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[B-172909]

Bids—Mistakes—Intended Bid Price Uncertainty—Correction Inconsistent With Competitive Bidding System

The determination by the contracting agency that although the low bidder on a military housing construction project had made a bona fide mistake, but in the absence of clear and convincing evidence of the bid actually intended the bid may not be modified but only withdrawn as the degree of proof required to permit correction is much higher than that required to justify withdrawal of a bid, is a question of fact made pursuant to authority delegated by the United States General Accounting Office (GAO) to administrative agencies, subject to GAO review, and review of the data furnished in support of the alleged error evidences the determination was reasonable, for there is nothing inconsistent in the fact the data submitted proves the existence of a mistake but does not meet the standard of proof required to establish the bid intended.

To von Baur, Coburn, Simmons & Turtle, July 1, 1971:

Reference is made to your letter dated June 16, 1971, and prior correspondence, on behalf of National Housing Industries, Incorporated (National Housing), protesting against the administrative refusal to correct National Housing's low bid submitted under invitation for bids No. F02600-71-B-0339, issued by Williams Air Force Base, Arizona.

The invitation, issued on February 24, 1971, requested bids for the design and construction of 200 military family housing units at Williams Air Force Base, Arizona. The nine bids received, opened on April 6, 1971, were as follows:

National Housing	$2,880,000
Bidder No. 2	3,186,398
Bidder No. 3	3,246,710
Bidder No. 4	3,263,642
Bidder No. 5	3,279,988
Bidder No. 6	3,295,000
Bidder No. 7	3,467,550
Bidder No. 8	3,566,296
Bidder No. 9	3,648,997

The Government estimate for the project was $3,645,000.

It is reported that immediately following the bid opening a representative of National Housing stated that since National Housing had designed their own houses, they knew what it cost to build them even though their bid was considerably lower than any other bid submitted. However, due to the wide variation ($306,398) between the bid of National Housing and the next lowest bid, and also because it was $765,000 below the Government estimate, the contracting officer, by letter dated April 7, 1971, requested National Housing to carefully review their bid and submit written verification of its accuracy.

The contracting officer reports that on April 8, 1971, he talked, via telephone, with the National Housing representative who attended the bid opening and he stated that they were reviewing their bid, that everything appeared to check out satisfactorily, and that they would submit a written verification of the bid in the near future. Not having received the verification, the contracting officer called National Housing's representative on April 12, 1971, and he advised that the bid was still under study. The following day, April 13, the contracting officer received a telephone call from another representative of National Housing who advised that a mistake had been discovered in their bid and requested a meeting the following day. On April 14, two representatives of National Housing met with base procurement officials and stated that indirect construction costs totaling $144,743 had been inadvertently omitted from their bid, and requested permission to increase the bid by that amount.

The alleged error was confirmed by letter dated April 15, 1971. Thereafter National Housing submitted copies of their subcontractors' bids, worksheets used in computing the bid and affidavits explaining the alleged mistake and how it occurred. The contracting officer reviewed the data submitted and concluded that the bid price included only direct construction costs plus 6½ percent thereon, or $175,774, for general administrative overhead and profit and that bid did not include various indirect costs totaling $144,743 which he considered valid and necessary for the successful performance of the contract. The documentation required by Armed Services Procurement Regulation (ASPR) 2-406.3(e)(3)(v) was submitted to the Office of the Staff Advocate, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (AFLC/JA), for final decision with the contracting officer's recommendation that National Housing be permitted to modify their bid as requested.

Pursuant to authority delegated under ASPR 2-406.3(b)(3), AFLC/JA made a determination as follows:

> In accordance with ASPR 2-406.3(a)(3), I hereby make the following administrative determination:
>
> That clear and convincing evidence has been presented that National Housing Industries of Phoenix, Arizona, made a bona fide mistake in its bid to IFB F02600-71-B-0339.
>
> That clear and convincing evidence has not been presented as to the bid actually intended.
>
> That National Housing Industries is not permitted to modify the bid, but is permitted to withdraw the bid from consideration for award.

By letter dated May 4, 1971, the contracting officer advised National Housing that their request for bid modification had been denied and requested written confirmation whether they wished to withdraw the bid or have the bid considered for award as submitted. Thereafter you requested on behalf of National Housing that AFLC/JA review

the administrative determination made. Such request was granted; the review was conducted and the original determination was reaffirmed. Thereupon you filed a protest with this Office against the administrative denial of National Housing's request for correction of their bid.

You urge that the evidence submitted by National Housing in support of the alleged error clearly establishes both that an error was in fact made and the intended bid price. Therefore you contend that National Housing should have been permitted to correct the bid. Originally, the authority to consider correction of mistakes in bids was retained in the General Accounting Office. Later the authority to correct mistakes alleged after bid opening and prior to award was delegated to the procuring department. 29 Comp. Gen. 393 (1950). While the General Accounting Office retained the right to review the administrative determination, the weight to be given the evidence was recognized as a question of fact to be considered by the administratively designated evaluator of the evidence. 41 Comp. Gen. 160, 163 (1961). With respect to the Department of the Air Force, that authority is delegated, without authority to redelegate, to AFLC/JA. See ASPR 2-406.3(b)(3).

From the data furnished in support of the alleged error, we cannot conclude that there was no reasonable basis for the determination reached. We find nothing inconsistent in the fact that the data submitted was found to include clear and convincing evidence of the existence of a mistake, but did not meet the same standard of proof with respect to the intended bid. The degree of proof required to permit correction is much higher than that required to justify withdrawal of a bid. 36 Comp. Gen. 441 (1956).

Accordingly, the protest must be denied.

[B-160096]

Military Personnel—Training—Civilian Schools—Studies Related to Military Specialty

Under the Marine Corps Associate Degree Completion Program (MADCOP), which requires an enlisted man to reenlist or extend his enlistment so as to have 6 years of active duty remaining at the time of assignment to the 2-year junior college program for the purpose of obtaining an associate degree, and which authorizes payment of all tuition costs and fees and the continuation of a member's pay and allowances, including previously approved proficiency pay, a member selected for MADCOP who will not use his specialty while attending junior college may only be paid a variable reenlistment bonus and proficiency pay if the major course of study pursued is reasonably related to his critical skill, such as a disbursing man studying data processing and who upon completion of the studies that enhanced his skills will resume the duties he had performed prior to entering the program.

To the Secretary of the Navy, July 2, 1971:

Our Defense Division has raised certain questions concerning payment of the variable reenlistment bonus and proficiency pay to enlisted members of the Marine Corps who qualify for the Marine Corps Associate Degree Completion Program (MADCOP).

It appears from Marine Corps Bulletin No. 1560, dated March 23, 1970, that the MADCOP is a program which enables selected enlisted members to work toward an associate degree in a junior college. The bulletin states that the increasing complexity of the Marine Corps require an increasing number of highly trained enlisted Marines, particularly those with qualifications in many technical areas. It is said that the program should provide outstanding Marines, who would otherwise leave the Marine Corps in search of higher education, with a means of obtaining an associate degree while remaining in the Marine Corps.

Also, it is said that the scope of the program will provide assistance in pursuit of an associate degree in any basic arts or science curriculum and does not preclude a change in the major pursuit during the first semester. The applicant states on his application the major subject which he will pursue in his course of study and any change in the major course during the first semester must be approved by the Marine Corps. The directives do not appear to require, however, that the major subject area be related to a critical skill for which an applicant may have been awarded proficiency pay.

In order to be eligible for the program, a member must agree to reenlist or extend his enlistment so as to have 6 years of active duty remaining in the Regular Marine Corps at the time of assignment to the 2-year program. The Marine Corps pays all costs for tuition, books, laboratory fees, and other academic fees of the participating Marine. The bulletin further states that the member continues to draw normal pay and allowances, including proficiency pay if previously authorized.

The case of Sergeant Robert N. Diab, 2192001, USMC, has been cited as an example of the payments of variable reenlistment bonus and proficiency pay that are made incident to enrollment in MADCOP. Sergeant Diab enlisted in the Marine Corps on May 8, 1967. On November 13, 1969, he submitted an application for assignment to MADCOP, stating that he would pursue a course of study in data processing. His application included an agreement to reenlist or to extend his current enlistment so that he would have an obligation of at least 6 years of active service remaining at the beginning of his assignment to the educational program. Sergeant Diab's application was approved and on January 2, 1970, he reenlisted for 6 years. He was enrolled at Pensacola Junior College in Pensacola, Florida, in a course of studies in the field of data processing as indicated in his application.

At the time of his reenlistment, in addition to the regular reenlistment bonus, Sergeant Diab received a variable reenlistment bonus of $7,531.20 under the provisions of 37 U.S.C. 308(g) for his critical military skill of disbursing man (MOS 3421).

The validity of this payment was questioned because after his assignment to MADCOP and while attending Pensacola Junior College, Sergeant Diab did not actually utilize his critical military skill of disbursing man and his reenlistment was not for the purpose of performing in the skill for which the bonus was paid. *Cf.* 47 Comp. Gen. 414 (1968) relating to Navy members who are enrolled in the Navy Enlisted Scientific Education Program (NESEP). Furthermore, neither the regulations describing the MADCOP nor assignments to individuals selected for the program indicate any connection between selection of a particular individual for the program and his possession of a critical military skill. Nor is an individual possessing a critical military skill required to be enrolled or remain in a course of study directly relating to his critical military skill.

In the letter of January 18, 1971, however, from the Commandant of the Marine Corps to the Commanding Officer, Marine Corps Finance Center, Kansas City, Missouri, the associate degree program is explained, in part, as follows:

2. The MADCOP is a program designed to equip enlisted Marines to meet the increasingly complex requirements and demands of a modern armed force, particularly in technical areas. It is not in any sense intended to be a program leading to a commission; a participant continues in an enlisted status both during and after successful completion of training. Nor is the MADCOP designed to be a retraining program; it is not expected that the Marine's military occupational specialty (MOS) will be changed as a result of his additional schooling. In other words, the program contemplates that upon completion of training the Marine will resume his regular duty in the same military skill in which he performed prior to assignment. This does not mean to imply, of course, that a Marine who completes the MADCOP will not later be commissioned if he qualifies under some other program nor that his MOS will not be changed if the needs of the service so dictate.

3. This Headquarters holds the view that the objective of the MADCOP readily distinguishes it from the Navy Enlisted Scientific Education Program (NESEP) and "similar" programs. The NESEP is intended to ultimately lead to a commission. It does not envision that a member who successfully completes training will again perform in his enlisted military skill. In view of the marked differences between the NESEP and the MADCOP, and since references (b) and (c) treat exclusively with the NESEP and "similar" programs leading to a commission, we are of the opinion that those references have no application to the MADCOP.

4. Turning to the specific case of Sergeant Diab, it is noted that he received a VRB for the critical military skill of disbursing man (MOS 3421). His records indicate that he is majoring in data processing while attending Pensacola Junior College under the MADCOP. With the expanding automation of Marine Corps pay and personnel systems, and especially with the impending implementation of the fully automated Joint Uniform Military Pay System by the Marine Corps, it appears that Sergeant Diab's training in data processing will greatly enlarge his overall skill as a disbursing man and will prove to be of immeasurable value to the Marine Corps for the balance of his six-year reenlistment. We therefore consider that he is "qualified and serving in his critical military skill" while undergoing training to enhance his proficiency in that skill.

5. In light of the foregoing, it is the opinion of the Commandant of the Marine Corps that Sergeant Diab was properly paid a VRB incident to his reenlistment of 2 January 1970.

As stated above, the pertinent directives do not appear to contain any requirement that a member possessing a critical skill for which he has been awarded proficiency pay, and who is selected for the program, shall pursue a course of study in which the major subject area will have any relationship to his critical skill.

The payment of the variable reenlistment bonus under 37 U.S.C. 308(g) to a member who has been designated as having a critical military skill, upon his first reenlistment, is authorized as an inducement to reenlist for the purpose of retaining the use of his service in such capacity. 47 Comp. Gen. 414 (1968).

Marine Corps Order No. 7220.12F, March 13, 1970, provides that continuation of proficiency pay (specialty) is contingent upon continued qualification and satisfactory performance in the skill for which the award was made. Such pay is to be terminated (paragraph 5b(2)(c)) if the member is assigned to any duty not requiring the specialty on which the pay is based, the effective date of termination to be the day prior to reporting to the new assignment.

This provision, the paragraph states, is not applicable to additional duty assignments not materially interfering with performance of the member's primary duties; to temporary or special duty not exceeding 90 days; and to duty under instruction in a service school pertaining to his specialty and where the trainee will be reassigned to that specialty upon completion of the training.

It seems clear that a member possessing a critical skill, such as Sergeant Diab who holds the MOS of disbursing man and who is reenlisted for MADCOP schooling, will not be utilizing his specialty while attending a junior college to obtain an associate degree. In view of the representations made by the Commandant of the Marine Corps, however, that the schooling will enhance his skill and that, as in the case of trainees assigned to duty under instruction in a service school pertaining to his specialty, upon completion of the schooling it is contemplated that the Marine will resume his regular duty in the same skill in which he performed prior to his assignment, we will not question payments, otherwise correct, of variable reenlistment bonus and proficiency pay to a member accepted for schooling under MADCOP, provided the student's major course of study is reasonably related to his critical skill.

If, however, a Marine is accepted for MADCOP and his major course of study is not reasonably related to his critical skill, we are of the opinion that there would be no basis to view his reenlistment as for the purpose of retaining his service in his critical skill and variable

reenlistment bonus is not authorized in such circumstances. And, neither would the payment of proficiency pay be authorized during the period of such schooling since he would not be utilizing his specialty nor pursuing a course of study reasonably related to it.

While we will not question payments of variable reenlistment bonus and proficiency pay, otherwise correct, that have already been made under MADCOP and any other similar program, payments of that nature hereafter made which are not in accordance with the views expressed above will be subject to objection in the audit of the accounts involved.

[B–173047]

Compensation—Overtime—Traveltime—Between Residence and Headquarters

The traveltime of one-half hour each way from home to duty station and return in a Government-owned boat by Federal Aviation Administration wage board employees assigned to Alaska and performing a regularly scheduled duty period of 8 hours per day is not compensable as overtime under 5 U.S.C. 5542(b)(2)(B) since the employees did not perform work while traveling, the travel was not incident to the performance of work, nor did it result from an event which could not be scheduled or controlled administratively, and the fact that the boat trip could be dangerous because of tidal action or a dock in need of repairs does not constitute travel under arduous conditions as travel under arduous conditions is travel performed under severe weather conditions.

To R. J. Schullery, Federal Aviation Administration, July 2, 1971:

Reference is made to your letter of May 20, 1971, requesting an advance decision on the propriety of certifying for payment the claims of Messrs. William S. Cordry, James H. Payne, and Dale Hughes, WS–10 employees, for overtime pay in connection with travel performed outside their regular duty hours.

You indicate that the above individuals are employees of the Federal Aviation Administration (FAA) with assigned duty station at Woody Island, Alaska. They commute there daily at Government expense on a Government-owned boat which you state "is the only means of transportation available to them." They reside on Kodiak Island and are required to arrive at the departure point one-half hour before their 8-hour prescribed tour of duty begins at the permanent duty facility on Woody Island. They depart from Woody Island at the end of their duty period and arrive at Kodiak Island one-half hour later. The claim is based upon this daily 1-hour period for which the employees demand overtime pay since it exceeds their regularly scheduled duty period of 8 hours.

The controlling statute, which is applicable to wage board employees of FAA pursuant to chapter 2, section 3, of FAA Pay Adminis-

tration Handbook No. 3550.10, is 5 U.S.C. 5542 and it provides in pertinent part as follows:

> (a) Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work * * *
>
> * * * * * * *
>
> (b) For the purpose of this subchapter—
> (2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—
>
> * * * * * * *
>
> (B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

Clause (iii) of subsection 5542(b)(2)(B) appears to be the only possible basis for approving these claims since your letter does not indicate that the subject employees perform work while traveling, or that the regular duties are performed in the course of other travel. It is also clear that the travel does not result from an event which could not be scheduled or controlled administratively within the meaning of clause (iv).

You have cited our decision B–157036, July 22, 1965, as the basis for the employees' claims as well as authority for your position that payment of overtime under the circumstances described above would not be proper. In that decision we considered the question of whether the Interior Department could officially extend the regularly scheduled tour of duty of inspector-type employees who were required to assemble at a point some 70 miles from their worksite for the purpose of checking out Government vehicles which they then drove to the worksite *before* commencing their 8-hour tour of duty. The Department sought to extend the normal duty period beyond 8 hours for the sole purpose of bringing the travel within the applicable statute, thus permitting overtime compensation for the travel period in question. We held that the duty period could not be extended solely for the purpose of including traveltime since the pertinent statutory provision contemplated that traveltime during overtime hours was compensable as overtime only when said "overtime hours" were established for "work" without regard to travel. In the text of our decision we recited the long-standing rule that traveltime alone (without the performance of actual duty) outside the regularly established hours of work does not entitle an employee to overtime compensation for the time so spent. See decisions cited in B–157036, July 22, 1965. We consider that rule as appropriate for application in similar circumstances that are not otherwise within the purview of a 5 U.S.C. 5542 (b)(2)(B).

The record you have furnished does not establish that the travel was performed under arduous conditions, although claimants state that "this can and has been a very dangerous trip because of excessive wind, tidal action, and a dock that is in need of repairs." We have held that travel under arduous conditions is not established where the evidence of record does not show that the claimants were actually traveling under severe weather conditions. See B–160928, April 16, 1970, and decision cited therein.

A line of Court of Claims cases has generally been consistent with our decisions on the issue of compensation for traveltime under similar circumstances. In *Ahearn, et al.* v. *United States*, 142 Ct. Cl. 309, 313 (1958), cert. denied, 364 U.S. 932, plaintiffs were Navy firefighters manning island fire stations who had to take half-hour boat rides each way. The trip was not required by the United States but it was the only way they could reach the duty station, and it was found to involve no more risk than the travel to and from work performed by any employee. The Court of Claims held that the time spent in that travel was no more compensable than the time spent by any employee in going from his home to his work. This case was followed in *Biggs, et al* v. *United States*, 152 Ct. Cl. 545, 287 F. 2d 908 (1961). In *Delano, et al.* v. *United States*, 183 Ct. Cl. 379, 393 F. 2d 517 (1968), the court distinguished *Ahearn* and *Biggs* in holding that overtime compensation was due where the employees' travel was necessitated incident to the nature of their work in conducting official immigration inspections on United States-bound Canadian rail-passenger carriers and was undertaken for the sole convenience and benefit of the railroad carrier who reimbursed the Government of the United States for their services. The court also found that they performed certain duties while waiting in Canada to depart for the United States at which time they undertook to perform their official inspection duties en route. The plaintiffs in *Ayres, et al.* v. *United States*, 186 Ct. Cl. 350 (1968), were not compensated for their daily traveltime in returning from their island duty station on Government furnished vessels. They claimed overtime pay under the statutory provisions for entitlement when travel is carried out under arduous conditions. They alleged that the trip was hazardous because of "tidal rip" which caused "water turbulence." On the basis of testimony relating to the hazards of the subject travel, the court concluded that the employees' travel was not performed under arduous condition and was therefore comparable to the noncompensable trips in the *Ahearn* and *Biggs* cases, *supra*.

In view of the foregoing, and our consideration of the record presented with your request for an advance decision, we find no basis on which the claims may be allowed.

With respect to your question concerning compensation for injuries under 5 U.S.C. 8101 *et seq.*, we refer you to the Secretary of Labor since by statute he has authority to administer and decide all questions arising under subchapter I of chapter 81, Title 5, United States Code. See 5 U.S.C. 8145.

The claims are returned herewith and may not be certified for payment.

[B-171908]

Officers and Employees—Transfers—Effective Date—Per Diem and Travel Purposes

An employee who while on temporary duty in Boston is confirmed for a permanent appointment at the temporary duty station effective July 12, 1970, notice of which was not received at Boston until July 27, after the employee had departed on July 23, and to which point he did not return to assume his new duties until August 9, during which period he performed duty at his old headquarters, Chicago, returned to Boston to seek housing, attended a conference, and was on leave, is considered to have been transferred for travel and per diem purposes on August 9, the date he returned to Boston, and as the employee was expected to return to Chicago after completing his temporary duty, the rule that an employee may not be allowed per diem after receiving notice his temporary duty station is to be his permanent station has no application.

To the Director, Office of Economic Opportunity, July 6, 1971:

This further refers to letter of February 9, 1971, from Mr. Robert C. Cassidy, former Associate Director for Administration, requesting a decision concerning the enclosed travel voucher of Mr. Robert E. Fulton for the sum of $239.65 covering expenses of temporary duty travel and per diem for 9¼ days, July 14 to 23, 1970, from Chicago, Illinois, to Boston, Massachusetts, and return under Travel Authorization No. P1N 2114 dated July 14, 1970.

The item in question is the claim for per diem for the period in Boston. It is stated in the letter of February 9, 1971, that your office is aware of the rule expressed in numerous decisions of our Office that an employee may not be allowed per diem in lieu of subsistence at a place where an employee is on temporary duty after he receives notice that such place is to become his permanent duty station; also, that such rulings have required that "the notice to the employee not only must be communicated to him by proper authority, but should be definite as to action being taken so as to leave no doubt in the employee's mind with respect thereto."

The facts of record material to determination of the question are that Mr. Fulton had been previously apprised of his pending appointment as Regional Director in Boston, Massachusetts, subject to approval by the Civil Service Commission. While holding the position of Chief, Lower Great Lakes Operations Division, and on temporary

duty in Boston, he received on July 15 a TWX message from you, as Assistant Director for Operations, informing him that the Civil Service Commission had confirmed his appointment as Regional Director at GS–16 level. The Standard Form 50, Notification of Personnel Action, was signed by Mr. Walter O. Johnson, Director of Personnel, on July 10, 1970, with the designated effective date of July 12, 1970, but was not received in Boston until July 27.

Upon completion of temporary duty at Boston on July 23, 1970, Mr. Fulton returned to Chicago to again perform official duties as the designated Chief of the Lower Great Lakes Division. During the interim from July 23 and preceding Mr. Fulton's arrival for duty in Boston as Regional Director on August 9, the following occurred:

July 24 (Friday)	On duty in Chicago.
July 26-30 (Sunday–Thursday)	Round trip by Mr. and Mrs. Fulton to seek housing at Boston performed under Region I Travel Authorization No. PlJ—8011 dated July 24.
July 31 (Friday)	On duty in Chicago.
August 1–5 (Saturday–Wednesday)	On leave.
August 5–7 (Wednesday–Friday)	Travel and attendance at Regional Director's meeting, Denver, Colorado.
August 8 (Saturday)	Chicago.
August 9 (Sunday)	Traveled Chicago to Boston.

The doubt as to whether the aforementioned rule should be applied arises because of Mr. Fulton's return to Chicago on July 23 to his official duties in that office as designated Chief of the Lower Great Lakes Division. Considering these circumstances, it is the administrative view that the effective date of transfer (for travel and per diem purposes) may be viewed as the date Mr. Fulton returned to Boston to stay (August 9).

The record shows that it was expected that Mr. Fulton, upon completion of his temporary duty in Boston during the period here in question, would return to Chicago for official duty. In view thereof and under the stated facts and circumstances in this particular case, Chicago may be considered as Mr. Fulton's headquarters for per diem purposes until August 9, 1970, the date he actually reported for permanent duty in Boston.

The voucher, with attachments, is returned and may be certified for payment, if otherwise correct.

[B-172029]

Subsistence—Per Diem—Military Personnel—Temporary Duty—Recall to Permanent Duty Station

A Navy officer who was unable to fulfill his temporary duty assignment because he was recalled to his permanent station for emergency duties a few hours after arrival at the temporary duty station and the advance payment for the rental of a hotel room may be reimbursed in addition to taxi fare and tips for handling baggage at the air terminal for the advance payment, even though the payment of per diem is precluded by paragraph M4253-3a of the Joint Travel Regulations because the officer's absence from his permanent duty station was less than 10 hours since the officer under proper orders rented the hotel room due to the unavailability of Government quarters, and the reimburseable hotel charge is considered an administrative expense that is chargeable to the appropriation for Operation and Maintenance, Navy.

To Chief Warrant Officer David W. Shannon, Department of the Navy, July 7, 1971:

By letter dated December 29, 1970, file reference 0224 7220, forwarded here by 3rd Indorsement dated February 25, 1971, of the Per Diem Travel and Transportation Allowance Committee, you request a decision concerning the entitlement of Lieutenant Commander Orlin A. Kohl, 603928, USN, to per diem and reimbursement of amounts paid for lodging, taxi, and tips on September 13, 1970, incident to his temporary duty assignment. Your request was assigned PDTA-TAC Control No. 71-9.

Temporary Additional Duty Orders No. T-264, dated September 15, 1970, directed Commander Kohl to proceed on September 13, 1970, from his duty station, Naval Torpedo Station, Keyport, Washington, to Nanoose Range, Nanaimo, British Columbia, Canada, for about 4 days' temporary additional duty. These orders indicated that no berthing or messing facilities were available at the temporary duty station.

Pursuant to those orders, Commander Kohl departed from his duty station at 2:45 p.m., September 13, 1970, by Government plane and arrived at Ranch Point, British Columbia, which is located in the vicinity of Nanaimo, at 4:10 p.m., that date. Upon arrival in Nanaimo, he rented a hotel room and paid the advance charge of $9. Several hours later he was recalled to his duty station for emergency treatment in a "bends" case, since, as diving officer, it is said that he is required to be present for the treatment of the bends. Accordingly, he departed from Nanaimo by Government chartered plane at 7:20 p.m., and arrived at his duty station at 9:15 p.m. The total elapsed time of the involved round-trip travel and time spent in Nanaimo was less than 10 hours (actually 6½ hours).

In support of his claim incident to the involved travel, Commander Kohl furnished a receipt for the hotel room rental of $9 and also a receipt evidencing the use of a taxicab at a cost of $7.75. He also paid $1.25 as tips for baggage handling. It has been reported that

Commander Kohl was unable to obtain a refund of the hotel room charge.

You say that, since Commander Kohl had not completed the required 10 hours of temporary additional duty and in view of paragraphs M4205-3 and 4 of the Joint Travel Regulations, doubt arises as to whether or not he is entitled to per diem. Also, you inquire whether entitlement exists for reimbursement of the amounts paid for lodging, taxicab, and tips, since Commander Kohl had anticipated being on temporary additional duty at least 4 days in Canada.

The Per Diem, Travel and Transportation Allowance Committee in commenting on this case has expressed the view that while the taxicab fare and the tips are properly reimbursable under paragraphs M4401 and M4402 of the Joint Travel Regulations, paragraph M4253-3a of the regulations precludes payment of per diem inasmuch as Commander Kohl was in a travel status for a period of less than 10 hours. The Committee also expressed the view that the Joint Travel Regulations contain no authority under which Commander Kohl may be reimbursed for the hotel room rental charge.

Section 404 of Title 37, United States Code, provides that under regulations prescribed by the Secretaries concerned, members of the uniformed services shall be entitled to receive travel and transportation allowances for travel performed under competent orders upon a change of permanent station, or otherwise, or when away from their designated post of duty. Section 405 provides that the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside of the United States or in Hawaii or Alaska, whether or not he is in a travel status.

The regulations implementing the above provision of law are contained in the Joint Travel Regulations, Volume 1. Paragraph M3050-3 thereof specifies among other things that a travel status will terminate with return to the permanent duty station. Paragraph M4253-3a prescribes that no travel per diem allowance is payable for a round trip from a permanent duty station performed entirely within a 10-hour period of the same calendar day, such period to begin with the hour of departure.

While Commander Kohl was unable to fulfill his temporary duty assignment because his return to the permanent duty station a few hours after arrival at the temporary duty station was necessitated by reason of official requirements, the fact remains that the period of his absence from the permanent duty station was less than 10 hours.

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In such circumstances payment of per diem for such period is specifically prohibited by the provisions of the above-mentioned paragraph M4253–3a of the Joint Travel Regulations, regardless of the reason for his return to the permanent duty station. See 35 Comp. Gen. 650 (1956); 45 *id.* 300 (1965); and 49 *id.* 173 (1969).

However, Commander Kohl was directed by proper administrative authority to travel to Nanaimo for temporary duty and he rented a hotel room there in expectation of a 4-day stay, Government quarters being unavailable. Since his return to his permanent duty station shortly thereafter was occasioned by official need for his services there, we are of the opinion that the hotel room expense is properly for consideration as a part of the administrative cost of operating that installation and is for reimbursement on that basis, chargeable to the appropriation for Operation and Maintenance, Navy.

We concur with the view of the Per Diem, Travel and Transportation Allowance Committee that pursuant to paragraph M4401 of the Joint Travel Regulations Commander Kohl is entitled to reimbursement of the taxicab fare of $7.75 and pursuant to paragraph M4402, item 2, of the regulations he is entitled to reimbursement of the tips of $1.25 paid for personal baggage handling at the air terminal.

The travel voucher and supporting papers are returned for payment on the basis indicated above.

[B–172594]

Travel Expenses—Reemployment After Separation—Liability for Expenses

The entitlement to travel and transportation expenses of an employee of the Army in the Canal Zone who separated in a reduction-in-force action is returned to his actual residence in the United States and after a 7-day break in service accepts a position with another Department of Defense component located 419 miles from his residence is because of the break in service within the purview of 5 U.S.C. 5724a(c) and not 5 U.S.C. 5724(e). Under section 5724(a)(c), governing the reimbursement of employees who involved in a reduction-in-force or the transfer of a function are employed within 1 year of separation, the acquiring agency bears the expenses of the employee's travel between the old and new stations, less costs incurred by the losing agency, which if in excess of the cost of direct travel between the stations, need not be recouped by the losing agency.

To Roscoe Cleveland, Department of the Army, July 7, 1971:

Reference is made to your letter dated April 6, 1971 (file reference IAGS–COMPT–F), requesting a decision concerning the propriety of making payment on a voucher submitted by Mr. Goodrich R. Simmons, a separated employee, who was subsequently hired by another Department of Defense component and represents his claim for travel costs from his residence to such new duty station.

The record shows that Mr. Simmons was employed by your activity

at Fort Clayton, Canal Zone, but due to a reduction-in-force action was returned to his place of actual residence in the United States at Solana Beach, California, for separation. The effective date of his separation after travel was performed was listed in his travel orders as June 16, 1970. It appears that on June 24, 1970 (after a break in service of 7 days), Mr. Simmons was offered and accepted a position with another Department of Defense component at Fort Ord, California, a distance of approximately 419 miles north of Solana Beach, and he has now submitted a voucher for travel and transportation of his household goods from Solana Beach to Fort Ord.

The question asked is whether the claimant is entitled to receive the computed costs of travel from his residence in Solana Beach to Fort Ord, California, and if he is so entitled, is your organization, as the losing activity, responsible for that payment. In regard to the latter, the file indicates that this is a matter of some concern, since the allowance of such expenses could conceivably represent a very large unbudgeted and unbudgetable expense which may well have a significant financial impact on IAGS as there are other employees scheduled for separation who may be similarly situated.

Section 5724(e) of Title 5, United States Code, relating to transfers from one official station to another, provides that:

> When an employee transfers from one agency to another, the agency to which he transfers pays the expenses authorized by this section. However, under regulations prescribed by the President, in a transfer from one agency to another because of a reduction in force or transfer of function, expenses authorized by this section * * * may be paid in whole or in part by the agency from which the employee transfers or by the agency to which he transfers, as may be agreed on by the heads of the agencies concerned.

Implementing regulations are contained in paragraph C1053–2b(1) of Joint Travel Regulations, Volume II. Subparagraph (b) thereof pertaining to funding for transfers between different departments and agencies provides in pertinent part that necessary costs incident to transfers of employees between Department of Defense activities located in the United States, Commonwealth of Puerto Rico, or Canal Zone, caused by reductions in force or transfer of function will be borne by the losing activity issuing the notice of reduction in force or transfer of function. Similar provisions are contained in paragraph C1053–2b(2)(b) with respect to transfers in connection with a reduction in force or transfer of function within the same department, that is, that the losing activity shall bear the necessary movement costs.

Mr. Simmons' entitlement to travel expenses to his new duty station, however, is not derived from 5 U.S.C. 5724(e) quoted above since he was not involved in a transfer without a break in service as contemplated by that section. Rather, the authority for payment of Mr. Simmons' travel from his place of residence to the new duty station is derived from 5 U.S.C. 5724a(c) which provides:

(c) Under such regulations as the President may prescribe, a former employee separated by reason of reduction in force or transfer of function who within 1 year after the separation is reemployed by a nontemporary appointment at a different geographical location from that where the separation occurred may be allowed and paid the expenses authorized by sections 5724, 5725, 5726(b), and 5727 of this title, and may receive the benefits authorized by subsections (a) and (b) of this section, in the same manner as though he had been transferred in the interest of the Government without a break in service to the location of reemployment from the location where separated.

While 5 U.S.C. 5724a(c) relates to entitlement, it is silent with respect to the funding. Enclosed with your submission was a copy of a memorandum dated January 28, 1971, of the Per Diem, Travel and Transportation Allowance Committee addressed to the Inter American Geodetic Survey Liaison Office concerning the questions raised in your letter. The Committee recognized that neither the pertinent provision of Office of Management and Budget Circular No. A-56 nor JTR, Vol. 2, cover the specific situation relating to the case of Mr. Simmons. The opinion was, however, expressed that funding should be borne by the losing activity. We have discussed this on an informal basis with a member of the staff of the Committee and confirmed the view as expressed in the memorandum that the Joint Travel Regulations contain no provision expressly covering funding arising by reason of 5 U.S.C. 5724a(c).

It is our view that where, as here, there has been a separation, and a subsequent hiring by another activity, it would be proper for the losing agency to pay the expenses incurred in traveling to the place of actual residence or some other selected point in the United States but not to exceed the constructive cost of travel to the place of actual residence. At this point the employee is separated and may or may not be entitled to additional travel. If subsequent to arriving at the place of residence and after removal from the rolls the former employee is hired by an agency within 1 year after separation and thereby within the entitlement of 5 U.S.C. 5724a(c), the acquiring agency should, consistent with the general authority of 5 U.S.C. 5724a, bear the expenses of his travel from the place of actual residence or other selected point to the duty station for the new position in which he is employed. The allowable cost could not exceed the cost of direct travel from the old to the new duty station, less the cost incurred by the losing agency for return travel as indicated above. *Cf.* 46 Comp. Gen. 628 (1967). However, in the event the costs paid by the losing agency are in excess of costs which would have been incurred for direct travel from the old duty station to the new duty station, no recoupment of monies already paid is necessary. See 47 Comp. Gen. 763 (1968), at page 765.

The voucher is returned herewith for handling in accordance with the above.

[B-173330]

Military Personnel—Outside United States—Tours of Duty Extended—Drayage and Storage of Household Effects

The involuntary extension of an overseas tour of duty being a marked departure from the usual practice of rotating members of the uniformed services from overseas to the United States, the extension may be viewed as the unusual or emergency circumstances contemplated by 37 U.S.C. 406(e), which authorizes the movement of dependents and household effects without regard to the issuance of orders directing a change of station. Therefore, the Joint Travel Regulations may be amended to authorize reimbursement to a member who unable to renew his lease for local economy housing for the extended tour of duty incurs the expense of drayage to other local economy quarters, or nontemporary storage, including any necessary drayage to storage, and drayage from nontemporary storage to local economy quarters.

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

By letter dated June 15, 1971, the Acting Assistant Secretary of the Air Force (Manpower and Reserve Affairs) requested a decision whether the Joint Travel Regulations, Volume 1, Chapter 8, may be amended to authorize drayage and/or nontemporary storage of household effects in the circumstances described. The request was assigned Control No. 71-23 by the Per Diem, Travel and Transportation Allowance Committee.

The Acting Assistant Secretary says that in an effort to reduce permanent change of station costs, the uniformed services are extending the tours of duty of certain members stationed outside the United States. He explains that upon arrival at their new duty stations, members whose tours of duty are subsequently extended, often do not know that such extensions will be made and they negotiate a lease of local economy housing upon arrival to cover the expected length of their tour. In the event the landlord declines to renew the lease, he says the member must pay for draying and/or storing (nontemporary) his household goods incident to occupying another residence where he (and his family, if any) will remain for the period of the tour extension.

The example given is that of an Air Force officer (Captain Kelly P. Lacombe), presently assigned to Defense Communications Agency, North American Field Office, Ottawa, Canada, whose tour of duty has been involuntarily extended from July 1971 to July 1972. Captain Lacombe executed a lease for local economy housing which expires in July 1971. He is unable to obtain an extension of the lease to correspond with his extended tour of duty because the house is being sold and the new owner is taking possession. It is said that the necessary movement of houshold effects results in a financial hardship on him because of circumstances beyond his control.

The Acting Assistant Secretary suggests that an involuntary tour extension such as that here involved constitutes an unusual circum-

stance within the contemplation of 37 U.S. Code 406(e). Therefore, our views are requested as to whether the Joint Travel Regulations may be amended to "authorize drayage to other local economy quarters, nontemporary storage including any necessary drayage to storage, and drayage from nontemporary storage to economy quarters, when a member's tour of duty outside the United States is involuntarily extended and he is required, for reasons beyond his control, to change his residence on the local economy."

As a general proposition, section 406 of Title 37 of the United States Code authorizes transportation of dependents when the member is ordered to make a permanent change of station. As an exception to the orders requirement, subsection (e) of section 406 provides for the movement of dependents and household effects in unusual or emergency circumstances without regard to the issuance of orders directing a change of station. It further provides that this subsection may be used only under "unusual or emergency circumstances" including those in which (3) the member is serving on permanent duty outside the United States, in Hawaii or Alaska, or on sea duty.

We have held that the term "unusual or emergency circumstances" as used in 37 U.S.C. 406(e) refers to conditions of a general nature incident to military operations or military needs, and not to conditions or matters of a personal nature. 38 Comp. Gen. 28 (1958); 45 *id.* 159 (1965); 45 *id.* 208 (1965), and 49 *id.* 321 (1970).

The statute authorizes the movement of household effects under unusual or emergency circumstances when the member is serving at a permanent station outside the United States. Since the involuntary extension of the term of service of a member at an overseas station is a marked departure from the usual practice in rotating members from overseas to the United States, we believe it may be viewed as an unusual or emergency circumstance within the contemplation of the statute. And, clearly the drayage and nontemporary storage incident to an involuntary extension in the described circumstances arises from the needs of the service.

Accordingly, we see no legal objection to the proposed amendment to Chapter 8, Volume 1, of the Joint Travel Regulations.

[B–172955]

Bids—Mistakes—Allegation Withdrawal—Award of Contract

The award of a construction contract to the low bidder who withdrew an allegation of error, confirmed the original bid price, and requested award on the basis of its low submitted bid is proper where submitted worksheets do not support the error alleged or establish the intended bid price was something other than the amount bid and, therefore, the error alleged is considered a judgmental error that may not be corrected or serve as the basis for withdrawal of the bid. Further-

more, the low bidder in confirming its bid price, waived an underaddition error found by the contracting officer, and no other error having been alleged by the bidder, the United States General Accounting Office will not conduct a complete review of the workpapers, for any discrepancies that may be found would not establish errors if the bidder contended otherwise.

To Capell, Howard, Knabe and Cobbs, P.A., July 8, 1971:

We refer to your letter dated May 13, 1971, and subsequent memoranda and affidavits, protesting on behalf of Algernon-Blair Industrial Contractors, Inc., against award of a contract to Pearce, DeMoss & King, Inc., under invitation for bids DACA01-71B-0039, issued by the United States Army Engineer District, Mobile, Alabama. The contract covers construction of three continuous process TNT lines at the Volunteer Army Ammunition Plant, Chattanooga, Tennessee.

Bids were opened on March 30, 1971. Pearce, DeMoss & King, Inc., was low bidder with a bid price of $13,083,504. Algernon-Blair Industrial Contractors, Inc., was second low bidder with a bid price of $14,360,000. Because the low bidder was approximately 22.89 percent below the Government cost estimate for the contract, the contracting officer requested by telephone on April 1, 1971, that the low bidder verify its bid. By its telegram of April 7 the low bidder alleged a mistake in bid and requested permission to make correction. In its letter of April 19, the low bidder alleged that the bid mistake resulted from an erroneous quote submitted to it by its mechanical subcontractor, Broyles & Broyles Inc. In this letter, it was alleged that Broyles & Broyles Inc. had given it a quote of $6,442,148 rather than $6,841,592—a difference of $399,444. This error is stated to be attributed to the erroneous use of a labor factor of 1.10 rather than 1.50 by the subcontractor's estimator. We have no definite information regarding this factor other than the allegation that the inadvertent use of the lower factor by Broyles & Broyles Inc. resulted in a $399,444 underquote to Pearce, DeMoss & King. In support of the claim of error, the worksheets of both Pearce, DeMoss & King and Broyles & Broyles were furnished to the contracting officer. After a review of these workpapers, the contracting officer found no basis to conclude that a 1.10 labor factor was used incorrectly or that a 1.50 factor was intended by Broyles & Broyles. We found no data establishing that Pearce, DeMoss & King was aware that the correctness of such quote was in doubt when it submitted its bid to the Corps in response to the invitation. Based upon his examination, the contracting officer concluded that the record did not establish the alleged error or that the intended bid was something more than the amount bid. He therefore recommended that award be made to Pearce, DeMoss & King at its low submitted bid price.

At this juncture, we must point out that an apparent $33,998 under-addition error was found by the contracting officer in his review of the workpapers. We are in receipt of a copy of a letter dated June 2, 1971, whereby Pearce, DeMoss & King withdrew its allegation of error, confirmed its original bid price of $13,083,504 and requested award on the basis of that bid. Hence, we will regard the $33,998 error as having been waived. We have been informally advised by the Corps that the bidder was aware of its $33,998 mathematical error when it withdrew its claim of error.

Algernon-Blair advances the view that the only permissible resolution of this matter is to permit the low bidder to withdraw its bid. Also, ancillary to this view, Algernon-Blair suggests that our Office must review the workpapers to determine whether additional errors have been made which, if considered, would displace Pearce, DeMoss & King as low bidder.

The error that is alleged here as to the subcontractor's quote is a judgmental error that ordinarily may not be corrected or serve as the basis for withdrawal of the bid. It cannot be argued that the bid, when submitted, was not the bid intended and it was not until later that the subcontractor claimed it had made an error in its quote.

As to our further review of the workpapers, when the bidder has not alleged other error, we see no valid reason to conduct a complete review of his voluminous workpapers to ascertain whether we can find other discrepancies which might indicate the possibility of error. Such discrepancies, even if found, would not establish that errors had been made if the bidder contended otherwise.

Accordingly, we conclude that the low bid of Pearce, DeMoss & King as submitted and as clarified by the waiver letter of June 2, 1971, may be accepted for award under the invitation. Your protest is therefore denied.

[B-172168]

Carriers—Communications—Statutes of Limitation

The claim submitted by the Western Union Telegraph Company within the 10-year limitation period for filing claims with the United States General Accounting Office (GAO) for services denied administratively on the basis the claim was barred by the 1-year limitation of action provision in the Communications Act, 47 U.S.C. 415(a), is cognizable under 31 U.S.C. 71 and 236, as the time limitations for the commencement of "actions at law" prescribed by the Communications Act and the Interstate Commerce Act do not affect the jurisdiction of the GAO unless specifically provided by statute, and the 3-year limitation for filing transportation claims with GAO prescribed by section 322 of the Transportation Act, as amended, 49 U.S.C. 66, does not affect the right of firms providing service under the Communications Act to have their claims considered by GAO if presented within 10 full years after the dates on which the claims first accrued.

To Director, Defense Communications Agency, July 9, 1971:

Reference is made to a letter dated April 27, 1971, filed No. 105, in response to our request for a report and recommendations concerning a claim submitted by the Western Union Telegraph Company, Office of the General Counsel, New York, New York, for $45,360, under contract No. DCA-20-111.

The claim was submitted to our Office for consideration under the authority contained in 31 U.S.C. 71, with the advice that the claim had been denied administratively on the basis that it is barred by the 1-year limitation of actions provision in the Communications Act, 47 U.S.C. 415(a). It was contended that the time in which the claim may be presented and the charges collected is subject to the provisions of 28 U.S.C. 2401 or 2501 (alternatively because of jurisdictional amounts), establishing 6-year periods in which to commence actions against the United States in the United States District Courts and in the Court of Claims. As provided in 31 U.S.C. 71(a) and 237, there is a time limitation of 10 years for the filing of claims or demands against the United States cognizable by our Office under 31 U.S.C. 71 and 236.

The Western Union Telegraph Company provided communication services at locations including the center at Fort Detrick, Maryland, and two other centers at Syracuse, New York, and Albany, Georgia. On March 25, 1965, an order was issued for the modification of all in-service and on-order disc message storage unit equipment, also known as mass memory units, and to furnish one additional modified mass memory unit in each center. On July 17, 1967, the Government was given an in-service notice with monthly charges for Fort Detrick. Although the charges were invoiced on a cost-per-center basis, the Government authorized the starting of monthly charges retroactively to January 1, 1967, the service date in the July 17, 1967, notice.

In May 1970, an invoice was submitted for the additional modified mass memory unit installed in the Fort Detrick Center. The invoice was prepared on the basis of applying a monthly rate of $1,620 for use of the particular equipment during the period January 1967 through May 1970. The Western Union Telegraph Company has been paid at the monthly rate from May 1969 but the Government refused payment for the period January 1967 through April 1969 based upon the 1-year limitation of actions provision in the Communications Act. The company is now claiming the amount of $45,360, applicable to the Fort Detrick Center, at the rate of $1,620 per month, for a period of 28 months, January 1967, to April 1969, inclusive. There is no dispute concerning the amount of the claim.

Subsection 415(a) of the Communications Act, 47 U.S.C. 415(a),

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provides that all actions at law by carriers for the recovery of their lawful charges, or any part thereof, shall be begun within 1 year from the time the cause of action accrues, and not after. The act does not specifically provide that claims of carriers against the United States are subject to the time limitation of 1 year for the commencement of actions at law.

The Western Union Telegraph Company considers the situation to be comparable to actions by carriers subject to regulation under the Interstate Commerce Act and the Transportation Act of 1940 which were determined by the courts to be subject to the general 6-year statutes of limitation affecting the jurisdiction of the United States District Courts and the Court of Claims, and not to the lesser 2-year period of limitation specified in the Interstate Commerce Act prior to its amendment in 1958. It is, however, the position of the Defense Communications Agency that amendments to the Transportation Act of 1940 and the Interstate Commerce Act by Public Law 85-762, approved August 26, 1958, 72 Stat. 859, clearly show the legislative intent to apply the statute of limitations to all parties equally, including the Government, and that this vitiates the effect of earlier court holdings.

The question whether the United States District Courts and the Court of Claims have jurisdiction to consider actions by carriers subject to regulation under the Communications Act, if such actions are not commenced within 1 year from the time the causes of action accrued, does not appear to be material in this case. The Western Union Telegraph Company has not filed an action either in a United States District Court or in the Court of Claims, but it has presented a claim to our Office for consideration under the authority contained in 31 U.S.C. 71. As above indicated, there is a time limitation of 10 years for the filing of claims or demands against the United States cognizable by our Office under 31 U.S.C. 71 and 236.

The limitation of actions provisions of the Communications Act and the Interstate Commerce Act, as amended, 47 U.S.C. 415(a) and 49 U.S.C. 16(3)(a), respectively, refer to "actions at law" which phrase normally would be considered as relating to judicial proceedings. See 1 C.J.S. 943. It has been our position that the time limitations for the commencement of such "actions at law" do not affect the jurisdiction of our Office to consider claims against the United States and that, unless otherwise specifically provided for by statute, we are required, as a general rule, to consider any claim against the United States cognizable by our Office if it is presented within 10 full years after the date such claim first accrued.

In recognition of the 10-year period of limitation for the submission

of claims to our Office, section 322 of the Transportation Act of 1940 was amended by Public Law 85-762 to provide, at 49 U.S.C. 66, that every claim cognizable by our Office for transportation within the purview of section 322 shall be forever barred unless such claim shall be received within 3 years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund of overpayment of such charges or (4) deduction made pursuant to section 322, whichever is later.

We do not regard the amendment to section 322 of the Transportation Act of 1940 as having affected in any manner the right of firms providing services under the Communications Act to have their claims considered by our Office if presented within 10 full years after the dates on which such claims first accrued.

In the circumstance, we conclude that the amount claimed by the Western Union Telegraph Company for services rendered at the Fort Detrick, Maryland, Communications Center, during 1967, 1968 and part of 1969, should be paid if otherwise correct.

[B-171876]

Officers and Employees—Service Agreements—Failure to Fulfill Contract—Service Interrupted by Military Duty

A civilian employee serving in Hawaii under a transportation agreement who as an Army reservist is ordered, effective July 29, 1968, to active duty for training in the United States and is granted military leave from July 18 to August 1, 1968 under 5 U.S.C. 5534, which is applicable to reservists and National Guardsmen, may be carried on civilian rolls beyond his military reporting date; may be reimbursed pursuant to 5 U.S.C. 5724 on the basis of administrative approval for the travel of his dependents and the shipment of his privately owned automobile to the United States; and may be also under 5 U.S.C. 5534 reemployed June 9, 1969, although released from active duty June 23, but the employee entitled under 5 U.S.C. 6323 to 15 days military leave for a single period of training, extending from 1 calendar year into the next, having been granted military leave from July 18, to August 1, 1968, may not be granted military leave from June 9 to 23, 1969, but may be granted annual leave.

Officers and Employees—Dual Benefits—Under Separate Statutes—Prohibition

A civilian employee who incident to the interruption of his service in Hawaii under a transportation agreement for a period of active duty training in the United States as an Army reservist receives a monetary allowance for his return travel to Hawaii, upon reemployment under a new transportation agreement is precluded by paragraph C4007 of the Joint Travel Regulations, prohibiting duplication of entitlement under separate statutes, to transportation to Hawaii as a civilian and, therefore, the employee is indebted for any amounts received for his transportation incident to the reemployment. Furthermore, since the employee's reemployment is regarded as a new appointment and not a transfer, payments made on the assumption a transfer was involved, such as temporary quarters subsistence and miscellaneous expenses under Office of Management and Budget Circular No. A-56, were unauthorized and too are for recovery.

To Major L. E. Sholtes, Department of the Army, July 13, 1971:

Further reference is made to your letter of November 17, 1970, with enclosure (PDTATAC Control No. 71-5), concerning the entitlement of Vernon R. Fegley, a civilian employee, to military leave and dependent travel and transportation allowances incident to his active duty for training orders dated July 5, 1968, as amended.

It appears that the employee was serving in Hawaii under a transportation agreement dated July 11, 1967, under which he was obligated to serve 24 months. By orders dated July 5, 1968, as amended, Headquarters, United States Army Advisor Group (USAR) Hawaii, he was ordered to report on July 29, 1968, to active duty for training (ACDUTRA) at Army War College, Carlisle Barracks, Pennsylvania, to attend a course of instruction for 47 weeks.

The employee performed his travel as a military member but transportation of dependents and shipment of privately owned vehicle were at his personal expense for the reason that it was believed he was not entitled to those allowances incident to his civilian employment. Thereafter it was administratively determined that proper orders should have been issued for his dependents' travel and shipment of his automobile on the basis of the employee having been released from his transportation agreement. However, his claim for reimbursement was denied for the reason that competent orders had not been issued by his civilian employer and it was doubtful whether orders could be issued after the travel was performed. Effective June 9, 1969, the employee was reemployed in his civilian position and a new transportation agreement dated June 3, 1969, was signed by the employee.

In your letter you say that it appears there is a possibility of erroneous payments, duplicate payments, and incorrect charges to annual leave. You present the following specific questions for clarification and determination.

a. May a civilian employee be authorized military leave based on orders for extended Active Duty for Training, for a period immediately preceding the reporting date and still be carried on civilian payrolls beyond the orders' reporting date? In the case in question, employee was granted military leave from 18 July to 1 August 1968 and annual leave for periods 15 July thru 17 July and 2 July thru 6 July 1968, notwithstanding the reporting date to the United States Army War College of 29 July 1968 and military travel voucher payment for military travel status for period 15 July thru 29 July 1968.

b. Since Civilian Personnel Division refuses to issue dependent travel orders for travel of dependents from Honolulu, Hawaii to Detroit, Michigan after the fact, on the basis that Volume II, Joint Travel Regulations does not provide for the issuance of retroactive orders, will the Indorsements by DA, DCSPER DCP P&R and the Finance Center, United States Army (Incl 12) approving claim for payment constitute valid and proper documentation to support such claim, or will travel orders be required to support payment thereof?

c. May a civilian employee be reemployed after performing military duty with an effective hire date prior to date released from active duty? Mr. Fegley was released from extended active duty for training on 22 June 1969, allowed 10 days traveltime, and last paid thru 2 July 1969, yet picked up on civilian payrolls effective 9 June 1969.

d. In connection with paragraph c above, may an employee be authorized military leave and annual leave for a period immediately preceding commencement of official travel for reemployment? In the case of Mr. Fegley, employee was hired effective 9 June 1969, took military leave from 9 June thru 23 June 1969, and annual leave from 24 June thru 31 July 1969.

e. May an employee who is a member of the United States Army Reserves be credited with 15 days military leave as a civilian employee and also be paid basic pay and alowances based on his reserve military grade on Active Duty for Training Orders, but without competent orders calling him to ANACDUTRA?

f. May an employee receive pay and allowances based on his civilian status also receive active duty pay and allowances as an officer while serving on active duty for training (not ANACDUTRA)?

g. May an employee take annual leave while serving on active duty?

Under the provisions of 5 U.S.C. 6323, military reservists and members of the National Guard who are civilian employees of the Federal Government are entitled to not in excess of 15 days of leave for use when they are called to active duty or required to perform certain training duties. Also the provisions of 5 U.S.C. 5534, applicable to reservists and National Guardsmen, authorize annual leave with pay in kind and military pay over the same period of time without regard to the dual compensation statutes.

We have held (consistent with 5 U.S.C. 5534) that in addition to military leave that it is proper to grant annual leave to employees on active duty as reservists or National Guardsmen. 37 Comp. Gen. 255 (1957); 47 *id.* 761, 762 (1968) and 49 *id.* 233, 238 (1969). Therefore, the employee may be carried on his agency's rolls beyond his reporting date for military duty. Question (a) is answered in the affirmative.

Question (b) is whether administrative approval of the employee's claim for dependent travel and shipment of vehicle will constitute a valid and proper documentation to support such claim. Section 5724 of Title 5 U.S. Code permits reimbursement of transportation and traveling expenses when authorized or approved. Since the return travel of the employee's dependents and shipment of privately owned vehicle to the United States incident to his release from his transportation agreement on call to active duty in the Armed Forces for training has been approved by the proper authority, he may be reimbursed for the expenses otherwise found to be proper. See 41 Comp. Gen. 574 (1962); B–170987, December 14, 1970; B–149648, August 20, 1962; and B–109466, June 4, 1952.

Referring to question (c), the answer to question (a) would likewise be applicable to a reservist who is reemployed after performing military duty with an effective hire date prior to date of his release from active duty. Question (c) is answered in the affirmative.

Concerning question (d), we have held that when a single period of training extends from 1 calendar year into the next year, an employee is limited to 15 calendar days for that period. 35 Comp. Gen. 708; 40

id. 186. In your letter it is stated that the employee was in a military leave status from July 18 to August 1, 1968. Consequently, he used the maximum of 15 days allowed for his entire period of active duty for training and therefore he may not be granted military leave for the period from June 9 to 23, 1969. He may, however, use annual leave for that period. Question (d) is answered accordingly.

We do not fully understand the significance of questions (e), (f) and (g). However, we point out that the 15 days of military leave authorized for civilian employees by the provisions of 5 U.S.C. 6323, apply to a reservist serving on active duty, as well as active duty for training. Moreover, the answers to the prior question would appear applicable to these questions.

In your letter you question the employee's entitlement to travel allowances from Carlisle Barracks, Pennsylvania, to Hawaii as both a military member and civilian employee after completion of his active duty. You say the employee was notified of indebtedness to the United States Government in the amount of $128 for duplicate travel payments.

Paragraph C4007 of the Joint Travel Regulations, Volume 2, promulgated pursuant to the Administrative Expenses Act of August 2, 1946, 60 Stat. 806, as amended, 5 U.S.C. 5724, provides as follows:

LOSS OF ENTITLEMENT UNDER AN AGREEMENT

Denial of transportation and/or indebtedness subject to collection action for reimbursement of transportation furnished may be the result if there is:

* * * * * * *

6. duplication of entitlement under separate statutes.

Since the employee received a monetary allowance for travel to Hawaii the place from which he was ordered to active duty at the time of his release from active duty, he is precluded by the above regulation from transportation thereto as a civilian at Government expense. Therefore he is indebted for any amounts allowed for his own return transportation to Hawaii. The question is answered accordingly.

We note that items 10 and 11 of the travel orders of June 9, 1969, authorize payment of temporary quarters subsistence expenses and miscellaneous expenses allowance, respectively. The reemployment of the employee after his military service in his former position was not a transfer of official station, but we would not object to such reemployment being regarded as a new appointment to Hawaii. On that basis there was no authority for payment of temporary quarters subsistence expenses and miscellaneous expenses allowance and appropriate action should be taken to recover such payments as well as any other payments made—such as per diem for dependents—on the as-

sumption of a transfer being involved. See the applicable sections of Office of Management and Budget Circular No. A–56, Revised, June 26, 1969.

The vouchers and papers transmitted are returned herewith for handling as indicated therein.

[B–172049]

Officers and Employees—Transfers—Relocation Expenses—Break in Service—Entitlement to Expenses Effect

An employee of the National Park Service in California who refusing to relocate with transferred functions was separated and granted severance pay, and who after placing his residence on the market, which was sold within 2 months, and storing his household effects, departed for Washington, D.C., in his privately owned automobile, towing his housetrailer, upon reinstatement in the Park Service in Washington within 4 months, is entitled pursuant to 5 U.S.C. 5724(a) to the same benefits he would have been entitled to had he transferred without a break in service, and under Public Law 89–516, the employee may be reimbursed for the sale of his house, the storage of household effects, the expenses incurred to travel to Washington with his wife prior to his reinstatement, and other proper relocation expenses. However, reimbursement for the storage and shipment of the employee's effects, precludes the allowance of mileage for the housetrailer.

To Floyd P. Hough, United States Department of the Interior, July 13, 1971:

We again refer to your letter dated February 25, 1971, file reference F5023–NCP(ABF) in which you requested our decision on a claim submitted by Mr. Robert Borgstede, an employee of the Department of the Interior, National Park Service, Eastern Service Center, Washington, D.C., for reimbursement of travel and transportation expenses and applicable allowances incident to his move from San Diego, California, to Washington, D.C.

The papers which accompanied the claim show that Mr. Borgstede was separated from his position with the Southwest Division, Naval Facilities Engineering Command, San Diego, California, on June 5, 1970, when that division was being disestablished effective June 27, 1970, and after he had declined to relocate with the Western Division of that command, located at San Bruno, California, to which the functions were being transferred. He was then granted severance pay in accordance with existing law and regulations. It is reported that his name was placed on a displaced persons list and consequently he received six inquiries as to interest in positions in Washington, D.C.

It is also reported that since Mr. Borgstede was interested in moving to some other part of the country for employment he had his residence in Chula Vista, California, listed for sale and his furniture placed in storage in San Diego. The residence was ultimately sold and settlement was effected on September 15, 1970.

On August 5, 1970, Mr. Borgstede and his dependent (wife) departed from San Diego by privately owned automobile and arrived in Washington on September 21, 1970. Apparently Mr. Borgstede towed his personally owned housetrailer at that time.

In culmination of negotiations for employment with the National Park Service, Eastern Service Center, Mr. Borgstede was officially notified of his selection on October 28, 1970, and on November 1, 1970, a travel authorization was issued authorizing travel by privately owned automobile from San Diego to Washington, D.C., per diem for self and dependent, shipment of household goods and personal effects, and other benefits under Public Law 89–516, approved July 21, 1966, 80 Stat. 323, 5 U.S.C. 5724, including $0.11 per mile for housetrailer. On November 2, 1970, he was reinstated in accordance with Civil Service regulations. The following day he signed the requisite 12-months service agreement. Thereafter he arranged for the shipment of his stored household effects by commercial van to his residence in Bethesda, Maryland, delivery being effected on or about December 4, 1970.

Mr. Borgstede has submitted two executed vouchers in which he has claimed $4,319.95, the aggregate amount of the following items:

Reimbursement of certain expenses incident to sale of residence	$1,534.87
Mileage (2,613 miles @ $0.08)	209.04
Mileage for house trailer (2,613 miles @ $0.11)	287.43
Per diem (for self)	140.00
Per diem (for dependent)	105.00
Temporary quarters	185.70
Shipment of household goods plus surcharge	1,335.72
Storage	322.19
Miscellaneous expense allowance	200.00
	$4,319.95

You say in your letter of February 25, 1971, that Mr. Borgstede feels that due to the circumstances in his case he is entitled to reimbursement for all of the involved expenses whether or not they were incurred prior to his appointment by your office. However, in expressing the view that under section 1.3(7) of Office of Management and Budget Circular No. A–56, revised June 26, 1969, the only allowable reimbursable items are those which were incurred after November 2, 1970, the effective date of Mr. Borgstede's reinstatement, you ask for our opinion as to whether, because of the nature of his separation due to transfer of function and the reinstatement by your office, he would

be entitled to reimbursement of the expenses other than those incurred after November 2, 1970.

Since Mr. Borgstede was separated because of a transfer of function and since there was a break in service before he was appointed by your office, his case falls within the purview of the provisions of 5 U.S.C. 5724a(c) which reads, as follows:

> Under such regulations as the President may prescribe, a former employee separated by reason of reduction in force or transfer of function who within 1 year after the separation is reemployed by a nontemporary appointment at a different geographical location from that where the separation occurred may be allowed and paid the expenses authorized by section 5724, 5725, 5726(b), and 5727 of this title, and may receive the benefits authorized by subsections (a) and (b) of this section, in the same manner as though he had been transferred in the interest of the Government *without a break in service* to the location of reemployment from the location where separated. [Italic supplied.]

The above provision of law is implemented by section 1.3a(7) of Circular No. A–56 and reads as follows:

> A former employee separated by reason of reduction in force or transfer of function who, within one year of the date of separation, is reemployed by a department for a nontemporary appointment effective on or after July 21, 1966, at a different permanent duty station from that where the separation occurred, may be allowed and paid the expenses and other allowances (excluding nontemporary storage when assigned to an isolated permanent duty station within the continental United States) in the same manner as though he had been transferred in the interest of the Government to the permanent duty sation where reemployed, from the permanent duty station where separated, *without a break in service,* and subject to the eligibility limitations as prescribed in these regulations. [Italic supplied.]

Our decision of May 28, 1971, B–172824, involved a similar case in which an employee who was involuntarily separated on September 6, 1969, by the Department of the Army because of reduction in force and who after the receipt of severance pay for 16 weeks was appointed to a position in the Federal Aviation Administration on May 25, 1970, in another State claimed reimbursement for real estate and other benefits under Circular No. A–56 as authorized in the travel orders. In interpreting and applying the above-quoted provisions of law and regulations to the facts in that case, we said that we are unaware of any reason why payment of relocation expenses otherwise proper incident to the employment with the Federal Aviation Administration would be precluded.

While the present case is distinguished from that covered by B–172824, *supra*, in that Mr. Borgstede incurred certain relocation expenses (sale of residence, storage of household goods, etc.) and traveled with his dependents to Washington prior to his appointment, we find nothing in the above-quoted provision of law or the legislative history to justify a conclusion that the benefits provided therein are required to be granted to a former employee only when he incurs relocation expenses subsequent to his reemployment at a different geographical location.

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It is our view that the effect of the subject provision of law is to consider for its purposes the date of any appointment, which was made within 1 year after the separation of an employee because of reduction in force or transfer of function, as of the date following the date of his separation in order that there would be no "break in service." Obviously, a holding to the contrary would serve to defeat the purposes of the law. Accordingly, and since a valid travel authorization—one which provided not only for travel and transportation allowances but other benefit under Public Law 89-516—was properly issued in this case it is our opinion that under the involved circumstances Mr. Borgstede is entitled to the same benefits authorized by the law and regulations as if he had been transferred to your office without a break in service.

Your understanding is correct that in any event the mileage claimed in connection with the housetrailer is not allowable. We have held that under the statutory authority (5 U.S.C. 5924(b)) and implementing regulations (section 9.3 of Office of Management and Budget Circular No. A-56, revised October 12, 1966) the payment for the transportation of a housetrailer for use as a residence is in lieu of any payment for transporting and storing household goods. See B-170183, August 14, 1970; B-169402, May 14, 1970; and B-165688, January 17, 1969. It is apparent, therefore, that under the law and regulation an employee may receive a payment in connection with the shipment and storage of his household goods or for the transportation of a housetrailer, but not for both. Since Mr. Borgstede arranged for the storage of his household goods in San Diego and shipment thereof to Bethesda and is claiming the aggregate amount of $1,657.91 incident thereto, an allowance for such shipment and storage would preclude the allowance of the mileage of $287.43 claimed for the transportation of the housetrailer.

The voucher and supporting papers are returned herewith for certification of the allowable amount on the basis indicated above.

[B-172302]

Compensation—Rates—Highest Previous Rate—Administrative Discretion

The retroactive adjustment in the pay rate of an employee who upon reemployment in a GS-3 position following resignation from a GS-6, step 4, position is placed in step 10 under the highest-previous rate rule to step 1 in accordance with an administrative regulation restricting the use of the highest-previous rate rule may not be reversed as the appointment to GS-3, step 10, was not an administrative waiver of the administrative restriction on the use of the highest-previous rate rule, nor may the original pay-setting action be affirmed by a regulating or higher level, since the distinctions recognized in 30 Comp. Gen. 492 between statutory and so-called purely administrative regulations

no longer apply in view of contrary court cases and the fact that B-158880 changed the rule in 30 Comp. Gen. 492. However, overpayments received in good faith by the employee may be waived under 5 U.S.C. 5584.

To the Chairman, United States Civil Service Commission, July 13, 1971:

We refer further to your letter of March 19, 1971, concerning the rights of an employee whose pay on reinstatement was set under the highest-previous-rate rule and thereafter reduced pursuant to an agency internal regulation.

You state that the employee who had resigned on September 26, 1969, at Scott Air Force Base, Illinois, as a GS-6, step 4, $7,569 a year, was offered and accepted at Tinker Air Force Base, Oklahoma, a GS-3 position with salary set at step 10, $6,393 a year. She was reinstated at that rate on March 9, 1970, but on March 30, 1970, was informed that due to the applicable administrative regulation she could receive only the minimum rate of GS-3, $4,917 a year. You report her pay rate was retroactively adjusted accordingly.

The administrative regulation in question was issued by Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, under date of December 24, 1969. Among other things, it restricted the use of the highest-previous-rate rule to certain specified situations not here involved. We assume in the absence of some indication to the contrary that the regulations of December 24, 1969, had been received by Tinker Air Force Base on or before March 9, 1970, the effective date of the reinstatement.

The papers enclosed with your letter show the Dallas Regional Office of the Civil Service Commission on appeal of the employee found that the adverse action procedures of part 752 of the Commission's regulations applied to the corrective action changing her salary from step rate 10 to step rate 1, retroactively. Such finding was based on the assumption that (a) the pay rate originally established upon reemployment was not illegal *per se* and (b) the agency had a choice to correct the action or let it stand.

The Department of the Air Force has appealed to the Civil Service Commission the decision of the Dallas Regional Office on the ground that the agency must abide by its regulations and cannot disregard them in certain individual cases and enforce them in others. The Department apparently feels this principle is applicable regardless of whether the regulation is statutory (pursuant to, or in execution of, a specific statute) or administrative (pursuant to general statutory authority or emanates out of regulatory authority reposed in another agency). Thus, the Department's position is that Tinker Air Force Base was precluded by regulations from setting the employee's salary in excess of the minimum of the grade to which reinstated.

You cite 30 Comp. Gen. 492 (1951) as involving a similar situation and ask whether that decision has been overruled or modified. In that case an employee was promoted upon reallocation of his position. The salary was fixed at a rate of $5,800 a year consistent with the highest-previous-rate rule as authorized by the Civil Service Commission regulations but not in accord with agency regulations which would have limited the rate change upon an upward grade reallocation to the lowest rate of the higher grade which exceeds the existing rate by not less than the equivalent of one step increase of the lower grade. The case in effect held that the administrative action—which was legal within the terms of the highest-previous-rate rule—constituted an authorized waiver of the more restrictive administrative regulations. In support of that decision the case cited 21 Comp. Dec. 482 (1915); 1 Comp. Gen. 13 (1921); 4 *id.* 767 (1925); and B–74921, April 5, 1949. 23 Comp. Gen. 941 (1944) was cited for comparison purposes.

You express the view that an agency head who has certain discretion in setting pay rates may affirm a rate (within such discretion) at which an appointment was made, notwithstanding his contrary 1 Comp. Gen. 13 (1921); 4 *id.* 767 (1925); and B–74921, April 5, 1949. 23 Comp. Gen. 941 (1944) was cited for comparison purposes.

You specifically ask (1) whether the appointment at the rate of GS–3, step 10, $6,393 a year, was an administrative waiver of the administrative restriction on the use of the highest-previous-rate rule, or (2) in the alternative, whether the original pay-setting action may be affirmed by the regulating level or higher level in the Department.

You refer to 37 Comp. Gen. 820 (1958) as an example of our decisions holding that certain regulations cannot be waived. You imply such decisions appear to involve only statutory regulations. The distinctions formerly made in our decisions prior to 1958 between statutory regulations and so-called purely administrative regulations are no longer regarded as applicable in all respects in view of subsequent court cases. See generally *Service* v. *Dulles*, 354 U.S. 363 (1956), and at 372 the court in stating a principle established in *Accardi* v. *Shaughnessy* (1954), 347 U.S. 260, said, "* * * that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even where the administrative action under review is discretionary in nature." We recognize that those decisions, however, involved administrative actions which not only were contrary to the regulations but were adverse to the employees.

In our decision of October 27, 1966, B–158880, to which you refer, the issue was whether exceptions could be granted to certain parts of the Joint Travel Regulations of the Department of Defense covering its civilian employees. That decision arose out of our prior

decision of April 28, 1966, in regard to the same subject matter. In holding that exceptions to the regulations would be the same as waivers, we quoted the following which appeared in the April 28, 1966 decision:

> Since the authority to issue travel regulations now rests exclusively with the Per Diem, Travel and Transportation Allowance Committee it follows that under the regulations as presently worded the Secretaries of the Uniformed Services may not waive or extend the time limit prescribed in paragraph C 7004–2. Likewise, we do not believe that the Committee could waive such provision. * * *

The effect of the April 28 and October 27, 1966 decisions was to change the rule set forth in 30 Comp. Gen. 492.

We point out that Volume 2 of the Joint Travel Regulations of the Defense Department involved in the above 1966 decisions could be described as administrative regulations in that they supplement statutory regulations issued under authority granted to the Office of Management and Budget. The regulations of the Department of the Air Force here involved seem to be similar in nature.

Accordingly, both of your questions are answered in the negative. It would appear, however, that the overpayment for the period covering the retroactive adjustment, March 9–30, 1970, during which the employee received the higher pay apparently in good faith would be for consideration of waiver under 5 U.S.C. 5584.

[B–171662]

Contracts—Negotiation—Evaluation Factors—"Best Buy Analysis"

The failure to disclose the 3 to 1 ratio of technical merit to the cost evaluation formula of the "best buy analysis" included in the Evaluation/Selection Plan approved as the basis for the award of a cost-plus-fixed-fee contract under a request for quotations for the procurement of automatic test equipment for internal combustion engine powered materiel—where no questions as to the best buy analysis were raised at a prequotation conference—was not prejudicial in the award competition, even though the solicitation did not accurately reflect the importance to be accorded to cost, which was ranked as the least important of eleven evaluation factors, since the two offerors selected for negotiations were essentially equal as to technical ability and, therefore, the only consideration remaining for evaluation was price, an advantage not to be ignored pursuant to paragraph 4–106.4 of the Armed Services Procurement Regulation.

To the RCA Corporation, July 19, 1971:

Further reference is made to your protest against the award of a contract to Dynasciences Corporation, pursuant to request for quotations (RFQ) No. DAAA25–70–Q–0653, issued by Frankford Arsenal, Philadelphia, Pennsylvania.

The RFQ was issued on May 26, 1970, for the procurement of automatic test equipment for internal combustion engine powered materiel, including development of programmable diagnostic units and transducer kits. Nine quotations were received by the closing date of July 31,

1970. After evaluation of the quotations in accordance with the Evaluation/Selection Plan approved May 15, 1970, by the Assistant Secretary of the Army (R. & D.), and negotiations with your company and Dynasciences, award was made to the latter on December 30, 1970, on a cost-plus-fixed-fee basis for an estimated cost of $3,594,429, including fee.

It is your primary contention that the "best buy analysis," applied to the quotations in the evaluation process, placed a much greater emphasis on cost in relation to technical merit than was indicated by section H, Evaluation and Award Factors, of the RFQ. In this connection, you point out that the best buy analysis employed a 3 to 1 ratio of technical merit to cost, whereas in section H cost was ranked last among 11 evaluation factors "listed in the order of their relative importance." You assert that in reliance on this provision of the RFQ, RCA took a technical and management approach in preparing its quotation based on a high-quality system not greatly constrained by considerations of cost. It is your position that had you known a 3 to 1 ratio would apply, you "would have taken some other approach calculated to attain a similarly high rating but with much greater recognition of cost as a very important factor." You also argue that in view of the RFQ language, application of the 3 to 1 ratio was contrary to Armed Services Procurement Regulation (ASPR) 3-805.2, which provides that in selecting a contractor for a cost-reimbursement type contract estimated costs and proposed fees should not be considered controlling. You also take issue with the technical merit rating assigned to your quotation.

As a final matter, you assert that contrary to 10 U.S.C. 2304(g) and ASPR 3-805.1, no written or oral discussions of RCA's cost and fee quotations were conducted after the acceptability of its technical quotation was resolved. In addition, you contend that there was a failure to conduct discussions concerning your offer of a contract with cost incentives coupled with an award fee based upon technical performance as provided for by ASPR 3-405.5(h). You also state that in addition to failing to conduct the required discussions with RCA, you believe cost discussions were conducted with Dynasciences, resulting in an increase of about one million dollars in its unreasonably low quotation price. On the basis of the foregoing, you ask our Office to declare the contract void *ab initio* and require resolicitation.

With regard to the evaluation, the record shows that the "best buy analysis" was included in the Evaluation/Selection Plan (E/SP) approved for the procurement prior to issuance of the RFQ in accordance with Frankford Arsenal Regulation (FAR) 715-35, Technical Evaluation of Research, Development, and Engineering Proposals. The

E/SP, which was not made part of the RFQ, established various levels of evaluation responsibility with the Commanding General, United States Army Tank-Automotive Command, being the Source Selection Authority. The E/SP also included a description of the 10 technical and managerial evaluation factors, sub-factors, and weights to be applied. It also provided for application of the "best buy analysis" upon completion of the technical evaluation and establishment of the final merit rating.

In accordance with paragraph 7(4) of FAR 715-35, a 3 to 1 ratio of technical merit to cost was determined justifiable for this procurement. Briefly, the best buy analysis provides for normalizing the technical merit ratings and costs of all acceptable quotations. This is accomplished by taking the lowest technically acceptable quotation as a base and comparing all others to it on a numerical basis. The costs of the acceptable quotations are similarly normalized. The 3 to 1 ratio is then applied to the normalized ratings to determine the best buy.

It is reported that on June 16, 1970, a prequotation conference was held at Aberdeen, Maryland, to familiarize potential sources with the technical aspects and the source selection procedure to be employed. All attendees were afforded an opportunity to ask questions and the evaluation procedure, including the best buy analysis, was demonstrated through the use of view graph projections. However, the technical merit to cost ratio was not disclosed. It is reported that neither RCA nor any of the other attendees raised any questions as to the best buy analysis.

The comprehensive file furnished our Office indicates that the technical evaluation procedure prescribed by the E/SP was applied to each quotation. All sections of each quotation were evaluated by several evaluators. Each evaluator was provided evaluation sheets for each factor and subfactor or element to be rated. In addition to the numerical rating, each evaluator was required to support his rating with a narrative explanation. The evaluation sheets were reviewed by the Chairman of the Technical Evalution Panel. The numerical scores for the technical portion of the proposals were tabulated, averaged and combined in accordance with the preestablished weights. The best buy analysis was then performed using the technical merit ratings and the proposed cost estimates. The Evaluation Panel's summary of the best buy with respect to RSA and Dynasciences was:

	Technical Merit	Best Buy Index
Dynasciences	62	2.73
RCA	64	1.69

The evaluation report was submitted to the SSA who on October 9, 1970, approved negotiations with RCA and Dynasciences.

The record shows that subsequent to approval by the SSA on October 9, 1970, negotiations were conducted with you and Dynasciences. Although it appears that the discussions with both firms related primarily to technical matters, the negotiations resulted in several price revisions. Subsequent to one discussion you reduced your cost estimate by approximately $1,300,000 as a result of certain technical changes. Following further discussions you made certain technical changes and increased your estimated costs by $310,000. Similar discussions were conducted with Dynasciences, as a result of which it upgraded its technical approach and made a commensurate cost estimate increase of about $400,000. Finally, both firms were advised that the closing date for negotiations was December 10, 1970. On that date you submitted a letter reducing both your estimated costs and fee to a total of $4,146,214. Dynasciences' final quotation resulted in its total quotation being about $500,000 below yours and a revised best buy index of 2.10 as compared to RCA's 1.95.

We agree with your primary contention. In our opinion, the listing of the 11 evaluation factors in the request for quotations with the statement that they are in the order of their "relative importance" did indicate an intent on the part of the Government to give considerably greater weight to technical achievement than to cost. Since the technical factors were evaluated on a combined basis of 3 to 1 in relation to cost while cost was ranked as least important of 11 evaluation factors, we believe that the solicitation did not accurately reflect the importance to be accorded to cost. However, we are not persuaded that your firm was prejudiced in the award competition as a result of this "misinformation." In this connection, the Army has furnished our Office computations, of which you were furnished a copy, showing that even if ratios of 11 to 1 and 20 to 1 were applied, Dynasciences would have been the "best buy."

The record shows that your firm and Dynasciences were selected for negotiations based on the initial proposals. All the other offerors were considered to be outside the zone of consideration, although they also were permitted the opportunity to revise their proposals. As a result of technical revisions made during the course of negotiations, your proposal was reduced in cost by approximately $1 million, while the Dynasciences proposal was increased by approximately $400,000 in amount. It appears that your final proposal was revised to give greater importance to cost. Although your final offer proposed a CPAF type contract, it was decided that the CPFF contract was more appro-

priate for this particular procurement and award was made on that basis. Based on the record, we cannot conclude that any firm was given a competitive advantage or that your firm suffered a disadvantage by reason of the information provided in the solicitation. B–169754, December 23, 1970. Further, we are unable to agree with your contentions concerning improprieties with respect to the evaluation procedure, the conduct of negotiations, or failure to accept your offer of a CPAF type contract. With regard to your contention that greater emphasis was placed on cost than permitted by ASPR 3–805.2, we believe the following excerpt from 50 Comp. Gen. 246, October 6, 1970, is dispositive of that contention.

> Where, as here, two offerors are essentially equal as to technical ability and resources to successfully perform a research and development effort, the only consideration remaining for evaluation is price. In such a situation, we believe that the lower priced offer represents an advantage to the Government which should not be ignored. Indeed, ASPR 4–106.4 makes it clear that awards should not be for capabilities that exceed those determined to be necessary for successful performance of the work. We view the award to TI as evidencing a determination that the cost premium involved in making an award to SRL, based on its slight technical superiority over TI, would not be justified in light of the acceptable level of effort and accomplishment expected of TI at a lower cost. The concepts expressed in ASPR 3–805.2 and 4–106.5(a) that price is not the controlling factor in the award of cost-reimbursement and research and development contracts relate, in our view, to situations wherein the favored offeror is significantly superior in technical ability and resources over lower priced, less qualified offerors.

Accordingly, we find no basis upon which we may properly disturb the award made to Dynasciences.

[B–171782]

Courts—Judgments, Decrees, Etc.—Judgment of Dismissal—Adjudication on Merits

The dismissal by the court of a complaint requesting both a preliminary injunction pending resolution of a protest filed with the United States General Accounting Office (GAO) to the award of a contract to reproduce research papers for sale to the Government and the public subsequent to the cancellation by mutual agreement of the contract initially awarded the petitioner due to deficiencies in the request for proposals (RFP), and permanent injunctive relief that would compel cancellation of the contested award and reinstate the initial contract was according to the Federal Rule of Civil Procedure 41(b) a final adjudication on the merits that GAO must honor since the two issues involved in the protest—that the resolicitation on the basis of price only should have been advertised and not negotiated and that procurement procedures had been violated by calling for best and final offers three times—were adjudicated by the court.

Contracts—Negotiation—Propriety—Incumbent Contractor

The fact that during the negotiations of a new contract for the reproduction of research papers for sale to the Government and the general public upon cancellation of an existing contract because of deficiencies in the request for proposals (RFP), discussions relative to start-up time were held with offerors within a competitive range but not with the incumbent contractor who had submitted an offer under the amended RFP was not prejudicial as the matter of start-up time was not germane to the incumbent contractor whereas discussions

were required with other offerors because the complications involved in the procurement necessitated a revision in the contract award date, thereby lessening the time a new contractor would have to prepare for contract performance.

To Freedman, Levy, Kroll & Simonds, July 19, 1971:

We refer to a telefax dated January 27, 1971, from the National Cash Register Company (NCR) and submissions dated January 29, March 4, May 13, and May 26, 1971, all with enclosures, from your firm on behalf of NCR protesting against the award of contract No. OEC-9-70-1041 to Leasco Information Products, Incorporated (Leasco), under request for proposals (RFP) No. 71-1, issued by the Office of Education, Department of Health, Education, and Welfare.

The subject RFP was issued on September 4, 1970, inviting proposals for the operation of a facility in support of the Educational Resources Information Center (ERIC) which would require the contractor to produce copies of Government furnished research papers in both reduced size transparencies (microfiche) and full size hard copy. The RFP also provided for the sale of those copies, over a 12-month period, to the public and to the Government at unit prices to be established by the contract. Annual sales under the contract were estimated at $1,400,000: $60,000 to the Government and $1,340,000 to the general public. The RFP provides for services to be performed for a period of 1 year from February 21, 1971, with the Government reserving the right to extend the contract period for 2 additional years. Proposals were to be evaluated on the basis of six criteria, one of which was cost.

On September 28, 1970, four firms including both Leasco and NCR submitted proposals which were then reviewed by an evaluation team comprised of Government and non-Government personnel. NCR was selected as the most qualified offeror and negotiations commenced. On December 11, 1970, contract No. OEC-0-71-0846 was awarded to NCR.

On December 22, 1970, NCR was requested to agree to a cancellation of the above-cited contract due to the existence of several serious procurement deficiencies. As a result of the above-cited request, NCR signed a "void ab initio" agreement with the Government whereby both parties waived all rights under the "contract."

On December 23, 1970, a new contracting officer was appointed to manage the procurement, and on January 4, 1971, the original RFP was amended deleting five of the six evaluation criteria. The amendment provided for award to the offeror with the lowest total price and requested revised proposals by January 11, 1971, from the four firms who submitted proposals under the original RFP. On January 7, 1971,

the RFP was further amended to require offerors to submit a marketing proposal addressed to the expansion of sales to the public.

Four proposals were received. Three firms including both Leasco and NCR were considered to be within competitive range. Negotiations followed with the three firms and each offeror was requested to submit its best and final offer by January 19, 1971.

On January 19, 1971, all three firms submitted written offers. The offer submitted by Leasco, which was low, contained a clause reserving to it an exclusive right to the originals of all materials contained in the Government information store. It appears that there was a misunderstanding as to whether during the previous negotiations the Government was given the right to delete the above-cited clause from the Leasco proposal. The contracting officer concluded that he had erred in asking for best and final offers prior to resolving the misunderstanding.

In an attempt to remedy this ambiguity another amendment to the RFP was issued on January 20, 1971, making clear that no exclusive rights could be obtained under the contract and requesting new, best and final offers by 11:00 a.m. on January 21, 1971.

We are informed by the contracting officer that he and his legal advisor were contacted by counsel for Leasco on the afternoon of January 20, 1971, in regard to the need for the last amendment. The contracting officer then agreed to meet with the Leasco representatives at 9:30 a.m. on January 21, 1971, to discuss the disputed clause in the Leasco proposal.

According to the contracting officer, Leasco's offer was submitted at the meeting before the time set for receipt of best and final offers. Offers were then received from the other two firms. NCR's proposal included a notation to the effect that they objected to the creation of a new deadline for best and final offers. It was then determined that Leasco was the low offeror and the contract was awarded to Leasco on the afternoon of January 21, 1971.

On January 22, 1971, the contracting officer discovered NCR's "protest before award" that had been delivered during the contracting officer's absence on the preceding afternoon.

NCR's protest is now based on the following contentions: (1) The amendment issued on January 4, 1971, eliminating all the evaluation criteria except price changed the nature of the contract, necessitating its resolicitation by means of an invitation for bids; (2) HEW has violated procurement procedure by calling for best and final offers three times pursuant to various amendments and by meeting with Leasco representatives on January 21, 1971, after negotiations had been closed but before the deadline for submission of final proposals; and

(3) HEW approved, at a meeting on January 15, an improper 60-day startup delay for Leasco which, in effect, communicated to Leasco that, as of that time, its price was low.

Issues No. 1 and No. 2 were involved in the court action described below. Issue No. 3 was not involved in the court action.

Subsequent to the filing of the instant protest with our Office, NCR filed a complaint on February 4, 1971, entitled *The National Cash Register Company* v. *Elliot L. Richardson*, Civil Action No. 2437–70. The complaint prayed for the following relief:

(a) Order Defendant and any and all his subordinates to cancel and set aside the contract awarded to Leasco (Contract No. OEC–0–71–1041) on January 21, 1971, and to reinstate the Contract awarded to Plaintiff on December 11, 1970 (Contract No. OEC–0–71–0846) or in the alternative to order that a new solicitation be issued and proper procedures followed:

(b) Permanently enjoin Defendant and any and all of his subordinates from implementing Contract No. OEC–0–71–1041 awarded to Leasco Information Products on January 21, 1971.

(c) Pending a hearing upon the merits of this case, issue a preliminary injunction enjoining Defendant and any and all his subordinates from implementing Contract No. 0–71–1041 awarded on January 21, 1971 until the Comptroller General of the United States has had an opportunity to rule on the Protest filed by Plaintiff with him on January 29, 1971.

(d) Pending the hearing upon the preliminary injunction, issue a temporary restraining order * * * restraining the Defendant and any and all his subordinates in the manner aforesaid until the Comptroller General of the United States has had an opportunity to rule on the Protest filed by Plaintiff with him on January 29, 1971.

(e) Award Plaintiff such further relief as may be just and equitable under the circumstances.

The motion for temporary restraining order was denied on February 4, 1971.

Subsequently, the motion for preliminary injunction was denied and the *complaint dismissed* pursuant to a memorandum opinion dated February 17, 1971. NCR then filed a motion to alter the memorandum opinion, based on the contention that the court had no authority to dismiss the complaint since it would be improper for the case to be disposed of finally on a hearing confined only to the question of preliminary injunction. In addition NCR alleged:

The dismissal of the complaint at this time is highly prejudicial to the Plaintiff for there is pending with the Comptroller General a Protest against HEW's award of a contract to Leasco and pending his ruling on the Protest, Plaintiff desires to retain its right to obtain a decision from the Court on the merits of this controversy after a full opportunity to present testimony and to cross-examine those persons who gave affidavits for the Defendant.

In denying this motion on February 19, 1971, the court held:

Plaintiff's sole prayer is for injunctive relief. The Court has ruled as a matter of law that this case is not an appropriate case for an injunction under any circumstances, even if all of plaintiff's allegations are accepted as true. Plaintiff's motion to alter Memorandum Opinion is denied.

Since we are informed that the time for appeal has expired without an appeal being filed, we consider the decision to be final.

Federal Rule of Civil Procedure 41(b), entitled "Involuntary Dismissal: Effect Thereof," provides as follows:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for a failure to join a party under Rule 19, operates as an adjudication upon the merits.

It is clear that the order in the instant case does not "otherwise specify" and that the dismissal of the complaint operates as a full adjudication upon the merits (*Glick* v. *Ballentine Products, Inc.*, 397 F. 2d 590 (1968)) which is conclusive not only as to the matters which were decided, but also as to all matters which might have been decided in the original action. *Englehardt* v. *Bell & Howell, Co.*, 327 F. 2d 30 (1964).

Since NCR prayed for relief in the form of an injunction compelling HEW to cancel the award to Leasco and to reinstate the contract to NCR, in addition to its prayer for a preliminary injunction pending a ruling by this Office on NCR's protest of January 29, 1971, we must conclude that the court's dismissal of NCR's entire complaint had the effect of a final adjudication on the merits of issues No. 1 and No. 2 involved in this protest.

The order of the court dismissing NCR's complaint was, in effect, an adjudication on the merits of its prayer for permanent injunctive relief, which would have required the court to decide the material issues involved in the instant protest. In B–171917, May 4, 1971, we dismissed a protest without deciding the merits because the material allegations had been considered and rejected on the merits by a court of competent jurisdiction. There has been a final adjudication on some of the issues raised in the instant protest.

We believe that by asking the court for permanent injunctive relief NCR attempted to obtain a court adjudication upon the merits of two of the material issues involved in this protest. Since the complaint was dismissed, effecting an adjudication upon the merits according to Federal Rule of Civil Procedure 41(b), we must likewise honor the court's ruling. See B–171917, May 4, 1971.

In regard to your allegation of an improper 60-day startup delay, the subject RFP provides that the contractor will be required to assume completely his duties under the contract within 30 days of the contract starting date (approximately February 20, 1971). It appears that although the time period allowed Leasco, until March 21, amounts to a total of 60 days from the date of contract award, January 21, it was actually in conformance with the RFP which provides for performance within 30 days of contract *starting date*, which was February 20, 1971.

Finally, in connection with your allegation that the mention of startup time during negotiations with Leasco on January 15 was an improper communication to Leasco that its price was low, we can find no evidence in the record to support such an assumption. We are informed that such discussions were held with two of the offerors found to be in the competitive range and were not held with NCR only because the matter would not be germane for the incumbent contractor. These discussions were required because the complications involved in this procurement necessitated a revision in the contract award date, thereby lessening the time a new contractor would have to prepare.

In the circumstances, we find nothing improper in the startup time discussions held with both new contractors.

In view of the foregoing, we must deny your protest in regard to issue No. 3 and dismiss your protest on the remaining issues.

[B-160778]

Contracts—Labor Stipulations—Davis-Bacon Act—Classification of Workmen—Local Area Practice

In the dispute concerning wages paid for placing and puddling concrete in which fiber duct pipe was encased, where the wage rate determination incorporated in the contract only listed "concrete puddler," and the invitation had not indicated any other rate was to be paid for fiber duct encased concrete, the request by the contracting agency for information that would indicate the substantial area practice of using concrete puddlers for encasing fiber duct in concrete at the rates specified in the wage determination was in accord with decisions of the Comptroller General and, although the Secretary of Labor's function under the Davis-Bacon Act, 40 U.S.C. 276a, generally is exhausted when a wage determination is furnished, the contract provided for referral to the Secretary of classification disagreements and, therefore, new evidence of local area practices may not be considered by the General Accounting Office. 50 Comp. Gen. 103. holding the contractor liable for Davis-Bacon Act violations, is affirmed.

To the Southwest Engineering Company, Inc., July 20, 1971:

Reference is made to your letters dated February 8, 15, and 25, April 20, and May 18, 1971, requesting reconsideration of our decision of August 19, 1970, 50 Comp. Gen. 103, which disallowed your claim for $410.47 withheld to cover alleged violations of the Davis-Bacon Act, 40 U.S.C. 276a, under contract No. DA-23-028-ENG-7904.

Your request for reconsideration is based upon your contention that our decision of August 19, 1970, is erroneous in that it is in conflict with certain prior decisions of our Office. In this connection, you point out that the major portion of the wages in issue are those paid for placing and puddling concrete in which fiber duct pipe was to be encased, and that the wage rate determination incorporated into your contract included a classification and wage rate for "concrete puddlers." In view thereof, you contend that if it was intended that any other rate was to be paid for puddling the concrete in which fiber duct

was to be encased, the invitation for bids should have so indicated, and you cite our decisions 45 Comp. Gen. 532, March 1, 1966, and B-158511, July 6, 1966, as supporting this conclusion.

Additionally, you contend that our decision of August 19, 1970, is predicated on the premise that a bidder must ascertain for himself whether any local practices may exist which differentiate between normally accepted worker classifications, even though such differentiation may be based upon labor union jurisdictional claims, and that a bidder should then prepare his bid on the basis of such local practices. You claim that all prior decisions of our Office have ruled that such a local practice theory is improper, and you cite 36 Comp. Gen. 806, June 10, 1957; B-147602, January 23, 1963; 43 Comp. Gen. 84, July 26, 1963; and 43 Comp. Gen. 623, March 31, 1964, as being illustrative of our prior position. Of the foregoing decisions, you indicate your belief that B-147602, January 23, 1963, is decisive of the issue in the instant case.

Alternatively, you contend that if this Office should again conclude that the "local jurisdictional practice" of a given area controls, we should then consider the fact that the affidavits of the Wichita electrical contractors on which the Government relied in the instant case do not, in fact, establish a local practice, since none of the contractors state that they ever installed fiber duct encased in concrete.

Concerning your contention that you were entitled to rely upon the classification and wage rate for concrete puddlers in the absence of any indication to the contrary in the invitation for bids, our decisions 45 Comp. Gen. 532, March 1, 1966, and B-158511, July 6, 1966, on which you rely, both involved situations in which two separate and distinct wage rate determinations were included in the invitation for bids, and no advice was given to bidders as to which determination was applicable to the work necessary to perform the contract. While we held in those cases that bidders were entitled to determine which of the wage rate determinations would be applicable, and to compute their bid prices on such rates, we cannot agree with your contention that bidders are entitled to assume, without regard to local practice, that all concrete puddling (and all other unskilled labor which may be required in the performance of a contract of the type here involved) may be performed by concrete puddlers and laborers and paid for at the wage rate for such workers specified in the wage rate determination. See in this connection, B-147602, January 23, 1963, which indicates that where the practice of using electricians to install fiber duct is exclusive, payment of electricians' wages would be appropriate. Conversely, where a substantial area practice of using laborers or pipelayers for a part of the installation can be shown, payment of laborer or pipelayer rates for such work is proper.

In this connection, you also cite *Black, Raber-Keif and Associates* v. *United States*, 174 Ct. Cl. 302 (1966), which holds the Government liable if it requires a contractor to pay higher wages than he is obligated to pay under his contract, as supporting your position. That case, however, involved the question of whether a wage rate of 60¢ per hour specified in the wage rate determination included or excluded additional perquisites of approximately 40¢ per hour. We see no basis upon which the court's conclusion in that case would impose a duty upon the contracting agency or the Department of Labor to ascertain area practices relative to types of unskilled work which are performed by journeyman mechanics, and to include such information in wage rate determinations.

You also contend that our decision of August 19 imposes a requirement on bidders to ascertain local practices, including those based upon union jurisdictional claims, and that such a requirement would be contrary to previous decisions of this Office from 1957 to 1964. While the decisions you have cited do set out the general rule that work classifications should not be made solely on the basis of local practices which are the subject of union jurisdictional disputes and which do not clearly establish actual differences in work skills, those same decisions set out several exceptions to the rule. Thus, in 43 Comp. Gen. 623, March 31, 1964, the following is stated:

> * * * Unless local practices clearly establish actual differences in work skills * * * *or unless they are exclusive,* it seems clear that their adoption * * * is neither required nor permitted by the terms of the Davis-Bacon Act. [Italic supplied.]

And in B–147602, January 23, 1963, we said the following:

> * * * In any event, since a substantial practice of using the laborer and pipelayer classification existed * * * we would be inclined to conclude that the classifications used by the contractor, [laborer and pipelayer] should not be questioned for wage adjustment purposes.

We believe these cases clearly indicate two principles. First, that a local area practice must be followed where it is *exclusive*. Second, that a prevailing local area practice need not be followed if a *substantial* area practice to the contrary can be shown. Those portions of our decisions which speak of jurisdictional disputes are directed to areas in which there are, in fact, two established practices, rather than one exclusive practice. And those portions of our decisions which speak of a substantial practice are directed to establishing that there is no exclusive practice in an area, and that more than one practice exists in an area, i.e., a prevailing practice and a substantial practice. We therefore do not agree with your contention that our prior decisions do not obligate bidders to ascertain and conform to local area practices, especially if such practices are exclusive or if there is no substantial area practice to the contrary. In the instant case we must therefore

agree that the request by the contracting agency, that you should furnish any information available to you which might indicate a substantial area practice of using concrete puddlers to encase the fiber duct in concrete, was in accord with the decisions of this Office cited above.

In this connection, you have also cited that portion of our decision of January 23, 1963, B–147602, which reads as follows:

> * * * It has been observed that under the Act the Secretary's function is exhausted once he has furnished such a wage determination and a schedule based thereon has been included in the contract specification * * *.
>
> * * * Moreover, it should be observed that by the terms of the Davis-Bacon Act the General Accounting Office, rather than the Department of Labor, is given sole responsibility to make wage adjustments and to determine violations for purposes of imposing debarment. While contracting agencies are responsible in the first instance for verifying and enforcing minimum wage requirements, for doing so in accordance with appropriate interpretations and regulations of the Department of Labor, and even for deciding certain factual matters in accordance with the contract provisions, in instances of non-compliance they are restricted to withholding funds to offset under-payments, and disputes over any wage adjustment involved are for final resolution by our office in the specified manner.

This decision (as well as the other three decisions which you cite and which we rendered from June 1957 through March 1964) were rendered in connection with contracts which contained the following Davis-Bacon Act provision:

> (a) All mechanics and laborers employed or working directly upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Act (Anti-Kickback) Regulations (29 CFR, Part 3)) the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and a copy of the wage determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

However, the contract in the instant case contained an additional provision, as part of paragraph (d) of Standard Form 19–A as revised in June 1964 and April 1965, reading as follows:

> (d) The Contracting Officer shall require that any class of laborers or mechanics which is not listed in the wage determination decision and which is to be employed under the contract shall be classified or reclassified conformably to the wage determination decision, and shall report the action taken to the Secretary of Labor. If the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers or mechanics to be used, the Contracting Officer shall submit the question, together with his recommendation, to the Secretary of Labor for final determination.

While your letter of February 15 points out that in B–147602, *supra*, we said that the Secretary's function under the act is exhausted once he has furnished a wage rate determination, and that disputes over wage adjustments are for final resolution by this Office, those statements must be reexamined and qualified where, as in the instant

case, a contractor agrees to a contractual provision which provides for referral of disputes to the Secretary of Labor for final determination. As stated in our decision of August 19, 1970, it is our view that, having agreed to the inclusion of clause 49 in your contract, the referral of the dispute to the Department of Labor on March 7, 1967, was proper, and you are bound by the decision rendered by the Solicitor of Labor unless such decision was arbitrary, capricious, or unsupported by substantial evidence.

While we held in our August 19 decision that there was substantial evidence before the Solicitor to support his determination that it was the prevailing practice in the area to use electricians for the installation of fiber duct as a conduit for electrical wires, you now allege that none of the evidence supports a conclusion that there was any practice in the area of using electricians to puddle concrete used in the installation of fiber duct. In support of this contention you point out that three of the affidavits relied on by the Government do not support the Government's position, since none of them states that the contractors used electricians to puddle concrete, and since your research fails to indicate that any of these contractors has ever installed fiber duct encased in concrete. In view thereof, you allege that the portions of our decision of August 19 which state that the evidence of record before the contracting officer and the Solicitor of Labor indicated that four out of the five contractors surveyed used electricians for the installation of fiber duct is in error, and that our decision should therefore be reversed.

Where, as in the instant case, the parties have agreed that a determination by a third party shall be final on a disputed question of fact, it is settled that a review by this Office shall be limited to the record before such third party when his determination was made. See 46 Comp. Gen. 441, 461–462 (1966), and cases cited therein. As indicated at page 2 of our decision to you of August 19, the Department's survey showed that four of the five companies which had installed fiber duct as a conduit for electric wires had used electricians to perform both the joining of the duct and the puddling of concrete.

The fact that you were not afforded an opportunity to present argument or evidence to refute the survey results while the question was before the Solicitor of Labor does not alter the rule as stated above, since the record clearly indicates that you were advised of the results of the Department's investigation, and that you were requested on several occasions to furnish evidence to the contracting officer of a substantial area practice of using laborers for the installation of fiber duct, and you refused to do so. It would therefore appear that you had the opportunity to refute Army's findings, and since it must

be assumed that any evidence or argument you may have submitted would have been referred to the Solicitor of Labor, it cannot be said that you were not afforded an opportunity to present evidence for consideration by the Solicitor. In view thereof, any consideration at the present time of any evidence which you could, and should, have submitted to the contracting officer would amount to a hearing *de novo*, and would be improper.

It is our opinion that the statements you have now submitted to this Office (and any evidence in support thereof) relative to the sufficiency and credibility of the Department's survey should have been submitted to the contracting officer at the time he advised you of the survey results and requested you to submit contrary evidence relative to the area practice. Since you failed to do so, this Office cannot now consider such allegations or evidence, or disagree with the conclusions of the Solicitor of Labor on the basis of such statements or evidence.

In view of the foregoing, we find no material error of fact or law in our decision of August 19, 1970, and it must therefore be affirmed.

[B-172219]

Contracts—Specifications—Qualified Products—Time for Qualification

The award of a contract to the low bidder whose product did not receive qualification approval for listing on the Military Products List prior to bid opening, although the product—electron tubes—had been tested and found qualified for listing on a specified date prior to bid opening but the ministerial act of approval had not been accomplished, does not violate paragraph 1-1107.1 of the Armed Services Procurement Regulation which prescribes that only bids "offering products which are qualified for listing on the applicable Qualified Products List at the time set for opening of bids" shall be considered in making awards, as the regulation does not impose a requirement for formal "approval" prior to bid opening, and, moreover, the regulation should be interpreted to insure the procurement of products meeting Government needs in a manner that will not place unnecessary restrictions on competition.

To the Fairchild Camera and Instrument Corporation, July 20, 1971:

We refer to your telegram of March 17, 1971, and your letter of May 24, 1971, relating to your protest against award to another firm under invitation for bids 71-71-A, issued by the U.S. Coast Guard Supply Center, Brooklyn, New York.

The invitation was issued on December 14, 1970, for bids on electron tubes, type 7012, qualified on the Military Products List. With respect to the qualification approval, the invitation provided: "Bids will be considered for such products as have, prior to the time of bid opening, been tested and approved for inclusion in the Military Products List

whether or not such products have actually been so listed by that date."

Two bids were received at the public bid opening on January 13, 1971. ITT Electron Tube Division of International Telephone Corporation submitted the lowest unit prices for the optional quantities specified and the lowest total price of $86,080. The bid from your firm set forth higher unit prices and a total price of $95,600.

Your letter of January 19, 1971, to the contracting officer furnished a copy of a notice of qualification approval for your product dated December 30, 1970, from the Naval Electronics Systems Command, based on your In-plant Report No. 70FD5 dated December 18, 1970. You alleged in your letter that ITT had not received qualification approval prior to bid opening as required in the IFB.

After receiving your letter of January 19, 1971, the contracting officer obtained a copy of ITT's Test Report No. PT-111 dated January 7, 1971. The purpose of the test was for requalification to a reinstated specification, and ITT's tubes tested passed each of the specific qualification requirements with no abnormalities or failures. The test report was forwarded to the Naval Electronics Systems Command on the same date it was completed, January 7, 1971, and we are advised it was received by the Command on January 12.

Notice of qualification approval was sent by letter of January 25, 1971, from the Naval Electronics Systems Command to ITT and furnished to the contracting officer by letter of January 28, 1971. The letter stated that "Qualification approval is hereby granted your product . . ." It will appear on Qualified Products List QPL-1 as follows:

GOVERNMENT DESIGNATION	MANUFACTURER'S DESIGNATION	TEST OR QUALIFICATION REFERENCE	MANUFACTURER'S NAME AND ADDRESS
7012		In-plant Rpt. No. PT-111 dtd 7 Jan 1971.	ITT Electron Tube Division, P.O. Box 100, Easton, Pa. 18043. Plant: Same Address.

The contracting officer decided that whether notice of approval was received before or after bid opening was of no significance, since approval of ITT's Type 7012 tube, occurred on January 7, 1971, upon successful completion of the test. Since it was the contracting officer's conclusion that ITT bid on a product which had been tested and approved for inclusion in the Military Products List prior to bid opening, he made award to ITT as the low bidder under the invitation on March 15, 1971.

In your protest to our Office, you take exception to the conclusion of the contracting officer. In support of your position, you quote from Navy's publication SD-6, Provisions Governing Qualification, to the effect that certification by the Government representative that the tests were monitored shall not be construed as meaning that the tests are acceptable to the Government for qualification of the product and that the preparing activity will determine whether the product conforms to the requirements of the specification. You advise that it has been your experience the preparing activity performs a complete engineering review of the data submitted prior to approval. You contend therefore that the required approval for inclusion in the Qualified Products List occurred on January 25, 1971, and the bid of ITT was not eligible for consideration at the time of bid opening on January 13, 1971.

We do not regard the publication to which you refer as controlling with respect to the issue presented by your protest. The determination by the contracting officer that qualification was complete on the date of the testing was not based on the fact that the testing was monitored by a Government representative, but rather upon the test results. In any event, the publication was distributed, as you indicated in your letter, at the time of authorization to conduct qualification testing and was not a part of the invitation or the applicable sections of the Armed Services Procurement Regulation (ASPR).

ASPR 1-1102 states that the preparing activity is responsible for qualification but does not set forth the method of discharging this responsibility. ASPR 1-1107.1 provides that when the Government is procuring qualified products, only bids "offering products which are qualified for listing on the applicable Qualified Products List at the time set for opening of bids" shall be considered in making awards. No requirement for a formal "approval" prior to bid opening is imposed by ASPR, the only requirement being that the product is qualified for listing.

Our Office has recognized that use of qualified products lists, while acceptable as a method of procurement in certain instances, is a method inherently restrictive of competition. 36 Comp. Gen. 809 (1957); 43 *id.* 223 (1963). In view thereof, and since the best interests of the Government require maintenance of full and free competition commensurate with the Government's needs, we are of the opinion that while regulations implementing the use of qualified products lists should be interpreted to insure procurement of products meeting the Government's needs they should not be interpreted in such a manner as to place unnecessary restrictions on competition.

In the particular circumstances present in the instant case, where the product was being tested for requalification to a reinstated speci-

fication and where the tests were completed, as authorized by the preparing activity, without any failures or abnormalities, it is apparent that ITT's product met the needs of the Government, and therefore was "qualified for listing" on the date the test report was issued. It is our opinion, therefore, that issuance of a letter of approval in this instance should be considered a ministerial act, and we do not believe the Government should be deprived of the benefit of considering ITT's bid merely because it had not completed its paperwork at the time of bid opening.

We recognize that, in other circumstances, we have held the effective date of qualification to be the date of the letter granting approval. See B-143282, August 18, 1960. However, in that case, the tests completed before bid opening were only partially successful, resulting in qualification of 18 of 22 items tested, and the approval which occurred after bid opening contained an element of discretion not present here. To the same effect, see B-155358, January 4, 1965. Moreover, in both of these cases, products were listed on the QPL without reference to the date of testing, while in the present case the proposed listing set forth in the letter of approval specifically refers to the date of qualification testing and to no other date.

In view of the foregoing, we believe the method of listing used in the instant procurement could reasonably be interpreted, as the contracting officer did, to establish the date of qualification as the date of the test report, rather than the date of the letter of approval. We are therefore unable to conclude that the actions of the contracting officer were unreasonable in the context of this particular fact situation, or that his award to ITT did not result in a valid, binding contract. Accordingly, your protest must be denied.

[B-172729]

Compensation—Rates—Highest Previous Rate—Applicability—Foreign Service Salary Rates

Employees of the Department of Agriculture who completed service in overseas positions under 22 U.S.C. 2385(d)(1) and are entitled to the same benefits as provided by 22 U.S.C. 928 for persons appointed to the Foreign Service Reserve, upon reinstatement to their former positions, may have their salaries set under the highest previous rate rule in accordance with 5 U.S.C. 5334(a) and section 531.203(c) of the Civil Service Regulations rather than on the basis they are only eligible to receive the step increases they would have earned had they remained in the positions in which regularly employed, as the highest previous rate rule has never been construed as excluding salary rates attained in the Foreign Service.

To the Secretary of Agriculture, July 20, 1971:

We refer further to the letter of April 22, 1971, from the Assistant Secretary for Administration concerning the setting of salary for

employees of the Department of Agriculture reinstated after having completed service in overseas positions under authority of 22 U.S.C. 2385(d)(1).

As indicated in the letter that section entitles employees covered thereby to the same benefits as are provided by 22 U.S.C. 928 for persons appointed to the Foreign Service Reserve. The latter section provides for reinstatement rights to "the same position he occupied at the time of assignment, or in a corresponding or higher position. Upon reinstatement he shall receive the within-grade salary advancements he would have been entitled to receive had he remained in the position in which he is regularly employed. * * *."

Our opinion is requested as to whether an employee returning to his former position is entitled only to those step increases he would have earned had he remained in that position, or whether that right is only a minimum guarantee so that the highest previous rate rule could be invoked to provide a higher rate.

Subsection 5334(a) of Title 5, U.S. Code, in pertinent part provides:

(a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Civil Service Commission in conformity with this subchapter and chapter 51 of this title when—
(1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;
(2) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter applies to another such position;
(3) he is demoted to a position in a lower grade;
(4) he is reinstated, reappointed, or reemployed in a position to which this subchapter applies following service in any position in the legislative, judicial, or executive branch;
(5) his type of appointment is changed;
(6) his employment status is otherwise changed; or
(7) his position is changed from one grade to another grade.

Section 531.203(c) of the Civil Service Regulations provides:

Position or appointment changes. Subject to §§ 531.204, 531.515, 539.201 of this chapter, and section 5334(a) of title 5, United States Code, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. When an employee's type of appointment is changed in the same position, the agency may continue to pay him at his existing rate or may pay him at any higher rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate.

The highest previous rate rule has never been construed as excluding salary rates attained in the Foreign Service. See 34 Comp. Gen. 380 (1955). Accordingly, our view is that under the law and regulations quoted above the application of the highest previous rate rule to reinstatement actions such as here involved is proper.

[B-172742]

Officers and Employees—Transfers—Break in Service—Expense Entitlement

An employee who resigned from the Federal Bureau of Investigation before the expiration of a 12-month service period following a transfer of official duty station and accepted employment with another bureau in the Department of Justice after a 15-day break in service is liable for the refund of transfer costs disbursed to him under 5 U.S.C. 5724(i), and the monies collected from him may not be reimbursed on the basis of *Finn* v. *United States*, 192 Ct. Cl. 814, which holds "Government service" as used in section 5724(i) is not synonymous with agency service since that ruling does not apply when there is a break in service for then the Government's obligation for "transfer" expenses could not be definitely established as the obligation would be dependent upon whether or not the separated employee eventually returned to Government service.

To Maurice F. Row, United States Department of Justice, July 20, 1971:

This refers to your letter of April 22, 1971, with enclosures, requesting an advance decision as to whether a voucher presented by Mr. William V. Ferris may be properly certified for payment. The voucher represents a claim, based upon the Court of Claims decision *Finn* v. *United States*, 192 Ct. Cl. 814 (1970), for a refund of monies collected when the employee resigned from the Federal Bureau of Investigation (FBI) before the expiration of a 12-month service period following a transfer of official duty station. Shortly after Mr. Ferris' resignation he accepted employment with another bureau in the Department of Justice. Your doubt in the matter arises because of a break in service of approximately 15 days in his continuous employment.

Your letter indicates that incident to Mr. Ferris' official transfer from Washington, D.C., to Milwaukee, Wisconsin, he was required to sign a service agreement directing him to remain in the service of the FBI for 12 months following the effective date of his transfer or become liable to refund those sums disbursed to him for his costs related to the transfer. His transfer to Milwaukee was effective July 9, 1969, and he resigned from the FBI on October 31, 1969. The record does not show the reason for the resignation and break in service before reemployment in the Government. At that time, you state, he was directed to and did in fact refund the amount of $1,332.13.

As you recognize, the relevant statute here is 5 U.S.C. 5724(i) which provides in pertinent part as follows:

* * * An agency may pay travel and transportation expenses * * * and other relocation allowances under this section * * * when an employee is transferred within the continental United States only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. If the employee violates the agreement the money spent by the United States for the expenses and allowances is recoverable from the employee as a debt due the United States.

The *Finn* case held that under the above statute an agency of the Government does not have authority to require an employee to sign an agreement to remain in the service of a particular agency, as contrasted to remaining in the Government service generally, for 12 months following the effective date of his official transfer. The decision stresses that Congress did not intend for "Government service" as used in the applicable statute to be synonymous with agency service. Our Office has followed this decision insofar as it applies to similar factual circumstances. See B–171238, December 8, 1970, and decisions cited therein.

Neither *Finn* nor any of our subsequent decisions considered the question of entitlement where there is a break in service during the 12-month period. We have held the view that, as a general rule, such required period of service must be performed continuously without a break in service. Otherwise, the Government's obligation with respect to the various "transfer" expenses would not be definitely established since such obligation would be dependent upon whether or not the separated employee eventually returned to Government service at a later date.

Since Mr. Ferris resigned his position with the FBI on October 31, 1969, and did not enter on duty with the Bureau of Narcotics and Dangerous Drugs until November 16, 1969, he did not perform 12 months of continuous service with the Government following his transfer to Milwaukee. Therefore, in the absence of a reduction in force or transfer of function (5 U.S.C. 5724a(c)) or a violation of a regulation or policy which might form the basis for regarding the separation as a transfer, we must conclude that he did not fulfill the terms of his employment agreement and is not entitled to recoup the travel expenses refunded to the FBI at the time of his resignation. The voucher returned herewith may not be properly certified for payment.

[B–172753]

Compensation—Downgrading—Saved Compensation—Reversion Rate

The special rate selected for a demoted employee as the rate he will receive at the end of the 2-year saved pay period prescribed by 5 U.S.C. 5337, the salary retention act, is not affected pursuant to 5 CFR 530.306(b)(3) by the fact the special rate is decreased or discontinued during the retention period, and the special rate is the rate to which the employee will revert on the expiration of the retention period and continues to be entitled to as long as he remains in the same position or until he becomes entitled to a higher rate. Therefore, a GS–13 employee demoted to GS–11 with the retained special rate of $18,945, for whom GS–11, step 10, at the special rate of $18,088 was selected, a rate subsequently decreased to $16,604, is entitled at the end of the retention period to $18,088 for as long as he remains in the same position or until he is entitled to a higher rate.

Compensation—Downgrading—Special Salary Rates—Adjustments on Basis of Statutory Increases

Since adjustments in special salary rates under 5 U.S.C. 5303(d) resulting from a general increase in statutory pay schedules are not increases provided by statute within the meaning of 5 U.S.C. 5337(a), the adjustments may not be reflected in the retained rates derived from the special salary rates established for demoted employees, and it follows the general conversion rule in section 531.205(a)(3) of the Civil Service Regulations (36 F.R. 1029) with respect to salary rates above the maximum rate of an employee's grade is for application in prescribing an increase for employees receiving a retained salary rate under 5 U.S.C. 5337(a).

Compensation—Downgrading—Saved Compensation—More Than One Downgrading Action

When an employee is receiving a retained rate of compensation based on a special rate that is limited by the formula in 5 U.S.C. 5337(b), an increase under 5 U.S.C. 5303(d) in the special rate of the grade and step from which he was demoted is not regarded as an increase provided by statute within the meaning of 5 U.S.C 5337(b), but the retained rate prescribed for the employee may be increased under the general conversion rule in section 531.205(a)(3) of the Civil Service Commission Regulations. Thus applying the general conversion rule, an employee reduced, more than three grades whose special rate in GS-12, step 3, was $15,611, and whose retained rate in GS-7, step 1, under the formula in 5 U.S.C. 5337(b) is $13,828, is entitled to a new retained rate of $14,456 ($13,828, plus $628, the increase in step 10 of GS-7).

Compensation—Downgrading—Special Salary Rates—Revision or Termination

The salary rates in excess of the maximum regular rates under Civil Service Regulations (5 CFR 530.306) and Executive Order 11073, dated January 2, 1963, received by employees as a result of a downward revision or termination of special rate ranges are not covered by 5 U.S.C. 5337—the salary retention act—but are saved rates to which the general conversion rules for statutory pay increases apply.

To the Chairman, United States Civil Service Commission, July 20, 1971:

Further reference is made to your letter of April 22, 1971, requesting our decision regarding various questions concerning salary retention since the issuance of Federal Personnel Manual Letter No. 530-157 discontinuing or revising certain special rate ranges under 5 U.S.C. 5303.

The specific questions on which you ask our decision are as follows:

1. When the rate selected at the time of an employee's demotion as the rate which would have been his rate of basic pay if he were not entitled to a retained rate, under regulation 531.512, is a special rate, does that remain the rate to which the employee will revert on expiration of the retention period if the special rates for the grade are decreased or discontinued before that expiration?

2. (A)(1) Are adjustments in special rates under 5 U.S.C. 5303(d) resulting from a general increase in statutory pay schedules to be regarded as increases provided by statute within the meaning of 5 U.S.C. 5337(a)? (2) If not, does a general conversion rule such as section 531.205(a) of the Commission's regulations (36 F.R. 1029) apply to a retained special rate received under 5 U.S.C. 5337(a)?

(B)(1) When an employee is receiving a retained rate which was based on a special rate but is limited by 5 U.S.C 5337(b), is an increase under 5 U.S.C. 5303(d) in the special rate in the grade and step from which he was demoted to be regarded as an increase provided by statute within the meaning of 5 U.S.C.

5337(b)? (2) If not, is his retained rate to be increased under a general conversion rule such as section 531.205(a) of the Commission's regulations under Executive Order No. 11576? (3) If neither, is any adjustment to be made in his retained rate at the time of a general pay increase?

(C) Do the general conversion rules for statutory pay increases apply to saved special rates resulting from downward revision or termination of special rate ranges?

Regarding question 1 you state that a GS–11 engineer is receiving a retained rate of $18,945 (a special rate) under 5 U.S.C. 5337, the salary retention law, as a result of his demotion in April 1969 from GS–13. At the time of his demotion the 10th rate in GS–11, then a special rate of $18,088, was selected as the rate he would receive at the end of the 2-year retention period. Since then the 10th rate for GS–11 engineers has become the regular rate, now $16,404.

At the time the employee was demoted he would have received the special rate of $18,088 if he had not been entitled to the saved rate. When the special rate was discontinued he would continue to receive that rate under Civil Service Regulations [5 CFR 530.306(b)(3)] as long as he remained in the same position or until he became entitled to a higher rate. Therefore, the employee should receive the rate of $18,088 at the end of the retention period unless he is entitled to a higher rate under the cited regulation.

With regard to questions 2(A) (1) and (2) we held in decision B–167671, September 17, 1969, that adjustments in special salary rates under section 504 of the Federal Salary Reform Act of 1962, as amended, now 5 U.S.C. 5303, are rates prescribed by administrative action and thus may not be regarded as statutory increases to be reflected in retained rates derived from special rates. The decision cited above involved a retained special rate which was adjusted by Federal Personnel Manual Letter No. 530–32, July 28, 1966. Paragraph 2 of that letter reads as follows:

> It should be noted that action has been taken to increase certain of the special ranges so that they would continue to bear the same relationship to the new regular ranges that they bore to the old regular ranges. This is the case with the ranges for GS–5, 6, and 7 on Tables I and XV. We must emphasize that this adjustment is not automatic but rather is based on a finding that such higher rates are needed and are justified.

Federal Personnel Manual Letter No. 530–156, January 29, 1971, the most recent authorization under 5 U.S.C. 5303(d) for adjustment of the salary rates of employees covered by special rate schedules in connection with a general pay increase for General Schedule and other statutory schedule employees, states that "the Commission has decided that the pay of such employees shall be increased by an amount fully equivalent to the general pay increase for General Schedule employees authorized by Executive Order 11576." While the letter does not state so explicitly, it appears that the increased rates were based on an

administrative finding that such increased rates were justified. The statutory language involved merely requires adjustment in the special rate ranges at the time of a general increase in the regular General Schedule rates. We understand that such a general increase of salaries in the General Schedule does not always require upward adjustment of salaries in the special rate ranges. Therefore, we see no basis for any different view from that expressed in the decision of September 17, 1969. In other words, the increases in the special rate ranges may not be regarded as statutory increases. It follows that a general conversion rule with respect to salary rates above the maximum rate of the employee's grade such as section 531.205(a)(3) of the Commission's regulations (36 F.R. 1029) would be for application.

In connection with questions 2(B)(1), (2), and (3), you state that the question concerns an employee demoted more than three grades from a position in which he was receiving a special rate. In one instance an engineer in GS–12, step 3, with a special rate of $15,611 was reduced to GS–7 on December 28, 1970. Under the formula in 5 U.S.C. 5337(b) his retained rate was computed as follows:

Employees special rate in GS–12	$15,611
Regular rate of GS–9, step 1	−9,881
	5,730
Regular rate of GS–7, step 1	8,098
Employee's retained rate	$13,828

The limiting formula in 5 U.S.C. 5337(b) reads as follows:

(b) The rate of basic pay to which an employee is entitled under subsection (a) of this section with respect to each reduction in grade to which this section applies may not exceed the sum of—

(1) the minimum rate of the grade to which he is reduced under each reduction in grade to which this section applies (including each increase in rate of basic pay provided by statute); and

(2) the difference between his rate immediately before the first reduction in grade to which this section applies (including each increase in rate of basic pay provided by statute) and the minimum rate of that grade which is three grades lower than the grade from which he was reduced under the first of the reductions in grade (including each increase in the rate of basic pay provided by statute).

Similar to the answer to questions 2(A) (1) and (2) the wording "including each increase in rate of basic pay provided by statute" as used in the limiting formula is not applicable to increases in special range rates authorized by action of your agency. Therefore, increases in special rate ranges as a result of a general increase by statute in the General Schedule rates may not be regarded as statutory increases for the purpose of applying the formula in 5 U.S.C. 5337(b). However, we see no reason why a general conversion rule such as section

531.205(a)(3) of the Commission's regulations would not be applicable to the retained rate. In that regard we note that you have recomputed the retained rate on various bases using the formula in 5 U.S.C. 5337(b). It is our view that where one of the three rates covered in that subsection is a special rate, as in this case, such a recomputation is not necessary. Accordingly, applying the general conversion rule the employee would be entitled to a new retained rate of $14,456 ($13,828 plus $628, the increase in step 10 of GS-7).

Your letter states that question 2(C) involves employees who are receiving salaries in excess of the maximum regular rates under Civil Service Regulations (5 CFR 530.306) and Executive Order 11073 as a result of a downward revision or termination of special rate ranges. Such rates are not covered by 5 U.S.C. 5337 and are merely rates which are saved by the regulation cited. We agree that the general conversion rules for statutory pay increases apply to such saved rates.

[B-165218]

Atomic Energy Commission—Contracts—Competition *v.* Defense Requirements

Although the Atomic Energy Commission's extension of a contract containing an "Avoidance of Organizational Conflicts of Interest" clause for manning an underground weapons testing activity for a 5-year period with the contractor initially selected in 1947 contributes to the common defense and security by avoiding the serious disruption of the weapons program that a change of contractors would entail, and the procedure was consistent with the Commission's procurement regulations, it is suggested that maximum practicable competition should be obtained in the future whenever contracts utilizing appropriated funds are to be awarded and it appears likely the Government's position can be improved in terms of cost or performance. In fact, the adoption of a policy favorable to competition instead of being disruptive to the weapons program might well have a salutory effect on the incumbent contractor's performance.

Contracts—Research and Development—Duality of Approach

The award of similar research and development contracts to two laboratories by the Atomic Energy Commission for the simultaneous development of nuclear weapons is not considered a duplication of effort but a duality of approach to double the opportunity for making new discoveries and to explore a diversity of branches of existing science and engineering fields.

To the Chairman, Atomic Energy Commission, July 21, 1971:

Reference is made to your letter of September 4, 1970, concerning certain allegations contained in a letter dated July 31, 1970, apparently from an employee of the Northrop Corporation, writing in an unofficial capacity, relating to certain unfair contractual arrangements between the Atomic Energy Commission (AEC) and its contractor for manning the Nevada Test Site for underground weapons testing.

The letter of July 31, 1970, alleges that AEC is in the process of renewing a service contract for approximately 25 million dollars per

year with EG&G for a 5-year term. The letter also advises of an apparent duplication of effort between Lawrence Radiation Laboratory and Los Alamos Scientific Laboratory.

AEC has furnished our Office with the following background information with regard to the contracting arrangements with EG&G:

2. EG&G Work Scope.

EG&G's major efforts are directed toward furnishing technical test support for engineering, installing, maintaining, and operating timing and firing facilities and making diagnostic measurements during tests of nuclear devices and high explosive experiments at the Nevada Test Site and other continental and off-continent test locations. Other test support activities include specialized high-speed photography and operating Operations Coordination Centers. EG&G also operates effluent cloud tracking aircraft and is engaged in development of detection equipment and improved air sampling capability.

3. History of EG&G Contract.

EG&G was initially selected in November 1947, to furnish R&D and design services for the Los Alamos Scientific Laboratory and Sandia Corporation in connection with nuclear weapons testing. The original contract was superseded by the existing contract which has been extended six times; the last extension was for three years, through June 30, 1971. On April 6, 1970, the Commission reviewed the staff's report and recommendations with regard to possible extension of the contract beyond June 30, 1971 (see discussion which follows) and authorized a five-year extension. The AEC's Nevada Operations Office is currently engaged in negotiating an appropriate contractual arrangement pursuant to that Commission authorization.

4. Annual Contract Costs.

The estimated cost of EGG's efforts for the AEC, on an annual basis, is in the range of $45 to $50 million. While the estimated cost is agreed to in advance, for the purpose of negotiatiing the fixed fee, it should be noted that the contractor is reimbursed for only those actual costs which meet the tests of allowability in accordance with provisions of the contract and the AEC's cost principles. In addition to being reimbursed for actual allowable costs, the contractor receives a fixed fee that is negotiated in accordance with the AEC's established fee policies.

AEC reports that the decision to renew EG&G's contract without competition was based on the following considerations:

b. Policy as applied in the EG&G case.

The Commission's April 6, 1970, authorization to extend the EG&G contract followed an analysis by the Headquarters staff of the facts in the light of the above policy and specific criteria and a thorough discussion of the resulting analysis with the Commission.

Although various portions of the present EG&G work scope could, undoubtedly, be handled competently by other firms, including, perhaps, Northrop Corporation, the broad spectrum of competencies that EG&G has developed and is now supplying to the AEC, the laboratories, and other users is not known to exist in any one organization likely to be considered as a prospective replacement. Any projected benefits from segmenting the work would most likely be more than offset by the serious disruptions this would create in the weapons test support program where close coordination and established inter-relationships can be crucial. Further, an arrangement involving many separate contractors, without the capability to interchange work or personnel (but with staffing to meet peak loads) would, necessarily, be less efficient than the current EG&G capability to manage a more level-loaded manpower pool across a broad spectrum of work. In addition, increased costs during the learning period and the more likely continuing higher costs associated with the overheads and fees of several con-

tractors made complete segmentation of the EG&G work unattractive from a cost-saving point of view.

From a programmatic point of view, a change of contractors during a period of critical underground tests to be conducted over the next two years was judged to severely and unnecessarily jeopardize the successful conduct of the weapons testing program.

These were among the considerations which went into this particular decision to extend this contract. Each case, of course, presents a different set of facts against which the criteria for possible replacement or re-competition are employed.

With respect to whether there should have been competition for the EG&G work, AEC's report states as follows:

7. Opportunity to Compete for EG&G Work.

As noted earlier, the Commission has authorized a five-year extension of the EG&G contract. Because of the highly technical nature of the work, the importance of established lines of communication with the Laboratories and other weapons test organizations, and the necessity of mobilizing and maintaining a stable, competent work force, it is considered essential that contracts such as this cover a span of several years. As such, they do restrict the number of opportunities other organizations have to compete for the work. It would, however, be neither feasible nor in the best interests of the Government to place these types of contracts on a year-to-year basis.

The Commission is interested in having firms, such as Northrop, make their capabilities and interests known. The most direct method of doing this is to contact the Managers of the various AEC Operations Offices under whom most of the AEC's contracts are administered. * * * we would suggest that he get in touch with the U.S. Atomic Energy Commission, Nevada Operations Office, P.O. Box 14100, Las Vegas, Nevada, 89114, Attention: Mr. Robert E. Miller.

By letter dated April 13, 1971, this Office solicited comments from the Northrop Corporation in regard to this matter. Their comments are summarized as follows:

Although the Northrop Corporation would not consider that it was in their best interests to bid the specific program referred to here, we do not consider that the jurisdictions given by AEC in their reports to the General Accounting Office inquiry are adequate to justify the extension of a sole-source contract of this type for a period of twenty-nine years without any recompetition based only on the alleged uniqueness of that contractor's capability and the continuing critical nature of the test program. We would believe, based on our own experience in the industry, that there are many companies that are capable of providing a suitable level of service to the AEC, and that there are appropriate points in any program where competition can be introduced. We would feel that such competition is in the best interests of the Government and the Support Service Industry. We are further confident that the interests of the Government in work performance can be suitably protected through appropriate, objective, evaluation criteria and appropriate form of contracting which emphasizes performance incentives.

AEC's view is that the procedures used in renewing the EG&G contract without competition are in accordance with AEC policy and several sections of the Atomic Energy Commission Procurement Regulations (AECPR) have been cited in support of this view. Specifically, AEC has cited AECPR 9–51.102(c) which deals with other contract actions requiring advance Headquarters approval such as requests for extension of on-site service-type contracts. AECPR 9–51.103–3(f) provides that requests for renewals and extensions shall be accompanied by a brief discussion of the possibilities of obtaining

a suitable replacement contractor where appropriate. AECPR 9-56.401 provides the criteria with regard to the replacement of contractors operating AEC-owned plants or laboratories.

AEC's report advises that the Commission is aware that conducting its operations by contract rather than in-house may open the possibility to some firms to acquire information that is not readily available to others and thereby have a competitive advantage. AECPR deals with this subject in section 9–1.54 entitled "General Policy for the Avoidance of Organizational Conflicts of Interest." Pursuant to this section of AECPR, a contract clause to control the private use of data acquired under an AEC contract is included in contracts such as EG&G's contract. Also included in EG&G's contract is a technical data provision relating to Drawings, Designs, and Specifications. In addition, copyright and patent clauses are included which enable AEC to keep informed of technical data and information developed under its contracts. We are advised that another purpose of these clauses is to assure AEC's rights to use such data for any purpose including dissemination to the public. We have no information which would indicate that AEC and EG&G are not complying with the requirements of these clauses.

The AECPRs are published in the Federal Register and are public knowledge. We are advised that the specific regulations relating to the extension of operating and service-type contracts and the criteria for the initial selection of such contractors have been brought to the attention of the Joint Committee on Atomic Energy. AEC's position is that the desirability of free competition in private enterprise must be balanced by the paramount objective of maximum contribution to the common defense and security.

Our Office has made its own investigation of the award of the EG&G contract and AEC's reasons for deciding to extend this contract without competition which may be summarized as follows:

(1) The serious disruptions in the weapons program that would result from segmenting the work.

(2) The loss of efficiency that would result from increasing the number of contractors (which would be necessary because apparently no one firm can duplicate all of EG&G's capabilities).

(3) The probability of increased costs.

(4) The judgment that a change in contractors would jeopardize the successful conduct of the program.

The review by our Office at AEC Headquarters disclosed that the above factors were, in fact, considered and documented by AEC in reaching its decision to extend EG&G's contract. Pursuant to our review of the AECPR, we found that the award in this case was consistent with these regulations.

We note that sections 31 (dealing with research assistance) and 41 (dealing with operation of the Commission's production facilities) of Public Law 83–703, 68 Stat. 919 *et seq.*, 42 U.S.C. 2051 and 2061, authorize the Commission to award contracts without regard to the provisions of section 3709 of the Revised Statutes, 41 U.S.C. 5. Further, we are not unaware of the fact that under 40 U.S.C. 474, nothing in the Federal Property and Administrative Services Act of 1949 shall impair or affect any authority of the Atomic Energy Commission. In light of these provisions we cannot conclude that the procedures followed by the AEC in this procurement are unlawful.

However, in our judgment the maximum practicable competition should, as a matter of policy, be obtained whenever contracts utilizing appropriated funds are to be awarded. We recognize that in many instances, such as here, the practicalities of the situation tend to impose severe limits on the amount of competition obtainable. Nevertheless, we note that under AECPR 9–56.401(b), it is contemplated that competition in the renewal of these contracts will be obtained only where the incumbent's performance is considered not better than average or where the circumstances "underscore the high desirability" of obtaining competition. We feel that competition should be sought whenever it appears likely that the Government's position can be improved either in terms of cost or performance. We do not believe that the adoption of such policy would lead to wholesale disruption of the Commission's programs. The inherent advantages enjoyed by the incumbent would tend to insure stability in most instances; and the adoption of a policy more favorable to competition might well have a salutory effect on the incumbent's performance.

The foregoing are general observations only and are not intended to imply that competition would necessarily have been obtained in the instant case even under the change in criteria we advocate.

With regard to the contention that there was duplication between the Los Alamos Scientific Laboratory (LASL) and the Lawrence Radiation Laboratory (LRL), AEC makes a distinction between quality of technical approach and duplication of effort and AEC's report advises as follows:

> The AEC does not consider it prudent to the National defense to risk the pursuit of only a single technical path; several approaches and ideas must be developed simultaneously to insure that the weapon designs selected provide the best solution and provide the optimum use of materials for the Department of Defense requirements. The dual laboratory approach to nuclear weapons development reduces the likelihood that there are new ideas being exploited by others of which the United States is unaware. By this duality, we more or less double our chances of making new discoveries and halve the probability of extraordinarily new ideas remaining hidden because of inadequate attention. To advance technology, one must explore a diversity of branches of the existing science and engineering fields. Therefore, it is essential to pursue dissimilar inferences from theoretical and experimental results, to pioneer new offshoots

from which is known to be successful design practice, and to reevaluate earlier concepts in light of new knowledge.

Each laboratory tends to pursue its own lines of investigation. Once a laboratory has chosen its course of action, the other laboratory rarely tries to surpass it on this basis; rather, it chooses different approaches to the problems. In some cases, the independent verification by others of new concepts can give the appearance of unwarranted duplication. However, we would not choose to discourage this vital aspect of scientific inquiry.

To avoid wasteful duplication, there is a constant flow of information between the laboratories through formally organized joint groups, technical meetings, correspondence, and personal contacts and communiques concerning the various scientific programs. However, perhaps the most effective deterrent to unnecessary duplication is that the urgency of success in meeting Department of Defense requirements within strict budgetary limits prohibits, for the most part, a duplication in the exploration and discarding of ideas and concepts.

3. Duplication of Test Data.

With regard to * * * comment that "many tests at the NTS appear to gather identical data," it should be noted that each test of a nuclear device is conducted to gather data with regard to a specific design concept or configuration under exploration by one of the laboratories. In no case would both laboratories be extracting the same data on the same test. This is not to say that many of the same types of diagnostic data are not collected on every shot for purposes of comparison of performance against established norms.

Pursuant to our review, we find that AEC's report fairly represents the situation on the question of duplication of effort. Our Office proposes to take no further action with respect to this issue.

[B-172570]

Bids—Government Equipment, Etc.—Special Tooling—Status of Tooling

The low bid on Fin Assemblies that indicated Government-owned special tooling would be used and included pursuant to the "Research and Production Property and Special Tooling" provision of the invitation for bids (IFB) a list of tooling identified as to part number, acquisition cost, and age, but did not include written permission to use the tooling, or information as to the anticipated amount of tooling to be used and rental fee, was erroneously evaluated as a nonresponsive bid as special tooling is not defined as a "facility" in paragraph 13-101.8 of the Armed Services Procurement Regulation and the IFB did not require permission to use the tooling, and since the omitted information could be calculated from the bid, the deviation is a minor one that may be waived. Therefore, it is recommended that the contract awarded be terminated for the convenience of the Government and the low bid considered for award.

To the Secretary of the Navy, July 26, 1971:

Reference is made to letter SUP 0232 dated May 6, 1971, from the Deputy Commander, Purchasing, Naval Supply Systems Command, reporting on the protest of Metals Engineering Corporation (MECO) under invitation for bids (IFB) No. N00104-71-B-1449, issued by the Ships Parts Control Center, Mechanicsburg, Pennsylvania.

The subject IFB was issued on February 17, 1971, to 120 firms for 55,000 each Fin Assemblies, MAU 94/B, FSN 1325-827-4021-F651. The purchasing activity reports that bids were opened on March 8, 1971, and of the 15 bids received, the lowest evaluated bid was submitted by MECO in the amount of $468,842.99. The second low bid, as evaluated, was submitted by Straightline Manufacturing Company

in the amount of $472,120.55. Page 10 of the IFB, Standard Form 36, July 1966, required bidders to represent whether or not they intended to use Government-owned "Research and Production Property and Special Tooling" in performing the work bid upon. That provision is set out below:

EVALUATION FACTOR FOR USE OF GOVERNMENT-OWNED RESEARCH AND PRODUCTION PROPERTY AND SPECIAL TOOLING

1. If the offeror or its anticipated subcontractors require the use of Government-owned production and research property and/or special tooling, as defined in Armed Services Procurement Regulation (ASPR) paragraph 13–101.9, in its or its subcontractors' possession, the offeror *SHALL NOT* include in its offer price any "Rental Fee" or "Use Charge" for use of such property. The offeror shall list and identify, in the offer or by separate attachment thereto, a complete description of each such item, in accordance with paragraph 2, below. Offers will be evaluated by adding to the total amount of each item requiring use of Government production and research property, a "Rental Fee" as calculated by the Contracting Officer in accordance with paragraph 3, below.

2. Offeror shall provide the following data:

(i) description of each item of Government Property and quantity thereof required;

(ii) acquisition cost to the Government of each such item;

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

(iv) the amount of use (in months) to be made of such Government Property, and, if any such property will be used concurrently in the performance of two or more contracts, the amounts of the respective uses in sufficient detail for prorating the rent between the proposed contract and such other work in accordance with ASPR 13–502.3(b) and,

(v) the amount of the "Rental Fee," if such fee were assessed, for the period from date of contract to completion of deliveries, computed in accordance with paragraph 3, hereof.

MECO represented that "Special Tooling" would be required and included a list of tooling identified as to part number, acquisition cost, and age. However, MECO did not furnish with its bid any written permission for such use from the contracting officer having cognizance of the property as required by subparagraph (iii), quoted above. Nor did MECO, in the opinion of the contracting officer, furnish any information with respect to the anticipated amount of use of the Government property in its possession, as required by subparagraph (iv), or with respect to the rental fee to be assessed, as required by subparagraph (v). The purchasing activity reports that the failure of MECO to furnish with its bid the data required by these three subparagraphs rendered its bid nonresponsive. Therefore, the contracting officer determined that the low responsive bid was submitted by Straightline Manufacturing Company and award was made to that firm on April 2, 1971.

MECO contends that it is not holding any "Government Facilities" as defined by paragraph 13–101.8 of the Armed Services Procurement Regulation (ASPR) and that the provisions of subparagraph (iii), above, which specifically reference "Government Facilities" are by their own terms inapplicable to the "Special Tooling" which consti-

tuted the only Government property held by MECO. Therefore, MECO contends that it was not required to furnish with its bid the written permission of the contracting officer to use the "Special Tooling." Accordingly, MECO states that it submitted the low responsive bid and should be awarded the contract.

We agree with MECO that the IFB did not require a bidder to furnish with its bid permission to use Government-owned "Special Tooling." ASPR 13–101.8 defines "facilities" as follows:

> *Facilities* means industrial property (other than material, *special tooling*, military property, and special test equipment) for production, maintenance, research, development, or test, including real property and rights therein, buildings, structures, improvements, and plant equipment. [Italic supplied in part.]

Although ASPR 13–101.11 indicates that "Facilities Contracts" occasionally cover tooling, and ASPR 13–101.9 defines Government production and research property as including Government-owned facilities, Government-owned special test equipment, and special tooling to which the Government has title or the right to acquire title, we do not agree with the Navy's position that MECO's interpretation is unreasonable as neither of the latter sections serves to overcome the explicit exclusion by ASPR 13–101.8 of "Special Tooling" from the definition of "Government Facilities." Subparagraph (iii) only requires a bidder to furnish with its bid written authorization to use "Government Facilities." There is no similar requirement for Government property other than "Government Facilities" and particularly no such requirement for "Special Tooling."

Therefore, although the Navy may have intended that bidders offering to use Government-owned "Special Tooling" furnish with their bid permission to use the special tooling, the IFB did not in fact require this. Accordingly, the bid of MECO should not have been rejected as nonresponsive for failure to furnish with its bid permission to use the Government-owned "Special Tooling."

With respect to subparagraphs (iv) and (v) of the invitation section dealing with the evaluation of Government-owned property and special tooling, MECO maintains that its bid contains sufficient information with respect to these subparagraphs to permit the calculation of the rental fee in accordance with ASPR 13–404 and the invitation instructions. In this regard, we have been informally advised by the Navy that assuming use of the involved special tooling for the 10-month life of the contract and calculating rental fee in accordance with the instructions contained in paragraph 3 of the evaluation section, the evaluated bid of MECO is $471,301.49, $819.06 less than the evaluated bid of Straightline. Inasmuch as sufficient information was provided in the MECO bid to permit calculation of the rental fee for evaluation purposes, any failure to furnish information in strict accordance with the requirements of subparagraphs (iv) or (v) may be waived as minor deviations. See B–170591, September 28, 1970.

We therefore conclude that the low responsive bid was submitted by MECO and that the contract awarded to Straightline, the second low bidder was erroneous.

In deciding whether a contract awarded erroneously but in good faith to other than the low responsive responsible bidder should be canceled, we must consider all of the relevant and material factors surrounding the award and base our decision on the best interests of the United States.

When it was determined that the protest might require action by our Office which would adversely affect Straightline's interests, in accordance with our bid protest procedures (4 C.F.R. 20.2), we furnished Straightline with a copy of MECO's protest as well as the administrative report and provided the company with an opportunity to present its views.

In a letter to our Office dated June 14, 1971, Straightline declined to submit its views on the protest. However, Straightline stated that delivery was scheduled to commence in May 1971, and be completed in January 1972, and that accelerated deliveries were authorized. Straightline advised that to produce the contract economically, it is necessary to complete while their present production line is set up and on an accelerated basis and that "All of the materials necessary have been purchased and some have been delivered." We have been informally advised by a representative of the Navy that no deliveries have been made to date, and that deliveries are not now scheduled to commence until October, 1971.

Accordingly, we recommend that the contract awarded to Straightline be terminated for convenience of the Government since the record establishes that award was made to other than the low responsive bidder. *Cf.* 49 Comp. Gen. 809, 815 (1970). We further recommend that award of the procurement be made to MECO if its low bid is still available for acceptance and it is otherwise eligible for award under the invitation. In this respect, MECO has furnished our Office with a letter dated June 4, 1971, from the Administrative Contracting Officer, Defense Contract Administration Services Region, Atlanta, Georgia, which MECO states constitutes authorization to use the MK 81 Government-owned tooling now in its possession.

The bid of MECO is returned as requested.

[B-173016]

Bidders—Debarment—Product Status

The sale to the Government of the products of a debarred firm through an affiliated company, a licensee, or a distributor, is legally permissible for, while a firm or individual may be debarred, there is no provision in the Armed Services Procurement Regulation (ASPR) for debarring the products of a debarred firm or individual, and although under ASPR 1-604.2(b) all know affiliates of a debarred concern or individual may also be debarred, the decision to include affiliates in a debarment is not automatic but is an individual determination to be made on a case by case basis.

Bidders--Debarment—Contract Award Eligibility—Business Affiliates

The fact that a bidder under an invitation for bids (IFB) for Globe valves is an affiliate of a debarred firm does not preclude the award of a contract to the affiliate, where the administrative determination not to extend the debarment of the principal to the affiliate a discretionary determination under paragraph 1-604 of the Armed Services Procurement Regulation was made with full knowledge of the relationship and only after an extensive preaward survey that found the production facilities, technical and quality capabilities of the affiliate to be adequate, as the purpose of debarment is not to punish but to protect the interests of the United States. Furthermore, the reason for the debarred corporation establishing the affiliate was to effect a settlement with its creditors by assigning the lease, sale, and licensing agreements with the affiliate to the creditors.

Bidders—Debarment—Types of Debarment

The debarment of firms or individuals from securing Government contracts are of two types—by statute or regulation—neither of which define the term "debarred." However, the grounds for listing a firm or individual on the Joint Consolidated List and the consequences thereof are set forth in detail in Part 6 of the Armed Services Procurement Regulation (ASPR). An administrative debarment of a firm or individual under ASPR 1-604 may be authorized at the discretion of the Secretary of each department or by his authorized representative in the public interest. The regulation is not based on a specific statute dealing with debarment, but is in implementation of the general authority to contract contained in the Armed Services Procurement Act of 1947, as amended (41 U.S.C. 151).

To the Denco Valve Company, July 26, 1971:

We refer to your telefax of May 20, 1971, and your letter of May 27, 1971, relating to your protest under IFB N00104-71-B-1008 and IFB N00104-71-B-1345, both issued by the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania.

The invitations were issued on December 29, 1970, and February 18, 1971, for quantities of 39 and 16 of two types of Globe Valves, with bid openings set for January 27, 1971, and March 19, 1971, respectively. Bids were received as follows:

IFB N00104-71-B-1008

Company	U/Price	Pres. & Pkg.	Data	Total Amount
Mindeco Corp.	$83.50	$1.50	Incl.	$3,315.00
Denco Valve Corp.	135.03	NC	Incl.	5,266.17
Crane Co.	165.00	1.50	$110.00	6,603.50

IFB N00104-71-B-1345

Company	U/Price	Pres. & Pkg.	Data	Total Amount
Controlled Production	$108.78	$1.50		$1,746.48
Denco Valve Corp.	320.00	NC		5,120.00
Dresser Industries	326.16	Incl.		5,218.56
Crane Co.	356.50	2.00		5,736.00

By letter of March 23, 1971, you protested to the contracting officer against any award to Controlled Production, Inc. (CPI) and Mindeco Corporation under the two invitations. The basis for your protest was that CPI is closely related to Western Affiliated Engineering Company (WAECO) and manufactures valves under a license agreement with WAECO. You contend that since WAECO is currently debarred from receiving Government contracts, its products should also be debarred. You further contend that since Mindeco is a distributor for CPI, its products should be debarred for the same reason.

Your protest was referred to the Department of the Navy, Office of the Chief of Naval Material, by the contracting officer. By letter of May 18, 1971, the contracting officer advised you of the response from that office, stating that the Joint Consolidated List of Debarred, Ineligible and Suspended Contractors contains a listing of WAECO and includes a former employee of that company, Bradford Preece, but lists no other individual or corporate affiliate of WAECO. The president of both WAECO and CPI, Mr. Darrell D. Robison, is not included in the debarment listing nor is Mindeco listed. Consequently the debarment of WAECO was not construed to extend to either CPI or Mindeco and awards were made to those two firms on May 18, 1971.

The report from the Department of the Navy, Naval Supply Systems Command, in response to your protest to our Office shows that prior to award, a preaward survey team found the production facilities, technical and quality capabilities of CPI to be adequate to perform within the requirements of the IFBs in question. The report further shows that both WAECO and CPI are owned by Mr. Darrell D. Robison, his wife, Allene Robison, and his mother, Ruth Robison, none of whom are listed as being debarred. The report also contains copies of a Lease Agreement for the lease of certain equipment by WAECO to CPI, a Sales Agreement for the sale of certain current assets of WAECO to CPI, and a License Agreement whereby WAECO granted a nonexclusive license to CPI to manufacture certain high pressure valves for a period of 5 years. The report indicates that WAECO has been negotiating to sell its land, building and most of its productive equipment, which is not related to high pressure valves, to another firm.

The report also contains an Assignment for Benefit of Creditors of WAECO which recites that the company is in serious financial difficulty and has been unable to pay the claims and demands of its creditors as they mature. The lease, licensing and sales agreements were all assigned by WAECO to the Inter Mountain Association of Credit Men for the benefit of WAECO's creditors.

Your protest to our Office raises four questions which you feel were not answered by the decision of the contracting officer in his letter of May 18, 1971. Your first three questions are essentially one question

dealing with the status of products of a debarred company and whether it is legally permissible for a debarred company to sell its products to the Government through an affiliated company, a licensee or distributor. Your fourth question asks for a definition of the term "debarred" as it relates to the Joint Consolidated List of Debarred, Ineligible or Suspended Contractors.

With respect to your fourth question, debarments are of two types, those based on specific statutory authority and those based on regulations. No precise definition of the term "debarred" is found in either statutes or regulations, but the grounds for listing a firm or individual on the Joint Consolidated List and the consequences thereof are set forth in detail in Part 6 of the Armed Services Procurement Regulation (ASPR).

The record before us indicates that WAECO's debarment was an administrative debarment in accord with the provisions of ASPR 1-604, which authorizes the Secretary of each department or his authorized representative to debar in the public interest a firm or individual for any of the causes enumerated therein. The decision to debar is discretionary with the Secretary. The regulation is not based on a specific statute dealing with debarment, but is in implementation of the general authority to contract contained in the Armed Services Procurement Act of 1947, as amended, 41 U.S.C. 151 (now 10 U.S.C. 2301 *et seq.*).

While a firm or individual may be debarred, there is no provision in ASPR for debarring the products of a debarred firm or individual. ASPR 1-604.2(b) provides that all known affiliates of a debarred concern or individual may also be debarred. Business concerns are defined as affiliates of each other when one concern or individual controls or has the power to control another, or a third controls or has the power to control both. The decision to include affiliates in a debarment is not automatic but is an individual determination to be made on a case by case basis.

As applied to the facts in the present case, these regulations mean that WAECO's products are not debarred since there is no provision to debar products, only firms or individuals. Consequently, there is no restriction on the Mindeco Corporation selling the products as a distributor. Your protest against award to Mindeco is therefore, without merit.

With respect to CPI, that company is clearly an affiliate of WAECO under the definition in ASPR, since ownership of the two corporations is identical. However, the Chief of Naval Material, the authorized representative of the Secretary of the Navy, made a determination that the debarment of WAECO should not be construed to extend to CPI. This determination was made after an extensive preaward survey and with full knowledge of the relationship between the two

corporations. In this regard, it should be noted that the purpose of debarment as set forth in ASPR 1–604 is not to punish a firm or individual but rather to protect the interest of the Government. In view thereof, and since the determination is a discretionary one that is specifically authorized in ASPR, we are not inclined to disagree with the conclusion of the Chief of Naval Material.

Although you contend that organization of CPI was merely a device to circumvent the debarred status of WAECO, the information included in the Navy's report suggests that an equally valid reason for establishing CPI was a desire on the part of WAECO to effect a settlement with its creditors by assigning the lease, sales and licensing agreements with CPI to the credit association for the benefit of creditors of WAECO.

For the reasons stated, we find no legal basis for disqualifying either CPI or Mindeco from receiving Government contracts, and your protest against awards to those two firms is therefore denied.

[B–172974]

Bids—Late—Hand Carried Delay

A hand-carried bid which was placed in the wrong box near the bid opening room more than an hour before the scheduled bid opening time, which if opened on schedule would have been the low bid, was properly considered not to be a late bid within the meaning of paragraph 2–303.5 of the Armed Services Procurement Regulation—a determination consistent with 34 Comp. Gen. 150—as the Government due to the vagueness of an employee's directions and the unidentified change in the location of the bid box was primarily responsible for the misdelivery, notwithstanding the lack of good judgment in depositing the bid. Therefore, the bid, responsive both as to method and timeliness of submission, may be considered for award without violating the spirit and interest of maintaining the integrity of the formal bid advertising system.

To the Fredericks Rubber Company, July 28, 1971:

Reference is made to your telefax of May 18, 1971, and to subsequent correspondence, relative to your protest against the possible award of a contract to Trenton Textile Engineering & Manufacturing Company, Trenton, New Jersey (Trenton Textile), pursuant to invitation for bids No. DSA100–71–B–1183, issued April 16, 1971, by the Defense Personnel Support Center, Philadelphia, Pennsylvania, for the procurement of 25,480 all weather, coated nylon twill, parkas.

Your protest involves a hand-carried bid which was placed in the wrong box near the bid opening room, and therefore not opened and read with the other bids during the bid opening meeting scheduled to begin at 2:00 p.m., local time, May 6, 1971. The lowest of the three bids opened and read at such time was submitted by your company. You quoted a unit price of $9.21 for delivery, f.o.b. destination, at each of the specified destination delivery points. The hand-carried bid which was placed in the wrong box was found at approximately 3:50 p.m., May 6, 1971. The bid was that of Trenton Textile and it quoted

three separate unit prices of $8.44, $8.52 and $8.60, based upon delivery, f.o.b. destination, of the quantities required for delivery at the different destination points specified in the invitation for bids.

It is the position of the contracting officer and Headquarters, Defense Supply Agency, that the Trenton Textile bid is not a late hand-carried bid, within the meaning of paragraph 2-303.5 of the Armed Services Procurement Regulation (ASPR), which states that a late hand-carried bid, or any other late bid not submitted by mail or telegram, shall not be considered for award. You contend that the bid should be regarded as a late hand-carried bid within the meaning of ASPR 2-303.5; that consideration of the bid would be contrary to the spirit and interest of maintaining the integrity of the formal bid advertising system; and that consideration of the bid would be in violation of ASPR 2-301(a), concerning the matter of responsiveness of bids, and of ASPR 2-401, entitled "Receipt and Safeguarding of Bids." ASPR 2-301(a) requires responsiveness both as to method and timeliness of bid submissions, and ASPR 2-401(a) states in part that all bids received prior to time of opening "shall be kept secure and * * * unopened, in a locked bid box or safe."

The invitation for bids provided that bids would be received at the Defense Personnel Support Center or, if hand-carried, in the depository located in "Receptionist's Desk 2nd Floor, Building 12."

It appears from the report of the contracting officer that the bid of Trenton Textile was hand-carried by a Mr. Simon, who arrived at the main gate of the Defense Procurement Support Center at about 12:30 p.m., May 6, 1971, and informed the security guard that he had a bid to deliver. He was directed to the Procurement and Production Receptionist in Building 12 and he was informed, according to a statement of the receptionist, who was substituting for the regular receptionist, that he should walk to the end of the hall and drop the bid in the box, "the box that says 'Bids.'" Mr. Simon went in the proper direction and reportedly stayed longer than usual to deposit the bid.

Mr. Simon has indicated that he was told by the substitute receptionist to take the bid "in the back and put it in the box." Mr. Simon apparently believed that the box was in the display area which separates the hallway designated by the substitute receptionist. The bid was placed into an open box which was one of the bid items on display. Mr. Simon was signed out on his visitor's pass and the visitor register as of 12:50 p.m., and the same time was stamped on his visitor's pass when he left the main gate of the Center, located just outside of Building 12. The bid apparently was placed in the box about 1 hour and 10 or 15 minutes before the scheduled bid opening time.

The box in which the bid of Trenton Textile was found is described in the contracting officer's report as a gray steel Navy gear box, $15\frac{1}{32}''$ deep, $22\frac{9}{32}''$ wide and $34\frac{5}{16}''$ long. At the time in question, the box re-

portedly was located approximately 7 feet from the hallway in the display area which separates the hallway leading to the bid opening room, Bid Room 4, which is located at the extreme end of the hallway, beyond the display area. The bid box had in the past been located on the receptionist's desk or counter on the second floor of Building 12. However, it had been removed early in March 1971, 1 month before the issuance of the present invitation for bids, and affixed to a stand outside of Bid Room 4.

The contracting officer states that, although there was a sign on the pillar next to the receptionist's desk stating the location of the bid box, Mr. Simon evidently did not see the sign. Instead, he apparently wandered around the reception area for a few minutes until he found the only thing he recognized as a box which possibly could be used as a bid depository. To add to the confusion, a blank Navy solicitation was in the gray steel Navy gear box on display as a bid item. It appears from the record that Mr. Simon may have previously deposited bids of Trenton Textile at the Defense Personnel Support Center, but that he was not familiar with the new location of the box.

The contracting officer expressed the opinion that the case falls squarely within 34 Comp. Gen. 150 (1954), in which it was determined that a hand-carried bid could be considered for award although it was presented 3 minutes late to the officer in charge of the opening of bids. It was noted in the decision that the bid had already been delivered to the room usually set aside for receiving bids.

The representative of Trenton Textile may not have exercised the best judgment when he deposited the bid in an open box not identified as a bid depository but it appears that the Government, and not the bidder, should be considered to be primarily responsible for the mistake which occurred. The invitation provided, and the bidder had every right to expect, that the bid box would be located either on the receptionist's desk or on a counter near the desk on the second floor of Building 12. The bid was hand-carried to the desk more than 1 hour prior to the time set for the opening of bids and it would seem unreasonable to conclude that the bidder did not comply with the terms of the invitation so far as concerns the matter of submitting hand-carried bids.

We believe that consideration of the Trenton Textile bid would be consistent with the determination made in the case of 34 Comp. Gen. 150, cited by the contracting officer. Furthermore, there is nothing in the record to suggest that there was any violation of the ASPR requirement in regard to the receipt and safeguarding of bids and, as indicated in the contracting officer's report, Mr. Simon's leaving from the main gate of the Defense Personnel Support Center at 12:50 p.m., on the bid opening date, would tend to negate any possible intention on the part of Trenton Textile to take the bid out of the Navy gear box

after other bids had been opened and the bid prices were disclosed. The Trenton Textile bid may be considered as having been responsive both as to method and timeliness of submission, and it is apparent that an award to that company would not be contrary, in any manner, to the spirit and interest of maintaining the integrity of the formal bid advertising system.

Accordingly, your protest in the matter is hereby denied.

[B-173061]

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, Etc., Determinations—Failure to Issue

The award of a cost-plus-award-fee contract for operational support and maintenance of the Pacific Missile Range Instrumentation Facility to other than the incumbent contractor on the basis of the lowest potential cost exposure to the Government was not illegal under the Service Contract Act of 1965, 41 U.S.C. 351, notwithstanding the Department of Labor within its discretionary authority refused to issue a wage determination, and as the refusal is not attributable to any misfeasance or nonfeasance on the part of the contracting agency, the failure to include a wage determination in the request for proposals will not affect the validity of the contract. Furthermore, lack of a wage determination was not prejudicial to the incumbent contractor, the possibility of labor strife is conjectural, and labor cost overruns will be borne by the new contractor to whom the "successor employer" doctrine is inapplicable as the former contractor had no bargaining agreement.

To Arnold & Porter, July 30, 1971:

Further reference is made to your protest on behalf of Kentron Hawaii, Ltd. (Kentron), against the award of a cost-plus-award-fee contract to Dynalectron Corporation (Dynalectron), under Solicitation No. N00123-71-R-0076, issued by the Navy Regional Purchasing Office, Los Angeles (NRPOLA).

The subject solicitation, issued on August 21, 1970, requires the successful offeror to provide operational support and maintenance of the Pacific Missile Range Instrumentation Facilities located at Barking Sands, Kauai, Hawaii, and at other remote Pacific Islands. It is reported that the facilities are primarily utilized for support of missile test flights. The record reflects that on August 5, 1970, a Standard Ford 98, "Notice Of Intention To Make A Service Contract" was forwarded by NRPOLA to the Department of Labor. On September 3, 1970, a representative of the Department of Labor advised NRPOLA that no wage determination was applicable, and that none would be made. Written confirmation that "no wage determination applicable to the specified locality and classes of service employees has been made" was given by the Department of Labor on September 8, 1970. On October 15, 1970, NRPOLA advised Kentron of the decision by the Department of Labor, and indicated that no wage determination would be included in the RFP.

Seven responses to the RFP were received by October 26, 1970. Analysis of these proposals disclosed that only Kentron, Dynalec-

tron, and the Bendix Corporation were considered to be within the competitive range, considering trade-off between price and technical acceptability. Following negotiations during the latter part of February 1971, NRPOLA requested by letter of March 1, 1971, that offerors submit their best and final offers no later than March 19, 1971. This request expressly advised that "maximum labor rates should contain any cost contingency you consider necessary with due regard to the unionization activities in process and/or pending as discussed at our meeting." The letter also reminded offerors they were required to agree to maximum labor rates, and that cost exposure would be a significant factor in determining who should receive the award. Under this provision, if the contractor exceeds his maximum wage rates, any excess cost would be unallowable, and would not be reimbursed by the Government. Since there was no significant difference among the three offerors in the area of technical approach, the award was made to Dynalectron on May 21, 1971, on the basis of the lowest potential cost exposure to the Government, with contract performance to commence on August 1, 1971.

Kentron's protest, in which the International Brotherhood of Electrical Workers (IBEW), AFL-CIO, joins, arises out of the unionization activities referred to in the NRPOLA letter of March 1, 1971. It is the position of Kentron and IBEW that:

1. The Department of Labor was required to issue a wage rate determination, and Kentron was prejudiced by the lack of a wage rate determination in the RFP.

2. Dynalectron's proposal was nonresponsive in that it contemplated no material increase in labor rates during the next five years, and that the award in question will likely result in a labor strike which will threaten the operation of the range, and

3. The Department of the Navy will ultimately bear the cost of Dynalectron's unrealistic labor projection.

It is undisputed from the record that IBEW was certified in April 1971 as the collective bargaining agent for approximately 234 of the 375 employees of Kentron, the incumbent contractor at the Pacific Missile Range, Kentron having operated and maintained the range for the past 10 years. While Kentron had not yet reached a collective bargaining agreement with the union at the time the RFP was issued, it noted in its letter of September 29, 1970, to the contracting officer:

> The wage determination is urgently needed and would be utilized as a baseline for conducting our agreement negotiations with the present and proposed unions. We are presently in the preliminary stages of negotiations with the Inlandboatmen's Union and we do not have the current wage survey information to use in negotiations.
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> * * * * * * *
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> * * * The contractor believes this RFP should be amended to incorporate the resulting wage determination. It will be very difficult for the Government to conduct a fair and impartial competitive procurement without a wage determination considering that the labor rates must be revised to incorporate the Union agreements negotiated by the incumbent contractor.

In response to the September 29 letter, the NRPOLA advised Kentron in its letter of October 15, 1970:

> Your request that a wage determination be issued and incorporated into the current contract has been carefully considered. A review of the situation with the Department of Labor indicates that the preponderance of labor categories have never been covered by any rate determination. Any effort to "conform" such labor categories into some "reasonable" relationship to labor categories already covered under other contract determinations would inject the Government into the labor-management negotiation process since a rate-setting effect would be unavoidable. It is the policy of the Navy to avoid any interference with the bargaining process and free interplay of labor market forces.
>
> This office will remain in close touch with developments during the current procurement effort, particularly the outcome of the prospective union elections whose impact cannot be assessed with any degree of accuracy at this time. Should development warrant a specific course of action to protect the interests of the Government and to facilitate a fair and impartial negotiation such action will be promptly taken.

Under these circumstances you urge that the Department of Labor should have made a wage survey and determination as requested by Kentron and NRPOLA long before the present solicitation was even issued. This, you contend, would have satisfied the requirements of Paragraphs 12–1005.2 and 12–1005.3 of the Armed Services Procurement Regulation (ASPR) for requesting a wage rate determination and including it in the RFP, and would have avoided placing Kentron in the tenuous position of negotiating wage rates as the same time that it was negotiating its contract with Navy. You also contend that Kentron's situation was aggravated, and the company was clearly prejudiced as the incumbent contractor, when in late February and early March 1971, just a few weeks before best and final offers were due, our Office rendered its decision 50 Comp. Gen. 592, February 26, 1971, and the National Labor Relations Board (NLRB), rendered its decision in *Emerald Maintenance, Inc.*, 188 NLRB No. 139, March 5, 1971. You interpret both of those decisions as holding that the "successor employer" doctrine, under which an employer who undertakes to perform work performed by a previous company and employs the same workers is bound to the term of its predecessor's collective bargaining agreement, is not applicable in Government contracting situations. These decisions, you state, placed Kentron in the incongruous posture of negotiating collective bargaining agreements which would define the wages it would have to pay during the next contract period but which would not be legally binding on either of its competitors for the Pacific Missile Range contract. You state however, that Kentron's negotiations, as a practical matter, are as binding on Dynalectron as they would have been on Kentron, since Dynalectron is a successor employer, and as such, must recognize the incumbent union and cannot unilaterally alter the working conditions, including, of course, wages, of the employees, without good faith negotiations with the union.

You also urge that in the circumstances of this case the absence of

wage determination from the instant RFP by and of itself, rendered the contract illegal under the Service Contract Act of 1965, 41 U.S.C. 351. Additionally you contend that the absence of the wage determination can be directly attributed to the carelessness of the contracting officer in not attaching any wage data whatsoever to the Standard Form 98 he forwarded to the Department of Labor. You also submit that the contracting officer disregarded ASPR 12–1005.2 in that he did not file Standard Form 98 within the time period specified therein.

There is no question as to applicability of the Service Contract Act of 1965, and the referenced regulations promulgated thereunder, to the instant procurement. However, the principal question to be answered, as we view it, is whether the act requires the issuance of a wage determination in all cases where the contract being awarded is covered by the act, and wage rate is requested by the contracting agency. As previously observed in our decision reported at 46 Comp. Gen. 278 (1966), by reason of the provisions of section 4(b) of Public Law 89–286, 41 U.S.C. 353(b), the Secretary of Labor is authorized to make such rules and regulations allowing reasonable variations, tolerances and exemptions to and from all or any provisions of the act as he may find necessary and proper. By Secretary's Order No. 36–65, that authority was delegated to the Administrator of the Wage and Hour and Public Contracts Division (now Workplace Standards Administration). Pursuant thereto the Administrator has issued the regulation set out at 29 CFR 4.5(b), which exempts from the wage and fringe benefits section of the act those contracts for which no prevailing wage and fringe benefits have been determined for any class of service employees to be employed thereunder. Likewise, ASPR 12–1005.1 reflects the responsibility of the Secretary of Labor as the party "authorized and directed to administer and enforce the provisions of the Act, to make rules and regulations, issue orders, make decisions, and take other appropriate actions under the Act."

Acting under this authority the Department of Labor declined to issue a wage determination in the instant case. It is reported, however, that on September 14, 1970, the negotiator for NRPOLA called the Department of Labor and inquired as to the reason for the failure of the Department to issue a wage determination. He was advised that were a determination to be made, it would cover only a portion of the applicable labor categories (approximately one-third) and that, for it to be useful, the Navy would be required (presumably in its evaluation of offers) to interpolate from such a determination compatible rates for the noncovered categories. Such interpolations, it was felt, would have constituted fixed ratios between the two classes of labor categories (those who were and those who were not covered by the Department of Labor determination), which would have had the effect of "rate setting" by the Navy and would have been an improper

injection of the Government into the negotiations then underway. The Department of Labor strongly advised, and the Department of the Navy concurred, that in light of these effects, a wage determination would be inadvisable.

Irrespective of whether this Office agrees with the reasoning on which the decision not to issue a wage rate determination was made, it is our opinion that such decisions are within the discretion of the Department of Labor in each individual case. Where, as in the instant case, the Department declines to issue a determination, and such declination is not attributable to any misfeasance or nonfeasance on the part of the contracting agency, it is our further opinion that the failure to include a wage rate determination in the RFP and in the resulting contract will not affect the validity of the contract.

Concerning your argument that the contracting officer did not file Standard Form 98 within the time period specified by ASPR 12-1005.2, we think it sufficient to observe that section (a) of that paragraph provides "not less than thirty days prior to any invitation for bids or the *commencement of negotiations* for any contract exceeding $2500 which may be subject to the Act * * * the contracting officer shall file Standard Form 98 * * *." Therefore, considering the fact that a Standard Form 98 was submitted some 16 days prior to the *issuance* of the RFP we find that no violation of that quoted paragraph occurred.

With respect to your contention that Labor's failure to issue a determination is attributable to the contracting officer's failure to submit wage rate information with the Standard Form 98, there is nothing in the record as submitted by Navy, or in the report forwarded to this Office by the Department of Labor, to indicate that the lack of wage rate information with the Standard Form 98 contributed to, or resulted in, Labor's failure to issue a wage rate determination. We therefore see no misfeasance or nonfeasance on Navy's part in its request for a wage rate determination which might affect the validity of the contract awarded to Dynalectron.

You also contend that Kentron was placed at a competitive disadvantage by the failure to issue a wage rate, and by the decisions of this Office and the NLRB on the "successor employer" question. However, even if it is assumed that Dynalectron would be considered a "successor employer" under the rationale of the cases you cite, as well as under the rationale in *William J. Burns International Detective Agency, Inc.* v. *NLRB*, 411 F. 2d 911 (2nd Cir., April 26, 1971), and as such would be required to recognize the union chosen by Kentron employees and would have the duty of bargaining in good faith with the union, Kentron has no collective bargaining agreement to which Dynalectron could be bound, and on that point the cases concerning the doctrine of a "successor employer" are therefore inapplicable.

We also agree that Dynalectron, under the ruling of *Overnight Transportation Co.* v. *NLRB*, 372 F. 2d 765 (4th Cir. 1967), must afford the union an opportunity to discuss and bargain with respect to any changes in the rates of pay that it may wish to make. In this connection, however, we have thoroughly and carefully examined the comparison of average wages presently being paid by Kentron ($3.59 per hour) and its offered first year's maximums ($3.86 per hour) and the maximum rate for comparable positions agreed upon in the Dynalectron contract ($3.46 per hour), and we fail to find, considering the possible "mix" of employees, *inter alia*, such gross differentials in the wages offered by the two parties as would justify a conclusion that Kentron was placed in such a competitive disadvantage as to render the contract void, or that Dynalectron's offer was nonresponsive to the terms of the RFP. Thus, as stated in 50 Comp. Gen. 592, February 26, 1971:

> While it is evident that your commitment to wage rates which were higher than those apparently available to Boeing and Pan Am placed you in a poor competitive position if you proposed only on the basis of paying such rates, that fact alone presents no adequate basis for requiring all other bidders to adopt your wage rates.

Finally, with respect to the first issue raised in your protest, we believe it is pertinent to note that the specified wage rates are but *minimum rates*. The issuance of a wage rate determination only constitutes a finding that the rates specified therein are the rates prevailing in the locality, and the inclusion thereof in an IFB or RFP does not constitute a representation by the Government that labor may be obtained by the contractor at such rates. *United States* v. *Binghamton Construction Co.*, 347 U.S. 171 (1954); 48 Comp. Gen. 22 (1968). Each offeror, therefore, had the burden of ascertaining for itself its probable labor cost. B–167250, November 13, 1969; 50 Comp. Gen. 648; 655, March 24, 1971. In this regard, our Office has noted that the award of cost-reimbursement contracts require procurement personnel to exercise informed judgments as to whether submitted proposals are realistic concerning proposed cost and technical approach involved. We believe that such judgment must properly be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess "realism" of cost and technical approaches, and must bear the major criticism for any difficulty or expenses experienced by reason of a defective cost analysis. 50 Comp. Gen. 390, December 16, 1970. Here, the contractor has agreed to maximum labor rates, and any loss occasioned by a cost overrun will be borne by the contractor, not the Government.

Contrary to the assertions in support of the second basis of your protest, Dynalectron did in fact include within its cost proposal provisions for year-to-year escalation in costs of direct labor. These pro-

visions reflect an expected annual increase of approximately 1.8 percent, as compared with Kentron's stated experience of an average annual increase of 1.4 percent over the prior years of the operation of the range. There has been no showing of any unreasonableness in the proposal submitted by Dynalectron, or that the contracting officer acted capriciously or arbitrarily in accepting Dynalectron's proposal as being in the best interest of the Government.

In support of your contention that performance by Dynalectron, pursuant to the terms of its contract, would encourage and make inevitable a violation of the National Labor Relations Act, both your office and the IBEW have furnished our Office a copy of an unfair labor practice charge filed with the National Labor Relations Board by IBEW, charging Dynalectron, among other things with (1) refusing to meet with the union to discuss conditions of employment, (2) dealing with employees on an individual basis rather than through their certified union representatives and (3) giving notice that it intends to alter unilaterally the existing terms and conditions of employment. Under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, the NLRB has authority to hear and issue orders relating to charges of unfair labor practices under the act. It would appear therefore that the proceedings to which you refer, charging Dynalectron with unfair labor practices and violation of the act, may well resolve the basic complaints of IBEW. However, in the absence of such a determination upholding the position of IBEW, we see no valid basis on which to disagree with Navy's position that it is a matter of conjecture whether labor strife will occur while the incumbent is performing or when a successor takes over.

We must agree with the procuring activity's action in refusing to incorporate, as a minimum requirement for negotiation, the average rate under the previous contract held by Kentron, since requirements concerning wages and other employment practices may be included in Government contracts only as specifically authorized by statute, and the statute applicable to this contract provides that the minimum wage requirements shall be those determined by the Secretary of Labor. The absence of such a wage determination would in no way change this well accepted principle of Government contract law. The Service Contract Act is remedial in purpose and was enacted for the benefit of employees only, not for the Government or prospective contractors. 48 Comp. Gen. 22 (1968).

Under the circumstances, we are unable to conclude that Navy's selection of Dynalectron for negotiation of a contract for this procurement, as set out above, was other than a valid exercise of the discretion granted to Navy, as the contracting agency, to make the award which will be most advantageous to the Government as contemplated by the provisions of ASPR 3-805.2. Accordingly, your protest must be denied.

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