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[B-172243]

Transportation—Overcharges—Tender Cancellation Disputed

Rate tenders which offer reduced freight rates pursuant to section 22 of the Interstate Commerce Act (49 U.S.C. 22 and 317(b)) on Government traffic are continuing offers to perform transportation services for stated prices, and as continuing offers power is created in the offeree to make a series of separate contracts by a series of independent acceptances until at least 30 days written notice by either party to a tender of the cancellation or modification of the tender is received. Therefore, where the Military Traffic Management and Terminal Service maintains supplements cancelling or modifying four rate tenders were not received and the carrier insists they were mailed, a question of fact is raised and the administrative statements must be accepted, and the overcharges resulting from the controversy are for recovery from the carrier either directly or by deduction from any amounts subsequently due the carrier as provided by 49 U.S.C. 66.

To William S. Richards, March 2, 1972:

We refer to your letter dated January 28, 1972, written in behalf of Barton Truck Line, Inc. (hereafter Barton). We have considered your letter as a request for reconsideration of the position taken in our letter of July 7, 1971, B-172243, to Barton, concerning the effective date of supplements cancelling or modifying four rate tenders previously issued by Barton in which, pursuant to section 22 of the Interstate Commerce Act, made applicable to motor carriers by section 217(b), 49 U.S.C. 22 and 317(b), it offered reduced freight rates on certain Government traffic. We held in our letter of July 7, 1971, to Barton, that the tenders remained unchanged and in effect until 30 days after receipt by the Military Traffic Management and Terminal Service (MTMTS) of copies of the supplements mailed September 8, 1970.

Each of the tenders includes a paragraph headed "TERMINATION OR MODIFICATION OF TENDER" providing that the tender may be cancelled or modified by written notice of not less than 30 days by either party to the other.

Rate tenders like these are considered to be continuing offers to perform transportation services for stated prices. 43 Comp. Gen. 54, 59 (1963); 39 *id.* 352 (1959); 37 *id.* 753, 754 (1958). As continuing offers they create in the person to whom the offers are made (the offeree) the power to make a series of separate contracts by a series of independent acceptances, and that power is good until effectively revoked by the person making the offers. Corbin on Contracts, section 38; Williston on Contracts, 3rd Ed., section 58; Restatement of Contracts, section 44. And it is settled that to be effective the offeror's revocation of an offer must be communicated to the offeree. *United States* v. *Sabin Metal Corporation*, 151 F. Supp. 683, 687 (1957), affirmed 253 F. 2d 956. Corbin on Contracts, section 39; Williston on Contracts, sections 56, 89; Restatement of Contracts, sections 41, 69.

The general rule is summarized in Corbin on Contracts, section 39, Notice of Revocation Necessary, pages 165–6, which reads in part:

> If there has been no express provision as to the mode of revocation, either in the terms of the offer as originally made or by some other communication to the offeree, a power of revocation exists none the less. The decisions have established the rule in such cases, however, that revocation is not effective unless it has been communicated to the offeree. It is not enough merely to mail a notice of revocation, properly addressed to the offeree; his power of acceptance will remain unaffected until the letter has been received by him. It has not yet been determined whether, in order to be effective, the letter of revocation must have been actually read by him. It is here suggested, however, that it should be held effective as soon as the offeree has had a reasonable opportunity to open and read the letter after it has been put into his hands or has been delivered at his business or home address.
>
> * * * Unless a power of revocation without notice is expressly reserved * * * a message of revocation is not effective to terminate the power of acceptance until it is received.
>
> In this respect a revocation of offer differs from an acceptance of offer; and it is reasonable that they should differ. An offeror invites an acceptance by the offeree and, because of the custom of men, has reason to know that the offeree will regard his expression of acceptance as closing the deal and as justifying immediate steps toward performance or other action in reliance. The offeree, on the other hand, has never invited a revocation of the offer and usually has no reason to expect one. This is again considered in discussing acceptance by post.

See, also, 17 C.J.S. Contracts, section 50d.

Cf. Corbin, section 78, page 340:

> So, also, where in an already completed contract, a power of revocation or termination by notice is reserved, the notice is not operative until actually received.

Furthermore, the use in the "TERMINATION OR MODIFICATION" paragraph of each offer of the phrase "written notice" likely would be construed to mean a communication received. See *N.L.R.B.* v. *Vapor Recovery Systems Company*, 311 F. 2d 782, 785 (1962); *United States* v. *Continental Casualty Co.*, 245 F. Supp. 871, 873 (1965); *cf. Corbin on Contracts*, section 78. And *cf. Benedict* v. *Andalman*, 475 P. 2d 593 (1970): notice sought to be served by mail is not effective until it is received by the one sought to be served.

Thus the Government's position is that the tenders were in effect until 30 days after written notice of the cancellation or modification of them was received by the Government's duly authorized agent, in this instance the Commander, MTMTS, as specifically provided in the rate tenders.

You state that Barton's position is that on April 22, 1970, it mailed to MTMTS 2 signed and 23 unsigned copies of supplements to Barton's section 22 tenders in accordance with MTMTS regulations.

You also state that you can prove that supplements cancelling or modifying the tenders were mailed on April 22, 1970, and that you have personally interviewed the parties responsible for preparing and mailing them. And as proof of the fact that written notice of the cancellation or modification of the tenders was received by the Com-

mander, MTMTS, Barton rests its case on the rule of evidence that where proof is given that a letter has been duly mailed, a presumption of the receipt of the letter by the sendee arises. 29 Am. Jur. 2d Evidence § 193, p. 246. But the next sentence of that section reads:

* * * On the other hand, proof of the failure of a letter to arrive at its destination raises a presumption that it was never mailed.

Loving v. *Allstate Ins. Co.*, 149 N.E. 2d 641, 644 (1958), involved the rule of evidence that you are relying on; the court said that "proof of the due mailing of a letter raises the presumption of its receipt, and when the receipt thereof is denied, the effect is to raise an issue of fact." This general rule is recognized in the Tenth Circuit, *Crude Oil Corp. of America* v. *Commissioner of Internal Revenue*, 161 F. 2d 809, 810 (1947), and in the Court of Claims. *McCallin* v. *United States*, 180 Ct. Cl. 220, 227 (1967). *Cf. Patrick* v. *Bowman*, 149 U.S. 411, 424 (1893): "Bowman denies that he ever received this letter, and as there is no direct evidence that he did, his denial must be accepted as conclusive."

We have no direct knowledge whether the notices cancelling or modifying your offers which you allege and indicate you can prove were mailed on April 22, 1970, were received by MTMTS. But as you know the officers and personnel at MTMTS responsible for receiving such notices report and maintain that such notices were not received. In such a factual matter we are required to accept the statement of facts furnished by the administrative officers of the Government. 45 Comp. Gen. 99, 100 (1965); 16 *id.* 325, 329 (1936). Also, while you may be able to produce evidence of mailing of the notices on April 22, 1970, it seems clear that you are in no position to establish, in the face of the administrative report to the contrary, that they were received by MTMTS. And in view of such report, the presumption of receipt upon proof of due mailing must be considered to have been rebutted.

Accordingly, the position taken in our letter of July 7, 1971, to Barton is affirmed and unless Barton refunds the involved outstanding overcharges resulting from this controversy, our Transportation Division, in accordance with its usual procedures, will in due course deduct the amounts of the overcharges from any amounts subsequently found due as provided by 49 U.S.C. 66.

[B–174298]

Bids—Omissions—Failure to Bid on All Items

The low bid that omitted the price of the "Environmental Protection" item contained in an invitation for bids to repair a portion of the Mississippi River banks, a price the bidder alleges was included in the basic bid price, is a nonresponsive bid that may not be considered for an award, for although the environmental work could have been treated as an inherent part of the job, it was regarded as material and listed as a separate item calling for a separate price and, there-

fore, the omission should not be waived as a minor informality. To do so would ignore the rule that where there is any substantial question as to whether the bidder upon award could be required to perform all of the work called for if he chose not to, the integrity of the competitive bid system requires that the bid be rejected as, at the least, ambiguous unless the bid otherwise affirmatively indicates that the bidder contemplated performance.

To the Secretary of the Army, March 2, 1972:

Your letter of November 17, 1971, reference DAEN-GCC, with attachments, concerns the protest by Massman Construction Company, against the proposed award of a construction contract to another concern under invitation for bids No. DACW 43-72-B-0004, issued by the United States Army Engineer District, St. Louis, for repairing the banks of a certain portion of the Mississippi River.

The Bidding Schedule and pertinent portion of the NOTES appear as follows on Page BS.1 of Amendment No. 0002:

Item No.	Description	Quantity	Unit	Unit price	Estimated amount
1.	Stone:				
	(a) Mobilization and Demobilization.	sum	job		$_____
	(b) Stone; Dike (Quarry-Run)	75, 000	ton	$_____	_____
	(c) Stone; Bank Paving	20, 000	ton	_____	_____
2.	Environment Protection	sum	job		_____
				Total	$_____

NOTES: (a) All quantities shown on the BIDDING SCHEDULE are estimated quantities except when the unit is shown as "job".

* * * * * * *

(e) Item No. 1 has been subdivided into three sub-items. A bid for the work shall include a bid for each of these sub-items. Bidders should refer to paragraph SP-16 of the Special Provisions before preparing their bids for this item.

Bids were opened on October 7, 1971, and the apparent low bidder was Wayne B. Smith, Incorporated (Smith), with a total bid price of $500,000. Massman Construction Company's total bid price of $502,852 was second low.

The Bidding Schedule in Smith's bid was filled in as follows:

1.	Stone:				
	(a) Mobilization and demobilization	sum	job		$15, 000. 00
	(b) Stone; Dike (Quarry-Run)	75, 000	ton	$5. 00	375, 000. 00
	(c) Stone; Bank Paving	20, 000	ton	5. 50	110, 000. 00
2.	Environment Protection	sum	job		_____
				Total	$500, 000. 00

After examining the bids, the procuring activity decided to obtain verification from Smith of its intended price for item 2. On October 8, 1971, the procuring activity was orally advised by Smith that the price for item 2 was included in item 1. This was confirmed by Smith's letter

of October 8, 1971, received by the procuring activity on October 12, 1971.

Massman initially protested by telegram dated October 7 to the procuring activity; on October 8 Massman filed its telegram of protest to our Office. Massman contended that the omission of a price for item 2 renders Smith's bid nonresponsive. Award is being withheld pending our resolution of the protest.

Section 4 of the specifications, the Environment Protection section, generally provides that the contractor shall do all work required for prevention of environmental pollution which may occur "during and as the result of" contract performance. The contractor must submit written proposals for pollution control within 10 days after receipt of notice to proceed and also meet with contracting representatives to develop mutual understandings with respect to the pollution control program. Some of the specific requirements are related to prevention of landscape defacement; restrictions on constructing temporary roads and embankments; post-construction cleanup and taking appropriate measures to avoid pollution of water resources. The contractor and subcontractors are required to comply with applicable Federal, State and local laws concerning environmental pollution. If the contracting officer gives written notice of noncompliance with applicable law and regulations, the contractor is required to take corrective action. Failure to promptly take corrective action entitles the contracting officer to stop all or a portion of the work, in which event the contractor agrees not to make any claims for excess costs or time extensions resulting from issuance of the stop work order.

Paragraph 9 of the provisions to be read in conjunction with the Instructions to Bidders (Standard Form 22), which is a part of the invitation, deleted paragraph 10(c) of Standard Form 22 and substituted the provision that: "Award will be made as a whole to one bidder."

Also pertinent is paragraph 5(b) of Standard Form 22, Instructions to Bidders, which provides as follows:

> (b) The bid form may provide for submission of a price or prices for one or more items, which may be lump sum bids, alternate prices, scheduled items resulting in a bid on a unit of construction or a combination thereof, etc. Where the bid form explicitly requires that the bidder bid on all items, failure to do so will disqualify the bid. When submission of a price on all items is not required, bidders should insert the words "no bid" in the space provided for any item on which no price is submitted.

On the first page of Standard Form 21 there is a section entitled "DESCRIPTION." Under subparagraph (a) the bidder was to indicate the work to be performed by his own organization and Smith filled in "ALL WORK." Under subparagraph (b) the bidder was to indi-

cate the percent and the estimated cost of the work he would do himself and Smith filled in "100 percent" and "$500,000."

The contracting officer in a report of October 29, 1971, recommended that Smith's bid be considered nonresponsive since it could not be ascertained from the bid documents that he intended to be bound to perform item No. 2 at his bid price. The General Counsel of the Corps of Engineers takes a contrary view on the grounds that Smith could not sign the contract and then allege that he was not obligated to perform the total job including the environmental protection measures at the total price bid.

It is urged by counsel for Smith that the failure to include a separate price on a "minor individual lump sum item" should be waived as a minor informality. In this connection counsel notes that the work concerns repairs to levees by placing stone from a barge; that there are no trees to cut and burn, haul roads to build or other major items falling within the environmental protection provisions of the specifications which would be reflected in item No. 2.

The work covered by item No. 2 is described in section 4 of the Specifications. The description covers nearly four pages of instructions; two paragraphs relate to keeping water free of contamination and debris. While it is true that the contractor is required to comply with Federal, State and local anti-pollution laws, we are not in a position to determine that compliance with those laws would automatically constitute compliance with the environmental protection provisions of the specifications.

In terms of the amounts otherwise bid for this item and the emphasis placed on it in the specifications, we cannot dismiss the failure of Smith to bid on the item as a minor informality. We have indicated that a requirement important enough to specify in extensive and finite detail should be regarded as material. 40 Comp. Gen. 458, 460 (1961). That standard appears to be applicable here also.

It has also been urged that the environmental protection work is an inherent part of the job and need not be set out as a separate item. Certainly, the work could be performed without environmental protection. Indeed, one of the problems with our environment is that work of this general type was performed in the past without such protection. We agree that item No. 2 relates to the manner in which the work resulting in an end product will be performed rather than the nature of the end product to be provided. We also agree that the specifications could have been written to incorporate the environmental protection work in the price of the other items. In fact, we note that sections 42 and 47 of the General Provisions may be said to fall precisely into the category of environmental protection work to be performed by the contractor as part of the job without an individual bid item. However,

the terms of the IFB were not so fashioned. Environmental protection was listed as a separate item calling for a separate price which Smith failed to include in his bid. In these circumstances Smith could well argue that award to him under his bid would not bind him to comply with section 4 of the specifications. For the foregoing reasons we believe that the failure to include a price for item No. 2 may not be waived as a minor informality.

Where there is any substantial question as to whether the bidder upon award could be required to perform all of the work called for if he chose not to, the integrity of the competitive bid system requires that the bid be rejected as, at the least, ambiguous unless the bid otherwise affirmatively indicates that the bidder contemplated performance of the work or the item is not to be awarded. B–173243, July 12, 1971; 41 Comp. Gen. 412 (1961); and 38 Comp. Gen. 372 (1958). It is true that each of the cited cases involved an item or items added by amendment to the IFB. However, in each case receipt of the amendment had been properly acknowledged by the bidder and the only question revolved around the contention that the price for an ancillary item added by amendment had been included in the price of the main item. Therefore, we believe that the cited cases are directly in point.

This rule has a substantial basis and is not a mere technicality. To hold otherwise would give a bidder an option after all bids had been exposed to argue, when bids were close in price, that the price for an item had already been included in another item. On the other hand, if the difference between bid prices was substantial, the bidder could urge that the item had been omitted and the price should be increased to include that item. *Cf.* 41 Comp. Gen. 721 (1962). In our judgment, maintenance of the integrity of the competitive bid system requires adherence to the rule even if the application appears to require a harsh result in a given case.

It is urged on Smith's behalf that the inclusion under paragraphs (a) and (b) of the "DESCRIPTION" section on Standard Form 21 of the commitments to furnish all of the work at its stated price of $500,000 constituted an affirmative indication of its intention to perform the work called for under item No. 2 within the above-cited rule. The purpose of the provision was to obtain information on the extent to which the bidder proposed to subcontract. In our opinion, the language can reasonably be construed to mean only that Smith intended to perform with his own forces all of the work bid on; we find nothing which could be construed as an affirmative indication of intent to be bound to perform item No. 2.

Smith's workpaper and Smith's affidavit furnished by its counsel cannot be considered to establish Smith's obligation since these are

extraneous to the bid. See 45 Comp. Gen. 221 (1965); B-166603, May 16, 1969, and B-173823, September 2, 1971.

The cases cited in Smith's behalf are B-173823, *supra;* B-169530, July 27, 1970; B-166603, *supra;* B-161012, June 13, 1967; B-157494, September 22, 1965, and B-151276, May 28, 1963. All of these cases are distinguishable. In B-173823 and B-166603, *supra*, the total price exceeded the sum of the items bid on and it was clearly established that the excess amount inserted for the total was intended to cover the item for which the price had been omitted. In this case the sum of the sub-items under item 1 exactly equals the total of Smith's bid. In B-173823, *supra*, the bidder further established its obligation by inserting next to the total that the bid was based on award of all items. In B-161012, *supra*, the bidder's intention to furnish the data item for which no price had been quoted was affirmatively demonstrated by the bidder's delivery schedule. In B-169530, *supra*, the bidder's obligation for the items on which price had been omitted was established through a modification by the bidder prior to bid opening. In B-157494, *supra*, the bidder made an affirmative statement on the bid that the total included all the sub-items for which a price had been omitted. In B-151276, *supra*, the bid specifically advised that award would be made on the basis of an entire schedule; therefore, by inserting a total price for the schedule the bidder was obligated to furnish all the items within the schedule even though separate prices were not quoted for them. Also, that case did not involve a situation where the total price was exactly equal to the sum of the units for which prices were shown.

For these reasons we conclude that Smith's bid is nonresponsive.

[B-174661]

Travel Expenses—Military Personnel—Leaves of Absence—Temporary Duty Termination

A Navy enlisted member stationed in California who while on leave in Baltimore, which was authorized under orders providing for subsequent temporary duty to attend school in Rhode Island, is directed to return to his permanent duty station upon completion of his leave is entitled to travel allowances equivalent to the round-trip distance between his permanent duty station and leave point, not to exceed the round-trip distance between his permanent and temporary duty stations, even though ordinarily such allowances are not payable for leave travel performed for personal reasons and not public business, since the member performed the circuitous travel to his leave point under competent orders, travel he would not have undertaken had he not been ordered to perform the temporary duty. B-166236, May 21, 1969, modified.

To E. L. Burgess, Department of the Navy, March 2, 1972:

Further reference is made to your letter dated June 28, 1971, file reference V/mc 4650, forwarded to this Office by 6th indorsement of

the Department of Defense Per Diem, Travel and Transportation Allowance Committee, in which you request an advance decision as to the entitlement of BU3 William M. Swink, B23 45 46, USN, to reimbursement for expenses incurred in connection with travel performed in the described circumstances. Your request for decision has been assigned Control No. 71-53 by the Per Diem, Travel and Transportation Allowance Committee.

Temporary additional duty orders, file No./designator 1326, dated April 16, 1971, directed Mr. Swink to proceed and report no later than April 26, 1971, to Davisville, Rhode Island, for approximately 8 weeks' temporary duty in connection with BU "C" school. Those orders authorized 10 days' delay in reporting prior to the school's convening date, which delay was reportedly to be taken as leave. Also authorized were advance mileage at the rate of $0.05 per mile and a maximum of 24 hours traveltime.

You indicate that Mr. Swink departed from his permanent duty station, Port Hueneme, California, on April 16, 1971, and traveled to his leave point, Baltimore, Maryland. On April 22, 1971, while on leave in Baltimore, he received a telegram from his permanent duty station advising him that his orders had been cancelled and directing him to return to his permanent duty station upon completion of his leave. This he apparently did.

Mr. Swink's travel advance in the amount of $150.35 remains outstanding. You question Mr. Swink's entitlement to reimbursement by the Government for travel and transportation expenses in these circumstances and, specifically you ask whether chapter 6, Part M of the Joint Travel Regulations is applicable in this case.

Section 404 of Title 37, United States Code, authorizes the payment of travel and transportation allowances to members of the uniformed services while traveling under orders away from their posts of duty, under regulations and conditions prescribed by the Secretaries concerned. Pursuant to such statutory authority, paragraph M3050-1 of the Joint Travel Regulations provides that members of the uniformed services are entitled to travel and transportation allowances only while actually in a "travel status" and that they shall be deemed to be in a travel status only while traveling on public business, pursuant to competent travel orders, including necessary delays en route incident to the modes of travel and periods of necessary temporary or temporary additional duty.

It has long been held that the travel allowances authorized for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in compliance with travel requirements imposed upon them by the needs of the service over which they have no control, not for expenses of travel performed for personal reasons.

Such allowances are not payable for travel performed solely for leave purposes, that travel being considered as having been performed for personal reasons and not on public business. *Perrimond* v. *United States*, 19 Ct. Cl. 509; *Day* v. *United States*, 123 Ct. Cl. 18; 30 Comp. Gen. 226 (1950); B–156903, June 22, 1965; and 49 Comp. Gen. 663 (1970).

In this case Mr. Swink departed from Port Hueneme pursuant to competent orders and traveled to Baltimore by a circuitous route where he used his leave, authorized in advance for such purpose, prior to the date he was to report to his temporary duty assignment at Davisville.

Part M, chapter 6 of the Joint Travel Regulations to which you refer, applies to members who depart from their duty stations on leave and, does not apply to members who depart pursuant to competent orders for the performance of temporary duty with travel time and leave authorized in conjunction therewith. Accordingly, Part M has no application in this case.

In our decision B–166236, May 21, 1969, to which reference is made in enclosures received with your letter, we denied a claim for reimbursement for travel and transportation expenses in a situation similar to Mr. Swink's. In that decision we held that since the member involved departed from his duty station prior to the time it would have been necessary to depart to comply with his orders and such early departure was because he was granted leave, his travel was performed for personal reasons and was not reimbursable when his travel orders were cancelled.

In our decision, B–173922, November 16, 1971, copy enclosed (citing B–156013, February 26, 1965, involving a civilian employee), we held that when the primary purpose of the trip was for official business, despite the fact that there was an early departure and circuitous travel for leave purposes, payment of allowances properly authorized would be permitted for necessary travel. In the decision of November 16, 1971, the member involved traveled to his leave point where, while in a leave status, he became ill and returned to his permanent duty station for his convenience without going on to his temporary duty station.

In that case we concluded that the member was entitled to be reimbursed for the outward travel to a point on a direct route to the first place of temporary duty equivalent to the distance between his permanent duty station and his leave point. Round-trip travel at Government expense was not authorized since paragraph M4212 of the Joint Travel Regulations specifically provides that when a member returns to his permanent duty station for personal reasons during a period of temporary duty, no travel allowances are creditable to him while he is in a leave status.

In the instant case the primary purpose of the trip appears to have been for official business despite the fact that the early departure and circuitous route was for leave purposes, which leave was for a reasonably short period of time, authorized in advance and at a place in the general direction of the place where the temporary duty was to be performed. These facts support the statement by the member to the effect that due to the high cost of traveling from California to Maryland he would not have taken leave and performed this travel had he not been ordered to perform the temporary additional duty at Davisville, Rhode Island.

The record also shows that Mr. Swink returned to his permanent duty station without going on to his temporary duty station as a result of an order to return, not for his personal convenience. In such circumstances paragraph M4212 of the Joint Travel Regulations has no application.

We conclude, therefore, that Mr. Swink is entitled to travel allowances for round-trip travel between Port Hueneme and a point on a direct route to Davisville equivalent to the round-trip distance between Port Hueneme and Baltimore, not to exceed the round-trip distance between Port Hueneme and Davisville. This rule is consistent with that applied in our decision B–171804, March 2, 1971, copy enclosed, involving a civilian employee traveling in similar circumstances. Per diem is, of course, not creditable for any day in which the member was in a leave status. See Joint Travel Regulations, paragraph M4201–3.

To the extent that this decision conflicts with B–166236, May 21, 1969, and other similar decisions, they will no longer be followed.

Mr. Swink's voucher with supporting papers is returned, payment thereon being authorized on the basis indicated above.

[B–174816]

Contracts—Labor Stipulations—Nondiscrimination—"Affirmative Action Programs"—Noncompliance

The rejection of the low bid on the non-set-aside portion of a requirements type contract for fiberboard because of noncompliance with Executive Order 11246 due to the bidder's failure to develop equal employment opportunity affirmative action plans (AAP) at facilities other than the one bidding, was a proper implementation of agency regulations requiring each establishment of a bidder to have an AAP and in addition providing for a hearing upon more than one nonresponsibility determination; for a 30-day "show cause" notice regarding enforcement proceedings, with aid to the bidder in resolving deficiencies; for contract cancellation or termination; and for debarment, and there was no denial of due process as the determination of nonresponsibility was a limited or temporary suspension and not a *de facto* debarment. However, in the future in issuing a "show cause" order a bidder should be advised he can be found nonresponsible until resolution of the matter—a resolution that should be determined without delay.

To the Alton Box Board Company, March 2, 1972:

This is in reply to your telegram of December 27, 1971, and supplemental letters of January 6 and February 3, 1972, protesting the rejection of the low bid submitted by your Jacksonville, Florida, facility under Solicitation No. CHNFT-71-041, issued by the General Services Administration (GSA), Region 5 (Chicago).

The solicitation, as amended, requested submission of bids for a requirement type contract for "FSC 8115" triple wall fiberboard boxes by the bid opening date of August 17, 1971. You were the low bidder for the non-set-aside portion of the solicitation covering Groups I and II, Regions 1 through 7 for an estimated award value of $288,995.

Your bid was rejected since it was determined that your firm did not meet the prescribed standards of responsibility in that acceptable equal employment opportunity (EEO) affirmative action plans (AAP) had not been developed at your corporate office at Alton, Illinois, and at your Dallas, Texas, facility. Contracts for the advertised requirements were awarded to other bidders on December 20, 1971.

Essentially, you state two bases for your position that GSA wrongfully rejected your low bid. First, you question the propriety of determining your Jacksonville facility ineligible because of EEO action taken or omitted at your other plant locations. You also contend that in the absence of a formal hearing regarding your compliance status, and/or further attempts after September 1971, by the Government to obtain compliance through conciliation, mediation and persuasion, the contracting officer's determination of nonresponsibility was unfair and resulted in a denial of due process.

The governing regulation relating to the bases of your protest is section 60-2.2 of Title 41, which provides as follows:

§ 60-2.2 Agency action.

(a) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 F.R. 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the equal employment opportunity clause.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments, the contracting officer shall notify the Director and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless, upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination that the contractor is nonresponsible: Provided, That during any pre-award conferences every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment

obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: Provided further, That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause a notice setting a timely hearing date shall be issued concurrently with the second nonresponsibility determination in accordance with the provisions of § 60–1.26 proposing to declare such contractor-bidder ineligible for future contracts and subcontracts.

(c) Immediately upon finding that a contractor has no affirmative action program or that his program is not acceptable to the contracting officer, the compliance agency representative or the representative of the Office of Federal Contract Compliance, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance of such fact. The compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted.

(1) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency, upon the approval of the Director, shall immediately issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts pursuant to § 60–1.26(b), giving the contractor 10 days to request a hearing. If a request for hearing has not been received within 10 days from such notice, such contractor will be declared ineligible for future contracts and current contracts will be terminated for default.

(2) During the "show cause" period of 30 days every effort shall be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director, shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts under § 60–1.26(b) of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

In connection with the propriety of denying the contract award to your Jacksonville facility because of the unacceptable compliance status of your Dallas and Alton facilities, we note that section 60–1.40 of Title 41 of the Code of Federal Regulations, as well as the above-quoted regulation and your prior contracts, provide that you shall develop a written affirmative action compliance program for each of your establishments. In our opinion, those provisions clearly contemplate a corporate wide application of EEO requirements, and in the absence of an acceptable AAP at each establishment, or in the absence of an appropriate exemption (see 41 CFR 60–1.5), the contracting officer was authorized to find your firm nonresponsible for noncompliance of any of its establishments.

It is also your position that due process and applicable regulations require the granting of a formal hearing prior to debarment from contract awards, and in the absence of such a hearing the rejection of your bid was unfair and improper. Moreover, you advise that, although you submitted revised AAP's in August and September for your Dallas and Alton facilities, you received no communication regarding deficiencies until the contracting officer's letter of December 20, 1971, which advised of the rejection of your bid. You believe, therefore, that

the Government failed to make sufficient effort to develop an acceptable plan through the processes of conciliation, mediation, and persuasion, as required by 41 CFR 60–2.2, quoted above.

As to whether you were aware of deficiencies in your AAP's, GSA has reported that your EEO coordinator was made fully aware, during several conferences and telephonic discussions with compliance officials, of GSA's position regarding its unwillingness to find you in compliance with EEO requirements. It seems these conferences were provided specifically to help you to develop an acceptable plan. It is GSA's position that as a result of these conferences, your firm should have been aware of the reasons your plans were unacceptable. In any event, it is reported that subsequent to the conference with your EEO coordinator and the submission of a revised plan for the Dallas facility, your coordinator was again advised what portion of the plan was considered to be unacceptable, and he stated that your firm intended to stand by the plan as submitted. In view of these representations by GSA we are unable to find that your firm was not sufficiently apprised of the unacceptable aspects of your plan.

In this connection we have also noted that subsequent to the rejection of your bid on December 20, your firm submitted revised AAP's and by letter of January 26, 1972, GSA advised that your plans are no longer considered to be deficient.

The provisions in 41 CFR 60–2.2(d), quoted above, clearly authorize and require that the determination of a contractor's responsibility be made during the "show cause" period, and prior to the conclusion of formal hearings. It is also clear from section 60–2.2(b) that so long as a contractor-bidder is not considered to have developed an acceptable AAP at each of its establishments the contracting officer is required to declare such contractor-bidder nonresponsible unless he is otherwise able to determine that the contractor is "able to comply" with equal employment obligations. However, subparagraph (a) of the regulation further provides that a contractor is *unable* to comply until its affirmative action programs are developed and found to be acceptable. While the regulation in subparagraph (b) requires notice of the timely hearing date to be issued concurrently with the *second* nonresponsibility determination proposing to declare such contractor-bidder ineligible for future contracts, this provision was apparently inapplicable to your situation. We therefore conclude that the contracting officer's determination that your firm was nonresponsible was a proper implementation of the above regulations, since your AAP was not at the time considered acceptable.

As a technical matter, publication of the above regulations provided notice of the requirement that noncomplying contractor-bidders would be declared nonresponsible, and we are therefore unable to agree that

you were entitled to further advice to that effect before the contracting officer found you nonresponsible. However, we believe this case illustrates it would be desirable, at the time of issuance of a "show cause" order, for the contractor to also be specifically advised that he can be found nonresponsible until the matter is finally resolved. We are therefore recommending to the Administrator, GSA, and to the Director, Office of Federal Contract Compliance (OFCC), that such notice be provided contractors in future cases.

Your protest also raises a question as to whether the nonresponsibility determination, and the subsequent denial of contract award, without a formal hearing as to your compliance status resulted in a *de facto* debarment without due process. In this regard, Executive Order 11246 authorizes, and is implemented by, the regulations of the Department of Labor, appearing in chapter 60 of Title 41 of the Code of Federal Regulations. The order, in pertinent part, authorizes contracting agencies to refrain from entering into further contracts with any noncomplying contractor and requires that no *order for debarment* be made without affording the contractor an opportunity for a hearing. In our opinion the determination of nonresponsibility in this case does not constitute an "order for debarment" from further contracts within the meaning of the Executive order. Rather, it would appear to be in the nature of a limited or temporary suspension, which is permitted by OFCC's implementing regulations. As provided in the regulations a finding of noncompliance could result in no more than two determinations of nonresponsibility prior to effectuation of formal hearing procedures on the debarment issue. As a general rule, temporary or limited suspension by way of such summary action does not of itself result in a denial of due process. See *Gonzalez* v. *Freeman*, 334 F. 2d 570, 579 (1964); *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152–153 (1941) and *R. A. Holiman & Co.* v. *Securities and Exchange Commission*, 299 F. 2d 127, 131–133, cert. denied, 370 U.S. 911 (1962). In our opinion there are procedural safeguards in the applicable regulations to protect bidders from repeated nonresponsibility determinations which might result in a *de facto* debarment without the requisite hearing. We are therefore unable to agree that the failure to offer you a hearing prior to declaring you nonresponsible was a violation of due process.

In view of the foregoing, your protest must be denied. We are, however, concerned by the failure of GSA to effect a formal resolution of this matter between the time of your last communication with GSA on September 28 and the date of award, December 20. While it would appear that the matter could, and certainly should, have been resolved prior to December 20, we find no evidence of record that the delay in providing a hearing or the contracting officer's failure to take any

action prior to award towards eliminating the unresolved deficiencies, were intentional or in bad faith. In the circumstances, the delay affords no legal basis for objection to the contracts awarded. We are, however, recommending appropriate action by GSA and OFCC to protect against prolonged delay, such as occurred in this case, in the future.

Copies of our letters to GSA and OFCC are enclosed.

[B–173370]

Transportation—Military Personnel—In Leave Status Without Funds

To eliminate the difficulty being experienced in distinguishing between "cost-charge" Government procured transportation furnished members traveling in a leave status without prior orders who are without funds to return to their duty station and the mixed travel that is adjusted under paragraph M4154 of the Joint Travel Regulations on the travel vouchers of members traveling under change-of-station orders with leave en route who are without funds at their leave point and are also furnished Government procured transportation, the regulations should be changed to produce uniformity in the treatment of member travel claims. It is suggested that the issuance of a transportation request (TR) in all leave cases be treated as a "cost-charge" transaction and the amount of the TR deducted from the pay and allowances due a member, or in lieu of issuing a TR, a casual payment be authorized.

To the Secretary of the Army, March 3, 1972:

Under the provisions of paragraph M5400 of the Joint Travel Regulations members traveling in a leave status without prior orders who are without funds may be furnished Government procured transportation for return to their duty stations. The cost of this transportation is charged against the member's pay account and is designated as cost-charge transportation.

Under the same provisions, members traveling under change of permanent station orders (PCS) with leave en route who are without funds at their leave point likewise may be furnished Government procured transportation for the onward travel from the leave point to their new duty station. In this situation, however, the transportation has been viewed under the regulations as having been furnished pursuant to the travel orders and the cost of the transportation considered a matter for adjustment on the members' travel vouchers as mixed travel under paragraph M4154 of the Joint Travel Regulations.

The Army has a system of allotment codes which it uses on transportation requests to distinguish between the two forms of travel referred to above. In the course of a review by our audit personnel of travel by Army members through use of carrier tickets procured by Government transportation requests issued in connection with these types of travel, it was found that approximately 31 percent of the

PCS sample and 7 percent of the cost-charge sample were erroneously classified. The allotment coding on the face of the transportation requests for PCS travel identified them as cost-charge and vice versa. A further investigation indicated that the offices issuing the transportation requests (TRs) have been experiencing difficulty in distinguishing between the two and their failure to do so leads to improper settlements of travel claims in many cases.

To illustrate the problem, a member traveling under permanent change-of-station orders from Korea to Fort Knox, Kentucky, was authorized 30 days' delay en route to count as leave with leave address at Hammond, Indiana. The orders contained no travel data and at member's election he chose to receive $0.06 per mile for the official mileage from McChord Air Force Base (port of entry) to Fort Knox and was paid $141 travel advance based on this mileage rate. While on leave the member was issued a TR for the completion of his journey from Chicago, Illinois, to his new duty station and the cost of this transportation, $14, was deducted from his pay under the cost-charge procedure.

Since the member had been traveling under permanent change-of-station orders when he had need for a TR for continued travel, the governing regulations apparently contemplate that all travel from McChord Air Force Base to Fort Knox should be considered mixed travel—partly at personal expense and partly by Government transportation—with the member's travel expense entitlement governed by paragraph M4154 of the Joint Travel Regulations. Under the provisions of that paragraph, the member would be entitled to a monetary allowance in lieu of transportation at $0.05 per mile for land travel from McChord to Fort Knox, less the distance from Chicago to Fort Knox, plus proper per diem, requiring a repayment of $29.27 instead of the $14 which he was charged.

From the standpoint of leave travel we perceive no practical difference between the cited case and that of a member on leave without travel orders, who is furnished transportation through use of a TR to return to his duty station.

In cases of travel performed under orders, section 404(a) of Title 37 of the U.S. Code provides that under regulations prescribed by the Secretaries concerned, members of the uniformed services shall be entitled to receive travel and transportation allowances without regard to the comparative costs of the various modes of transportation. Insofar as here involved, permanent change-of-station travel costs are legally reimbursable on two bases. A monetary allowance for transportation plus per diem (37 U.S.C. 404(d)(2)) or a mileage allowance (37 U.S.C. 404(d)(3)).

As indicated above, the current Joint Travel Regulations provide in paragraph M5400 that:

1. PRIOR ORDERS

a. *General.* When * * * a member otherwise without funds * * * under prior orders, reports in * * * to a station of one of the respective Services other than his duty station and is without funds with which to purchase transportation, he may be furnished the necessary transportation * * * to travel to his new duty station * * *. In such cases, the transportation * * * will be considered as furnished in connection with the prior orders, and reimbursement * * * should be made in accordance with the appropriate instructions of Chapter 4.

Paragraph M4154 of chapter 4, which governs mixed travel, provides for the computation of travel allowances in cases involving land travel on permanent changes of station where such travel is partly by Government means—including transportation requests—and partly at personal expense. This paragraph properly establishes the rule in all situations where mixed travel is contemplated by the PCS orders. Its application, however, in cases where no travel data is included in the orders and the travel was from a leave point to the member's new station appears questionable.

We held in 23 Comp. Gen. 713 (1944), that where travel has been performed on a mileage basis and the orders authorize the allowance on that basis, those orders may not be amended retroactively to change the reimbursement for travel already performed. Under the principle of that decision—which has been consistently followed and applied by this Office—the travel reimbursement rights of a member who had performed travel on a mileage basis may not legally be changed retroactively to reimburse him on another basis for that travel. Such reimbursement rights may only be changed prospectively.

Under this rule, it would be improper to amend the member's orders so as to require recomputation of the travel reimbursement rights in the cited case for any of the travel performed on PCS with the possible exception of the distance from Chicago to Fort Knox. Yet, the cited regulations as applied have precisely that effect in leave en route PCS cases where Government transportation is furnished for onward travel from the leave point.

Also, such application appears inconsistent with case 9, paragraph M4156 of the Joint Travel Regulations, which provides that a member who takes leave before joining his new station while under change-of-station orders is not deprived of the allowances to which he would be entitled had he not availed himself of leave. In this regard, it seems apparent that but for the taking of leave, the member in the submitted case would have been entitled to mileage for the full distance as paid and clearly the issuance of the TR was incident to the taking of leave rather than the performance of the ordered travel.

In such circumstances and since the present regulations have produced lack of uniformity in the treatment of member travel claims, it is recommended that changes be made in the Joint Travel Regulations to resolve this problem. In our opinion there would be no legal objection to treating the issuance of a TR in all leave cases as a cost-charge transaction—in effect a casual payment—and deducting the amount of the TR from the pay and allowances otherwise due the member. If that approach to the problem is deemed inappropriate, it would appear that a casual payment in lieu of transportation requests could be authorized in all leave cases of the type discussed above.

[B-156548]

Travel Expenses—Military Personnel—Miscellaneous Expenses—Reservists on Temporary Duty

Members of the Reserve components away from home on active duty for less than 20 weeks, and entitled to a per diem at their permanent station, may be reimbursed such miscellaneous expenses as are authorized for Regular members of the uniformed services under part I, chapter 4, volume 1 of the Joint Travel Regulations in connection with travel or temporary duty and the regulations amended accordingly in view of the parity intended to be accomplished by the addition of clause (4) to 37 U.S.C. 404(a) by the act of December 1, 1967, the amended regulations, of course, subject to the limitations in part A, chapter 6. However, the entitlement to travel between place of lodging or messing and duty as prescribed in paragraph M4413 may not be authorized since under clause (4) members at their permanent station performing annual training duty are not entitled to per diem when Government quarters and mess are available.

To the Secretary of the Navy, March 6, 1972:

Reference is made to letter of October 4, 1971, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requesting a decision whether the Joint Travel Regulations, Volume 1, may be amended to provide for the payment of the same miscellaneous reimbursable expenses presently authorized to Regular members of the uniformed services under Part I, Chapter 4, Volume 1 of the Joint Travel Regulations, to members of the Reserve components on active duty for less than 20 weeks. The request has been assigned PDTATAC Control No. 71-41 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary refers to our decision in 45 Comp. Gen. 30, in which we said that we would not object to the amendment of the Joint Travel Regulations to provide military members the same travel reimbursement rights provided for civilian employees in the Standardized Government Travel Regulations for local transportation costs. This, he says, resulted in the addition of paragraph M4413 to the regulations authorizing daily travel expenses for travel required to procure suitable meals and lodging to members while on temporary duty.

The Assistant Secretary cites section 3 of the act of December 1, 1967, Public Law 90–168, 81 Stat. 525, which amended section 404(a) of Title 37, United States Code, by adding clause (4) thereto to provide for payment, under regulations prescribed by the Secretaries concerned, of allowances to a member of a Reserve component when away from home to perform duty. He refers to the legislative history of that act which expresses an intent to provide the same entitlements to all military personnel in the matter of per diem eligibility when the circumstances are essentially the same.

The Assistant Secretary therefore asks whether our Office would be required to object to an amendment to the Joint Travel Regulations providing reimbursement to members of the Reserve components on active duty for less than 20 weeks for the miscellaneous expenses authorized for members on extended active duty under Part I, Chapter 4, Volume 1 of the regulations, including an entitlement to reimbursement for travel between places of lodging/messing and duty as prescribed in paragraph M4413 of the regulations.

Regulations promulgated pursuant to 37 U.S.C. 404(a), clause (4), are contained in Part A, Chapter 6, Volume 1, Joint Travel Regulations. Paragraph M6001 thereof provides, under the circumstances there specified, for entitlement to travel and transportation allowances to members of the Reserve components while on active duty with or without pay. Paragraph M6001–1b and 1d of the regulations provide that Part I, Chapter 4, Joint Travel Regulations, is applicable to Reserve members within the purview of that paragraph, for their travel to and from a permanent duty station, as well as for travel away from and return to a permanent station for the performance of temporary duty. However, Part I, Chapter 4 of the regulations is not made applicable to such members during the periods they are performing duty at their permanent duty stations.

We have held that section 404(a)(4) of Title 37, United States Code, provides authority for the issuance of regulations authorizing per diem to members of the Reserve components on active duty for less than 20 weeks in all cases where members of the Regular components performing similar duty at a temporary duty station would be entitled to per diem, except that no per diem is payable to members performing annual training duty when Government quarters and a Government mess are available. 49 Comp. Gen. 621 (1970). Paragraph M4400 of Part I, Chapter 4 of the regulations authorizes reimbursement for the expenses specified in that Part to all members while in a travel and temporary duty status and paragraph M4413 thereof authorizes reimbursement of transportation expenses to such members when required to procure suitable lodgings or meals while at a place of business in a temporary duty status.

In view of the parity intended to be accomplished by the addition of clause (4) to 37 U.S.C. 404(a), we would not be required to object to the issuance of regulations which would provide members of the Reserve components away from home on active duty for less than 20 weeks and entitled to a per diem at their permanent duty station, an entitlement to reimbursement of miscellaneous expenses similar to the entitlement authorized in Part I, Chapter 4, in connection with travel or temporary duty.

These regulations should, of course, be subject to the limitations now contained in Part A, Chapter 6, particularly those itemized in paragraph M6001 thereof. 48 Comp. Gen. 517 (1969).

Since it is clear from the legislative history of clause (4) that members at their permanent duty station performing annual training duty are not entitled to per diem when Government quarters and a Government mess are available, we are of the opinion that there is no authority to extend the entitlements provided in paragraph M4413 of the regulations to such members. The question presented is answered accordingly.

[B–174726]

Personal Services—Contracts—Basis for Contracting Personal Services

Since the rule that purely personal services for Government are to be performed by Federal personnel under Government supervision is a rule of policy and not positive law it need not be applied when contracting out is substantially more economical, feasible, or made necessary by unusual circumstances and the services do not require Government supervision, and, therefore, the services of a Spanish translator obtained under a purchase order may be continued and payment made in accordance with the terms of the order. However, such services in the future should be made subject to a formal contract, for the authority to use a purchase order for services is primarily intended to relate to a one-time operation. Overrules 6 Comp. Gen. 364.

To Roy B. Hogg, Office of Economic Opportunity, March 6, 1972:

We refer to your letter of December 9, 1971, requesting to be advised whether Mrs. Olga E. Ramirez may continue to perform and be paid for services secured by the use of a Standard Form 147 order for supplies and services.

Purchase Order No. C2C–0035 dated July 9, 1971, provides in part as follows:

This is a Blanket Purchase Arrangement for a Spanish translation of a variety of Office of Economic Opportunity informational materials which might be significantly interesting and/or beneficial to Spanish-speaking groups for period 7/1/71–6/30/72 * * *

* * * * * * *

PRICING—Vendor prices to the Government shall be as low as, or lower than, those charged the supplier's most favored customer, in addition to any discounts for prompt payment.

With regard to price, the purchase order provides in addition only that the amount is not to exceed $2,500.

You indicate that the need for the services may continue after the full amount of funds available is utilized. It is noted that for the first half of fiscal year 1972 Mrs. Ramirez has provided $775 worth of services. Accordingly, we see no reason to assume that the $2,500 limitation will be exceeded.

You state that this case is practically identical to 6 Comp. Gen. 364, November 27, 1926, in which it was held that, inasmuch as the Personnel Classification Board had classified translators and allocated such positions to particular grades, a contract for the services of a translator would be in contravention of the then applicable civil service and classification laws.

The case which you have cited was one of our early decisions which held in effect that all services normally performed by Government employees and all services which could be performed by incumbents of existing civil service positions were "personal services" for which there existed no authority to enter into contracts. Since those early decisions, this Office and the Civil Service Commission have recognized that services normally performed by Government personnel may be performed under a proper contract if that method of procurement is found to be more feasible, more economical, or necessary to the accomplishment of the agency's task. In 43 Comp. Gen. 390 (1963), we stated:

> The General rule is that purely personal services for the Government are required to be performed by Federal personnel under Government supervision. See for example, 6 Comp. Gen. 140; 24 *id.* 924; and 32 *id.* 427, which is cited in the letter. However, the requirement of this rule is one of policy rather than positive law and when it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by non-Government parties, and that is clearly demonstrable, we would not object to the procurement of such work through proper contract arrangement. 31 Comp. Gen. 372.

A "proper contract" for services as contemplated by the above language has been recognized to be one in which the relationship established between the Government and the contract personnel is not that of employer and employee. In 45 Comp. Gen. 649 (1966), we summarized the rule as follows:

> It has been held that services normally performed by Government personnel may be performed under contract if it can be shown that the contracting out is substantially more economical, feasible, or necessary by reason of unusual circumstances. That rule is to be applied to contract procurement on a strictly job basis under which the Government contracts for the furnishing of a product or the performance of a service with no detailed control or supervision over the method by which the result required is accomplished. * * *

See also 31 Comp. Gen. 372 (1952); 33 *id.* 143 (1953); 43 *id.* 390 (1963); 44 *id.* 761 (1965). In determining whether the relationship

created is proscribed the Civil Service Commission has taken the position that if the terms of the contract permit or require detailed Government supervision over the contractor's employees it is to be questioned. Chapter 304, Subchapter 1–4, of the Federal Personnel Manual sets forth criteria for determining whether the contract permits or requires supervision.

In the case which you have presented there is no suggestion that the service which Mrs. Ramirez is to provide in fact requires detailed Government supervision, nor would we suppose from the nature of work described that such was contemplated or is likely to be required. You are therefore advised that Mrs. Ramirez may continue to perform and be paid for services as outlined in the purchase order. However, in the future services such as here involved should be made the subject of a formal contract between the parties. The authority for use of a purchase order for services is primarily intended to relate to a one-time operation.

Your file is returned herewith.

[B–174959]

Military Personnel—Record Correction—Overpayment Liability—Debt Remission

The correction of military records under 10 U.S.C. 1552 directing remission of the indebtedness of an officer who refunded an overpayment of retired pay resulting from the erroneous use of pay rates effective July 1, 1968, rather than the rates in effect June 1, 1968, the officer's mandatory retirement date, does not support repayment of the amount collected since the officer's mandatory retirement date computed on the base retirement date of April 30, 1938 remained unaffected by the correction as the failure to accomplish the officer's retirement on the date required by law does not add to his right in any way in computing retired pay entitlement and, furthermore, the authority to correct military records is limited to factual changes and the Secretary concerned has no authority to waive the indebtedness of an officer, 10 U.S.C. 9837(d) applying only to enlisted personnel.

To N. R. Breningstall, Department of the Air Force, March 6, 1972:

We refer to your letter dated December 13, 1971, which was forwarded here by letter dated January 14, 1972, of Headquarters United States Air Force, requesting a decision as to the propriety of payment of a voucher for $803.86 in favor of Colonel George A. Simeral, SSAN 551–01–9181, USAF, retired, representing refund of an overpayment of retired pay collected during the period from March 1, 1971, through July 31, 1971. Your request has been assigned Air Force Request No. DO–AF–1141 by the Department of Defense Military Pay and Allowance Committee.

The overpayment of $803.86 for the period September 1, 1968, through August 31, 1970, resulted from the fact that Colonel Simeral's retired pay was erroneously computed on the pay rates effective July 1,

1968, rather than the correct rates in effect on his mandatory retirement date, May 28, 1968. Upon review of his records, it was determined that his base retirement date of April 30, 1938, was correct and that his mandatory retirement date should be June 1, 1968, instead of September 1, 1968.

On August 2, 1971, the Assistant Secretary of the Air Force, having considered the recommendation of the Air Force Board for the Correction of Military Records and under the authority of 10 U.S.C. 1552, directed that:

1. The pertinent military records of the Department of the Air Force, relating to GEORGE A. SIMERAL, 551-01-9181 FR, be corrected to show that the indebtedness in the amount of $803.86 be, and it hereby is, remitted.
2. All necessary and appropriate action be taken in consonance with this Directive.

On the basis of our decisions holding that the Secretaries of the military departments are not vested with any discretionary power to make determinations of the specific amounts to be paid as a result of the correction of military or naval records and that the correction, if it is to give rise to a right to the payment of money, must, without exception, be a change of facts as set out in the original record or an addition to or a deletion of some of those facts, you raised the question as to whether the correction in this case, which merely directed remission of the debt may be considered a "correction" which will support repayment of the amount collected.

By Special Order No. AC 7209, dated March 13, 1968, Colonel Simeral was relieved from active duty on August 31, 1968, and retired effective September 1, 1968. There was no indication on the order that he had been retained beyond his mandatory retirement date.

Prior to processing Colonel Simeral's retirement, a recomputation of his base retirement date was made and the date was established as August 30, 1938, instead of April 30, 1938. On July 22, 1970, his retirement date was questioned, since the 1968 edition of the Air Force Register showed his base retirement date as April 30, 1938. Upon another review of his records, it was determined on October 27, 1970, that the original base retirement date of April 30, 1938, was correct and that his mandatory retirement date should have been June 1, 1968.

Thus, on the basis of 43 Comp. Gen. 742 (1964), in which it was held that failure to accomplish a member's retirement on the date required by law does not add to his right in any way with respect to computing the amount of retired pay to which he is entitled, Colonel Simeral's retired pay was recomputed under the pay rates in effect on June 1, 1968, instead of the pay rates in effect on September 1, 1968. His retired pay was reduced and it was determined that he had been overpaid $803.86 for the period from September 1, 1968, through

August 31, 1970, which amount was recovered by withholding from his retired pay during the period from March 1, 1971, through July 31, 1971.

Colonel Simeral apparently requested correction of his records to show that his mandatory retirement date was September 1, 1968. However, his record was only corrected to show remission of the indebtedness. The purported correction did not make any change in the facts of record upon which his right to additional retired pay depends and in fact admits the validity of the overpayment, since such "correction" is nothing more than an attempted remission of an indebtedness properly chargeable to him on the basis of the existing facts.

It is our view that the authority vested in the Secretary of a military department pursuant to 10 U.S.C. 1552 to correct military records, in order to "correct an error or remove an injustice," is limited to factual changes. 34 Comp. Gen. 7 (1954). The base retirement date of April 30, 1938, which required that he be mandatorily retired on June 1, 1968, stands unchanged and the overpayment which resulted from the establishment of an erroneous base retirement date remains of record. The "correction" directing remission of the indebtedness, if anything, reflects a view that the Secretary of the Air Force is authorized to remit the indebtedness of a commissioned officer of the Air Force. While the Secretary is authorized by 10 U.S.C. 9837(d) to remit the indebtedness of an enlisted member of the Air Force, we know of no authority of the Secretary to remit the indebtedness of a commissioned officer. In the absence of such authority the action of the Secretary in changing the record only to show remission of Colonel Simeral's indebtedness in our opinion has no effect on his liability to the United States.

In such circumstances and since the records of Colonel Simeral still establish that he was overpaid in the amount of $803.86, he is not entitled to refund of the amount collected. There being no authority for payment of the voucher, it will be retained here.

[B–173887]

Leases—Building Construction for Lease to Government—Lease Negotiation—Propriety

In the negotiation pursuant to 41 U.S.C. 252(c)(10) of a 20-year lease with four 5-year renewal options for space in a building to be constructed, the application of principles inherent in the competitive system, even if the negotiations were not subject to the Federal Procurement Regulations, would have secured a more favorable lease, for then the possibility of transferring option cost benefits to the 20-year price would have been discussed; zoning requirements would not have been stated in terms of nonresponsiveness, terms inappropriate in a negotiated contract; past performance and not financial capacity alone would have determined the capacity to provide the lease space by the date specified; a price

evaluation basis would have been stated with the information option prices would not be considered; and the cutoff date for negotiations would have been prospective. Although termination of the lease would not be in the best interests of the Government, the progress of the building construction should be closely monitored.

To the Acting Administrator, General Services Administration, March 16, 1972:

We refer to the report dated October 15, 1971, from your General Counsel, relative to the protest by Sutherland, Asbill and Brennan, as attorneys for the Tinton Realty Co., Inc. (Tinton), against the award of a contract to the Dworman Building Corporation (Dworman), under solicitation for offers (SFO) 2PRA(71) 160, issued by the Public Buildings Service, New York, New York.

The SFO, issued on April 19, 1971, was negotiated pursuant to 41 U.S.C. 252(c)(10) after the proposed lease-construction prospectus had been approved by the Public Works Committees and Committees on the Armed Services of the Congress. The project required construction of a building containing 535,000 net usable square feet of office, storage, and related space for occupancy by the Army Electronics Command and the Army Materiel Command in the vicinity of Fort Monmouth, New Jersey. The maximum allowable rent was established as $5.50 per square foot of net usable space per annum.

The SFO contained the following pertinent provisions:

TERM OF LEASE: Twenty (20) years firm commencing with the date the Government takes possession with four (4) five (5) year renewal options upon 90 days' prior written notice to the Lessor. The Government shall have the right to cancel at any time, during the renewal periods only, upon 90 days' prior written notice to the Lessor.

SCHEDULE D

MISCELLANEOUS PROVISIONS

6. *ZONING.* Prior to award under this invitation, offerors may be required to furnish evidence that their property is zoned in conformance with the Government's intended use. Such evidence must be furnished within five (5) days from the date of the Government's written request. Failure to provide satisfactory evidence will automatically make the bid nonresponsive. Moreover, if rezoning or a zoning variance is necessary for the proposed use of the property, the offeror must furnish evidence that such rezoning or variance would be authorized even if the Federal Government, as such, were not involved.

* * * * * * *

13. *AWARD FACTORS.*

(a) Space shall be offered on an annual square foot cost rather than on an overall per annum or monthly rate, and price evaluation and award will be made on the basis of the lowest annual per square foot cost to the Government and not on the lowest overall rental cost.

(b) All offers will be analyzed and comparatively evaluated. Award will be made to that responsible offeror whose offer, conforming to the Solicitation for Offers, will be most advantageous to the Government, price and other factors considered.

(c) In determining which offer will be most advantageous to the Government, the Contracting Officer will consider the following factors, in addition to the

rental proposed and the conformity of the space offered to the specific requirements of this Solicitation for Offers:

1. Susceptibility of the design of the space offered to efficient layout and good utilization.
2. The effect of environmental factors, including the physical characteristics of the building and the area surrounding it, on the efficient and economical conduct of agency operations planned for the requested space.
3. The adequacy and effectiveness of the interior road system in precluding traffic backup.

Thereafter, on May 9, 1971, amendment No. 1 was issued, providing in pertinent part:

19. Prior to making a lease award and upon the request of the General Services Administration, any offeror shall obtain and exhibit to GSA at least a conditional commitment of funds in an amount necessary to perform the work, and in addition, shall furnish GSA with the name of the construction contractor.

* * * * * * *

21. Within thirty days after the award, the successful offeror shall provide the Government evidence of:

(a) The firm commitment of funds in an amount sufficient to perform the work.
(b) Sufficient ownership interest or control of the construction site to insure the Government's interest for the full term of the lease.
(c) Compliance with local zoning laws or variances, approved by the proper authorities.
(d) Execution of a construction contract with a firm completion date.
(e) Issuance of a building permit by the proper authority.

A second amendment was issued June 8, 1971, providing for additional lighting requirements.

Dworman and Tinton were the only offerors to respond by the closing date of June 22, 1971. Tinton proposed to construct the facility on the northeast corner of Tinton Avenue and Hope Road in Eatontown, New Jersey, at a rental of $5.47 per square foot per annum for the 20-year firm term and each option period. Dworman proposed three alternative sites, all at a rental of $5.50 for the firm term and options. Dworman's site "A," the one ultimately chosen by GSA, was described as "Easterly side of Tinton Avenue at Wayside Road Intersection, Eatontown, New Jersey." It has been determined that Dworman's site "A" is actually situated in New Shrewsbury, rather than Eatontown.

After negotiations were conducted on July 8, 1971, between representatives of Tinton and GSA, Tinton reduced its proposed rental on July 12 to $5.40 for the firm term and option periods, contingent upon receiving award by August 25. Pursuant to a meeting of July 13, 1971, Tinton submitted its Affirmative Action Plan on July 14, 1971. By letter of the same date, Dworman submitted information relative to its proposed architectural approach and also reduced its offer to $5.40 for both the firm term and option periods. By letter dated July 15, Tinton amended its Affirmative Action Plan and submitted evidence of a conditional construction loan and the name of its proposed construction contractor.

On July 19, 1971, GSA received an analysis, requested June 30, 1971, from the Director of County Planning, Monmouth County Planning Board, of the impact of the proposed facilities on the local road network for the proposed sites. The preface to the report indicated:

> Unfortunately all of the proposed sites have serious drawbacks when viewed from the standpoint of traffic flow. None of the sites will be able to adequately provide for safe and efficient flow of traffic without extensive road improvements.

Commenting on Dworman's site "A", the analysis points out the transportation deficiencies of the intersection of Tinton Avenue and Wayside Road:

> * * * For this site to be acceptable, there would have to be a complete redesign and reconstruction of this intersection, including a realignment of a portion of Wayside Road.

After further analysis, the report concludes:

> If the necessary road improvements were made as outlined above, this site would be the best of the four sites from the traffic viewpoint.

Tinton's site was characterized as follows:

> Any development of this site should include the reconstruction of the intersection of Tinton Avenue and Hope Road as a minimum. Even with such improvement, however, the site will have an adverse impact on the traffic flow through this intersection.

On the same date, Dworman also submitted evidence of a conditional loan commitment. Also, on July 19, Tinton submitted reductions to its option prices for each successive period to $4.95, $4.75, $4.50 and $3.95.

By letter dated July 20, 1971, Dworman submitted a copy of a letter dated July 16, 1971, from the Administrator of the Borough of New Shrewsbury, indicating that the proposed Dworman location was serviced by existing storm drains of the Monmouth Consolidated Water Company and that a sewage system was then being installed for projected completion by mid-1972. The Administrator of New Shrewsbury further indicated that, as Mayor, he would endorse the necessary zoning changes to attract the proposed building to New Shrewsbury. The cover letter of July 20 also submitted a further yearly rental reduction to $2,884,000, or approximately $5.39, while erroneously indicating that the proposed site had already been properly zoned. The next day Tinton amended its proposal for the firm term of the lease to $2,885,000 per annum.

On July 23, 1971, Tinton's Affirmative Action Plan was approved by GSA. On July 26 GSA approved Dworman's Affirmative Action Plan and also received a letter from Dworman reducing its rental to $5.365. On July 28, Tinton's offer was reduced to $5.35 for the firm term of the lease.

Both offerors were determined financially responsible by the Credit and Finance Officer on August 2, 1971. On August 4, Dworman re-

duced its proposal to $5.33 for both the firm term of the lease and option periods. On August 5, 1971, Tinton extended its acceptance period for 90 days, in lieu of the August 25 date previously imposed. By letter dated August 9, 1971, GSA advised both offerors that negotiations were closed and that no further revisions, amendments or modifications would be accepted.

On August 12, 1971, the Regional Administrator recommended acceptance of Dworman's offer of $5.33 for its site "A" for the 20-year firm term and option periods primarily on the ground that its offer was the lowest received. This recommendation was based on the evaluation of the Tinton and Dworman offers for the 20-year firm term only, not including the prices offered for the option periods. Evaluation of the two offers on the basis of the 20-year firm term plus the option periods, however, would have resulted in Tinton's offer having been evaluated at $8,262,750 less than the Dworman offer. GSA justifies evaluation of the firm term only by stating that it was not known whether the options would be exercised and that option evaluation would have been inappropriate. Tinton's primary ground of protest concerns this evaluation method. Notwithstanding that the Tinton offer presented an excellent opportunity to GSA to discuss with Tinton (with the same opportunity offered to Dworman) the possibility of transferring some of the option cost benefit to the firm 20-year term price, lease No. GS–02B–15526, dated August 12, 1971, was awarded to Dworman.

At the outset, while we recognize that the conduct of negotiations for leased space is not subject to the Federal Procurement Regulations (FPR) (see FPR sec. 1–1.004–1), we perceive no sound reason why the principles inherent in the competitive procurement system should not be applied to lease activities. Since GSA has promulgated internal regulations to govern the conduct of leased space acquisition in its handbook PBS 1600.1, January 24, 1964, "Acquisition of Leasehold Interests in Real Property," we will review this case predicated upon PBS 1600.1, in light of the aforementioned standards.

The initial ground of protest, advanced by attorneys for Tinton, is that Dworman did not comply with paragraph 6 of schedule "D", which provides for automatic rejection of an offer as nonresponsive if the offeror fails to evidence proper zoning within 5 days of a written request by the Government for such information. Counsel argues that the statement in Dworman's letter of July 20, 1971, to GSA, that proper zoning had been secured, indicated that GSA had orally requested the information called for under paragraph 6, and that the later submission of factually incorrect information by Dworman relative to proper zoning provided a compelling reason for rejection of Dworman's offer as nonresponsive.

In this respect, the report of October 15, 1971, from your General Counsel, states that paragraph 6 of schedule "D" is considered to be inapplicable because "the Government did not request the bidders, prior to award, to furnish evidence that their sites were properly zoned." While Dworman's July 20 letter advising, albeit incorrectly, that proper zoning was in effect would seem to indicate that a request for such information was, in fact, made by the Government, we need not resolve this issue.

It was unfortunate that the language of the SFO couched the zoning requirement in terms of responsiveness. We feel that the use of the term is inappropriate in a negotiated procurement. In any event, it is our view that Amendment No. 1 to the SFO rectified the erroneous categorization by requiring submission of evidence of proper zoning within 30 days after award. This evidence was timely submitted by Dworman.

With regard to the determination of Dworman's responsibility, section 16(f) of chapter 3 and 2(b)(2) of chapter 5 of PBS 1600.1 merely require an affirmative determination of financial capacity pursuant to GSA handbook "Credit, Finance and Insurance," CPT 3000.1. This requirement was satisfied by the August 2, 1971, report of the Credit and Finance Officer, referenced above. However, from the record, we do not believe that the determination of financial capacity alone provided the contracting officer with sufficient assurance that Dworman had the capacity to provide the lease space by the date specified. We believe that, at a minimum, GSA should have considered (in consonance with FPR 1–1.1203–1(c)) Dworman's past performance in arriving at its determination of responsibility.

Concerning the evaluation basis employed by GSA, by letter dated December 13, 1971, attorneys for Tinton allege that full and free competition was not obtained:

> The procurement technique followed by GSA violates the fundamental requirement that a procuring agency set forth the basis upon which an award is to be determined and then that the award be made on that basis. Here, both the terms of the solicitation for offers and the course of conduct of the GSA representatives in their negotiations with Tinton clearly established that the low price for the full 40-year period of the lease (the 20-year firm term and the period of the four 5-year options) was the basis upon which the award would be made.

The GSA position on the matter is as follows:

> * * * Dworman's offer is $10,700 per year less than protestant's or $214,000 less over the twenty year firm term of the lease. Obviously, the lower rates for the renewal terms cannot be used to calculate protestant's offer as low bid, since it cannot be known now whether the Government will exercise its renewal rights.

However, we note that PBS 1600.1, chapter 3, part 2, section 5–b(1)(b), provides in part:

> In situations calling for award factor evaluation to meet the test of propriety, it is necessary to clearly state the specific factors related to valid agency require-

ments and give adequate notice to offerors that these factors will be considered in the evaluation of the offers.

Nevertheless, the SFO failed to advise offerors of the bases of price evaluation and, especially, that option prices would not be evaluated. Rather, the SFO calls only for offers to be submitted for both the 20-year firm term and four 5-year options. Also, section 21b, Amendment No. 1 to the SFO, evidences GSA's concern with the full 40-year period by requiring submission of evidence within 30 days after award of sufficient ownership interest or control of the site to insure the Government's interest for the "full term of the lease." Further, section 13, "Award Factors," merely indicates that price evaluation would be conducted on the basis of the "lowest annual per square foot cost to the Government and not on the lowest overall rental cost" with no advice that option prices would not be considered. Finally, the SFO stated that award was contemplated to that responsible offerer whose offer will be most advantageous to the Government, price and other factors considered, again without mention that option prices would not be considered.

Our Office believes that these sections of the SFO did not set forth sufficient information concerning evaluation of offers to enable a bidder to properly prepare a proposal with any degree of certainty as to how it would be evaluated. Moreover, GSA had ample opportunity to clarify its intention concerning evaluation of the option periods during the course of negotiations. In this respect, Tinton claims that GSA placed considerable emphasis on the option rentals during negotiations. Although GSA asserts that the option periods were never discussed during negotiations, it seems that in either case GSA did not fulfill its obligation to clearly communicate the basis of proposal evaluation. In any event, when Tinton submitted its amended proposal on July 19, 1971, offering substantial price reductions for the option periods, GSA should have been aware that Tinton was attaching great importance to its option prices. At this point, it should have been apparent to GSA that Tinton was not competing on the same basis as Dworman. In our opinion, this deficiency relating to the option periods deprived the Government of an award predicated upon full and free competition.

Further, assuming, as GSA asserts, that it had no intention of evaluating the prices for the option periods, we think that sound procurement policy required discussions with Tinton in an effort to obtain for the 20-year firm term some of the cost benefits relating to the option periods. We note, in this regard, that GSA is not wholly unconcerned with option prices, as evidenced by section 18(d)(3), chapter 3, PBS 1600.1. This section indicates that one of the factors to be considered in the course of negotiations is a renewal option quoted at a

higher rental than the initial period, particularly where expenditures should have been amortized over the initial term so as to provide a negotiation tool to obtain reduced renewal rentals. While cognizant that Dworman's option prices were the same as the initial term, its costs should have been amortized over the 20-year firm term with the result that GSA might have obtained option rentals at a lower than quoted price. We say this because if the Government elects to exercise the first 5-year option, Tinton's proposal would be $192,660 lower than Dworman after 2 years; $802,500 lower at the end of the 5-year option period; and $8,262,750 lower for the full 40-year period. Even though it cannot now be known whether the Government will elect to exercise its option rights, the failure to conduct discussions with Tinton and Dworman concerning the options raises substantial doubt that the lease was awarded by the Government on the most favorable terms.

Negotiations were closed by letters of August 9, 1971, from GSA to Dworman and Tinton. The advice was as follows:

> In reference to the above captioned subject, this is to inform you that the Government will not accept or consider any further revision, change, or modification of your offer.

However, PBS 1600.1, chapter 3, part 3, section 18i, provides the method to terminate negotiations, as follows:

> A cutoff date must be established for termination of negotiations. This will assist in eliminating delays and uncertainties. The contracting officer shall receive all offers until an award is made. Offerors shall be advised that the cutoff deadline is at the convenience of the Government and may be waived by the Government. Sound Business judgment shall dictate whether the cutoff deadline shall be extended. * * *

We believe that it is implicit in this section that the cutoff date be established prospectively, not retrospectively. The retrospective cutoff date employed in this procurement precluded the Government from receiving a final offer predicated upon the knowledge that negotiations were being terminated and the offeror's best and final offer was being solicited. We believe sound procurement policy dictates that to properly terminate negotiations: (1) offerors must be advised that negotiations are being conducted; (2) offerors must be asked for their "best and final" offer, not merely to confirm a prior submission; and (3) there must be a cutoff date common to all offerors. *Cf.* 50 Comp. Gen. 117, 125 (1970). We feel that these steps represent the minimum necessary to assure full and free competition and avoid any appearance of favoritism.

We feel that it is necessary to comment upon the apparent lack of communication encountered here between the GSA central and regional offices. While the central office attributed delays in responding to our requests for information to the regional office, the regional office maintains that but for requests for specific information initiated by our

Office, it had not been contacted or consulted on matters concerning the protest since preparation of the initial report. We feel that corrective procedures need to be instituted to remedy this situation in order that our requests for reports can be handled in a responsive and expeditious manner.

In our opinion, the above-discussed facts indicate the conduct of negotiations did not assure that the Government secured the most favorable lease arrangement available to it. However, with respect to Tinton's request that we recommend this lease be terminated, we are not convinced the foregoing deficiencies would be considered by the Court of Claims so clearly illegal as to render the lease a nullity. *John Reiner & Co.* v. *United States*, 163 Ct. Cl. 381, 386, 325 F. 2d 438, 440 (1963), *cert. denied*, 377 U.S. 931 (1964). The Government does not have the right to terminate the lease for its convenience during the firm 20-year period. Therefore, any termination action taken pursuant to such a recommendation by our Office might well impose liability on the Government for substantial damages, including loss of anticipated profits. We do not believe, under the circumstances, termination of the lease would be in the best interest of the Government.

However, Tinton has raised another matter which introduces doubt, in our opinion, as to the ability of Dworman to meet its responsibilities under its contract. It is Tinton's contention in this regard that any construction work performed by Dworman is illegal because the building permit issued by the Borough of New Shrewsbury is not valid and subject to court challenge in the absence of prior site plan approval by the county. Should such a challenge materialize, Dworman's ability to perform in accordance with its contract construction schedule would be seriously, if not fatally, impaired. We suggest that Dworman's construction progress be closely monitored and serious consideration be given to terminating the contract for default should work not proceed as scheduled. Inasmuch as it is our understanding that, to date, Dworman's progress has been monitored upon Dworman's unverified statements, we also suggest that future surveillance be conducted personally by appropriate GSA personnel. We also urge that the circumstances generating this protest be closely reviewed and the results be communicated to the appropriate officials for their future guidance in similar procurement situations.

[B–171958]

Leases—Building Construction for Lease to Government—Construction Commitment Prior to Leasing

Since the implementation of the statutory limitation on the use of appropriations for lease construction programs included in Independent Offices Appropriation

Acts since 1963 must assure that only construction already committed as a private venture is offered to the Government for rental, and the fact that an offered building is not actually in existence is not decisive, the General Services Administration should not have accepted a lease offer that failed to satisfy the five criteria designed to meet the restriction because the lessor as of the date of the solicitation did not have title or any other possessory interest to the site to permit the start of construction—the first criterion—or have a firm construction contract with a fixed completion date—the fifth criterion—and, furthermore, the doubts as to compliance with the remaining criteria—design, financing, and a building permit—were not resolved.

Leases—Negotiation—Competition—Maximum

The fact that a lease offer was accepted although the offeror had not complied with the five criteria established to implement the statutory limitation on the use of appropriations for lease construction programs included in the Independent Offices Appropriation Act of 1970 does not exclude the lessor from participating in any resolicitation of the requirement, or preclude participation in future lease procurements as the Government has the duty to secure maximum competition in its procurements. However, since the issues of noncompliance are broader than the single transaction involved, Congress will be informed of the matter for possible corrective legislative action and, although payments under existing leases will be accepted, payments on leases hereafter executed without regard for the restriction against leasing buildings to be erected for the Government will be questioned.

To the Acting Administrator, General Services Administration, March 17, 1972:

By letter dated February 11, 1972, the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, forwarded a copy of the court's order of February 7, 1972, staying action in the case of *John W. Merriam* v. *Kunzig, et al.*, United States District Court, Eastern District of Pennsylvania, Civil Action No. 71–2262, pending receipt of our decision on a protest covering the same subject matter initially filed with our Office by the plaintiff.

The matter presently before the court was initially brought to our attention by telegram of February 19, 1971, from Richard B. Herman and Company, agent for John W. Merriam (Merriam), which questioned generally the propriety of the negotiation of a lease by the General Services Administration (GSA), acting on behalf of the United States, with Gateway Center Corporation (Gateway) under solicitation for offers No. NEG(70)–63. By letter dated April 12, 1971, with enclosures, your General Counsel furnished our Office an administrative report outlining the circumstances involved. By letter with enclosures dated May 28, 1971, Lankler and Parker, counsel for Merriam for purposes of its protest before our Office, responded to the administrative report. As a result of counsel's reply, we requested a further report from GSA. By letter, with enclosures, dated July 9, 1971, we received a reply from your General Counsel and this supplemental report was made available to Merriam's counsel for comment. By letter received in our Office on July 22, 1971, counsel responded. Further submissions were also received from Merriam's counsel by letters dated August 25, 27, and September 10, 1971.

By letter dated September 16, 1971, we advised Merriam's counsel that we could not authoritatively rule at the time on the basic question presented by the protest, namely, whether Gateway met the crieria established by GSA for the purpose of assuring compliance with the limitation in the Independent Offices Appropriation Act of 1970 (Public Law 91–556, 84 Stat. 1442), which, in effect, precludes the lease of new construction unless such construction has already been committeed as a private venture. This action was taken in view of the fact that we were still in the process of reviewing GSA's lease construction practices, with particular emphasis on its implementation of the appropriation limitation. Merriam was advised, however, that we would consider the protest in the context of our report to the Congress. We were also cognizant of the fact that Merriam would institute court proceedings in the event of our declination to rule.

Our review is now complete and our report to the Congress will be released in the next few weeks. In view of the court's request for a specific ruling by our Office on the merits of Merriam's contention that the award to Gateway violates the Appropriation Act limitation and in consonance with the principles recently articulated in *The Wheelabrator Corporation* v. *Chafee, et al.*, 455 F. 2d 1306 (D.C. Cir. Nos. 24,705 and 24,729, October 14, 1971), and *M. Steinthal & Co., Inc.* v. *Seamans, et al.*, 455 F. 2d 1289 (D.C. Cir. No. 24,595, October 14, 1971), we have considered the facts surrounding the Merriam protest independent of the report. In our view, two separate inquiries are involved. First, there is question as to the meaning and application of the Appropriation Act limitation and, second, there is question as to the impact of the five criteria on competitive aspects of the procurement, that is, the rights of contending offerors during the negotiation of a lease contract.

With respect to the first question, the statutory limitation on the use of appropriations for lease construction programs were first included in the Independent Offices Appropriation Act of 1963, Public Law 87–741, 76 Stat. 728. In explaining the proposed statutory limitation, the House Committee on Appropriations stated:

> The General Services Administration wants to build several new buildings in the District of Columbia under a lease construction program to provide 1 million square feet of additional space. The entire space in each building is to be rented by the Government. With this procedure the Committee disagrees since they are completely financed new buildings under lease construction contracts. The Committee believes that the Government should own the buildings instead of giving somebody a ten to fifteen year payout.
>
> The concern of the Committee is that lease construction is clearly the most expensive method of providing Government space. Under this method the Government * * * never obtains title to the property. A limitation on use of funds for lease construction projects costing over $200,000 has therefore been included in the bill * * *. H. Rept. No. 2050, 87th Cong., 2d sess., at page 13.

In presenting its views to Subcommittee on Independent Offices of the House Committee on Appropriations in connection with the 1964 appropriations, GSA requested deletion of the restrictive provision. GSA suggested that the limitation was inconsistent with the program it considered necessary to meet the office space requirements of the Government. In rejecting GSA's request, the chairman of the subcommittee stated:

I am afraid the GSA misinterpreted the language. The language was intended absolutely to forbid the leasing of that space under your jurisdiction, and requiring of you to come to the proper committees for authorization. Your language is quite weak. The reason you want this deleted is that you do not want to come back to Congress every year for your funds and authorization. In that regard, you are no different from any other agency that wants back-door authority.

We believe the statutory limitation and its legislative history evidence a strong congressional policy against lease construction programs. Although this policy is directed primarily against GSA, as opposed to a particular class of prospective lessors, the basic thrust of any implementation of the Appropriation Act limitation in the case of new construction must be to assure that only construction already committed as a private venture is offered to the Government for rental. In our view, the underlying question which any administrative implementation of the limitation must seek to resolve is whether there is a bona fide intention on the part of the offeror to construct the building offered for lease irrespective of its securing a lease with GSA. If this is the basic question, as we believe it is, then the fact that an offered building is not actually in existence is not decisive.

The five criteria are designed to provide objective assurance that a particular offeror intends to go forward with his building irrespective of executing a lease with the Government—and this is their only purpose. The practical effect of meeting the criteria is to create a presumption overriding the appropriation restriction against leasing space to be erected for the Government. Compliance must be judged on the basis of the circumstances existing at the time of issuance of the solicitation for offers.

As noted by GSA in its submissions to the court, discussions were held between representatives of our Office and GSA prior to GSA's determination to rely upon the five criteria. We did not object to use of the criteria because we could not say that their adoption and proper enforcement would not adequately insure compliance with the Appropriation Act limitation. We remain of that view.

A basic question, then, is whether there has been bona fide compliance with each of the five criteria in this case, and we turn to a consideration of the specific circumstances involved.

Solicitation NEG(70)-63 was issued on September 30, 1970, for the leasing of 314,000 net usable square feet of office, storage and related

space to be ready for possession by July 1, 1972. The lease is to be for a period of 20 years beginning on the date the space is accepted for Government occupancy with the right reserved to the Government to renew the lease for two additional 5-year periods.

The subject solicitation contained the following provisions:

12. SPECIAL CONDITIONS RELATING TO BUILDING TO BE ERECTED BY BIDDER.

a. *Requirement.* Each year since 1963 the following provision has been included in the Independent Offices Appropriations Act:

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

b. *Buildings and Improvements to be Erected or Altered.* In the event a bidder offers (1) a new building to be erected, or (2) an existing building to be extended or added to (see c(2)(c), below) such bid shall remain open for acceptance by the Government for 120 days beyond the date for bid acceptance elsewhere specified in this solicitation, in order to afford the Government adequate time to prepare and submit to the appropriate Committees of Congress for approval, the prospectus required by the Act quoted in a, above.

c. *Definition of Existing Buildings, Extension, and Additions.*

(1) For the purpose of this solicitation, buildings, extensions or additions "which are to be erected by the lessor" do not include:

(a) Buildings, extensions, or additions, construction of which is substantially completed prior to date of the solicitation.

(b) New buildings, or extensions of and additions to existing buildings the construction status of which, *on the date of issuance of the solicitation,* met all of the following conditions:

i. Title to the site was vested in the offeror or he possessed such other interest in and dominion and control over the site to enable starting construction.

ii. Design was complete.

iii. Construction financing fully committed.

iv. A building permit for construction of the entire building, extension or addition had been issued.

v. Actual construction is currently in progress or a firm construction contract with a fixed completion date has been entered into. [Italic supplied.]

Gateway submitted the following documentation to the contracting officer to establish that its offered building was within the exception of paragraph c(1)(b):

1. A lease dated September 23, 1970, between University City Science Center, landlord, and Gateway, as tenant, for a term of 50 years, with an option to purchase. Opinions of counsel as to the validity of the lease.

2. A letter from the Provident National Bank, Philadelphia, Pennsylvania, dated September 15, 1970, approving a construction loan to the extent of $12,000,000.

3. Building permits issued by the city of Philadelphia.

4. A construction contract dated September 30, 1970, between Gateway and Rosemont Construction Corporation.

5. Drawings to demonstrate the design of the building had been completed.

Since this documentation satisfied the contracting officer that Gateway met the five criteria set out in the solicitation, Gateway was included in the negotiations conducted with Merriam and two other sources. Ultimately, Gateway's offer was accepted on February 18, 1971.

It is Merriam's position that the award to Gateway contravenes the Independent Offices Appropriation Act of 1970 (Public Law 91-556, 84 Stat. 1442) because the documentation submitted by Gateway does not demonstrate that it fulfilled the five criteria on September 30, 1970, the date of issuance of the requestf or offers.

With respect to the question whether Gateway possessed "such * * * interest in and dominion and control over the site to enable starting construction," as required by the first criterion, Merriam points out that paragraph 25 of the lease between University City Science Center and Gateway expressly provides that it was made pursuant to a certain redevelopment contract dated November 26, 1965, between the Science Center and the Redevelopment Authority, the terms of which are to be binding on the tenant. In the referenced agreement between the Redevelopment Authority of the City of Philadelphia (Authority) and the Science Center, the Authority agrees to transfer title to the subject property to the Center subject to certain conditions binding on the Center and any transferee thereof. Paragraph 14 of this agreement provides:

> The REDEVELOPER or its nominee shall not sell, lease or otherwise transfer the Project area, or Project, or any part thereof, without the prior written consent of the AUTHORITY until the AUTHORITY shall have certified in writing that the Redevelopment Project has been completed.

Paragraph 18 of the agreement provides:

> The REDEVELOPER or its nominee shall submit to the AUTHORITY for its review and approval all necessary final plans, designs, and specifications for the development of the Project area, including architectural and landscaping drawings. The REDEVELOPER or its nominee shall not commence any work pursuant to such plans, designs or specifications until approval by the AUTHORITY is made in writing; however, if no written communication is made by the AUTHORITY within thirty (30) days after such submission, AUTHORITY approval is inferred, unless the AUTHORITY requests an additional thirty (30) days for approval. Such approval shall not be unreasonably withheld.

In support of its position that the requisite approval had not been given as of the date of solicitation issuance, Merriam submitted a letter dated March 19, 1971, to a city councilman from the Executive Director of the Authority. The letter states in pertinent part:

> In response to your March 18 inquiry, please be advised that the Redevelopment Authority has approved no lease between the Science Center and Gateway Center Corporation for the above cite.

Preliminary plans for the proposed building on the site were approved in August, 1970. Final working drawings of the building have not yet been submitted for our approval. These plans must be submitted before construction can commence.

A letter dated April 20, 1971, between the same two persons states that while the Science Center has requested the Authority's approval of Gateway, the required documentation had not as of that date been furnished. Another letter dated September 28, 1970, from the Authority to the Center states that Gateway is accepted as the Center's nominee subject, however, to several conditions such as formal approval by the Authority and the Department of Housing and Urban Development. The record before our Office fails to show that the required approvals were granted as of the date the solicitation was issued.

Your General Counsel's position in reply is that the approvals have no bearing on the efficacy of the lease and notes that Gateway had taken steps to secure the needed approvals, citing as an example the approval of the preliminary building plans in August of 1970. The point, however, is that in the absence of the Authority's approval of the "final plans, designs, and specifications" pursuant to paragraph 18 of the redevelopment contract between the Authority and University City Science Center, it is difficult to understand how it can be said under any reasonable interpretation of the circumstances and the language of the first criterion that Gateway's interest on September 30, 1970, was such as would "enable starting construction."

While failure to meet the first criterion is, in itself, a sufficient basis to support Merriam's position, we note that documentation submitted by Gateway to show compliance with the fifth criterion is also subject to question. We may agree that the construction contract between Gateway and Rosemont Construction Corporation literally complies with the requirement that there be a "firm construction contract with a fixed completion date." However, Merriam's contention that Rosemont Construction Corporation is controlled by the same individual who controls Gateway and that, subsequent to award, Rosemont entered into a joint venture with a firm with the capacity to perform the work—a capacity which Rosemont allegedly did not have—certainly raises question as to whether Gateway complied with the spirit of the criterion. This question is not, in our opinion, adequately answered by your General Counsel's advice in his letter of July 9 that Gateway complies with the criterion since actual construction is currently in progress. The issue is whether Gateway complied with the criterion at the time of issuance of the solicitation for offers.

We might add that if the case turned solely on the propriety of GSA's determination that Gateway complied with the third and fourth criteria, we would be inclined to deny Merriam's protest. Insofar as

the requirement of the third criterion that financing be fully committed is concerned, the letter dated September 15, 1970, from the Provident National Bank recites that:

> This letter represents our agreement to provide a construction loan up to a maximum of $12,000,000 * * * subject to the execution of our usual construction loan documentation prior to closing. The interest rate shall be set at market level at the time of closing.

We cannot say the GSA's position that this letter satisfies the requirement that construction financing be fully committed is unreasonable, for there is no indication that the commitment is subject to a material condition, such as Gateway obtaining a lease with GSA.

With respect to the fourth criterion, the question whether Gateway possessed a building permit for construction of the "entire" building involves an interpretative issue and GSA notes in this regard that three permits were issued to Gateway prior to September 30 by the City of Philadelphia Department of Licenses & Inspections for over $12,000 in permit fees. While Merriam urges that Gateway lacked permits for air conditioning, plumbing and electrical work, there is, as GSA points out, no indication that the basic permit is for less than an entire building. More important, in our view, is the following observation in your General Counsel's letter of July 9, 1971, with which we agree:

> * * * Whether the word "entire" means "completed" in the sense of total, final construction is a matter of semantics, GSA does not require the latter which is not only impractical but virtually impossible since in order to meet the SFO [solicitation for offers requirements,] changes, even in building design, might be required.
> All that is required is that a permit has been issued for the building offered. * * *

The clear implication of Merriam's position with respect to GSA's determination that Gateway complied with the five criteria, particularly insofar as the first and fifth criteria are concerned, is that a reasonable attempt to verify or assess the adequacy of the documentation submitted was not made. From the record before us, we must agree. The attitude of GSA is also reflected in its treatment of the requirement of the second criterion that the design be "complete." From the record, it appears to us that GSA considered that this requirement was complied with by virtue of the approval of the preliminary plans by the Authority in August of 1970, the bank commitment and the issuance of building permits by the city of Philadelphia. This conclusion appears to be bolstered by your General Counsel's advice that the drawings were submitted by Gateway only for the purpose of aiding the contracting officer in evaluating the space in terms of potential use, layout, etc. This interpretation fails, in effect, to accord any independent meaning to the second criterion.

We should add at this point that by letter dated February 17, 1972, Merriam's counsel submitted for our consideration certain depositions and affidavits (which we understand are part of the record before the court). We also received a further letter dated February 28, 1972, from counsel, forwarding a copy of University City Science Center's deed to the property. While we believe that reliance on this additional documentation is unnecessary to support our conclusion, we have examined the documentation and find nothing therein which would detract from Merriam's position.

We recognize that since GSA is charged with the primary responsibility for insuring compliance with the Appropriation Act limitation, its interpretations concerning application of the criteria in any given case must be accorded great weight. Its determination if reasonable should stand notwithstanding that an alternative approach might appear to be more reasonable. We have expressed our opinion in light of this standard. To sustain GSA's determination here, we would have to say that it was under no duty to conduct a reasonable and independent examination of a particular offeror's compliance with the criteria, including when necessary a request for additional information to resolve reasonable doubts about compliance. Such a conclusion would sanction a complete evasion of the Appropriation Act limitation.

We come now to the competitive aspects of the procurement. Although it is our opinion that the agreement to lease is improper by reason of Gateway's noncompliance with some of the criteria as of the date specified, it does not follow that Gateway must be excluded from any resolicitation of the requirement, as Merriam urges. While noncompliance with the criteria implementing the Appropriation Act limitation at the date of issuance of a particular solicitation for offers may be decisive as to the eligibility of a particular prospective lessor to participate in those negotiations, we do not believe this alone would preclude that proposer from participating in future negotiations. Elimination of Gateway from future participation would relate to the competitive aspects of GSA's lease procurements—namely, the right of interested sources to compete equally for lease awards. As we indicated, this question is separate from an inquiry relating to the appropriation restriction. Insofar as the latter question is concerned, we find nothing in the limitation itself which would bar an offeror such as Gateway from future participation. See B–153036, September 2, 1964, wherein we expressed no objection to the subsequent execution of a new lease with an offeror who did not comply with the limitation at the time the original lease was executed.

From the competitive standpoint, it has long been our position that the Government has the duty to secure maximum competition in its procurements. The rights of prospective offerors to exclude other

sources from any competition are clearly subordinate to the Government's obligation to secure maximum competition. Moreover, in this context, as Merriam's counsel recognizes in his letter of March 7, 1972, the elimination of Gateway from further participation would require a determination that Gateway was not a responsible prospective contractor because of a lack of integrity.

We cannot ignore the fact that Gateway has made substantial construction progress in reliance on GSA's assurance that it complied with the Appropriation Act limitation. Merriam would have us disregard the equities in favor of Gateway stemming from reliance upon determinations made by GSA. Merriam urges that if Gateway had truly intended to construct a building irrespective of executing a Government lease, there is no real harm done to Gateway in concluding that its lease with GSA is invalid for having failed to comply with solicitation requirements.

But such approach begs the question. If in fact it was certain that Gateway fully intended to construct the building in question apart from GSA interest, there would be little question concerning validity of the lease in terms of the operative appropriation restriction. And it would be difficult to construe as a fatal defect any failure to meet solicitation criteria designed solely to establish such intent. In the instant case an issue arises only by reason of the fact that it is not clear as to Gateway's intent apart from GSA's interest. In the circumstances we find it difficult to reach a conclusion that would penalize Gateway for having relied upon the Government's own determinations in the matter.

Moreover, we believe that the issues posed by this case are broader than the isolated circumstances of a single lease transaction. GSA's implementation of the appropriation restriction compliance criteria in the instant case is not unique, as our report to the Congress will demonstrate, and there is substantial likelihood that numerous other lessors are similarly situated. Thus, the magnitude and seriousness of the problem created by GSA's administration of the criteria leads us to conclude that the appropriate course of action for our Office is to draw the entire matter to the attention of the Congress for its consideration and possible corrective legislative action.

In light of the above conclusions we do not propose to initiate any question (in the context of the issues discussed herein) with respect to payments under existing leases. However, we must advise that we have no alternative to raising objection to payments under any lease executed after the date of this decision without proper regard for the restriction against leasing buildings to be erected for the Government, where the restriction is operative both at the time of lease execution and at the time of payment.

[B-174730]

Contracts—Specifications—Samples—Brand Name or Equal Procurement—"Facility of Use"

The requirement for samples to be submitted with bids on a brand name or equal procurement for quantities of a noise generator and a noise figure meter was in accord with the policy in paragraph 2-202.4 of the Armed Services Procurement Regulation for "products that must be suitable from the standpoint of balance, facility of use, general feel, color, or pattern," and the testing of samples notwithstanding descriptive data indicated compliance with the specifications was proper under an invitation that provided for inspection and testing of samples to evaluate the characteristics of "facility of use" to determine compliance with the brand name items with respect to workmanship, performance, verification, and compatibility. Furthermore, the conflict regarding test results must be resolved in favor of the administrative position since there is no showing the test was defective, improperly conducted, or erroneously reported.

To the General Microwave Corporation, March 17, 1972:

Reference is made to your telegram of December 10, 1971, and subsequent correspondance, protesting award of a contract to another bidder under IFB F41608-72-B-0815, issued by the San Antonio Air Materiel Area (SAAMA), Kelly Air Force Base, Texas.

This was a brand name or equal procurement for quantities of a noise generator (Hewlett-Packard Model 343 or equal) and a noise figure meter (Hewlett-Packard Model H74-340B or equal). The IFB required submission of both descriptive material and bid samples with "or equal" offers. Testing and evaluation performed on the samples submitted by the low bidder and you, the second low bidder, revealed that the samples did not conform to the specifications, and as a result both bids were rejected as nonresponsive. Award was made to Hewlett-Packard, the only other bidder, on December 1, 1971, for the brand name items.

Your sample was found to deviate from the specifications in that your noise generator included a cable less than the required 6 feet in length and had a source impedance of 75 ohms instead of the required 50 ohms. You claim that the first discrepancy was an easily correctable minor variation and you dispute the validity of the test results which indicated an impedance of 75 ohms. You further claim that the contracting officer acted unreasonably in accepting the test results without first seeking supporting data. In addition, you question the necessity for requiring bid samples in this procurement, and you contend that it was improper for the Government to test your sample for source impedance when your descriptive bid data indicated compliance with the 50 ohm requirement.

As required by ASPR 1.1206-3, paragraph C-39 of the IFB included the requirement that:

* * * to insure that sufficient information is available, the offeror must furnish as a part of his offer all descriptive material * * * necessary for the purchasing activity to (i) determine whether the product offered meets the requirements of

the solicitation and (ii) establish exactly what the offeror proposes to furnish and what the Government would be binding itself to purchase by making an award.

Paragraph C–40 stated:

BID SAMPLES (1965 OCT.):

(a) Bid samples, in the quantities, sizes, etc., required for the items so indicated in this solicitation, must be furnished as a part of the offer and must be received before the time specified in paragraph C–8 hereof. Samples will be tested or evaluated to determine compliance with all characteristics listed for such test or evaluation in this solicitation.

(b) Failure of samples to conform to all such characteristics will require rejection of the offer. Failure to furnish samples by the time specified in the solicitation will require rejection of the offer, except that a late sample transmitted by mail may be considered under the provision for considering late offers, as set forth elsewhere in this solicitation. However, the requirement for furnishing samples may be waived as to an offeror if (i) the offeror states in his offer that the product he is offering to furnish is the same as a product he has offered to the purchasing activity on a previous procurement and (ii) the Contracting Officer determines that such product was previously procured or tested by the purchasing activity and found to comply with specification requirements conforming in every material respect to those in this solicitation. (1960 OCT.)

(c) Products delivered under any resulting contract shall conform to the approved sample as to the characteristics listed for test or evaluation and shall conform to the specifications as to all other characteristics.

Paragraph C–41(c) stated that bid samples "shall be supplied for inspection and testing to evaluate the characteristic of 'facility of use' (ASPR 2-202.4(b)). The items shall be subjected to the following tests * * * ." The indicated tests were described as ease of calibration, workmanship, components, operating peculiarities, verification of operation and maintenance manual, and application compatibility. With respect to the last test, the IFB stated that the sample "shall be tested to determine performance in the intended application, since absolute compatibility is required."

The IFB also included a "Procurement Data List," which stated that "the following data are necessary to the procurement" and that "this description covers the salient characteristics of an automatic noise figure measurement system for determining the noise figure of receiving equipment." There followed detailed specifications of the system including requirements for a 6-foot cable and an input impedance of 50 ohms.

ASPR 2–202.4 sets forth the Government policy with respect to requiring bid samples:

(b) *Policy.* Bidders shall not be required to furnish a bid sample of a product they propose to furnish unless there are certain characteristics of the product which cannot be described adequately in the applicable specification or purchase description, thus necessitating the submission of a sample to assure procurement of an acceptable product. It may be appropriate to require bid samples, for example, where the procurement is of products that must be suitable from the standpoint of balance, facility of use, general "feel," color, or pattern * * *.

In the administrative report furnished by the Air Force, the contracting officer states that this was the first competitive procurement of this equipment. The record before us further indicates that the noise

measurement system must be exactly compatible with the equipment with which it is to be used, and that the Air Force required evaluation of "facility of use" to determine compliance with the brand name item with respect to such things as workmanship, performance, verification and compatibility. We think these circumstances indicate that without samples the Government could not adequately determine that the offered equipment would meet its minimum needs. B-166092, April 4, 1969. Therefore, we cannot agree with your contention that bid samples should not have been required.

Although your descriptive data apparently stated that your noise generator's source impedance was 50 ohms, as required by the IFB, we do not think it was unreasonable to test for this requirement. The invitation stated that the sample would be tested "to determine performance in the intended application, since absolute compatibility is required." It is our understanding that a significant deviation in the required source impedance would in fact render the measuring system incompatible and incapable of the desired performance. Accordingly, we see nothing improper in SAAMA's decision to test the bid samples for compliance with the specifications in this respect.

There is an unresolved conflict in the record as to whether the source impedance of your sample noise generator is actually 50 ohms or 75 ohms. You state that you tested the generator both before it was shipped to SAAMA and after it was returned to you, and that on both occasions the test results reflected an impedance of 50 ohms. The Air Force states that your sample was tested in SAAMA's Electronics Standards Laboratory and measured 75 ohms. In response to your challenge of SAAMA's test results, the administrative report indicates that the test equipment was properly calibrated when used to perform the impedance measurements, and further states the following:

(1) The equipment used and the applicable technical order provide for determining the VSWR from the measured source impedance and phase angle. Additionally, the testing was performed at the SAAMA Electronics Standards Laboratory, and the calibration accuracies of the equipment used to perform the test are traceable to The National Bureau of Standards.

(2) Based on the measured source impedance of 75 ohms, we agree with the statement in paragraph (5) of the referenced General Microwave letter; "However, it follows automatically that if the source impedance were 75 ohms (in lieu of the required 50 ohms), the VSWR values *must* also be discrepant." The out of tolerance VSWR was confirmed; however, *since the deviation* in the measured source impedance (*75 ohms*) *was so large with respect to the required* source impedance (*50 ohms*), *the VSWR values were not noted.* The frequencies at which the out of tolerance source impedance was measured were not recorded. However, considering the measurement method, any measured impedance of less than 42 ohms or more than 60 ohms, at any phase angle and frequency from 10 to 100 megahertz, would result in an out of tolerance VSWR. * * *.

The record further indicates that you do not question the testing procedures used, but only the results of that test. The only evidence

you present to impeach those test results are statements regarding the tests you performed which reflected different results. In this kind of a factual dispute where we have available no evidence other than the assertions of the parties, we do not believe that the administrative position can be rejected without a showing that the Government test was in some way defective or improperly conducted or that the results were erroneously reported.

Further, we see nothing arbitrary or unreasonable in the contracting officer's reliance on the reported test results to reject your bid. The IFB specifically stated that the failure of the samples to conform to the characteristics to be tested would require rejection of the bid. The contracting officer was under no obligation to question the test results or to seek additional data from you to resolve the apparent conflict. In fact, had he done so, it would have given rise to a serious question involving action prejudicial to other bidders. The fact that the discrepancies were found only in the noise generator and not in the noise meter still required rejection of the entire bid, since it was clear from the nature of the procurement that one could not be used without the other because of the strict compatibility requirement.

In view of our conclusion there is no need to consider the significance of the admitted deviation in cable length.

In your letter of February 1, 1972, you protest the Air Force's delay in submitting a report to us and our tolerance of that delay. By letter of December 13, 1971, we requested a report from the Secretary of the Air Force, and on December 21, 1971, we forwarded to him a copy of your letter of December 17, 1971, setting forth the basis of your protest. Upon receipt of your letter of December 29, 1971, we forwarded a copy to the Secretary on January 4, 1972, for consideration. The Air Force report to us is dated February 4, 1972. Under the circumstances, we do not believe there was inordinate delay in this case. However, we are fully cognizant of the need for expeditious handling of bid protest cases and continually strive toward that end.

[B-130187]

Holidays—Days in Lieu of—Inauguration Day

The fact that Inauguration Day, January 20 of each fourth year after 1965 is prescribed in 5 U.S.C. 6103(c) as a legal public holiday for Federal employees in the District of Columbia and specified adjacent areas does not require regarding Friday January 19, 1973, as a legal holiday for the purposes of 5 U.S.C. 6103(b), which substitutes other days as legal holidays for the purpose of statutes relating to the pay and leave of Federal employees for those holidays enumerated in 5 U.S.C. 6103(a) that fall on nonworkdays, such as the Friday immediately before a Saturday holiday. Not only does the listing of public holidays in section 6103(a) not include Inauguration Day, the legislative history of subsection (c) indicates no additional legal holiday was intended and that only the working situation of employees around the metropolitan area of the District of Columbia would be affected.

To the Chairman, United States Civil Service Commission, March 20, 1972:

Reference is made to your letter dated January 28, 1972, with attachments, making inquiry as to whether Friday, January 19, 1973, is to be regarded as a holiday for pay and leave purposes of Federal employees.

The applicable provisions of law are contained in 5 U.S.C. 6103 as follows:

(a) The following are legal public holidays:
New Year's Day, January 1.
Washington's Birthday, the third Monday in February.
Memorial Day, the last Monday in May.
Independence Day, July 4.
Labor Day, the first Monday in September.
Columbus Day, the second Monday in October.
Veterans Day, the fourth Monday in October.
Thanksgiving Day, the fourth Thursday in November.
Christmas Day, December 25.

(b) For the purpose of statutes relating to pay and leave of employees, with respect to a legal public holiday and any other day declared to be a holiday by Federal statute or Executive order, the following rules apply:

(1) Instead of a holiday that occurs on a Saturday, the Friday immediately before is a legal holiday for—

(A) employees whose basic workweek is Monday through Friday; and

(B) the purpose of section 6309 of this title.

(2) Instead of a holiday that occurs on a regular weekly nonworkday of of an employee whose basic workweek is other than Monday through Friday, except the regular weekly nonworkday administratively scheduled for the employee instead of Sunday, the workday immediately before that regular weekly nonworkday is a legal public holiday for the employee.

This subsection, except subparagraph (B) of paragraph (1), does not apply to an employee whose basic workweek is Monday through Saturday.

(c) January 20 of each fourth year after 1965, Inauguration Day, is a legal public holiday for the purpose of statutes relating to pay and leave of employees as defined by section 2105 of this title and individuals employed by the government of the District of Columbia employed in the District of Columbia, Montgomery and Prince Georges Counties in Maryland, Arlington and Fairfax Counties in Virginia, and the cities of Alexandria and Falls Church in Virginia. When January 20 of any fourth year after 1965 falls on Sunday, the next succeeding day selected for the public observance of the inauguration of the President is a legal public holiday for the purpose of this subsection. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 515; Pub. L. 90–363, § 1(a), June 28, 1968, 82 Stat. 250.)

Subsection (c) of the above-quoted statute was derived from the act of January 11, 1957, Public Law 85–1. In connection with this provision, you have referred to a statement made by Mr. Rees in the House of Representatives that:

This resolution does *not authorize an additional legal holiday.* It merely takes care of a situation that happily occurs every 4 years in the United States and affects only the working situation of the employees around the metropolitan area of the District of Columbia. [Italic supplied.]

Based upon the above remark by Mr. Rees, you express doubt whether Inauguration Day should be considered a legal public holiday so as to be subject to those provisions of law contained in subsection (b) above.

Subsection (b) was derived from the act of September 22, 1959, Public Law 86-362, which mentioned therein those holidays now referred to in subsection (a) with the exception of Columbus Day.

Subsection (a) of 5 U.S.C. 6103, which was derived from the act of June 28, 1968, Public Law 90-363, specifically enumerates those days which are to be regarded as legal public holidays. It is significant that in both the act of 1959 and the act of 1968 no mention is made of Inauguration Day as being considered a legal public holiday.

Also worthy of note is the fact subsection (c) was enacted in 1957 whereas subsection (b) was enacted in 1959.

By reason of the foregoing, our view is that the provisions of 5 U.S.C. 6103(b) were not intended to include Inauguration Day which is a holiday only for Federal employees in the District of Columbia and specified adjacent areas. It follows that Friday, January 19, 1973, would not be a legal holiday for pay and leave purposes.

[B-174455]

Bidders—Qualifications—Preaward Surveys—Timeliness of Use

The rejection of the low offer to overhaul aircraft engines at a price sufficiently significant to be of prime importance in any overall evaluation of proposals on the basis of an old preaward survey recommending "no award" to the offeror was not justified for had the contracting officer complied with paragraph 1-905.1 of the Armed Services Procurement Regulation requiring that a determination of contractor responsibility be based on the most current information he would have learned the deficiencies reflected in the survey report had been corrected. A contractor's responsibility should be measured from information of record at the time of award, a concept particularly significant in view of the involved price differential, and, therefore, a current preaward survey should be obtained and the rejected offeror's responsibility reconsidered.

Bidders—Qualifications—Preaward Surveys—Survey Team Impartiality

The residence of the preaward survey team members at the facilities of the competitor of the offeror they disqualified for award created an appearance of conflict, if not an actual conflict, which should not have been allowed to exist, and it could very well have precluded an impartial survey. Although there is no evidence of impropriety, it is suggested that when appointments to survey teams are made extraordinary care should be exercised to preclude any possible basis for using the appointment action as a ground for a subsequent complaint in the event of an adverse survey action, and consideration should be given to the practicality of assigning survey team members that have no connection with the competitors of the contractor being surveyed.

To the Secretary of the Air Force, March 22, 1972:

We refer to reports submitted to us on January 5 and February 17, 1972, by the Chief, Contract Management Division, Dir/Procurement Policy, DCS/S&L, concerning the protest of Spartan Aviation, Inc., (SAI) under request for proposal (RFP) F41608-71-R-4929 issued by the San Antonio Air Material Area, Kelly Air Force Base, Texas, on July 15, 1971. Spartan Aviation made a qualified protest on No-

vember 1, 1971, and on November 23 submitted the detailed basis for its protest.

The RFP solicited proposals to overhaul R–3350 aircraft engines and components during a 3-year period, and provided for two additional 1-year options. Proposals were received from Gary Aircraft Corporation (Gary), who has facilities in San Antonio, Texas, and is the incumbent contractor for overhaul of the R–3350 engine, and from SAI, which has current contracts for overhaul of the R–2000 and R–4360 engines at its Harlingen, Texas, facility. SAI offered the apparent low price by an amount which is sufficiently significant to be of prime importance in any overall evaluation of the proposals.

Preaward surveys of both offerors were conducted concurrently as a matter of expediency and involved different survey teams. The survey of SAI was conducted from September 27 to September 30, 1971, and then processed in the regular way through the Defense Contract Administration Services Office, San Antonio and coordinated with the Defense Contract Administration Services Region, Dallas. It was reviewed in its final form and cleared under date of October 8, 1971, bearing report number S4404A19005HN. The report recommended that no award be made to Spartan Aviation, Inc., because of nonresponsibility findings in the following areas:

1. Lack of an adequate quality control system.
2. Inadequate past performance.
3. Inability to meet required schedule due to inadequate quality assurance system.
4. Inadequate property control system.
5. Inadequate plant facilities and equipment.

Under date of November 15, 1971, the contracting officer summarized the findings set out in survey report S4404A19005HN and, based upon the "no award" recommendation contained therein, determined that SAI was "non-responsible with respect to their offer on RFP F41608–71–R–4929." The contracting officer set out in somewhat greater detail the bases for the findings in the survey report, and again indicated his acceptance of, and reliance upon, such findings in a Statement of Facts and Findings which was also dated November 15, 1971, in which he recommended denial of the protest filed by Spartan on November 1.

It is SAI's position that, while the findings set out in the survey report may have had merit when the survey was made from September 27 to 30, and even as late as the date of the survey report on October 8, occurrences between October 8 and November 15 were of such a nature as to invalidate the findings set out on the survey report. It is therefore SAI's position that the contracting officer was not justified on November 15 in basing his determination of SAI's responsibility on the survey report findings alone, and without considering those events subsequent

to the report date which reflected favorably upon SAI's responsibility. In this connection, SAI points out that the first three areas of deficiency in the survey report, as enumerated above, were related to quality control problems it was experiencing in its overhaul of R-4360 and R-2000 engines under two separate contracts at the time of the survey. However, it contends that such deficiencies were corrected by October 11, and that SAI resumed invoicing under both contracts on October 14, and such invoices were accepted, thus indicating that prior deficiencies had been corrected.

With respect to the last two areas of deficiency set out in the survey report, as enumerated above, SAI contends it submitted a statement to the survey team to the effect that 60,000 square feet of additional warehouse space would be available by November 15. While the lack of such storage space at the time of the survey, and the lack of firm assurance that it would be available to perform the contract, appears to have been a material factor in the survey report's negative recommendation on the last two areas of deficiency enumerated above, SAI's protest alleges that such space was in fact available prior to November 15, and contends that the contracting officer should therefore have considered this change in circumstances before declaring SAI nonresponsible.

The several reports from your Department to this Office on the protest do not question the correctness of SAI's advice relative to these post-survey developments, but do appear to take the position that the contracting officer was justified in relying upon the facts as set out in the survey report, without further investigation or consideration of subsequent developments.

In our decision B-160562, July 26, 1967, the intended purpose of the preaward survey and the relationship of the contracting officer with regard to its use in arriving at his final determination, is described as follows:

> We have been advised by the Defense Supply Agency that DCASR preaward surveys are generally accomplished on a team basis comprised of technical representatives from quality assurance and production and financial specialists. The results of their individual investigations are compiled and forwarded to a preaward monitor with recommendations in their respective areas of analysis. The preaward findings and recommendations are then subjected to supervisory review and ultimately are examined by a preaward survey board composed of key personnel appointed by the Region Director. The final report submitted to the contracting officer represents the collective judgments and recommendations of the Region. However, the ultimate authority as to whether to grant or deny an award still rests with the contracting officer who evaluates the recommendations contained in the preaward survey report, *together with other information available to him*, in rendering a final determination regarding the proposed contractor's responsibility. [Italic supplied.]

In another decision, 49 Comp. Gen. 139, 144 (1969) it is stated that "* * * a determination regarding a prospective contractor's responsi-

bility should be based upon the most current information available * * *." This is consistent with ASPR 1-905.1(a) and (b), where currency of information is stressed, and of ASPR 1-905.2 where it is stated "Notwithstanding the foregoing, information regarding financial resources * * * and performance capability * * * shall be obtained on *as current a basis as feasible with relation to the date of contract award.*" In a very recent decision we pointed out that a bidder's responsibility generally should be measured from information of record at the time of award, rather than an earlier time, and we expressed the view that further consideration of a determination of nonresponsibility would be desirable because of a material change in a principal factor on which the determination was based. See 51 Comp. Gen. 448 (1972), and cases cited therein. This concept becomes even more significant when a substantial price differential may be involved, as appears to be the situation in the instant case. Certainly, the most currently available data becomes imperative in any review or updating of the survey information to insure that the projection of responsibility is as accurate as possible, especially when an extended period of performance is involved, and there is a significant period between the date of the survey and the date of the contracting officer's determination, as in the instant case. [Italic supplied.]

With respect to the seriousness of the deficiencies before the contracting officer on November 15 there is no evidence in the file that notifications contemplated by ASPR 1-905.1(c) had been instigated, which indicates that the deficiencies then known were not considered to be of, or treated with, a high degree of criticality.

Under all of the circumstances, as outlined above, we believe that it was incumbent upon the contracting officer to ascertain whether the findings in the survey report were still representative of the existing circumstance before he made his November 15 determination that SAI was nonresponsible. Since it is our further opinion that the current information which was not considered in the November 15 determination would have been material in both the recommendations of the survey team and the contracting officer's determination, we believe that a full and fair evaluation of SAI's capabilities now requires a current preaward survey and a reevaluation of SAI's present responsibility by the contracting officer based upon the resulting survey report.

There are two ancillary matters which, while not affecting this decision, should be recorded.

First SAI, through its attorney's letter of January 17, 1972, a copy of which was sent directly to the Chief, Contract Management Division, requested the right to inspect the PAS report. Although the Air Force has made no specific response to that request the issue has become

moot by reason of a letter dated March 1, 1972, from the attorneys withdrawing SAI's demand.

Second, SAI has alleged that the presence of two PAS team members who were resident DCAS representatives at the competitors facilities "created an appearance of conflict, if not an actual conflict, which should not have been allowed to exist and which could very well have precluded an impartial survey of Spartan's capability to perform the R-3350 contract." In regard to this issue there is nothing in the record indicative of any improprieties by any individuals connected with these proceedings. However, we feel that when appointments to survey teams are made, extraordinary care should be used to preclude any possible basis for using the appointment action as a ground for a subsequent complaint in the event of an adverse survey action. While the record does not reflect whether it would have been practicable to assign survey team members to the SAI survey who had no connection with Gary, we believe such a procedure would be desirable as a general rule in the selection of survey teams, and we suggest that consideration be given to the practicability of adopting this procedure in this, and any similar, procurements.

To the extent that a resurvey of the capabilities of SAI is appropriate for the reasons indicated earlier, the protest is upheld.

The files submitted to us by your Department are returned.

[B-174480]

Bids—Two-Step Procurement—Evaluation—Overliteral Interpretation of First-Step

The rejection of the first-step proposal of a two-step advertisement to supply and assemble all components of a firefighting truck to be furnished by the Government for failure to respond to the problem of tailgate interference even though the evaluation report did not require a response, identified the problem, and provided solutions, and otherwise the technical offer was acceptable, was based on an overliteral interpretation of the first-step procedure designed to be flexible, similar to negotiated procurement and to evaluate a potential bidder's ability to meet specifications; in fact the letter request for technical proposals advised first-step offerors that it realized all design factors could not be detailed in advance. Therefore, since the first-step proposal should not have been summarily rejected, the second-step invitation should be cancelled with all qualified offerors, including the rejected one, allowed to bid upon readvertisement.

To the Secretary of the Air Force, March 23, 1972:

We refer to letter SPPM, January 7, 1972, transmitting an administrative report on the protest of Henry Spen & Company, Inc. (Spen), against award of a contract under letter request for technical proposal (LRTP) No. F33657-71-R-0619, issued April 16, 1971, by the Aeronautical Systems Division (ASD), Wright-Patterson Air Force Base, Ohio, for a quantity of airfield ramp firefighting trucks,

type A/S32P–13, in accordance with cited U.S. Air Force specifications.

Under the procedure established in the LRTP for this two-step advertised procurement, ASD would supply the basic truck and one type of fire extinguisher and the contractor would be required to supply other equipment and to assemble all components of a firefighting truck for use on airfield ramps. The LRTP was sent to thirty prospective offerors and four companies responded with unpriced technical proposals. The only proposals considered acceptable for further negotiation were submitted by Ward La France Truck Corporation (La France), Cardox Division of Chemetron Corporation (Cardox), and Spen. In letters of June 24, 1971, specific deficiencies in the three proposals were explained to each company and requests were made for amended proposals to be submitted by July 23, 1971. The offerors were also given an opportunity for discussion of the proposals with ASD on July 6–7, 1971. After submission and evaluation of the amended proposals, on August 4, 1971, ASD furnished a second evaluation to first-step offerors and requested that further clarifications of the proposals be submitted by August 16, 1971.

In its final technical evaluation of August 25, 1971, ASD stated that it found the proposals of Cardox and La France technically acceptable, but that the proposal from Spen was not acceptable because it failed to meet the requirements of paragraph 3.8.3 of military specification MIL–T–83303. This specification requires that firefighting equipment be installed on the Government-furnished trucks in a manner which prevents all interference between parts and, in particular, requires that hose reels be placed sufficiently high so that operators would have ready access to the equipment while standing at the rear of the truck with the tailgate raised. The importance of tailgate clearance was pointed out to Spen by the contracting officer in his second evaluation letter of August 4, 1971. Although Spen amended its proposal for the hose-reel cranks, in response to the August 4 evaluation, in the opinion of ASD the amended proposal still did not satisfy paragraph 3.8.3 of MIL–T–83303 because the hose-reel crank proposed was only 13½ inches above the bed of the truck and would not clear the tailgate which is 19¼ inches in height. For this reason, ASD determined in its third and final technical evaluation that the Spen proposal did not satisfy the requirements of the LRTP.

The invitation for bids, the second step of the procurement, was then sent to Cardox and La France. In a letter of October 15, 1971, Cardox explained that it would not submit a bid because it was not able to furnish the equipment by the date required for delivery. La France submitted the only bid at a unit price of $7,963 which the contracting officer determined to be fair and reasonable in view of the agency engi-

neer's estimate. The contracting officer also recommended that the contract be awarded to La France, but award has been delayed on account of the Spen protest.

For reasons set out below, we conclude that the rejection of the Spen first-step proposal was erroneous and that the second-step invitation, to which only La France responded, should be canceled and reissued to both La France and Spen.

In this respect, paragraph 3 of the August 4 evaluation by ASD, the portion of the evalution pertinent to our consideration, made reference to two problems connected with the proposed utilization by Spen of hose reels manufactured by Clifford B. Hannay & Son, Inc.—namely, that it appeared that the Hannay reels were too wide to be installed side by side as required and that the reels proposed would not "allow for hose withdrawal without tailgate interference, reference paragraph 3.8.3 of MIL-T-83303, unless they are either elevated or provided with the 30 degree bracket." Spen's amended proposal submitted in response to this critique adequately answered the problem of width. However, nothing was said therein about the tailgate interference problem, and Spen has since explained that it considered no response necessary in view of the alternate solutions proposed by ASD in its evaluation critique to what it considered a minor problem, i.e., that the reels would either have to be elevated or provided with a 30-degree bracket. As indicated above, however, the contracting officer's final technical evaluation rejected the Spen proposal for failure to adequately respond to the problem of tailgate interference.

In our opinion, paragraph 3 of the August 4 technical evaluation of the Spen proposal did not adequately advise Spen of the necessity of specifically indicating in its amended proposal how the problem of tailgate interference would be resolved. We think that it was reasonable for Spen to regard the August 4th evaluation as not to require a definitive response since paragraph 3 thereof not only identified the tailgate problem, it also provided solutions to the problem. We further think that so long as modification of the reels proposed by Spen—either by elevating the reels themselves or by installing a 30-degree clamp—is, in fact, a technically acceptable solution of the problem, the Spen proposal, as amended, should have been considered acceptable.

In this regard, the purpose of the first step of a two-step advertised procurement is to evaluate the potential bidder's ability to meet the specifications of the contract and, in fact, the LRTP specifically advised first-step offerors that it was realized that all design factors could not be detailed in advance. Since the first-step phase of a two-step advertisement is designed to be flexible, similar to negotiated procurement, we think that a proposal indicating a generally acceptable technical approach should not be summarily rejected. See 48 Comp. Gen. 49

(1968). In the present case, ASD has not voiced any reservations concerning Spen's ability to meet the specifications. With respect to Spen's final technical proposal of September 9, 1971, ASD's only objection was to the failure to state that it would raise the hose reels or attach a 30° bracket, either of which would assure an operator's accessibility to the hand crank mechanism. In other words, there is no criticism, stated or implied, that Spen cannot solve the hand crank problem, other than that no mention was made in the Spen proposal, as amended, as to which of two acceptable and easily accomplished solutions to the problem would be utilized. Considering that Spen's proposal, as amended, contains sufficient assurances that the tailgate specification will be complied with, together with the fact that the technical evaluation, communicated to Spen, itself provides the guidance for solution to the tailgate problem, we feel that an overliteral interpretation of the first-step procedures should not prevail to exclude the only other available source of supply.

We therefore think that the rejection of Henry Spen's proposal was unreasonable in the circumstances and that, as indicated above, the second-step invitation should be canceled with all offerors found qualified for the second step, including Spen, allowed to bid upon readvertisement.

[B–174807]

Contracts—Awards—Small Business Concerns—Self-Certification—"Good Faith" Certification

The low bidder under a total small business set-aside for tool sets who on the date of bid opening did not qualify as a small business concern under the invitation for bids or the Small Business Administration (SBA) regulations may not be considered for a contract award on the basis of its erroneous self-certification allegedly made in good faith, for although the bidder met the appropriate size standard at the time the bid was prepared, the SBA requirement that the number of employees be based on the average for the four quarters preceding bid preparation had been overlooked. Since the standard of "good faith" is not necessarily limited to an incident of intentional misrepresentation, the bidder apprised of the applicable small business size having failed to exercise prudence and care to ascertain its size under prescribed guidelines has not certified itself to be a small business concern in good faith.

To the Allied Research Associates, Inc., March 23, 1972:

Reference is made to your letter dated February 2, 1972, and prior correspondence, protesting against the proposed award of a contract to another firm, under invitation for bids (IFB) No. N00104–71–B–2013, issued by the Navy Ships Parts Control Center (SPCC), Mechanicsburg, Pennsylvania.

For the reasons hereinafter stated, the protest is denied.

The IFB, as amended, a total small business set-aside, solicited bids for tool sets. Bid opening occurred on August 10, 1971, and your firm

became the apparent low responsive bidder after the low bid was rejected as nonresponsive. However, the preaward survey report recommended against an award to your firm because of unsatisfactory financial capability to perform under the contract. In view thereof, SPCC initiated Certificate of Competency action with the Small Business Administration (SBA) on September 15, 1971. By letter dated October 7, 1971, the SBA Philadelphia Regional Office informed your firm that, since it did not qualify as a small business concern under the IFB or SBA regulations on the date of bid opening, it was ineligible for a Certificate of Competency. Your firm filed a timely appeal with the Size Appeals Board. The Board, by message dated November 24, 1971, advised SPCC as follows:

> The SBA Size Appeals Board finds that Allied Associates did not qualify as a small business at the time of bid opening of IFB N00104-71-B-2013 nor for the four quarters ending June 30, 1971. However, the Board does find that the number of employees of Allied for the four quarters ending September 30, 1971 [52 days after bid opening] as within the size standard for subject procurement and at present time qualifies as a small business.

The formal decision of the Size Appeals Board, dated November 23, 1971, set forth the following facts:

> The record reveals that the average number of employees of Allied for the four quarters ending June 30, 1971 [41 days before bid opening], was 521, that the actual number of employees on June 30, 1971, was 488, that the average number of employees for the four quarters ending September 30, 1971, was 498, and that the actual number of employees on September 30, 1971, was 444.

The SPCC contracting officer rejected your bid since it was determined that your company was not responsive "because it was large business at the time it submitted its bid on a solicitation which was set-aside for small business concerns." You disagree with the rejection and contend that the award should be made to you since your company is now a small business and you state that the certification of such status was made in good faith, albeit erroneously, in the bid. Our attention is invited to the provisions of paragraph 1-703(b) of the Armed Services Procurement Regulation (ASPR), which reads, in pertinent part, as follows:

> * * * The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has * * * in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers * * *.

In consideration of that ASPR section, the threshold question is whether your firm did, in good faith, represent and certify itself to be a small business concern in the bid. That portion of the IFB in which your company represented and certified that it was a small business concern advised offerors to "(See par. 14 on SF 33-A.)." That reference, a part of the instructions and conditions of the IFB, reads as follows:

14. SMALL BUSINESS CONCERN. A small business concern for the purpose of Government procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is submitting offers on Government contracts, *and can further qualify under the criteria concerning number of employees,* average annual receipts, or other criteria, *as prescribed by the Small Business Administration.* (See Code of Federal Regulations Title 13, Part 121, as amended, which contains detailed industry definitions and related procedures.) [Italic supplied.]

In addition, paragraph 30.87 of the IFB prescribes that, to qualify as a small business concern, *the number of employees* of a concern and its affiliates must not exceed 500 employees. See, also, 13 CFR 121.3-8(b)(3), to which bidders were referred in the IFB's instructions and conditions quoted, *supra.* Furthermore, the phrase "number of employees," as used in SBA regulations, is specifically defined as "the average employment of any concern, including the employees of its domestic and foreign affiliates, based on the number of persons employed on a full-time, part-time, temporary, or other basis during the pay period ending nearest the last day of the third month in each calendar quarter for the preceding four quarters." See 13 CFR 121.3-2(s).

In a conference with representatives of our Office on February 1, 1972, it was indicated that the small business certification was made because the number of persons actually employed at the time the bid was prepared was less than 500 and the SBA requirement that the number be based on the average for the preceding four quarters was inadvertently overlooked. Therefore, it was asserted that the certification was made in good faith and that no intentional misrepresentation can be imputed to the firm. Also, in a letter to our Office, it is stated that:

The fluctuations in number of employees have been fortuitous and are the direct result of business conditions at our Baltimore Division.

The standard of "good faith" when applied to a certification as a small business in a bid is not necessarily limited to an incident of intentional misrepresentation. In our opinion, where, as here, a bidder is fully apprised in an IFB, and referenced regulations, of an applicable small business size standard but fails to take the necessary steps to ascertain its size status under the referenced guidelines, it may be concluded that it has not certified itself to be a small business concern in good faith. As we have stated in previous decisions, bidders are usually in a good position to know their size status and they should not be permitted to casually or negligently utilize the self-certification process without using a high measure of prudence and care. See 41 Comp. Gen. 47, 55 (1961), and 49 *id.* 369, 376 (1969). *Cf.* B-156882, July 28, 1965. We can understand your belief that your certification was made in good faith. However, we believe that in these cases,

since self-certifications usually are not questioned, bidders must be held to a higher than usual degree of care in determining whether they are or are not small business. In the present case, if your company had exercised such prudence and care preceding the erroneous certification, it would have known that it was not eligible to certify itself as small business. Therefore, we find that even though, as of the present, Allied is a small business, it is not eligible for award under the above-cited ASPR.

[B-174839]

Vessels—Charters—Long-Term

Hire costs for tankers to be constructed for charter to the Military Sealift Command (MSC) for a 5-year term with options to cover 15 years, and the costs of breach, termination, failure to exercise a renewal option, or the value of a lost tanker are operating expenses chargeable to the Navy Industrial Fund since the charter arrangement is not the purchase of an asset requiring the authorization and appropriation of funds. The fact that MSC assumes certain termination costs does not transform the 5-year charter with its 15-year renewal options into a 20-year charter, and other than the authority in section 739 of the Department of Defense Appropriation Act, 1972, there is no authority to set aside cash for option termination costs; also the question of the general, full faith and credit obligations of the United States is for determination by the Attorney General; and the only way to insure investors of the unconditional obligation of the Fund is to so provide in the charter for each vessel.

To Stephen N. Shulman, March 23, 1972:

Reference is made to your letter of December 27, 1971, written on behalf of several firms that are interested in a proposal by the Military Sealift Command (MSC), Department of the Navy, involving the construction and charter hire to MSC of nine 25,000 DWT tankers.

It is explained that the financing of the construction of the vessels to be chartered by MSC will involve substantial financial commitments from a variety of institutions. During the period of construction of the vessels, two groups of commercial banks will provide interim financing to the respective shipyards. A third group of commercial banks (the "owners") will purchase the vessels upon their delivery by the shipyards by repaying a portion of the construction loans. The balance of the construction loans will ultimately be refinanced through the private sale to institutional investors, including insurance companies and pension trusts, of First Preferred Fleet Mortgage Bonds to be secured by an assignment of charter hire.

A separate bareboat charter will be entered into by MSC with respect to each vessel. These charters will give MSC the full use of the vessels during the charter period, during which MSC will be fully responsible for the operation and maintenance of the vessels and will bear the risk of loss and seizure of the vessels. The charters will provide for a construction period during which the shipyards may deliver

completed vessels. Such vessels will be chartered by MSC under the charters on an interim basis until the end of the construction period, which we understand consists of 900 days for the last vessel. If a vessel is not delivered during such construction period, MSC will remain obligated to charter such vessel when delivered and the shipyard will be required to pay MSC liquidated damages of up to $4,000 per day if such delay in delivery is not excusable. The charters will provide an initial term of 5 years following the construction period and either with options to renew for fifteen consecutive 1-year periods or with optional renewal provisions for three consecutive 5-year periods with the Government having the privilege to terminate at the end of every 6-month period. The charter hire during the entire 20-year term of the initial and optional charter periods has been computed to repay to the Bondholders and the Owners all of the capitalized costs of the vessels together with accrued interest on the unamortized portion thereof. If a delay in the delivery of any vessel requires that substitute financing arrangements be made, charter hire will be adjusted to reflect the terms of such substitute financing. Capitalized costs to be amortized will be defined in the charters to include all amounts payable for construction of the vessels, interest on interim loans during the construction period, commitment fees payable to the bond purchasers, fees and expenses payable to the Trustees for the Bondholders and Owners throughout the term of the charters and other specified costs relating to the construction and financing of the vessels.

The charters will contain a provision covering breach, termination, or failure by MSC to renew at the end of the construction period, the initial period, or any 1-year period which is designed to assure the financial institutions the necessary protection that no matter what should occur during the term of the charters there will be sufficient funds available to repay the Bonds in full and to return the Owners' investments. Such funds will be provided out of the net proceeds received from the sale of the vessels by the Trustees in the event of an MSC breach, termination, or failure to exercise a renewal option. MSC will be unconditionally obligated to pay for the benefit of the Bondholders and the Owners the amount, if any, by which the net proceeds of any such sale are less than a specified amount (the "Termination Value") calculated to pay the outstanding principal and interest on the Bonds and to return to the Owners their investments and a rate of return to the date of termination after taking into account related tax effects. As such, Termination Value will of course exceed capitalized costs to be amortized.

You state that it is possible that the proceeds of sale will not cover Termination Value in that it is not possible to predict what the commercial value of the vessels may be and because amortization of

capitalized cost is deferred until the eleventh year of the charters. If a vessel is lost, MSC would also be obligated to pay a stipulated Loss Value which will be approximately the same as the Termination Value. In this connection, MSC evaluates its obligations under the charters at $47 million for the initial 5-year period with a Termination Value of approximately $160 million not taking into consideration any sales proceeds from the ships. Thus the maximum total charges that could be incurred under the proposal would be $207 million.

Consequently, without a firm and unconditional commitment by the Government to pay charter hire, as well as the difference between proceeds of sale and Termination Value in the event of breach, termination or failure to renew or the Loss Value in the event of loss or seizure of the vessel, you state it will not be feasible to arrange the financing necessary for the construction of the vessels.

Accordingly, you request our opinion as to whether MSC has all requisite authority to proceed with the charters and other proposed contracts as an appropriate industrial fund activity, and particularly whether the obligations incurred thereunder would be only obligations of the Navy Industrial Fund or general, full faith and credit obligations of the United States.

In order to assure that all aspects of the proposed plan for the construction and charter hire of the vessels receive consideration, comments were requested of the Department of Defense (DOD).

In its reply of February 15, 1972, DOD referred to our decisions mentioned below and stated that, for the reasons discussed in their reply, it was their view that the proposal is legally supportable on the basis reflected in those decisions.

Concerning the authority of MSC to enter into the proposed contract and charters and the propriety of using the Navy Industrial Fund to finance the proposal, DOD explained that—

> Under the provisions of 10 U.S.C. 2208 the Secretary of Defense is authorized to provide for the establishment of working capital funds in the Department of Defense for the purpose of providing working capital for "such industrial type activities and such commercial type activities that provide common services within or among departments and agencies of the Department of Defense as he may designate." Such working capital funds are to be charged with the cost of services or work performed and be reimbursed, or otherwise credited, for those costs including the cost of using equipment. It is clear from the terms of this statute that these working capital funds possess all the characteristics of and are revolving funds without fiscal year limitation. They have been operated as such for the more than 20 years since their inception; at that time they were exempted from the apportionment requirements of RS 3679 (31 U.S.C. 665(c)) by the then Director of the Bureau of the Budget pursuant to his authority under subsection (f) of that statute to so exempt revolving funds, and have been continuously carried on the books of the Treasury as such with a no-year-symbolization.
>
> The regulations governing industrial fund operations issued pursuant to 10 U.S.C. 2208 (DOD Directive 7410.4) provide for the establishment of an industrial fund within each military service and vests their administration and management in the respective military departments under the supervision of their

Secretaries. Additionally, the regulations provide among other things, that "industrial funds will be used to finance the operating costs of major service units (industrial type and commercial type) that produce goods and services in response to requirements of users and central management organizations within and among the DOD Components * * *." "Customers of an industrial fund activity may be: (1) operations force commands or mission units thereof of operating agencies, commodity commands, inventory control points, weapons systems or project managers, or any Department of Defense Component having missions and responsibilities separate from management and operation of the industrial fund activity * * *." Provision is also made for issuance of charters subject to the approval of the Assistant Secretary of Defense (Comptroller) prior to the financing of any activity under an industrial fund, which charter shall govern the operations of the activity.

DOD further explained that under regulations prescribed by the Secretary of Defense pursuant to his authority under the National Security Act (DOD Directive 5160.10) the Military Sealift Command was designated as Single Manager for Ocean Transportation. Pertinent responsibilities of MSC are set forth in those regulations as follows:

VI.A. Within the mission of MSC, provide ocean transportation planning support to the Organization of the Joint Chiefs of Staff, the unified and specified commands, the Military Services and the Department of Defense agencies in support of the plans of the Joint Chiefs of Staff and other military operations as required.

* * * * * * *

H. Maintain and operate a DOD ocean transportation system within limits approved by the Secretary of Defense to:

* * * * * * *

4. Provide ocean transportation service, except that performed by units of the fleet, to all components of the Department of Defense, and as authorized for other agencies of the United States Government on a basis consonant with national policy, the need for efficient and economical operations, and responsiveness to military requirements.

I. Procure ships outside the MSC fleet by bare boat, time, or voyage charter, or by allocation from other government agencies, and procure passenger (except individual travel which may be procured by the military departments) and cargo space in commercial ships to meet the requirements of the Department of Defense and such other agencies of the United States Government as authorized by the Secretary of Defense. * * *

* * * * * * *

S. Provide tankers to meet ocean transportation bulk POL requirements of the military departments.

It is reported that MSC (then the Military Sea Transportation Service) was chartered for operation of all its activities, including the foregoing under the Navy Industrial Fund in 1951.

Further in its reply, DOD summarizes the proposal and relative to the termination charge states that—

* * * This is a charge for the use of the vessels. MSC does not at any time acquire any property rights in these vessels beyond the right to use them in order to provide the services in accordance with its assigned authority and responsibility.

To the extent that such a termination charge is incurred the charter hire costs are increased as part of the charge for charter hire for each year of use. Such costs would be considered operating costs of the Military Sealift Command within the meaning of 10 U.S.C. 2208 and as such are properly chargeable

to the Navy Industrial Fund. Since the proposal does not contemplate acquisition of any capital assets there is no need nor basis for considering the availability of any other appropriations or funds for such purpose.

As stated in your quoted opinion contracts for the initial period with renewal options are permitted where the outstanding obligational availability is sufficient to cover an initial period, together with additional charges, if any, necessary to cover the increase in the costs for failure to exercise options of renewal. It should be made clear that no increase in MSC's liability for the payment of $47,000,000 for the initial period of use occurs if the proceeds of the sale of the vessels equals the termination liability. The commercial value of the vessels at the end of five years should be high since the owners contemplate commercial use of these vessels even after 20 years as stated in Mr. Shulman's letter.

In any event, the financial statements of the Navy Industrial Fund, as included in the President's annual budget submission (the latest of which appears on page 342, Appendix "Budget of the United States for Fiscal Year 1973") disclose that the unobligated balance of the fund available at the close of fiscal year 1971 was $718,146,000 and is estimated at $773,964,000 and $840,907,000 for fiscal years 1972 and 1973 respectively. An examination of these statements shows that the drawing account of the funds with the Treasury was at the end of fiscal years 1970 and 1971 $255,888,000 and $249,466,000, respectively and is estimated in fiscal years 1972 and 1973 at $315,166,000 and $311,966,000, respectively. The accounts receivable at the end of fiscal years 1970 through 1973, on a comparable basis, range from $229,880,000 to $138,120,000.

All of these amounts show that in any of these years including the current year the financial condition of the fund was more than adequate to cover the maximum contingent liability that could occur with the termination of the charter for any reason provided under the contract. The contract covers a five-year period which has an anticipated obligation of $47 million. A failure to renew could increase this obligation for the five-year period. The existence or nonexistence of this obligation is based upon the amount of the resources which may be generated by the sale of the vessels at the time of such nonrenewal. In the extreme case, the deficiency could be the total cost of the vessels but only if the value of the vessels is equal to the scrap value of their metals.

As indicated in paragraph (d.) of the referenced MSC memo the estimate of $160,000,000 for the termination value may be overstated since the fixed price for the nine ships is $146,550,000 plus a supervisory agent's fee of approximately $500,000 and interest during the construction period. It is highly improbable that the sale of these vessels would not generate a fair percentage of their costs, particularly since the owners expect to employ the vessels commercially after the twenty year period. In any event, even if the termination value were conceded to be $160,000,000, and no credit applied from the proceeds of sale of the vessels the total of the future charges will be less than one-third of either the actual unobligated balance at the end of fiscal year 1971 or of the expected unobligated balance at the end of fiscal year 1972. The total charges of $207,000,000 for services and maximum termination costs compares with the FY 1971 actual unobligated balance of $718,146,000 and the 1972 year-end unobligated balance of $773,964,000.

It is obvious from the foregoing that the obligational availability of the Navy Industrial Fund in fiscal year 1972 is more than sufficient to cover obligations for the total charges permitted under the initial period and all succeeding obligational periods. Under these circumstances, we are of the opinion that an obligation can be created against the Navy Industrial Fund at least to the extent of the corpus of the fund plus anticipated reimbursements for one year. If this test has been met, as in the instant case, it is no longer necessary to consider the question of availability for obligation of anticipated reimbursements for the succeeding fiscal year.

As indicated above, the Navy Industrial Fund is exempted from apportionment under the provisions of RS 3679 (31 U.S.C. 665). Consequently administrative allocations to the various activities financed under the fund are not considered administrative subdivisions of the fund within the meaning of subsection (g.) of that statute and therefore, the limitations of the statute with respect to the creation of obligations are applicable to the total of the fund and not to the allocations. DOD Directive 7200.1, governing the administrative control of funds in the Department of Defense, which was approved by the Director of the

Bureau of the Budget, recognizes that the limitations and sanctions of the statute only apply to administrative subdivision of revolving funds which are themselves subject to apportionment. It should be recognized, of course, that each activity under the fund must maintain accountability in order to insure proper application of the limitation of the statute to the fund as a whole.

In this connection it should be noted, as outlined in the MSC memorandum, that the obligational availability of the MSC segments of the fund is adequate to cover these liabilities. In addition to having obligation availability the operation of the revolving fund requires that further consideration be given to the timing of the receipt of revenues and the making of expenditures. For this reason the revenues must be established in a time frame that would match the flow of expenditures. Section 739 of the Department of Defense Appropriation Act (FY 1972) establishes a cash requirement which insures on a minimum basis the matching of revenues with expenditure requirements. This is typical of any industrial operation which must match its current liabilities against its current assets and maintain sufficient cash flow so that it will be within a proper time frame adequately meeting its current liabilities as they mature. The statute does not require the retention of cash greater than this basic requirement of meeting bills when they are due. As a matter of practice, as can be seen by the financial statement of the fund, cash balances have been maintained that are more than adequate to meet the requirement of maturing liabilities.

Relative to the last paragraph quoted above, the MSC memorandum referred to therein states in paragraph (c) thereof that—

As of 30 November 1971, the amount of MSC's corpus had increased to $50,000,000, and its obligations apart from this contract decreased to $301,000,000. MSC's anticipated revenue for the next fiscal year and the obligations under these charters for the initial 5-year period, remain at $700,000,000 and $47,000,000 respectively.

Also, section 739 of the Department of Defense Appropriation Act, 1972, approved December 18, 1971, 85 Stat. 734, referred to above by DOD, provides as follows:

During the current fiscal year, cash balances in working capital funds of the Department of Defense established pursuant to section 2208 of title 10, United States Code, may be maintained in only such amounts as are necessary at any time for cash disbursements to be made from such funds: *Provided*, That transfers may be made between such funds in such amounts as may be determined by the Secretary of Defense, with the approval of the Office of Management and Budget.

An examination of the legislative history of this provision discloses that language similar thereto first was contained in the Supplemental Defense Appropriation Act, 1966, approved March 25, 1966, 80 Stat. 82. In approving such provision the House Committee on Appropriations in Report No. 89–1316 stated that—

The recommended Section 101 provides authority for the Secretary of Defense to transfer cash balances between working capital funds of the Department of Defense in such amounts as he may determine, with the approval of the Bureau of the Budget. This language is intended to provide operational flexibility as among the working capital funds, particularly the stock funds of the various military departments and the Department of Defense so as to alleviate situations wherein one fund may have an excess of cash while another might be temporarily short of cash. This section also contains language prescribing minimum cash balances for working capital funds in such amounts as are necessary at that time to meet cash disbursements to be made from such funds. This authority provides, in effect, relief from certain administrative interpretations of Section 3679 of the Revised Statutes in such a manner as to minimize the amounts of cash necessary to be tied up in an inactive status.

As recognized in your letter the decisions of our Office involving somewhat similar proposals concerning termination payments to be made in the event the Government fails to exercise its renewal options after expiration of the basic contract term require that amounts equal to the maximum contingent liability of the Government be available for obligation at the time the contract is made and at the time renewals thereof are made. With respect to revolving funds and the requirements of 31 U.S.C. 665(a) and 41 U.S.C. 11, we stated in 48 Comp. Gen. 497, 502 (1969) that—

> We have no legal objection to contracting for reasonable periods of time in excess of 1 year subject to the conditions that sufficient funds are available and obligated to cover the costs under the entire contract. See 43 Comp. Gen. 657, 661. Nor as stated above, would we have any objection under revolving funds to contracts for a basic period with renewal options, provided funds are obligated to cover the costs of the basic period, including any charges payable for failure to exercise the options.

We will consider your four questions in the order in which presented.

Your first question is whether the commitments of MSC described in your letter and particularly the provisions requiring MSC to make up the difference, if any, between proceeds of sale and Termination Value, serve to transform the charters into a purchase of a capital asset, the vessels, which would require an appropriation rather than use of the Navy Industrial Fund. While the MSC assumes all the liabilities attached to ownership and in effect equitable ownership of the vessels upon construction, the fact remains that MSC never obtains actual title to all or any portion of any of the nine vessels. We therefore cannot say that the arrangement results in the purchase of an asset for which funds are required to be authorized and appropriated by the Congress.

Your second question is whether these provisions have the effect of transforming the charter from one for 5 years with options to renew into one for 20 years, when the capitalized costs of the vessels will be fully amortized. While the terms of the proposal are such that the failure to renew the options would be so costly that the options under normal conditions would most likely be renewed through the 20-year period, the proposal is not one for a 20-year period. You quote a sentence from 48 Comp. Gen. 497 indicating that we have no objection under revolving funds to contracts for a basic period with renewal options, providing funds are obligated to cover the cost of the basic period, including any charges payable for failure to exercise the options. The instant proposal is different however in that no cash is being set aside to cover the termination charges for the failure to exercise any of the options. This is authorized during the fiscal year 1972 by section 739 of the Department of Defense Appropriation Act, 1972, quoted above.

Your third question refers to what would happen if expenditures or a short fall in anticipated revenues so depleted the Fund that it lacked sufficient monies to pay the charter hire in a given year, or to compensate for the inadequate proceeds of sale, if any, or for the loss or seizure of the vessels and asks whether in any of such events, would the charters be only an obligation of the Fund or are they general, full faith and credit obligations of the United States.

We have never recognized any authority of a Federal agency to incur obligations against receipts anticipated to be received beyond the end of the current year in the absence of specific authority of law therefor and we have considerable doubt that the mere disclosure of a 5-year defense plan to the committees authorizing and appropriating funds for the Department of Defense, constitutes authority to incur obligations against receipts anticipated during such 5-year period. It is of interest that section 31.3 of OMB Circular No. A–34 provides that even apportionments of anticipated receipts for the current year in no way authorizes an agency to obligate or make disbursements in excess of the amounts to become available from such sources.

While the MSC is restricted to its annual operating budget in incurring obligations and making disbursements, the Secretary of the Navy, within the limitations of the Navy Industrial Fund established by the Assistant Secretary of Defense (Comptroller), may make administrative allocations and adjustments of working capital between the various segments—including the MSC fund—of the Navy Industrial Fund. See DOD Directive No. 7410.4, January 2, 1970. Moreover, the Secretary of Defense, with the approval of the Office of Management and Budget, is authorized during the fiscal year 1972 by section 739 of the Department of Defense Appropriation Act, 1972, to transfer funds between the Industrial Funds of the three military departments. In view of the various statutory authorities relating to the Industrial Funds and the assurance of DOD that the obligational availability of the Navy Industrial Fund in fiscal year 1972 is more than sufficient to cover obligations for the total charges permitted under the initial period and all succeeding obligational periods without considering anticipated reimbursements beyond 1 year, we cannot question the legality of the proposed arrangement. This does not mean however that the charters are general, full faith and credit obligations of the United States. This is a matter within the jurisdiction of the Attorney General and you may want to have DOD request his opinion thereon. We are not convinced that the cases of *Myerle* v. *United States*, 33 Ct. Cl. 1 (1897) and *Dougherty* v. *United States*, 18 Ct. Cl. 496 (1883), which were cited in the letter from DOD would be applied in a situation where the contractor is aware that funds are not being obligated and set aside for liquidation of the contractual obligation or that the Gov-

ernment is relying upon anticipated receipts. The fact of the matter here is that if the entire cost under the contracts is not funded, the MSC fund will be relying for the most part upon appropriations to be made by the Congress over the 20-year period to the customer agencies using the nine tankers.

The fourth area of concern to the investors and their counsel relates to the question of receiving adequate and conclusive assurance that at the time the charter is entered into and at or prior to the time of each renewal thereof MSC has followed proper procedures necessary to obligate unconditionally the Navy Industrial Fund and as to obtaining a certification that such procedures have been followed. We know of no way to get such assurance unless MSC is willing to include a provision in its charter of each vessel agreeing to set aside the cash to cover its obligations thereon and provide you with an appropriate certification. We do not believe it is, or should be, our responsibility to assure you that such authority has been so exercised. While we can understand your desire to have such assurance, the need therefor would not be as great if the Attorney General renders an opinion that the charters are general, full faith and credit obligations of the United States.

[B–155690]

Checks—Travelers—Reimbursement—Military Personnel

Reimbursement to members of the uniformed services for the cost of purchasing traveler's checks, whether the related travel is performed within or without the United States, may be authorized without regard to the value of the checks purchased in view of the broad authority for reimbursement in connection with the travel of members and their dependents, and the Joint Travel Regulations amended accordingly, thus bringing reimbursement for the cost of traveler's checks for travel within the United States in line with the long recognition that the cost of traveler's checks incident to travel outside the United States is a valid expense. However, the amendment of the Standardized Government Travel Regulations to accomplish the same uniformity in reimbursing civilian employees for the cost of traveler's checks is a matter for consideration by the Administrator of the General Services Administration.

To the Secretary of the Army, March 27, 1972:

We refer further to letter dated February 17, 1972, from the Deputy and Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), forwarded here by letter of February 23, 1972, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 72–6), regarding a revision of paragraph M4412 and item 6, paragraph M7002–3, of the Joint Travel Regulations, to become effective on April 1, 1972.

The Deputy and Acting Assistant Secretary states that the effect

of the regulation changes is to permit reimbursement for the cost of traveler's checks whether the related travel is within or without the United States, and also to permit reimbursement even though the value of the checks purchased is less than $100. It is explained that no reimbursement presently is permitted when traveler's checks or similar instruments are used incident to travel to, from, or between points within the United States or when the value of checks purchased for other travel is under $100. In this connection reference is made to the Standardized Government Travel Regulations governing the travel of civilian employees, which restrict reimbursement to cases involving travel outside the continental United States but contain no provision as to the minimum value of such instruments in order to qualify for reimbursement.

It is stated further that the reasons for safeguarding funds incident to official travel in the United States appear to be no different than for travel in other areas and that such reasons form the basis of the action of the Secretaries of the uniformed services in authorizing the changes indicated. It is indicated that while our holding in 23 Comp. Gen. 212 (1943) permits regulations authorizing reimbursement for traveler's checks connected with travel outside the United States, it leaves unaffected the prohibition against reimbursement contained in 4 Comp. Gen. 883 (1925), as regards travel within the United States.

Additionally, it is stated that a similar change regarding travel in the continental United States has been suggested for the Standardized Government Travel Regulations, the statutory base of Volume 2 of the Joint Travel Regulations, which govern the travel of Department of Defense civilian personnel. Therefore, decision also is requested regarding the propriety of amendment of the Standardized Government Travel Regulations to permit such reimbursement.

Par. M4412, JTR, to become effective April 1, 1972, provides as follows:

> Costs of traveler's checks or similar instruments purchased by the member for the safe transportation of personal funds necessary for normal expenses incurred incident to temporary or permanent change-of-station travel are reimbursable provided that the total value of such instruments is not more than the per diem and travel expenses administratively estimated for the ordered travel.

Par. M7002–3, JTR, also to become effective April 1, 1972, provides that the member is entitled to reimbursement for expenses incurred incident to the transportation of his dependents, as follows:

> 6. Costs of traveler's checks or similar instruments purchased for the safe transportation of personal funds necessary for normal expenses incurred in connection with the authorized travel of dependents, provided that the total value of such instruments is not more than the reasonable anticipated travel expenses of the authorized dependent movement;

The Standardized Government Travel Regulations, section 9.1, Office of Management and Budget Circular No. A–7, revised effective October 10, 1971 (now under the authority of the Administrator of the General Services Administration) makes provision for allowable expenses as follows:

c. *Fees relating to travel outside the continental United States.* The following items of expense may be authorized or approved:

* * * * * * *

(3) *Travelers checks.* Costs of Travelers Checks purchased in connection with travel outside the limits of the continental United States, not to exceed the amount reasonably needed to cover the reimbursable expenses incurred.

As noted in the request for decision, in 4 Comp. Gen. 883, we held that the cost of traveler's checks was an unnecessary and unauthorized expense, whether private or Government funds were to be protected. In 23 Comp. Gen. 212 (1943) it was recognized that an expense incurred for traveler's checks or other credit arrangements was necessary for civilian commercial travel abroad, and, accordingly, the Standardized Government Travel Regulations were amended to provide for reimbursement of these costs as necessary travel expenses.

In decision of January 21, 1965, 44 Comp. Gen. 416, we held the cost of traveler's checks to be a valid travel expense for travel outside the United States for members of the uniformed services, and that amendment of the Joint Travel Regulations to provide for their reimbursement in connection with the travel of members and dependents was proper under the provisions of paragraphs 404(a) and (d), and 406(a) and (c), Title 37, United States Code. We said that it long had been recognized that the cost of traveler's checks was a valid expense for travel outside the United States and it was within the power and discretion of the Secretaries concerned to promulgate regulations authorizing reimbursement to members for the cost of such expenses should they deem it advisable and necessary to do so.

We are aware that travel-related costs have increased considerably in the United States since 1925, requiring travelers either to carry large sums of cash which are increasingly subject to loss or theft, or to rely on the use of personal checks, to meet such costs. Since travel often is performed in areas of the country where individual travelers are unknown, it may be difficult to cash a personal check or use one to pay for required goods or services and as a matter of necessity, it has become a common practice for travelers in this country to use traveler's checks, or their equivalent, to safeguard their funds and have them readily available. Consequently, it is concluded that use of traveler's checks or similar instruments by members or dependents, or by civilian travelers, now is a necessary expense of official travel in the United

States. The decision reported at 4 Comp. Gen. 883 will no longer be followed.

The broad grant of authority contained in the cited provisions of the U.S. Code, in our opinion, provides sufficient legal basis for the promulgation of regulations authorizing reimbursement of such expenses where travel is performed within or outside the United States, without regard to the value of the checks purchased. Therefore, we have no objection to the cited changes in the Joint Travel Regulations effective April 1, 1972.

Similarly, we would have no objection to an amendment of the Standardized Government Travel Regulations to permit reimbursement to civilian employees for such costs in connection with official travel performed inside the limits of the continental United States. Since any action in that regard is a matter for consideration by the Administrator of the General Services Administration, we are today furnishing him a copy of this decision.

[B-174750, B-174871, B-175117]

Equipment—Automatic Data Processing Systems—Selection and Purchase—Warranties and Damages

The refusal of the General Services Administration (GSA) to consider the several proposals by an offeror on automatic data processing equipment because they contained a provision disclaiming implied warranties of merchantability and fitness for a particular purpose and excluding liability to the Government for consequential damage is a discretionary procurement policy, which in the absence of a statutory or regulatory provision requiring GSA to accept the exclusionary clauses is not subject to legal objection. Also discretionary is the use of a "model" contract by GSA for the procurement of the equipment, a technique which was not imposed upon offerors without an opportunity for discussion and negotiation; in fact the offeror protesting its use instead of doing so immediately, urged the inclusion of its limitation of liability clause until the time set for submission of final prices, and further participated by offering amendments to the model contract.

To Covington & Burling, March 27, 1972:

Reference is made to letters dated December 14, 1971, January 3, 1972, and February 2, 1972, from the International Business Machines Corporation (IBM), and to your subsequent correspondence on behalf of IBM, protesting the terms of the solicitations and the conduct of negotiations under requests for proposals MCS 43-67 AFLC (ALS), 700-68-R-0484 (DIDS) and ASPESO Project 002-69 (NAVSHIPS) respectively, issued by the General Services Administration (GSA).

In each of these procurements IBM submitted a proposal which included a provision disclaiming implied warranties of merchantability

and fitness for a particular purpose and excluding liability to the Government for consequential damages. This provision was consistent with prior GSA practice, under which IBM had been awarded Federal Supply Schedule contracts containing similar provisions limiting its liability with respect to implied warranties and consequential damages. During the final stages of negotiations under each of the instant procurements, IBM was advised that the Government was not in a position to award a contract to any company whose offer contained exclusionary clauses pertaining to consequential damages or implied warranties, and that IBM's proposals were not being considered for award because the inclusion of such a clause in the proposals rendered them nonresponsive to the requirements of each procurement.

You have made a number of arguments in support of the proposition that the present GSA policy of rejecting proposals containing exclusionary clauses is improper: that the policy unduly restricts competition (as shown by IBM's refusal to submit final prices in the instant procurements); that its adoption has not been accompanied by a formal policy determination in violation of a Memorandum of Understanding between GSA and the Department of Defense (DOD); that it is in conflict with existing DOD policy as expressed in Armed Services Procurement Regulation (ASPR) 1-330; and that no contractor can responsibly assume the risk of liability inherent in the ALS procurement.

Although we have reservations in the matter, it must be recognized that the position taken by GSA regarding implied warranties and consequential damages is a matter of procurement policy. We are aware of no statutory or regulatory provision which requires GSA to disclaim implied warranties and exclude consequential damages, or to assert the existence of implied warranties and seek the recovery of consequential damages, or to assume some intermediate position on the extent to which it would hold its contractors liable for consequential damages. As a matter of policy, therefore, the position taken by GSA is within its discretion and, despite our reservations, not appropriate for a ruling by our Office in the context of a bid protest. We are not aware of any valid legal basis on which we could properly interpose a legal objection to the award of contracts under the instant solicitation. However, we have recommended by letter of today to the Acting Administrator of GSA, copy enclosed, that GSA's policy regarding implied warranties and consequential damages be given further consideration.

Additionally, in the ALS and NAVSHIPS procurements IBM's proposals were rejected because the presence therein of exclusionary

clauses regarding implied warranties and consequential damages was deemed in conflict with the terms of "model" or "standard" contracts made a part of those solicitations. You have objected to such use of "model" contracts on grounds that the model imposes terms and conditions in excess of the minimum needs of the Government; that it prevents meaningful negotiations and eliminates the flexibility which should exist in negotiated procurements; and that it perpetuates errors and ambiguities in solicitations. You assert that the most significant aspect in which the use of "model" contracts has had these undesirable effects in the ALS and NAVSHIPS procurements has been in the treatment accorded implied warranties and consequential damages.

The use of "model" contracts was described as follows in the administrative report of February 15, 1972:

As a matter of administrative policy, GSA decided to use a "standard" or "model" contract for this procurement. Instead of each offeror submitting a proposal with his varying terms and conditions, GSA proposed, as a basis for negotiations, a contract with basically the same language and the same terms and conditions for each offeror. However, the proposed contract upon which GSA finally requested the offerors to submit their prices was the result of numerous negotiating sessions with each offeror. In no sense did this procedure result in the "imposition" of an entire contract. Until the time set for the close of negotiations every contract item was subject to discussion. Every contract item was also subject to amendment, except (1) final user agency-determined minimum requirements for equipment and services, (2) contractual items made mandatory by statute or regulation, and (3) administratively-determined, reasonable, and necessary contractual requirements to effectively protect Government interests and to provide for orderly and efficient contract negotiation and administration. Every amendment or change requested by offerors was in fact seriously and carefully considered. The greater number of requests for change, including those from IBM, were granted, resulting in extensive revisions of the "model contract." Changes made at the request of one offeror were granted to all offerors, thus maintaining the same basic terms and conditions in all proposals. There were several rounds of negotiations (each generally lasting a day) with each offeror.* * *

The use of this "model contract" technique has many advantages in the negotiation of large and complex ADPE procurements, especially where, as in this case, the only criterion for award is the lowest overall cost to the Government. The use of this technique assures participation by all offerors in the development of the final mandatory terms and conditions of the "model contract". Also, this technique (1) assures equal treatment and fairest competitive evaluation of proposals, (2) places the competition on the lowest overall cost to the Government rather than on "other factors," (3) shortens the negotiation process by starting all offerors from the same advanced position, (4) eases burden of and improves the administration of contract negotiation by permitting concentration of effort on one set of uniform provisions, and (5) permits a higher standard of "draftsmanship" and a less error-prone final contract. We believe that offerors also benefit from these advantages. At the same time the "model contract" permits offerors wide latitude in structuring price proposals as they see fit, such as by including or excluding maintenance in the rental price or imposing extra-use rental charges for use in excess of one shift daily, etc. These differences can be readily "costed-out" and do not detract from the advantages of general uniformity. This practice is consistent with the requirements of BOB (OMB) Circular A-54 as amended (October 14, 1961, revised and/or amended on June 27, 1967, January 7, 1969, and August 26, 1971).

The record shows that the "Standard Form of Contract" was issued on February 26, 1971, as Amendment No. 23 to the solicitation. The amendment advised offerors:

1. Offerors are requested to carefully review the content of the Standard Form of Contract and all referenced documents, since the Government intends that any contract to be awarded as a result of this solicitation will be the Standard Form of Contract and any amendments issued pursuant to paragraph 3. below, all completed in accordance with the self-contained instructions.
2. If this standard contract contains provisions which an offeror feels cannot be complied with, or which he feels may not be in the best interest of the Government, he is requested to immediately communicate such conditions, along with his proposed language for any recommended changes to the Contracting Officer * * *.
3. The Government will evaluate all suggested changes and/or comments. Any changes considered desirable will be incorporated as a subsequent amendment(s) to the Standard Form of Contract.

* * * * * * *

5. Offerors who do not submit their proposals in accordance with the specific terms provided for in the Standard Form of Contract will be considered nonresponsive and may not receive further consideration under this solicitation.
6. The Government does not intend to undertake negotiations with individual offerors for the purpose of developing unique provisions to suit an individual offeror's desires other than for terms which may apply to priceable items * * *.

It would seem that if IBM viewed this approach as fundamentally defective, the appropriate time to have protested against its use was in February 1971. However, it appears that on March 9 and April 2, 1971, IBM requested changes to the "Standard Form of Contract." On April 27, 1971, IBM submitted its "Standard Form of Contract" under cover of a letter setting forth eight paragraphs of "assumptions, interpretations and additions." Apparently, another submission was made by IBM on May 5, 1971, and on May 25, 1971, IBM submitted revised pages of the contract and reasserted all but one of the "assumptions, interpretations and additions" of its letter of April 27. By letter of June 16, 1971, the contracting officer responded to the IBM letter of April 27, and advised that the Government "still does not agree with the limitations" of IBM's clause regarding implied warranties and consequential damages.

The "Standard Form of Contract" was amended four times before April 30, 1971, at which time a complete revision, incorporating all prior changes, was issued. A fifth amendment was issued on June 18, 1971, after review of the offerors' proposals, supplying additional modifications, clarifications, and interpretations of the solicitation. IBM continued to insist, without success, upon the inclusion of its limitation of liability clause and on August 26, 1971, formally advised the contracting officer of its position:

* * * that the Limitation of Liability clause we proposed, *and which represents the only contract clause upon which agreement has not been reached,* must be included in the model contract. [Italic supplied.]

IBM's efforts to obtain acceptance of its limitation of liability clause continued until the time set for submission of final prices, which IBM refused to supply in light of the Government's rejection of the clause.

We do not view this record as one of "imposition" of an entire contract upon offerors without the opportunity for discussion and negotiation thereof. Rather, the record indicates that the model contract was amended several times in response to offerors' suggestions. IBM participated in suggesting amendments to the model contract and it appears that all of IBM's objections to its terms were met, except with regard to the limitation of liability clause, which we have concluded above was a matter of procurement policy. Under these circumstances, and in view of the broad discretion accorded agencies of the Government in determining the conditions under which they may contract, we must deny your protest against the use of the "model" contract in the instant procurements.

[B-174750, B-174871, B-175117]

Equipment—Automatic Data Processing System—Selection and Purchases—Warranties and Damages

Although the refusal of the General Services Administration to accept the proposals of an offeror to furnish automatic data processing equipment for Defense user agencies that included a disclaimer against implied warranties and liability for consequential damages is a matter of procurement policy within the discretion of the agency, the interests of the Government and its contractors would be better served if the Government's position was fully and explicitly set forth in regulations of general applicability and in solicitations furnished prospective contractors rather than enunciated during negotiations, and it is suggested that the policy be further examined, with consideration given to varying the extent of contractor liability for consequential damages, and to the effect of such variances on the cost to the Government and the disposition of firms toward doing business with the Government.

To the Acting Administrator, General Services Administration, March 27, 1972:

Reference is made to letters dated February 15, February 24 and March 6, 1972, from your General Counsel, furnishing reports concerning the protests by International Business Machines Corporation (IBM) under Requests for Proposals Project Reference MCS 43-67 AFLC (ALS), 700-68-R-0484 (DIDS) and ADPESO Project 002-69 (NAVSHIPS), respectively. These procurements are being conducted by the General Services Administration (GSA) for Department of Defense user agencies. In each of these procurements, IBM has protested the rejection, made on the basis of conflict with

GSA policy, of proposals containing exclusionary clauses regarding implied warranties and consequential damages.

As we advised IBM in our decision of today, copy enclosed, there is no statutory or regulatory provision applicable to the instant procurements which precludes the application to contractors of implied warranties or which would prohibit the Government from seeking to recover consequential damages from those contractors. We regard the degree, if any, to which implied warranties may be disclaimed and to which liability for consequential damages may be excluded in the instant procurements to be matters of policy.

However, it is our opinion that the question whether the Government's best interests will be served in this type of procurement by requiring contractors to assume no liability, limited liability, or unlimited liability for implied warranties and consequential damages deserves more extensive consideration and comprehensive expression than that which appears from the present record to have preceded promulgation of the present policy. In this regard, we observe that the Department of Defense has established a policy, now set forth in Armed Services Procurement Regulation (ASPR) 1-330, of limiting contractor liability for loss of, or damage to, property of the Government occurring after final acceptance of supplies delivered to the Government and resulting from any defects or deficiencies in such supplies. The policy and its implementing contract clauses "are the result of a long period of study and are aimed at reducing Government procurement costs by limiting the contractor's risk." Defense Procurement Circular No. 86, February 12, 1971. The minutes of the ASPR Committee disclose that the Department of Defense policy concerning contractor liability for defective supplies was promulgated only after most exhaustive discussion, including the consideration of comments from industry and other Government agencies.

Many of the problems which are reflected in the minutes of the ASPR Committee may also have received consideration by GSA. However, such consideration does not appear from the record before us. We believe the administrative reports filed in response to these protests may fairly be characterized as stating that contractual silence on implied warranties and consequential damages "thus relegating the determination of liability to the general law of damages," was a "minimum need of the Government." The administratve report of February 15, 1972, states:

Thus IBM was clearly informed that GSA had determined that the question of consequential damages involved a vital interest of the Government which GSA would not compromise.

However, we are advised by the same report that IBM's liability "under the general legal principles governing consequential damages" is "so limited that the Government, to our knowledge, has never attempted to hold a vendor of general-purpose automatic data processing equipment (ADPE) liable for consequential damages * * *." We believe the fact that this type of liability apparently never has been asserted requires a reexamination of how vital an interest the Government has in insisting that it be assumed by responsible bidders who are unwilling to compete on that basis.

Our concern is also derived from the circumstances that, apart from a general expression of desire on the part of GSA to preserve implied warranties and not to be prevented from the recovery of consequential damages, no other considerations underlying its policy appear in the present record. The following issue raised by IBM is illustrative of problems which appear worthy of consideration.

IBM has alleged that during negotiations under the ALS procurement, it was orally advised by the contracting officer that implied warranties of merchantability and fitness for a particular purpose were applicable to the contract, which would contain the standard Inspection clause. This allegation has not been refuted in the administrative report submitted to our Office, and we are not called upon to determine whether the contracting officer's position is sound or unsound. However, we note that a concern of the ASPR Committee was the relationship of its proposed coverage to other contract provisions, such as the standard Inspection clause. The opinion was expressed during one Committee meeting "that the existing Inspection clause as currently interpreted terminates all warranties (unless otherwise specifically provided for in the contract) except for latent defects." The decision in *Republic Aviation Corp.*, ASBCA Nos. 9934 & 10104, March 31, 1966, 1966–1 BCA 5482, has been viewed as authority for the proposition that implied warranties do not survive inspection and acceptance under contracts containing the standard Inspection clause. Haddock, *Uniform Commercial Code Warranties—Application to Government Purchases*, 1 Pub. Cont. L. J. 77 (1968); Note, *Post-Acceptance Liability in Defense Supply Contracting*, 56 U. Va. L. Rev. 923, 929 (1970). *Contra*, Spriggs, *Implied Warranties Under Government Contracts*, 4 Pub. Cont. L. J. 80, 83–85 (1971). See also, Rishe, *UCC Brief No. 12:*

The Effect of Inspection Under Government Contracts and the UCC, 15 Prac. Law. 75, 79–80 (1969).

The contracting officer's position, apart from its soundness, has been taken in a controversial and unsettled area. We understand the administrative reports to say that the interests of the Government are served by maintaining contractual silence on the matter and by awaiting the judgment of a court, in an appropriate case, as to whether implied warranties are applicable to a contract and, if so, whether they survive inspection and acceptance under the Inspection clause. We believe the interests of the Government and its contractors would be better served if, pursuant to thorough consideration, the Government's position was fully and explicitly set forth in regulations of general applicability and in solicitations furnished to prospective contractors, rather than enunciated during negotiations with individual contractors under individual soliciations.

It is not clear from the present record whether GSA's policy of rejecting proposals containing exclusionary clauses relating to implied warranties and consequential damages is applicable to all procurements of automatic data processing equipment, or only selected procurements. We believe consideration may properly be given to varying the extent of contractor liability for consequential damages, perhaps through the establishment in certain solicitations of a ceiling upon a contractor's liability.

Under certain circumstances, as in the instant case, the question of liabilities may affect the willingness of some firms to bid on Government work. Further, it appears to be generally agreed that contractors' prices reflect the post-acceptance risks of liability they are required to assume. Thus, an announced purpose of the Department of Defense policy regarding contractor liability for defective supplies is to reduce "Government procurement costs by limiting the contractor's risk." Defense Procurement Circular No. 86, February 12, 1971. See also Haddock, *supra*, at 89–90; Payne, *Government Contract Warranties: Isn't the Caveat Venditor Rather Than Emptor?*, 4 Nat. Cont. Man. J. 31, 59–60 (1970); Spriggs, *supra*, at 89; Twomey, *Warranties Under Government Contracts*, 1 Ins. L. J. 464, 468–69 (1970); Note, *supra*, at 937–41. In view thereof, we are of the opinion that any consideration of the propriety of your present policy must include consideration of its cost to the Government. We therefore suggest that consideration be given to obtaining data on the cost, if any, which bidders might add to proposed prices under varying degrees of assumed liability and that an assessment be made as to the effect of such variances upon the disposition of firms toward doing business with the Government.

In the ALS and NAVSHIPS procurements, IBM's proposals containing exclusionary clauses regarding its liability were rejected as being in derogation of "standard" or "model" contracts made a part of those solicitations. For the reasons stated in our decision of today to IBM, we have denied its protests against the use of "model" contracts.

It is not our intention to inject this Office into the discretionary considerations leading to the award of contracts. However, we are of the conviction that an informed exercise of discretion by your Administration, and any review by this Office, requires further examination of the policy adopted by GSA regarding implied warranties and consequential damages. The above observations are directed to that end.

We request to be advised of further developments in GSA policy regarding implied warranties and consequential damages, and to be provided an opportunity to comment thereon. We will, of course, be glad to discuss these matters further, if you so desire.

[B–175223]

Insurance—Damage and Loss Claims—Effective Date of Insurance

Crop insurance contracts to cover freezing losses which were made effective by the Federal Crop Insurance Corporation pursuant to 7 CFR 409.25 as of November 1, under the mistaken belief freezing weather would not occur earlier, may be modified to permit payment for crop damage resulting from a freeze on October 30 and 31, on the basis of mutual mistake—a rule applicable to future as well as past events—since the contracts did not reflect the intention of the parties to accomplish the objective of providing crop insurance coverage for a period of possible freeze. Furthermore, the administrative delay in accepting timely filed applications for insurance until after several freezes had injured crops should not deprive the applicants of insurance coverage, and the Corporation failing to act within a reasonable time has the authority under 7 U.S.C. 1506(i) to take corrective action.

To the Secretary of Agriculture, March 29, 1972:

By letter dated February 15, 1972, the Assistant Secretary for International Affairs and Commodity Programs requested our opinion whether certain contracts of crop insurance entered into by the Federal Crop Insurance Corporation (FCIC) may be reformed. The Corporation is of the view, because of the circumstances later discussed, that the contracts in question may be reformed because the contracts as executed did not express the actual intention of the parties by reason of a mutual mistake of fact, i.e., the fixing of November 1 as a date which would precede any freezing weather.

The particular program in question is known as the Arizona-Desert Valley Citrus Crop Insurance (7 CFR 409.20 *et seq.*) which designates

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two counties each in the States of Arizona and California as being eligible for insurance coverage under this particular program.

It is reported that the current crops of some 18 insured farmers were damaged by a freeze that occurred on October 30 and 31, 1971. The form of the application and the policy, as set forth in 7 CFR 409.25, provides in pertinent part:

2. *Cause of loss insured against.* The insurance provided is against unavoidable loss resulting from freeze occurring within the insurance period.

* * * * * * *

6. *Insurance period.* For each crop year insurance shall attach on November 1, unless the application is accepted after October 31 in which event insurance shall attach on the 10th day after the date of acceptance of the application by the Corporation, and as to any portion of the citrus crop shall cease upon harvest, or on January 31 for types I, II, and V and on March 31 for types III, IV, and VI of the following calendar year, whichever occurs first.

The reasons given by FCIC for using November 1 as the commencement date of the insurance period, as well as the facts it uses in support of its argument for reformation are:

Under all crop insurance programs covering other than fruit or tree crops, the insurance is against virtually all natural hazards and insurance commences when the crop is planted and extends through the normal harvesting period. Thus it is intended that insurance be provided for the crop throughout the growing season against the risks insured against. This same coverage was intended by the contracts in question under the Arizona-Desert Valley Citrus program, except that freeze is the only risk insured against. However, since a crop of this kind is not subject to planting each year, it was desirable from the standpoint of administration of the program to fix some definite time for the beginning of the insurance period. In doing so, the purpose was to select a date for the commencement of the insurance that would be early enough to give protection during the entire period of possible freeze damage to a given crop. Premium rates are established on that assumption. November 1 was selected because it was thought that it clearly antedated the period of possible freeze in the area affected. Our information was that the principal danger from damaging freeze came after December 1, though it might occur in November. Further, the records of the Weather Bureau indicate that temperatures below freezing in the area affected prior to November 1 have not been known in approximately 75 years. Accordingly, it is our belief that it would be appropriate to reform the contracts so as to cover the damage due to the freeze which occurred on October 30 and 31, 1971, since it was intended to cover freeze damage to a given annual crop of citrus regardless of when the freeze occurs, and since the premiums have been established on that basis.

While the regulations must be strictly complied with when the Government is a party to a policy of insurance, *United States* v. *Blackburn*, 109 F. Supp. 319 (D. Ct. Mo. 1952), in the circumstances present here we believe there is for application the established rule of contract law that where, by reason of mutual mistake, a contract as reduced to writing does not reflect the actual intention of the parties, the written instrument may be reformed if it can be established what the intended agreement actually was. 36 Comp. Gen. 507 (1957); 39 Comp. Gen. 363 (1959).

It is not necessary, in order to establish a mistake in an instrument, that it be shown that particular words were agreed upon by the parties as words to be inserted in the instrument. "It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention." *Williamson* v. *Brown*, 93 S.W. 791, 796 (S. Ct. Mo. 1906).

It is apparent from the record before us that the intent of the parties was that insurance would be provided for the citrus crops throughout the growing season against loss resulting from freeze. Both parties, assuming from the records of the Weather Bureau that a freeze would not likely occur before November 1, and desiring to use language (in this instance a date) that would reflect such assumption, accepted November 1 as a safe date for the commencement of the desired insurance coverage. That date would clearly have accomplished that purpose if the first freeze had occurred on a subsequent date, as each expected it would. The fact that the first freeze occurred on October 30 and 31, however, proved that the parties were mutually mistaken in their belief that a commencement date of November 1 would provide the total coverage desired. There can be no doubt from the evidence that this expectation was entertained by both parties; that the mistake in that respect was mutual; and that by reason thereof the contract(s) failed to express the true intention of the parties. As stated in *F.P. Cutting Co.* v. *Peterson*, 127 P. 163, 165 (S. Ct. Calif. 1912):

> We do not understand that relief from the consequences of a mutual mistake is confined to cases where the mistake was with reference to a past event, or to the present existence of some fact or thing. No sound reason appears why the doctrine should not equally apply where both parties by mistake expect a future event to occur and describe the subject-matter by words which make the intent clear if the event does happen as expected, but which defeat the real intent if the event does not happen precisely in the manner expected. * * *

Consequently, we are of the opinion that the contracts in question may be reformed so as to reflect the actual intent of the parties at the date of their execution, and such damage as may have been suffered by the insureds by reason of the October 30 and 31 freeze may properly be paid. It is suggested, however, that the application and policy forms be amended in a manner which will avoid a reoccurrence of this situation.

The Assistant Secretary also requests our opinion whether six applications, which had not been accepted prior to November 1, 1971, and which suffered damage due to the October freeze, and eight applications not accepted prior to November 1, 1971, and which suffered dam-

age due to a December freeze may also be approved so as to cover the referenced damage although such applications were not actually accepted at the time of one or both freezes.

The arguments made by FCIC in support of recognizing liability in these cases are:

> Although under the regulations (section 409.22), new applications might have been received up to and including October 31, the Corporation in fact took no new applications after September 30, 1971. A number of these applications were not accepted until after November 1, and some were not accepted until after a second freeze, which occurred on December 4, 1971. As stated above, paragraph 6 of the policy provides that, if an application is accepted after October 31, insurance attaches on the tenth day after acceptance. To apply this provision literally, of course, would deprive these insureds not only of any indemnity for damage due to the freeze in October, but possibly also of any indemnity for damage due to the December freeze depending upon the date the applications were accepted.
>
> The purpose of the provision for a ten-day lag in the effectiveness of the insurance, where the application is accepted after October 31, was merely to encourage citrus growers to file their applications in time to be acted upon prior to November 1. As stated above, however, no application was taken after September 30, 1971. There was ample time to accept or reject all of them prior to the freeze on October 30 and 31. However, because of adverse loss experience in the area in recent years, the Corporation undertook to make a careful examination of the groves and to evaluate the risk for each individual the risk for each individual grove before determining whether to accept or reject the application. In view of manpower limitations, this took considerable time. As a result, there was an abnormally long delay in acting on the applications. In some cases no action was taken until some time in December after the second freeze mentioned above. To say that these applicants should not have coverage for the October or the December freeze because of the provisions of paragraph 6 of the policy would obviously be unjust and probably untenable legally. The purpose of that provision was satisfied in every respect, since the applications were all submitted by September 30, 1971. The delay in accepting them was in no way the fault of the applicants. In the normal course of events they would have been accepted prior to the October freeze. The delay was caused solely by the desire of the Corporation to make sure that the groves were in acceptable condition and that the risk had been properly evaluated. There was, of course, no intent to deprive the applicants of any substantial part of the insurance for which they were applying should the applications be deemed otherwise acceptable. Further, it should be noted that no allowance is made in the premium charged on account of the late acceptances. Accordingly, we feel that the Corporation should under the circumstances recognize liability in these cases for the damage due to the October freeze and the December freeze even though the applications may not have been accepted more than ten days prior to the freeze.

Both the regulations and the application form are silent as to the period of time in which the Corporation was to accept a timely filed application. This being the case, the application, if it is finally accepted, must be accepted within a reasonable time, and may not be unreasonably delayed so as to defeat the purpose of the insurance coverage. In fact, this is in keeping, we think, with the requirement of 7 CFR 409.22 which provides in pertinent part:

> § 409.22 Application for insurance.
>
> * * * The Corporation further reserves the right to reject any application or to exclude any definitely identified acreage for any crop year of the contract if upon inspection it deems the risk on such acreage is excessive. If any such

acreage is to be excluded, *the insured shall be notified of such exclusion before insurance attaches for the crop year for which the acreage is to be excluded.* * * * [Italic supplied.]

We think that all applicants having submitted their applications no later than September 30, and not being advised to the contrary by the Corporation, had every right to believe that their applications would be accepted by November 1, or at least in time to cover the December freeze.

While we recognize the right of the Corporation to investigate the applications more thoroughly than had been the practice in the past, we believe it was incumbent upon the Corporation to either approve or disapprove such applications by November 1. In view thereof, and the broad authority vested in the Corporation by 7 U.S.C. 1506(i), we do not believe it would be legally improper for the Corporation to provide insurance coverage for both of the freezes in question on those applications that were filed on or before September 30 and not accepted until after November 1.

[B-173677]

Contracts—Negotiation—Awards—Propriety—Upheld

The negotiations under 10 U.S.C. 2304(g) leading to the award of a contract for the space shuttle main engine, upon review are found to have been conducted in a fair manner, consistent with applicable law and regulations. The review disclosed discussions were meaningful, and it is possible that there may be occasions when weaknesses, inadequacies, or deficiencies can be discussed without being unfair to other proposers; the review upheld the successful proposal was responsive, and found that the determination the protestant's proposal was deficient was not arbitrary and capricious, but that the evaluations of the highly technical proposals were comprehensive and objective, and provided a sound basis for selecting the most advantageous proposal after considering the protestant's prior program experience, and all aspects of cost, including lowness, realism, and risk of cost overruns and, furthermore, the successful offeror had not obtained an unfair advantage because of participating in the Saturn program.

To the Administrator, National Aeronautics and Space Administration, March 31, 1972:

Enclosed is a copy of our decision to the attorneys for Pratt & Whitney Aircraft Corporation denying its protest against the selection of Rocketdyne Division of North American Rockwell, Incorporated, for negotiations leading to the award of a contract for the space shuttle main engine (SSME) pursuant to NASA's request for proposals No. SSME 70-1.

In view of the many issues presented, the length of our decision, and our views concerning the propriety of NASA Procurement Directive 70-15, we are providing in this transmittal letter a summary of Pratt & Witney's major contentions and our conclusions. For ready reference the corresponding pages in the decision are cited.

I. NASA Failed to Conduct Meaningful Negotiations. (See pp. 6–37)

Pratt & Whitney contends that the negotiations did not comport with 10 U.S.C. 2304(g) because such written and oral discussions as were conducted did not include the pointing out of deficiencies or weaknesses and did not afford offerors an opportunity to improve their proposals, but were merely to seek clarifications. In this connection, it is argued that NASA Procurement Directive 70–15, which prohibits the pointing out of deficiencies in cost-reimbursement type contracts and all contracts for research and development, is contrary to the above statute as evidenced by its legislative history and as interpreted in decisions of this Office. Furthermore, it is Pratt & Whitney's position that had it been advised of the alleged deficiencies in its proposal, it would have been in a position to explain, clarify, or correct its proposal. In conclusion, Pratt & Whitney contends that in the absence of full and meaningful negotiations in the instant procurement, the Government will not receive the most advantageous contract.

The issue presented with respect to the conduct of negotiations turns on the meaning to be ascribed to the statutory mandate for "written or oral discussions." While the provisions of 10 U.S.C. 2304(g) do not define the nature, scope, or extent of the required discussions, it is our view that the legislative history evidences a congressional intent that negotiations be conducted under competitive procedures to the extent practicable and that they be "meaningful by making them discussions in fact and not just lip-service," to the end that competition is maximized and the Government is assured of receiving the most favorable contract.

On the other hand, the statute should not be interpreted in a manner which discriminates against or gives preferential treatment to any competitor. Any discussion with competing offerors raises the question as to how to avoid unfairness and unequal treatment. Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such "transfusion" should be avoided. It is also unfair, we think, to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal.

We think the propriety of the prohibition in NASA Procurement Directive 70–15 against discussing "deficiencies" must be considered in the light of these problems. We think certain weaknesses, inadequacies, or deficiencies in proposals can be discussed without being unfair to other proposers. There well may be instances where it becomes apparent

during the course of negotiations that one or more proposers have reasonably placed emphasis on some aspect of the procurement different from that intended by the solicitation. Unless this difference in the meaning given the solicitation is removed, the proposers are not competing on the same basis. Similarly, if a proposal is deemed weak because it fails to include substantiation for a proposed approach or solution, in the circumstance where the inadequacy appears to have arisen because of a reasonable misunderstanding of the amount of data called for, we believe the proposer should be given the opportunity, time permitting, to furnish such substantiation. Thus, it seems to us that the prohibition in NASA Procurement Directive 70–15 against discussing "deficiencies" needs clarification.

In the present case, we have examined the voluminous documentation to determine whether the negotiations comported in substance with the statutory mandate for "written or oral discussions." In this connection, we have taken cognizance of various aspects of this procurement which, in our view, justify the limited scope of the discussions. This is a research and development procurement in which the offeror's independent approach in attaining the desired performance is of paramount importance. Also, Pratt & Whitney's SSME proposal was to a considerable extent a scaled-up version of its work under the XLR–129 program which was familiar to the NASA evaluators. In addition, there was more than a year of almost daily contact between Pratt & Whitney and NASA during the Phase B period which culminated in the SSME proposal. Furthermore, there were, in fact, extensive written and oral discussions, some of which related to areas later judged weak, although they were framed in the context of clarifications. In addition, some of the major Pratt & Whitney deficiencies involved comparative weaknesses and their discussion would have likely involved leveling and technical transfusion.

In view of the foregoing, as more fully set forth in the decision, we are unable to conclude that the negotiations did not comport with the statutory mandate for "written or oral discussions."

II. NASA Erroneously and Illegally Accepted a Nonresponsive Proposal. (See pp. 38–41)

It is Pratt & Whitney's contention that Rocketdyne's proposal is not responsive to the specifications in two respects: (1) the proposed welding of major components into a single unit is inconsistent with the requirements for reusability, maintainability, and overhaul capability; and (2) the proposed use of metal alloy INCO–718, which is subject to hydrogen embrittlement, will not satisfy the life requirements.

From our review of the record, it does not appear that either the proposed welding or the proposed use of INCO–718 violate any specific provision of the specifications. Furthermore, NASA has determined in the exercise of its technical judgment that in neither respect is there any indirect or inherent conflict with the specification requirements. Having in mind the discretion afforded the contracting activity with respect to such matters, we find no basis to object to the technical judgment reached.

III. NASA's Determination of Pratt & Whitney's Deficiencies was Arbitrary and Capricious. (See pp. 42–52)

First, Pratt & Whitney contends that any downgrading in its ground support equipment proposal was arbitrary because NASA failed to provide the necessary information for the type proposal it apparently wanted even though repeated requests were made for such information. Second, it is asserted that Pratt & Whitney was penalized because of the Source Evaluation Board's doubt that specific impulse requirements could be met with its transpiration cooling method, while, in contrast, Rocketdyne was not penalized for demonstrated greater specific impulse losses associated with the use of baffles in its regenerative cooling design. Third, it is argued that penalties assessed with respect to dynamic stability, high suction specific speed, and the ball valve seal design are inconsistent with various Air Force, NASA, and Pratt & Whitney experience and test data. Finally, it is Pratt & Whitney's contention that other criticisms resulted from the evaluators' apparent failure to read and fully comprehend Pratt & Whitney's proposal.

The administrative report contains a detailed rebuttal of these contentions. Determination of the relative desirability of the respective proposals is properly a function of NASA and we have not attempted to make an independent determination in this respect. However, we have made a thorough review of the many volumes detailing the evaluations, findings, and scoring of these highly complex technical proposals. From this review, we are satisfied that the evaluations were not arbitrary or capricious, as contended, but were comprehensive and objective and provided a sound basis for selecting the most advantageous proposal.

IV. Selection of Rocketdyne Wastes Eleven Years of Knowledge, Test-Proven Design, and Government Investment in Prior Pratt & Whitney Programs. (See pp. 53–57)

The crux of Pratt & Whitney's argument here is that because of its knowledge, experience, and test-proven design resulting from its

work under the XLR–129 program, its proposal for the SSME based upon that program was the most advantageous offered the Government and should have been selected. On the other hand, it is contended that the selection of Rocketdyne was arbitrary and capricious because its experience in rocket engines is not based upon SSME concepts and its proposed design is based upon "paper" analysis.

We have concluded from our review of the entire record that due consideration was given to both the relevant experience of the respective offerors, including Pratt & Whitney's XLR–129 experience, and to the degree and nature of substantiation offered in support of their respective designs. Since the determination that Rocketdyne offered the superior technical approach included consideration of these factors and, in addition, was made after a comprehensive and objective evaluation, this contention has not in our opinion been supported.

V. Selection of Rocketdyne was Based on Procedures that Maximize the Risk of Cost Overruns. (See pp. 58–67)

Pratt & Whitney's argument in this connection is threefold: (1) selection of Rocketdyne's "paper" design over Pratt & Whitney's test-proven design invites a cost overrun; (2) the announcement of a "cost bogey" of $450 million (part A of Increment I), exclusive of fee, invites unrealistic cost estimates; and (3) neither lowness nor realism of cost was considered a factor in the selection.

In connection with the previous contention, we noted that the degree and nature of substantiation offered in support of the respective designs were duly considered. Since the so-called "cost bogey" (which was publicly available) appears to have a reasonable basis, we do not agree that emphasis on meeting it prevented the submission of realistic cost estimates. It is also clear from the record that all aspects of cost, including lowness, realism and risk of overrun, were given comprehensive and objective consideration in the evaluation process, and were considered in the selection.

VI. Rocketdyne Obtained an Unfair Competitive Advantage by Diversion of Saturn Funds to SSME Proposal Effort. (See pp. 68–107)

Briefly, it is Pratt & Whitney's contention that Rocketdyne was permitted by NASA to perform certain tasks under its Saturn launch support contract which were germane to its SSME proposal. Furthermore, it is contended that although the SEB knew of these technological efforts and was influenced thereby, the results of these tasks were not revealed to the other competitors until well after the selection of Rocketdyne.

It appears that Rocketdyne may have gained some knowledge in its performance of three of the tasks which aided it in its SSME proposal, and that its work under two of these tasks had some influence on the SEB. However, as described in more detail in the decision, we do not believe that the knowledge gained was of substantial benefit or that such advantage was unfair. With regard to the matter of fairness, we have concluded that there was a legitimate need for both the Saturn support contract and the tasks thereunder; that NASA's efforts to screen out tasks potentially relevant to SSME were largely successful; that Pratt & Whitney apparently knew of the work being performed under Saturn and knew where and how to obtain reports; and that the results of the three relevant tasks would not have been of benefit to Pratt & Whitney. With regard to our conclusion that Pratt & Whitney apparently knew of the work being performed under the Saturn contract, we have noted that when Pratt & Whitney learned that Rocketdyne was working on hydrogen embrittlement problems it contacted the NASA office having cognizance of the Saturn contract; that NASA's briefing of Pratt & Whitney on this matter indicated that the work was being done under a NASA contract other than Phase B; that in February 1971, Pratt & Whitney was furnished a copy of the final report on the Cost Segment Evaluation Contract, and that report clearly showed that the work on hydrogen embrittlement was continued under the Saturn contract; and that a Pratt & Whitney representative made statements to NASA personnel during the Phase B period indicating its knowledge of Rocketdyne's work under Saturn.

As noted in our audit report of November 29, 1971, there were instances where some Rocketdyne employees charged their time to the Saturn support contract although the work was related to the SSME proposal. We understand that recently Rocketdyne determined the amount involved to be $2,526, and that it has made appropriate adjustments to the respective contracts. In this connection, we understand that the Defense Contract Audit Agency has reviewed Rocketdyne's findings and adjustments and is satisfied that they were appropriate and sufficient. We intend to follow up on this matter and assure that any erroneous time charging is rectified. However, in our judgment any impropriety relates to improper charging of time, which may be remedied by a proper adjustment in the appropriate accounts, rather than to a substantial defect in the negotiation of the instant procurement.

After thorough consideration of all the facts and arguments presented to us in the case, we believe the procurement was conducted in a manner which was consistent with applicable law and regulations and was fair to all proposers.

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Under request for proposals that required that "bidding organization must have demonstrated competence and experience in developing and implementing complex computer aided simulation systems together with working knowledge of commercial marine operations and understanding of potential technological advances available in current products as they may be related to advanced ship operations," and also provided for the evaluation of offers on basis of prescribed weighted criteria that included "experience in ship operational simulation systems" factor, determination that successful offeror met experience factor requiring broad exercise of administrative judgment in a technical area, validity of determination will not be questioned by U.S. GAO 397

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Even though obvious error of quoting two-color printing job at one-thrid price of same job printing in one color in response to invitation for printing weekly newspaper for Naval Weapons Center, China Lake, California, was verified as correct by low bidder, bid should not have been accepted for acceptance gave ostensible low bidder option to withdraw its bid, request bid correction, or insist upon correctness of its bid despite ridiculously low price quoted on two-color job, and preservation of fairness in competitive system precludes giving bidder right to make such election after results of bidding are known. Although correction of erroneous item displaced low bid, since only other bidder was nonresponsive, directed cancellation was withdrawn in B–174592, Apr. 27, 1972, as being in best interest of Govt---------- 498

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Federal agencies delegated authority by GSA, pursuant to 40 U.S.C. 759(b)(2), to purchase automatic data processing equipment (ADPE) are required to conform to Federal Property Management Reg. (FPMR)

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Even though obvious error of quoting two-color printing job at one-third price of same job printing in one color in response to invitation for printing weekly newspaper for Naval Weapons Center, China Lake, California, was verified as correct by low bidder, bid should not have been accepted for acceptance gave ostensible low bidder option to withdraw its bid, request bid correction, or insist upon correctness of its bid despite ridiculously low price quoted on two-color job, and preservation of fairness in competitive system precludes giving bidder right to make such election after results of bidding are known. Although correction of erroneous item displaced low bid, since only other bidder was nonresponsive, directed cancellation was withdrawn in B–174592, Apr. 27, 1972, as being in best interests of Govt ---------- 498

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Low bid that omitted price of "Environmental Protection" item contained in IFB to repair portion of Mississippi River banks, a price bidder alleges was included in basic bid price, is nonresponsive bid that may not be considered for award, for although environmental work could have been treated as inherent part of job, it was regarded as material and listed as separate item calling for separate price and, therefore, omission should not be waived as minor informality. To do so would ignore rule that where there is any substantial question as to whether bidder upon award could be required to perform all of work called for if he chose not to, integrity of competitive bid system requires that bid be rejected as, at least, ambiguous unless bid otherwise affirmatively indicates that bidder contemplated performance ---------- 543

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Contractors purchases from foreign sources

Items not for inclusion in contract performance

Since award by a Govt. joint venture prime contractor of subcontract to Canadian firm for mobile office units manufactured in Canada for its own use while constructing an anti-ballistic missile site in Montana was not subject to Buy American Act, 41 U.S.C. 10a-d, award did not violate the act nor the ASPR, notwithstanding any adverse effect on domestic trailer industry. Not only does act not apply to contractor's purchases for his own use, as they are not to become permanent part of structure being constructed for Govt., mobile units are not considered components of construction material as defined in Buy American clause of contract, which conforms to act, and procurement regulations, nor do they constitute end products acquired for public use as contemplated by the act... 538

CHECKS

Travelers

Reimbursement

Military personnel

Reimbursement to members of uniformed services for cost of purchasing traveler's checks, whether related travel is performed within or without U.S., may be authorized without regard to value of checks purchased in view of broad authority for reimbursement in connection with travel of members and their dependents, and Joint Travel Regs. amended accordingly, thus bringing reimbursement for cost of traveler's checks for travel within U.S. in line with long recognition that cost of traveler's checks incident to travel outside U.S. is valid expense. However, amendment of Standardized Government Travel Regs. to accomplish same uniformity in reimbursing civilian employees for cost of traveler's checks is matter for consideration by Administrator of GSA... 606

CLAIMS

Evidence to support

Administrative records contrary to allegations

Acceptance of administrative statements

Rate tenders which offer reduced freight rates pursuant to sec. 22 of Interstate Commerce Act (49 U.S.C. 22 and 317(b)) on Govt. traffic are continuing offers to perform transportation services for stated prices, and as continuing offers power is created in offeree to make series of separate contracts by series of independent acceptances until at least 30 days written notice by either party to tender of cancellation or modification of tender is received. Therefore, where Military Traffic Management and Terminal Service maintains supplements cancelling or modifying four rate tenders were not received and carrier insists they were mailed, question of fact is raised and administrative statements must be accepted, and overcharges resulting from controversy are for recovery from carrier either directly or by deduction from any amounts subsequently due carrier as provided by 49 U.S.C. 66..... 541

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Special clothing and equipment
Hazardous occupations
Safety necessity for expenditures by Government
Purchase of protective clothing and equipment for personnel performing hazardous duty is not only authorized under 5 U.S.C. 7903, it is prescribed by sec. 19(a) of the Occupational Safety and Health Act of 1970, which establishes Federal safety program and provides that head of each Federal agency has the primary responsibility for determining protective clothing and equipment to be acquired at Govt. expense for the use of employees. Therefore, protective clothing and equipment for personnel operating snowmobiles under varying physical conditions over rough and remote forest terrain may be furnished by Govt. if purchase is determined to be necessary because of priority safety need established by operation of safety management program, regardless of whether or not procurement satisfies requirements of 5 U.S.C. 7903 ---------- 446
COMPENSATION
Holidays
Days in lieu of
Inauguration Day
Fact that Inauguration Day, January 20 of each fourth year after 1965 is prescribed in 5 U.S.C. 6103(c) as legal public holiday for Federal employees in the District of Columbia and specified adjacent areas does not require regarding Friday, Jan. 19, 1973, as legal holiday for purposes of 5 U.S.C. 6103(b), which substitutes other days as legal holidays for purpose of statutes relating to pay and leave of Federal employees for those holidays enumerated in 5 U.S.C. 6103(a) that fall on nonworkdays, such as the Friday immediately before a Saturday holiday. Not only does the listing of public holidays in sec. 6103(a) not include Inauguration Day, legislative history of subsec. (c) indicates no additional legal holiday was intended and that only the working situation of employees around metropolitan area of District of Columbia would be affected-- 586
Increases
Retroactive
Increases withheld during wage freeze
Use of terms "contract" and "employment contract" in sec. 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing payment of wage or salary increases agreed to in employment contract executed prior to Aug. 15, 1971, to take effect prior to Nov. 14, 1971, but withheld by reason of the wage and price freeze imposed by E.O. 11615, does not exclude General Schedule and other annual rate Federal employees from application of the section, and Federal wage board employees are within purview of sec. 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-

COMPENSATION—Continued Page
Increases—Continued
Retroactive—Continued
Increases withheld during wage freeze—Continued
grade increases for both statutory and wage board employees may be paid retroactively as conditions of sec. 203(c)(3)(A) and (B) were satisfied to effect increases were provided by law or contract prior to Aug. 15, 1971, and funds are available to cover increases ---------- 525
Military pay. (*See* **Pay**)
CONFERENCES
(See **Meetings**)
CONTRACTS
"Affirmative action programs." (*See* **Contracts, labor stipulations, nondiscrimination, "affirmative action programs"**)
Appropriation obligations. (*See* **Appropriations, obligations, contracts**)
Awards
Cancellation
Damages
Service charges imposed by Airlie House "75% of total or $750.00 per night, whichever is less" upon cancellation of confirmed reservation, terms which were furnished contracting agency before issuance of purchase order reserving facilities, may be paid since valid contractual relationship was created upon issuance of purchase order and provisions of Airlie's operating policy furnished the Govt. prior to issuance of purchase order became part of contract. While cancellation of hotel reservations within reasonable time prior to dates reserved generally will not involve liability to pay for unused rooms, and provision regarding payment of unreasonably large amount would be unenforceable penalty clause, there is no basis for determination that cancellation charges are unreasonable since Airlie is exclusively a conference center which deals only in group reservations ---------- 453
Erroneous awards
Bid evaluation error
Where contracting officer overlooked discount offered by bidder which if evaluated would have displaced successful bidder awarded 1-year janitorial requirements contract under invitation for bids, when first two low bidders were found nonresponsive because low bidder, unable to show its intended bid, withdrew and second low bidder, although erroneously interpreting the specifications, would not allege mistake, award made contrary to 10 U.S.C. 2305(c) to other than lowest responsive bidder should be terminated for convenience of Govt., notwithstanding claim for 6 months performance under contract, as administratively recommended on basis no difficulties are anticipated in changing contractors and that termination would be in best interest of U.S. ---------- 423
Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation effects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it

CONTRACTS—Continued Page
Awards—Continued
Cancellation—Continued
Erroneous awards—Continued
Bid evaluation error—Continued
does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B–173244, August 16, 1972 518
Termination for convenience in lieu
Determination by contracting officer upon reviewing procurement for set of water distillation units and associated manuals, drawings, and provisioning list in connection with protest, that award to offeror who reduced price of list to become low offeror was improper because other offerors within competitive range were not given opportunity to review their offers and perhaps modify their prices was in accord with 10 U.S.C. 2304 (g). Opportunity to revise or modify proposal, regardless of whether opportunity results from action initiated by Govt. or offeror, constitutes discussion and, therefore, award based on price reduction without discussion with other offerors was improper, but impropriety does not require severe remedy of contract cancellation, and cancellation may be modified to termination for convenience of Govt. 479
Cancellation of contract award because of contracting officer's failure to hold discussions with all offerors within competitive range after holding discussions with one offeror should be converted to termination for convenience since contracting officer did not lack authority to make award and there is no indication in record that either offeror or procurement activity contracted other than in good faith or with any intent to deprive other offerors of equal opportunity to compete and, consequently, contract awarded was not void *ab initio*. Cancellation of contract is desirable, but for urgency of procurement, costs that would be chargeable against Govt., or similar circumstances relating to best interests of Govt. when termination for convenience would either be too expensive or not in Govt.'s best interest 481
Propriety
Upheld
Unsuccessful offeror under request for proposal (RFP) to provide management and technical services to develop marine computer aided operational research center was not prejudiced by failure of chairman of evaluation committee to visit its facility, or by facility selected for visit in absence of any legal or regulatory requirements to this effect; nor by selection of the site for contract performance since selection was made after award; nor by fact award of the research and development contract was made on fixed price basis as the two categories are not mutually exclusive—one term referring to type of work, the other to type of contract used; and, furthermore, subsequent authorization of funds for procurement of hardware and software under Phase II of contract was not in conflict with terms of RFP 397

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Awards—Continued
Small business concerns
Certifications
Denial
Reconsideration
Bidder denied Certificate of Competency (COC) by SBA following the contracting officer's determination of nonresponsibility based on preaward survey may not when reason for the denial—ability of subcontractor to deliver major component of submarine equipment solicited—is corrected request reconsideration of denial, and refusal of contracting officer to re-refer COC issue does not constitute arbitrary action where his determination of nonresponsibility was affirmed by SBA and is not affected by change in delivery schedule, and where re-referral of COC issue would require further survey and nonresponsibility determination, which time does not permit. Furthermore, U.S. GAO has no authority to compel SBA to review COC denial, or to reopen issue and its protest procedure may not be used to delay contract award to gain time for bidder to improve its position after denial of COC by SBA ---------- 448
Self certification
"Good Faith" certification
Low bidder under total small business set-aside for tool sets who on date of bid opening did not qualify as small business concern under the IFB or SBA regulations may not be considered for contract award on basis of its erroneous self-certification allegedly made in good faith, for although bidder met appropriate size standard at time bid was prepared, SBA requirement that number of employees be based on the average for four quarters preceding bid preparation had been overlooked. Since standard of "good faith" is not necessarily limited to an incident of intentional misrepresentation, bidder apprised of applicable small business size having failed to exercise prudence and care to ascertain its size under prescribed guidelines has not certified itself to be small business concern in good faith ---------- 595
Size
Conclusiveness of determination
Determination by Size Appeals Board of the Small Business Administration that low offeror under RFQ was qualified as small business concern on both date for receipt of quotations and date of award is conclusive pursuant to 15 U.S.C. 637(b)(6), which states that "Offices of the Government having procurement or lending powers * * * shall accept as conclusive the Administration's determination as to which enterprises are to be designated 'small-business concerns.'" ---------- 531
Bid procedures. (*See* Bids)
Bid shopping. (*See* Contracts, subcontracts, bid shopping)
Bidders. (*See* Bidders)
Breach of contract
By Government
Authority to determine
Forest Service has authority to enter into agreement with contractor to settle termination costs incident to Agriculture Board of Contract Appeals ruling that Govt. improperly defaulted contract, but since

CONTRACTS—Continued Page
Breach of contract—Continued
By Government—Continued
Authority to determine—Continued
Board's holding that Forest Service breached its obligation to furnish agreed supplies is not supported by evidence, damages awarded by Board for supposed breach may not be settled. Breach of contract claims are not properly cognizable by Boards of Contract Appeals, and Dept. of Agriculture should make independent analysis of merits of claim and full examination of available defenses, and then determine if breach occurred under decisions of courts and/or U.S. GAO, and should provide that in future proceedings, Board shall not express opinion or make finding of contract breach ---------- 491
Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)
Conflicts of interest prohibitions
Applicability to Federal Procurement Regulations
In award of contract for management and technical services to develop marine computer aided operational research center, Dept. of Commerce properly did not consider rules of organizational conflicts of interest as provisions of ASPR App. G "Rules for the Avoidance of Organizational Conflicts of Interest" do not apply to the procurement, and there are no comparable organizational conflicts of interest provisions in the Federal Procurement Regs. Moreover, even if applicable, App. G would only prohibit the successful contractor—a producer of marine equipment who will gain an unavoidable competitive advantage from the research and development effort—from participating in competition for a production contract and would not preclude award of the research and development contract ---------- 397
Exclusionary clause
Although interpretation of conflict of interest exclusionary clause in request for proposals for management and technical services to develop marine computer aided operational research center that "major income" meant 50 percent of sales should have been communicated to all offerors by written amendment as contemplated by sec. 1-3.805-1(d) of the Federal Procurement Regs., the interpretation that 50 percent figure best served the Govt.'s purpose was reasonable and since both protestant and successful offeror qualified under 50 percent criterion, failure to issue written amendment did not adversely affect evaluation of their proposals 397
Damages
Consequential
Refusal of GSA to consider several proposals by offeror on automatic data processing equipment because they contained provision disclaiming implied warranties of merchantability and fitness for particular purpose and excluding liability to Govt. for consequential damage is discretionary procurement policy, which in absence of statutory or regulatory provision requiring GSA to accept exclusionary clauses is not subject to legal objection. Also discretionary is use of "model" contract by GSA for procurement of equipment, technique which was not imposed upon offerors without opportunity for discussion and negotiation; in fact offeror protesting its use instead of doing so immediately, urged inclusion of its limitation of liability clause until time set for submission of final

CONTRACTS—Continued Page

Damages—Continued

Consequential—Continued

prices, and further participated by offering amendments to model contract----------

Although refusal of GSA to accept proposals of offeror to furnish automatic data processing equipment for Defense user agencies that included disclaimer against implied warranties and liability for consequential damages is matter of procurement policy within discretion of agency, interests of Govt. and its contractors would be better served if Govt.'s position was fully and explicitly set forth in regulations of general applicability and in solicitations furnished prospective contractors rather than enunciated during negotiations, and it is suggested that policy be further examined, with consideration given to varying extent of contractor liability for consequential damages, and to effect of such variances on cost to Govt. and disposition of firms toward doing business with Govt---------- 613

Government liability

Method of computation

"Total cost" method used by Court of Claims in computing damages when Govt.'s responsibility for damages was clearly established, no other method of computing damages was available, and contractor's bid was considered reasonable is not for application where prior to award bid of improperly defaulted contractor was so low contracting agency believed contractor would be unable to perform---------- 491

Data, rights, etc.

Disclosure

United States General Accounting Office role

"Entry into plant" requirement in request for proposals that would permit Govt. personnel to observe and consult with contractor during performance of manufacturing flyers' helmets solicited by Defense Supply Agency is essential requirement and offer of manufacturer who developed helmet that did not extend access to its plant was nonresponsive and properly rejected, for in addition to its license agreement with manufacturer, Govt. not only wanted to test contractor's ability to manufacture helmet, but also adequacy of specification in mass production. Moreover, mere allegation of possible divulgence of trade secrets in violation of confidential relationship does not warrant intervention of U.S. GAO in award process where adequate safeguards exist against improper disclosure of proprietary information---------- 476

Default

By Government

Determination propriety

Forest Service has authority to enter into agreement with contractor to settle termination costs incident to Agriculture Board of Contract Appeals ruling that Govt. improperly defaulted contract, but since Board's holding that Forest Service breached its obligation to furnish agreed supplies is not supported by evidence, damages awarded by Board for supposed breach may not be settled. Breach of contract claims are not properly cognizable by Boards of Contract Appeals, and Dept. of Agriculture should make independent analysis of merits of claim and full examination of available defenses, and then determine if breach

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Default—Continued
By Government—Continued
Determination propriety—Continued
occurred under decisions of courts and/or U.S. GAO, and should provide that in future proceedings, Board shall not express opinion or make finding of contract breach ---- 491
Deliveries
Defective supplies, etc.
Rejection
Acceptance of self-certification by manufacturers on Qualified Products List that their products comply with noise level requirements standard set for power tools solicited pending completion of test facilities by Naval Ship Engineering Center is administrative matter, since facilities will be ready in ample time to test deliveries under contract awarded and failure of a product to meet noise level requirements would be basis for rejection of delivery ---- 415
Labor stipulations
Nondiscrimination
"Affirmative action programs"
Noncompliance
Rejection of low bid on non-set-aside portion of requirements type contract for fiberboard because of noncompliance with E.O. 11246 due to bidder's failure to develop equal employment opportunity affirmative action plans (AAP) at facilities other than the one bidding, was proper implementation of agency regulations requiring each establishment of a bidder to have an AAP, and in addition providing for hearing upon more than one nonresponsibility determination; for 30-day "show cause" notice regarding enforcement proceedings, with aid to bidder in resolving deficiencies; for contract cancellation or termination; and for debarment, and there was no denial of due process as the determination of non-responsibility was limited or temporary suspension and not *de facto* debarment. However, in future in issuing "show cause" order, bidder should be advised he can be found nonresponsible until resolution of matter—resolution that should be determined without delay ---- 551
Wage and price stabilization effect
The general rule that failure of bidder to acknowledge receipt of amendment which could affect price, quality, or quantity of procurement being solicited, renders bid nonresponsive because bidder would have option to decide after bid opening to become eligible for award by furnishing extraneous evidence that addendum had been considered or to avoid award by remaining silent, is for application to low bid for construction of prefabricated metal building as unacknowledged amendment incorporated wage determination that affected contract price, notwithstanding that E.O. 11615, dated Aug. 15, 1971, concerning stabilization of prices, rents, wages and salaries was in effect, since Executive order does not obviate implementation of rates in wage determination and, therefore, failure to acknowledge amendment may not be waived ---- 500

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Leases. (*See* Leases)

Mistakes

Allegation before award. (*See* Bids, mistakes)

Mutual

Future events

Crop insurance contracts to cover freezing losses which were made effective by Federal Crop Insurance Corp. pursuant to 7 CFR 409.25 as of November 1, under the mistaken belief freezing weather would not occur earlier, may be modified to permit payment for crop damage resulting from freeze on October 30 and 31, on the basis of mutual mistake—a rule applicable to future as well as past events—since contracts did not reflect intention of parties to accomplish objective of providing crop insurance coverage for period of possible freeze. Furthermore, administrative delay in accepting timely filed applications for insurance until after several freezes had injured crops should not deprive applicants of insurance coverage, and Corporation failing to act within reasonable time has authority under 7 U.S.C. 1506(i) to take corrective action..... 617

"Model"

Propriety

Refusal of GSA to consider several proposals by offeror on automatic data processing equipment because they contained provision disclaiming implied warranties of merchantibility and fitness for particular purpose and excluding liability to Govt. for consequential damage is discretionary procurement policy, which in absence of statutory or regulatory provision requiring GSA to accept exclusionary clauses is not subject to legal objection. Also discretionary is use of "model" contract by GSA for procurement of equipment, technique which was not imposed upon offerors without opportunity for discussion and negotiation; in fact offeror protesting its use instead of doing so immediately, urged inclusion of its limitation of liability clause until time set for submission of final prices, and further participated by offering amendments to model contract..... 609

Negotiation

Awards

Initial proposal basis

Specification adequacy

Award of contract on basis of initial proposal because specifications in request for proposals are considered to adequately describe Govt.'s requirements was not justified since, pursuant to par. 3-805-1 of the ASPR, adequate specifications are not an exception from requirement to conduct discussions with all offerors within competitive range and, therefore, prospective contractors submitting proposals that are not materially deficient and can be made acceptable through minor revisions or modifications should be afforded opportunity to satisfy Govt.'s requirements rather than closing door to possible fruitful negotiations, and discussions must be meaningful and furnish information to all offerors in competitive range as to areas in which their proposals are deficient to enable them to satisfy requirements..... 431

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Negotiation—Continued
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Propriety
Evaluation of proposals

In negotiation pursuant to 41 U.S.C. 252(c)(10) of 20-year lease with four 5-year renewal options for space in building to be constructed, application of principles inherent in competitive system, even if negotiations were not subject to the Federal Procurement Regs., would have secured a more favorable lease, for then possibility of transferring option cost benefits to 20-year price would have been discussed; zoning requirements would not have been stated in terms of nonresponsiveness, terms inappropriate in negotiated contract; past performance and not financial capacity alone would have determined capacity to provide lease space by date specified; price evaluation basis would have been stated with information option prices would not be considered; and the cutoff date for negotiations would have been prospective. Although termination of lease would not be in the best interests of Govt., the progress of building construction should be closely monitored---------- 565

Upheld

Negotiations under 10 U.S.C. 2304(g) leading to award of contract for space shuttle main engine, upon review are found to have been conducted in fair manner, consistent with applicable law and regulations. Review disclosed discussions were meaningful, and it is possible occasions when weaknesses, inadequacies, or deficiencies can be discussed without being unfair to other proposers; review upheld successful proposal was responsive, and found that determination protestant's proposal was deficient was not arbitrary and capricious, but that evaluations of highly technical proposals were comprehensive and objective, and provided sound basis for selecting most advantageous proposal after considering protestant's prior program experience, and all aspects of cost, including lowness, realism, and risk of cost overruns and, furthermore, successful offeror had not obtained unfair advantage because of participating in Saturn program---------- 621

Changes, etc.
Reopening negotiations
Administrative determination

Although late acknowledgment of amendment which provided in event of discrepancy between solicitation requirements and sample display kit, solicitation would govern, and added a clause to request for proposals for survival kits regarding royalties, by low offeror who prior to issuance of amendment had confirmed its offer did not include royalties was erroneously waived on basis amendment did not go to substance of offer and was not prejudicial to other offerors, issuance of amendment was proper exercise of administrative authority in absence of statutory or regulatory provision establishing criteria for determination of what constitutes substantial change to justify reopening negotiations after they have been terminated by call for best and final offers------- 411

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Negotiation—Continued

Changes, etc.—Continued

Specifications

Brand name or equal provision

When brand name or equal clause contained in par. 1–1206.3(b) of ASPR and written for advertised procurements is adopted for use in negotiated procurements pursuant to ASPR 1–1206.5 and 3–501(b)C (xxv), clause should be suitably modified. Mere substitution of the words "offeror" for "bidder" and "offer" for "bid" leaves restrictions in a request for proposals (RFP) which are contrary to intent and purposes of negotiated procurement. Furthermore, the inclusion in RFP of provision similar to par. (c)(3) of clause, which precludes modification after bid opening to make product conform to brand name is inconsistent with principle of allowing modifications in proposals pursuant to ASPR 3–805.1(b) ---------- 431

Competition

Discussion with all offerors requirement

Equal opportunity to compete

Cancellation of contract award because of contracting officer's failure to hold discussions with all offerors within competitive range after holding discussions with one offeror should be converted to termination for convenience since contracting officer did not lack authority to make award and there is no indication in record that either offeror or procurement activity contracted other than in good faith or with any intent to deprive other offerors of equal opportunity to compete and, consequently, contract awarded was not void *ab initio*. Cancellation of contract is desirable, but for urgency of procurement, costs that would be chargeable against Govt., or similar circumstances relating to best interests of Govt. when termination for convenience would either be too expensive or not in Govt.'s best interest ---------- 481

Relaxation of manning requirements during negotiations with low offeror under RFQ to perform maintenance and operation services for technical laboratory for 1-year period with two 1-year options, after assuring offerors at prequotation conference that minimum manning requirements of RFQ would be enforced and penalty levied for noncompliance, even if performance was satisfactory, without providing all offerors in competitive range an opportunity to reconsider their offers was contrary to par. 3–805.1(e) of the ASPR, and options should not be exercised, notwithstanding award was made with understanding that satisfactory performance with less than specified minimum personnel would be acceptable and no price reduction required ---------- 531

Proposal revisions

Determination by contracting officer upon reviewing procurement for set of water distillation units and associated manuals, drawings and provisioning list in connection with protest, that award to offeror who reducdd price of list to become low offeror was improper because other offerors within competitive range were not given opportunity to review their offers and perhaps modify their prices was in accord with 10 U.S.C. 2304(g). Opportunity to revise or modify proposal, regardless of whether opportunity results from action initiated by Govt. or offeror, constitutes discussion and, therefore, award based on price reduction without

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Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Proposal revisions—Continued
discussion with other offerors was improper, but impropriety does not require severe remedy of contract cancellation, and cancellation may be modified to termination for convenience of Govt 479

Specification adequacy effect
Award of contract on basis of initial proposal because specifications in request for proposals are considered to adequately describe Govt.'s requirements was not justified since, pursuant to par. 3-805-1 of the ASPR, adequate specifications are not an exception from requirement to conduct discussions with all offerors within competitive range and, therefore, prospective contractors submitting proposals that are not materially deficient and can be made acceptable through minor revisions or modifications should be afforded opportunity to satisfy Govt.'s requirements rather than closing door to possible fruitful negotiations, and discussions must be meaningful and furnish information to all offerors in competitive range as to areas in which their proposals are deficient to enable them to satisfy requirements 431

Written or oral negotiations
Written negotiations conducted with offeror whose proposal in response to request for quotations to procure Fatigue Analysis Program for B-57 aircraft was deficient with respect to component test plan specification and, therefore, its proposal was nonresponsive, satisfied the requirements of par. 3-805.1 of ASPR implementing 10 U.S.C. 2304(g) to provide that "written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range," and discharged contracting officer's duty to negotiate, and further negotiations were not required because offeror advised in writing of deficiencies in its proposal failed in his final offer to comply with specifications for component test plan 433

Conflicts of interest prohibitions
Exclusionary clause based on sales
Although interpretation of conflict of interest exclusionary clause in request for proposals for management and technical services to develop marine computer aided operational research center that "major income" meant 50 percent of sales should have been communicated to all offerors by written amendment as contemplated by sec. 1-3.805-1(d) of the Federal Procurement Regs., the interpretation that 50 percent figure best served the Govt.'s purpose was reasonable and since both protestant and successful offeror qualified under 50 percent criterion, failure to issue written amendment did not adversely affect evaluation of their proposals. 397

Evaluation factors
Competitive advantage precluded
In negotiation pursuant to 41 U.S.C. 252(c)(10) of 20-year lease with four 5-year renewal options for space in building to be constructed, application of principles inherent in competitive system, even if negotiations were not subject to the Federal Procurement Regs., would have secured a more favorable lease, for then possibility of transferring option cost benefits to 20-year price would have been discussed; zoning re-

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Evaluation factors—Continued
Competitive advantage precluded—Continued
quirements would not have been stated in terms of nonresponsiveness, terms inappropriate in negotiated contract; past performance and not financial capacity alone would have determined capacity to provide lease space by date specified; price evaluation basis would have been stated with information option prices would not be considered; and the cutoff date for negotiations would have been prospective. Although termination of lease would not be in the best interest of Govt., the progress of building construction should be closely monitored..... 565
Criteria
Consideration of evaluation factors not contained in request for proposals (RFP) for management and technical services to develop marine computer aided operational research center but were developed in discussions with offerors was proper, even though factors are not easily categorized under RFP criteria, in view of fact additional factors are sufficiently correlated to generalized criteria shown in RFP to satisfy requirement that prospective offerors should be advised of evaluation factors which will be applied to their proposals. Furthermore, the two competing offerors received same evaluation information and each proposal was evaluated according to same criteria..... 397
Manning requirements
Noncompliance
Relaxation of manning requirements during negotiations with low offeror under RFQ to perform maintenance and operation services for technical laboratory for 1-year period with two 1-year options, after assuring offerors at prequatotion conference that minimum manning requirements of RFQ would be enforced and penalty levied for noncompliance, even if performance was satisfactory, without providing all offerors in competitive range an opportunity to reconsider their offers was contrary to par. 3-805.1(e) of the ASPR, and options should not be exercised, notwithstanding award was made with understanding that satisfactory performance with less than specified minimum personnel would be acceptable and no price reduction required..... 531
Propriety of evaluation
Negotiations under 10 U.S.C. 2304(g) leading to award of contract for space shuttle main engine, upon review are found to have been conducted in fair manner, consistent with applicable law and regulations. Review disclosed discussions were meaningful, and it is possible occasions when weaknesses, inadequacies, or deficiencies can be discussed without being unfair to other proposers; review upheld successful proposal was responsive, and found that determination protestant's proposal was deficient was not arbitrary and capricious, but that evaluations of highly technical proposals were comprehensive and objective, and provided sound basis for selecting most advantageous proposal after considering protestant's prior program experience, and all aspects of cost, including lowness, realism, and risk of cost overruns and, furthermore, successful offeror had not obtained unfair advantage because of participating in Saturn program..... 621

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Negotiation—Continued
Request for proposals
Brand name or equal procedure
When brand name or equal clause contained in par. 1–1206.3(b) of ASPR and written for advertised procurements is adopted for use in negotiated procurements pursuant to ASPR 1–1206.5 and 3–501(b)C(xxv), clause should be suitably modified. Mere substitution of the words "offeror" for "bidder" and "offer" for "bid" leaves restrictions in a request for proposals (RFP) which are contrary to intent and purposes of negotiated procurement. Furthermore, the inclusion in RFP of provision similar to par. (c)(3) of clause, which precludes modification after bid opening to make product conform to brand name is inconsistent with principle of allowing modifications in proposals pursuant to ASPR 3–805.1(b)---------- 431
Performance
Inspection
"Entry into plant" requirement in request for proposals that would permit Govt. personnel to observe and consult with contractor during performance of manufacturing flyers' helmets solicited by Defense Supply Agency is essential requirement and offer of manufacturer who developed helmet that did not extend access to its plant was nonresponsive and properly rejected, for in addition to its license agreement with manufacturer, Govt. not only wanted to test contractor's ability to manufacture helmet, but also adequacy of specification in mass production. Moreover, mere allegation of possible divulgence of trade secrets in violation of confidential relationship does not warrant intervention of U.S. GAO in award process where adequate safeguards exist against improper disclosure of proprietary information---------- 476
Protests
Certificate of Competency denial
Bidder denied Certificate of Competency (COC) by SBA following the contracting officer's determination of nonresponsibility based on preaward survey may not when reason for the denial—ability of subcontractor to deliver major component of submarine equipment solicited—is corrected request reconsideration of denial, and refusal of contracting officer to re-refer COC issue does not constitute arbitrary action where his determination of nonresponsibility was affirmed by SBA and is not affected by change in delivery schedule, and where re-referral of COC issue would require further survey and nonresponsibility determination, which time does not permit. Furthermore, U.S. GAO has no authority to compel SBA to review COC denial, or to reopen issue and its protest procedure may not be used to delay contract award to gain time for bidder to improve its position after denial of COC by SBA---------- 448
Purchase orders. (*See* Purchases, purchase orders)
Qualified products. (*See* Contracts, specifications, qualified products)
Research and development
Conflicts of interest prohibitions
Applicability to Federal Procurement Regulations
In award of contract for management and technical services to develop marine computer aided operational research center, Dept. of Commerce properly did not consider rules of organizational conflicts of interest as

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Research and development—Continued
Conflicts of interest prohibitions—Continued
Applicability to Federal Procurement Regulations—Continued
provisions of ASPR App. G "Rules for the Avoidance of Organizational Conflicts of Interest" do not apply to the procurement, and there are no comparable organizational conflicts of interest provisions in the Federal Procurement Regs. Moreover, even if applicable, App. G would only prohibit the successful contractor—a producer of marine equipment who will gain an unavoidable competitive advantage from the research and development effort—from participating in competition for a production contract and would not preclude award of the research and development contract 397

Exclusionary clause based on sales
Although interpretation of conflict of interest exclusionary clause in request for proposals for management and technical services to develop marine computer aided operational research center that "major income" meant 50 percent of sales should have been communicated to all offerors by written amendment as contemplated by sec. 1-3.805-1(d) of the Federal Procurement Regs., the interpretation that 50 percent figure best served the Govt.'s purpose was reasonable and since both protestant and successful offeror qualified under 50 percent criterion, failure to issue written amendment did not adversely affect evaluation of their proposals 397

Funding
Propriety
Unsuccessful offeror under request for proposals (RFP) to provide management and technical services to develop marine computer aided operational research center was not prejudiced by failure of chairman of evaluation committee to visit its facility, or by facility selected for visit in absence of any legal or regulatory requirements to this effect; nor by selection of the site for contract performance since selection was made after award; nor by fact award of the research and development contract was made on fixed price basis as the two categories are not mutually exclusive—one term referring to type of work, the other to type of contract used; and, furthermore, subsequent authorization of funds for procurement of hardware and software under Phase II of contract was not in conflict with terms of RFP 397

Sales, generally. (*See* Sales)
Small business concerns. (*See* Contracts, awards, small business concerns)
Specifications
Adequacy
Minimum needs standard
Invitation for bids soliciting Attitude Indicators for 2-year period that included items for definite and estimated quantities, and First Article Test Report which was not to be separately priced, but omitted the technical data specification for determining cost of spare parts, maintenance, etc., of indicators was an inadequate invitation and was properly canceled pursuant to 10 U.S.C. 2305(c) and par. 2-404.1(b)(i) of ASPR, since omission precluded consideration of all cost factors as required by ASPR 2-404.1(b)(iv), and therefore the minimum needs of

CONTRACTS—Continued Page
Specifications—Continued
Adequacy—Continued
Minimum needs standard—Continued
Govt. not having been met, reason for cancellation of the inadequate invitation was cogent. Moreover, reinstatement of original invitation to permit data package to be offered would be prejudicial without insuring the standing of bidders would remain unchanged---------- 426
Ambiguous
Pricing provisions
A bid that offered an aggregate of component prices that exceeded unit prices for vehicular lighting kits solicited under invitation that included options to purchase additional kits and kit components "up to 100 percent" and provided for award at kit unit prices is nonresponsive bid, and defect may not be corrected on basis other bidders will not be displaced since award will not be made at component prices, for acceptance of bid may not result in the lowest cost should Govt. exercise option for component parts. Fact that deviation is considered material does not mean solicitation was ambiguous because component option was for indefinite quantity, "up to 100 percent," as bidders had responsibility of submitting competitive bids that would allow for recovery of costs and reasonable profit regardless of extent to which the option was exercised---------- 439
Conformability of equipment, etc., offered
Self-certification by bidder
Acceptance of self-certification by manufacturers on Qualified Products List that their products comply with noise level requirements standard set for power tools solicited pending completion of test facilities by Naval Ship Engineering Center is administrative matter, since facilities will be ready in ample time to test deliveries under contract awarded and failure of a product to meet noise level requirements would be basis for rejection of delivery---------- 415
Technical deficiencies
Negotiated procurement
Negotiations under 10 U.S.C. 2304(g) leading to award of contract for space shuttle main engine, upon review are found to have been conducted in fair manner, consistent with applicable law and regulations. Review disclosed discussions were meaningful, and it is possible occasions when weaknesses, inadequacies, or deficiencies can be discussed without being unfair to other proposers; review upheld successful proposal was responsive, and found that determination protestant's proposal was deficient was not arbitrary and capricious, but that evaluations of highly technical proposals were comprehensive and objective, and provided sound basis for selecting most advantageous proposal after considering protestant's prior program experience, and all aspects of cost, including lowness, realism, and risk of cost overruns and, furthermore, successful offeror had not obtained unfair advantage because of participating in Saturn program---------- 621

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Specifications—Continued
Delivery provisions
Open-ended provision
Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B–173244, August 16, 1972 518
Deviations
Informal *v.* substantive
Delivery provisions
Failure of bidder to acknowledge receipt of amendment issued on Standard Form 30 to correct delivery date stated in invitation for bids to procure library shelves, and which contained Standard Form 33A, to include installation of the shelves may not be waived as minor informality, notwithstanding waiver of provision in the amendment for extension of bid opening date would be proper, since correction of delivery provision had more than trivial or negligible effect on price, delivery, and performance as bidder under initial invitation would only be obligated to make delivery and not to install the shelves in period stated. Furthermore, Standard Forms used although not requiring amendment to be signed and returned, provide for compliance by other means with mandatory acknowledgment requirement 408
"Entry into plant" requirement
"Entry into plant" requirement in request for proposals that would permit Govt. personnel to observe and consult with contractor during performance of manufacturing flyers' helmets solicited by Defense Supply Agency is essential requirement and offer of manufacturer who developed helmet that did not extend access to its plant was nonresponsive and properly rejected, for in addition to its license agreement with manufacturer, Govt. not only wanted to test contractor's ability to manufacture helmet, but also adequacy of specification in mass production. Moreover, mere allegation of possible divulgence of trade secrets in violation of confidential relationship does not warrant intervention of U.S. GAO in award process where adequate safeguards exist against improper disclosure of proprietary information 476
Failure to bid on each item
Low bid that omitted price of "Environmental Protection" item contained in IFB to repair portion of Mississippi River banks, a price bidder alleges was included in basic bid price, is nonresponsive bid that may not be considered for award, for although environmental work could have been treated as inherent part of job, it was regarded as material and listed as separate item calling for separate price and, therefore, omission

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Specifications—Continued
Deviations—Continued
Informal *v.* Substantive—Continued
Failure to bid on each item—Continued
should not be waived as minor informality. To do so would ignore rule that where there is any substantial question as to whether bidder upon award could be required to perform all of work called for if he chose not to, integrity of competitive bid system requires that bid be rejected as, at least, ambiguous unless bid otherwise affirmatively indicates that bidder contemplated performance---------- 543
Option prices
Low bid that failed to quote unit price on option items under invitation for radar transponders that stated offers would be evaluated "exclusive of the option quantity" is not nonresponsive bid. If IFB had specified that option prices may not exceed basic bid prices or established some other standard for option prices, Govt. would be deprived of valuable benefit if option could not be exercised, or if Govt. intended to exercise option, or portion of it, at time of award, bid omitting option prices would be nonresponsive. However, IFB did not establish ceiling for option prices or provide for including them in bid evaluation; therefore, failure to quote option prices is not material deviation since there is substantially no difference between bid with an unreasonably high option price and bid without any option price---------- 528
Failure to furnish something required
Addenda acknowledgment
Wage determinations
The general rule that failure of bidder to acknowledge receipt of amendment which could affect price, quality, or quantity of procurement being solicited, renders bid nonresponsive because bidder would have option to decide after bid opening to become eligible for award by furnishing extraneous evidence that addendum had been considered or to avoid award by remaining silent, is for application to low bid for construction of prefabricated metal building as unacknowledged amendment incorporated wage determination that affected contract price, notwithstanding that E.O. 11615, dated Aug. 15, 1971, concerning stabilization of prices, rents, wages and salaries was in effect, since Executive order does not obviate implementation of rates in wage determination and, therefore, failure to acknowledge amendment may not be waived--- 500
Waiver
Basis
Failure of bidder to acknowledge receipt of amendment issued on Standard Form 30 to correct delivery date stated in invitation for bids to procure library shelves, and which contained Standard Form 33A, to include installation of the shelves may not be waived as minor informality, notwithstanding waiver of provision in the amendment for extension of bid opening date would be proper, since correction of delivery provision had more than trivial or negligible effect on price, delivery, and performance as bidder under initial invitation would only be obligated to make delivery and not to install the shelves in period stated. Furthermore, Standard Forms used although not requiring amendment to be signed and returned, provide for compliance by other means with mandatory acknowledgment requirement---------- 408

CONTRACTS—Continued Page
Specifications—Continued
Failure to furnish something required—Continued
Addenda acknowledgment—Continued
Waiver—Continued
Erroneous
Although late acknowledgment of amendment which provided in event of discrepancy between solicitation requirements and sample display kit, solicitation would govern, and added a clause to request for proposals for survival kits regarding royalties, by low offeror who prior to issuance of amendment had confirmed its offer did not include royalties was erroneously waived on basis amendment did not go to substance of offer and was not prejudicial to other offerors, issuance of amendment was proper exercise of administrative authority in absence of statutory or regulatory provision establishing criteria for determination of what constitutes substantial change to justify reopening negotiations after they have been terminated by call for best and final offers---- 411
Minimum needs requirement
Erroneously stated
Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., not withstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B–173244, August 16, 1972---- 518
Specification adequacy
Invitation for bids soliciting Attitude Indicators for 2-year period that included items for definite and estimated quantities, and First Article Test Report which was not to be separately priced, but omitted the technical data specification for determining cost of spare parts, maintenance, etc., of indicators was an inadequate invitation and was properly canceled pursuant to 10 U.S.C. 2305(c) and par. 2–404.1(b)(i) of ASPR, since omission precluded consideration of all cost factors as required by ASPR 2–404.1(b)(iv), and therefore the minimum needs of of Govt. not having been met, reason for cancellation of the inadequate invitation was cogent. Moreover, reinstatement of original invitation to permit data package to be offered would be prejudicial without insuring the standing of bidders would remain unchanged---- 426
Qualified products
Product designation
Under invitation for bids providing for award of guaranteed minimum requirements type contract for power tools that contained Qualified Products clause and provided space for manufacturer's name, QPL test qualification reference number, but not for product designation, failure to furnish product designation does not require rejection of bid since, although omitted information is useful in identifying whether an item

CONTRACTS—Continued Page
Specifications—Continued
Qualified products—Continued
Product designation—Continued
is on applicable QPL, it is not essential as manufacturer's name and QPL test numbers furnished by bidder suffice for locating appropriate item on QPL, and task of tracing an item imposes no undue burden on contracting agency. Therefore, there is nothing in omission of product designation to equate with failure to identify ---------- 415
Restrictive
Particular make
Negotiated procurement
When brand name or equal clause contained in par. 1-1206.3(b) of ASPR and written for advertised procurements is adopted for use in negotiated procurements pursuant to ASPR 1-1206.5 and 3-501(b)C (xxv), clause should be suitably modified. Mere substitution of the words "offeror" for "bidder" and "offer" for "bid" leaves restrictions in a request for proposals (RFP) which are contrary to intent and purposes of negotiated procurement. Furthermore, the inclusion in RFP of provision similar to par. (c)(3) of clause, which precludes modification after bid opening to make product conform to brand name is inconsistent with principle of allowing modifications in proposals pursuant to ASPR 3–805.1(b) ---------- 431
Samples
Brand name or equal procurement
"Facility of Use"
Requirement for samples to be submitted with bids on brand name or equal procurement for quantities of noise generator and noise figure meter was in accord with policy in par. 2–202.4 of Armed Services Procurement Reg. for "products that must be suitable from standpoint of balance, facility of use, general feel, color, or pattern," and testing of samples notwithstanding descriptive data indicated compliance with specifications was proper under invitation that provided for inspection and testing of samples to evaluate characteristics of "facility of use" to determine compliance with brand name items with respect to workmanship, performance, verification, and compatibility. Furthermore, conflict regarding test results must be resolved in favor of administrative position since there is no showing test was defective, improperly conducted, or erroneously reported ---------- 583
Subcontracts
Bid shopping
Listing of subcontractors
Where invitation for bids did not require bidder to name his subcontractors and there was no statutory or regulatory requirement for listing of subcontractors, there is no basis to reject low bid for construction of Govt. building for failing to identify subcontractors used in compilation of bid or to be used in performance of contract. Since "bid shopping" was not prohibited under procurement, fixed price stated in bid could be premised on nothing more than wisdom of bidder, however, use of subcontractors' bids as guide in determining the prime bid would not give bidder an unfair advantage, and it follows award to low bidder constitutes an unconditional obligation for Govt. to pay the fixed price and contractor to perform at that price ---------- 403

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Termination

Compensation

Authority to settle

Forest Service has authority to enter into agreement with contractor to settle termination costs incident to Agriculture Board of Contract Appeals ruling that Govt. improperly defaulted contract, but since Board's holding that Forest Service breached its obligation to furnish agreed supplies is not supported by evidence, damages awarded by Board for supposed breach may not be settled. Breach of contract claims are not properly cognizable by Boards of Contract Appeals, and Dept. of Agriculture should make independent analysis of merits of claim and full examination of available defenses, and then determine if breach occurred under decisions of courts and/or U.S. GAO, and should provide that in future proceedings, Board shall not express opinion or make finding of contract breach 491

Convenience of Government

Cancellation converted to termination

Cancellation of contract award because of contracting officer's failure to hold discussions with all offerors within competitive range after holding discussions with one offeror should be converted to termination for convenience since contracting officer did not lack authority to make award and there is no indication in record that either offeror or procurement activity contracted other than in good faith or with any intent to deprive other offerors of equal opportunity to compete and, consequently, contract awarded was not void *ab initio*. Cancellation of contract is desirable, but for urgency of procurement, costs that would be chargeable against Govt., or similar circumstances relating to best interests of Govt. when termination for convenience would either be too expensive or not in Govt.'s best interest 481

Award of contract under IFB to furnish plant growth chamber complex to low bidder who was nonresponsive to specification dimensions should be terminated for convenience of the Govt., notwithstanding contracting officer believes offer satisfies needs of Govt. since deviation affects quality and price and, therefore, award was improperly made. The procurement should be resolicited to reflect Govt.'s actual needs, and revised specification should eliminate both the open-ended delivery provision, because it does not provide definite standard against which all bidders can be measured or on which all bids can be based, and the clause allowing minor bid deviations if listed and submitted as part of bid before bid opening, a clause that prevents free and equal competitive bidding. The cancellation originally directed was modified to a termination in B-173244, August 16, 1972 518

Erroneous awards

Where contracting officer overlooked discount offered by bidder which if evaluated would have displaced successful bidder awarded 1-year janitorial requirements contract under invitation for bids, when first two low bidders were found nonresponsive because low bidder, unable to show its intended bid, withdrew and second low bidder, although erroneously interpreting the specifications, would not allege mistake, award made contrary to 10 U.S.C. 2305(c) to other than lowest responsive bidder should be terminated for convenience of Govt., notwithstanding

CONTRACTS—Continued Page
Termination—Continued
Convenience of Government—Continued
Erroneous awards—Continued
claim for 6 months' performance under contract, as administratively recommended on basis no difficulties are anticipated in changing contractors and that termination would be in best interest of U.S---------- 423
Two-step procurements
Bid pro cedure. (*See* Bids, two-step procurement)
Warranties
Implied
Disclaimer by contractor
Refusal of GSA to consider several proposals by offeror on automatic data processing equipment because they contained provision disclaiming implied warranties of merchantability and fitness for particular purpose and excluding liability to Govt. for consequential damage is discretionary procurement policy, which in absence of statutory or regulatory provision requiring GSA to accept exclusionary clauses is not subject to legal objection. Also discretionary is use of "model" contract by GSA for procurement of equipment, technique which was not imposed upon offerors without opportunity for discussion and negotiation; in fact offeror protesting its use instead of doing so immediately, urged inclusion of its limitation of liability clause until time set for submission of final prices, and further participated by offering amendments to model contract---------- 609
Although refusal of GSA to accept proposals of offeror to furnish automatic data processing equipment for Defense user agencies that included disclaimer against implied warranties and liability for consequential damages is matter of procurement policy within discretion of agency, interests of Govt. and its contractors would be better served if Govt.'s position was fully and explicitly set forth in regulations of general applicability and in solicitations furnished prospective contractors rather than enunciated during negotiations, and it is suggested that policy be further examined, with consideration given to varying extent of contractor liability for consequential damages, and to effect of such variances on cost to Govt. and disposition of firms toward doing business with Govt---------- 613
CORPORATIONS
Corporate entity
Bid under trade name acceptability
The fact that bid of corporation to furnish guard services was submitted under its trade name does not require rejection of bid on basis corporation lacks legal entity since recognized principle is that corporation may conduct business under assumed name, or under name differing from its true corporate name, and in District of Columbia where corporation is located, contract executed in assumed name is valid if unaffected by fraud and, therefore, bid may be considered as being submitted in true name of organization which had corporate entity at time of bid opening---------- 494

CORPORATIONS—Continued Page
Corporate entity—Continued
Determination
Bidder who was authorized to operate as detective agency at time its bid was submitted and was under consideration for award, and during part of period of its performance of interim guard service pending determination of its "legal entity," but who is not now subject to prohibition against employment by Govt. of detective agencies—prohibition that applies regardless of actual services performed—since its detective agency license has expired, should not be eliminated from consideration for award of proposed service contract, in view of fact that bid describing corporate business of bidder "as guard service to commercial and residential establishments," with no mention of its detective service was made in good faith 494

DECEDENTS' ESTATES
Person causing death of decedent
Federal *v.* State law
Husband who entered plea of guilty to first degree manslaughter in connection with death of wife—former Federal employee in State of Ohio—is not entitled to unpaid compensation due decedent. Statute and case law of State which permit payment to husband would prevail only in absence of Federal statute or policy. However, policy governing payment pursuant to 5 U.S.C. 5582, prescribing order of precedence for payment of money due deceased employee, is that payment will not be made to person otherwise entitled if such person participated in death of individual in whose estate he seeks to benefit in absence of evidence establishing that there was no felonious intent on his part. Furthermore, payment may not be made to estate of decedent as there is surviving minor child who is higher in order of precedence 483

DETECTIVE SERVICES
Employment prohibition. (*See* Personal Services, detective employment prohibition)

ECONOMIC STABILIZATION ACT OF 1970
Federal employees
Wage freeze
Adjustment
Use of terms "contract" and "employment contract" in sec. 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing payment of wage or salary increases agreed to in employment contract executed prior to Aug. 15, 1971, to take effect prior to Nov. 14, 1971, but withheld by reason of the wage and price freeze imposed by E.O. 11615, does not exclude General Schedule and other annual rate Federal employees from application of the section, and Federal wage board employees are within purview of sec. 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-grade increases for both statutory and wage board employees may be paid retroactively as conditions of sec. 203(c)(3) (A) and (B) were satisfied to effect increases were provided by law or contract prior to Aug. 15, 1971, and funds are available to cover increases 525

EQUAL EMPLOYMENT OPPORTUNITY Page

Contract provision. (*See* Contracts, labor stipulations, nondiscrimination)

EQUIPMENT

Automatic Data Processing Systems

Selection and purchase

By other than General Services Administration

Applicability of General Services Administration regulations

Federal agencies delegated authority by GSA, pursuant to 40 U.S.C. 759(b)(2), to purchase automatic data processing equipment (ADPE) are required to conform to Federal Property Management Reg. (FPMR) promulgated by GSA to coordinate and provide for economic and efficient purchase of ADPE systems or units and, therefore, procurement of ADP equipment by Army Corps of Engineers delegated authority subject to provisions of FPMR, particularly late proposals and modifications provision—authority redelegated to District Engineer—is not governed by Armed Services Procurement Reg., and District Engineer vested with all authority and responsibility usual to position of contracting officer, with exception of choosing successful offeror, having issued request for proposals that failed to incorporate late proposal and modification requirement of FPMR, properly cancelled request..... 457

Warranties and damages

Refusal of GSA to consider several proposals by offeror on automatic data processing equipment because they contained provision disclaiming implied warranties of merchantability and fitness for particular purpose and excluding liability to Govt. for consequential damage is discretionary procurement policy, which in absence of statutory or regulatory provision requiring GSA to accept exclusionary clauses is not subject to legal objection. Also discretionary is use of "model" contract by GSA for procurement of equipment, technique which was not imposed upon offerors without opportunity for discussion and negotiation; in fact offeror protesting its use instead of doing so immediately, urged inclusion of its limitation of liability clause until time set for submission of final prices, and further participated by offering amendments to model contract.... 609

Although refusal of GSA to accept proposals of offeror to furnish automatic data processing equipment for Defense user agencies that included disclaimer against implied warranties and liability for consequential damages is matter of procurement policy within discretion of agency, interests of Govt. and its contractors would be better served if Govt.'s position was fully and explicitly set forth in regulations of general applicability and in solicitations furnished prospective contractors rather than enunciated during negotiations, and it is suggested that policy be further examined, with consideration given to varying extent of contractor liability for consequential damages, and to effect of such variances on cost to Govt. and disposition of firms toward doing business with Govt..... 609

FUNDS Page

Miscellaneous receipts. (*See* **Miscellaneous Receipts**)

Trust

Creation of trust

Prohibition

Annuity payments

Creation of trust to receive annuity payments made under Retired Serviceman's Family Protection Plan (RSFPP), 10 U.S.C. 1431–1446, is not legally permissible since sec. 1435 describes eligible beneficiaries as spouse or children, and sec. 1440 provides that annuity elected by member of armed services is not assignable or subject to execution, levy, attachment, garnishment, or other legal process. Therefore, widow receiving RSFPP annuity payments may not retain both legal and equitable ownership by executing Living Trust Agreement appointing herself as trustee or a bank in the event of her incompetency; annuities for a child or children in accord with DOD Dir. 1332.17 may only be paid to guardian or person who has care, custody, and control of child or children; and only payments to a duly appointed legal representative will discharge the Govt.'s liability 437

GENERAL ACCOUNTING OFFICE

Informal opinion

Not a legal precedent

An informal opinion to Navy member who was not entitled to decision that erroneously informed him as to his entitlement to transportation at Govt. expense of dependent acquired during his return travel from restricted overseas area to U.S. incident to his transfer to Fleet Reserve has no legal effect as precedent and should not be used as authority in similar cases 485

Jurisdiction

Civil service matters

Postal service

In establishing permanent pay schedule for Postal Rate Commission employees exempted from General Schedule Pay Rates of Title 5 by 5 U.S.C. 2104(b) and 2105(e), Commission is, pursuant to 39 U.S.C. 3604(b), required to follow appropriate compensation rates established by Postal Service under ch. 10 of Title 39, notwithstanding sec. 3604(d) appears to give Commission independent authority as sec. 3604(d) does not supersede sec. 3604(b). However, sec. 3604(d) makes 39 U.S.C. 410(a) applicable to Commission to effect "No Federal law dealing with public or Federal contracts, property, work, officers, employees, budgets, or funds * * * shall apply to the exercise of the powers of the Postal Service" and, therefore, the Commission and not U.S. GAO is vested with authority to make final determination as to applicability of ch. 10 of Title 39 to Commission 395

Small business matters

Bidder denied Certificate of Competency (COC) by SBA following the contracting officer's determination of nonresponsibility based on preaward survey may not when reason for the denial—ability of subcontractor to deliver major component of submarine equipment solicited—is corrected request reconsideration of denial, and refusal of contracting officer to re-refer COC issue does not constitute arbitrary action where his determination of nonresponsibility was affirmed by

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Small business matters—Continued
SBA and is not affected by change in delivery schedule, and where re-referral of COC issue would require further survey and nonresponsibility determination, which time does not permit. Furthermore, U.S. GAO has no authority to compel SBA to review COC denial, or to reopen issue and its protest procedure may not be used to delay contract award to gain time for bidder to improve its position after denial of COC by SBA ---------- 448

HOLIDAYS
Days in lieu of
Inauguration Day
Fact that Inauguration Day, January 20 of each fourth year after 1965 is prescribed in 5 U.S.C. 6103(c) as legal public holiday for Federal employees in the District of Columbia and specified adjacent areas does not require regarding Friday, Jan. 19, 1973, as legal holiday for purposes of 5 U.S.C. 6103(b), which substitutes other days as legal holidays for purpose of statutes relating to pay and leave of Federal employees for those holidays enumerated in 5 U.S.C. 6103(a) that fall on nonworkdays, such as the Friday immediately before a Saturday holiday. Not only does the listing of public holidays in sec. 6103(a) not include Inauguration Day, legislative history of subsec. (c) indicates no additional legal holiday was intended and that only the working situation of employees around metropolitan area of District of Columbia would be affected ---------- 586

INSURANCE
Damage and loss claims
Effective date of insurance
Crop insurance contracts to cover freezing losses which were made effective by Federal Crop Insurance Corp. pursuant to 7 CFR 409.25 as of November 1, under the mistaken belief freezing weather would not occur earlier, may be modified to permit payment for crop damage resulting from freeze on October 30 and 31, on the basis of mutual mistake—a rule applicable to future as well as past events—since contracts did not reflect intention of parties to accomplish objective of providing crop insurance coverage for period of possible freeze. Furthermore, administrative delay in accepting timely filed applications for insurance until after several freezes had injured crops should not deprive applicants of insurance coverage, and Corporation failing to act within reasonable time has authority under 7 U.S.C. 1506(i) to take corrective action ---- 617

LEASES
Building construction for lease to Government
Construction commitment prior to leasing
Since implementation of statutory limitation on use of appropriations for lease construction programs included in Independent Offices Appropriation Acts since 1963 must assure that only construction already committed as private venture is offered to Govt. for rental, and fact offered building is not actually in existence is not decisive, GSA should not have accepted lease offer that failed to satisfy five criteria designed to meet the restriction because lessor as of date of solicitation did not have title or any other possessory interest to site to permit start of

LEASES—Continued Page
Building construction for lease to Government—Continued
Construction commitment prior to leasing—Continued
construction—the first criterion—or have firm construction contract with fixed completion date—the fifth criterion—and, furthermore, doubt as to compliance with remaining criteria—design, financing, and building permit—were not resolved ---- 573
Lease negotiation
Propriety
In negotiation pursuant to 41 U.S.C. 252(c)(10) of 20-year lease with four 5-year renewal options for space in building to be constructed, application of principles inherent in competitive system, even if negotiations were not subject to the Federal Procurement Regs., would have secured a more favorable lease, for then possibility of transferring option cost benefits to 20-year price would have been discussed; zoning requirements would not have been stated in terms of nonresponsiveness, terms inappropriate in negotiated contract; past performance and not financial capacity alone would have determined capacity to provide lease space by date specified; price evaluation basis would have been stated with information option prices would not be considered; and the cutoff date for negotiations would have been prospective. Although termination of lease would not be in the best interests of Govt., the progress of building construction should be closely monitored ---- 565
Negotiation
Competition
Maximum
Fact that lease offer was accepted although offeror had not compiled with five criteria established to implement statutory limitation on use of appropriations for lease construction programs included in the Independent Offices Appropriation Act of 1970 does not exclude lessor from participating in any resolicitation of the requirement, or preclude participation in future lease procurements as Govt. has duty to secure maximum competition in its procurements. However, since issues of noncompliance are broader than single transaction involved, Congress will be informed of matter for possible corrective legislative action, and, although payments under existing leases will be accepted, payments on leases hereafter executed without regard for restriction against leasing buildings to be erected for Govt. will be questioned ---- 573
LEAVES OF ABSENCE
Military personnel
Missing, interned, etc.
Accrual and payment of leave
Since Missing Persons Act, 37 U.S.C. 551–558, neither enlarges nor decreases entitlement of member of armed services to leave benefits, entitlement to leave and to payment for unused accrued leave are governed by Armed Forces Leave Act of 1946 (10 U.S.C. 701–707 and 37 U.S.C. 501–504) and, therefore, person in missing status continues to accrue leave at rate of 2½ calendar days for each month in missing status until date of death, and payment for any leave to the credit of a missing person on date determined by competent evidence to be date of death, subject to 60-day maximum prescribed in 37 U.S.C. 501(d), should be computed on the basic pay and allowances to which member was entitled on date of death ---- 391

LOANS Page
Government insured
Default
Bank's negligence, fraud, or misrepresentation effect on guarantee
Although under loan guarantee program conducted pursuant to sec. 7(a) of Small Business Act, SBA has discretionary power to arrange for bank to make demand payment (immediate purchase) for percentage of loan guaranteed, either upon default of loan or when borrower breaches material convenant of loan agreement, payment by SBA to bank under loan guaranteed program "where SBA officials have knowledge, prior to payment, of possibility of bank negligence, fraud, or misrepresentation," in order to protect certifying officers would not be in best interest of U.S. and may not be approved. However, SBA may pay innocent holder of guaranteed loan note upon default of borrower since payment will not waive any right of SBA against bank involved 474

MEALS
Furnishing
Military Airlift Command flights
Liability of Government travelers
The practice of collecting from officers and civilians reimbursement for meals provided them on Military Airlift Command military flights may not be discontinued on bases charges for transportation provided to Govt. travelers on contract charter flights appear to be subject to tariff rates fixed by Civil Aeronautics Board on substantially same basis as tariff rates established for commercial flights and, therefore, cost of in-flight meals could not be identified as part of cost of either contract charter flights or private commercial flights, and that in-flight meals are not extra compensation within meaning of 5 U.S.C. 5536, since meals supplied by Base Mess are chargeable to funds appropriated for operation of messes and, therefore, collection for cost of meals furnished is required by sec. 810 of Dept. of Defense Appropriation Act, 1971 455

MEETINGS
Reservation cancelled
Liability
Service charges imposed by Airlie House "75% of total or $750.00 per night, whichever is less" upon cancellation of confirmed reservation, terms which were furnished contracting agency before issuance of purchase order reserving facilities, may be paid since valid contractual relationship was created upon issuance of purchase order and provisions of Airlie's operating policy furnished the Govt. prior to issuance of purchase order became part of contract. While cancellation of hotel reservations within reasonable time prior to dates reserved generally will not involve liability to pay for unused rooms, and provision regarding payment of unreasonably large amount would be unenforceable penalty clause, there is no basis for determination that cancellation charges are unreasonable since Airlie is exclusively a conference center which deals only in group reservations 453

MILITARY PERSONNEL Page

Benefits generally

Election

Irrevocable

Election by Army Reserve 2nd Lt. incident to graduation from Officer Candidate School at Ft. Benning and assignment to 2 years' active duty there, to move his household goods rather than his housetrailer from home of record to Columbus, Ga., where he had rented an apartment, because he anticipated duty in Vietnam, may not be revoked when overseas orders were cancelled, and member paid trailer allowance authorized in 37 U.S.C. 409 in lieu of dislocation allowance and shipment of baggage and household goods. Unless erroneously informed of benefits and election is irrevocable, for an additional election or reelection may not be authorized, and finality in the settlement of claims is essential. Since member was aware of amounts payable whatever his election and he chose to move his household goods as most beneficial arrangement for him, he is not entitled to adjustment of cost 509

Dependents

Transportation. (*See* Transportation, dependents, military personnel)

Household effects

Transportation. (*See* Transportation, household effects, military personnel)

Missing, interned, etc.

Leaves of absence

Accrual and payment

Since Missing Persons Act, 37 U.S.C. 551–558, neither enlarges nor decreases entitlement of member of armed services to leave benefits, entitlement to leave and to payment for unused accrued leave are governed by Armed Forces Leave Act of 1946 (10 U.S.C. 701–707 and 37 U.S.C. 501–504) and, therefore, person in missing status continues to accrue leave at rate of 2½ calendar days for each month in missing status until date of death, and payment for any leave to the credit of a missing person on date determined by competent evidence to be date of death, subject to 60-day maximum prescribed in 37 U.S.C. 501(d), should be computed on the basic pay and allowances to which member was entitled on date of death 391

Storage of household effects

Extension of nontemporary storage

The requirement in Joint Travel Regs. that Secretary concerned or his designee at termination of each year member of uniformed services is in missing status—that is absent for period of more than 29 days—must determine need for and authorize an extension of nontemporary storage of household and personal effects of member provided under par. M8101–6 of the regs. is in accord with language of Public Law 90–236 (37 U.S.C. 554(b)) and its legislative history and, therefore, regs. may not be amended to delete yearly approval requirement to provide for continuation of nontemporary storage so long as member is in missing status 392

Pay. (*See* Pay)

Quarters allowance. (*See* Quarters Allowance)

MILITARY PERSONNEL—Continued

Record correction Page

Overpayment liability

Debt remission

Correction of military records under 10 U.S.C. 1552 directing remission of indebtedness of officer who refunded an overpayment of retired pay resulting from erroneous use of pay rates effective July 1, 1968, rather than rates in effect June 1, 1968, officer's mandatory retirement date, does not support repayment of amount collected since officer's mandatory retirement date computed on base retirement date of April 30, 1938 remained unaffected by correction as failure to accomplish officer's retirement on date required by law does not add to his right in any way in computing retired pay entitlement and, furthermore, authority to correct military records is limited to factual changes and Secretary concerned has no authority to waive indebtedness of officer, 10 U.S.C. 9837(d) applying only to enlisted personnel 563

Storage

Household effects. (*See* **Storage, household effects, military personnel**)

Transportation

Household effects. (*See* **Transportation, household effects, military personnel**)

While in a leave status

To eliminate difficulty being experienced in distinguishing between "cost-charge" Govt. procured transportation furnished members traveling in leave status without prior orders who are without funds to return to their duty station and mixed travel that is adjusted under par. M4154 of the Joint Travel Regs. on travel vouchers of members traveling under change-of-station orders with leave en route who are without funds at their leave point and are also furnished Govt. procured transportation, regulations should be changed to produce uniformity in treatment of member travel claims. It is suggested that issuance of transportation request (TR) in all leave cases be treated as "cost-charge" transaction and amount of TR deducted from pay and allowances due member, or in lieu of issuing TR, a casual payment be authorized 556

Travel expenses. (*See* **Travel Expenses, military personnel**)

MISCELLANEOUS RECEIPTS

Special account *v.* miscellaneous receipts

Federally and State supported projects

Revenues received by Smithsonian Institution from several activities at National Zoo may be deposited into the Treasury to credit of the Institution under sec. 5589, Revised Statutes, 20 U.S.C. 53, since requirement for deposit of gross receipts from activities supported by appropriated funds into general fund of the Treasury as miscellaneous receipts, pursuant to sec. 3617, Revised Statutes, need not apply to Zoo operations that receive support from trust funds and gifts, and are conducted under authority of original trust charter and 1846 Organic Act and not on basis of real property rights. However, as bulk of administration of Zoo activities will continue to be supported by appropriated funds, books should reflect gross amount of receipts realized from Zoo activities supported by appropriated funds and a full disclosure made to Congress. 42 Comp. Gen. 650, modified 506

OFFICERS AND EMPLOYEES Page

Clothing and personal furnishings. (*See* Clothing and Personal Furnishings)
Compensation. (*See* Compensation)
Death or injury
Compensation claims. (*See* Decedents' Estates, compensation)
Postal service employees. (*See* Postal Service, United States, employees)
Qualifications
Licenses
Doctors
Use by VA's Dept. of Medicine and Surgery of physicians who have been granted temporary or limited license to practice medicine, surgery, or osteopathy, from State where appropriate State Board has made determination that applicant is professionally qualified to practice in that State, but does not qualify for regular license, because he has not complied with various technical requirements—either statutory or administrative—such as residency or citizenship requirements, may be continued for period not to exceed 18 months in view of inability of Dept. to hire medical personnel with permanent or unrestricted licenses, provided VA also determines in accordance with 38 U.S.C. 4106(a) that individual involved is professionally qualified to practice medicine, surgery or osteopathy 536
Training
Failure to fulfill obligated service
Indebtedness of employee
Training costs provided under 5 U.S.C. 4108, which were collected from employees who transferred to other Govt. agencies or organizations, without discharging their service commitment, prior to issuance of Fed. Personnel Manual Ltr. No. 410-8, authorizing waiver of repayment of training costs if recovery would be against equity and good conscience or against public interest, may not be reimbursed to employees, notwithstanding completion of period of time by employee with gaining agency at least equal to service commitment to losing agency, as waiver authority extends only to waiver of right to recover and, therefore, since debt for training costs has been extinguished, no right of recovery remains 419
Service requirement
Transfer to another Government agency
Assumption of training costs by acquiring agency
Irrespective of whether determination is made that recovery is required of training costs provided employee under 5 U.S.C. 4108 at time of his transfer to another Govt. agency or organization, or whether employee's obligations under a service agreement are satisfied by service with another agency or organization, there is no authority for assessment of training costs against agency to which employee transfers notwithstanding the benefit of employee's training paid for by losing agency inures to gaining agency 419
Waiver of training costs
With amendment of Fed. Personnel Manual by Ltr. No. 410-8, head of agency or his delegated representative is authorized to waive recovery of training costs extended under 5 U.S.C. 4108 when an employee transfers to another agency or organization in any branch of Govt. prior to completion of agreed period of services and gives notice of at least 10

OFFICERS AND EMPLOYEES—Continued Page
Training—Continued
Service requirement—Continued
Transfer to another Government agency—Continued
Waiver of training costs—Continued
workdays of his intent to transfer, and losing agency determines collection of training costs would be against equity and good conscience or against public interest, and instructions may be applied retroactively where gaining agency benefits by employee's training and waiver is conditioned on completion of employee's obligated service by continued employment with his new agency, since waiver is in public interest and, therefore, retroactive application of instructions is immaterial 419

ORDERS
Cancelled, revoked, or modified
Leave status
Navy enlisted member stationed in California who while on leave in Baltimore, which was authorized under orders providing for subsequent temporary duty to attend school in Rhode Island, is directed to return to permanent duty station upon completion of leave is entitled to travel allowances equivalent to round-trip distance between permanent duty station and leave point, not to exceed round-trip distance between permanent and temporary duty stations, even though ordinarily such allowances are not payable for leave travel performed for personal reasons and not public business, since member performed circuitous travel to his leave point under competent orders, travel he would not have undertaken had he not been ordered to perform the temporary duty. B–166236, May 21, 1969, modified 548

PAY
Civilian employees. (*See* Compensation)

PAY
Retired
Annuity elections for dependents
Trust establishment to receive payments
Creation of trust to receive annuity payments made under Retired Serviceman's Family Protection Plan (RSFPP), 10 U.S.C. 1431–1446, is not legally permissible since sec. 1435 describes eligible beneficiaries as spouse or children, and sec. 1440 provides that annuity elected by member of armed services is not assignable or subject to execution, levy, attachment, garnishment, or other legal process. Therefore, widow receiving RSFPP annuity payments may not retain both legal and equitable ownership by executing Living Trust Agreement appointing herself as trustee or a bank in the event of her incompetency; annuities for a child or children in accord with DOD Dir. 1332.17 may only be paid to guardian or person who has care, custody, and control of child or children; and only payments to a duly appointed legal representative will discharge the Govt.'s liability 437

PERSONAL SERVICES Page

Contracts

Basis for contracting personal services

Since rule that purely personal services for Govt. are to be performed by Federal personnel under Govt. supervision is rule of policy and not positive law it need not be applied when contracting out is substantially more economical, feasible, or made necessary by unusual circumstances and services do not require Govt. supervision, and, therefore, services of Spanish translator obtained under purchase order may be continued and payment made in accordance with the terms of order. However, such services in future should be made subject to formal contract, for authority to use purchase order for services is primarily intended to relate to one-time operation. Overrules 6 Comp. Gen. 364 ---------- 561

Detective employment prohibition

Applicability

Bidder who was authorized to operate as detective agency at time its bid was submitted and was under consideration for award, and during part of period of its performance of interim guard service pending determination of its "legal entity," but who is not now subject to prohibition against employment by Govt. of detective agencies—prohibition that applies regardless of actual services performed—since its detective agency license has expired, should not be eliminated from consideration for award of proposed service contract, in view of fact that bid describing corporate business of bidder "as guard service to commercial and residential establishments," with no mention of its detective service was made in good faith ---------- 494

POSTAL SERVICE, UNITED STATES

Employees

Compensation

Postal Rate Commission employees

In establishing permanent pay schedule for Postal Rate Commission employees exempted from General Schedule Pay Rates of Title 5 by U.S.C. 2104(b) and 2105(e), Commission is, purusant to 39 U.S.C. 3604(b), required to follow appropriate compensation rates established by Postal Service under ch. 10 of Title 39, notwithstanding sec. 3604(d) appears to give Commission independent authority as sec. 3604(d) does not supersede sec. 3604(b). However, sec. 3604(d) makes 39 U.S.C. 410(a) applicable to Commisison to effect "No Federal law dealing with public or Federal contracts, property, work, officers, employees, budgets, or funds * * * shall apply to the exercise of the powers of the Postal Service" and, therefore, the Commission and not U.S. GAO is vested with authority to make final determination as to applicability of ch. 10 of of Title 39 to Commission ---------- 395

PROPERTY

Public

Private use

Receipts disposition

Revenues received by Smithsonian Institution from several activities at National Zoo may be deposited into the Treasury to credit of the Institution under sec. 5589, Revised Statutes, 20 U.S.C. 53, since requirement for deposit of gross receipts from activities supported by appropriated funds into general fund of the Treasury as miscellaneous

PROPERTY—Continued Page
Public—Continued
Private use—Continued
Receipts disposition—Continued
receipts, pursuant to sec. 3617, Revised Statutes, need not apply to Zoo operations that receive support from trust funds and gifts, and are conducted under authority of original trust charter and 1846 Organic Act and not on basis of real property rights. However, as bulk of administration of Zoo activities will continue to be supported by appropriated funds, books should reflect gross amount of receipts realized from Zoo activities supported by appropriated funds and a full disclosure made to Congress. 42 Comp. Gen. 650, modified---------- 506
PURCHASES
Purchase orders
Use limitation
Since rule that purely personal services for Govt. are to be performed by Federal personnel under Govt. supervision is rule of policy and not positive law it need not be applied when contracting out is substantially more economical, feasible, or made necessary by unusual circumstances and services do not require Govt. supervision, and, therefore, services of Spanish translator obtained under purchase order may be continued and payment made in accordance with the terms of order. However, such services in future should be made subject to formal contract, for authority to use purchase order for services is primarily intended to relate to one-time operation. Overrules 6 Comp. Gen. 364---------- 561
QUARTERS ALLOWANCE
Availability of quarters
Assignment delayed
Navy ensign, without dependents, who while on temporary duty in connection with fitting out a vessel was not assigned Govt. Bachelor quarters for more than 2 months after reporting for duty, although aware of their availability within few days after arrival, and who for period prior to quarters assignment was credited with BAQ under 37 U.S.C. 403(f), and resided, without authority, in civilian community and was paid per diem, is not considered to have been involuntarily assigned to quarters occupancy since he was aware of availability of quarters and assignment policy in effect at the Command and, therefore, his residency in civilian community was for his own convenience. Although payment of BAQ prior to assignment of quarters will not be questioned, there is no authority for further payment of BAQ---------- 513
Dependents
Husband and wife both members of armed services
Female officer who married another officer receiving basic allowance for quarters (BAQ) on account of children from previous marriage until his separation from service on June 7, 1971, is not entitled to allowance from date of birth of a son to the marriage on March 14, 1971, until her husband left service, for although under rule 12, table 3–2–4, Dept. of Defense Military Pay and Allowances Entitlements Manual when both members are assigned to same or adjacent bases or shore stations and male member has dependents other than a wife and female member has dependents "in her own right"—parents and children under 21 from another

QUARTERS ALLOWANCE—Continued Page
Dependents—Continued
Husband and wife both members of armed services—Continued
marriage—and family type quarters are not assigned for joint occupancy, both are entitled to receive BAQ, the child born of the marriage of the two officers must be regarded as father's dependent to prevent dual BAQ payments 413
REGULATIONS
Noncompliance effect
Delegated authority
Federal agencies delegated authority by GSA, pursuant to 40 U.S.C. 759(b)(2), to purchase automatic data processing equipment (ADPE) are required to conform to Federal Property Management Reg. (FPMR) promulgated by GSA to coordinate and provide for economic and efficient purchase of ADPE systems or units and, therefore, procurement of ADP equipment by Army Corps of Engineers delegated authority subject to provisions of FPMR, particularly late proposals and modifications provision—authority redelegated to District Engineer—is not governed by Armed Services Procurement Reg., and District Engineer vested with all authority and responsibility usual to position of contracting officer, with exceptions of choosing successful offeror, having issued request for proposals that failed to incorporate late proposal and modification requirement of FPMR, properly cancelled request 457
SALES
Bids
Mistakes
Lot *v.* unit price basis
Notwithstanding clause in invitation offering steel bolts for sale on lot basis provided that in event total bid price and unit bid price were not in agreement, "the unit bid price will not be considered," contracting officer should have requested verification of bid price prior to award where bid on item appraised at $100 was $477.25, and other bids ranged from $7 to $82, since unit price multiplied by any of quantities in lot item did not result in total price bid, but was correct for item below item bid on, and as Defense Disposal Manual DOD 4160.21–M requires sales contracting officer to examine all bids for mistakes and to request verification from bidder in cases of apparent mistake, even though sales terms indicate otherwise, contract awarded should be cancelled and bid deposit refunded. B–173163, dated Oct. 1, 1971, modified 488
SMALL BUSINESS ADMINISTRATION
Contracts. (*See* Contracts, awards, small business concerns)
Loans
Guaranteed loan programs
Default, etc., by borrower
Bank's demand payment status
Although under loan guarantee program conducted pursuant to sec. 7(a) of Small Business Act, SBA has discretionary power to arrange for bank to make demand payment (immediate purchase) for percentage of loan guaranteed, either upon default of loan or when borrower breaches material covenant of loan agreement, payment by SBA to bank under loan guaranteed program "where SBA officials have knowledge, prior

SMALL BUSINESS ADMINISTRATION—Continued Page

Loans—Continued

Guaranteed loan programs—Continued

Default, etc., by borrower—Continued

Bank's demand payment status—Continued

to payment, of possibility of bank negligence, fraud, or misrepresentation," in order to protect certifying officers would not be in best interest of U.S. and may not be approved. However, SBA may pay innocent holder of guaranteed loan note upon default of borrower since payment will not waive any right of SBA against bank involved 474

SMITHSONIAN INSTITUTION

National Zoo

Revenue disposition

Revenues received by Smithsonian Institution from several activities at National Zoo may be deposited into the Treasury to credit of the Institution under sec. 5589, Revised Statutes, 20 U.S.C. 53, since requirement for deposit of gross receipts from activities supported by appropriated funds into general fund of the Treasury as miscellaneous receipts, pursuant to sec. 3617, Revised Statutes, need not apply to Zoo operations that receive support from trust funds and gifts, and are conducted under authority of original trust charter and 1846 Organic Act and not on basis of real property rights. However, as bulk of administration of Zoo activities will continue to be supported by appropriated funds, books should reflect gross amount of receipts realized from Zoo activities supported by appropriated funds and a full disclosure made to Congress. 42 Comp. Gen. 650, modified 506

STATES

Municipalities

Services to Federal Government

Service charge *v.* tax

Even though governmental or private entity furnishing ambulance services is supported in whole or in part by State or local taxes, VA may enter into contract for transporting veterans to and from a VA facility, provided political subdivision involved is not required to furnish such service without direct charge, and contract should not only provide for payments not to exceed fair and reasonable value of services received, but should comply with Fed. procurement law and regs. Under Mississippi statutes local governments are not required to furnish ambulance services and, therefore, VA may enter into contract with city of Biloxi or private concern to furnish transportation to and from VA center at Biloxi, but contract may not provide for subsidy since 46 Comp. Gen. 616 is not precedent for authorizing subsidy payments generally. Modifies B–172945, June 22, 1971 444

STORAGE Page

Household effects

Military personnel

Nontemporary storage

Missing persons

The requirement in Joint Travel Regs. that Secretary concerned or his designee at termination of each year member of uniformed serivces is in missing status—that is absent for period of more than 29 days—must determine need for and authorize an extension of nontemporary storage of household and personal effects of member provided under par. M8101–6 of the regs. is in accord with language of Public Law 90–236 (37 U.S.C. 554(b)) and its legislative history and, therefore, regs. may not be amended to delete yearly approval requirement to provide for continuation of nontemporary storage so long as member is in missing status 392

TRANSPORTATION

Dependents

Military personnel

Dependents acquired after issuance of orders

Navy member who interrupted his travel from Saigon to Philadelphia incident to his transfer to Fleet Reserve to be married in England is not entitled to dependent's transoceanic transportation at Govt. expense under authority of par. M7060 of Joint Travel Regs. since pursuant to par. 4300–2, member is considered to have been without dependent at restricted station and he, therefore, is subject to par. M7000–14, prohibiting payment by Govt. of transoceanic or overseas land transportation of dependent, and to par. M7000–17, prohibiting transportation of dependents at Govt. expense upon member's permanent change of station when presence of dependents at member's overseas station was not authorized or approved by appropriate military overseas commander. 485

Household effects

Military personnel

Election of benefits

Irrevocable

Election by Army Reserve 2nd Lt. incident to graduation from Officer Candidate School at Ft. Benning and assignment to 2 years' active duty there, to move his household goods rather than his housetrailer from home of record to Columbus, Ga., where he had rented an apartment, because he anticipated duty in Vietnam, may not be revoked when overseas orders were cancelled, and member paid trailer allowance authorized in 37 U.S.C. 409 in lieu of dislocation allowance and shipment of baggage and household goods. Unless erroneously informed of benefits and election is irrevocable, for an additional election or reelection may not be authorized, and finality in the settlement of claims is essential. Since member was aware of amounts payable whatever his election and he chose to move his household goods as most beneficial arrangement for him, he is not entitled to adjustment of cost 509

TRANSPORTATION—Continued Page

Military personnel

In leave status without funds

To eliminate difficulty being experienced in distinguishing between "cost-charge" Govt. procured transportation furnished members traveling in leave status without prior orders who are without funds to return to their duty station and mixed travel that is adjusted under par. M4154 of the Joint Travel Regs. on travel vouchers of members traveling under change-of-station orders with leave en route who are without funds at their leave point and are also furnished Govt. procured transportation, regulations should be changed to produce uniformity in treatment of member travel claims. It is suggested that issuance of transportation request (TR) in all leave cases be treated as "cost-charge" transaction and amount of TR deducted from pay and allowances due member, or in lieu of issuing TR, a casual payment be authorized ---------- 556

Overcharges

Tender cancellation disputed

Rate tenders which offer reduced freight rates pursuant to sec. 22 of Interstate Commerce Act (49 U.S.C. 22 and 317(b)) on Govt. traffic are continuing offers to perform transportation services for stated prices, and as continuing offers power is created in offeree to make series of separate contracts by series of independent acceptances until at least 30 days written notice by either party to tender of cancellation or modification of tender is received. Therefore, where Military Traffic Management and Terminal Service maintains supplements cancelling or modifying four rate tenders were not received and carrier insists they were mailed, question of fact is raised and administrative statements must be accepted, and overcharges resulting from controversy are for recovery from carrier either directly or by deduction from any amounts subsequently due carrier as provided by 49 U.S.C. 66 ---------- 541

TRAVEL EXPENSES

Military personnel

Leaves of absence

Temporary duty termination

Navy enlisted member stationed in California who while on leave in Baltimore, which was authorized under orders providing for subsequent temporary duty to attend school in Rhode Island, is directed to return to permanent duty station upon completion of leave is entitled to travel allowances equivalent to round-trip distance between permanent duty station and leave point, not to exceed round-trip distance between permanent and temporary duty stations, even though ordinarily such allowances are not payable for leave travel performed for personal reasons and not public business, since member performed circuitous travel to his leave point under competent orders, travel he would not have undertaken had he not been ordered to perform the temporary duty. B–166236, May 21, 1969, modified ---------- 548

Miscellaneous expenses

Reservists on temporary duty

Members of Reserve components away from home on active duty for less than 20 weeks, and entitled to per diem at their permanent station, may

TRAVEL EXPENSES—Continued Page

Military personnel—Continued

Miscellaneous expenses—Continued

Reservists on temporary duty—Continued

be reimbursed such miscellaneous expenses as are authorized for Regular members of uniformed services under part I, ch. 4, vol. 1 of the Joint Travel Regs. in connection with travel or temporary duty and regulations amended accordingly in view of parity intended to be accomplished by the addition of clause (4) to 37 U.S.C. 404(a) by act of December 1, 1967, the amended regulations, of course, subject to limitations in part A, ch. 6. However, entitlement to travel between place of lodging or messing and duty as prescribed in par. M4413 may not be authorized since under clause (4) members at their permanent station performing annual training duty are not entitled to per diem when Govt. quarters and mess are available 562

Traveler's checks

Reimbursement

Reimbursement to members of uniformed services for cost of purchasing traveler's checks, whether related travel is performed within or without U.S., may be authorized without regard to value of checks purchased in view of broad authority for reimbursement in connection with travel of members and their dependents, and Joint Travel Regs. amended accordingly, thus bringing reimbursement for cost of traveler's checks for travel within U.S. in line with long recognition that cost of traveler's checks incident to travel outside U.S. is valid expense. However, amendment of Standardized Government Travel Regs. to accomplish same uniformity in reimbursing civilian employees for cost of traveler's checks is matter for consideration by Administrator of GSA .. 606

TRUST FUNDS

(*See* **Funds, trust**)

VESSELS

Charters

Long-term

Hire costs for tankers to be constructed for charter to Military Sealift Command (MSC) for 5-year term with options to cover 15 years, and costs of breach, termination, failure to exercise renewal option, or value of lost tanker are operating expenses chargeable to Navy Industrial Fund since charter arrangement is not purchase of an asset requiring authorization and appropriation of funds. Fact that MSC assumes certain termination costs does not transform 5-year charter with its 15-year renewal options into 20-year charter, and other than authority in sec. 739 of the Dept. of Defense Appropriations Act, 1972, there is no authority to set aside cash for option termination costs; also question of the general, full faith and credit obligations of United States is for determination by Attorney General; and only way to insure investors of unconditional obligation of the Fund is to so provide in charter for each vessel 598

VETERANS ADMINISTRATION

Page

Contracts
Ambulance services
Authority to contract

Even though governmental or private entity furnishing ambulance services is supported in whole or in part by State or local taxes, VA may enter into contract for transporting veterans to and from a VA facility, provided political subdivision involved is not required to furnish such service without direct charge, and contract should not only provide for payments not to exceed fair and reasonable value of services received, but should comply with Fed. procurement law and regs. Under Mississippi statutes local governments are not required to furnish ambulance services and, therefore, VA may enter into contract with city of Biloxi or private concern to furnish transportation to and from VA center at Biloxi, but contract may not provide for subsidy since 46 Comp. Gen. 616 is not precedent for authorizing subsidy payments generally. Modifies B–172945, June 22, 1971 ---------- 444

Employees
Medical and surgery
Qualifications
Licensing

Use by VA's Dept. of Medicine and Surgery of physicians who have been granted temporary or limited license to practice medicine, surgery, or osteopathy, from State where appropriate State Board has made determination that applicant is professionally qualified to practice in that State, but does not qualify for regular license, because he has not complied with various technical requirements—either statutory or administrative—such as residency or citizenship requirements, may be continued for period not to exceed 18 months in view of inability of Dept. to hire medical personnel with permanent or unrestricted licenses, provided VA also determines in accordance with 38 U.S.C. 4106(a) that individual involved is professionally qualified to practice medicine, surgery or osteopathy ---------- 536

WAGE AND PRICE STABILIZATION

Wage changes
Federal employees
Adjustment of wage increases withheld

Use of terms "contract" and "employment contract" in sec. 203(c) of the Economic Stabilization Act Amendments of 1971, authorizing payment of wage or salary increases agreed to in employment contract executed prior to Aug. 15, 1971, to take effect prior to Nov. 14, 1971, but withheld by reason of the wage and price freeze imposed by E.O. 11615, does not exclude General Schedule and other annual rate Federal employees from application of the section, and Federal wage board employees are within purview of sec. 203(c)(2) by reason that their pay increases resulted from agreement or established practice. Within-grade increases for both statutory and wage board employees may be paid retroactively as conditions of sec. 203(c)(3)(A) and (B) were satisfied to effect increases were provided by law or contract prior to Aug. 15, 1971, and funds are available to cover increases ---------- 525

WAGE AND PRICE STABILIZATION—Continued Page

Wage determination contract provisions

The general rule that failure of bidder to acknowledge receipt of amendment which could affect price, quality, or quantity of procurement being solicited, renders bid nonresponsive because bidder would have option to decide after bid opening to become eligible for award by furnishing extraneous evidence that addendum had been considered or to avoid award by remaining silent, is for application to low bid for construction of prefabricated metal building as unacknowledged amendment incorporated wage determination that affected contract price, notwithstanding that E.O. 11615, dated Aug. 15, 1971, concerning stabilization of prices, rents, wages and salaries was in effect, since Executive order does not obviate implementation of rates in wage determination and, therefore, failure to acknowledge amendment may not be waived..... 500

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