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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

John T. Burns

Stephen P. Haycock

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[B-173729]

Bids—Aggregate *v.* Separable Items, Prices, Etc.—Subitem Pricing

The low bid on an indefinite type contract that failed to quote separate prices on the supply and service subline items—identified as 0001AA through 0001AE—to accompany electric counters—0001—solicited under an invitation that scheduled the subline items pursuant to paragraph 20-304.2(b) of the Armed Services Procurement Regulation as alphabetical suffixes of the basic contract item, and requested bidders to quote prices on the "Total Item" and not on subline item quantities may be considered for a contract award as the bidder would be obligated to furnish all listed requirements of the schedule at the price quoted for the basic item, notwithstanding confusing "shorthand references" to the subitems—references that should be avoided in future procurements. Furthermore, the fact that other bidders construed the invitation as requiring separate prices for the subitems is extraneous evidence that may not be considered.

Bids—Mistakes—Nonresponsive Bid—Mistake Procedure Use to Correct

Although under paragraph 2-406.1 of the Armed Services Procurement Regulation an apparent mistake in bid must be verified, confirmation of the bid cannot make a nonresponsive bid responsive. However, notwithstanding the erroneous statement of a contracting officer that verification of a low bid made it a responsive bid since the bid was responsive on its face, rejection of the bid is not required, but remedial action is recommended to insure the bid mistake procedure is not used for determining whether a bid is responsive.

Bids—Prices—Unprofitable

An allegation that the low bidder submitted a bid on which he will incur a loss is for referral to the Secretary of the Department involved with advice that it should be considered by the procuring activity in determining whether the bidder is a responsible bidder for the procurement.

To the Dynasciences Corporation, November 3, 1971:

Further reference is made to your letter dated July 30, 1971, and subsequent correspondence concerning your protest against award of a contract to any other firm under invitation for bids (IFB) No. N00126-71-B-0363, issued by the Navy Electronics Supply Office, Great Lakes, Illinois, on June 10, 1971. Bids were requested for an indefinite quantity type contract for a requirement of Electronic Counters, with associated subline items (subitems), which was set forth on page 13 of the IFB, in pertinent part, as follows:

SECTION E—SUPPLIES/SERVICES & PRICES:

Item No.

OFFERORS/BIDDERS TO QUOTE PRICES ON "TOTAL ITEM" AND/OR "ALTERNATE QUANTITY" ONLY. DO *NOT* QUOTE PRICES ON SUB-LINE ITEM QUANTITIES.

0001 FSN (Will Be Assigned at Time of Award) ELECTRONIC COUNTER, DIGITAL READOUT: Military Type AN/USM-207 ( ) in accordance with Specification MIL-C-24165(SHIPS) and Amendment #3 and the clause entitled "Equipment Requirements and Specifications."

Total Item 0001 1100 ea. (ESTIMATED)

Purchase Request: #OE0054 (Priority 09)
" " #1YWA15
" " #1YWA46
" " #1YWA53

0001AA RUNNING SPARES: One set of Running Spares shall be supplied with each equipment under Item 0001. The Running Spares shall be in accordance with the Generalized List Signal Corp drawing SC-D-93392. See Note A
Total Item 0001AA 1100 ea. (ESTIMATED)

0001AB REPAIR PARTS KIT: (Option Item). A kit of parts shall be supplied with the equipment in the event concurrent spare parts cannot be supplied at the Time of Delivery of the equipment under Item 0001. The parts for the kit shall be selected by the USAECOM from the Provisioning Parts List. The cost of this kit shall not exceed 10% of the cost of Item 0001. "Price shall be negotiated at the Time Parts are selected."

0001AC TECHNICAL MANUALS: In accordance with the clause entitled "Government-Furnished Literature." See Note C and clause 204A (Incl. 2).

0001AD CONTRACT DATA REQUIREMENTS LIST:
See DD Form 1423 (Encl. 4)

0001AE MAINTENANCE REPAIR PARTS (Concurrent Repair Parts): (Option Item) In accordance with Specification MIL-P-21873 and ESO Publication 24. See Note B.

* * * * * * *

NOTE B:
Offerors should not quote a price for this item. It is an option item which is to be supplied only if and to the extent said option is exercised, in which case estimated and firm prices will be negotiated.

The IFB also contained the following pertinent provisions:

MAXIMUM AND MINIMUM QUANTITY

The maximum quantity under the indefinite quantity items is the total estimated quantity set forth for each such contract item. The minimum quantity under the indefinite quantity item, is as follows:

Item	Quantity
0001	536
0001AA	536

SLIDING SCALE BIDS

Sliding scale bids under the indefinite quantity items will be considered nonresponsive. Unit prices bid under the indefinite quantity items are to cover total estimated quantity set forth for each such contract item and bids will be evaluated on the basis of such total estimated quantity.

INDEFINITE QUANTITY (AUG. 1965)

(a) This is an indefinite quantity contract for the supplies or services specified in the Schedule and for the period set forth therein. Delivery or performance shall be made only as authorized by orders issued in accordance with the "Ordering" Clause of this contract. The quantities of supplies or services specified herein are estimates only and are not purchased hereby.

When bids were opened on July 15, 1971, it was noted that AEL–EMTECH Corporation (AEL) had submitted the lowest bid for item No. 0001, but had not quoted prices for the other subitems listed in the schedule. It was also noted that your concern and Hickock Electronic Corporation had submitted bids for subitems 0001AA and 0001AD, in addition to pricing item 0001.

Since the AEL bid for item 0001 was much lower than the other two bids received, the procuring activity requested the corporation to verify its bid, and to verify that the prices of items 0001AA, "Running Spares," and 0001AD "Contract Data Requirements List" were included in the price of item 0001.

On July 28, 1971, AEL confirmed its price for item 0001 and stated that such price included the prices for subitems 0001AA and 0001AD. In this regard the corporation stated that it interpreted the bidding instructions set forth in the schedule to require a total bid price for the *main* line item (Item 0001); that no separate prices were required to be quoted against the subitem quantities of the IFB; and that the prices for the subitems were to be included in the price of item 0001.

You maintain that the IFB required separate price quotations for subitems 0001AA, "Running Spares," and 0001AD, "Contract Data Requirements List," as well as item 0001, and that the failure of AEL to quote such separate prices rendered its bid nonresponsive. In this regard, the essential grounds of your protest may be summarized as follows:

1. The provisions entitled "Maximum and Minimum Quantity" and "Sliding Scale Bids," as well as the phrase "Total Item" set forth within the listing of subitem 0001AA in the schedule, refer to the "Running Spares" as a separate total item, not a subitem, and therefore this supply was required to be separately priced in accordance with the directive of the schedule to quote prices on the "Total Item";

2. The directive to bidders in the schedule not to quote prices on subline item quantities meant only that the bidders were not to quote prices on any quantity other than the total estimated quantities set forth for each supply or service in the schedule, and that bidders were required, therefore, to price the indefinite quantity supply set forth in subitem 0001AA;

3. There would have been no purpose to the note attached to subitem 0001AE, which directed bidders not to quote a price on the subitem, if bidders were not under a general duty to quote prices on all other subitems unless directed otherwise;

4. The schedule required a separate price for the data requirement, since no statement was made that the price of this subitem should be included in the total item price for the procurement unlike the case in earlier procurements issued by the procuring activity.

The contracting officer states that the schedule was structured in accordance with the general requirements set forth in Armed Services Procurement Regulation (ASPR) section XX, part 3, Uniform Contract Line Item Numbering System, and, specifically, ASPR 20-304.2(b), which provides that subline items may be established by attaching an alphabetical suffix in sequential order to the basic contract line item number in the manner set forth in the instant solicitation; that the phrase "sub-line item quantity" in the sentence immediately preceding Item No. 0001, and the references to subitem 0001AA, "Running Spares," as "Total Item 0001AA" in the Supplies/Services section of the schedule and as an "Indefinite Quantity Item" in the other above-quoted provisions of the schedule were merely "shorthand" references to the subitem status of this part of the procurement; and that the bidders were not expected to submit separate prices for any of the subitems.

The essential question for consideration is whether AEL has submitted its bid in such a form that it would be clearly obligated, if a contract was awarded to the firm, to furnish all listed requirements of the schedule at the price which the concern quoted for item 0001. See B-166603, May 16, 1969. In this connection, it is clear that such obligation must be ascertained from the face of the bid itself without resorting to extraneous data. 45 Comp. Gen. 221 (1965).

We note that the alphabetical and numerical designations for the supplies and services under the column entitled "Item Number" in the schedule are so arranged that, while the numerical designation remains the same for each supply or service, the alphabetical designation increases in sequential order. It is clear, therefore, that the item *number* of all the supplies or services in the schedule is the same. Accordingly, there is only one numbered item in the schedule. If there was more than one item it would be designated by another numerical designation, for example, 0002, 0003, etc. This interpretation is obviously in accordance with the procedures set forth in the ASPR provisions, cited above.

While the subitem entitled "Running Spares," designated by the index 0001AA in the item number column, contains a reference to

"Total Item 0001AA," we do not believe such reference operates to make "Running Spares" a separately *numbered* item. Similarily, the references in the clauses entitled "Maximum and Minimum Quantity" and "Sliding Scale Bids" of the IFB to supply 0001AA as an "item" does not convert that subitem into a separately numbered item in the Supply/Services section of the IFB in the absence of a separate number for the subitem in that section.

Since there is only one numbered item, No. 0001, it is clear that this item must be the "Total Item" referred to in the directive to bidders to quote prices on "Total Item." In this regard, the directive to quote prices on the "Total Item" merely means that the bidders are to calculate prices for all the supplies and services listed in section E in order to arrive at one total price for the total item, No. 0001.

With respect to your argument that the directive to bidders not to quote prices on subline items quantities did not refer to any separate category and only directed the bidders not to quote prices on less than the total indefinite quantities listed for the counters and the running spares, we believe such argument is necessarily predicated on the erroneous assumption that the prefix "sub" in the directive is appended to "quantities" rather than "line." However, the prefix is clearly appended to "line" so that your interpretation of this part of the directive cannot be regarded as reasonable. Rather, we believe the directive not to quote prices on subline items quantities directed bidders not to quote prices on quantities at less than the numbered line item level, that is, at the categories identified by the addition of the alphabetical suffixes to the line item number. Accordingly, there was no obligation for a bidder to specify separate prices for the five supplies and services listed in section E of the schedule which were identified by the addition of the alphabetical suffixes to the line item number.

While you state that there would have been no purpose for restating the estimated quantity for subitem 0001AA if the IFB did not request a separate unit price at that level, it is our opinion that the quantity was merely restated in order to emphasize the quantity of counters and spares which were required for the procurement, but not to require a separate price at that inferior level.

With respect to your argument that note B, quoted above, would not have been attached to subline item 0001AE if the IFB did not impose a duty to bid on all other subitems, unless specifically excluded, as with subitems 0001AB, 0001AC and 0001AE, we note that your argument assumes that there was a specific direction to bid on subitem 0001AC. While you state that subitem 0001AC "obviously" does not require a price, such conclusion is not based on an express statement

appended to the subitem in question, as is the case with respect to subitems 0001AB and 0001AE. Instead, we can only perceive a direction not to bid on subitem 0001AC by noting the general direction not to bid on "sub-line item quantities." Accordingly, we cannot agree that note B demonstrates a "general duty to bid on all sub-items."

With respect to your contention that the IFB required the data subitem to be separately priced, we cannot conclude that the mere absence of a notation appended to the subitem directing bidders to include the data price in the total price, or the absence of the notation "NSP," implied that a separate price was to be quoted for this subitem. In this respect the contracting officer states that there is more than one way to inform bidders not to bid on data items and that the direction set forth in section E, quoted above, adequately informed bidders not to bid on the data item. We concur with this argument.

Although you point out that the procuring activity issued IFB N00126–71–B–0388 for a similar requirement of electronic counters within 2 weeks of the subject IFB, and that IFB–0388 contained the same bidding directive which is set forth immediately preceding item 0001 in the subject case, with the added instruction attached to each of the subitems not to separately price the supplies, we cannot conclude that the absence of such additional directives in the instant solicitation required the pricing of the subitems, since we believe the directive not to bid on "sub-line item quantities" was sufficient in itself to inform bidders not to price the subitems.

The several other arguments of your concern regarding the alleged need of the procuring activity to have the data item separately priced are, we believe, adequately rebutted by the administrative report, a copy of which has been furnished to you.

In view of the above analysis, we believe AEL would be bound to furnish all the supplies and services listed in the schedule for the price that the concern bid for item No. 0001, and that the several decisions of our Office which you cite as precedent for rejecting a bid when a bidder neglects to price a certain supply or service are distinguishable from the circumstances here, since in those decisions we found a specific obligation for a bidder to separately price a supply or service, unlike the situation with respect to the subitems in the subject procurement.

With respect to your argument that two out of three of the bidders construed the IFB as requiring separate prices for the running spares and the contract data subitems, and that this circumstance is highly persuasive that such interpretation should govern, we have noted that our interpretation of the responsiveness of certain bids was supported by the interpretation of other bidders. *Cf.* B–166840, May 19, 1969.

However, it is clear that the interpretation of other bidders cannot be considered to be *determinative* with respect to such questions, since this would involve the acceptance of extraneous evidence in determining responsiveness, which is prohibited, as noted above. In the instant case our analysis shows that AEL would be bound to furnish all the subitems in question, and we therefore cannot accept the extraneous evidence of the two other bids as determinative of the question of responsiveness of AEL's bid in the manner you suggest.

With respect to the propriety of the contracting officer's action in requesting AEL to confirm its bid, we cannot conclude that such action was improper in view of the materially lower bid submitted by the company. In this connection, ASPR 2–406.1 provides that in cases of apparent mistakes in bid the contracting officer *shall* request from the bidder a verification of the bid. However, we disagree with the apparent position of the contracting officer that such confirmation here shows that AEL's bid was responsive. In this regard it is the well-established position of our Office that a nonresponsive bid cannot be made responsive through the "mistake" procedure. 38 Comp. Gen. 819 (1959).

Since it is our opinion that AEL's bid is responsive on its face, we do not believe the contracting officer's erroneous statement should require rejection of the bid here. However, we are advising the Secretary of the Navy by letter of today that remedial action should be taken to ensure that the bid mistake procedure is not used in the future in determining whether a bid is responsive. We are also suggesting that, to avoid any possible source of confusion in future procurements, where subitems are utilized all references thereto in the IFB shall be expressed as subitems, and that no "shorthand references" to the total item or subitem should be employed.

With respect to your allegation that AEL has submitted a bid on which it will incur a loss, we are forwarding your allegation to the Secretary of the Navy with advice that it should be considered by the procuring activity in determining whether AEL is a responsible bidder for this procurement.

[B–173173]

Gratuities—Reenlistment Bonus—Critical Military Skills—Conditions to Qualify for Initial Entitlement

A sergeant first class who had 1 year, 1 month, and 28 days of enlisted active duty prior to 17 years of commissioned service, upon the termination of which he immediately reenlisted for 3 years in grade E–7 and was paid a first reenlistment bonus pursuant to 37 U.S.C. 308(d), does not qualify for the payment of the variable reenlistment bonus prescribed by 37 U.S.C. 308(g), for not only does he not meet the requirement that he must have served at least 21 months of enlisted active service, he does not as a former officer reenlisting in the service

satisfy the requirement that he possess a critical skill that the service does not want to lose, which is the sole purpose of inducing first-term enlisted members to reenlist by offering them the variable reenlistment bonus.

To Lieutenant Colonel J. H. Cook, Department of the Army, November 4, 1971:

Further reference is made to your letter dated March 24, 1971, with enclosures, requesting a decision concerning the propriety of payment of a variable reenlistment bonus to Sergeant First Class Jimmie W. Frazier, SSAN 552 44 3768. Your submission has been assigned D.O. No. A–1127 by the Department of Defense Military Pay and Allowance Committee.

You state that Sergeant Frazier had 1 year, 1 month and 28 days of enlisted active service prior to receiving his commission in 1954. It is further indicated that he served on active duty as a commissioned officer until he was relieved from active duty on January 24, 1971, under authority of section XV, chapter 3, AR 635–100. On January 25, 1971, he reenlisted for a term of 3 years in grade E–7 and was paid a first reenlistment bonus in the amount of $1,587.64, as a member with over 17 years of service. It is further stated that the first increment on a variable reenlistment bonus-2 in the amount of $1,058.43 was paid on February 5, 1971. The voucher submitted for decision covers payment in a lump sum of the remaining unpaid increments.

In view of the fact that the member had only 1 year, 1 month and 28 days of enlisted active service, doubt as to the legality of payment of the variable reenlistment bonus is expressed since paragraph 10–3a(3), AR 600–200, provides that a member to be eligible for such bonus must have completed at least 21 months of active service before discharge or release from active duty. You question specifically whether the commissioned service prior to his release from active duty may be counted to meet the requirement of 21 months' active service.

Subsection 308(d) of Title 37, U.S. Code, specifically authorizes a reenlistment bonus under subsection (a) of that section in the case of an officer of a uniformed service who reenlists in that service within 3 months of his release as an officer, if he served as an enlisted member in that service immediately before serving as an officer.

Variable reenlistment bonus is authorized under the provisions of 37 U.S.C. 308(g) which provides as follows:

(g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount

not more than four times the amount of that bonus. The additional amount shall be paid in equal yearly installments in each year of the reenlistment period. However, in meritorious cases the additional amount may be paid in fewer installments if the Secretary concerned determines it to be in the best interest of the members. An amount paid under this subsection does not count against the limitation prescribed by subsection (c) of this section on the total amount that may be paid under this section.

The legislative history of subsection (g) of section 308 of Title 37 discloses that the purpose of the variable reenlistment bonus is to provide a strong reenlistment incentive to first-term enlisted personnel whose skills are critically required by the military departments. It is indicated in the legislative history that it was considered that the best method of providing this incentive was to concentrate the monetary reward of the variable reenlistment bonus at the first reenlistment decision point. See Senate Report No. 544, 89th Congress, Committee on Armed Services, United States Senate, on H.R. 9075, pages 13–14, 18, and House Report No. 549, 89th Congress, Committee on Armed Services, House of Representatives, on H.R. 9075, pages 47–48.

In view of this intent expressed in the legislative history it appears that a variable reenlistment bonus was designed to encourage members who during their first enlistment acquire a military skill designated as critical by a military department to reenlist so that the skill would not be lost to the service. Nothing has been found in the legislative history to indicate any intent that it would be paid to former officers who reenlist following release from duty as officers.

AR 600–200, paragraph 10–3a sets forth the requirements for eligibility to receive variable reenlistment bonus. That paragraph provides, in pertinent part, as follows:

10–3 Eligibility. a. An individual is eligible to receive VRB if, at the time of reenlistment, he or she—

* * * * * * *

(3) Has completed at least 21 months of active service (other than active duty for training) before discharge, release from active duty, or extension of initial term of service (the 21 months of active service must be performed in the enlistment which is being extended or being terminated by discharge followed by reenlistment within 3 months).

Under the terms of the regulation the 21 months of active service required to qualify for the variable reenlistment bonus must have been served in the enlistment which is being extended or which is being terminated by discharge followed by the reenlistment on which the first reenlistment bonus is based. Therefore, the regulation appears to require at least 21 months of active enlisted service and since it is specified that such service must be performed in the enlistment which is being extended or being terminated by discharge followed by reenlistment, such language would preclude payment of the variable reenlistment bonus to a member who reenlists following service as an officer.

Furthermore, as indicated above, the legislative history of the provision authorizing the variable reenlistment bonus shows that the sole purpose in enacting such provision was to authorize the bonus as an inducement to retain in the service first term enlisted members possessing critical skills. In view thereof, we are of the opinion that subsection 308(g) is to be read as applying only to an enlisted member who is designated as having a critical military skill at the time of his discharge and who is entitled to a bonus computed under subsection (a) upon his first reenlistment, following discharge as an enlisted member.

Accordingly, payment on the voucher in favor of Sergeant Frazier is not authorized. The voucher and supporting papers will be retained here.

[B-173588]

Contracts—Subcontracts—Bid Shopping—Listing of Subcontractors

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

To the Administrator, General Services Administration, November 4, 1971:

By letter dated August 23, 1971, the General Counsel, General Services Administration (GSA), furnished our Office with a report on the protest filed by the attorney for Walker Construction Company (Walker) against the pending award of a contract to J. W. Bibb, Inc. (Bibb), for the conversion of various Federal buildings in Fort Worth, Texas. Additional information on the protest was received from GSA on September 9 and October 20, 1971.

The preinvitation notice for the work was issued on March 29, 1971, and the invitation for bids (IFB) was issued approximately 1 month later on April 27, 1971. Both documents stated that the estimated cost range for the project was from $500,001 to $1,000,000. Eight bids were timely received and all ranged between the cost estimates stated in the aforementioned documents. The low bid of $879,384 submitted

by Bibb was approximately $2,600 lower than that of the second low bidder, Walker.

Although low, the Bibb bid was initially rejected as nonresponsive on the ground that Bibb had failed to complete the subcontractor listing form, as required by the specifications, for the areas of "CURTAIN WALL CONSTRUCTION [Fabricator]" and "CURTAIN WALL CONSTRUCTION [Erector]." This subcontractor information was submitted on May 29, 1971, 2 days after bid opening with the notation, subsequently restated in a letter of June 2, 1971, that no curtain wall was shown on the plans and specifications. The June 2 letter also noted that the preinvitation notice did not refer to curtain wall but used the term "insulated metal siding" and that metal siding, not curtain wall, was the term used in the specifications at section 19.

GSA at first reaffirmed its prior determination that Bibb was nonresponsive but later reconsidered the matter and waived Bibb's failure to complete the subcontractor listing form on the basis that the two curtain wall categories did not individually constitute 3½ percent of the estimated cost of the project. It was explained that the cost data, indicating total cost, upon which this analysis was made, had been prepared at the time the project was placed on the market. As a result of this waiver, Walker protested to our Office.

Section 5B-2.202-70(a) of Title 41, Code of Federal Regulations, the GSA procurement regulation entitled "Listing of subcontractors," provides, *inter alia:*

> * * * In addition such [subcontractor] listing shall include all other general construction categories of work which, individually, are determined by the contracting officer to comprise at least 3½ percent of the estimated cost of the entire contract. Categories estimated to cost less shall not be included.

In this connection, the administrative report states that the categories of curtain wall fabrication and erection were included in the subcontractor listing form in the mistaken belief that the total estimate of cost for both items was to be used in determining whether listing was required. GSA contends that the cost breakdown for these items, prepared after bid opening, indicates that the fabrication cost estimate amounted to $37,260, while the erection cost estimate was $24,840, both figures being well under 3½ percent of the total estimated project cost of $1,401,000.

The origin of the $1,401,000 figure is an estimate dated October 1, 1970. The record before us discloses, however, that this estimate was preceded by an estimate dated February 5, 1970, and succeeded by an estimate dated July 16, 1971, which reflect total cost figures for the project of $880,000 and $892,265, respectively. These total cost estimates, coupled with the advice of both the preinvitation notice and

IFB that the maximum estimated cost of the project did not exceed $1,000;000 and the fact that the bids of all eight bidders range from approximately $879,000 to $952,000, lead us to conclude that the $1,401,000 estimate is not a reasonable approximation of what costs would be for the entire project. As such, it provides no basis to support a determination that one or another category of general construction work constitutes such a percentage of the entire cost of the anticipated contract as to require the listing or nonlisting of such a category.

From the foregoing, it appears that a more reasonable maximum estimate of costs would be the $1,000,000 stated as the maximun cost figure on the IFB. Using GSA's own figures, 3½ percent of this amount would require, at $37,260, the listing of the curtain wall fabrication. On the other hand, the curtain wall erection category at $24,840 should not have been included on the subcontractor listing form in the first instance. Consequently, Bibb's failure to complete this portion of the form may be waived. See 41 CFR 5B–2.404.70(a).

There remains, however, the matter of Bibb's failure to complete the subcontractor listing form with respect to the properly included category of curtain wall fabrication. Bibb contends in essence that the term "curtain wall" does not mean "insulated metal siding" while the contracting officer contends that it does. We note, however, that the seven other bidders listed subcontractors for the curtain wall category. It therefore appears that the interpretation advanced by GSA is reasonable. In the circumstances, Bibb's failure to list a subcontractor for the "curtain wall" category rendered its bid nonresponsive. See 43 Comp. Gen. 206 (1963).

The pertinent portions of the specifications relative to completion of the subcontractor listing form are paragraphs 2–16(a) and (m) which state:

> a. For each category on the List of Subcontractors which is included as part of the bid form, the bidder shall submit the name and address of the individual or firm with whom he proposes to subcontract for performance of such category, *Provided*, that the bidder may enter his own name for any category which he will perform with personnel carried on his own payroll (other than operators of leased equipment) to indicate that the category will not be performed by subcontract.
>
> * * * * * * *
>
> m. If the bidder fails to comply with the requirements of subparagraphs (a), (b), or (c) of this clause, the bid will be rejected as nonresponsive to the invitation.

These specifications explicitly require bidders, on pain of having their bids declared nonresponsive, to complete each and every category found on the subcontractor listing form. In view of this requirement, bidders can only reasonably assume that the categories of work so listed are properly included and must be completed because to conclude that a listed category need not be completed flies in the face of the specification.

In this case, Bibb was faced with having to complete a category on the subcontractor list which it did not feel was pertinent to the procurement. In our opinion, Bibb was under an obligation to clarify any doubts about the applicability of the category in question to the instant job before, not after, bid opening. To allow the argument after bid opening that the category description is not applicable to the job at hand would be to afford the bidder an opportunity not extended to other bidders, i.e., to decide after the exposure of bid prices whether to withdraw its bid or to argue for its acceptance. Instead, however, Bibb chose to disregard a listed category of work without attempting the simple expedient of requesting clarification from the contracting officer. By so doing, it assumed the risk, clearly stated in the IFB, that its bid would be rejected as nonresponsive. B–157279, August 17, 1965, which the contracting officer cites in justification for waiving Bibb's failure is distinguishable from the present case in that the category not completed in that case did not have to be listed on the subcontractor list in the first instance.

We conclude, therefore, that the contracting Officer's original determination that Bibb was nonresponsive was correct and that any award to Bibb would be improper.

Finally, we note that this is not the first case in which subcontractor listing categories did not conform to specification descriptions of work to be performed. In 50 Comp. Gen. 839 (1971), the subcontractor listing categories were general in nature and as a result did not explicitly require listing for some specialty categories considered to be subject to the listing requirement. In that case, we mentioned the need for clarity in setting out subcontractor listing categories. Since the problem seems to be a recurring one, we now suggest that instructions be issued to the field to the effect that subcontractor listing categories in future invitations conform with the actual divisions or sections set but in the project specifications. It is also suggested that consideration be given to utilizing the paragraph numbers set out in the specifications in the listing form so that no doubt as to listing requirements will be possible.

We are returning the enclosures to the August 23, 1971, letter as requested.

[B–173957]

States—Federal Aid, Grants, Etc.—Relocation Allowances and Assistance—Persons Displaced by Federally Assisted Programs

Although the Department of Housing and Urban Development must amend project grants, contracts, and agreements with State agencies entered into prior to January 2, 1971, the effective date of the Uniform Relocation Assistance and

Real Property Acquisition Policies Act of 1970, in order to comply with title II of the act which provides for relocation allowances and assistance to persons displaced by Federal and federally assisted programs on or after January 2, 1971, including persons whose displacement was delayed until July 1, 1972, pursuant to section 221(b), the cost-sharing requirements of section 211(a) do not apply since section 211(c) providing for amendment of programs to implement relocation assistance does not include section 211(a), and pursuant to section 220(a), the repeal of the Housing Act of 1949, as amended, does not affect the 100 percent existing Federal liability for relocation costs.

To the Secretary of Housing and Urban Development, November 5, 1971:

Reference is made to your letter of August 25, 1971, requesting our opinion as to whether the cost-sharing requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91–646, 84 Stat. 1894, 42 U.S.C. 4601 (hereinafter referred to as the "act"), apply to those projects of the Department of Housing and Urban Development (HUD) that were under contract with a State agency prior to January 2, 1971, the date the act was approved.

Title II of the act is entitled "Uniform Relocation Assistance" and its stated purpose is to establish, for the first time, a uniform policy for the fair and equitable treatment of persons displaced by Federal and federally assisted programs. Sections 202 through 206 of the act, 42 U.S.C. 4622–4626, provide for relocation allowances, replacement housing prior to displacement, and relocation assistance advisory services to homeowners, tenants, businessmen, and farmers displaced by any Federal project carried out by any Federal agency.

Section 210 of the act, 42 U.S.C. 4630, provides that the head of a Federal agency shall not approve any grant, contract, or agreement with a State agency for any program or project involving Federal financial assistance which will displace any person on or after the effective date of the title, unless he receives satisfactory assurances from the State agency that there will be compliance with the same relocation requirements as those made applicable to Federal projects under sections 202 through 205, 42 U.S.C. 4622–4625. As used in the act, the term "State agency" is defined by section 101(3), 42 U.S.C. 4601(3), to include "any department, agency, or instrumentality of a State or of a political subdivision of a State * * *."

Section 211(a), 42 U.S.C. 4631(a), provides:

The cost to a State agency of providing payments and assistance pursuant to sections 206, 210, 215, and 305, shall be included as part of the cost of a program or project for which Federal financial assistance is available to such State agency, and such State agency shall be eligible for Federal financial assistance with respect to such payments and assistance in the same manner and to the same extent as other program or project costs, except that, notwithstanding any other law in the case where the Federal financial assistance is by grant or contribution the Federal agency shall pay the full amount of the first $25,000 of the cost to a

State agency of providing payments and assistance for a displaced person under sections 206, 210, 215, and 305, on account of any acquisition or displacement occurring prior to July 1, 1972, and in any case where such Federal financial assistance is by loan, the Federal agency shall loan such State agency the full amount of the first $25,000 of such cost.

Section 211(c), 42 U.S.C. 4631(c), provides, in pertinent part:

Any grant to, or contract or agreement with, a State agency executed before the effective date of this title, under which Federal financial assistance is available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this Act, shall be amended to include the cost of providing payments and services under sections 210 and 305 * * *

Section 220(a), 84 Stat. 1903, January 2, 1971, repeals eleven prior laws and parts of laws relating to relocation assistance. Section 220(b), 42 U.S.C. 4621 note, provides:

Any rights or liabilities now existing under prior Acts or portions thereof shall not be affected by the repeal of such prior Acts or portions thereof under subsection (a) of this section.

Your letter indicates that under HUD programs, and under the urban renewal program in particular, a substantial number of projects, which were under contract prior to January 2, 1971, will continue to displace persons after July 1, 1972 (the date when, under the provisions of section 221(b), 42 U.S.C. 4601 note, the act becomes completely applicable to all States) and that these contracts provide for full Federal payment of relocation costs as authorized by section 114 of the Housing Act of 1949, as amended (42 U.S.C. 1465), one of the provisions of law repealed by section 220(a) of the act. Your counsel's office has subsequently advised us that under that law HUD administratively limited the amount of relocation payments to any person to a maximum of $25,000, with higher payments allowed only if the local agency agreed to share in the cost of the excess.

Your letter further advises that it has always been understood between HUD and its local grantees that the Federal payment formula in executed agreements cannot be modified except by the mutual consent of the parties and that this view has always been respected by the Congress. You add that many local agencies are concerned about the heavy financial burden imposed on them by the act and have raised the issue of whether the Government can unilaterally modify its existing contracts.

Since subsection 211(a) of the act requires cost sharing of relocation costs in the same manner and to the same extent as for other program or project costs, and since 211(c) requires that any grant to or contract or agreement with a State agency executed before the effective date of title II shall be amended to include the cost of providing relocation payments and services under section 210, you request our advice as to

the application of the act to such preexisting contracts, and you suggest three possible approaches that might be followed, namely:

(1) *Mandatory Amendments and Cost Sharing.* Such projects must be amended so as to change the provisions for 100 percent Federal reimbursement of relocation payments to a provision requiring that payments under the Act became a part of shared project costs with respect to displacements on or after July 1, 1972.

(2) *Permissive Amendments.* Local agencies will be encouraged to amend such projects to provide payments on a shared cost basis after July 1, 1972, pursuant to the Act. However, where a local agency is unwilling to so amend its present contract, such projects may be permitted to be completed with 100 percent Federal payment of the relocation benefits provided by preexisting law and reflected in the contract, but without the new and generally higher benefits of the Act.

(3) *Mandatory Amendments with 100 Percent Federal Funding.* Such projects must be amended so that the new benefits under the Act will be made available to displacees, but still on a 100 percent Federal basis, without cost sharing, even after July 1, 1972.

We note that other Federal agencies will be affected by the application of the act to preexisting contracts because the act applies uniform relocation requirements to all Federal agencies. However, because of the differences in relocation laws applicable to other agencies prior to the uniform act, we shall restrict our opinion here to the application of the act to your Department.

It is clear that the primary intent of the legislation was to give better treatment to persons forced to relocate. In Senate Report No. 91–488, October 21, 1969, the Subcommittee on Intergovernmental Relations said (p. 4):

It is a bill devoted to providing the means of assuring consistent and fair treatment of those who are uprooted from their homes and places of business by projects carried out by the Federal Government, and by State and local governments with Federal assistance. It provides for uniform procedures and policies with regard to relocation assistance and land acquisitions.

The introduction of this bill was the culmination of efforts begun in 1965, with the introduction of S. 1681. That bill was designed to implement many of the recommendations filed by the report of the Select Subcommittee on Real Property Acquisition, of the House Committee on Public Works, in 1964. The report showed conclusively the inequity and hardship suffered by hundreds of thousands of families, businessmen, and farmers for the sake of projects intended to benefit the public as a whole.

See also House Report No. 91–1656, December 2, 1970, Committee on Public Works (pp. 1–3).

With respect to the amendment of prior contracts, the bill (S. 1), 91st Congress, 1st session, as introduced by Senator Muskie and passed by the Senate, provided in section 231(e) that "any grant to, or contract or agreement with, a State agency executed before the effective date of this section * * * *may be amended* * * *" to include the terms and conditions required by subsection 231(a). The Senate report (*supra*, p. 15) states that section 231(e) "is an administrative section dealing with amendments to the Federal contract with States and localities * * *." The brief Senate debate contains no mention of the section. [Italic supplied.]

In the House of Representatives, the Public Works Committee struck out the language of S. 1 as it had passed the Senate and inserted substitute language. Among other changes, the House amendment changed the provision on preexisting contracts (§ 211(c) in the House version) to provide that such contracts "*shall be amended*" to include the cost of providing payments and services under sections 210 and 305 of the House bill. There is no explanation given for this change from "may be amended" to "shall be amended." The House report (*supra*, p. 17) says only that section 211(c) "requires the amendment of previously executed agreements, contracts, or grants with a State agency as necessary to include the cost to a State agency of providing payments and assistance under the bill." The bill, as so amended by the Committee, passed the House without any mention of the specific sections involved here, and was agreed to by the Senate without any changes relevant here. [Italic supplied.]

Section 211(c) of the act provides that contracts executed before the effective date "shall be amended to include the cost of providing payments and services under sections 210 and 305." It does not specifically provide that such contracts shall be amended to include the cost-sharing requirements of section 211(a). If Congress had intended such requirements to apply, it could have specifically so provided.

The language of section 211(c), in requiring the amendment of prior contracts, evidences an intent to insure that all persons under preexisting grants or contracts who would be displaced after the effective date of the act, would receive the relocation benefits provided by the act. This intent is in harmony with the declared purpose of the act to establish a uniform policy for the fair and equitable treatment of persons displaced and with the definition of "displaced person" in section 101(6), 42 U.S.C. 4601(6), as meaning "any person who, on or after the effective date of this Act moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property * * *" for any Federal or federally-assisted program or project.

In addition, section 211(c) must be read together with section 220(b) which expressly provides that existing rights and liabilities under prior acts shall not be affected by the repeal of such prior acts under section 220(a). In our opinion, section 220(b) demonstrates that Congress did not intend to affect existing contractual rights under prior acts, except insofar as specifically provided for in other sections of the act.

In view of the foregoing, the absence of any clear intent in the legislative history, and the problem of unilaterally amending the grants and contracts, we believe that Congress intended that displaced

persons under grants and contracts executed prior to January 2, 1971, should get the relocation benefits provided in sections 210 and 305 (42 U.S.C. 4630 and 4655) without necessarily requiring cost sharing by the State agency.

Although, under section 221(b), the effective date of sections 210 and 305 of the act may be delayed until July 1, 1972, to the extent that any State is unable under its laws to comply with such sections, we believe, under our interpretation of the act, that there would be no legal barrier to compliance in any State with respect to any contract executed with HUD before January 2, 1971, and that under section 221(a) the act became effective as to such contracts on the date of enactment, January 2, 1971.

The foregoing analysis makes it unnecessary to consider the issue raised by the local agencies of whether Congress would have the constitutional power to require the unilateral modification of the Department's obligation under existing contracts to pay relocation costs in full. See generally, *Continental Illinois National Bank & Trust Co.* v. *Chicago, R.I. & P. Railway Co.*, 294 U.S. 648, 680 (1935); *Lynch* v. *United States*, 292 U.S. 571, 579–580 (1934); *Pfile* v. *Corcoran*, 287 F. Supp. 554, 559–561 (D. Colo. 1968). See also *Triangle Improvement Council* v. *Ritchie*, 314 F. Supp. 20, 28 (S.D.W. Va. 1969), affirmed 429 F. 2d 423 (4th Cir. 1970), cert. granted 400 U.S. 963, December 21, 1970, cert. dismissed as improvidently granted 402 U.S. 497, May 17, 1971, which involved, inter alia, the application of the relocation provisions of the Federal-Aid Highway Act of 1968, 23 U.S.C. 501 note, to preexisting projects.

Accordingly, the Department of Housing and Urban Development may follow the third approach stated in your letter and reimburse local agencies for the full cost of relocation payments and assistance under the act. This means that grants, contracts or agreements executed before January 2, 1971, should be amended to include provisions for the relocation payments and assistance provided by the act to persons displaced on or after January 2, 1971, including those displaced after July 1, 1972, there being no mandatory requirement for full cost sharing after July 1, 1972, applicable thereto.

[B–173674]

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Minority Subcontracting

Under a request for proposals for institutional support services at the George C. Marshall Space Flight Center to be evaluated on five main criteria—experience; staffing; management; policies, procedures, and financial capability; and facilities and equipment—with no provisions for the formal scoring of subcri-

teria that included subcontracting with small business concerns or minority owned enterprises, and the assignment of numerical value to cost estimates, the selection of the offeror that ranked behind its competitors on the basis of subcontracting with an inexperienced minority custodial firm is within the authority of the Source Selection Official, in the absence of statutory or regulatory direction, even though the selection was a departure from sound procurement policy from a competitive standpoint since the official should have informed offerors when the relative importance of the minority subcontracting factor was changed.

To the Administrator, National Aeronautics and Space Administration, November 8, 1971:

We refer to reports dated August 26 and October 12, 1971 (reference KDA–2), concerning the protest of RCA Service Company, and several of its prospective subcontractors, under request for proposals (RFP) No. 3–1–14–00001, issued on October 23, 1970, by the George C. Marshall Space Flight Center. The RFP covered the furnishing of certain institutional support services at the Flight Center consisting of telecommunications, photographic and reproduction equipment repair, graphic arts, models and exhibits, technical publications, documentation repository, protective services, custodial services, and laundry and refuse collection services for a period of 1 year, with an option to extend the period of performance for a maximum of two 1-year periods.

The RFP stated that a cost-plus-award-fee (CPAF) type of contract was considered most desirable for this procurement but that if any firm desired another type of contract, or incentive plan, its alternate proposal would be considered but only as a secondary approach to the specified type.

Section IV, *Evaluation of Proposals*, of the RFP established five criteria for evaluating proposals and set forth the relative importance of these criteria as follows:

B. Evaluation Criteria—Proposals will be evaluated and ranked against the following criteria and a numerical score assigned. The total weights of the first three criteria are approximately five times greater than the weight of the fourth criteria. In evaluating the first three criteria, primary consideration will be given information received under the first two criteria (Management Plan and Previous Experience), which are approximately equal to each other. Information received under the third criterion (Staffing Plan) will be given somewhat less consideration than either of the first two criteria. In evaluating the last two criteria, primary consideration will be given information received under the fourth criterion (Policies, Procedures and Financial Capability). Significantly less consideration will be given the fifth criterion (Facilities and Equipment).

1. Management Plan—Under this criterion the proposer will be evaluated on the overall quality of the management operations, whether prime contractor or subcontractor, envisioned to properly plan, implement and control the technical and business performance of the support contract. Responsiveness to the requirements of the RFP, i.e., the number and extent of deviations or exceptions will be considered to determine the degree of any non-compliance. Evaluation will include the following aspects of your plan:

a. Organization

* * * * * * *

b. Processing and Control of Work

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c. Management Information Systems

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d. Phase-In

* * * * * * *

e. Make-or-Buy Plan

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f. Small and Minority Business Utilization Plan—Special consideration will be given to proposals containing firm commitments to small business subcontractors or minority owned enterprises. (See Part A, Section I, Paragraphs Q. and R.)

2. Previous Experience—Evaluation of your experience will include the extent to which directly related services have been successfully performed and managed during the past several years.

3. Staffing Plan

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4. Policies, Procedures and Financial Capability

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(a) Policies, Procedures and Practices.

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(b) Financial Capability.

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5. Facilities and Equipment

Section I, General Information, and Section II, Proposal Content, of the RFP provided further instructions regarding the evaluation criteria for the requirement as follows:

I. General Information

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Q. Participation By Small Business Firms

a. It is National policy that a reasonable proportion of NASA purchases be placed with small business firms and that the number of firms engaged in research and development work be expanded to include competent small business. Accordingly, any contract awarded as a result of this solicitation shall fully comply with the intent of this policy, and successful proposers shall agree to use their best efforts in placing subcontracts and purchases in accordance with its objectives.

* * * * * * *

c. In fostering stated small business policy objectives the Source Evaluation Board will favor those proposals containing firm commitments which establish set-asides for small business subcontracts. *Accordingly, proposers shall indicate the particular functions, if any, in the scope of work that would be performed by subcontract under a set-aside or similar arrangement reserved for participation only by firms classified as Small Business concerns. In the event a proposer does not offer a set-aside of functions for subcontracting to small business firms, the reasons therefor shall be included in his proposal.*

R. Participation By Minority Business Firms

a. Consistent with the National interest, it is NASA policy to increase the total minority business participation and the number of minority firms participating in NASA procurements. Any contract awarded as a result of this solicitation shall fully comply with the intent of this policy, and successful proposers shall agree to actively seek out and place contracts with minority

firms and otherwise use their best efforts in placing subcontracts and purchases in accordance with these objectives, and consistent with efficient performance of the contract work.

b. In fostering minority business policy objectives, the Source Evaluation Board will favor those proposals containing firm commitments to award contracts to minority business firms. *Accordingly, proposers shall indicate the particular functions, if any, in the scope of work that would be performed by subcontract to minority firms. In the event a proposer does not offer to subcontract to, or procure from, minority firms, the reasons therefor shall be included in his proposal.*

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II. Proposal Content

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F. Proposal Data

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1. Management Plan

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f. Small and Minority Business Utilization Plan—Proposals shall indicate the extent to which the scope of work covered by this Request for Proposals will be performed by small business and minority owned concerns (either as a prime or subcontractor). Further, the proposer shall include his plan for the fulfillment of the objectives of the national small business and minority owned enterprise program.

2. Previous Experience

a. The proposer shall provide a listing of related technical experience and contracts he and proposed subcontractors have performed during the past several years. The listing should identify the contract, project and names, addresses and telephone numbers of responsible Government technical personnel and Contracting Officers who have knowledge of the contractor's performance. In order to assist the Government's qualitative evaluation in this area, the proposer is encouraged to furnish a self-analysis of such previous experience by ranking his performance of these projects as above-average, average, and below-average. Experience data should cover the proposer's qualifications in critical areas of the statement of work as well as provide a verifiable indication of ability to perform this proposed procurement.

The RFP was issued to 93 firms on October 23, 1970. Subsequently, 60 additional firms requested and were also furnished copies of the RFP.

On December 9, 1970, proposals for the procurement were received from Hayes International Corporation (Hayes), RCA Service Company (RCA), and the Federal Electric Corporation (FEC).

The record indicates that these proposals were subsequently analyzed in accordance with an evaluation plan established prior to issuance of the RFP. That plan established procedures for a detailed evaluation of proposals by a Source Evaluation Board (SEB) in accordance with the criteria set forth in the RFP and specified numerical weights for those criteria as follows:

SEB EVALUATION CRITERIA, WEIGHTS, AND FACTORS

Criteria		Factors
I. PREVIOUS EXPERIENCE	(300)	a. EXTENT OF TECHNICAL EXPERIENCE b. APPLICABILITY OF TECHNICAL EXPERIENCE c. VERIFIABILITY OF TECHNICAL EXPERIENCE d. BUSINESS EXPERIENCE
II. STAFFING PLAN	(200)	a. INITIAL STAFF b. BUILD-UP PLAN c. SOURCES OF MANPOWER d. KEY PERSONNEL QUALIFICATIONS
III. MANAGEMENT PLAN	(300)	a. ORGANIZATION b. PROCESSING AND CONTROL OF WORK c. MANAGEMENT INFORMATION SYSTEMS d. PHASE-IN e. MAKE-OR-BUY PLAN f. SMALL AND MINORITY BUSINESS UTILIZATION PLAN
IV. POLICIES, PROCEDURES AND FINANCIAL CAPABILITY	(150)	a. POLICIES, PROCEDURES AND PRACTICES b. FINANCIAL CAPABILITY
V. FACILITIES AND EQUIPMENT	(50)	a. ADEQUACY b. AVAILABILITY c. LOCATION
TOTAL	(1000)	

In this connection the plan did not provide for scoring by the SEB at the subcriterion or factor level, that is, those evaluation standards indicated by the alphabetical designations under each of the five main criteria. However, the plan did provide that proposals were to be informally scored at the subcriterion level by committees which were established to assist the SEB. Also, cost estimates were not to be given a numerical value in the evaluation process, but were to be used in evaluating an offerors understanding of the services to be performed.

The record shows that the SEB commenced its evaluation of the quotations on December 10, 1970, the day following the closing date set for receipt of proposals. The initial scores and ranking on the basic proposals were:

Criteria	Max Score	RCA Score	Hayes Score	FEC Score
Previous Experience	300	270	240	240
Staffing Plan	200	180	150	150
Management Plan	300	270	230	180
Pol., Proc. & Fin. Cap.	150	110	120	120
Facilities & Equip.	50	50	50	40
Total Score	1000	880	790	730

The scores were accompanied by narrative statements setting forth the strengths and weaknesses of the quotations, upon which basis the scores were assigned.

In this regard, the record shows that the SEB gave Hayes 240 points out of 300 for previous experience and noted that the contractor had limited experience in telecommunications, repair of photographic and reproduction equipment, custodial services and laundering of clean room garments.

The SEB further reported that Hayes proposed to subcontract the custodial services to a newly organized minority firm and that the proposed cost of this subcontract was in excess of $4 million.

With respect to Hayes' staffing plan the Board noted that its key personnel in the areas of telecommunications, industrial relations, subcontract operations, and custodial services lacked experience.

Based on the point scores, all of the basic proposals were determined to be in the competitive range for the procurement, since their overall approaches were either acceptable or correctable to the extent that they had a reasonable potential for selection for final contract award.

Subsequently, oral discussions were conducted with the concerns on March 23, 1971. In this regard, the record indicates that these discussions were limited to clarification of ambiguities or uncertainties in the proposal, but in accord with NASA Procurement Regulation Directive No. 70–15, dated December 1, 1970, deficiencies in the proposals were not discussed.

After final offers were received by the common cutoff date established on April 2, 1971, the SEB finally scored and ranked the final proposals of RCA and Hayes as follows:

Changes In Initial Scores

	Max Score	RCA Svc Co Initial	RCA Svc Co Final	Hayes Basic Initial	Hayes Basic Final
Prev Exp	300	270	270	240	240
Staff Plan	200	180	180	150	150
Mgmt	300	270	280	230	240
Pol, Proc & Fin Cap	150	110	110	120	120
Fac & Equip	50	50	50	50	50
Total	1000	880	890	790	800

The proposal submitted by FEC received a total point score of 840.

With respect to the costs proposed by RCA and Hayes, the Board stated that neither the Government estimate nor the proposers cost estimates were more accurate than ±5 percent. Inasmuch as there was only a cost differential between Hayes and RCA's proposals of 3.8

percent, the difference in the SEB estimated costs for these proposals was considered negligible.

The record indicates that the SEB's evaluation of the proposals was presented to the source selection official on June 7, 1971, who subsequently concluded that the competition among the contenders was close; that there was no assurance of any differential in cost between the offerors, but there was a possible slight differential in favor of Hayes; that he was particularly impressed by the efforts of Hayes in locating and assisting a Negro-owned firm capable of taking on the important custodial subcontract; that he discounted the reported weakness of Hayes flowing from the subcontractor's lack of experience, as an unavoidable consequence of increasing minority business participation in NASA's work; that, although Hayes was ranked behind both RCA and FEC in the Board's evaluation, the differences were not great; and that the weaknesses in Hayes' proposal appeared to be correctable in the final contract negotiations. Accordingly, Hayes International Corporation was selected for the award. However, the source selection official directed that special attention be given in the contract negotiations to overcoming the reported weakness of the corporation in the area of telecommunications work and its proposed key personnel in that area. The source selection official also directed that ceilings on indirect costs be negotiated prior to award.

On June 30, 1971, RCA was given a formal debriefing to discuss the weak points of its proposal. In this regard RCA's proposal was criticized, among other things, for token utilization of minority owned concerns, since its only minority group subcontract was for $127,964 and involved five employees. RCA was further advised that if it had been selected for negotiations that it could have changed its proposal to include additional minority owned firms, provided that such concerns were "capable and economical." However, the debriefer stated that the SEB did not regard RCA's proposal as deficient in the minority business area.

The protesting concerns maintain, among other things, that the selection of Hayes was not based on adherence to the relative importance of the evaluation criteria set forth in the RFP. In this regard it is stated that RCA was informed in the debriefing that its proposal rated much higher than Hayes in its approach to accomplish the telecommunications services of the RFP; that the statement of the selection official regarding the importance of Hayes' minority subcontracting effort as a basis for selecting that concern for award indicates that the selection official gave greater weight to the small and minority business subcriterion of the RFP than was otherwise indicated by the fact that such subcriterion was placed last under the general criterion "Management Plan"; and that the decision of the selection

official to discount the reported weakness of Hayes flowing from the lack of experience of that company's minority business subcontractor was in contravention of the statement of the RFP that an offeror's previous experience, including the experience of his subcontractors in furnishing directly related services was an important evaluation criterion. Accordingly, RCA requests that negotiations should be conducted with that firm whose proposal "most satisfied the requirements of the procuring activity in conformity with the terms of the RFP," or alternatively, that the required services be recompeted.

It is the position of your Administration that all offerors were adequately advised in the RFP that their plans to utilize small and minority businesses would be considered in selecting a successful offeror for the award; that the SEB evaluated the proposal strictly in accordance with the criteria established in the RFP, utilizing a scoring system for the purpose of facilitating the achievement of objectivity and impartiality; and that the discriminating factors, noted above, which were used by the selection official in selecting one of five closely ranked proposals were reasonable, in accordance with broad NASA objectives and national goals, and consistent with the RFP.

It has been the consistent position of our Office that offerors should be placed in a position to make accurate and realistic proposals by informing them in the solicitation of the relative importance to be attached to each evaluation factor. 44 Comp. Gen. 439, 442 (1965). Accordingly, we have held that each evaluation factor and its relative importance should be disclosed to offerors. B–167867, January 20, 1970; B–167508, December 8, 1969; 48 Comp. Gen. 314, 318 (1968).

In this regard, the NASA Source Evaluation Board Manual, NPC 402, as amended, paragraph 512, section (g), provides that the RFP should include "a general indication of the relative importance of the areas of interest," which "*will have the beneficial effect of focusing the concern's major attention to the more significant areas to be covered in the evaluation process.*" [Italic supplied.]

With respect to the action of the selection official in discounting the inexperience of Hayes' minority group subcontractor, it appears that such decision reflected a different interpretation of the "Previous Experience" criterion with respect to the evaluation of the experience of this subcontractor than the SEB had adopted and applied. In this regard it is clear that the SEB interpreted the Previous Experience criterion to apply equally to all prospective subcontractors, whether the concerns were minority owned or not. It is our opinion that this is the only interpretation which can reasonably be derived from the Previous Experience portion of the RFP.

In this connection your Administration's Source Evaluation Board Manual, NPC 402, as amended, chapter 5, Source Evaluation Procedures, provides that the Source Evaluation Board is charged with establishing the proposed evaluation criteria for a request for proposals; that the Chairman of the Board is directed to furnish such criteria to the cognizant procurement office for use in the RFP; and that the RFP will not be issued to prospective sources until it has been reviewed and approved by the Board.

In view of the above, it is clear that the Board was responsible for establishing the "Previous Experience" criterion and the "Small and Minority Business Utilization Plan" subcriterion under the subject RFP. It follows that the SEB's interpretation of the interrelationship of those criteria, noted above, as requiring the equal evaluation of the experience of all subcontractors, without reference to whether the subcontractor qualified as a minority group subcontractor, must be considered to be what was meant by the language used. It is our opinion that the interpretation which the SEB placed upon the language set out in the Previous Experience portion of the RFP is reasonable and is the interpretation which prospective contractors were intended to use in formulating their proposals.

In view thereof, it is apparent that the decision of the selection official to make a distinction in evaluating the experience of Hayes' custodial subcontractor based on its minority ownership was contrary to the advice which the SEB intended to furnish to all offerors in the RFP.

With respect to that portion of the protest which is directed to whether the RFP adequately advised offerors of the importance which the source selection official placed upon utilization of minority group subcontracts, as contemplated under the Management Plan evaluation criterion in the RFP, we note that this portion of the RFP advised offerors special consideration would be given to proposals containing firm commitments to small business subcontractors *or* minority owned enterprises. However, no indication was given to offerors relative to the extent of such special consideration, or that more consideration would be given to a proposal which included a firm commitment to use a minority owned enterprise than would be given to a proposal which included a firm commitment to use a nonminority owned small business concern. Nor were offerors advised that the amount of consideration given to proposals which included firm commitments to use minority owned small business concerns would be directly proportionate to the size of the subcontractual commitment, computed on either a dollar or employee basis. Moreover, no indication was given in the RFP that the use of either small or large business minority

owned subcontractors was to be considered more important than any of the other five subcriteria listed ahead of subcriterion f under the Management Plan evaluation criterion.

In this regard it is the apparent position of your Administration that information regarding the relative importance of the small and minority business utilization subcriterion need not have been conveyed to offerors, since the SEB plan did not provide for weighting or scoring at the subcriterion level during the Board's evaluation. Although this statement appears to be correct, the record indicates that subcriteria were weighted during their consideration at the Committee level.

We would agree that there is no obligation to advise bidders of the relative importance of evaluation subcriteria, or to list such subcriteria in descending order of importance, if they are to be considered of equal, or approximately equal importance. However, where one subcriterion is to be considered of outstanding or overriding importance, offerors should be so advised, and in the absence of specific advice to the effect that one or more subcriteria will be given substantially more weight in the evaluation than others, it is our opinion that offerors are entitled to assume that all subcriteria will be considered of equal, or approximately equal, importance. In the instant case, however, the statement of the source selection official clearly indicates that the efforts of Hayes in utilizing a minority owned concern to accomplish the custodial services requirement was a primary factor in his determination that Hayes should be selected for award, notwithstanding Hayes was scored almost 11 percent lower than RCA by the SEB.

While we do not question the right of the selection official to exercise his review authority by changing the weights or relative importance of evaluation factors, or by determining that the narrative definitions should convey a meaning different from that intended by the drafters of such definitions, we believe that when this occurs offerors should be informed of such revisions, and be afforded an opportunity to submit proposal revisions reflecting such changes for further consideration.

In any event, it is our informal understanding that the "selecting out" procedure is utilized in order to prevent the diffusion of technical approaches during negotiations and, consequently, a leveling of the technical quality of proposals for the award of procurements which require technically sophisticated services or products. However, in the subject case, it is apparent that technical approach was not considered to be of paramount importance in determining the successful offeror, since it is admitted that Hayes was relatively weak in the telecommunications area. In view thereof, it would appear that the stated basis for

initiating the "selecting out" procedure, that is, the need to prevent the diffusion of technical approaches among the offerors, may not be applicable to the subject procurement.

In this connection, we believe the statement, noted above, given to RCA at its debriefing that it could have changed its proposal to include additional minority firms, if it had been selected for negotiations, shows that discussions with that concern prior to the selection of the successful offeror would have been feasible, as well as desirable from the standpoint of encouraging maximum utilization of small or minority businesses by NASA contractors.

We cannot state as a matter of law as distinguished from sound procurement policy, that your Administration is without authority to make an award of this contract to Hayes. The RFP did specify that special consideration would be given to proposals evidencing firm commitments for minority subcontracting, albeit in terms that were not sufficiently precise to warrant clearly the action taken. All of the proposals were meticulously and fairly evaluated by the SEB according to the precise terms of the RFP. On the basis of such evaluation RCA was determined to have submitted the superior proposal and apparently would have been selected for award apart from consideration of minority subcontracting.

The question of the source selection official's legal authority to rely on the extent of minority subcontracting in selecting Hayes for award on the basis of a proposal scored inferior to RCA's, turns on whether there exists a mandate, statutory or otherwise, that the source selection official must either select a superior proposal or conduct further negotiations to cover any changes in concepts from those upon which proposals were initially submitted. Assuming an affirmative conclusion on this issue, it is our view, despite the absence of any statutory or regulatory provision specifically directed toward the point, that the dictates of the overall competitive negotiation process require an affirmative conclusion, except where an overriding legitimate Government need or purpose supports a contrary result. In this connection, we believe that there are three basic aspects to be considered—the competitive aspect of the negotiation process, including the avoidance of arbitrary actions; the openness of the process to avoid the award of Government contracts on the basis of improper favoritism; and the concept that the rights of bidders on advertised procurements and negotiated procurements are not the same.

There can be no question but that the basis upon which an award to Hayes is being proposed has been openly stated, with no implication that the source selection official in making his choice is proceeding in other than a straight-forward manner after full and fair evaluation

of all proposals. While there may be grounds for disagreement with the reasoning by which the source selection official chose to select Hayes over the other offerors, we cannot conclude that such selection was arbitrary. In view thereof, and recognizing the absence of either a statutory or regulatory direction relative to awards in negotiated procurements of this type, we cannot conclude that the departure from what we consider to be sound procurement policy from a competitive standpoint is sufficient in itself to preclude the source selection official from making his selection on the basis stated.

The files forwarded with the reports of August 26 and October 12 are returned.

[B-173477]

Bids—Mistakes—Unit Price *v.* Extension Differences—Decimal Point Misplaced

The correction of a bid in accordance with an invitation for janitorial services that provided "in case of error in extension of price, the unit price will govern," which displaced the bid from low to second place was proper, for the bidder's contention its bid price was firm and the price intended, and that the errors in placement of decimal points in the unit prices were clerical errors to be waived as minor informalities under paragraph 2-405 of the Armed Services Procurement Regulation (ASPR) is not acceptable where the contracting officer found it impossible to tell whether the misplaced decimal points occurred in the unit price figures or the multiplication performed to compute the price extension and, therefore, the errors are not apparent within the meaning and intent of ASPR 2-406.2 to permit correction of the unit prices and award a contract on the basis of the low total price.

Contracts—Protests—Resolution—Award Notwithstanding Protest

Where a contracting officer is aware prior to award that a bidder considered its total bid and not the unit prices to be correct, and he determined that the errors in unit prices were not for correction, the protest was "resolved" prior to award within the contemplation of paragraph 2-407.8 of the Armed Services Procurement Regulation since it does not appear that any different result would have, or should have, obtained if the award had been delayed.

To Hudson, Creyke, Koehler, Brown & Tacke, November 9, 1971:

We refer to your letter of July 2, 1971, and subsequent correspondence on behalf of Jayhawk Enterprise, protesting award of Contract No. N62472-71-C-4568, Janitorial Service for Navy Buildings, U.S. Naval Base, Philadelphia, Pennsylvania.

The invitation for bids in this case was issued on June 4, 1971, by the Resident Officer in Charge of Construction, Naval Facilities Engineering Command, U.S. Naval Base, Philadelphia, Pennsylvania, and called for bids on one item, the entire work complete in accordance with the drawings and specifications. The work to be performed was

set forth in twelve subitems, A through M, with the exception of H, which described the buildings where the services were to be performed. Each subitem contained eleven paragraphs of description of the services and included information on the frequency, area, estimated quantity and unit of service. Clause 2(b), Preparation of Bids, provides as follows:

Unit prices for all bid items shall be shown * * *. A total shall be entered for each item bid on. In case of error in extension of price, the unit price will govern.

Five bids were received and opened on June 24, 1971:

Bidder	Total Bid
Jayhawk Enterprise	$552,952.16
Kentucky Building Maintenance	566,305.14
Atlantic	648,770.00
Advance Building Maintenance	736,103.43
Dynamic International	859,736.02

Each bidder's submission was checked for accuracy and no errors were found in the bids of Kentucky Building Maintenance and Advance Building Maintenance. However, a comparison of the Bid Summary Sheets and the unit prices disclosed a number of errors in the other three bids. After extending the unit prices set forth in the bids and correcting the errors in extension and addition the bids were entered in the abstract of bids as follows:

Bidder	Corrected Bid
Kentucky Building Maintenance	$566,305.14 (no error)
Jayhawk Enterprise	635,064.59
Atlantic	667,363.55
Dynamic International	859,735.84
Advance Building Maintenance	736,103.43 (no error)

The report from the Navy states that your client, Jayhawk Enterprise, was advised of this action on June 30, 1971, and thereafter on the same date award was made to Kentucky Building Maintenance.

You submit that Jayhawk responded immediately in writing on June 30, 1971, acknowledging the existence of certain decimal errors in unit price, but stating that its bid price remained firm computed from the unit prices after proper placing of the decimal points. In the formal letter of protest to the contracting officer, dated July 1, 1971, Jayhawk states that its total price of $552,952.16 is the price intended and the errors in placement of decimal points in the unit prices are minor informalities which should be waived under ASPR 2-405. In neither letter were the errors in the unit prices identified nor were the correct unit prices set forth.

Your letter of protest to our Office on July 12, 1971, asserts that this is a case of an apparent clerical error under ASPR 2–406.2 and that correction of decimal errors in the unit prices would therefore be proper. You contend that the contracting officer's decision to change the extended prices to conform to the unit prices in the bid was arbitrary and contrary to the governing regulations.

The Navy report states that an analysis of Jayhawk's bid shows eight errors in price extension as well as other errors in totaling figures for the Bid Summary Sheet. The contracting officer found that it was impossible to tell whether misplaced decimal points occurred in the unit price figures or in the multiplication performed to compute the price extensions. There was no consistent pattern of error since some errors raised the price while others lowered it. In addition to the errors in decimal placement in unit prices there were other errors in totaling the extensions for the Bid Summary Sheet. The contracting officer determined that the errors were not "apparent" within the meaning and intent of Armed Services Procurement Regulation (ASPR) 2–406.2, and accepted the unit prices set forth in the bid as controlling in accordance with the provision in the invitation. When the bid computations were performed using the unit prices set forth in Jayhawk's bid, the resultant total bid price of Jayhawk was $635,064.59, or the second low bid. The contracting officer states that award was made to Kentucky Building Maintenance, who made no error in its bid, in the amount of $566,305.14.

Your letter of August 10, 1971, in rebuttal of the Navy report, takes issue with the conclusion of the contracting officer that the errors in Jayhawk's bid were not "apparent" within the meaning and intent of ASPR 2–406.2. You state that Jayhawk made three kinds of errors: errors in totaling extended prices which caused a discrepancy of $5.64; errors in "rounding off" extended prices which caused a discrepancy of $0.06; and errors in placement of decimal points in the unit prices for eight items, the net result of which was to increase Jayhawk's bid by $81,661.32. You aver that only one error, in Item K b, was of a magnitude sufficient to displace Jayhawk as low bidder.

You point out that the service described in subitem "b" is "wash and rinse all floors in toilet rooms" and you submit a chart showing all the unit prices bid for "b" work in 14 locations. You contend that the chart shows a general pattern of an inverse relationship between the estimated square footage and the price to be charged. In other words, the greater the square footage, the lower the unit price. You assert that the extended price for Item K b, when computed on the unit price shown in the bid, was so out of line with other unit prices and

so completely inconsistent with the extended price for Item K b and other extended "b" prices as to leave no doubt concerning the unit price Jayhawk had intended to bid. It is your position that correction of the mistake should have been allowed.

You also introduced a new argument in your letter of August 10 which was not present in your original protest. You assert that Jayhawk made a written protest to the contracting officer on July 1 and that award of the contract was not made until after receipt of the protest, although the Navy report shows an award was made on June 30. You insist that award should have been held up pending resolution of the protest pursuant to the provisions of ASPR 2-407.8(b)(3) concerning preaward protests.

We will consider first your allegation that the errors in Jayhawk's bid were apparent on the face of the bid and should have been corrected pursuant to ASPR 2-406.2. We agree with your argument that the provision in the invitation that "In case of error in extension of price, the unit price will govern" is not controlling. As indicated in the numerous decisions of this Office you have cited, that clause means precisely what it says: if the error is in the extension, the unit price is obviously correct and should govern. However, if there is convincing evidence that the error occurred in the unit price, the error is dealt with in accordance with the established principles of error correction. 36 Comp. Gen. 429 (1956); 37 *id.* 829 (1958); 39 *id.* 185 (1959); B-164453, July 16, 1968; B-165454, November 8, 1968; B-164869, August 6, 1968; B-161147, August 6, 1967.

Our examination of Jayhawk's bid discloses that, excluding Item K b, Jayhawk bid unit prices on thirteen items of "b" work, ranging from a high of $0.0545 per square foot for an estimated quantity of 2,184 square feet in Item C b to a low of $0.000621 per square foot for an estimated quantity of 213,696 square feet in Item B b. As you have indicated, there is a general pattern of an inverse relationship between the estimated square footage and the unit price to be charged, in that some of the unit prices for the larger quantities tend to be lower.

There is also, as you observed, an inconsistency between the unit price of $0.015 per square foot for 7,199,640 square feet in Item K b and the unit price of $0.000646 per square foot for 5,638,608 square feet in Item J b, the nearest comparable quantity. Your argument of an inverse relationship between the unit price and the quantity would appear to lead to the conclusion that the unit price for Item K b should be less than the unit price for Item J b, because of the increase in quantity. However, there is no discernible relationship between the bid prices for Items K b and J b. Even if the unit price for Item

K b is corrected to conform to the extension price, the corrected unit price of $0.0015 is still almost two and one-half times higher than the unit price of $0.000646 for Item J b, instead of being lower. Both the unit price and the extended price of Item K b are out of line with the unit price and extended price for Item J b under the theory of an inverse relationship between quantity and unit price.

On the other hand, if the theory of inverse relationship is abandoned, we find that both the unit price as stated and as corrected are within the range of unit prices quoted for the same services in other buildings. In these circumstances we think it is unreasonable to assert that the contracting officer could determine from the face of the bid what price Jayhawk intended to bid for Item K b. The same lack of correlation between bid prices for the same services in different locations may be observed in the seven other instances where there is a discrepancy between the unit price and the extension. In Items C e, C i, M f, M g and M h, both the unit price as stated and the unit price as changed to conform to the extension are within the range of unit prices bid for the same services in other buildings. In a second bid under Item C i, both the unit price as stated and as corrected are outside the range of other bids for the same services. In only one instance, Item C h, is the unit price stated outside the range of other bid prices, while the corrected unit price is within that range.

Based on our examination of Jayhawk's bid, as outlined above, we must conclude that the contracting officer was correct in his conclusion that it was impossible to tell whether the misplaced decimal points occurred in the unit prices or in the multiplication performed to compute the price extension. In 49 Comp. Gen. 12 (1969) we stated at page 14:

> While ASPR 2-406.2 authorizes the correction of a clerical mistake which is "apparent on the face of a bid," we are of the view that such a situation is not present here, since it is not apparent from the face of the bid whether the error occurred in the unit price or in the extended price.

In our opinion, the present case falls squarely within the purview of this principle and correction of the eight decimal errors in Jayhawk's bid was properly denied under ASPR 2-406.2.

There remains the question of whether it would be proper to refer to extrinsic evidence, such as the Jayhawk worksheets, to determine Jayhawk's intended bid. As indicated above, Jayhawk's bid is low on the basis of the total shown on its face, and second low when computed on the basis of the unit prices stated therein. In 49 Comp. Gen. 107 (1969) and 43 Comp. Gen. 817 (1964) we held that where a bid is readily susceptible of being interpreted as offering either one of two prices shown on its face, one of which is low while the other is not, it is unfair to the other bidder or bidders affected to permit the bidder

who created such ambiguity to elect which price to support. In line with these decisions, ASPR 2-406.3(a)(3) provides that a determination shall not be made to permit a bidder to correct a mistake where the correction would result in displacing one or more lower bids unless the mistake and the bid actually intended are ascertainable from the invitation and the bid itself.

In view of the foregoing, we see no basis on which correction of Jayhawk's bid could properly be permitted.

Your remaining contention is that Jayhawk's letter of protest of July 1 was delivered to the contracting officer before award of the contract and the award should have been delayed until the protest was resolved. While this raises a disputed question of fact in that the Navy report states that the contract was awarded on June 30, the point is, as you have observed, irrelevant. A contracting agency is permitted, under ASPR 2-407.8, to resolve a protest filed with a contracting officer. In this instance, the contracting officer was aware, prior to award, that Jayhawk considered its total bid and not the unit prices to be correct. He made a determination—and properly so, in our opinion—that the errors in unit prices were not for correction. It does not appear that any different result would have, or should have, obtained if the award had been delayed. We must therefore conclude that the matter was "resolved" prior to award within the contemplation of ASPR 2-407.8. See 46 Comp. Gen. 307 (1966).

For the reasons stated, we find no basis on which to object to the award to Kentucky Building Maintenance. Accordingly, your protest is denied.

[B-171729]

Bidders—Qualifications—Tenacity and Perseverance—Certificate of Competency Effect

The determination a small business concern was nonresponsible on the basis of a negative preaward survey evidencing past unsatisfactory performance under both Government and private contracts attributable to tenacity and perseverance which, pursuant to section 1-1.708-2(a)(5) of the Federal Procurement Regulations that concerns deficiencies other than capacity and credit, was forwarded to the Small Business Administration (SBA) for issuance of a Certificate of Competency (COC) if warranted is upheld where SBA agreed the bidder lacked tenacity and perseverance and, in addition, concluded the concern was deficient in capacity and the issuance of a COC was not justified. While the factor of tenacity and perseverance is not covered by the COC procedure, the denial of a COC operated as concurrence by SBA in the contracting officer's determination an award to the low bidder was precluded.

To the Southwest Engineering Company, November 10, 1971:

We refer to your protest, by telegram of November 2, as supplemented by telegram and letter of November 4 and your telegram of

November 7, 1971, against the rejection by the National Oceanic Atmospheric Administration (NOAA), United States Department of Commerce, of a low bid submitted by you for construction of upper air facilities for the National Weather Service at Monett, Missouri.

The procurement solicitation, invitation for bids N–16–10–72, issued on July 12, 1971, by the National Weather Service, NOAA, Monett, provided for bid opening on August 20, and your bid on the project was in the amount of $48,287. The only other bid received by the Government was submitted by Branham Brothers Construction Company (Branham), and the amount was $50,804.

By telegram dated October 29, the contracting officer notified you that your bid was rejected following receipt from the Small Business Administration (SBA) of advice upholding a determination that you were nonresponsible under the standards set forth in Federal Procurement Regulations (FPR) 1–1.310–5 for responsible prospective Government contractors. In addition, you were notified that award would be made no later than November 10 to Branham.

In your telegram of November 4 you state that the rejection of your bid was based on (1) lack of tenacity and perseverance in the performance of past contracts; (2) submission to our Office of 9 bid protests, 7 of which have been denied; (3) problems involving employee wage rates with which the United States Department of Labor was concerned; (4) complaints of discrepancies in your financial reports; and (5) lack of skilled or experienced employees on your current work force. You take exception to each of such bases on various grounds.

Your telegram of November 7 sets forth the same issues and arguments as your telegram of November 4 together with your specific contention that SBA's decision on your Certificate of Competency (COC) application should relate only to (a) ability to finance the project, (b) experience and capability, (c) organization, (d) equipment and facilities. In addition, you contend that none of such "conditions" should act as a deterrent to award to your firm.

The record before our Office includes documentation from NOAA and from the Defense Contract Administration Services Office (DCASO), Defense Supply Agency, Kansas City, Missouri, as well as the complete file of the SBA Kansas City regional office.

Following the opening of bids on August 20, as scheduled, the contracting officer, acting pursuant to FPR 1–1.310–9, requested DCASO Kansas City to perform preaward surveys of your firm and of Branham. The DCASO report on Branham was favorable and included a recommendation for complete award. The DCASO report on your firm, however, was negative and recommended no award, primarily on the basis of past unsatisfactory performance of both Government and com-

mercial contracts, which factor, DCASO stated, was attributable to lack of tenacity and perseverance.

On September 15 the contracting officer issued a written Determination of Nonresponsibility, as required by FPR 1-1.310 6, which provided in pertinent part as follows:

a. The prospective contractor will not, based on past experience, comply with plans and specifications unless forced to comply by Government personnel as the job progresses.

b. The prospective contractor will not meet the 120 day completion date required due to his lack of complete cooperation and attitude toward Government personnel as exhibited in the past.

c. The prospective contractor lacks the technical capability required to perform in a timely manner and to produce a quality building as demonstrated in the past.

d. Past performance by this contractor for Southwestern Bell Telephone Company, FAA and the Department of Commerce-National Weather Service bears out unsatisfactory performance due to failure to apply necessary tenacity or perseverance in the right direction to do an acceptable job.

The basis of the preceding determinations are (1) reflected in Pre-Award Survey No. S2604A18007P performed by the Defense Contract Administration Services Office, Kansas City whose Pre-Award Survey Board recommended to the Contracting Officer "No Award" and (2) the past performance by Southwest Engineering Company under National Weather Service Contract ES-16-5-70 for the construction of National Weather Service Office Building and Radar Complex at Monett, Missouri, which reflected marginal quality of work, failure to proceed diligently to completion within the authorized performance period, the substantial deficiencies requiring rejections during performance and considerable remedial work following occupancy and (3) affidavits from capable and qualified sources from other Government agencies attesting to poor performance in the past by Southwest Engineering which are included in the Appeals File NOAA-1 for the previously mentioned contract.

Pursuant to FPR 1-1.708-2(a)(5), which concerns determinations of nonresponsibility of small business concerns for reasons other than deficiencies in capacity or credit (including persistent failure to apply necessary tenacity or perseverance to do an acceptable job—not whether the bidder *can* perform but whether he *will* perform), the contracting officer furnished to SBA a copy of his determination and the supporting documentation to afford SBA an opportunity to express, if desired, contrary views in the matter. Presumably because paragraph (c) quoted above related to your capacity to perform the contract, SBA subsequently afforded you an opportunity to apply for a Certificate of Competency, and then proceeded to conduct its own independent investigation as to your responsibility.

SBA's records in this matter show that a thorough investigation was made by SBA representatives relative to both your present capacity and your past performance, and information was obtained which indicates poor performance by you of several Government and private contracts, including the three contracts cited in the DCASO report, due to lack of tenacity and perseverance. In addition, SBA concluded, on the basis of information furnished by you relative to your present organization and work force, that you were deficient in

capacity for reasons which come within the scope of the COC procedure, as set forth in FPR 1–1.708–2.

By letter dated October 28, SBA advised you that it had given careful consideration to your COC application, that it had also carefully reviewed all of the information and data supplied, and that it found no sufficient reason for disagreeing with the decision of the procuring agency. The letter also indicated SBA's conclusion was based, in part, on its conclusion that you had inadequate experienced or skilled employees, and in part on the conclusion that both Government agencies and commercial concerns for whom you had performed work in the recent past had indicated dissatisfaction with both the quality and timeliness of such work, and had attributed such deficiencies to matters which reflected lack of tenacity and perseverance on your part.

The concluding paragraph of the SBA letter included a statement that "conditions present in this instance did not justify our issuance of a Certificate of Competency on your behalf."

The contracting officer's telegram of October 29 which notified you of the rejection of your bid was issued after receipt by NOAA of a letter dated October 28 from SBA advising of the action taken on your application for a Certificate of Competency and after approval by the head of the procuring activity of the contracting officer's determination of nonresponsibility.

Under 15 U.S.C. 637(b)(7), SBA is empowered to certify to Government procurement officers the competency as to capacity and credit of any small business concern to perform a specific Government contract, and such certification is required to be accepted by procurement agencies as conclusive of a prospective contractor's responsibility as to capacity and credit. The Certificate of Competency procedures set forth in FPR 1–1.708 accordingly require, with certain exceptions not pertinent here, that SBA be notified whenever a contracting officer has found a small business concern to be nonresponsible as to capacity or credit and the bid is to be rejected for such reason alone. SBA thereafter considers the matter independently and takes action either to issue or to decline to issue a COC.

Factors indicative of nonresponsibility which do not relate to capacity or credit of a small business concern (e.g., lack of integrity, business ethics, or persistent failure to apply necessary tenacity or perseverance to do an acceptable job—not whether the bidder *can* perform but whether *he will* perform) are not covered by COC procedures. 43 Comp. Gen. 257 (1963). The contracting officer's determination, however, where lack of tenacity and perseverance is a factor in past unsatisfactory performance, must be supported by substantial

evidence documented in the contract file and is subject to approval by the head of the procuring activity as his designee. FPR 1-1.708-2(a)(5). In addition, FPR 1-1.708-2(a)(5)(i) requires that SBA be notified of the adverse determination, and FPR 1-1.708-2(a)(5)(ii) provides for submission by SBA, if desired, of contrary views to the procurement agency.

The record in the instant case raises some question as to whether the contracting officer's referral to SBA was not intended solely for the purpose of giving SBA the opportunity to disagree with the contracting officer's findings that matters relating to your tenacity and perseverance precluded a determination that you were a responsible bidder. In that event, it would appear that the issuance or denial of a COC would not come into issue until and unless SBA disagreed with the contracting officer's determination that his findings related to tenacity and perseverance, rather than to capacity and credit. Nevertheless, the record indicates that SBA did conduct a full scale investigation which resulted not only in agreement with the contracting officer's conclusion that you lacked tenacity and perseverance, but also in adverse findings relative to your capacity to perform the contract. While we question the inclusion of matters relating to tenacity and perseverance in a denial of a COC, it is apparent that the denial in the instant case did operate as concurrence by SBA in the contracting officer's determination that your poor past performance was attributable to lack of tenacity and perseverance.

From our review of the records furnished this Office by NOAA, by SBA, and by DCASO, which include substantial documentation on your performance of several past contracts, both Government and private, we must agree that such records include substantial evidence of lack of tenacity and perseverance on your part in performing the work covered by such contracts. While it well may be, as you state, that the majority of your contracts have been completed without complaint, we are unable, in view of the documentation of record, to conclude that the substantial evidentiary requirement of FPR 1-1.708-2(a)(5) as to lack of tenacity and perseverance has not been met. Accordingly, and since the contracting officer complied with the provisions of FPR 1-1.708-2(a)(5)(i) relating to notification to SBA of his adverse determination, we find no legal basis to question the propriety of the contracting officer's determination that you were nonresponsible by reason of lack of tenacity and perseverance, or to question the proposed award to Branham, who has been determined to be responsible as well as responsive.

The foregoing evidences that it is the contracting officer's adverse determination of your responsibility, based on factors not governed

by the COC procedures, which precludes award to you. In the circumstances, no discussion is required of the other issues set forth in your telegrams of November 4 and 7, which were apparently based on information which you received from SBA and which are not decisive of the lack of tenacity and perseverance issue.

For the reasons stated, your protest must be denied.

[B-173563]

Contracts—Specifications—Failure to Furnish Something Required—Addenda Acknowledgment—Addenda in Bid Package

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

General Accounting Office—Recommendations—Implementation

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

To the Secretary of the Army, November 12, 1971:

Reference is made to letter AMCGC-P dated October 5, 1971, with enclosures, and prior correspondence, from the Deputy General Counsel, Headquarters, United States Army Materiel Command, reporting on the protests of Thompson Optical Engineering Company and Davidson Optronics, Inc., under invitation for bids (IFB) No. DAAA-25-71-B-0506, issued by Frankford Arsenal, Philadelphia, Pennsylvania.

The subject invitation was issued on May 7, 1971, to 57 firms for 59 articles described as follows:

Telescope M101, P/N 7695945, in accordance with Dwg. F7695945, Rev. F. Specifications MIL-T-46333, Rev. A dated 9/10/70, MIL-I-45208, Rev. A dated 12/16/63 and all data listed in Technical Data Package List No. 7695945 dated 3/12/71 incorporated herein and made a part hereof.

After the invitation was issued, a review of the technical data package list (TDPL), referenced in the invitation, by the technical operations office revealed that a number of relevant drawing numbers had been omitted from the TDPL included in the IFB package and that Military Specification (Milspec) No. MIL-T-46333A referenced two relevant drawings by erroneous numbers. Therefore, amendment No. 001 was issued on May 12, 1971, to add the omitted drawing numbers to the TDPL and to correct the erroneous drawing numbers. In addition, 45 aperture cards (microfilms of drawings) representing the omitted drawings were furnished to the bidders. In this regard, the invitation as originally issued contained aperture cards depicting all drawings referenced in the TDPL. With respect to the erroneous drawing numbers contained in Milspec MIL T-46333A, the amendment provided as follows:

> On page No. 2 of Military Specification No. MIL T 46333A, Dwg. No. F7659479 should read F7695479 and Dwg. No. F8614973 should read F8214973. On page No. 9 Dwg. No. F8614973 should read F8214973.

The amendment also contains a notice that failure to acknowledge the amendment may cause rejection of the bid.

The record indicates that 7 bids were received by the June 7, 1971, opening date. The contracting officer determined that the low and second low bidders, Thompson Optical Engineering Company and Davidson Optronics, Inc., respectively, were nonresponsive for failure to acknowledge amendment No. 001 to the invitation which affected price and quality and therefore could not be waived as a minor informality. Accordingly, on June 1, 1971, the contracting officer awarded contract No. DAAA25-72-C-0077 to Optic as the low responsive and responsible bidder.

We are advised that all bidders who were issued IFB's after the May 12, 1971, amendment date, however, including the protestants should have received complete bid sets containing: (1) cards showing all drawings referenced in the specifications and TDPL, as amended, (2) a revised TDPL listing all drawing numbers, (3) a complete IFB, and (4) amendment No. 001. In this regard, although only amended bid sets were furnished after the issuance of amendment No. 001, a copy of the amendment was incorporated in the bid sets, with its requirements for acknowledgement, in order to indicate that the amendment had earlier been made and in order for the contracting officer to ascertain with certainty that all bidders were bidding to the same requirements.

Thompson and Davidson and one other firm receiving a bid set after the May 12 issuance of the amendment contend that their bid sets did not contain the amendment. However, by letter of July 23, 1971,

Thompson advised that its firm and Davidson Optronics received with their bid packages the corrected TDPL which included new pages 14 and 14a as well as all the aperture cards. Therefore, Thompson contends that any amendment or acknowledgment thereof was unnecessary and superfluous.

The issue for our consideration is whether, under the circumstances, a bidder's failure to acknowledge the amendment rendered its bid nonresponsive. Our Office has consistently held that a bidder's failure to acknowledge a material amendment renders its bid nonresponsive. See 50 Comp. Gen. 11 (1970); 47 *id.* 597 (1968). We must decide whether the Thompson bid in the absence of an acknowledgment of the amendment would bind that bidder to performance in full accordance with the terms, conditions, and specifications of the invitation, as amended. The contracting officer contends that Thompson would not be so bound in the absence of its acknowledgment of the amendment.

For the reasons stated below, we conclude that the failure of Thompson and Davidson to acknowledge amendment No. 001 did not render their bids nonresponsive. In reaching this conclusion, we need not determine whether the protestants received the documents missing from the original bid package, as they contend, because it is our conclusion that the invitation for bids, before amendment, served to bind prospective contractors to the same specification requirements as did the amended invitation. In this regard, Thompson and Davidson in submitting their bids agreed to perform in accordance with all the terms and conditions set forth in the invitation. Page 33 of the unamended invitation requires that the telescopes are to be supplied in accordance with Milspec MIL–T–46333A. As indicated above, amendment No. 001 added certain drawing numbers which were depicted on 45 aperture cards. However, the drawing numbers added to the TDPL by amendment No. 001, with the exception of the erroneous drawing numbers, were already referenced in specification MIL–T–46333A incorporated in the unamended invitation. All of the drawing numbers later added to the TDPL are, therefore, a part of the original invitation. Therefore, the drawings themselves, as represented by the 45 aperture cards, could have been furnished to bidders at any time without the necessity of an amendment and without any effect on the obligation of bidders to perform in accordance with Milspec MIL–T–46333A.

While the invitation schedule required that the subject telescope be constructed in accordance with "all data" in the referenced TDPL, and while the invitation specified on page 35 that "all drawings and specifications" listed in the TDPL would apply, we cannot conclude that the omission of certain drawing numbers from the TDPL or the failure to include certain aperture cards in the bid package could be said to

eliminate the requirement of compliance with those drawings clearly stipulated in the Milspec. This is not a case of ambiguity, as contended by the contracting officer, inasmuch as there is no conflict between the drawings referenced in the Milspec and those called out in the TDPL and depicted in the aperture card drawings in the unamended invitation. Rather, to the extent that those documents reference the same drawing numbers, they duplicate one another, while with respect to the drawing numbers not included in the unamended TDPL and aperture cards, the Milspec, standing alone, requires bidder compliance.

Concerning the two drawing numbers erroneously identified in Milspec MIL-T-46333A and corrected by amendment No. 001, a reading of the Milspec, as unamended, reveals that while drawing No. F7695479 is misidentified in paragraph 2 of the Milspec entitled "Applicable Documents," the correct drawing number appears in paragraphs 4.6.2.1, 4.6.2.3, and 4.6.2.11 of the Milspec which deal with the actual requirements of the specification. Since the Milspec itself requires all bidders to perform the work in accordance with the correct drawing number, F7695479, the erroneous number listed in paragraph 2 is immaterial and a bidder's failure to acknowledge the amendment would not affect its obligation to perform in accordance with drawing number F7695479.

With regard to the amendment's correction of drawing No. F8614973 reportedly a nonexistent drawing to read F8214973, we note that Milspec No. MIL-T-46333A referenced the incorrect drawing number in two places. On page 2 of the Milspec, the incorrect number is listed directly across from the description "Adapter Vibration" and on page 9 of the Milspec, the incorrect number is again set out in the specification section entitled "Vibration." That section is set out below:

> 4.6.2.1.2 *Vibration*—This test shall be performed using a testing device, the accuracy of which shall be equal to or exceed the accuracy depicted on Fixture F7560085 and Adapter F8614973 * * *.

With respect to specification errors and omissions, page 14 of the invitation provides in pertinent part as follows:

> Section C-6 Errors and Omissions.
>
> The prospective bidder/offeror and/or contractor will not be permitted to take advantage of any errors or omissions in these specifications. Should such errors or omissions be discovered, full instructions will always be given for clarification by the Contracting Officer or his duly authorized representative * * *.

All firms submitting bids were bound to perform in full accordance with Milspec No. MIL-T-46333A. The fact no drawing No. F8614973 existed would not serve, in our opinion, to relieve a bidder from the responsibility of performing the test under paragraph 4.6.2.1.2 in ac-

cordance with the proper drawing number in view of the language contained in section C–6 above. In view of the foregoing, any bidder responding to the invitation as unamended would be obligated to perform the work in accordance with drawing No. F8214973 in event of award regardless of whether the amendment had been acknowledged.

Accordingly, we conclude that the bids of Thompson and Davidson should not have been rejected for failure to acknowledge the amendment. While award was made to the third low bidder, Optic Electronic Corporation, on July 1, 1971, Frankford Arsenal ordered the contractor to stop work as of August 9, 1971.

Assuming that Thompson Optical is the low responsive, responsible bidder, the question arises whether a contract awarded erroneously but in good faith to other than the low responsive, responsible bidder should be canceled.

When it was determined that the protest might require action by our Office which would adversely affect Optic's interests, in accordance with our bid protest procedures (4 CFR 20.2), we furnished Optic with a copy of the protest and provided Optic with an opportunity to present its views.

Optic Electronics submitted its comments to our Office by letter dated August 16, 1971. We have considered the arguments advanced by Optic in support of its contention that failure to acknowledge the amendment rendered Thompson's bid nonresponsive but we do not agree for reasons discussed above. Optic states that its firm had been awarded the contract about 45 days prior to its August 16 letter and that because of the complexity of the system and the short delivery cycle, it has expended substantial start-up costs to assure meeting the tight delivery schedule. In a letter dated August 30, 1971, from the Office of Counsel at Frankford Arsenal, it is stated that Optic estimates potential cancellation costs as $18,784, excluding outstanding purchase orders as to which it estimates $500 cancellation charges. In this regard, we note that the Thompson Optical bid was evaluated as being some $15,300 lower than the Optic bid. Further, the delivery schedule provides in pertinent part as follows:

Section H–1—Delivery Schedule

Deliveries shall be made as follows: *(No. of months after date of award)

Line Item or Subline Item	Quantity	Del. Date
0001	3 each	11½ months
	15 each	12 months
	15 each	13 months
	15 each	14 months
	11 each	15 months

Since a stop work order was issued to the contractor about a month after award and deliveries are not scheduled to commence until 11½ months after award, we foresee no serious impact on delivery requirements in the event of contract termination.

In view of the above, we recommend that the contract awarded to Optic be terminated for the convenience of the Government since the record establishes that award was made to other than the low responsive bidder. See 51 Comp. Gen. 62 (1971). We further recommend that award of the procurement be made to Thompson Optical Engineering Company if its low bid is still available for acceptance and it is otherwise determined to be responsible.

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

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

[B-163501]

Pay—Service Credits—Dual Credit—Concurrent Payments of Retired Pay

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

Public Health Service—Commissioned Personnel—Retired Pay—Annuity Election for Dependents—Validity

The election by an Army Reserve officer retired for age under 10 U.S.C. 1331 not to participate in the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1441–1446, does not affect the validity of his election to come under the plan

in connection with his retirement from the Public Health Service (PHS), where he served as a commissioned officer on active duty following discharge from the Army Reserve. Since the officer had in effect a valid election to participate in the plan at the time of his retirement from the PHS, and there was an implied surrender by him of his military retired pay at that time, the deductions made from his PHS retired pay based solely on that retired pay were proper.

To the Secretary of Health, Education, and Welfare, November 16, 1971:

Further reference is made to letter dated August 17, 1971, from the Assistant Secretary for Administration and Management requesting a decision on various questions arising out of the concurrent receipt by Dr. Paul S. Parrino of retired pay as a Reserve officer of the Army and retired pay as a Public Health Service commissioned officer.

The records show that after more than 20 years of active service in the National Guard and the United States Army Reserve, Dr. Parrino was discharged July 31, 1957, to accept a commission in the United States Public Health Service. In 1960 he wrote to The Adjutant General of the Army concerning his options on retirement as a former Reserve officer of the Army and on retirement from the Public Health Service Commissioned Corps.

On being advised by The Adjutant General that he was not aware of any provision of law precluding concurrent receipt of retired pay from both services an opinion was requested from the Office of the General Counsel, Department of Health, Education, and Welfare, concerning the legality of using his years of active duty in the Army for purposes of determining eligibility for retirement and the computation of retired pay for both the Army and the Public Health Service. The reply from the General Counsel's Office seemed clearly to indicate that dual crediting was permissible.

Upon becoming 60 years of age on April 13, 1961, Dr. Parrino applied for and was granted military retired pay by the Army under the provisions of 10 U.S.C. 1331–1337 and received such pay concurrently with his active duty pay and allowances from the Public Health Service from May 1, 1961, to June 30, 1966, when he began receiving retired pay from the Public Health Service at the maximum rate of 75 percent of his active duty pay. He was mandatorily retired from the Public Health Service under the provisions of 42 U.S.C. 212(a) (1) effective May 1, 1965, but was immediately recalled to active duty and served in that status through June 30, 1966. In the computation of his Public Health Service retired pay some of his active service with the Army was credited. He has continued to receive Army retired pay and Public Health Service retired pay to the present time.

In our decision of June 7, 1968, 47 Comp. Gen. 713, involving the case of former Commander Alfred S. Lazarus we held that, in the

absence of a statute expressly authorizing the crediting of the same period of military service for purposes of determining eligibility for retirement pay under both 10 U.S.C. 1331 and 42 U.S.C. 212, there is no basis for permitting the dual use of his Navy and Naval Reserve service to provide concurrent payments of retired pay from the Navy and the Public Health Service. In view of that decision the following questions were presented for our decision:

QUESTION 1—Does the Lazarus decision apply to Dr. Parrino?

QUESTION 2—If Question 1 is answered in the affirmative, may Dr. Parrino utilize a portion of his Army service (active and inactive) plus his active duty in the Public Health Service in order to be eligible for the maximum retired pay from the Public Health Service and use the remainder of his Army service to qualify for retired pay, if any, from the Army under Title III, P.L. 810, 80th Congress? Copies of his service records are attached (Enclosure 6).

QUESTION 3—If the answer to Question 2 is negative, may Dr. Parrino elect to apply all of his Army service toward his Public Health Service retired pay thus in effect waving receipt of retired pay from the Army? Such action might properly be termed as an election of entitlements.

While at the time of his discharge from the United States Army Reserve on July 31, 1957, Dr. Parrino had over 20 years of active service and was eligible to retire under the provisions of 10 U.S.C. 3911, his service in the Army Reserve was terminated and between July 31, 1957, and April 13, 1961 (his 60th birthday), he was not entitled to receive retired pay under any law. Hence, he was entitled to retired pay under the provisions of 10 U.S.C. 1331 upon reaching age 60 on April 13, 1961, subject to 5 U.S.C. 8301, and he continued to be entitled to such retired pay until he began receiving retired pay from the Public Health Service on July 1, 1966.

It has long been the rule of the courts that in the absence of specific statutory provisions a former officer, enlisted man, or employee of the United States is not entitled to two pensions, two retired pays, or two annnuities or gratuities for the same service. See 16 Comp. Gen. 83 (1936), 20 Comp. Gen. 41 (1940) and cases cited in those decisions. In the *Lazarus* case (47 Comp. Gen. 713 (1968)), we held that neither 10 U.S.C. 1336 nor any other law would permit the dual use of military service to provide concurrent payments of military retired pay and Public Health Service retired pay. Although Dr. Parrino need not use his Army Reserve and National Guard service to establish entitlement to Public Health Service retired pay, the principle of the *Lazarus* case that dual use of such service is prohibited applies to his case. Accordingly, question 1 is answered in the affirmative.

We know of no statute which would permit Dr. Parrino to utilize a portion of his Army Reserve and National Guard service to increase his Public Health Service retirement pay while using the remainder to qualify for military retired pay under 10 U.S.C. 1331.

In this connection, it may be noted that 42 U.S.C. 212(d) provides that the "term 'active service,' as used in subsection (a) of this section, includes * * * all active service in any of the uniformed services," and that section 212(a)(4) provides for use of "each year of active service" in the computation of retired pay thereunder. Accordingly, question 2 is answered in the negative.

Since Dr. Parrino may not receive a double benefit for his Army Reserve and National Guard service and since he apparently is entitled to a greater benefit by using such service to increase his Public Health Service retired pay, it will be assumed that he would elect the greater benefit and thus he must be considered as having surrendered his Army Reserve retired status as of July 1, 1966. Question 3 is answered accordingly.

By letter of today we are advising the Department of the Army of his nonentitlement to retired pay under 10 U.S.C. 1331 after June 30, 1966, and requesting that appropriate steps be taken to collect all of the payments of such retired pay made to him for periods after that date. The fact that he acted in good faith in requesting legal advice and accepting the payments made as the result of a mistake of Government personnel does not, in our opinion, afford a basis for not requiring him to repay the amount overpaid.

In regard to Dr. Parrino's participation in the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1441–1446 (formerly the Uniformed Services Contingency Option Act of 1953), we are of the opinion that his election not to participate in the plan in connection with his Army Reserve retirement did not affect the validity of his election to come under the plan in connection with his retirement from the Public Health Service. Since he had in effect a valid election to participate in the plan at the time of his retirement from the Public Health Service, and there was an implied surrender by him of his military retired pay at that time, the deductions made from his Public Health Service retired pay based solely on that retired pay were proper, if otherwise correct.

[B–172557]

Leaves of Absence—Annual—Accrual—Crediting Basis—Service Creditable Under the Civil Service Retirement Act

Federal Personnel Manual Letter No. 831–26, dated January 21, 1971, prescribing that service creditable for annual leave accrual may be considered as including all service which may be credited under the Civil Service Retirement Act is not in conflict with the decisions of the United States General Accounting Office. Furthermore, all service creditable under 5 U.S.C. 8332 for annuity purposes under the act even though not regarded as military or Government service may be used in determining years of service for leave accrual purposes unless ex-

cluded under other provisions of law. Therefore, the service specified in 5 U.S.C. 8332(b)(1) through (8) is creditable, but employment not otherwise creditable for leave accrual purposes is not creditable solely because it may by specific provision—other than 5 U.S.C. 8332—be creditable for retirement purposes.

To the Chairman, United States Civil Service Commission, November 18, 1971:

This refers to your letter of August 9, 1971, relative to the determination of years of service creditable for accrual of annual leave.

You say that our decision 50 Comp. Gen. 820 of May 24, 1971, which states in part that the term "years of service" as used in 5 U.S.C. 6303(a) is limited to military service and Federal service unless otherwise provided by evident legislative intent or specifically by statute, has caused a question to be raised about certain statements in Federal Personnel Manual (FPM) Letter No. 831–26 of January 21, 1971.

The FPM letter resulted from Public Law 91–658, approved January 8, 1971. The first section of that statute amended 5 U.S.C. 8332, the section of the civil service retirement law headed "Creditable Service," by adding to subsection (f) the following sentence: "An employee or former employee who returns to duty after a period of separation is deemed, for the purpose of this subsection, to have been in a leave of absence without pay for that part of the period in which he was receiving benefits under subchapter I of chapter 81 of this title or any earlier statute on which such subchapter is based." Employees on leave without pay while on employees' compensation receive full service credit for retirement (under 5 U.S.C. 8332(f)) without regard to the limitation of 6 months credit in the calendar year for leave without pay. Thus, under the recent amendment, an employee who is separated from the service while receiving employees' compensation (for work-connected injury) is entitled to credit the period of separation for retirement provided he returns to duty. The FPM letter in part referred to the amendment as granting service credit for retirement "and related" purposes, and as changing "leave accrual rates."

You suggest that we reconsider our decision 50 Comp. Gen. 820 (1971) in the interest of administrative simplicity and to avoid the hairline decisions which are not understood by employees adversely affected; or in the alternative, that we render a decision whether the statements as to leave in FPM Letter No. 831–26 may be permitted to stand, and that service creditable for annual leave may be considered as including all service which may be credited under the civil service retirement law.

In 40 Comp. Gen. 412 (1961) it was held that service other than Federal Government Service (except service with the Pan American

Sanitary Bureau) was not creditable for leave accrual purposes. Service with the Pan American Sanitary Bureau was held by that decision to be creditable for leave purposes because it was specifically included in section 3 of the retirement act, now 5 U.S.C. 8332(b), and was required by the terms of section 203(a) of the annual leave act of 1951, now 5 U.S.C. 6303, to be creditable service.

5 U.S.C. 6303(a) pertaining to annual leave accruals based on years of service provides in part as follows:

> * * * In determining years of service, an employee is entitled to credit for all service creditable under section 8332 of this title for the purpose of an annuity under subchapter III of chapter 83 of this title. * * *

Consistent with the above authority, it was held in 40 Comp. Gen. 412 that Agriculture County Committee service under the law then in effect was not creditable for leave accrual purposes. Such service, however, was authorized by 5 U.S.C. 6312, as added by section 2 of the act of June 29, 1968, Public Law 90–367, to be credited for leave accrual, and is now listed in 5 U.S.C. 8332. Service such as that considered in decision 50 Comp. Gen. 820, was not specifically authorized by the retirement or leave provisions of 5 U.S.C., or by any other provision of law, to be creditable for leave accrual purposes. The decision was consistent with the holding in 40 Comp. Gen. 412.

In view of the foregoing the statement in FPM Letter No. 831–26 concerning creditable service for leave accrual is not in conflict with the rulings of our Office and may be permitted to stand. Further, all service designated as creditable under 5 U.S.C. 8332 for the purpose of an annuity under the Civil Service Retirement Act even though not otherwise regarded as military or Government service may be used in determining the years of service for leave accrual purposes unless, of course, specifically excluded under other provisions of law. Thus, the service as specified in 5 U.S.C. 8332(b)(1) through (8) is creditable. However, employment not otherwise creditable for leave accrual purposes is not creditable solely because it may by specific provision—other than 5 U.S.C. 8332—be creditable for retirement purposes. We trust the above clarifies our decisions relating to leave accrual.

[B–151168]

Details—Military Personnel—Civilian Duty—Travel Funds Advanced Recovery

The unaccounted travel funds advanced by the Federal Aviation Administration to members of the Armed Forces detailed to the Department of Transportation as "Sky Marshals" to prevent air piracy, and who subsequently retired, may be recovered from the retired pay of the members indebted for the outstanding

travel funds advanced, pursuant to 5 U.S.C. 5514, notwithstanding the debt arose in other than a military department, as a detailed member remains a member of the Armed Forces subject to recall to duty, and since his paramount obligation is to the military, his pay and allowances are subject to military laws and regulations, and the indebtness of each individual should be referred to the appropriate military department for collection.

To the Director, Office of Management Systems, Federal Aviation Administration, November 22, 1971:

Reference is made to letter dated July 23, 1971, reference MS-400, from the Acting Director of Management Systems, MS-1, requesting advice as to whether outstanding travel funds advanced by the Federal Aviation Administration (FAA) to members of the Armed Forces as hereinafter indicated can be recovered from the retired pay of a member by administrative setoff without his consent.

On October 1, 1970, an agreement was entered into between the Department of Transportation and the Department of Defense which governed the participation of military personnel detailed to the Department of Transportation as "Sky Marshals" in carrying out the functions assigned to the Secretary of Transportation and the Secretary of Defense by the President's Statement of September 11, 1970, relating to air piracy. Under this agreement the Department of Transportation was required to pay all travel and per diem costs incident to the performance of Department of Transportation duties by personnel detailed to it in accordance with the Joint Travel Regulations in effect at the time.

The circumstances giving rise to the matter in question are reported as follows:

To assure that the sky marshals had adequate travel funds they were advanced, by the Federal Aviation Administration, the sum of $500 upon completion of the basic sky marshal training program. At the end of each 30-day period, travel vouchers were submitted by the sky marshals to FAA. However, due to the press of other work, the travel vouchers were not timely computed to ascertain entitlement to travel allowances, and to assure that adequate funds were available, the sky marshals continued to receive travel advances in the amount of $500 at 15-day intervals. Consequently, when the sky marshals were phased out of the program and their final travel vouchers were computed and the amounts due were applied against travel advances received, most of the sky marshals owed the FAA amounts ranging from a few hundred to several thousand dollars. The FAA is now in the process of collecting from the sky marshals amounts of outstanding travel advances. In some cases we [FAA] find that the member has retired from the armed forces. * * *

In the absence of specific statutory authority, the general rule is that the current pay (including retired pay) of a member of the armed services may not be withheld without his consent to liquidate general debts due the United States. 37 Comp. Gen. 353, 354 (1957); B-167880, January 28, 1970.

The act of July 15, 1954, chapter 509, 68 Stat. 482, now 5 U.S.C. 5514, provides in pertinent part that when it is determined by the head of the agency concerned or his designee that a member of the Armed Forces is indebted to the United States because of an erroneous payment made by the agency to or on behalf of the individual, the amount of the indebtedness may be deducted from retired pay. The statute further states that if the individual retires before the complete amount of the indebtedness is collected, deduction shall be made from later payments of any nature due the individual from the agency concerned. We have held that no withholdings are authorized where the erroneous payment did not arise in the same department or agency. 34 Comp. Gen. 170, 173 (1954).

This rule against the setoff of current pay for recovery of erroneous payments made by another agency is applicable where the payee was a regular employee of one Government agency and received an erroneous payment by that establishment prior to the time he was employed by another Government agency. See B–127814, October 29, 1956.

Thus, it is clear that deductions are authorized from the current pay of an employee of FAA who is indebted for erroneous payments made to him by that agency. Similarly, deductions from the current pay are authorized under the statute in the case of a member of the Armed Forces who is indebted for erroneous payments by the military department concerned. The situation here does not clearly fall within either category. We find no reasonable basis, however, for an interpretation which would take the individuals concerned outside the scope of the statute. The controlling factor as we see it is that the military member detailed to FAA remains a member of the Armed Forces and is subject to recall at any time when the military determines such action to be in the best interest of the military department concerned. The member's paramount obligation is to the military and his pay and allowances are subject to military laws and regulations. In the circumstances we hold that the travel advances here in question are to be treated the same as travel advances to a military member not on detail. It follows that recovery of the travel advances from the retired pay of the members is authorized under 5 U.S.C. 5514. We suggest you refer the indebtedness of each individual to the appropriate military department with a copy of this decision.

[B–173457]

Contracts—Negotiation—Request for Quotations—Firm Offer Confirmation

In issuing a request for quotations, since the use of Standard Form 18, which contained inconsistent and misleading provisions, instead of Form 33 was the

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

To the Secretary of the Army, November 22, 1971:

Reference is made to the letter of August 25, 1971, from the Assistant Deputy For Procurement, Office of the Assistant Secretary, Department of the Army, reference SAOAS (I&L)-PO, with attachments, concerning the protest by Vinnell Corporation against the award of a contract to Pacific Architects and Engineers under request for quotations (RFQ) DAJB11-71-Q-0217, issued by the United States Army Procurement Agency, Vietnam (APAV).

Briefly, Vinnell's low proposal was rejected for the reasons that Vinnell failed to confirm that its quote was a firm offer and failed to submit a revised technical proposal after being advised that award could not be made on the basis of its initial proposal in view of the technical deficiencies therein.

Enclosed is a copy of our decision of today to Vinnell denying its protest. However, pursuant to our review of this protest, there are several matters which we wish to bring to your attention.

Paragraph 10 of Standard Form 18, the form used in this solicitation, provided:

> * * * This is a request for information, and quotations furnished are not offers. If you are unable to quote, please so indicate on this form and return it. This request does not commit the Government to pay any costs incurred in the preparation or the submission of this quotation, or to procure or contract for supplies or services.

Section D–2 of the solicitation, entitled "PRICE EVALUATION," provided:

> Each quoter whose technical proposal is considered acceptable after technical evaluations will be considered for award on the basis of their price quotation. Quoters are cautioned to submit their lowest price quotation with their technical proposal since the Government reserves the right to make an award without further negotiation.

Section C–10 titled "ORDER OF PRECEDENCE" provided:

> In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule, (b) Solicitation Instructions and Conditions; (c) other provisions of the contract; (d) General Provisions, whether incorporated by reference or otherwise; and (e) the specifications.
>
> (ASPR 3-501(b) Sec. C (xxxi))

The contracting officer has stated that Vinnell was aware of the requirement for confirming that its quote was a firm offer since this was carefully explained to Vinnell during the negotiation session and

that this was the purpose for giving Vinnell copies of amendment 0001 (quoted in the decision to Vinnell) at the close of such session.

The legal argument advanced by Vinnell is that in view of section D–2 of the solicitation, it is clear that Vinnell submitted a firm offer notwithstanding the use of Standard Form 18 and the issuance of amendment 0001. Vinnell urges that the language in amendment 0001 in itself supports the argument that the RFQ was requesting firm offers.

The contracting officer's answer to Vinnell's argument is that under the "ORDER OF PRECEDENCE" clause, the provisions of paragraph 10 of Standard Form 18, which is part of the "Solicitation Instructions and Conditions," takes precedence over the provisions of section D–2, which is part of the other provisions. In the alternative it is the contracting officer's view that even if paragraph 10 of Standard Form 18 were not given preference over Clause D–2, the two provisions would then be of an equivalent stature and to arrive at a consistent result, it must be considered that Vinnell's quotation was not an offer.

In addition to paragraph D–2, which certainly supports Vinnell's position, we have found several other provisions which indicate that the solicitation did not preclude the submission of firm offers. The "Table of Contents" immediately below paragraph 10 on Standard Form 18 uses the terms "Offeror" and "Offerors" in two different sections. Paragraph C–11 of the solicitation states "It is contemplated *that this solicitation* will result in a * * * contract." Paragraph C–13 states that the quoter agrees to furnish the Government with certain information relating to his capabilities "to perform any contract resulting from this solicitation." Amendment 0001, as indicated by Vinnell, also supports the argument that the RFQ was requesting offers. For example, paragraph 9 of amendment 0001 states the "Offerors must acknowledge receipt of this amendment * * *. If, by virtue of this amendment you desire to change an *offer already submitted* * * *." Paragraph 13 of amendment 0001 states "*Contractor/Offeror* is required to sign this document." [Italic supplied.]

The only language the contracting officer can point to in support of his position is the standard provision in paragraph 10 of Standard Form 18 that the solicitation did not request firm offers. The various provisions of the solicitation were obviously inconsistent and misleading and the contracting officer's reliance on the "ORDER OF PRECEDENCE" clause or the equivalent stature argument is a strained resolution of the apparent inconsistency. If we accepted the contracting officer's arguments we would, in effect, be sanctioning a procedure whereby a prospective contractor would have to "second guess" whether the solicitation was requesting a quotation or a firm offer.

Attempting to resolve the matter by giving instructions during negotiations that proposers were expected to confirm that their quotes were firm offers before an established deadline also leaves much to be desired as the present protest indicates. While the language on an amendment to a subsequent procurement furnished to our Office by Vinnell's counsel (amendment of solicitation No. DAJB11-71-Q-0213), does more clearly state what is expected from quoters, it still does not seem the best solution.

The crux of the problem seems to be that the procuring activity is using Standard Form 18 when it should be using Standard Form 33. In the absence of substantive reasons for using Standard Form 18, we do not think that prospective contractors should have to go through the additional step of confirming that their initial proposals are firm offers. If Standard Form 33 were used in the first instance this additional step could be eliminated. Armed Services Procurement Regulation (ASPR) 16.102.1(b)(1) does not require the use of Standard Form 18 but only authorizes its use.

We are bringing this matter to your attention for consideration in future procurements.

The file attached to the report is returned as requested.

[B-173576, B-173579]

Contracts—Negotiation—Evaluation Factors—Manning Requirements

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

To Sellers, Conner and Cuneo, November 22, 1971:

Further reference is made to your letter of October 21, 1971, requesting on behalf of ABC Management Services, Inc. (ABC), reconsideration and clarification of our decision, 51 Comp. Gen. 204, dated October 12, 1971, wherein we denied the protests of your client under Solicitation Nos. N00204-71-R-0037 (0037) and N00204-71-R-0040 (0040), issued by the Naval Air Station, Pensacola, Florida, for mess

attendant services at New Orleans, Louisiana, and Gulfport, Mississippi, respectively.

In the reference decision we found, among other things, that once it has been determined that an offeror's manning chart indicates his understanding of, and his ability to fulfill, the contract requirements (including wage rates, number of workers and total estimated labor hours) he should be considered to be within the competitive range for negotiation purposes. We also expressed the opinion that to conclude otherwise would require ignoring the fact that manning charts are used as an aid to contracting officers in determining responsibility, not responsiveness, for which the contracting officer has quite broad discretion. Since the successful offeror's proposal offered manning hours approximating the Government's estimate under both procurements, and the offered prices under each solicitation were sufficient to cover the payment of the minimum wage, plus health and welfare, and there was approximately $5,000 left under each procurement to cover the cost of other fringe benefits, we concluded that both offers were properly found to be within the competitive range for negotiation purposes. While we recognize the offered prices might be below the amount required to pay the cost of performance if all the offered hours were utilized, we were unable to find that the offered prices were so inadequate as to prevent the offeror from satisfactorily performing the contract.

You contend that our decision of October 12 is erroneous in three distinct areas and there is great need of clarification of our position. First, you assert that the current language of the Navy solicitations indicating that: (1) manning charts with insufficient hours may be rejected and (2) the manning charts will be used in determining whether a bidder [sic] is within the competitive range, is totally inconsistent with our decision that manning charts in this instance would be used only in determining responsibility. Rather, you claim that the manning charts go to the responsiveness of the offer (to the extent that concept is applicable in negotiated procurements).

The pertinent language of the solicitation found in section 5.1 thereof is quoted on page 3 of our decision under discussion. While it may be argued that the language, "Manning charts whose hours do not *approximate* these ranges [the Government's estimates] *may* result in rejection of the offer without discussion," is somewhat akin to the failure of a bidder under an advertised procurement to furnish something required by the invitation (e.g., a bid bond) responsibility may not be made a question of responsiveness by requiring evidence of responsibility. We think the manning charts, when viewed in the context of the quoted language, are initially probative evidence of an

offeror's responsibility. Responsibility ordinarily cannot be determined by the offer alone. Hence, the reason for advising offerors of the factors to be used in evaluating the manning charts for the purpose of establishing a competitive range, and use of the words "may result in rejection of the offer without discussion." Even where an offeror's manning chart does not approximate the Government's estimate and it is determined that discussions should not be conducted with him, in our view this is an initial determination of nonresponsibilty based upon an apparent misunderstanding of the requirements necessary to satisfactorily perform the services in question. [Italic supplied.]

We therefore continue to be of the belief that manning charts do not affect the responsiveness of bids or offers. B-160537, October 17, 1967. The quoted language does not change the essence of the purpose for which the manning charts are required, and since it is our understanding they are required by the contracting activity as an aid in determining responsibility, they cannot be made a matter of responsiveness by any language in the RFP.

The second error you allege to be present in our decision of October 12 results from your belief that our Office failed to view the offer of manhours in the manning charts, and the price offered, as two parts of one whole. You state:

> The decision conveniently splits these two questions, contrary to the language of the solicitation. Your decision first finds that the manhours offered by Space Services puts Space Services within the competitive range for negotiations. Then without recognizing the relation between hours and dollars, you find that it is acceptable for a contractor to offer a bid under which it might incur a loss and could not pay minimum wages for the manhours promised.

If our decision can be properly so construed, which we do not agree that it can be, it is attributable to our effort to be responsive to your initial protest. The thrust of ABC's protest was that under solicitation No. 0037 Space Services did not offer the total minimum hours estimated by the Government to assure satisfactory performance, and that in both procurements the successful offeror's prices failed to include enough money to pay for the minimum labor costs and payroll taxes which it promised in its manning charts. Consequently, our decision dealt first with the contention of insufficient hours under 0037 and next with the argument that under both procurements the offered prices were at variance with the manhours offered. It was not our intent to imply that there need be no reasonable relation between hours and dollars. Indeed, we think the penultimate paragraph of our decision, which stated in part, "The evaluation criteria now being employed in mess attendant solicitations are intended to more fully advise offerors of the exact role the manning charts are to play in evaluating offers, to help minimize the receipt of offers which quote

prices that bear no reasonable relation to the number of manning hours offered, and to preclude acceptance of the lowest rate per manhour, rather than the lowest overall proposal" is clearly indicative of the fact that offerors are not free to offer a price substantially at variance with the manhours offered.

The question, of course, to be decided in each case is whether the offered price is *substantially* at variance with the offered manhours. In this regard, our Office has consistently recognized the broad authority vested in the procuring activities in negotiated procurements to establish a competitive range for the purpose of determining those bidders with whom written or oral negotiations will be undertaken. We continue to be of the view that the contracts here involved were awarded in a manner consistent with the language and intent of the solicitations, and we fail to find that the experienced offerors here involved were in any way misled as to the intended use of the manning charts, or were placed at a competive disadvantage by such use.

Your third assignment of error in our decision is your assertion that the prices offered by the successful offeror were not consistent with the manhours offered; that it is clear the offeror did not intend to offer manhours approximating those in the Government's estimate; and that the offers should therefore have been rejected as being outside the competitive range. You state that the discrepancy between price and offered manhours is 5 percent at New Orleans (0037) and nearly 10 percent at Gulfport (0040). ABC arrives at these figures by adding to the minimum hourly rate (minimum wage plus health and welfare) "concomitant costs" of 11 percent, consisting of FICA amounting to 5.2 percent; State and Federal Unemployment Taxes of 3.2 percent, and Workmen's Compensation and Liability Insurance of 2.6 percent.

The solicitations did not require the offeror's price, when compared to manhours, to cover such elements. It did give as an example of other employee-related expenses the cost for FICA. However, we think the requirement that offeror's manhours be consistent with offered prices connotes a test of reasonableness, rather than an exact requirement to quote a certain minimum price per manhour. Even if ABC's calculations are accepted, we cannot say that a 5 percent or a 10 percent discrepancy should automatically oust an offeror from consideration because its offer did not approximate the Government's estimated range. On the other hand, we have held that a 30 percent discrepancy was sufficient to justify the contracting officer's refusal to negotiate with the offeror there involved. B–173628, September 9, 1971. Since we do not think that manning charts can properly be used as an exact formula in the exercise of the discretionary authority given the

contracting agencies in this area, unless there is a clear abuse of such authority we would not be justified in interposing any objection to the determinations of which offerors are properly considered to be within the competitive range.

In view of the foregoing we must conclude that you have not presented any factual or legal arguments which would support your position that our decision of October 12 was erroneous, and consequently that decision is affirmed. We are hopeful, however, that our reconsideration of this matter may have clarified our prior decision, as you requested.

[B-173769]

Leaves of Absence—Military Personnel—Payments for Unused Leave on Discharge, Etc.—Allowances for Inclusion

The lump sum payment for accrued leave, not to exceed 60 days, provided in 37 U.S.C. 501(b) for all members of the uniformed services upon separation—whether enlisted members or warrant or commissioned officers—is authorized to be computed at regular military compensation consisting of basic pay and subsistence and quarters allowances and, therefore, an Army officer upon retirement entitled to payment pursuant to paragraph 40401 and Table 4-4-5 of the Department of Defense Military Pay and Allowances Entitlements Manual may not have his payment increased by including station housing and cost-of-living allowances in the computation of the 60 days' accrued leave to his credit as these allowances are not payable by virtue of membership in the uniformed services but accrue incident to particular duty assignments.

To Lieutenant Colonel L. E. Sholtes, Department of the Army, November 23, 1971:

Reference is made to your letter of May 28, 1971, with enclosures, in which you request a decision whether the items of station housing allowance and cost-of-living allowance are to be included in the computation of the payment for accrued leave due Lieutenant Colonel William E. Coleman, United States Army, upon the date his active service terminated incident to his retirement. You say he contemplated retiring effective August 1, 1971. The request has been assigned Control No. DO-A-1132 by the Military Pay and Allowance Committee, Department of Defense.

In your letter you say that the officer is entitled to 60 days' accrued leave and in accordance with paragraph 40401 and Table 4-4-5 of the Department of Defense Military Pay and Allowances Entitlements Manual, he was advised that the accrued leave payment would include basic pay, basic allowance for quarters and basic allowance for subsistence, based on his grade on date of separation. However, the officer contends that station housing allowance and cost-of-living allowance should also be included in the computation of the accrued leave. You therefore present for decision the question whether payment is au-

thorized on a voucher which you enclosed reflecting station housing and cost-of-living allowances for 60 days' accrued leave, stating that other items (basic pay, basic allowance for quarters and basic allowance for subsistence) will be settled separately.

The statutory authority for the payment for accrued leave to the credit of an officer of an armed force upon separation or release from active duty is contained in section 501(b) of Title 37, United States Code, which provides generally that on the date of his discharge (including release from active duty), he is entitled to be paid for the accrued leave to his credit on the basis of the basic pay and allowances to which he was entitled on that day.

Paragraph 40401, Department of Defense Military Pay and Allowances Entitlements Manual, implementing the statutory authority referred to above, provides in pertinent part that a member who is discharged under honorable conditions is entitled to payment for unused accrued leave unless he continues on active duty under conditions which require accrued leave to be carried forward. Paragraph 40402 states that Table 4–4–5 of the manual shows the items to be included in the accrued leave payment and how to compute the payment. Table 4–4–5 provides in rules 4 and 5 that an officer's accrued leave payment is computed on the number of days' accrued leave, but not more than 60, to include basic pay, basic allowance for subsistence and basic allowance for quarters at rates applicable for a member with or without dependents as applicable on date of separation.

In support of his claim, Colonel Coleman presents a brief in which he contends that the term "basic pay and allowances" as used in 37 U.S.C. 501(b) includes basic pay, basic allowance for subsistence, basic allowance for quarters, cost-of-living allowances and station housing allowances. He analyzes the phrasing of section 501(b) as presently in effect and as originally enacted and codified in 37 U.S.C. 33(c) (1946 ed.) and says it is reasonable to conclude that Congress did not intend for the word "allowances" to be modified by the limiting word "base" or "basic" in the phrasing of the provisions which set forth the basis upon which accrued leave is to be paid to warrant or commissioned officers upon discharge.

In further support of his contention, he cites 35 Comp. Gen. 699 (1956) and 44 Comp. Gen. 403 (1965) and quotes certain passages from each decision to show that in our discussion of the payments due the individual members involved, the word "basic" was used to modify "pay" only. He therefore alleges that it is reasonable to conclude that all allowances, not just basic allowance for quarters and basic allowance for subsistence, are to be included in computing the pay and allowances for accrued unused leave due an officer at date of termination of active duty.

The legislative history of the Armed Forces Leave Act of 1946 shows that H.R. 4051, 79th Congress, which became that act (Public Law 704, 79th Congress, dated August 9, 1946, 60 Stat. 963) was originally passed by the House of Representatives as a measure to grant to enlisted personnel only leave while in the service and a lump-sum payment for accumulated leave upon discharge. The lump sum was to be computed at the rate of base and longevity pay and monetary allowances for subsistence and quarters which the individual was receiving immediately prior to discharge. As finally passed, it was revised to establish a comprehensive leave system in which distinction in leave benefits between officers and enlisted personnel was to be entirely eliminated.

The act as amended August 4, 1947, 61 Stat. 748, provides in section 4(c) thereof that any member of the Armed Forces discharged after August 31, 1946, having unused leave to his credit at time of discharge shall be compensated for such unused leave in cash on the basis of the base and longevity pay and allowances applicable to such member on the date of discharge, including for enlisted persons the allowances as provided for enlisted persons in subsection (a) thereof. Subsection (a) provides that compensation for leave accumulated as an enlisted member shall be computed on the basis of the applicable base and longevity pay, a subsistence allowance at the rate of 70 cents a day, and in the case of enlisted members of the first three grades with dependents, a quarters allowance at the rate of $1.25 a day. These provisions were codified as section 33(c) of Title 37, United States Code (1952 ed.) and were subsequently recodified with minor changes as section 501(b) of Title 37 (1964 ed.).

The legislative history of the 1946 act, as amended by the 1947 act, contains little discussion with respect to the allowances to be included in the computation of the leave payment to be made to officers, but the primary purpose of the legislation was to place enlisted personnel substantially on a parity with officers in the matter of leave benefits. Since the leave laws specifically authorized a subsistence allowance and a quarters allowance to be included in the leave payment to be made to eligible enlisted personnel, it seems apparent that those allowances were authorized to correspond to the quarters and subsistence allowances to be included in the payment to officers and that there was no intention to include any other allowances in the lump-sum leave payment.

Commissioned officers of the Public Health Service are included as members of the uniformed services but were not specifically included as part of the "Armed Forces" entitled to leave benefits under the Armed Forces Leave Act of 1946. Under the provisions of Public

Law 677, ch. 654, 81st Congress, dated August 9, 1950, 64 Stat. 426, to correct this disparity, commissioned officers of the Public Health Service, including those of the Reserve Corps on active duty, were given the right, under certain conditions, to be compensated for unused accumulated leave upon separation, retirement, or release from active duty. This compensation consisted of a lump-sum payment to be computed on the basis of the basic pay, subsistence allowance and the allowance for rental of quarters, whether or not they are receiving that allowance on that date. This provision was recodified as subsection (g) of section 501, Title 37. The legislative history of that act described the lump-sum payment as comparable to that paid to commissioned officers of the Army, Navy and Marine Corps.

Thus it seems clear from the analysis of the various provisions cited that it was the intention of the Congress in the enactment of provisions for the lump-sum payment for accrued leave to all members of the uniformed services, whether enlisted members or warrant or commissioned officers, to provide a uniform basis upon which all such accrued leave should be computed, namely, their usual and regular military compensation consisting of basic pay, a subsistence allowance and an allowance for quarters to eligible members upon release from active duty or separation or discharge from the service.

In our opinion, therefore, the implementing provisions contained in paragraph 40401, 40402 and Table 4–4–5, Department of Defense Military Pay and Allowances Entitlements Manual, correctly reflect the intention of the Congress in providing for the payment for accrued leave and should be followed in determining the amount due all military personnel for accrued leave, if otherwise eligible, upon discharge or separation from the service.

Station housing allowances and cost-of-living allowances are not payable by virtue of membership in a uniformed service but accrue incident to particular duty assignments and, accordingly, any such allowances to which Colonel Coleman may have been entitled on the date of separation from the active service may not be included in the computation of the payment for accrued leave that is authorized to be paid to him upon separation or release from active duty. Payment is not authorized on the voucher which, together with supporting papers, will be retained here.

[B–172006]

Contracts — Specifications — Restrictive — "Same Manufacturer" Requirement for All Items

The nonresponsiveness of the low bid to the requirements in an invitation to increase the electrical capacity at the Government Printing Office that the switchboard to be installed in a new substation and the circuit breakers be the

product of the same manufacturer, and that the switchboard accept the breakers in use was not remedied by the assurance of compliance in the bidder's accompanying letter and its supplier's descriptive literature where the bidder before bid opening failed to seek an interpretation of specifications alleged to be restrictive and the nonresponsiveness of the descriptive literature is not a bid ambiguity to be construed as binding the bidder to perform according to the specifications. Moreover, the "same manufacturer" requirement based on the determination of less risk to the malfunctioning of the equipment—which was drafted into the specifications to reflect the minimum needs of the Government—and the determination of bidder noncompliance are primarily the responsibility of the contracting agency.

To Sadur, Pelland & Braude, November 24, 1971:

We refer to your telegram of October 7, 1971, as supplemented by letters of October 8 and 22, protesting, in behalf of Kennedy Electric Company, Inc. (Kennedy), the rejection by the Government Printing Office (GPO) of a low bid submitted by Kennedy under an invitation for bids (IFB) issued July 13, 1971, and bearing Purchase Request No. 12770. The procurement involves the furnishing of all necessary labor, material and equipment, except for certain equipment to be furnished by the Government, to increase the electrical capacity at GPO. The basic issues involved in the bid rejection are the proper interpretation of the IFB requirement related to the switchboard (or switchgear) to be installed in a new substation, and whether Kennedy complied with the descriptive data requirement in the IFB.

The IFB represents the second solicitation issued for the procurement. The first IFB was issued in January 1971, and Kennedy was the lowest bidder. Kennedy's bid was rejected as nonresponsive for failure to furnish descriptive data as required by the IFB, an action which was upheld in our decision B–172006, March 15, 1971. Subsequently, however, the IFB was cancelled for reasons not pertinent to the instant protest.

The face sheet of the second IFB bore a notation advising bidders to read "Instructions to Bidders" (Standard Form 22). Paragraph 1 of the form reads as follows:

1. *Explanations to Bidders.* Any explanation desired by a bidder regarding the meaning or interpretation of the invitation for bids, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach bidders before the submission of their bids. Any interpretation made will be in the form if an amendment of the invitation for bids, drawings, specifications, etc., and will be furnished to all prospective bidders. Its receipt by the bidder must be acknowledged in the space provided on the Bid Form (Standard Form 21) or by letter or telegram received before the time set for opening of bids. Oral explanations or instructions given before the award of the contract will not be binding.

The specifications governing installation of a new substation at GPO (section 1–E) require a switchboard which is capable of accepting the same type of circuit breakers as General Electric (GE) 208 volt switchboards currently in use at GPO, which GE manufactured

under its requisition No. 322–72639. Paragraph 8.a., relating to the switchboard circuit breakers, reads as follows:

> 8. Switchboard Circuit Breakers:
>
> a. The air circuit breakers to be furnished by the Contractor for mounting in the switchboard shall be of the magnetic trip type, of dead front drawout mounting rated at 600 volts A.C. in ampere sizes as indicated in Section 1–E–8–1 of this specification. All breakers shall be the product of the same manufacturer as the switchboard and shall be capable of being mounted in any of the other 208 volt switch boards at the Government Printing Office without modifications to it or the switchboards, and likewise the new switchboard shall accept without modification the circuit breakers presently in use. Circuit breakers rated 1,600 amperes or less shall be manually operated and provided with automatic overcurrent devices on each pole. Breakers above 1,600 ampere rating shall be electrically operated.

A similar requirement was included in the original IFB.

On August 16, 1971, the nine bids received by GPO were opened as scheduled. Kennedy's bid, in the amount of $286,440, was lowest. The other eight bids ranged from $286,889 to $344,319.

Kennedy's bid was accompanied by a letter which stated that all materials and equipment would be in strict adherence to the contract requirements. Descriptive literature attached to the bid, in a folder bearing the name Powercon Corporation (Powercon), carries statements to the effect that the literature clearly indicates that the character of the material and system offered are in accordance with plans and specifications and that Powercon will supply material to comply with the requirements of the IFB plans and specifications, to which Powercon takes no exception. The folder includes a letter dated August 9, 1971, from the General Electric Company, addressed to Powercon, which refers to GPO Purchase Request No. 12770, and reads as follows:

> The circuit breakers and housings we will furnish the Powercon Corporation on receipt of an order will be completely and totally interchangeable with those furnished on General Electric Reqn. #322–72639 for installation at the Government Printing Office in Washington, D.C.

Under section E of the literature, entitled "Low-Voltage Switchgear Spec. Section 1 Paragraph E 7 & 8," portions of the specifications set forth in section 1–E of the IFB appear. No change was made in paragraph 7, relating to the switchboard, but in paragraph 8.a., relating to the switchboard circuit breakers, the language setting forth the GPO requirement that the breakers be the product of the same manufacturer as the switchboard was deleted. Related catalog material on pages imprinted with the name "Powercon Corp." depict various elements of the switchgear, and the picture of the AK–25 circuit breaker clearly shows the General Electric name and trademark. The major components of the switchboard, however, are not all identified in the illustrations by the manufacturer's name, and the printed text of the catalog material does not provide such information.

The other eight bidders, GPO reports, were completely responsive to the IFB. The second low bidder is reported to have offered a switchboard and breakers of GE manufacture.

In a letter dated August 27, as amended by a letter dated September 1, Kennedy advised GPO as follows:

> We recently inquired as to the status of award of a contract for the above work upon our bid which appears to be the lowest bid received by the Government Printing Office. We were advised that the second bidder has challenged the responsibility of our bid on the grounds that the language of section 8 obligated the manufacturer of the breakers to be the same as the manufacturer of the switchboard has not been complied with in our proposal, and as a result our bid is non-responsive.
>
> Our proposal clearly confirms that the breakers shall be capable of being mounted in any of the other 208 volt switchboards at the Government Printing Office without modification to it or the switchboard, and requires the new switchboard which accepted without modification the circuit breakers to be furnished are manufactured by General Electric and are of the identical number and model set forth in the specifications. The only thing that is different is that the structural frame, base and buss supports of the switchboard are assembled by Powercon, our supplier, utilizing all General Electric electrical components and in the configuration of General Electric products. The switchboard to be manufactured is identical with the existing boards capable of the electrical components being unchanged without modification with existing switchboard.
>
> Under the circumstances, we consider that the submittal [of] our supplier, Powercon, meets the intents and purpose of the specifications fully and that the equipment installed shall be interchangeable, serviceable, and completely compatible with the existing equipment in the Printing Office. The selection and use of General Electric breakers and other major electrical components, including switches, relays, instruments, etc., assures the high quality desired by the Printing Office and complies with the technical specifications of the invitation.
>
> It would be obviously unreasonably restrictive of competitive bidding requirements to insist that the assembler of the switchboard super-structure and enclosure by the manufacturer of the breakers and other major electrical components comprise the switchboard. It would be unreasonable for your office or any other bidder to interpret the language in any other manner.

GPO states that the requirements that the switchboard and the circuit breakers be products of the same manufacturer was based on the judgment of GPO's electrical engineering staff that there is inherently less risk of malfunction if both the circuit breaker and the board are designed and tested to operate as a unit. Further, GPO states that it could expect more reliable trouble-free equipment if both products are made by the same manufacturer.

It is also GPO's position that the Kennedy descriptive data was not adequate for GPO's electrical engineers to determine what electrical components were being offered as the switchboard and that Kennedy did not clearly offer circuit breakers and switchboards which were products of the same manufacturer. In addition, GPO contends that Kennedy had adequate time before bid opening to question whether the IFB required the entire switchboard to be made by the manufacturer of the circuit breakers or whether the nonelectrical frame of the switchboard might be assembled by Powercon as planned by Kennedy but not disclosed until its letters of August 27 and September 1 were

received by GPO. GPO accordingly urges that it should not now be thwarted in its efforts to award a contract for the work in question, for which there is a critical need, to its own detriment and to the detriment of the other bidders because of actions which were solely within the control of Kennedy and which led to the rejection of its current bid.

You take exception to GPO's position for various reasons, which are discussed below. Further, on the basis that the equipment offered by Kennedy does meet the Government's requirements, you assert that Kennedy could properly have been permitted to resolve any possible ambiguity after bid opening, and that such confirmation would not have been inconsistent with a reasonable interpretation of the descriptive data which accompanied Kennedy's bid. In support of this position, you cite 39 Comp. Gen. 653 (1960).

On the issue of the Paragraph 8.a. requirement, you contend that Kennedy reasonably interpreted the switchboard specifications as permitting the superstructure, which is nonelectrical, to be assembled by Powercon. In this connection, you cite our decision B–156680, September 9, 1965, to Powercon concerning a Veterans Administration (VA) procurement of low voltage switchgear. In that case the VA engineers, after Powercon had protested that the superstructure need not be manufactured by the manufacturer of the electrical components, reviewed the specifications and concurred with Powercon, and the VA office of construction indicated that future VA specifications for such equipment would not be unduly restrictive. While no remedial action could be taken in that case since the award had been made in good faith under the original specifications, and delivery had been effected before the VA decision to revise its switchgear specifications, we suggested to Powercon that it bring any invitation for bids with a requirement such as was involved in the VA specification to the attention of the procuring agency "immediately" in order that the matter could be resolved "before bids are required to be submitted."

You acknowledge that no question was raised with GPO before bid opening by Kennedy or by Powercon, its supplier, as to the requirement now in issue. Nevertheless, you urge that Kennedy's interpretation of the specifications as permitting the superstructure to be provided by someone other than the manufacturer of the major electrical components of the switchboard and the circuit breakers is in line with the views of our Office in B–156680, *supra*, and that any requirement beyond said interpretation is necessarily unreasonable and restrictive and has no engineering justification to further restrict competition. Further, you state that in writing its letter of August 27 to GPO, Kennedy took for granted that GPO engineers knew that Kennedy was proposing to use GE electrical components for the

switchboard, and the letter therefore concentrated on the argument that it would be unreasonably restrictive of competitive bidding requirements to insist that the assembler of the switchboard superstructure also be the manufacturer of the major electrical components and breakers to be supplied. In addition, you comment that no question was raised by Kennedy regarding the similar requirement in the original IFB since neither Kennedy, nor apparently the Government, interpreted said specifications as requiring nonelectrical superstructure and miscellaneous components to be manufactured by the same manufacturer as the circuit breakers.

You further contend that a reading of paragraph 8.a., section E, of the specifications in its entirety evidences Government intent that the breakers and the enclosures into which they are mounted (including all new and existing breakers and enclosures) must be interchangeable and be the products of one manufacturer. Insofar as the switchboard is concerned, you assert that the only major or critical items thereof which are required to be compatible, interchangeable and products of the same manufacturer are the separate compartments, or housings, into which the breakers are mounted, which include all of the major electrical components of the switchboard.

Additionally, you state that even when the circuit breaker and the entire assembled switchgear, or switchboard, are in fact products of one manufacturer, the entire assembly is not customarily tested in the industry to operate as a unit. You therefore maintain that if GPO desires such testing, the specifications should have so provided, and any assembler of the switchboard could perform the test.

Considering first your statement concerning the apparent interpretation of the Government, as well as Kennedy, of the "same manufacturer" requirement in the original IFB for the switchboard and the circuit breakers, we find nothing in the record relating to that IFB to support your statement. As is clear from our decision B–172006, March 15, 1971, to the Public Printer, a copy of which was furnished to you as attorney for Kennedy, the issue was the nonresponsiveness of Kennedy's bid since no descriptive data was furnished by Kennedy with its bid as required by the original IFB, and the bid did not otherwise indicate what equipment Kennedy offered. If Kennedy interpreted the requirement as you claim it did, its interpretation was not reflected in the record. Further, there is nothing of record to show that GPO interpreted the specifications as requiring anything but a complete switchboard, not just certain components, to be the product of the manufacturer of the circuit breakers.

As for Kennedy's interpretation of the identical requirements in the specifications in the second IFB, we see nothing in such specifications

or elsewhere in the IFB which would support the premise that GPO's requirements would be satisfied by a switchboard in which only the major electrical components were manufactured by the same firm as manufactured the circuit breakers. Nor do we concur with your view that B–156680, *supra*, stands for such premise.

The drafting of specifications reflecting the minimum needs of the Government and the determination whether items offered by bidders will meet such needs are primarily the responsibility of the particular contracting agency. 17 Comp. Gen. 554 (1938). In recognition of such well established principles of competitive bidding, we did not hold in B–156680, *supra*, that a procurement requirement that the entire switchgear, or switchboard, including the superstructure, be the product of one manufacturer was restrictive of competition *per se*. To so hold would have been to require other contracting agencies to accept VA's determination without regard to their own requirements. Rather, we suggested, as discussed above, that any similar issue be discussed with the particular contracting agency before the final date for submission of bids. For your information, following our decision of September 9, 1965, we further advised Powercon in this regard by letter of September 23, 1965, which reads, in pertinent part, as follows:

> The question whether a specification is unduly restrictive or is necessary to assure a quality product is most difficult to determine. Unquestionably it is possible for a competent and conscientious assembler to produce a quality assembly equal to or perhaps even better than a regular manufacturer of the complete assembly. However, due to the nature of the assemblies, it is difficult, if not impossible, to determine after assembly whether the various components used are first-class, compatible, properly assembled, etc. Furthermore, in view of the small quantity involved, in particular procurements, many times only one item, it is not feasible to provide for inspection during assembly. For this reason engineering experts apparently are hesitant to accept other than a standard, known and proven type of assembly from a manufacturer regularly engaged in the field. This is understandable when the overall importance of the particular assembly is considered. A similar problem is involved when a minimum acceptable grade of a product is established. Some will urge that the standard is too high and a waste of money, while others will argue that it is not high enough and will be more costly over all.
>
> The procurement statutes and the regulations issued thereunder require that specifications be drawn so as to afford the greatest amount of competition possible consistent with the needs of the Government. As stated in our letter of September 9, 1965, if you believe that the specifications under a particular Invitation for Bids are unduly restrictive and do not reflect a *bona fide* need of the Government, the matter should be taken up immediately with the administrative agency involved so that it may be considered before bids are required to be submitted. In the event that you do not agree that the administrative action taken is proper, bearing in mind that there is room for legitimate differences of opinion and that the administrative determination is entitled to substantial weight, the matter may be referred to this Office for consideration.

The record before us establishes that neither Kennedy nor Powercon raised the issue with GPO before bid opening. In fact, it was not until GPO received Kennedy's letter of August 27, 1971, eleven days after

the opening of bids under the second IFB, that GPO became aware that Kennedy, without asking any questions regarding the interpretation of paragraph 8.a. of the switchboard circuit breakers specifications, intended to offer a switchboard superstructure and certain other components which are not the product of GE, the manufacturer of the circuit breakers offered by Kennedy. It is therefore apparent that our suggestion to Powercon in B-156680, September 9, 1965, was not heeded, nor did Kennedy comply with the requirements of paragraph 1. of Standard Form 22 relating to explanations to bidders.

Additionally, we note that GPO's engineers made a presolicitation judgment that less risk of malfunction would be involved if both the circuit breaker and the switchboard were designed and tested to operate as a unit, and there is no evidence that this judgment has been changed, as was the case in the VA procurement considered in B-156680, *supra*. Further, any change in such requirement at this time would necessitate cancellation of the second IFB after exposure of the bid prices and issuance of a third IFB with attendant delay in the making of an award, since it is apparent that such change would not only affect the work involved but the contract price as well.

Finally, the record indicates that Kennedy was not responsive to the descriptive data requirement in the second IFB with respect to the adequacy of identifying information as to the manufacturer of the switchboard. This is not an ambiguity in the bid, as you urge, which might be construed to bind Kennedy to furnish to the Government a switchboard which is the product of GE, the manufacturer whose name appears on the catalog pictures of the switchboard circuit breaker. Rather, there is an absence of identifying information as to the manufacturer of all of the components of the switchboard, and the blanket statements in Kennedy's bid and descriptive data concerning compliance with the specifications do not remedy the deficiency. B-172006, *supra*, and decisions therein cited. In the circumstances, we concur with the position of GPO that Kennedy's bid was properly rejected as nonresponsive.

With respect to your comments regarding the testing of the assembled switchboard and circuit breakers, we see nothing in GPO's statement which could be construed as indicating that GPO desires that the manufacturer perform the test.

Accordingly, since we see no legal basis for objection to the making of an award under the IFB to the lowest responsive bidder, your protest must be denied.

[B-173052]

Contracts—Specifications—Qualified Products—Parts for Qualified Product

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

To the Secretary of the Army, Novembr 26, 1971:

Reference is made to the protest of Aerokits, Inc., against the possible award of a contract to another firm under request for proposals (RFP) DAAE07-71-R-0667 issued by the United States Army Tank-Automotive Command (USATACOM), Warren, Michigan, on February 16, 1971. This matter was the subject of a report dated August 25, 1971, AMCGC-P, from the Deputy General Counsel Headquarters, Army Material Command.

The RFP is for a procurement of 19,695 repair kits for a 25 amp generator, P/N 10950808. The closing date was originally March 8, 1971. The solicitation contained a qualified components clause and at the time of the solicitation was issued the Prestolite Company was considered to be the sole supplier for this kit. A determination was made pursuant to 10 U.S.C. 2304(a)(2), as implemented by paragraph 3-202.2(vi) of the Armed Services Procurement Regulation (ASPR), to negotiate without formal advertising. The above code provision authorizes the negotiation of contracts when the public exigency will not permit the delay incident to advertising.

The repair kit is for use in connection with the above-mentioned generator. The generator is on a Qualified Products List (QPL) and Prestolite is the only approved source for the generator. Therefore, it was reasoned that Prestolite was the only source for the four QP kit parts used with other parts in the kit to maintain the generator. A previous procurement of the kit had been negotiated with Prestolite in 1969. The four QP parts were the Plate and Seal, Ord. P/N 10950813; Ball Bearing, Ord. P/N 10950814; Ball Bearing, Ord. P/N 10950815; and Brush, Ord. P/N 7374852. However, in addition to the proposal received from Prestolite, unsolicited proposals were received from Aerokits and other offerors. The additional offerors indicated

they would procure the QP parts from the same source that Prestolite utilizes. None of the proposals was accepted because it was felt that there was a likelihood that a reduction in price and a shorter delivery schedule could be obtained through further negotiations.

Negotiations were reopened on March 23, 1971, with a closing date of April 2, 1971, and prospective offerors were advised that Prestolite was the only approved source for the above-mentioned QP kit parts. Once again proposals were received from the unsolicited firms which had originally submitted offers. Such proposals offered to furnish the QP approved parts from manufacturers which are the same sources for the QP parts that Prestolite used in the QPL generator. These offerors contend that such parts are therefore automatically qualified under paragraph 3.1.1.1 of specification MIL-G-12604F covering the generator. Paragraphs 3.1.1 and 3.1.1.1 of the specification provide:

3.1.1 *Repair parts requiring qualification.* Repair parts, (Armatures, bearings, brushes and seals), furnished under this specification shall be products which have been tested and have passed the qualification tests specified herein and have been listed on, or approved for listing on the qualified products list (see 4.2.2 and 6.3.1).
3.1.1.1 *Submitted generator assembly.* Individual repair parts requiring qualification to this specification will be automatically qualified when those repair parts have been contained in a generator assembly that has been qualified.

On April 8, 1971, USATACOM, Research, Development and Engineering Directorate, was requested to review its position that Prestolite was the only source for these QP items and to determine if there were any other sources acceptable in lieu of Prestolite. In its reply of April 20, 1971, the Research, Development and Engineering Directorate again took the position that Prestolite was the only acceptable source for these items. Thus, on May 14, 1971, the contracting officer advised the unsolicited offerors that their proposals were considered nonresponsive since they were based on supplying the QP kit parts from sources other than Prestolite, the only approved source for these items. On May 21, 1971, the Research, Development and Engineering Directorate was requested to review specification MIL-G-12604F, especially paragraph 3.1.1.1, giving attention to the impact of such provision on the acceptability of parts from manufacturers of the parts used in the QPL generator.

On May 27, 1971, the contracting officer sent a letter to the unsolicited offerors rescinding the letter of May 14, 1971, and stating that their proposals were under evaluation based on the solicitation provisions including the qualified components clause. On June 7, 1971, the Research, Development and Engineering Directorate advised the procurement officials that contractors should be eligible for award who could furnish satisfactory evidence that the QP parts would be the

same as those furnished by Prestolite, and would so certify prior to award of the contract. On June 11, 1971, offerors were advised that negotiations were once again reopened and that to be considered for award offerors must furnish satisfactory evidence and certify that the QP parts they proposed to furnish were identical to the parts that were utilized in the 25 amp generator assembly tested and approved for QPL. Subsequently, by letter of June 18, 1971, Aerokits requested that the procuring activity furnish it with all qualified Government sources available to supply the QP kit parts in question.

By letter of June 30, 1971, requesting best and final offers, offerors were advised that Prestolite was the only approved source for the parts in question, plus five additional parts in the kit. Offerors were further advised that the Command did not have necessary data available to accept other than Prestolite's parts, and to be considered for award proposals must contain a certification that the items offered were identical to or the same as the listed parts. While the listing showed both the ordnance part number and the Prestolite part number, it is reported that the letter of June 30 meant that offerors could supply only Prestolite parts or parts which had been certified by testing. By letters dated July 14, 1971, all offerors other than Prestolite were advised that their proposals were nonresponsive for failure to meet all the conditions set forth in the letter of June 30.

It is the unsolicited offerors' position that while Prestolite is the only approved source for the assembled generator, it is not the sole approved source for the kit parts which were used in the approved generator. These offerors disagree with the Command's position that in order to be responsive the offeror must offer either Prestolite kit parts or qualify the offered parts through testing. Such offerors contend that the kit parts offered by Prestolite's suppliers should be acceptable to the Government, since the information in the Command's possession conclusively shows that they propose to furnish qualified parts in accordance with the RFP requirements. In this connection we note that engineering concurrence in the Toyo Bearing Mfg. Co., Ltd., as a second source for the bearings in the kit was based on ATAC's evaluation of Prestolite data rather than by testing. In the concurrence letter of April 5, 1966, it is stated:

> It is the responsibility of the manufacturer to establish and report sufficient data to ATAC, the qualifying activity. ATAC will evaluate such data to determine whether or not the item proposed for use is equivalent to the first source item(s) as previously approved in the qualified product and notify the applicant. Engineering concurrence or approval may be revoked if subsequent testing and evaluation by ATAC indicates that the item(s) do not meet the drawing, specification, and vehicle application requirements.

In the contracting officer's supplemental administrative report it is stated:

> * * * The buying of components from Prestolite sources does not in itself prove Aerokits is giving us the Prestolite kit. This fact was explained to Aerokits at length. The Government (TACOM) does not know what manufacturing processes Prestolite performs on these purchased items prior to their inclusion in the kit. We have been assured that some components are in fact subject to additional processing by Prestolite. However, representatives of Prestolite, when asked by me, would not disclose or otherwise identify this processing. * * *

The contracting officer's statements appear to be bottomed on the following reported circumstances. At a meeting held on June 21, 1971, engineering personnel determined that the Command did not have a complete engineering package on the QP parts in the kit. It was therefore decided to inquire of the known sources for the parts to obtain the required information. All of the sources contacted were able to furnish the requested information with the exception of New Departure, one of the approved sources for the bearings, which was unable to give its corresponding part number for Prestolite part X–3626. However, Prestolite's Kit–213 identifies that part with ordnance number 10950814, and the record shows New Departure part Z99503LR3068LK5 for this ordnance number.

On June 25, 1971, the contracting officer held a meeting with Prestolite in response to that firm's request to discuss the ramifications of the competitive procurement indicated by the notification to the offerors of June 11. Prestolite representatives stated that the Government did not have a complete procurement package and wanted to know what the contracting officer was going to buy under the competitive solicitation. The representatives stated, among other things, that the Government would be accepting substitutes of components because it could not positively identify each component of the kit, and that Prestolite performed an additional manufacturing process on some of the parts. After inspecting the Government's technical package for the kit, Prestolite's representatives stated unequivocally that the package was not complete and that they would not give the Government the necessary information to make it complete.

On July 1, 1971, the Technical Data Division of the Research, Development and Engineering Directorate, stated in reference to the June 21 meeting that further evaluation of the engineering package revealed that it is inadequate for competitive procurement, since some of the components "other than the four parts requiring qualification" are lacking in essential data. It was further found that no verification could be made that Prestolite does, or does not, process some of the parts prior to their inclusion in the kit. Based on these findings it was recommended that any contractor providing the kit be required to procure those items, on which complete engineering data was lacking, from Prestolite.

We find the record confusing as to whether four or nine parts in the kit are considered to be Qualified Products, and as to which specific QP parts the Command has complete technical data. In any event, it seems that the basic question for resolution is whether those parts requiring qualification to the military specification and being offered in the unsolicited proposals, were contained in the generator assembly that was qualified. If the pertinent parts in the QPL generator, as supplied to Prestolite by the source manufacturers, were not altered by Prestolite in any material manner, it would appear that the source parts should be considered as having been automatically qualified under paragraph 3.1.1.1 of the military specification, and no further qualification testing of those parts is required. While Prestolite stated that it performs an additional process on some of the parts which it now furnishes in the kit, the relevant point is whether Prestolite did anything to the subject parts furnished for the QPL generator which was indispensable to the acceptability and proper performance of the generator. We assume, however, that Prestolite's position would be that the operation which it states it now performs was also performed on some of the kit parts in the QPL generator and that the processing was essential to the proper performance of that generator.

We believe that, since the Prestolite kit QP part numbers are identifiable with part numbers of the source manufacturers, had Prestolite not contended that it performs an additional process on some of the parts the procurement would have proceeded on a competitive basis pursuant to the notice of June 11. This presents, therefore, a situation wherein the procuring activity proposes to exclude unsolicited proposals, offering source parts, from competing for the contract mainly by reason of a selfserving statement by the QPL offeror, and an apparent lack of technical data in the Command to completely refute or support the statement. In addition Prestolite refuses to identify the exact nature of the alleged manufacturing process or the part, or parts, in the kit on which the process is performed.

ASPR 3-102(c) requires that negotiated procurements be on a competitive basis to the maximum practicable extent. This regulation places an affirmative responsibility on the purchasing activity for assuring that competitive procurement is not feasible and for acting whenever possible to avoid the need for subsequent noncompetitive procurements. The record does not indicate that the actual Prestolite QP parts and the corresponding source parts have been subjected to a comparative scientific inspection to determine whether they are essentially the same. In view of the administrative responsibility for assuring that competitive procurement is not feasible, and the par-

ticular circumstances here involved, we do not believe an award to any offeror would be justifiable on the present record. We therefore suggest that, if time permits for the procurement at hand, consideration should be given to making a comparative examination and analysis of the Prestolite kit parts and the corresponding source parts. Such an examination by the pertinent engineers or other technical personnel in your Department having expertise in such matters should be made, perhaps in conjunction with the source manufacturers, to determine whether the source QP parts offered by the unsolicited offerors are for all practical purposes the same as those parts furnished in Prestolite's kit. As indicated above, if it can be determined from such an examination and analysis that the source QP parts are not materially altered or enhanced by Prestolite then the parts should be regarded as being automatically qualified under paragraph 3.1.1.1.

If it cannot be determined from such an examination and analysis whether the source parts have been materially altered or enhanced when furnished in Prestolite's kit, or if it is the considered judgment of your Department that such an examination is not practical, an award may be made to Prestolite, if otherwise proper. In that event, however, a determination should be made, and the unsolicited offerors advised, as to those specific parts for which qualification testing will be required before being accepted from sources other than Prestolite in any future procurements of the kit.

We also call your attention to the evaluation, in paragraph 3b of the contracting officer's supplemental administrative report, of the cost of certain parts in the kit against the total kit price to determine whether some foreign-manufactured parts could be supplied by an offeror who certified in the Buy American Certificate that each end product being furnished is a "domestic source end product." That term is defined in the Buy American Act clause which is incorporated in the RFP by reference. For a manufactured item to qualify under the specified definition as a domestic source end product, the item must first be "manufactured" in the United States. We believe it is at least questionable from the present record that the kit, as distinguished from the individual manufactured parts comprising the kit, may properly be considered as having been "manufactured" in the United States so as to qualify the kit under the definition in the Buy American Act clause as a domestic source end product. It would therefore appear that an offeror who is awarded the contract, and did not list any exceptions in the Buy American Certificate or otherwise indicate that foreign-manufactured parts were being offered, might be required to furnish individual kit parts, all of which have been manufactured in the United States.

The file forwarded with the report of August 25 is returned.