some $1,300,000 more than its previous bid, an increase comparable to that quoted by McKee.

By letter and telegram dated November 30, 1971, McKee protested against correction of Donovan's bid on the grounds that such action would be unfair to McKee and all other bidders on Government projects. McKee stated that if Donovan made an honest mistake in its bid, whereby it is entitled to relief, such relief should be limited to permitting it to withdraw its bid.

Our Office has frequently held that to permit correction of an error in bid prior to award, a bidder must submit clear and convincing evidence that an error has been made, the manner in which the error occurred and the intended bid price. 49 Comp. Gen. 480 (1970). The same basic requirements for the correction of a bid are found in section 1-2.406-3(a)(2) of the Federal Procurement Regulations (FPR) which provides:

> A determination may be made permitting the bidder to correct his bid where the bidder requests permission to do so and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. * * *

While the Donovan final summary and adjustment sheet contains numerous erasures, as indicated in the administrative report, it is conceded by the report that erasures on a worksheet of this type should not be considered to be unusual. The important consideration is not whether erasures have in fact been made but whether it can be demonstrated that the entries in the subcontract column of the final summary and adjustment sheet, particularly those which have obviously been erased and reentered, were, in fact, made before bids were submitted. In this regard, in addition to the final summary and adjustment sheet, Donovan has submitted a recapitulation of the low subbids used in the formulation of its bid, including certain subitems to be performed by Donovan itself rather than by subcontractors. More importantly, Donovan has also submitted an exhibit (exhibit 5) consisting of the actual subbids submitted by prospective subcontractors for those items intended to be subcontracted and the internal estimates used to formulate prices for those subitems to be self-performed. In all but six instances the final subbid prices indicated on the final summary and adjustment sheet (and also on the subbid recapitulation) are substantiated by the papers contained in exhibit 5. The six items not substantiated do not represent a significant dollar amount when compared to

the amount of the claimed mistake and none of these six items is among the final summary and adjustment sheet entries which were erased and reentered. Accordingly, we believe that the existence of documentary evidence indicating that the majority of the figures inserted in the final summary and adjustment sheet (particularly those figures which have been erased and reentered) represent actual subbids or estimates is sufficient proof that such entries were, in fact, made before submission of the Donovan bid.

While Donovan alleges that its intended bid price for the project was $17,970,000, this figure does not include any amount for increased markups for "Use Tax and Bond," "contractor's fee," or use tax on the contractor's fee. Donovan maintains that the additional amount for markups would be $12,449 (markup for contractor's fee and use tax on fee on the $450,000 mistake). Donovan has stated, however, that if the evidence submitted by it does not establish the amount of the additional markups, it wishes to waive any claim to the amount covering such markups. While the final summary and adjustment sheet does show that Donovan added certain amounts to its subtotal bid price to cover the aforementioned markup items, such summary sheet does not show that fixed percentages were used in arriving at the amounts of the vaious markup items and we therefore cannot determine with certainty what the amount of the markup items would have been absent the mistake.

Accordingly, the bid of Donovan should be corrected to show a total bid price of $17,982,449 for the project and such bid, as corrected, which will be still the lowest bid received, should be considered along with the other bids received for purposes of making an award.

[B–150004]

Property—Public—Private Use—Receipts Disposition

The revenues received by the Smithsonian Institution from several activities at the National Zoo may be deposited into the Treasury to the credit of the Institution under section 5589, Revised Statutes, 20 U.S.C. 53, since the requirement for the deposit of gross receipts from activities supported by appropriated funds into the general funds of the Treasury as miscellaneous receipts, pursuant to section 3617, Revised Statutes, need not apply to Zoo operations that receive support from trust funds and gifts, and are conducted under the authority of the original trust charter and the 1846 Organic Act and not on the basis of real property rights. However, as the bulk of the administration of Zoo activities will continue to be supported by appropriated funds, books should reflect the gross amount of receipts realized from the Zoo activities that are supported by appropriated funds and a full disclosure made to the Congress. 42 Comp. Gen. 650, modified.

To the Secretary, Smithsonian Institution, February 15, 1972:

By letter dated January 24, 1972, you advised that the Smithsonian Institution receives revenues from several activities at the National

Zoo and proposed that in accordance with Smithsonian practice in other areas such revenues be deposited into the Treasury to the credit of the Smithsonian Institution under the provisions of section 5589, Revised Statutes, 20 U.S.C. 53. In view of our holding in 42 Comp. Gen. 650 (1963) it would appear any revenues produced from activities at the Zoo supported by appropriated funds would be for deposit to miscellaneous receipts under Revised Statutes 3617, 31 U.S.C. 484. You request a reconsideration of that decision. This matter has been the subject of considerable informal discussion between the staffs of our Offices for the past year.

In 42 Comp. Gen. 650 (1963) we ruled that a proposed agreement with the Friends of the Zoo was subject to the statutory requirements for formal advertising of public contracts. In that case the operation of the Zoo by the Smithsonian Institution was treated in the same fashion as a Government agency insofar as the Revised Statutes providing for congressional control are concerned. Specifically, we held that "It is our understanding that the National Zoological Park is the property of the United States and not a part of the lands appropriated to the Smithsonian Institution by section 4 of the act of August 10, 1846, 9 Stat. 104 (20 U.S.C. 52)" and that the Regents of the Smithsonian Institution in directing Zoo operations under the act of April 30, 1890, 20 U.S.C. 81, are subject to all limitations and restrictions applicable generally to administrative officials of the Government. We stated that Congress has guarded its appropriation prerogatives under the Constitution by enacting from time to time general statutes which are designed to withstand any possible encroachment by the executive department. Insofar as the present question is concerned, we pointed out that to insure that the executive shall remain wholly dependent upon the appropriation process, the gross amount of all monies received from whatever source for the United States are for deposit to the Treasury under section 3617, Revised Statutes.

Included in the contentions made by the Smithsonian Institution against the application to the Institution of section 3617, Revised Statutes, are that:

(1) the receipts arising from Smithsonian's activities supported in part by annual appropriations are properly for deposit into the Treasury to the credit of the Smithsonian Institution in the same manner as all other receipts as provided by section 5589, Revised Statutes, 20 U.S.C. 53;

(2) the "gross amount" requirements of Revised Statutes 3617 can never apply to Smithsonian Institution activities since all of its activities are supported by trust funds which are entitled to reimbursement;

(3) the rationale of the Government rule against illegal augmentation, which stems from Revised Statutes 3617, obviously cannot apply to the Smithsonian Institution because it has always had its appropriations augmented by gifts; and with regard to the Zoo, were it not for the gift of animals, there would be no Zoo; and,

(4) the question of where title to the Zoo vests is largely symbolic since the authority of the Regents over the Zoo is not founded on real property rights but rather, as in the case of all Smithsonian Institution activities, is found in the charter of the original trust and the Organic Act to conduct the activities of the Smithsonian Institution "for the increase and diffusion of knowledge among men." Thus, even if the Zoo is U.S. property such fact would not make its administration by the Smithsonian Institution Regents subject to Government rules that are in conflict with the independent statutory authority of the Smithsonian Institution.

It is not necessary to restate here at greater length the contentions advanced by the Smithsonian Institution in support of the inapplicability of Revised Statutes 3617 to Zoo operations nor to discuss them individually. Suffice it to say that upon reviewing all of the contentions now presented and the justifications therefor we agree that the requirements for the deposit of gross amounts of receipts from activities supported by appropriated funds into the general fund of the Treasury as miscellaneous receipts need not apply to Zoo operations. Accordingly, insofar as 42 Comp. Gen. 650 (1963) would require the application of section 3617 of the Revised Statutes to receipts realized from Zoo operations that decision will not be followed.

It remains a fact that the bulk of the administration of Zoo operations will, as in the past, be mainly supported by appropriated funds. Accordingly, it is expected that books will be maintained in such detail as to reflect clearly the gross amount of receipts realized from Zoo activities supported by appropriated funds and that full disclosure will be made to the Congress of amounts received from Zoo operations.

[B-174754]

Bonds—Bid—Penal Sum Omitted

The criteria for the determination that a bid bond submitted with a bid is sufficient is whether the surety intends to be obligated for a sum certain and objectively manifests such an intent. Therefore, where the bid bond accompanying the low bid omitted the penal sum required by the invitation but the surety signed and sealed the bond, which was referenced to the specific invitation that the bid was submitted on, the rejection of the low bid was erroneous and the bid should be reinstated since the surety knew the extent of the obligation undertaken and in issuing the bond manifested the intent to be bound in the required penal sum.

To the Secretary of the Interior, February 16, 1972:

Reference is made to a letter, 1333, with enclosures, dated December 17, 1971, from the Bureau of Reclamation, Engineering and Research Center, Denver, Colorado, responding to the protest of United Power & Control Systems, Inc. (United), regarding invitation for bids (IFB) DS-6917.

United's protest questions the propriety of the contracting officer's rejection of its low bid as nonresponsive because no penal sum had been inserted in the bid bond accompanying its bid as required by the invitation. The bid bond was otherwise properly completed. We believe that United's protest has merit and that the rejection of its bid, under the circumstances here present, was improper.

We are of the opinion, with respect to the requirement for submission of a bid bond with a bid, that the sufficiency of the submitted bond is to be ascertained by two criteria. First, the surety must have intended to be obligated for a sum certain and, second, such intent must be objectively manifested.

In the present case, the low bidder obtained from the surety and submitted with its bid a bid bond, signed and sealed by the surety, which referenced the specific invitation on which the bid was submitted. In the circumstances, we conclude that the surety knew the extent of the obligation it was undertaking and that by issuing the bond it manifested its intent to be bound. To reach a contrary conclusion would require us to ignore the fact of bond issuance and the preceding preliminary acts on the parts of the surety such as signing and sealing the bond form and attaching thereto a power of attorney showing the authority of its attorney-in-fact. Given the surety's prior knowledge of the amount required, these actions must be assigned a reasonable significance which we take to be that the surety intended to be bound in the required penal sum.

Accordingly, we recommend that United's bid be reinstated.

[B-173865]

Transportation—Household Effects—Military Personnel—Election of Benefits—Irrevocable

The election by an Army Reserve second lieutenant incident to graduation from Officer Candidate School at Fort Benning and assignment to 2 years' active duty there, to move his household goods rather than his housetrailer from his home of record to Columbus, Georgia, where he had rented an apartment, because he anticipated duty in Vietnam, may not be revoked when the overseas orders were cancelled, and the member paid the trailer allowance authorized in 37 U.S.C. 409 in lieu of a dislocation allowance and shipment of baggage and household goods. Unless erroneously informed of benefits an election is irrevocable, for an additional election or reelection may not be authorized, and finality in the settlement of claims is essential. Since the member was aware of the amounts pay-

able whatever his election and he chose to move his household goods as the most beneficial arrangement for him, he is not entitled to an adjustment of cost.

To Lieutenant Colonel R. E. VanDerLike, Department of the Army, February 18, 1972:

We refer further to your letter dated May 20, 1971, with attachments, forwarded here by indorsement dated August 13, 1971, of the Per Diem, Travel and Transportation Allowance Committee (Control No. 71–32), in which you request an advance decision regarding the entitlement of Second Lieutenant Daniel A. Bigley, USAR, to reimbursement of the cost of transporting his house trailer from Damariscotta, Maine, to Columbus, Georgia.

After graduation from the Officer Candidate School at Fort Benning, Georgia, Lieutenant Bigley was ordered to 2 years' active duty and was assigned to Fort Benning by Special Orders Number 105, May 6, 1970, Headquarters The Candidate Brigade, United States Army Infantry Center, Fort Benning, Georgia 31905. His home of record was New Harbor, Maine. The member was authorized to ship his household goods to Fort Benning by Special Orders Number 109, May 11, 1970, same headquarters.

In May 1970, Lieutenant Bigley moved his household effects in a U-Haul trailer from Damariscotta, Maine, to Columbus, Georgia, for which he received $49.60 as reimbursement for the cost of trailer rental.

By Special Orders Number 279, October 6, 1970, Headquarters United States Army Infantry Center, Fort Benning, Lieutenant Bigley was directed to proceed in March 1971 on a permanent change of station to United States Army Republic of Vietnam Transient Detachment, APO San Francisco, California 96384. The issuing authority revoked the permanent change-of-station orders by Special Orders Number 351, dated December 17, 1970.

On December 28, 1970, the member personally authorized the shipment of his house trailer (purchased on February 1, 1970), from Damariscotta, Maine, to Columbus, Georgia, where it was delivered in January 1971. According to Lieutenant Bigley, shipping charges of $1,875 were paid by him from his own funds. He has submitted a supplemental claim for reimbursement for the cost of transporting the house trailer.

Lieutenant Bigley has said that he was advised that it was normal assignment procedure for newly commissioned second lieutenants to be sent to the Republic of Vietnam within 6 to 9 months of initial assignment. Therefore, in view of the short period he expected to remain at Fort Benning, the member says he wished to avoid the personal expenses in excess of the authorized allowance which would be incurred in moving his mobile home from Maine to Georgia and back to Maine.

Consequently, he moved only his household possessions and rented an apartment in Columbus, Georgia.

Upon revocation of orders for duty in Vietnam, Lieutenant Bigley says that he was informed by the Officer Assignment Branch of the Department of the Army that he would remain at Fort Benning until May 14, 1972, the scheduled date of termination of his active duty. After receiving this assurance and in view of the financial burden of making payments on the mobile home in Maine which Lieutenant Bigley says he had been unable to rent, plus the rent for a home in Columbus, he decided to move the mobile home to his duty station.

He states that he inquired with respect to such movement at the transportation office at Fort Benning where he was told that since he had been paid previously for transportation of his household goods under his orders dated May 11, 1970, which provided authority for permanent change-of-station transportation allowances, he was not entitled to the movement of his mobile home at Government expense under those orders and he was referred to the local office of a commercial transporter. Shortly thereafter, Lieutenant Bigley personally authorized the commercial shipment of the mobile home at his expense.

In these circumstances, you ask if under the provisions of paragraphs M10001 and M10002–2 of the Joint Travel Regulations, the member validly may be allowed to repay the amount he received for the movement of his household goods and submit a claim for trailer allowance. If such claim is permissible, you wish to know which method of computation would be proper: Official distance authorized at $.74 per mile, less previous payment of $49.60; actual cost the Government would have allowed, $973.10, less the previous payment; or cost comparison between the above methods and pay lesser amount and deduct the previous payment.

Section 406(b) of Title 37, United States Code, provides for the transportation of baggage and household effects of members of the uniformed services in connection with a change of station. Section 409 of the same title states that under regulations prescribed by the Secretaries concerned and in place of the transportation of baggage and household effects or payment of a dislocation allowance, a member who would otherwise be entitled to transportation of baggage and household effects under section 406 may transport a house trailer or mobile dwelling within the continental United States, within Alaska, or between the continental United States and Alaska, for use as a residence.

Paragraph M8253–4 of the Joint Travel Regulations provides that for officers commissioned from the ranks, including graduates from officer candidates' schools, shipment of household goods is authorized from home to the new permanent duty station, including the place at

which the member is commissioned, if such place is, in fact, the first permanent duty station as a commissioned officer.

Paragraph M10001–1 defines a house trailer as a residence designed to be moved overland. It includes all household goods, personal effects and professional books, papers, and equipment contained in the trailer and owned or intended for use by the member or his dependents.

Paragraph M10002 of the Regulations provides, with certain exceptions not here applicable, that any member of the uniformed services who would otherwise be entitled to have his household goods transported at Government expense is entitled to trailer allowances provided certain conditions exist including: (1) that the house trailer is acquired on or prior to the effective date of the member's orders and is to be transported for use by the member, his dependents, or both, as a residence; and (2) the member elects trailer allowances in lieu of both the dislocation allowance, if eligible therefor, and transportation of baggage and household goods (par. M10002–2).

Paragraph M10014 of the regulations requires that applications for Government transportation of a house trailer and claims for reimbursement for transportation of a house trailer will be supported by a statement over the member's signature to the effect that: he understands that application for shipment or acceptance of payment for the transportation of his house trailer precludes receipt of the dislocation allowance and shipment of baggage and household goods within the United States, within Alaska, or between the United States and Alaska, as applicable; he has not made and will not make claim for the dislocation allowance; and he has not requested and will not request shipment of permanent change-of-station weight allowance of household goods at Government expense within the United States, Alaska, or between the United States and Alaska, as applicable.

Pursuant to 37 U.S.C. 409, paragraph M10002 of the Joint Travel Regulations provides for a member's election of trailer allowances in lieu of both a dislocation allowance, if eligible therefor, and transportation of baggage and household goods. While the law does not specifically preclude a change in the member's election from the shipment of household goods to a trailer allowance, it apears to contemplate that once a member makes an election and receives reimbursement for transportation of household goods at Government expense, the election is irrevocable and he may not thereafter change his election. To hold otherwise would in effect permit an additional election or reelection which is not authorized. Additionally, this would result in a lack of finality in the settlement of such claims.

Where a member was erroneously informed as to the benefits to which he was entitled we have held that he should not be bound by his election and we have permitted a change in election. See decision

B–158509, March 22, 1966, copy enclosed. However, such circumstances must be distinguished from those in which a member has knowledge of his rights but a change in circumstances subsequent to his election indicates that a different election would be more beneficial.

The record before us shows that Lieutenant Bigley was fully aware of the proper amounts to be received either for trailer allowances or for movement of his household goods and that he elected to move his household effects because he thought that arrangement would be the most beneficial in view of the expected short duration of his stay at Fort Benning. Afterwards, only when he had been unable to rent his house trailer in Maine and it became clear that he would remain at Fort Benning for the duration of his tour of duty did Lieutenant Bigley seek to transport his house trailer to his duty station. However, the fact that he could not rent his house trailer and did not receive a change of permanent station as he had expected, a circumstance common to members of the uniformed services, may not serve as the basis for the invalidation of his prior election to receive reimbursement for the movement of his household goods.

In view of the foregoing, Lieutenant Bigley is not entitled to reimbursement of the cost of transporting his house trailer from Damariscotta, Maine, to Columbus, Georgia. As the claim for the difference between the previously paid household goods allowance and a trailer allowance may not be allowed, it is not necessary to consider the method of computation of trailer allowance in such circumstances.

[B–174275]

Quarters Allowance—Availability of Quarters—Assignment Delayed

A Navy ensign, without dependents, who while on temporary duty in connection with fitting out a vessel was not assigned Government bachelor quarters for more than 2 months after reporting for duty, although he was aware of their availability within a few days after his arrival, and who for the period prior to quarters assignment was credited with a basic allowance for quarters (BAQ) under 37 U.S.C. 403(f), and resided, without authority, in the civilian community and was paid per diem, is not considered to have been involuntarily assigned to quarters occupancy since he was aware of the availability of quarters and the assignment policy in effect at the Command and, therefore, his residency in the civilian community was for his own convenience. Although the payment of BAQ prior to the assignment of quarters will not be questioned, there is no authority for further payment of a basic allowance for quarters.

To Lieutenant T. A. Kelly, Department of the Navy, Februruary 18, 1972:

By letter dated October 4, 1971, the Director, Navy Military Pay System, transmitted your letter of May 4, 1971, with enclosures, requesting a decision as to the entitlement of Ensign Doyle L. Arnold,

SC, USNR, to basic allowance for quarters (without dependents) in the circumstances presented. The request has been assigned to Control No. DO–N–1134 by the Military Pay and Allowance Committee, Department of Defense.

Ensign Arnold was directed by Bureau of Naval Personnel Order No. 100737, dated November 20, 1970, to proceed, upon completion of temporary duty under instruction at Athens, Georgia, and when directed on or about December 17, 1970, to Commander, Eighth Naval District, New Orleans, Louisiana, for temporary duty in connection with the fitting out of the *U.S.S. Paul* (DE-1080). The orders provided for further temporary duty, when further directed, at the First Naval District, Boston, Massachusetts, and to report on board that vessel for duty upon its commission.

Second endorsement by Commandant, Eighth Naval District, dated December 29, 1970, to the orders of November 20, 1970, stated that the member reported for temporary duty at 1400 on December 29, 1970. It is stated further that Government quarters and messing facilities were not available; however, "quarters will be available in the near future." By third endorsement dated Decembr 31, 1970, it was stated that Government quarters were available as of 0900 December 30, 1970. A further notation (said to have been typed on March 12, 1971), stated that Government quarters were assigned on March 12, 1971.

In a letter dated April 26, 1971, Ensign Arnold protested the assignment of quarters, contending that the assignment was contrary to the provisions of paragraph F(5), Enclosure (2) to Office of the Chief of Naval Operations Instruction (OPNAVINST) 11012.2A dated September 28, 1967, which he quoted. That paragraph is to the effect that a member in a travel status once authorized to reside in the civilian community (while on temporary duty) shall not be involuntarily assigned to occupancy of Navy bachelor quarters during that tour of duty except for cause. He said further that the assignment was disadvantageous to the Government in that quarters were leased on an as required basis and it cost more to lease such quarters than to pay basic allowance for quarters.

In your request dated May 4, 1971, you say that the member was credited basic allowance for quarters (BAQ) from December 17, 1970, through March 11, 1971, under conditions where Government quarters were available but not assigned, citing Rule 14, Table 3–2–3, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) as authority. Credit was terminated after the Director of Military Personnel, Eighth Naval District, was informed on March 12, 1971, that entitlement to BAQ (PCS) was governed by the assignment of Government quarters.

You cite a message of April 1971 from the Chief of Naval Personnel as indicating that Government quarters could not be available and yet not be assigned and you question whether credit of BAQ through March 11, 1971, was authorized. You therefore ask whether the member is entitled to any credit for basic allowance for quarters, based on the provisions of Rule 14, Table 3–2–3, DODPM and Navy Comptroller Notice 7220, dated May 15, 1969, or whether such allowance should be credited from March 12, 1971, based on the provisions of OPNAVINST 11012.2A, dated September 28, 1967. You indicate that the member was paid per diem at $11.80 commencing December 30, 1970, which, in accordance with paragraph M4205–5, table item d(2)(a) and footnote s, Joint Travel Regulations, is authorized for officers on temporary duty at an installation where Government quarters are available and Government mess is not available.

In a letter dated June 4, 1971, the Director, Navy Military Pay System, advised the Chief of Naval Operations that, under applicable regulations, it is the assignment to rather than the availability of Government quarters which is the governing factor insofar as the officer's BAQ entitlement is concerned prior to March 12, 1971, but his entitlement thereafter was contingent on whether a valid assignment to quarters was made.

By second endorsement to that letter, the Commandant, Eighth Naval District, indicates that it was thought at that command that availability and assignment were the same and therefore no assignment was made of available quarters until March 12, 1971, at which time it was learned that quarters must be assigned to preclude payment of basic allowance for quarters. He says, however, that the member was told on reporting that adequate bachelor quarters would be available within the next few days and because the member knew about the availability, his decision to move ashore was his own. The Commandant further indicates that the member was not in fact involuntarily assigned to occupancy of Government quarters on March 12, 1971, since he had not been authorized to obtain civilian quarters.

By third endorsement the Chief of Naval Personnel cited 48 Comp. Gen. 216 (1968) as apparently being applicable to this case. This decision states that quarters, although available, must be administratively assigned by the local commander or other responsible official pursuant to service directives before the entitlement to BAQ is affected. He says that the quarters in question in this case were leased to be available to members assigned on temporary duty in connection with the construction of new ships in order to reduce per diem costs. They were therefore "available" on an "as required" basis for the purpose of reducing per diem.

The Chief of Naval Personnel says further that it was understood that the leased quarters were originally not assigned to single officers who did not desire the quarters, because the lease costs exceeded the BAQ. Since, he says, the quarters were assigned on March 12, 1971, only to satisfy the requirements of the DODPM to preclude payment of BAQ, it is considered that significant cause had not been shown to involuntarily assigned the quarters as required by the provisions of OPNAVINST 11012.2A. He therefore recommends payment of the claim.

Section 403(f) of Title 37, United States Code, provides that a member without dependents who is in pay grade E–4 (4 or more years' service), or above, is entitled to a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay enroute or proceed time, when he is not assigned to quarters of the United States. Subsection (g) of section 403, provides that the President may prescribe regulations for the administration of section 403.

Section 403 of Executive Order No. 11157, June 22, 1964, as amended (including Executive Order No. 11511, February 27, 1970, 35 F.R. 3877), issued under that authority, provides in pertinent part that any quarters or housing facility under the jurisdiction of any of the uniformed services "in fact occupied without payment of rental charges * * * (b) by a member without dependents * * * shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances," with exceptions not here pertinent.

Paragraph 30212, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), promulgated pursuant to section 407 of the Executive Order, provides that the base or installation commander assigns and terminates assignment of quarters. He also determines whether quarters are "adequate" and "suitable" for assignment. Rule 14, Table 3–2–3 of that manual, provides that when an eligible member without dependents is in a travel status on permanent change of station, basic allowance for quarters does not accrue if he is assigned quarters, or occupies transient quarters for any period in excess of 30 days.

Implementing Navy Department instructions, contained in Office of the Chief of Naval Operations Instruction (OPNAVINST) 11012.2A, dated September 28, 1967, provide in Enclosure (2) thereof, that in accordance with the pertinent Executive order, commanding officers are legally required to assign all available adequate Navy bachelor quarters promptly to eligible personnel. Quarters determined to be adequate shall be fully utilized at normal capacities. As a policy

matter, there is no requirement that members without dependents permanently assigned, or members in a travel status, reside in Navy bachelor quarters except to fully utilize existing adequate accommodations or as dictated by military necessity.

Paragraph D(9) of Enclosure (2) provides that commanding officers shall advise in writing each newly assigned officer whether adequate accommodations will be available for immediate occupancy and indicate whether either involuntary assignment will be made to adequate quarters; adequate (or inadequate) accommodations will be made available on an optional basis, or BOQ accommodations will not be available during his tour of duty. Paragraph F(5) of that Enclosure, as quoted in part by the member, provides that, except for cause, a member without dependents and in a travel status, once authorized to reside in the civilian community shall not be involuntarily assigned to bachelor quarters during his tour of duty in the same area. It provides further that to fully utilize bachelor quarters which become available, the commanding officer shall make assignments thereto from among eligible personnel newly reporting, before a commitment for civilian community housing is made by such individual.

Under the provisions of 37 U.S.C. 403(f) as amended, a member without dependents is entitled to a basic allowance for quarters while in a permanent change-of-station travel status "when he is not assigned to quarters of the United States." However, the law obviously does not contemplate the payment of a quarters allowance to an officer without dependents, in grade O–1, who is assigned adequate Government quarters.

We have held that the assignment of public quarters to members, and their dependents, if with dependents, is primarily an administrative matter. 39 Comp. Gen. 561 (1960); 48 *id.* 216 (1968). The mere availability of quarters to an officer which could have been assigned to him does not defeat the right of that officer not assigned to such quarters to basic allowance for quarters. 48 *id.* 216. However, under the pertinent statutory provisions, claims for payment of basic allowance for quarters are for determination on the basis of the facts appearing in the case rather than a specific administrative authorization or certification that is contrary to the actual facts. 39 *id.* 561; 48 *id.* 216.

It would seem from the information in the case that through an error in interpretation by the Eighth Naval District Command of the distinction between "availability" of quarters for per diem purposes and "assignment" of quarters for basic allowance for quarters purposes, Ensign Arnold's orders were endorsed on December 31, 1970, to read that quarters were available on December 30, 1970, when he should have been assigned quarters and his orders endorsed accordingly.

In his statement, the Commandant, Eighth Naval District, says that the member was advised when he reported aboard that command on December 29, 1960, that adequate bachelor housing (leased quarters) would be available within the next few days and there is nothing to indicate that he was authorized to reside in the civilian community. The record shows that quarters were made available on December 30, 1970. The Commandant contends that Ensign Arnold knew and understood that Government quarters would be available to him in a few days. This is substantiated by the fact that commencing December 30, 1970, the member was paid per diem for temporary duty on the basis that Government quarters were available. The Commandant therefore contends further that it may not be said that the member was in fact involuntarily assigned to occupancy of quarters and that the decision to move ashore was the sole decision of the member.

It seems reasonably clear that adequate quarters were made available to Ensign Arnold on or about December 30, 1970, and he was aware of their availability. Also, in view of the assignment policy in effect at that command of which presumably he was aware, he was not officially authorized to reside in the civilian community and we concur with the view of the Commandant that the member maintained a residence in the civilian community for his own convenience. 39 Comp. Gen. 561. However, in the absence of an assignment of quarters, we will not question the payment of basic allowance for quarters for the period prior to March 12, 1971. But, after he was assigned Government quarters on March 12, 1971, there was no authority for the further payment of basic allowance for quarters.

Accordingly, payment of any additional basic allowance for quarters is not authorized. The enclosures received with your letter will be retained here.

[B-173244]

Contracts—Specifications—Minimum Needs Requirement—Erroneously Stated

The award of a contract under an invitation for bids to furnish a plant growth chamber complex to the low bidder who was nonresponsive to the specification dimensions should be terminated for the convenience of the Government, notwithstanding the contracting officer believes the offer satisfies the needs of the Government since the deviation affects quality and price and, therefore, the award was improperly made. The procurement should be resolicited to reflect the Government's actual needs, and the revised specification should eliminate both the open-ended delivery provision, because it does not provide a definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of the bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B-173244, August 16, 1972.

To the Secretary of Agriculture, February 22, 1972:

Reference is made to the letter of July 8, 1971, and subsequent correspondence, from the Acting Director, Office of Plant Operations, regarding the protest of Environmental Growth Chambers against award of a contract to Scientific Systems Corporation, under invitation for bids No. 96-RN-ARS-71 issued by the Agricultural Research Service, New Orleans, Louisiana.

The solicitation, issued on April 28, 1971, was for a plant growth chamber complex. The following two bids were received and opened on May 28, 1971:

Scientific Systems Corporation (SSC)	$54,804
Environmental Growth Chambers (EGC)	74,956

On June 9, 1971, the contracting officer received a letter from EGC protesting any award to the low bidder. On June 14, 1971, award was made to SSC; later on the same day the contracting officer received a copy of the protest filed with this Office, and the next day requested the contractor to withhold performance pending resolution of the protest. The contracting officer states that he proceeded with the award action on June 14, before receiving the formal protest, on the basis of his understanding that EGC had decided not to file a formal protest before award.

The protestor urges several grounds for cancellation of the award, including nonresponsiveness of SSC's bid. In addition, the solicitation itself is attacked as defective.

The specifications required that the "internal chamber dimensions shall be no less than 8 feet wide * * *." The specification sheets submitted by SSC as part of its bid, in a section headed "dimensions" which was completed in ink, indicate that the width of its chamber is 90 inches, 6 inches less than the required 8 feet. The descriptive literature which accompanied the bid also indicates an "I.D." width of 90 inches for the model offered. The protestor claims that this represents a material deviation requiring rejection of the low bid.

The contracting officer, however, denies that there is any deviation. The administrative report states that the low bidder's submission "shows an out-to-out width dimension of 9 feet 3 inches * * * and gross internal detail of equipment installed on both interior sides of the growth chamber. Although no dimensions are given for the internal equipment, a nominal thickness of 4 inches for each would result in a net internal dimension of the chamber of 103 inches * * *. This is well above the minimum requirements of the IFB * * *." The contracting officers further states that the low bidder, when asked to clarify the point, stated that "the gross internal feature represents the air handling ducts which are not an integral part of the chamber wall

construction and that the internal dimension of the chamber itself (wall-to-wall) is indeed 8 feet 7 inches." Thus, it is the position of the contracting officer that the specifications required a distance of 96 inches from the insides of the exterior walls, while the protestor claims that 96 inches of usable space within the chamber was required.

We note that SSC's bid does not state a dimension of 103 inches. The only width dimensions contained in its specification sheets are 111 inches in the column headed "O.D." and 90 inches in the column headed "I.D." This suggests that SSC was not aware of the contracting officer's interpretation of this specification requirement, and had not adopted that interpretation at the time it submitted its bid. Furthermore, at a meeting held in our Office attended by representatives of all the parties to the protest, the individual responsible for drafting the specifications in the IFB indicated that 96 inches of usable space was desired, although he refrained from stating that the IFB as issued actually specified that requirement.

We think the above circumstances indicate that SSC's bid was nonresponsive. The only reasonable interpretation of the specification requirements is that 96 inches of usable space was required. This appears to be the accepted meaning of "internal chamber dimension" for plant growth chambers and is the apparent basis for the various "I.D." figures listed in SSC's descriptive literature. Since SSC's bid clearly offered an internal width dimension of 90 inches, the bid deviated from the specifications, and we think there is no question that this deviation is material as affecting quality and price. See FPR 1-2.301 and 1-2.404-2. Furthermore, the record indicates that the contracting officer was unable to definitely ascertain the responsiveness of the bid, even in accordance with his interpretation of the specifications, without assuming a wall thickness and without seeking clarification from SSC.

In our opinion the low bid was clearly nonresponsive to the specification requirement for the internal chamber dimension. Accordingly, we conclude that the award was improperly made to the low bidder and should be cancelled.

In addition, we are concerned over the use of two clauses in this IFB which we believe to be detrimental to the competitive bidding system. The delivery clause, on page 12 of the IFB did not set any desired or required date of delivery but merely stated:

> Number of calendar days required for delivery and final installation of the equipment they propose to furnish after receipt of Notice of Award: - - ——— calendar days.

The contracting officer supports the use of this clause as follows:

> When time is not of the essence in the procurement of equipment, to place an arbitrary delivery time in the solicitation would have the net effect of (1)

eliminating potential bidders who may not be able to meet such a deadline, (2) cause some increase in bid prices, and/or (3) create an atmosphere for acceptance of stipulated delivery time limitation with the expectation of extending the time later by incremental advances.

We think this open-ended delivery provision is objectionable because it does not provide a definite standard against which all bidders can be measured or on which all bids can be based. Put another way, this clause allows bidders to determine the delivery date without any specified limitation whatsoever, and we think it is reasonable to assume that a variation in offered delivery dates can be directly responsible for variations in bid prices, thus giving a bidder who offers a later delivery date a possible price advantage. Should there be a wide variation in offered delivery dates, the contracting officer would not be able to consider delivery time in making award since it was not specified as an evaluation factor, and he would have to make award to the low responsive bidder or cancel the solicitation. 49 Comp. Gen. 713 (1970).

We have upheld invitations permitting bidders to select a delivery date so long as the date was within a stipulated or reasonable time after a "desired" date specified in the invitation. See 46 Comp. Gen. 745 (1967) and cases cited. However, we have made it eminently clear that a failure to include a required or desired delivery date in an invitation is improper and grounds for cancellation. In the cited case, the IFB requested bidders to specify the time for delivery, but further provided that a failure to so specify would result in an allowable delivery period of 90 days. While we held that this provision was ambiguous because it wasn't clear if a bidder could offer a delivery date in excess of 90 days, we also stated that:

* * * as a matter of policy we feel such open ended delivery terms are unwise in that they afford an opportunity for the arbitrary inclusion or exclusion of bids. Even granting impartial consideration, these undefined delivery terms can only result in uneven and unpredictable treatment of bidders because reasonable men will differ on what constitutes a reasonable delivery date under any given set of circumstances. 46 Comp. Gen. 745, 748 (1967).

See also 49 Comp. Gen. 713 (1970) and FPR 1–1.316–2. Accordingly, we strongly urge that in future procurements a definite delivery time be specified.

The other clause, causing us concern, which allowed bid deviations of minor importance, stated:

Bid Deviations

Consideration will be given to items offered which may deviate from the specification particulars provided such deviation is specifically noted and that the deviation from the specification is of minor importance and will not affect the ability of the unit to perform upon an equal basis with competitive units in its class, and otherwise fulfill the service requirements.

Bidders offering equipment or material which deviates from the specification particulars shall prepare a listing of such deviations with a clear description of the deviations. In addition to the listing of deviations, bidders shall furnish tech-

nical information, such as cuts, illustrations, drawings and brochures which show the characteristics or construction of a product or explain its operation. If descriptive literature furnished does not describe in detail salient elements specified herein, additional information shall be provided *with the bid* to cover those elements so that the Government can determine acceptability of the equipment or material offered. Cuts, illustrations, drawings and brochures furnished in connection with deviations listed shall be identified to show the item in the bid to which it pertains. The listing containing all deviations and relevant documents shall be furnished as a part of the bid and must be received before the time set for opening bids. *BIDDERS FAILURE TO FURNISH LISTING OF DEVIATIONS OR EXCEPTIONS AND RELEVANT DOCUMENTS WITH THEIR BID, WILL BE CONSTRUED AS ACCEPTANCE OF THE PROVISIONS OF THE SOLICITATION REQUIREMENTS AND THE GOVERNMENT WILL DEMAND FULL AND COMPLETE COMPLIANCE WITH THE SOLICITATION REQUIREMENTS.*

In prior cases we have indicated that clauses allowing deviations are objectionable because they do not generally permit free and equal competitive bidding. 39 Comp. Gen. 570 (1960); B-159579, July 20, 1966. We believe that the instant clause is objectionable for the same reasons, and has no place in a formally advertised procurement.

While SSC's bid was nonresponsive, we note that the contracting officer believes that the chamber offered by SSC satisfies the needs of the Government. Accordingly, we believe the procurement should be resolicited on the basis of specifications revised to reflect the actual needs of the Government.

[B-174430]

Bids—Late—Mail Delay Evidence—Certified Mail

The low bid to re-roof several plant buildings sent by certified air mail which was not timely received, but a telegram reducing the bid price was, properly was considered for award as the requirements of section 1-2.303 of the Federal Procurement Regulations were satisfied since the late receipt of the bid was due solely to a delay in the mails, and the initialed, certified mail receipt issued indicated the bid should have been timely received, and notwithstanding the omission of the symbol "AIR MAIL" from the bid envelope. The envelope was received as part of an "airmail bundle" and should have been dispatched as airmail and delivered on time, for the omission of the legend where sufficient airmail postage was attached does not mean the envelope was handled as ordinary mail, for the fact that postal regulations require use of the symbol does not preclude designating mail as "airmail" by other acts of the sender.

To A & H Builders, Incorporated, February 22, 1972:

Reference is made to your telegram of October 4, 1971, to the Contract Administrator, Atomic Energy Commission, Rocky Flats Area Office, and your letters to our Office of October 25 and 28, 1971, regarding your protest against the award of a contract to Southern Roofing and Petroleum Co., Inc., pursuant to invitation No. 292-72-1, dated September 1, 1971, by the U.S. Atomic Energy Commission, Rocky Flats Area Office, Golden, Colorado.

The subject invitation requested services necessary to reroof Buildings 444 and 881, Rocky Flats Plant, near Denver, Colorado, in accordance with the specifications and provisions therein contained.

The record indicates that at the time of bid opening, 2:00 p.m. on September 16, 1971, bids were received from three firms, with your firm the low bidder at $696,200. While no bid was received from Southern at the time of bid opening, the file contains a copy of a telegram transmitted by Southern to the procuring activity on the morning of September 16 by which that activity was requested to reduce Southern's bid by $352,302.54. The record also reveals that Southern's base bid of $1,000,000 arrived at the procuring activity at 10:30 a.m., September 17.

Pursuant to paragraph 7(a) of Standard Form 22, Instructions to Bidders, incorporated in the subject invitation and reflecting the requirements of Federal Procurement Regulations (FPR) 1-2.303, bids received after the exact time set for bid opening and sent by registered or certified mail for which an official, dated, post office stamp on the original Receipt for Certified Mail has been obtained (as in the instant case), may be considered if it is determined by the Government that the late receipt was due solely to a delay in the mails for which the bidder was not responsible.

FPR 1-2.303(d) provides that in determining whether the lateness of a bid is due solely to a delay in the mails, information as to the normal time for delivery shall be obtained by the procuring activity from the postmaster, superintendent of mails, or a duly authorized representative of the post office serving that activity.

Pursuantly, a memorandum dated September 20, 1971, reveals that the General Engineer, Construction & Facilities Branch, Rocky Flats Area Office, made such an inquiry of officials in the post offices at Golden, Denver, and Knoxville, Tennessee (the place of mailing), and all agreed that the bid, for which an initialed, certified mail receipt indicated mailing at Knoxville at 11:55 a.m. on September 14, 1971, should have reached the procuring activity by 10:30 a.m. on the morning of September 16, 1971, and that there was accordingly a mistake in handling by the postal service.

In view thereof, it was concluded that Southern's bid was eligible for consideration under the aforementioned provisions and, as the low bidder by virtue of its timely telegraphic modification, Southern was awarded Contract No. AT(29-2)-3057 on October 22, 1971.

The essence of your protest is that by failing to mark its bid envelope "AIR MAIL," Southern's omission was either the sole or contributory cause of the bid's late arrival, and therefore such bid was ineligible for consideration since its lateness could not be attributed solely to a delay in the mails.

You cite section 136.6 of the Post Office Services (Domestic) Regulations instructing senders of airmail to mark it as such. It is contended that a failure to comply with this instruction will result in

routine handling, as opposed to the expeditious handling that is accorded priority mail such as airmail or special delivery.

The record reveals that Southern's certified letter of September 14, 1971, was received by postal officials in Knoxville as part of an "airmail bundle" from Southern, and that normal dispatching [via air mail] would have resulted in the letter's arrival in Denver that same evening at 9:12 p.m., and receipt at the Golden post office by the evening of the next day, September 15, or early in the morning of September 16, sufficiently before 9:00 a.m., to ensure its arrival at the procuring activity by 10:30 a.m., September 16.

Such representations by postal officials as to the chronology of a letter's routing under normal conditions must be given full credence by the contracting agency in its determination to accept a late bid. 50 Comp. Gen. 325, 328 (1970).

The remaining issue to be resolved is whether Southern's failure to label its certified mail envelope "air mail" contributed to its late receipt by causing it to be transmitted as ordinary mail.

You have cited section 168.1 of the referenced postal regulations, which provides a description of certified mail and states, inter alia:

> * * * It will be dispatched and handled in transit as ordinary mail * * *.

However, we do not necessarily concur with your logic that without a legend denoting expeditious handling, certified mail will receive no special treatment, for section 168.2, also applicable to certified mail, provides that such mail may be sent by air upon payment of the required postage. It is noted, significantly, that this section fails to reference any additional requirement, above and beyond the payment of sufficient postage, in order to qualify a certified letter for transmittal by air as opposed to ordinary mail.

The record contains copies of the envelope faces of ten airmail, certified letters transmitted by your firm from Knoxville to the procuring activity, presumably to verify normal delivery periods for such letters. It is noted that the postage (including certified mail fee) on your airmail certified letters is 41 cents per letter while a copy of Southern's envelope (submitted in an airmail bundle) depicts a paid postage of $1.27. This would indicate that the postage was for air as opposed to ordinary transit. Nothing in the record indicates that the postal authorities considered that sum insufficient to transmit the bid by airmail, nor is it conclusively established that the bid was actually dispatched by ordinary as opposed to airmail.

With regard to Southern's failure to mark the envelope as airmail, the record states that its bid was received in Knoxville in an "airmail bundle." In a similar situation, where a late bid was submitted to a Post Office employee with instructions to transmit it by airmail and

with sufficient postage to transmit it by that means, our Office concluded that the bid should in fact have been sent by airmail. 46 Comp. Gen. 307, 314 (1966). In that case, we noted a prior decision of our Office holding that the single fact that a bidder did not mark his envelopes for airmail transportation should not be given undue weight over other mailing facts that might be construed as an instruction to transmit by airmail, the most significant being the insertion of the bid in an airmail chute at the post office.

Our analysis of the circumstances pertaining to the instant case compels us to conclude that the tender of the bid in "an airmail bundle" cannot be legally differentiated from the submission in an airmail chute as regards an act of the sender which will suffice to delineate a bid for airmail in lieu of a specific marking as such by the sender.

Accordingly, the effect of prior decisions of our Office is that Section 136.6 of the cited postal regulations, instructing the senders of airmail to place the word "Airmail" on the face of a letter, does not preclude the designation of mail as airmail by other acts of the sender. In view thereof, and in the light of the cited decision, Southern submission of its bid in an airmail bundle with sufficient postage, coupled with the statements of all postal officials to whom inquiries were made that under normal conditions the bid should have been received prior to bid opening, we must concur that its late receipt was due solely to a delay in the mails for which Southern was not responsible.

While you cite B–151607, June 28, 1963, as support for your position, our perusal of the same reveals that responsibility for the delay in that case was attributed to the bidder because he neglected to instruct a postal employee to send the envelope via airmail, and then ignored the employee's offer to retrieve it from the ordinary mail in order to dispatch it as airmail. Accordingly, we find B–151607 inapplicable to the circumstances at hand.

In view of the foregoing, your protest must be denied.

[B–173976]

Compensation—Increases—Retroactive—Increases Withheld During Wage Freeze

Use of the terms "contract" and "employment contract" in section 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing the payment of wage or salary increases agreed to in an employment contract executed prior to August 15, 1971, to take effect prior to November 14, 1971, but withheld by reason of the wage and price freeze imposed by Executive Order 11615, does not exclude General Schedule and other annual rate Federal employees from the application of the section, and Federal wage board employees are within the purview of section 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-grade increases for both statutory and wage board employees may be paid retroactively as the conditions of section 203(c)(3)(A) and (B) were satisfied to the effect the increases were provided by law or contract prior to August 15, 1971, and funds are available to cover the increases.

To the Chairman, United States Civil Service Commission, February 23, 1972:

Reference is made to your letter dated January 4, 1972, in which you requested our decision on "the applicability of section 203(c) of the Economic Stabilization Act of 1970 (hereinafter "act"), as amended by the Economic Stabilization Act Amendments of 1971, 12 U.S.C. 1904 note [Public Law 92-210], to the Federal Government and, if so applicable, on the effect of the act on within-grade increases for General Schedule (and other annual rates) and wage employees, and to wage-grade schedules, during the period covered by Executive Order 11615. Specifically, if section 203(c) is applicable to the Federal Government—

1. Does this section require the retroactive payment of within-grade (including quality within-grade) increases which would have been paid to General Schedule and other annual rate employees (e.g., Department of Medicine and Surgery and Foreign Service employees) and to wave employees, except for the limitations imposed by Executive Order 11615?
2. Does this section require that wage schedules that would have been effected during the period covered by Executive Order 11615 under 5 U.S.C. § 5343 (1970 ed.) now must be effected (and employees paid as required by 5 U.S.C. § 5344 (1970 ed.)) as of the date the schedules otherwise would have been placed in effect, except for the limitations imposed by Executive Order 11615?

Section 203(c) of the Economic Stabilization Act Amendments of 1971 states:

(c)(1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract) scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (A) related to such wage or salary, and (B) was executed prior to August 15, 1971, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

(3) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

(A) such increases were provided for by law or contract prior to August 15, 1971; and

(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

The above statute contains no express reference to Federal employees. However, we do find in its legislative history a colloquy be-

tween Congressman Patman and Congressman Udall on the floor of the House of Representatives. That colloquy mentions one class of Federal employees, namely overseas teachers of the Department of Defense, as being covered by section 203(c), to the extent they otherwise meet the conditions thereof.

Ordinarily the terms "contract" or "employment contract," as used in the statute, would not embrace Federal employees whose salaries are fixed by law, such as those subject to the General Schedule. Obviously the provisions of section 203(c) could not be applicable to general salary increases in the General Schedule and other statutory systems since such increases were specifically covered by section 3 of Public Law 92-210, 5 U.S.C. 5305 note, and such increases do not meet the conditions specified in section 203(c). However, it is noted that section 3 makes no mention of step increases which are otherwise provided by law or regulation. As to increases authorized by administrative action or through wage board procedures, it cannot be said that such employees serve under "contract" or "employment contract" in the literal sense of those terms.

To determine whether the Congress intended the above terms to be interpreted other than in their literal and usual sense, there are for consideration various statements of the legislators in connection with the statute.

In Conference Report No. 92-753, House of Representatives, it was stated in pertinent part:

> * * * The conferees intended to require retroactive and deferred pay under either the House provisions or the Senate provisions, whichever provision would authorize such payments to be made. The conferees also intended that the provisions relating to employment contracts also apply to wage increases which were scheduled to be paid as a result of an agreement or an established practice but which were not allowed to go into effect because of the 90-day freeze or subsequent controls issued under the authority of this title.

(A similar statement appears in Senate Conference Report No. 92-579.)

In explaining the statement of the House conferees, Congressman Garry Brown, one of the conferees, said:

> * * * when we talked about *contracts we were not talking only about negotiated contracts by organized labor* but talking about contracts, agreements, and understandings *or where there is a scheduled increase* that is understood by both parties. The law does not contemplate disparate treatment between recognized contracts, even though the formality may be lacking, nor between parties to a contract, be they "organized" or not. [Italic supplied.] Congressional Record for December 14, 1971, H. 12528.

In addition, we also note that in his discussion on section 203(c), Congressman Wright Patman of the Committee of Conference stated as to the scope of such section:

> Mr. Speaker, this means that all teachers, *public employees* and others * * * must immediately be paid their wages and salaries that have been withheld

because of orders issued under the Economic Stabilization Act since August 15. This language obviously covers all teachers and *public employees and most other categories of workers on wages and salaries in this Nation.*

* * * * * * * * *

* * * Under the language which was originally adopted by the Senate—and is now incorporated as part of the conference version—all wage and salary contracts for *all classes of employees* must be allowed so long as they do not violate the standards in an unreasonably inconsistent manner (Congressional Record for December 14, 1971, H. 12525.)

From the foregoing it is apparent that the use of the terms "contract" or "employment contract" does not necessarily exclude Federal employees from the provisions of section 203(c). As to wage board employees it may be said that any general wage increases which would have gone into effect during the freeze period pursuant to a survey beginning prior to August 15, 1971, may be regarded as increases which were scheduled to be paid as a result of an agreement or established practice. Accordingly, our view is that general pay increases for Federal wage board employees are within the purview and subject to the limitations of paragraph (2) of section 203(c).

The provisions of paragraph (3) of section 203(c) would appear to be for consideration only if the conditions specified in (A) and (B) of such paragraph are met. For example, if a determination is made under paragraph (2) that a particular class of employees was not qualified, then consideration must be given as to whether that class would qualify under paragraph (3). While the legislative history indicates paragraph (3) was aimed at the private sector, no exclusion was provided for Federal employees. Under the literal terms of paragraph (3), we believe both conditions (A) and (B) are satisfied with respect to statutory and wage board within-grade increases.

Your questions are answered accordingly.

[B–174575]

Bids—Evaluation—Options—Price Omission

A low bid that failed to quote a unit price on option items under an invitation for radar transponders that stated offers would be evaluated "exclusive of the option quantity" is not a nonresponsive bid. If the IFB had specified that option prices may not exceed the basic bid prices or established some other standard for option prices, the Government would be deprived of a valuable benefit if the option could not be exercised, or if the Government intended to exercise the option, or a portion of it, at the time of award, a bid omitting option prices would be nonresponsive. However, the IFB did not establish a ceiling for the option prices or provide for including them in the bid evaluation; therefore, the failure to quote option prices is not a material deviation since there is substantially no difference betweeen a bid with an unreasonably high option price and a bid without any option price.

To the Secretary of the Navy, February 23, 1972:

Reference is made to the letter of January 25, 1972, with enclosures, from Counsel, Naval Air Systems Command (AIR–OOC:CM/tah),

relative to the protest of Communicology, Incorporated, against award of a contract to any other bidder under invitation for bids No. N00019–72–B–0012, a total small business set-aside.

The solicitation was for various quantities of specified radar transponders and included options for quantities of two of the transponders. At bid opening, Communicology was found to be the apparent low bidder, but the contracting officer considered the bid nonresponsive because Communicology had not entered a unit price for either of the option items. Communicology immediately protested, and award has not been made.

Paragraph D–4 of the IFB stated that offers would be evaluated "exclusive of the option quantity." It was further stated on page 4–3 that a unit price, but not a total price, was to be entered in the IFB schedule for the option items. Paragraph J–7 stated that "the Government may increase the quantity of supplies called for herein by requiring the delivery of the numbered line item identified in the Schedule as an option item, in the quantity and at the price set forth therein * * *." Paragraph J–8 provided that the option would be exercised, if at all, within 180 days after date of the contract.

The protestor claims that nothing in the solicitation required submission of prices for the option items and that its bid cannot be nonresponsive because it did in fact comply will all material requirements of the IFB.

On several occasions we have considered a bidder's failure to bid on option quantities. In 46 Comp. Gen. 434 (1966), cited by both the protestor and your counsel, a bidder protested rejection of his bid for failure to bid on an option item. We held that:

> The failure to quote on the option quantity * * * unquestionably was a material deviation in that it deprived the Government of a substantive and valuable right to increase the quantity * * * within 180 days after receipt of notice of award. Furthermore, the invitation specifically provided that "Bidders *must* bid on all items * * * or their bids will be rejected as nonresponsive" * * *. [Italic supplied.] 46 Comp. Gen. 434, 435.

The protestor distinguishes this case on the grounds that the instant IFB does not contain any language requiring rejection of bids not including option prices. Your counsel, on the other hand, states that the basis for our holding was the deprivation of the Government's right to increase the quantity and that the language of the IFB merely provided an additional basis. We believe, however, that two more recent decisions are more analogous to the case at hand.

In B–165799, February 27, 1969, involving the Naval Ordnance Systems Command, a bidder failed to bid on option items. We said that the failure to bid on the option quantities did not render the bid nonresponsive since "the option quantities were not to be evaluated

and bidders were not required to submit option price 'the same' as the prices bid" on the basic items. We noted that "They were free to quote unrealistically high option prices," and that under the circumstances the failure to submit option prices was not material. Shortly thereafter, in B–166138, April 11, 1969, involving the Naval Air Systems Command, we again held that a bidder's failure to quote an option price was not material under the circumstances. We rejected the argument that such a failure was material because of the statement in the IFB schedule providing that offerors submitting prices for any quantities less than those called for would be rejected as nonresponsive.

If the IFB specifies that option prices may not exceed the basic bid prices or establishes some other standard for the option price, it is clear that the Government would be deprived of a valuable benefit if it could not exercise an option so limited. Similarly, where the Government intends to exercise the option, or a portion of it, at time of award, a bid without an option price would have to be regarded as nonresponsive.

However, when the IFB does not establish a ceiling for option prices and the option prices are not to be included in the evaluation, we do not think the failure of a bidder to quote option prices may be considered as a material deviation. We see no substantial difference between a bid with an unreasonably high option price and a bid without any option price. Since an otherwise proper bid could not be rejected because of the high option price where the option quantity was not to be included in the award, we see no reason why the absence of any option price should result in rejection. In both cases, the Government's position is basically the same.

We note that the next low bidder in this case quoted identical unit prices for both the basic and option quantities. But this fact does not alter our view of the situation. Whether or not the failure to submit option prices is material and constitutes grounds for bid rejection must be determined on the basis of the terms and conditions of the solicitation and not on the basis of the option prices quoted in the other bids.

For the foregoing reasons, we believe the failure of Communicology, Incorporated, to include option prices in its bid did not render the bid nonresponsive. Of course, we recognize that your Department can choose to resolicit bids under a revised option provision if it is deemed necessary to include option rights in the contract.

The files forwarded with the letter of January 25, 1972, are returned.

[B-173248]

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Noncompliance

The relaxation of the manning requirements during negotiations with the low offeror under a request for quotations (RFQ) to perform maintenance and operation services for a technical laboratory for a 1-year period with two 1-year options, after assuring offerors at a prequotation conference that the minimum manning requirements of the RFQ would be enforced and a penalty levied for noncompliance, even if performance was satisfactory, without providing all offerors in the competitive range an opportunity to reconsider their offers was contrary to paragraph 3-805.1(e) of the Armed Services Procurement Regulation, and the options should not be exercised, notwithstanding the award was made with the understanding that satisfactory performance with less than the specified minimum personnel would be acceptable and no price reduction required.

Contracts—Awards—Small Business Concerns—Size—Conclusiveness of Determination

A determination by the Size Appeals Board of the Small Business Administration that the low offeror under a request for quotations was qualified as a small business concern on both the date for receipt of quotations and the date of award is conclusive pursuant to 15 U.S.C. 637(b)(6), which states that "Offices of the Government having procurement or lending powers * * * shall accept as conclusive the Administration's determination as to which enterprises are to be designated 'small-business concerns.'"

To the Secretary of the Air Force, February 24, 1972:

We refer to letter SPPM of October 4, 1971, and prior correspondence, from the Contract Management Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, furnishing reports on the protest of Tecdata, Inc., against the award of contract No. F04693-71-C-0084 to Action Industries, Inc., under request for quotations (RFQ) No. F04693-71-Q-0003, issued by the Base Procurement Division, Los Angeles Air Force Station, California.

The RFQ, issued on March 26, 1971, requested quotations from approximately 30 prospective offerors for a fixed-price contract covering the performance of maintenance and operations services for the civil engineering, prototype technical laboratory, and classified materials destruction functions at the Los Angeles Air Force Station. Quotations were to be submitted by May 3, 1971. The procurement was a 100 percent small business set-aside. Upon receipt, each quotation was to be evaluated on the basis of its management and technical proposals. Negotiations were then to be conducted with all offerors whose proposals were determined by the evaluation board to be within the competitive range. Award was to be made to that offeror submitting the best quotation, price and other factors considered. Of the

seven quotations received, the three that were considered to be within the competitive range were:

Offeror	Score
Action Industries, Inc. (Action)	945
Interservco, Inc. (Interservco)	1007
Tecdata, Inc. (Tecdata)	976

The quotations were scored on the basis of a possible total of 1,440, points.

Thereafter, negotiations were conducted with each of these offerors, and by letter of May 20, the contracting officer requested each offeror to submit its best and final prices on or before May 24. Although the contract was to cover a 1-year period with two 1-year options and prices were to be submitted for each year, the low offeror was to be determined on the basis of the total price submitted for the 3-year period. The final prices for the 3-year period were as follows:

Offeror	Net Price
Action	$5,053,416.80
Interservco	5,064,851.53
Tecdata	5,133,300.69

A determination was made to award the contract to Action. Under a determination that the procurement was urgent, award was made to Action on June 23, 1971, notwithstanding a protest by Tecdata.

By message of June 11, 1971, and subsequent correspondence, Tecdata had protested the award of the contract. The first basis for the protest was that Action was not a small business concern. The second basis was that Action was supplying less than the 142 minimum personnel required under the contract without being penalized therefor and that, consequently, Action must have known that it would not be required to furnish all the personnel and must have computed its final prices accordingly. If so, it is contended, all offerors were not submitting quotations on the same basis.

The question as to whether Action was a small business concern was submitted to the Small Business Administration. The Size Appeals Board on December 15, 1971, in reconsidering its decision of October 8 that Action was not a small business, determined Action to have been qualified as a small business concern on both the date for receipt of quotations and the date of award. In 15 U.S.C. 637(b)(6), it is stated that "Offices of the Government having procurement or lending powers * * * shall accept as conclusive the Administration's determination as to which enterprises are to be designated 'small-business concerns.'" Since the decision of the SBA is conclusive by statute, the

protest regarding the small business status of Action is denied. 44 Comp. Gen. 271, 273 (1964) and 46 *id.* 898, 900 (1967).

As regards the second basis for the protest, we note that part IV, section "M," attachment "A," section 1 of the RFQ, states as follows:

1.01 Work Statement

* * * * * * *

B. *Description of Services.* The contractor shall be expected to furnish as minimum requirements, the * * * minimum number and type of personnel contained in Addendum No. II to Attachment A in order to perform satisfactorily all work necessary. * * * This does not restrict the contractor from furnishing additional property or employing additional personnel if he determines such is required for him to accomplish his work.

Part IV, section "M," addendum No. II, attachment "A" of the RFQ provides a list with job descriptions of 133 contractor personnel. Part IV, section "M," attachment "A," section XVI, specifically sets out the work hours for each of these personnel. Each is to be employed on the basis of a 40-hour workweek. Part IV, section "M," attachment "B," of the RFQ lists four personnel to be assigned to the prototype technical laboratory function and their hours of employment. Part IV, section "M," attachment "C" lists five personnel to be assigned to the classified materials destruction function and their hours of employment. These nine personnel are also to be employed on the basis of a 40-hour workweek.

Further, at the prequotation conference held on April 6, 1971, the following questions were among the 20 posed and answered:

17. Reference Part IV Sec. M Para 1.01B "Description of Services" and 1.06A "Working Force"

(a) The Statement of Work clearly requires that the Contractor provide sufficient personnel to perform the required services satisfactorily. However, is the Contractor required to provide the minimum personnel specified in Addendum II to Attachment A if he is able to perform the services satisfactorily with a lesser number of employees?

Answer: Yes. The Contractor is required to furnish the minimum number of personnel as set forth in Addendum II to Attachment A.

(b) If the Contractor is required to provide the minimum personnel specified in Addendum II to Attachment A, is there a penalty levied on the Contractor for hours not provided, assuming that the services are being performed satisfactorily?

Answer: Yes.

* * * * * * *

19. Reference Part IV Section M, Addendum II Attachment A. Is the total number of personnel (133) the absolute minimum which must be provided or can contractor provide less people?

Answer: Yes. The total number of personnel is the minimum.

The contracting officer subsequently furnished all the prospective offerors a written list of the questions and answers.

Apparently, the nature and scope of the penalty clause that was to be applicable when less than the minimum number of personnel was furnished were to be formulated during negotiations to be held with

acceptable offerors. The Base Civil Engineer noticed the omissison of such a clause from the RFQ and brought this to the attention of the contracting officer. He was told that the matter would be taken care of during negotiations. We also note that the fixed-price contracts for these services held by Tecdata during the 2 previous years contained a deduction clause providing that if the contractor failed to furnish the minimum number of man-hours, that number being based on the minimum manning requirement of 175 personnel for the first contract and 144 personnel for the second contract, the contract prices were to be reduced by an hourly rate.

An investigation conducted by our Office into this procurement revealed no information in the records covering the preaward negotiations between the contracting officer and Action which would indicate that the firm was told in advance of submitting its price quotation that less than 142 personnel could be used in performing the work required. It further revealed that no mention was made during negotiations to any offeror that minimum manning was not mandatory until the final negotiation session with Action. At this final session, the Base Civil Engineer stated that it was his opinion that the contractor would be required to provide the minimum number of personnel at all times. The president of Action took exception to the statement on the grounds that the requirement was impossible to accomplish and was inconsistent with the fixed-price nature of the RFQ. The record of negotiation indicates that as a result of the discussion some thought was given to requiring the contractor to provide 142 personnel with variations subject to the approval of the contracting officer and to provide for amendment of the contract if the workload diminished or increased over a continuous period of time. However no such provisions were included in the contract.

In addition, SAMSO Form 126, Attachment 1, dated June 10, 1971, from the Air Force Procurement Review Committee, contained the following clause to be added to the contract:

> B. In the event the contractor fails to furnish the minimum manning requirements, as required by A above, the parties shall negotiate a reduction in the contract price at the end of each month contractor fails to meet such minimum manning requirement * * *.

The requirement for the clause was deleted by the Review Committee on June 20, 1971, as a result of conversations between the contracting officer and a member of the Review Committee. A different clause was incorporated into the contract by the addition of paragraph 19, part II, section "J", which provides as follows:

19. MANNING REQUIREMENTS

A. The Manning Requirements set forth in Part IV, Section M, Addendum No. II, Attachment A, Attachment B, and Attachment C are considered the minimum necessary by the Government to perform all the work under this Contract. The Contractor shall provide the Contracting Officer with periodic reports when and as called for by the Contracting Officer, but in no event less than once a month.

Further evidence of the basis upon which the contract was awarded is included in a June 23, 1971, letter from Action to the Base Procurement Division signed by the president of Action and concurred in by the contracting officer:

* * * the position of the Air Force and Action Industries, Inc., concerning the number of personnel required, as discussed and mutually agreed during negotiations, is: the Air Force considers 142 personnel the minimum necessary to perform all the work under the contract; however, satisfactory performance with less than 142 personnel will be acceptable, with no deductions being applicable.

Since the time of contract award, as the investigation conducted by our Office indicates, the contractor rarely, if ever, has furnished 142 personnel. Apparently, there have been more than a few days during which less than 100 personnel have been furnished. The contractor does not include the number of personnel furnished in his monthly report submitted under the "Manning Requirements" clause of the contract. Considering this, and as it is the opinion of the contracting officer that the number of personnel the contractor provides is irrelevant as long as he performs his work satisfactorily, we fail to see why the contracting officer felt constrained to tell the president of Tecdata at a conference held on July 8, 1971, that Action was being required to furnish the minimum number of personnel, even though the contracting officer had specifically been informed by the Base Civil Engineer that Action was not furnishing this minimum number of personnel.

In view of the June 23, 1971, agreement we are unable to conclude that the utilization by Action of less than 142 employees is contrary to the intention of the contracting officer and Action under the contract. Nevertheless, it is our view that the prequotation conference and the RFQ were misleading in that the former had indicated that the total number of manning in the RFQ was the absolute minimum and the latter specifically set forth the various job descriptions, the number of persons for each job description, and the specific duties, experience and education pertaining to each job description. Further, each offeror was required to list each of the 142 personnel with the hourly wage rate and resulting expense of employing each as a part of submitting its proposed price. There is nothing in the record which indicates that anyone other than Action was specifically advised that the listed personnel requirements would not have to be complied with in

the performance of the contract. The relaxation of that requirement without providing all offerors in the competitive range an opportunity to consider the effect of such action upon their offers was contrary to regulations. See ASPR 3-805.1(e).

Accordingly, in view of the foregoing, we believe that new proposals should be solicited rather than exercising the options in the contract with Action and we so recommend.

[B-159325]

Veterans Administration—Employees—Medical and Surgery—Qualifications—Licensing

The use by the Veterans Administration's Department of Medicine and Surgery of physicians who have been granted a temporary or limited license to practice medicine, surgery, or osteopathy, from a State where the appropriate State Board has made a determination that the applicant is professionally qualified to practice in that State, but does not qualify for a regular license, because he has not complied with various technical requirements—either statutory or administrative—such as residency or citizenship requirements, may be continued for a period not to exceed 18 months in view of the inability of the Department to hire medical personnel with permanent or unrestricted licenses, provided that the VA also determines in accordance with 38 U.S.C. 4106(a) that the individual involved is professionally qualified to practice medicine, surgery or osteopathy.

To the Administrator, Veterans Administration, February 28, 1972:

Your letter of December 17, 1971, with enclosures, requests our advice as to whether physicians who have been granted temporary or limited medical licenses, may be considered to be licensed to practice as required by 38 U.S.C. 4105, which provides:

> (a) Any person to be eligible for appointment to the following positions in the Department of Medicine and Surgery must have the applicable qualifications:
> (1) Physician—
>
> Hold the degree of doctor of medicine or of doctor of osteopathy from a college or university approved by the Administrator, have completed an internship satisfactory to the Administrator, and *be licensed to practice medicine, surgery, or osteopathy in a State* * * * [Italic supplied.]

The pertinent facts, as described in your letter, are:

> There are a number of states which grant forms of temporary or limited licenses without having required the physician to pass a professional examination, examples of which are West Virginia and California. * * * After the appropriate State Board has made a determination that the individual applicant is, in fact, professionally qualified to practice medicine, it will issue him a license to practice medicine in a particular VA hospital, as in the case of West Virginia, or it will issue him a license to participate in the professional activities of the approved medical school and in the programs of the affiliated hospitals conducted by the medical school, as in the case of California. The applicant has not yet taken the state medical license examination, usually because he has not complied with various technical requirements, either statutory or administrative, such as a prescribed period of residency in the state, or a requirement of U.S. citizenship.

You refer to our decision of August 1, 1966, B–159325, wherein we held that a certificate of registration issued under the provisions of 2 D.C. Code 133 could not be considered a license to practice medicine in the District of Columbia for the purposes of 38 U.S.C. 4105. We stated therein that:

> * * * This is so because the act does not provide that the certificate is a license to practice medicine but merely that certificates may be issued to medical officers of the Federal Government as evidence of the fact that the law permits them to practice medicine in their official capacity in the District of Columbia without a District of Columbia license.

You state that your Department of Medicine and Surgery has hired a number of individuals with temporary or limited licenses in areas where physicians with permanent unrestricted licenses could not be obtained. You suggest that our 1966 decision may be distinguished from the instant situation on the basis that the States here involved have determined that the individual applicant is, in fact, professionally qualified to practice medicine, whereas in our 1966 case, the physician's qualifications were not considered or examined prior to the issuance of the certificate of registration.

You ask whether this Office would be required to object to the Veterans Administration (VA) continuing individuals, who have been granted temporary or limited licenses, on its rolls for a period not to exceed 18 months to enable them to complete the statutory requirements for permanent or unrestricted licenses or until they can be replaced with fully licensed individuals in a feasible manner which will not seriously affect the VA's ability to continue to treat veterans in States where fully licensed physicians are difficult to recruit.

We agree that the instant situation is distinguishable from our 1966 decision in that the States involved have determined that the individual applicant, is in fact, professionally qualified to practice medicine, etc., whereas in our 1966 case the physician's qualifications were not examined prior to the issuance of the certificate of registration. Also, as distinguished from the practice of the District of Columbia, some States issue temporary or limited licenses to individuals wishing to practice in a hospital (or elsewhere) operated by other than the VA or other Federal agency, so that it is clear that such licenses are not always issued solely because the physician is employed by the United States.

Also we have considered in connection with the matter 38 U.S.C. 4106(a), which provides:

> (a) Appointment of physicians, dentists, and nurses shall be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Administrator, without regard to civil-service requirements.

Considering the foregoing, we would have no objection to the VA continuing on its rolls for a period not to exceed 18 months, physicians

who have been granted a temporary or limited license to practice medicine, surgery or osteopathy, from a State where the appropriate State Board has made a determination that the applicant is, in fact, professionally qualified to practice medicine, etc., in that State, but does not qualify for a regular license, because he has not complied with various technical requirements—either statutory or administrative—such as residency or citizenship requirements, provided that the VA also determines—in accordance with 38 U.S.C. 4106(a)—that the individual involved is professionally qualified to practice medicine, surgery or osteopathy.

The question presented is answered accordingly.

[B–174851]

Buy American Act—Applicability—Contractors Purchases from Foreign Sources—Items not for Inclusion in Contract Performance

Since the award by a Government joint venture prime contractor of a subcontract to a Canadian firm for mobile office units manufactured in Canada for its own use while constructing an anti-ballistic missile site in Montana was not subject to the Buy American Act, 41 U.S.C. 10a–d, the award did not violate the act nor the Armed Services Procurement Regulation, notwithstanding any adverse effect on the domestic trailer industry. Not only does the act not apply to the contractor's purchases for his own use, as they are not to become a permanent part of the structure being constructed for the Government, the mobile units are not considered components of the construction material as defined in the Buy American clause of the contract, which conforms to the act, and the procurement regulations, nor do they constitute end products acquired for public use as contemplated by the act.

To Mico Mobile Sales and Leasing Company, February 29, 1972:

We refer to your protest, by letter of December 17, 1971, addressed to the Department of the Army, against award by the joint venture of Peter Kiewit Sons Company and Associates, a Government prime contractor, of a subcontract to a Canadian firm for the furnishing of mobile office units manufactured in Canada. The contract is DACA87–72–C–0019, which involves construction of an anti-ballistic missile (ABM) site at Conrad, Montana, and the subcontractor is ATCO Industries.

You maintained in the above letter that inasmuch as the prime contract is being financed by United States taxpayers, the Buy American Act, 41 U.S.C. 10a–d, should apply to preclude award of the subcontract in question. In response to your protest the contracting officer for the Huntsville Division, Corps of Engineers, Department of the Army, advised you as follows:

As Contracting Officer for the prime contract for A.B.M. Site construction work near Conrad, Montana, I am replying to your letter of December 11, 1971, which you addressed to Mr. Dell McCuaig. Mr. McCuaig, as my authorized representative, consented to award of the subcontract to which you protest.

The Buy American Act does not apply to purchases made by a contractor solely for his own use and which are not to become a permanent part of the structure or facility being constructed for the Government. The office space procured under the subcontract with ATCO Industries is for the sole use of the contractor and does not become a part of the permanent facilities being constructed for the Government.

Mr. McCuaig was aware of the foreign origin involved in the proposed subcontract and carefully considered applicability of Buy American Act restrictions prior to consenting to the award of the proposed subcontract.

There are inclosed for your further information excerpts from the Armed Services Procurement Regulation (ASPR) which controlled approval action on the ATCO subcontract.

In the protest papers which a member of Congress has forwarded to our Office for consideration, you specifically question whether the subcontract award is in accord with the intent of the Buy American Act.

The record indicates that the prime contract, which was awarded on December 2, 1971, was for Phase II construction at the Malmstrom SAFEGUARD sites, and included the following clause prescribed by Armed Services Procurement Regulation (ASPR) 18–509.5 for use in construction contracts:

BUY AMERICAN ACT (1966 OCT)

a. *Agreement.* In accordance with the Buy American Act (41 U.S.C. 10a–10d), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and supplies) in the performance of this contract, except for nondomestic construction material listed in "Nondomestic Construction Materials" clause, if any, of this contract.

b. *Domestic construction material.* Construction material means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

c. *Domestic component.* A component shall be considered to have been "mined, produced, or manufactured in the United States" (regardless of its source in fact) if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. (ASPR 7–602.20)

The record further indicates that the subcontract, which covers procurement of office trailers and relocatable steel buildings, was awarded to ATCO Industries, Houston, Texas, on or about December 15, 1971, with approval of the contracting activity, which was on notice that the trailers were to be manufactured in Canada.

The contracting officer states that neither the trailers nor the relocatable steel buildings were specified as a requirement of the prime contract; that there is no intent that the Government acquire title thereto; and that while the items will be brought to the construction site, they are not for incorporation in the building or the work but

are being procured solely for the contractor's use. In addition, the contracting officer urges that the items do not constitute construction material but are analogous to contractor plant equipment such as scaffolding forms, tools and vehicular equipment which, whether already owned or newly acquired by the contractor, are used in performance of the contract. The contracting officer accordingly contends that the Government had no right to prevent the prime contractor from purchasing the trailers of Canadian manufacture, and that the subcontract procurement was lawfully effected and was not in violation of the contract provisions or ASPR.

The Buy American Act includes the following pertinent provisions:

American materials required for public use.

Not withstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. * * * [41 U.S.C. 10a]

Contracts for public works; specification for use of American materials; blacklisting contractors violating requirements.

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, materialmen, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States * * *. [41 U.S.C. 10b]

The language of the Buy American Act clause used in the prime contract is consistent with the provisions of the Buy American Act.

Since the trailers and the relocatable office buildings which the prime contractor is procuring from ATCO Industries are not to become part of the buildings or other structures which are being constructed under the prime contract, it is apparent that they are not components of the construction material, as defined in the Buy American Act clause and the procurement regulations. Further, since the items do no constitute property which is required by the contract to be furnished to the Government, and we are advised that title will not vest in the Government, it is also apparent that they are not end products acquired for public use as contemplated by the Buy American Act.

In the circumstances, although the importation into the United States of the foreign source trailers undoubtedly has an adverse impact on the domestic trailer industry, we are unable to conclude that there has been any violation of the existing provisions of the Buy American Act and the ASPR in the award of the subcontract. Your protest is therefore denied.

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