Decisions of The Comptroller General of the United States

VOLUME 52 Pages 309 to 404

DECEMBER 1972

WITH

INDEX DIGEST

OCTOBER, NOVEMBER, DECEMBER 1972

UNITED STATES

GENERAL ACCOUNTING OFFICE

PCN 45300104100

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price 45 cents (single copy) ; subscription price: $4 a year; $1 additional for foreign mailing.

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[B-162502]

Railroads—Reorganization—Government to Maintain Services

The option obtained from the Central Railroad of New Jersey by the Secretary of Transportation pursuant to section 3(b)(4) of the Emergency Rail Service Act of 1970 incident to guaranteeing the trustee certificates issued in the reorganization proceedings of the railroad, which option provides that the Secretary acquire by purchase or lease trackage rights and equipment to maintain railroad services in the event of actual or threatened cessation of such services, may not be exercised without further action by the Congress. The legislative history of the act contains no indication the Secretary is authorized to take over a railroad and operate it, but rather evidences that he may exercise the option, following favorable congressional action, without awaiting the outcome of proceedings before the reorganization court or the Interstate Commerce Commission.

To the Secretary of Transportation, December 1, 1972:

Reference is made to letter of November 22, 1972, from Acting Secretary James M. Beggs, requesting our opinion as to the extent to which the Secretary of Transportation (Secretary) is authorized under the Emergency Rail Service Act of 1970, Public Law 91-663, approved January 8, 1971, 84 Stat. 1975, 45 U.S. Code 661 note, to acquire trackage rights and equipment in order to provide essential transportation services.

The question regarding this matter is said to arise in the context of the reorganization proceedings of the Central Railroad of New Jersey (CNJ).

It is stated that pursuant to authority contained in section 3 of the act, 45 U.S.C. 662, the Secretary has guaranteed the issuance of trustee's certificates by CNJ, and as a condition of such guarantee, as required by section 3(b)(4) has obtained the option, in the event of actual or threatened cessation of essential transportation services by CNJ, to procure by purchase or lease trackage rights over the lines of the railroad and such equipment as may be necessary to provide such services.

Since it now appears possible that CNJ will not be successfully reorganized, your Department is considering the possibility of exercising the Secretary's option under 3(b)(4) of the act, 45 U.S.C. 662(b)(4), to purchase or lease trackage rights and equipment from CNJ and to provide for the continuance of its essential rail services. A question regarding such course of action arises, however, in that the act does not contain express authority to exercise the option nor does it specifically provide funds immediately necessary for the purchase or lease of trackage rights and equipment or for payment of operating expenses incurred in the rendition of essential rail services.

Specifically our opinion is requested as to whether the Secretary is authorized to exercise the option discussed above and, if so, whether there is any limitation on the amount of money that can be obligated to

carry out the exercise of the option absent any appropriations by the Congress for that purpose.

Section 3(a) of the act, 45 U.S.C. 662(a), authorizes the Secretary to guarantee certificates issued by trustees of any railroad undergoing reorganization under certain conditions including findings that cessation of essential transportation services would endanger the public welfare and that such cessation is imminent.

Subsection 3(b) provides in pertinent part that the Secretary, as a condition to such guarantee shall require that—

> (4) in the event of actual or threatened cessation of essential transportation services by the railroad, the Secretary shall have the option to procure by purchase or lease trackage rights over the lines of the railroad and such equipment as may be necessary to provide such services by the Secretary or his assignee, and, in the event of a default in the payment of principal or interest as provided by the certificates, the money paid or expenses incurred by the United States as a result thereof shall be deemed to have been applied to the purchase or lease price. The terms of purchase or lease shall be subject to the approval of the reorganization court and the operation over the lines shall be subject to the approval of the Commission pursuant to the provisions of section 5 of the Interstate Commerce Act, but in no event shall the rendition of services by the Secretary or his assignee await the outcome of proceedings before the reorganization court or the Commission.

Section 3(e), 45 U.S.C. 662(e), provides that the outstanding aggregate principal amount of all certificates shall not exceed $125,000,000.

Funds needed by the Secretary to carry out his rights and responsibilities under section 3 are provided by section 5(a), 45 U.S.C. 664(a), whereby the Secretary is authorized to issue notes to the Secretary of the Treasury.

As stated by the Acting Secretary, there is hardly any discussion in the legislative history of the act to indicate that Congress intended to vest the Secretary with the authority to take over a railroad and operate it; the discussion being centered almost entirely on the loan guarantee provision. Also, as noted in the letter, although the $125 million limitation in section 3(e) applies only to loan guarantees, and section 5(a), if applicable, places no limit on the amount of funds which the Secretary would be authorized to expend in the exercise of his rights under section 3(b)(4), the legislative history is replete with discussions indicating the congressional intent to limit the Federal obligation under the act to $125 million.

H.R. 19953, 91st Congress (which subsequently was enacted as the Emergency Rail Services Act of 1970), when introduced on December 14, 1970, contained no provisions such as those now contained in section 3(b)(4). Hearings were held on this bill by the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, on December 15, 1970. Members of that subcommittee were concerned that the bill contained no provision for Federal operation of a railroad in the event the railroad was unable to pro-

vide necessary transportation services. *See* pages 550, 567–570 of those hearings.

Apparently as a result of those hearings the subcommittee added the language in question when it reported the bill to the House on the following day, December 16, 1970. The House report accompanying the bill, No. 91–1770, which also includes the minority views, contains no explanation as to what was intended by the added section 3(b)(4). However, we feel confident that if authority for such drastic action as the taking over and the operation of a railroad were intended thereby without further congressional action, such intent would have been specifically stated in the report or elsewhere in the legislative history.

The related Senate Report No. 91–1510, page 12, merely notes that—"Subsection 3(b)(4) provides an option of direct action to ensure that essential service is continued." Nothing therein indicates that the Senate Committee on Commerce believed that the Secretary would be authorized to exercise such option without further congressional action. A different construction of the reference to section 3(b)(4) would, it seems, fly in the face of a statement on the same page of that report wherein, under the heading "COST," it is explained that—"The cost of *preserving essential service* as authorized by this act is limited to $125,000,000 by section 3(e) of the legislation" which amount clearly refers only to the loan guarantees. [Italic supplied.]

Concerning the language of section 5(a) which, as stated above, authorizes the Secretary to issue notes to the Secretary of the Treasury to enable the Secretary of Transportation "to carry out his rights and responsibilities under section 3 of this Act," it is suggested that—

> * * * If Congress intended to provide the section 5(a) financing authority solely to enable the Secretary to honor the guarantees, it is difficult to understand why it provided in section 5(a) a source of funds to carry out the Secretary's "rights" as well as his "responsibilities" under section 3. Arguably, these funds were provided for the exercise of section 3(b)(4) options necessary to continue essential rail services, as well as for honoring loan guarantees. Thus, section 5(a) of the Act is strong evidence supporting the proposition that Congress intended to vest authority in the Secretary to exercise the purchase or lease option. * * *.

Whatever the effect of the term "rights and responsibilities" might be, we believe the above argument must fail in that such term appeared in H.R. 19953 when originally introduced, before section 3(b)(4) was added thereto.

With respect to the last sentence of section 3(b)(4) the Acting Secretary suggests that such provision is designed to ensure that the exercise of the option not be delayed by judicial or regulatory proceedings and would not have been necessary if Congress had not contemplated that the option could be exercised without further congressional action.

We agree that, standing alone, the last sentence of section 3(b)(4) reasonably could be construed as suggested by you. However, when

read in connection with the entire paragraph 4 and considering the legislative history discussed above, we believe such sentence does not permit the Secretary to exercise his option without further congressional action but rather that it merely directs the Secretary, following favorable action by the Congress, to exercise his option to take over and operate a railroad without waiting the outcome of the reorganization court or Interstate Commerce Commission proceedings. That is to say, section 3(b)(4) requires the Secretary to include in the guarantee as a condition thereof an option which would give him the right to procure by purchase or lease trackage rights and equipment as may be necessary to operate the railroad and—if otherwise authorized by law—to exercise the option and operate the railroad without awaiting the outcome of proceedings before the reorganization court or the Interstate Commerce Commission.

Accordingly, and as above-indicated, it is our view that the act provides no authority for the Secretary to exercise any option acquired thereunder.

[B-174866]

Contracts—Data, Rights, Etc.—Subcontractors—End *v.* Precursor Formulas

In the development of a second source subcontractor for the Short Range Attack Missile (SRAM) propulsion subsystem of the SRAM rocket motor, the release to the selected subcontractor of the end formulas for the SRAM liner, insulation, and adhesive materials, did not violate the proprietary rights of the primary subcontractor in the precursor formulas since the end formulas furnished the second source subcontractor were wholly new and independent and not just routine extensions of the precursor formulas. Furthermore, the contracting agency had acquired more than limited rights to the end formulas even though the technical data requirements of both the prime contract and subcontract were broadly stated, and the administrative determinations that the precursor formulas did not comprise the basic end formulas for the SRAM liner, insulation, and adhesive materials or components thereof were neither arbitrary nor capricious.

To the Lockheed Propulsion Company, December 4, 1972:

This is in reply to your letter of December 24, 1971, and subsequent correspondence, protesting the release to the Thiokol Corporation of the end formulas for the liner, insulation and adhesive materials used in the Short Range Attack Missile (SRAM) rocket motor which, you contend, include certain precursor formulas proprietary to Lockheed.

The prime Air Force contract for the design, development, test and evaluation (DDT&E) of the SRAM system program is with the Boeing Company and the record shows that on November 7, 1966, Boeing placed a purchase order with Lockheed for the DDT&E of the SRAM propulsion subsystem. On November 15, 1971, the Air Force entered into a supplemental agreement to the SRAM production contract with Boeing for the purpose of developing a second source sub-

contractor for the SRAM propulsion subsystem. The Thiokol Chemical Corporation was selected as the second source subcontractor, and has been provided with the end formulas for the SRAM liner, insulation and adhesive. Thiokol has commenced performance of its contract. You ask that it be ordered that use of the end formulas on present and future procurements is prohibited pending an equitable settlement with your company.

Essentially, you have raised two main issues which, we believe, are decisive of your protest. First, you contend that the disputed data for the end formulas was not specified for delivery under the Boeing and Lockheed contracts and, in accordance with the contract data provisions, the Government had no right to have this data furnished to it. Second, it is your position that even if the data on the end formulas had been specified for delivery, the precursor formulas are the basic formulas used in the manufacture of the liner, insulation and adhesive, and were developed entirely at Lockheed's expense prior to the SRAM propulsion subcontract. You contend that in any event, pursuant to the contracts' Rights in Technical Data clause, the Government is entitled to unlimited rights in only the Government-funded modifications which were made to the precursor formulas during the performance of the SRAM subcontract.

We have held that in the interest of preserving the integrity of the Government as a purchaser, and of avoiding possible legal liability, the Government should recognize an individual's proprietary rights to information and should not disclose or use such information for procurement purposes unless it acquires the right to do so. 42 Comp. Gen. 346, 354 (1963). In the present case the Government permitted the release of the formulas to Thiokol as well as the formulation of contractual obligations with that company. While this matter was not brought to our attention until after the end formulas were released and Thiokol had been awarded a contract, we note that you sought to suppress the use of those formulas by raising the matter directly with the Air Force and Boeing after learning of their positions.

The Rights in Technical Data clause incorporated in both the prime contract and the SRAM motor subcontract defines technical data, in part, as that "which are specified to be delivered pursuant to this contract." It is your position that the data delivery requirements in the contracts were not sufficiently specific to require delivery of the contested end formulas. On the other hand, the Air Force contends that the data involved in the end formulas was sufficiently specified in the contracts and, in any event, that the Government's rights in material furnished pursuant to an inadequate identification of that and other necessary material are not affected by the inadequacy of the data de-

scription documents, since the sole criteria for determining the extent of data rights is the "private expense" policy of the Department of Defense (DOD) which is reflected in the following provisions of paragraph (b) of the Rights in Technical Data clause:

(b) Government Rights

(1) The Government shall have unlimited rights in:

(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract.

(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense.

The Air Force reports that in development contracts for large systems such as SRAM, piece-by-piece calls for data have not been viewed as necessary for compliance with the "specified to be delivered" provision of the data clause. The data requested to be furnished under a DOD contract is identified on DOD Form 1423, entitled "Contractor Data Requirement List," which sets forth various categories or items of data. The SRAM data items called for on DOD Form 1423, that are pertinent to this protest, include the requirements to furnish data of contractor's "Materials and Process Specifications" (item A046) and of contractor's "Materials and Processes R&D [research and development] report" (item A151). The prime contract further provides (on AFLL/AFSC Form 9) that the data to be submitted should include specifications, standards, reports and other engineering documentation resulting directly from the performance of research work under the contracts and subcontracts thereunder. Also, the Lockheed subcontract provides that "a complete data package should be prepared (or compiled from existing data) consisting of drawings, specifications, standards, reports, lists and other engineering documentation which resulted directly from the performance of experimental, developmental or research work under the contract."

While data requirements are broadly stated in the SRAM prime contract and subcontract, such broad statements of data requirements are reported to be customary in defense contracting. It is believed, particularly because of your experience with similar language in performing a series of Government contracts for exploratory development of pulse type motors antedating the SRAM, that you were not misled as to what was intended to be encompassed by such terms as "materials and process specifications" and "materials and process research and development." Moreover, the record does not show any instance in which you questioned the sufficiency of the data call at,

or before, the time you furnished data pertaining to the end formulas for the liner, adhesive and insulation. Accordingly, we agree with the Air Force that the data provisions of the contracts were sufficient to require delivery of the end formulas, and therefore we see no need to consider further whether an inadequate call for the data would have affected the Government's rights to the end formulas.

You argue at considerable length that the end formulas for SRAM liner, adhesive and insulation are basically the precursor formulas developed at your own expense and, under paragraph (b)(1)(ii) of the Rights in Technical Data clause, quoted above, the Government is entitled, at most, to unlimited rights only in the Government-funded modifications to those precursor formulas, which you believe are "finite and easily discernable." You state that the end fomulas were consistently marked with a proprietary legend. Moreover, you feel it can be established that the precursor formulas were developed at your expense through a review of your accounting records and the statements submitted by the individual emplcyees who actually created the precursor formulas.

While the correspondence submitted by your firm and the Air Force presents several complex arguments in support of the disparate positions taken, we are of the view that the principal question for consideration here is whether the precursor formulas constitute data on the SRAM liner, adhesive and insulation, or components thereof, to which the Government would be entitled to only limited rights under the exception in paragraph (b)(1)(ii) of the data clause.

In reviewing the above-quoted data clause provisions, we believe it is significant, as both your firm and the Air Force have suggested, to consider the official interpretation given those provisions by responsible DOD officials at the time this clause was established. The DOD position has been stated to be as follows:

> Where there is a mix of private and government funds, the developed item cannot be said to have been developed at private expense. The rights will not be allocated on an investment percentage basis. The government will get 100 percent unlimited rights, except for individual components which were developed completely at private expense. Thus, if a firm has partially developed an item, it must decide whether it wants to sell all the rights to the government in return for government funds for completion or whether it wants to complete the item at it own expense and protect its proprietary data. On the other hand, if the government finances merely an improvement to a privately developed item, the government would get unlimited rights in the improvement or modification but only limited rights in the basic item. Hinricks, *Proprietary Data and Trade Secrets under Department of Defense Contracts*, 36 Mil. L.R. 61, 76.

Thus, we are of the view that for the Government to obtain only limited rights in the end formulas, or the precursor formulas which may have been developed entirely at private expense, the precursor formulas must be recognizable as the basic end formulas for the SRAM

liner, adhesive and insulation materials or as components of the end formulas.

On the basis of the analyses and opinions of its technical advisors the Air Force has taken the position that the precursor formulas are not recognizable as the basic end formulas or as components of the end formulas. Specifically, it is reported that there are significant differences in the composition of the end formulas and the precursor formulas in that certain ingredients present in the precursor formulas are not present in the end formulas, and ingredients present in the end formulas are not present in the earlier formulas. Furthermore, the weight percentages of the common ingredients vary as between the end formulas and the earlier formulas. The existence of a number of common ingredients in the end and earlier formulas is felt to be of no consequence since other commercially available compounds all have certain basic ingredients in common which persons knowledgeable in the field can readily combine with other materials to achieve desired end products. The Air Force also argues that the efforts expended by your firm in developing the end formulas for the SRAM insulation, liner and adhesive materials were massive, as documented in your claim for equitable adjustment of that contract price. These efforts, the Air Force contends, justify the conclusion that wholly new and independent end formulas were developed under the SRAM contract and that the end formulas were not just routine extensions of the earlier formulas. (In this connection, we note that portions of your claim for equitable adjustment submitted here with the Air Force report, a copy of which has been made available to you, indicate research and exploratory development efforts by your firm of considerable magnitude in arriving at satisfactory end formulas for SRAM insulation, liner and adhesive materials.)

From our review of the record, we believe there is substantial support for the Air Force position that the precursor formulas should not be regarded as comprising the basic end formulas for the SRAM insulation, liner and adhesive materials or components thereof. Since the significance of any commonality in the formulas is a matter involving technical expertise and consideration, and since we cannot hold that the determinations of the Air Force technicians in such respect were arbitrarily or capriciously made, we do not believe that an adequate showing has been made for this Office to reject the agency views in this matter.

Since we are not persuaded that the precursor formulas should be recognized either as constituting the basic end formulas for the SRAM insulation, liner and adhesive materials, or components there-

of, the question of whether the precursor formulas were privately developed is considered to be academic.

In view of the foregoing we cannot accept your contention that the Air Force has released technical data to which it had acquired only limited rights, and your protest is therefore denied.

[B-175113]

Pay—Active Duty—While Under Civil Arrest

A member of the uniformed services under a sentence of confinement by civil authorities who while paroled to the custody of military authorities on a daily basis performed duties with his unit in accordance with the court's work release recommendation, satisfactorily serving in the capacity of a noncommissioned officer squadron leader, a position commensurate with his grade, military specialty, and length of service, is pursuant to 37 U.S.C. 204(a) and 101(18), which govern entitlement to basic pay, eligible to receive pay and allowances commensurate with his grade and specialty for each day of full-time duty performed while paroled to the military authorities.

To Lieutenant Colonel W. J. Duffy, Department of the Army, December 5, 1972:

Further reference is made to your letter dated November 19, 1971, with enclosures, requesting an advance decision as to the propriety of making payment on a voucher in favor of a staff sergeant in the gross amount of $228.60, representing pay and allowances for the period October 18 through 31, 1971, in the circumstances described. Your letter was forwarded to this Office by letter dated January 26, 1972, from the Office of the Comptroller of the Army (DACA-FIS-PP), and has been assigned Control No. DO-A-1142 by the Department of Defense Military Pay and Allowance Committee.

The file shows that the sergeant, a member of Company B, 3rd Battalion, 325th Infantry, 82nd Airborne Division, Fort Bragg, North Carolina, was convicted of several civil offenses in North Carolina and was duly sentenced to a term of 12 months in the Robeson County jail beginning on or about August 10, 1971. The Judgment and Commitment papers show that concurrent with that sentence the court recommended that the member be permitted to perform work under the North Carolina State Department of Correction Work Release Program, a program, we understand, that is designed to permit prisoners to be gainfully employed during civil confinement for the purpose of supporting their dependents and to assist in their own rehabilitation.

According to the material in the file, the 82nd Airborne Division, through the sergeant's unit, agreed to accept him under the program whereby he was to be released from jail each morning to report for duty at the start of the unit's workday and returned to jail each evening. We understand that the member reported for duty with his unit

each morning at 5:45 a.m., and that at the end of the normal workday, 4:30 p.m., the member was returned to the Robeson County jail where he was confined until the following morning. The sergeant began such work on October 18, 1971; however, we understand that despite his presence with his unit, the unit's Morning Report carried him as "Confined, Civil Authorities" for the entire period that he was employed under the Work Release Program.

Based on the above, you ask the following questions:

a. Is the member entitled to full pay and allowances, if otherwise entitled?
b. If a above is negative, is member considered in the hands of civil authorities for pay purposes?
c. If b above is negative, is member in an ordinary leave status until accrued leave expires and is then entered into an excess leave status?
d. If c above is negative, what is the member's status and entitlements in view of the fact that he is present for duty during normal working hours?

Section 204(a) of Title 37, U.S. Code, provides in part that a member of a uniformed service who is serving on active duty is entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with his years of service computed under section 205 of the same title. Section 101(18) of Title 37, U.S. Code, defines active duty to mean full-time duty in the active service of a uniformed service, and includes duty on an active list, etc.

In 36 Comp. Gen. 173 (1956), we considered several questions presented in a Committee Action by the Department of Defense Military Pay and Allowance Committee concerning a situation where a member of a uniformed service (1) is arrested by civil authorities in a foreign country for a civil offense, (2) then released to the custody of United States military authorities pending trial, (3) confined by such military authorities pending release for trial, and (4) tried and convicted by the civil authorities for such offense. We expressed the opinion that such a member was to be regarded as being constructively absent during such periods of confinement and thereby precluded from receiving pay and allowances during such absence unless the absence was excused as unavoidable.

In decision B–132595, August 26, 1957, involving an Air Force enlisted man charged with, and convicted of, a civil offense by Japanese civil authorities, but released to United States military authorities for certain periods pending trial and later, while his conviction was being appealed, we concluded that the member was entitled to pay and allowances for each day where he was neither held in "confinement" for civil authorities nor in a situation where he was considered to be absent from duty without leave or where such absence was not excused as being unavoidable.

In reaching that conclusion we said that,

While a member of the uniformed services who is restricted to his base, in a sense, is being confined by military authorities, the term "confinement" was used in the decision of August 28, 1956 [36 Comp. Gen. 173], as having reference generally to periods of actual incarceration. The term as there used does not include periods when the member is in a duty status while awaiting civil trial even though his area of movement is restricted during such periods.

In 45 Comp. Gen. 766 (1966), we held that the right to pay and allowances by a member of the uniformed services while being held by military authorities on behalf of foreign civil authorities is not to be determined on the basis of custody alone. The criterion expressed in that case was whether there is a loss to the Government of the member's services and if there is such a loss to the Government whether it was the direct result of his committing the civil offense or whether it may be considered that his confinement or any part thereof was effected solely in connection with court-martial proceedings.

Decision B–169366, April 8, 1970, involved an Army enlisted man who was charged, convicted and sentenced to a period of confinement for a civil offense by Spanish civil authorities, was released to United States Naval authorities in Spain pending appeal and performed military duties at a Naval Station. We held that except for any periods of actual confinement by military authorities, the member might be allowed pay and allowances for any periods during which he rendered military duties appropriate to his grade and military specialty as distinguished from those duties normally required of military prisoners. *Cf.* 51 Comp. Gen. 380 (1971).

In the present case, while the member was under a sentence of confinement by civil authorities, he was paroled to the custody of military authorities on a daily basis. It is our understanding that while in military custody he performed duties with his unit, serving in the capacity of a non-commissioned officer squadron leader, a position commensurate with his grade, military specialty and length of service and that such duty was satisfactorily performed. Therefore, based on our understanding of the facts as indicated above, question a is answered by saying that the member is entitled to receive pay and allowances for each day of full-time duty commensurate with his grade and specialty performed by him during the period in question. Hence, questions b, c, and d apparently require no answer.

Accordingly, the voucher submitted with your request is returned herewith for payment on the basis of the days of actual duty involved, if otherwise correct.

[B–177032]

Compensation — Overtime — Entitlement — Employees Receiving Premium Pay

The preliminary and postliminary ministerial duties performed at headquarters by employees of the Border Patrol, a component of the Immigration and Naturali-

zation Service, and the traveltime to and from regularly scheduled duty at traffic checkpoints located at least 35 miles from headquarters—a matter of 2 hours of the employees' time outside of their regularly scheduled 8-hour tour of duty—is compensable as regularly scheduled overtime under 5 U.S.C. 5542, notwithstanding the employees receive annual premium pay for administratively uncontrollable overtime under 5 U.S.C. 5545(c)(2), for not only is the time involved in traveling and performing the ministerial duties reasonably constant and susceptible of determination, the traveltime is viewed as hours of employment for the purposes of 5 U.S.C. 5542(b)(2) since the employees while traveling perform essentially their regular duties that involve the search and apprehension of illegal aliens.

Compensation—Overtime—Irregular, Unscheduled—Annual Premium Pay in Lieu of Overtime

Employees of the Border Patrol, a component of the Immigration and Naturalization Service, who in addition to performing preliminary and postliminary regularly scheduled duties at headquarters in connection with a regularly scheduled 8-hour tour of duty at traffic checkpoints, which is compensable at overtime rates under 5 U.S.C. 5542, as is the traveltime to the checkpoints, process cases and handle other enforcement duties after their regularly scheduled 8-hour tours of duty and overtime have ended may be paid annual premium pay in addition to the regularly scheduled overtime, if the additional work qualifies as administratively uncontrollable under 5 U.S.C. 5545(c)(2) since payment under both 5 U.S.C. 5542 and 5545(c) is not precluded as premium compensation and regularly scheduled overtime relate to independent, mutually exclusive, methods for compensating two distinct forms of overtime work.

To the Assistant Attorney General for Administration, United States Department of Justice, December 5, 1972:

We refer to your letter of September 12, 1972, requesting our determination as to whether employees of the Border Patrol, a component of the Immigration and Naturalization Service, are entitled to overtime compensation in accordance with the provisions of 5 U.S. Code 5542 under the circumstances recited therein.

You indicate that the Border Patrol agents concerned are assigned to duty at the El Centro, California, headquarters, but that for more than one-half of their regular workdays they are assigned to either of two regular traffic checkpoints, both of which are located some 35 to 37 miles distance from headquarters. These two checkpoints are manned 24 hours a day and agent assignments are generally made 3 to 4 days in advance.

Before reporting to a regular traffic checkpoint, agents are required to report to headquarters to receive special instructions or last minute changes of assignments, to check out Government vehicles and to perform the other functions enumerated in your letter, all of which are preliminary to their departure by Government vehicle to the assigned checkpoint. They then drive the Government vehicle to the checkpoint upon arrival at which their regular 8-hour tour of duty commences. At the end of those 8 hours they return by Government vehicle to headquarters, park the vehicle, perform maintenance functions with respect to the vehicle, write and file reports of the day's activities, and perform the additional ministerial functions described in your letter.

You indicate that agents are not permitted to drive their own vehicles to the checkpoints or to bypass their chores at headquarters. You further indicate that the responsibilities at headquarters consume 10 to 15 minutes prior to departure for a checkpoint and a like amount of time after returning to headquarters; and further that 45 to 50 minutes are required to travel in each direction between headquarters and the checkpoints. Thus, agents perform such duty and travel for a total of approximately 2 hours on each day they are assigned to a regular checkpoint.

Prior to May 7, 1970, four shifts of agents were assigned to each of the checkpoints, requiring each agent to spend 6 hours at the checkpoint and permitting the aforedescribed duties and travel to be included in the regular 8-hour tour of duty. Effective May 7, 1970, the scheduling of assignments was changed to provide for three shifts, thus requiring each agent to man the checkpoint for a full 8-hour tour of duty, with the result that the preliminary and postliminary duties and traveltime involved are now required to be performed outside of the regularly scheduled 8-hour tour of duty. The memorandum dated May 6, 1970, of the then Acting Chief Patrol Agent, in this regard is in part as follows:

> Officers will report for duty at the traffic checkpoint at the hour on which their scheduled tour of duty begins and will remain on the checkpoint until they are relieved. For example, an officer who is scheduled to work from 8:00 a.m. to 4:00 p.m. at the traffic checkpoint on Highway 86 will report to Sector Headquarters early enough to get a Government vehicle and to drive to that checkpoint in time to relieve at 8:00 a.m. His relief would be expected to be at the traffic checkpoint at 4:00 p.m., after which the officer will return to Sector Headquarters.
> Officers assigned to traffic checkpoints where they are not to be relieved will follow the same procedure and will normally be expected to remain at the checkpoint to the end of their shift unless their supervisory officer instructs them to the contrary.

The Border Patrol has declined to compensate agents for the preliminary and postliminary duties and traveltime involved at overtime rates under the authority of 5 U.S.C. 5542, partly in reliance upon the determination in General Accounting Office Claims Division Settlement Certificate Z–2423648, March 19, 1971. The Claims Division indicated therein that inasmuch as the claimant, a Border Patrol agent, assigned to the El Centro headquarters had received premium pay on an annual basis for administratively uncontrollable overtime under 5 U.S.C. 5545(c)(2) he was precluded by section 550.163(b) of Title 5, Code of Federal Regulations, from being compensated for such work under the provisions of 5 U.S.C. 5542.

Section 5545(c) of Title 5, U.S. Code, provides with regard to compensation for administratively uncontrollable overtime work as follows:

> (c) The head of an agency, with approval of the Civil Service Commission, may provide that—
> * * * * * * *

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 per centum nor more than 25 per centum, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS–10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position.

Section 550.163(b) of 5 CFR provides as follows:

(b) An employee receiving premium pay on an annual basis under § 550.151 may not receive premium pay for irregular or occasional overtime work under any other section of this subpart. An agency shall pay the employee in accordance with other sections of this subpart for regular overtime work and work at night, on Sundays and on holidays.

You pose the following specific questions under the facts and law discussed:

1. Should the time devoted to administrative work at Sector Headquarters, prior to and following highway checkpoint duty, be regarded as scheduled overtime or as administratively uncontrollable overtime?
2. Should the time required for traveling to and from the highway checkpoint be regarded as scheduled overtime or as administratively uncontrollable overtime?

The requirement of 5 U.S.C. 5545(c) that the hours of duty not be subject to administrative control is explained by the Court of Claims in *Burich* v. *United States*, 177 Ct. Cl. 139, 145 (1967), as follows:

In claiming entitlement to overtime on an hourly basis, plaintiff emphasizes that his assignments were regularly scheduled. We do not disagree. But the point we would emphasize is that, as a consequence of his regular assignments, he experienced erratic and irregular periods of overtime work. His assignments were received on a daily basis, but neither the nature of the work nor the length of time required in its performance could be ascertained beforehand. To the extent that this work involved overtime, it is clear that such overtime could perhaps be anticipated, but it could not be regulated. And thus the point of distinction is that plaintiff was not assigned overtime; he was assigned a task which *might* require overtime. Under such circumstances, his additional duty hours represented administratively uncontrollable overtime rather than regularly scheduled overtime.

See also *Byrnes, et al.* v. *United States*, 163 Ct. Cl. 167 (1963), *Fix, et al.* v. *United States*, 177 Ct. Cl. 369 (1966), and 5 CFR 550.153.

More recently, in 48 Comp. Gen. 334 (1968), this Office held that the term "regularly scheduled overtime" refers to work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals as distinguished from the situation considered in B–168048, August 19, 1970, copy enclosed, where schedules were made on a day-to-day or hour-to-hour basis and where the amount of overtime varied with no discernible pattern. *See also* B–160165, January 6, 1967, and B–160472, January 5, 1967, copies enclosed.

Your submission does not indicate the regularity with which assignments to regular checkpoints were made other than to state that agents are assigned more than one-half of their workdays to the checkpoints and that assignments are posted 3 to 4 days in advance. We understand, however, that an agent is often assigned to work at a checkpoint on successive days and may be assigned to such duty for a full workweek or longer. In view of those facts, we believe that the particular days on which agents are assigned to checkpoints are regularly scheduled; further, the facts show that the time involved in traveling to and from those points and in performing preliminary and postliminary duties is reasonably constant and susceptible of being determined. These circumstances in themselves establish, in accordance with our holding in 48 Comp. Gen. 334, *supra*, that the functions performed before and after the regular 8-hour tours of the agents concerned involved "regularly scheduled" duty. In view of the information now presented it is apparent that the determination of our Claims Division, as referred to above, which was based on the assumption that the overtime involved was uncontrollable cannot be sustained.

The authority for compensation for regular overtime, 5 U.S.C. 5542, provides in pertinent part as follows:

§ 5542. Overtime rates; computation.

(a) Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS–10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

The questions which you pose indicate that the time involved in travel between headquarters and the checkpoints and in performing the ministerial duties at headquarters qualifies as authorized or approved overtime hours of work.

With respect to the payment of premium compensation for the traveltime involved, subchapter V of Chapter 55 of Title 5 of the U.S. Code, including both sections 5542 and 5545, requires that traveltime meet the criteria set forth at 5 U.S.C. 5542(b)(2) which provides as follows:

(2) time spent in a travel status away from the official-duty station of an employee, is not hours of employment unless—

(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

In regard to the agent's responsibilities while traveling, you state:

> * * * While driving to the checkpoint, and later towards the close of the work day, driving from the checkpoint to headquarters the Agent is required to keep a lookout for suspected illegal aliens and to interrogate them. He is also notified by headquarters, on the radio, to stop and render interpreting service between Highway Patrol officers or policemen and their Spanish-speaking detainees * * *.

Inasmuch as the agents' regular duties involved the search and apprehension of illegal aliens, the performance of essentially those duties while traveling to and from a regular checkpoint must be considered as the performance of work for purposes of section 5542(b)(2). 41 Comp. Gen. 82 (1961). This is in keeping with information received from the Immigration and Naturalization Service to the effect that they regarded the traveltime involved as work although they considered it work for purposes of determining the number of hours of uncontrollable overtime performed by each agent and thus his entitlement to premium compensation under 5 U.S.C. 5545(c) and section 550.154 of the Civil Service Regulations.

For the reasons stated the time in travel as well as the time spent in preliminary and postliminary duties may be regarded as regularly scheduled overtime compensable under 5 U.S.C. 5542. Your questions are answered accordingly.

We note that, in addition to the above-discussed preliminary and postliminary duties and travel, agents are expected to complete the processing of cases and handle other enforcement duties which arise after their regular tours of duty have ended. They are thus required from time to time to work beyond the end of the scheduled shifts. Unlike the preliminary and postliminary duties and traveltime discussed above, work of this nature qualifies as administratively uncontrollable under 5 U.S.C. 5545(c) and the criteria discussed above. Whether that work is "substantial" as required by 5 U.S.C. 5545(c) and, if so, the rate of premium compensation which may be authorized pursuant to the Civil Service Regulations, 5 CFR 550.151–164, cannot be ascertained from the information contained in your submission. We point out, however, that if such uncontrollable overtime meets the criteria prescribed, payment for that time under 5 U.S.C. 5545(c) and for regularly scheduled overtime under 5 U.S.C. 5542 incident to duty at the regular checkpoints is not precluded.

In that connection the following Court of Claims comments in *Burich* v. *United States*, *supra*, at page 145 are applicable:

> Based upon the foregoing, it is evident that premium compensation and regularly scheduled overtime relate to independent, mutually exclusive, methods for compensating two distinct forms of overtime work. The statute authorizes premium compensation where the hours of duty cannot be controlled administratively; it provides this in lieu of all other forms of premium compensation (*i.e.*, compensation for night and holiday work) *except* for regularly scheduled overtime duty. Thus, the statute does not preclude an employee from receiving regular

(hourly) overtime pay in addition to premium pay, but he cannot claim both for the same work. Neither may he claim hourly compensation for administratively uncontrollable overtime. Under the terms of this statute, administratively uncontrollable overtime falls clearly outside the scope of regularly scheduled overtime. This distinction plaintiff fails to bear in mind.

If the administratively uncontrollable duties which agents have performed without regard to the 2 hours overtime performed in connection with a day's assignment to a regular checkpoint are found either not to qualify for a premium compensation under 5 U.S.C. 5545 (c) or to justify a lower rate of premium pay than that which has been paid the resulting excess amounts received as compensation for administratively uncontrollable overtime should be set off against regular overtime compensation which is found to be payable under this decision.

[B-119969]

Courts—Jurors—Fees—Government Employees in State Courts—Travel Expenses in Lieu of Fees

When jury services are performed in the courts of Calvert, Charles, Prince George's, and St. Mary's counties in the State of Maryland by Federal employees who are granted court leave pursuant to 5 U.S.C. 6322(a), and are required under 5 U.S.C. 5515 to turn over jury fees for credit against salary payments for the periods of court leave, the expense money received as authorized by article 51, section 19(f) of the Maryland Code may be retained by such employees on the basis the moneys received are traveling expenses within the contemplation of section 12 of article 51 of the Code rather than jury fees and as traveling expenses the payments are not within the purview of 5 U.S.C. 5515.

To the Assistant Director (Administration), United States Information Agency, December 6, 1972:

We refer to your letter dated September 26, 1972, requesting our decision regarding the treatment to be accorded those payments received by employees of the United States Information Agency (USIA) for jury service in the courts of Calvert, Charles, Prince George's and St. Mary's counties, in the State of Maryland, in view of certain recent amendments to the Maryland Code.

You state that effective July 1, 1972, article 51, section 19(f), of the Maryland Code was amended to read as follows:

19(f) In Calvert, Charles, Prince George's and St. Mary's counties, jurors shall *in lieu of a jurors* (*sic*) *salary* receive $10.00 *as expense money* for each day in attendance at a court as jurors, covering service up to the hour of six o'clock p.m. on any day. An additional sum of five dollars shall be paid *as expense money* if the service on any day extends beyond six o'clock p.m., and up to nine o'clock p.m. A second additional sum of five dollars *as expenses* shall be paid if the service on any day extends beyond nine o'clock p.m.

Prior to the July 1, 1972, amendment, article 51, section 19(f) of the Maryland Code stated that—

(f) In Calvert, Charles, Prince George's and St. Mary's counties, jurors shall receive ten dollars for each day in attendance at a court as jurors, covering

service up to the hour of six o'clock p.m. on any day. An additional sum of five dollars shall be paid if the service on any day extends beyond six o'clock p.m. and up to nine o'clock p.m. A second additional sum of five dollars shall be paid if the service on any day extends beyond nine o'clock p.m.

The primary question presented is whether payments made under the authority of section 19(f), as amended, to USIA employees serving as jurors on court leave granted pursuant to 5 U.S. Code 6322(a) may now actually be considered as being for expenses rather than for services rendered so as to not require such amounts to be turned into the agency as credits against salary payments for the periods of court leave.

5 U.S.C. 5515 concerning crediting amounts received by Federal employees for jury service in State courts provides as follows:

An amount received by an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia for jury service in a State court for a period during which the employee or individual is entitled to leave under section 6322 of this title shall be credited against pay payable by the United States or the District of Columbia to the employee or individual.

Under the above-quoted section it is mandatory that the amounts received from a State for jurors' fees be credited against the amount of compensation payable by the United States for such period of absence.

Under our decisions we do not require a Federal employee who has served as a juror in a State court to remit to the Federal Government that part of the compensation he receives from the State to cover traveling expenses where it is clear that a specific amount is received for such purpose. We have also allowed payment of jury fees to Federal employees serving as jurors in a State court on nonworkdays, including holidays. *See* 27 Comp. Gen. 293 (1947); 37 *id.* 695 (1958) and 45 *id.* 251 (1965). Also, jury fees may be retained by the Federal employee when the jury service occurs during a period when the employee is in a nonpay status. 24 Comp. Gen. 450 (1944).

Section 12, the general provision covering compensation of jurors, of article 51 of the Maryland Code, provides in pertinent part as follows:

§ 12. Compensation of jurors.

A juror shall receive such compensation *and/or reimbursement for expenses of travel incident to jury service as may be now or hereafter provided by law* * * *. [Italic supplied.]

We have been informally advised that the proposal to amend section 19(f) was initially introduced by the Prince George's county delegation. The original text of such amendment, which was reported out of the House Ways and Means Committee, read as follows:

In Calvert, Charles, Prince George's, and St. Mary's counties, jurors shall receive $10.00 for expenses for each day in attendance at a court as jurors covering service up to the hour of six o'clock p.m. on any day. An additional sum of

$5.00 shall be paid as expenses if the service on any day extends beyond six o'clock p.m. and up to nine o'clock p.m. A second additional sum of $5.00 shall be paid if the service on any day extends beyond nine o'clock p.m.

When considered by the House, that body chose to modify the reported amendment so as to read as is now contained in the new section 19(f), quoted above.

We have further been informally advised that the purpose for seeking the subject amendment was to alleviate those problems encountered by residents of such county who are Federal employees. The difficulties referred to were those accruing out of the application of 5 U.S.C. 5515, discussed above.

In such light an amendment was sought to the cognizant section of the Maryland Code (section 19(f)) in such a way that any monies received by residents of Prince George's county for jury service in a local court would be considered as being for travel expenses. In the cases of those individuals serving as jurors who are Federal employees, the net effect would be to exempt the monies received for such services from the purview of 5 U.S.C. 5515.

Our analysis of the legislative history of section 19(f), as amended, is to the effect that it was the clear intent of the Maryland General Assembly that any monies received by residents of the subject counties for juror service in a local court be regarded as being for travel expenses rather than for juror fees. Both the original and final versions of the amendment to section 19(f) support this viewpoint.

Moreover, we feel that payment on a flat fee basis for travel expenses as is provided by section 19(f) would be within the intent of section 12, *supra*. It follows that any monies received under the authority of article 51, section 19(f) of the Maryland Code may now be retained by employees on the basis that such amounts are for traveling expenses rather than jury fees.

[B–175364]

Transportation—Vessels—American—Cargo Preference—Towage of Empty Barge

The prohibition in 10 U.S.C. 2631, the Cargo Preference Act of 1904, as amended, to the effect that "only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps," does not apply to the towage of an empty barge by a foreign-flag tug since the tug is not a supply item and the language of the act as well as court cases which distinguish between contracts of affreightment and contracts for tonnage services indicate the preference granted United States vessels by the 1904 Cargo Preference Act is limited to transportation by sea of military supplies under contracts of affreightment and the preference does not extend to towage of empty vessels under ordinary towage contracts. Therefore the payment under a towage contract from appropriated funds was proper.

To Galland, Kharasch, Calkins & Brown, December 6, 1972:

We refer to your letter of June 22, 1972, and earlier letters, on behalf of the Dillingham Corporation of Honolulu, protesting award by the Military Sealift Command of a contract under which towage of an empty barge belonging to the United States Navy would be performed by a foreign-flag tug. It is your view that use of the tug is unlawful under 10 U.S. Code 2631. The section provides:

> Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons. (Act of April 28, 1904, ch. 1766, 33 Stat. 518, as amended, 70A Stat. 146, 10 U.S.C. 2631.)

The award in question was made pursuant to MSC Request for Proposals No. N0003372R0020, dated February 14, 1972. The request for proposals is subtitled "Towage Service" and requests offers for towage of a nonpropelled refrigerator barge (BR-6668) from Manila to Rio Vista, California. The typewritten text of the request asks for offers of "U.S. Flag tugs" but a handwritten interlineation between the words "U.S. Flag" and the word "tugs" inserts the words "AND F.F." in printed capitals, presumably indicating that offers are requested for either U.S.-flag tugs or foreign-flag tugs.

Dillingham Corporation, through Hawaiian Tug and Barge Company, submitted an offer of a U.S.-flag tug at a cost of $95,000. Award of the contract was made to Lasco Shipping Company of Portland, Oregon, for use of a foreign-flag tug at a price of $64,665, the lowest price obtained under the request for proposals, and the contract reportedly has been executed.

In your letter of March 3, 1972, you ask that we investigate the regularity and sufficiency of the interlineation purporting to open the bidding to tugs of foreign registry. While it would have been preferable that the typewritten text of the request for proposals show that it was directed to both U.S.-flag and foreign-flag tugs, we think the handwritten notation was not so confusing as to mislead prospective offerors. Furthermore, since the request clearly reserved the right to the Government to reject any or all offers, and since the award actually made was in the form of a negotiated contract purportedly entered into under appropriate procurement regulations, we do not believe that the notation prejudiced the rights of prospective offerors so as to vitiate the procurement if it was otherwise correct. The real question, of course, is whether the procurement was in violation of the 1904 act.

It is your view that for the purposes of the proposed tow the barge is not itself an instrumentality of transportation but a piece of Navy

cargo; i.e., a supply item of the Navy. From this premise, you argue that the towing tug is the transporting vessel and under the quoted statute must be a vessel of the United States unless findings are made that will trigger statutory exceptions.

Counsel for MSC takes the position that the 1904 act does not apply to a contract for towage of an empty barge and argues that the term "supplies" does not include barges and other vessels. Counsel points out that the definitions section of Title 10, section 101, defines "supplies" as including "material, equipment, and stores of all kinds." The term "equipment" is not defined in the section. However, in the procurement chapter of Title 10, Chapter 137, section 2303(b) provides that the chapter covers all property (other than land) including, among other listed specific classes of property, "vessels" and "equipment." Since "vessels" and "equipment" are separately listed as classes of property covered by the procurement chapter, and since the term "vessels" is not specifically included in the definition of "supplies" in the definitions section of Title 10, it is concluded that the word "supplies," as used in the 1904 Cargo Preference Act, does not include vessels.

We are not convinced that the term "supplies," as used in the 1904 Cargo Preference Act, excludes vessels if they are vessels capable of being transported by sea under transportation contracts envisaged by the statute. As originally enacted, the statute covered "supplies of any description" and the plain meaning to be accorded such words would seem to be broad enough to include some classes of vessels.

The first sentence of the statute provides that only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. Under the contract in question, the barge surely would be transported by sea in the sense that it would be towed from one port to another and we think it conceivably could be considered to be a "supply" bought for the use of the Navy. However, the further language of the statute indicates that the reference in the first sentence to transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps is to transportation by sea under contracts of affreightment and not to transportation by sea under contracts for ordinary towage.

The second sentence of the act provides that if the President finds that the *freight* charged by United States vessels is excessive or unreasonable, contracts for transportation may be made as otherwise provided by law. It is noteworthy that the statutory phrase is "freight charged" and not "freight or towage charged," and that the phrase used in the original act was "rates of freight charges by said vessels."

Finally, the last sentence of the act, the so-called McCumber Amendment, provides that charges—and in light of the preceding sentence this can only mean freight charges—made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons. It would be extremely difficult, if not impossible, to apply the amendment provision in the case of contracts for towage because towage charges usually are lump-sum charges determined in relation to all the peculiar facts and circumstances surrounding a given tow, including such factors as the amount of steaming required to reach the tow, the possibility or probability of a return tow, etc. On the other hand, freight charged under contracts of affreightment is usually computed at some weight or measurement rate basis related to the amount of cargo carried or the amount of space occupied by the cargo, and thus it would be a relatively simple matter to determine whether the freight charged the Government for a particular cargo is the same as, or greater than, the freight that would be charged a private person for transportation of like cargo.

Towage is said to be the employment of one vessel to aid in the propulsion or to expedite the voyage of another where there is no circumstance of peril, such service being rendered pursuant to contract. *P. Dougherty Co.* v. *United States*, D.C. Del., 1951, 97 F. Supp. 287, 291. The word "towage" means both the act of towing and the price paid for towing. *Webster's New International Dictionary, Second Edition.* A "towage service" is said to be one which is rendered for the mere purpose of expediting a vessel's voyage without reference to any circumstance of danger. *Kittelsaa* v. *United States*, D.C. N.Y., 1948, 75 F. Supp. 845, 846; *Sacramento Nav. Co.* v. *Salz*, 273 U.S. 326 (1927); *The Roanoke*, D.C. Cal., 1913, 209 F. 114, 115.

On the other hand, it is said that a contract to transport goods constitutes a contract of "affreightment," although there is towage service connected therewith. *The Nettie Quill*, D.C. Ala., 1903, 124 F. 667, 670, *Sacramento Nav. Co.* v. *Salz*, 273 U.S. 326 (1927). And the word "freight" is defined as the price paid for transportation of goods. *Webster's New International Dictionary, Second Edition.* The cases of *Hartford Accident & Indemnity Co.* v. *Gulf Refining Co.*, D.C. La., 1954, 127 F. Supp. 469, 475, and *The Independent*, C.C.A. La., 1941, 122 F. 2d 141, 143, serve to illustrate the difference between a contract of affreightment and a contract of towage.

In the *Hartford* case, a contract to transport petroleum products in barges towed and owned by the promissor was held to be not a contract of "towage" but a contract of "affreightment" with a private carrier, to which rules as to negligence of a tug owner under a contract of towage are inapplicable. But in the case of *The Independent*,

it was held that a contract whereby a towing company agreed to lease barges to an oil company at a certain rate per month and to furnish a tug to tow the barges at a certain rate for each trip, and whereby no receipt or bill of lading was issued by the towing company and the oil company retained custody and control of the oil until it was delivered to its customer, was one of "charter" of barges and a separate contract for towing whenever called upon to do so, and was not a contract of "affreightment." No case has come to our attention where towage of an empty vessel was held to constitute transportation of goods under a contract of affreightment.

The difference between contracts of affreightment and contracts of towage is illustrated by numerous cases involving constructions of the Harter Act, which was enacted over a decade before passage of the 1904 Cargo Preference Act. The Harter Act reads, in relevant part:

> If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel * * *. (Act of February 13, 1893, c. 105, Section 3, 27 Stat. 445, 46 U.S.C. 192.)

The limitation of liability contained in this act has been held by the courts to apply only to contracts of affreightment. Thus, where the contract with the towing vessel was one for delivery of cargo under a contract of affreightment, the limitation of liability was upheld. *The Nettie Quill*, D.C. Ala., 1903, 124 F. 667; *Sacramento Nav. Co.* v. *Salz*, 273 U.S. 326 (1927). But where the contract was one for ordinary towage, the limitation of liability was denied. *The Murrell*, D.C. Mass., 1911, 200 F. 826; *The Coastwise*, D.C. Mass., 1915, 230 F. 505, 509.

In addition to the distinction between contracts of affreightment and contracts of towage drawn by the Harter Act cases, a further distinction between the towing of vessels and the transportaton of merchandise by water is illustrated by the cabotage laws, 46 U.S.C. 316 and 46 U.S.C. 883, the former pertaining to towage of vessels in coastwise waters of the United States and the latter pertaining to the transportation of merchandise in similar waters. The precursors to these current statutes were enacted before the 1904 Cargo Preference Act, that is, the Act of July 18, 1866, c. 201, Section 21, 14 Stat. 183, and Act of February 17, 1898, c. 26, Section 1, 30 Stat. 248, and it must be concluded that the legal distinction between contracts for ordinary towage and contracts for transportation of merchandise was known to the Congress at the time the 1904 Cargo Preference Act was enacted.

For the reasons stated, we believe the preference granted United States vessels by the 1904 Cargo Preference Act is limited to transportation by sea of military supplies under contracts of affreightment and does not extend to towage of empty vessels under ordinary towage contracts. The contract here in question clearly was one of towage and we believe therefore that payment of the contract price from appropriated funds was proper.

[B-175252]

Printing and Binding—Purchases From Other Than Public Printer—Commercial Sources *v.* Professional Societies

The award of a contract to a consortium of the American Institute of Physics and the American Chemical Society by the National Bureau of Standards for the publication and marketing of physical and chemical reference data using compilations presented in camera-ready form by the National Standard Reference Data System is not in conflict with the objectives of the Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and the general public" since neither the language of the act nor its legislative history evidences the use of commercial publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, the award was not violative of the competition required by section 1-1.301-1 of the Federal Procurement Regulations since requests for proposals were issued to commercial houses and all proposals received were properly evaluated.

Contracts—Protests—Timeliness

Since the United States General Accounting Office (GAO) bid protests regulations in effect prior to February 7, 1972, the effective date of the "Interim Bid Protest Procedures and Standards," did not set a specific limitation for the filing of protests, a contractor who protested the July 29, 1971, award of a contract to the contracting agency on December 1, 1971, which was denied February 16, 1972, may have the subsequent protest filed with GAO within 5 days of notification of adverse agency action considered timely filed under the bid protest procedures made effective February 7, 1972, 4 CFR 20.2(a).

To Cadwalader, Wickersham and Taft, December 7, 1972:

Further reference is made to your letter dated February 16, 1972, and subsequent correspondence, on behalf of John Wiley & Sons, Inc. (Wiley), protesting the award of contract No. 1-35956 to a consortium of the American Institute of Physics and the American Chemical Society (AIP/ACS) by the National Bureau of Standards (NBS), Department of Commerce. The contract is for the publication and marketing of physical and chemical reference data, during the calendar years 1972 and 1973, using compilations presented in camera-ready form by the National Standard Reference Data System.

The intial issue for our consideration is whether this protest should be dismissed as untimely. In June 1971, NBS decided to contract with AIP/ACS instead of a commercial publishing house, such as Wiley. By letter of June 24, 1971, and an undated letter of about June 30, 1971, Wiley was advised that NBS was establishing a publishing

arrangement with AIP/ACS. This contract was executed on July 29, 1971. There was no communication from Wiley regarding the award for 5 months after this notification. On December 1, 1971, Wiley protested to the Department of Commerce against the award to AIP/ACS. Discussions concerning the protest were held in December 1971 and January 1972, and on February 16, 1972, the protest was denied by the contracting agency. You filed a protest with this Office on the same day.

This protest presents no argument which could not have been known upon the execution and public availability of the AIP/ACS contract in July 1971. However, we recognize that our bid protest regulations in effect in 1971 set no specific time limits for the filing of such protests which, if exceeded, could result in the dismissal of a subsequent protest to our Office. On December 23, 1971, our Office promulgated the "Interim Bid Protest Procedures and Standards" which are applicable to protests received by our Office on and after February 7, 1972. Wiley's protest to our Office was made within 5 days of notification of adverse agency action and, therefore, is timely under these procedures and standards. 4 CFR 20.2(a).

Your initial basis for protest is that in enacting the Standard Reference Data Act, 15 U.S. Code 290, 290a–f (hereafter "the act"), "* * * the Congressional purpose was to achieve * * * dissemination [of data compiled and evaluated under the act] by using private publishing houses." You contend that the award to a consortium of two professional societies is in conflict with this congressional purpose and excludes commercial publishing houses "from a role the Act specifically sought to give them."

The need which the act seeks to fulfill has been described as follows:

> [The act], which was enacted on July 11, 1968, established within the Department of Commerce a standard reference data system to be administered by the National Bureau of Standards. The act declared the policy of the Congress to make critically evaluated reference data readily available to scientists, engineers, and the general public. To carry out this policy, the Secretary of Commerce was directed to provide or arrange for the collection, compilation, critical evaluation, publication, and dissemination of standard reference data.
>
> In essence, the standard reference data system seeks to deal with one aspect of the broad science information problem by producing and disseminating compilations of critically evaluated data on the physical and chemical properties of materials. This includes, for example, measurements of the amount of energy released when chemical elements combine to form new compounds, or the ability of various substances to conduct electricity or heat under certain conditions. The boiling point of a liquid, the mass of an atom, the amount of heat released when a given substance burns, the rate at which an undesirable pollutant decomposes in water—these are examples of the kind of quantitative numerical data that are focused on. Since substances behave the same way in Laboratory B as they do in Laboratory A, such data, once accurately measured, can be used over and over by scientists and engineers throughout the world. When data of this kind are extracted from the technical literature of the world, evaluated by a specialist, and compiled for convenient use, we call them "Standard Reference Data."

The significance of the standard reference data can be illustrated by understanding the process by which measurements of the properties of substances are made available to scientists and engineers. Property measurements are produced as a result of the research done by millions of scientists and engineers throughout the world, and are published in various scientific journals and reports. Therefore, while these data are available to anyone who is prepared to search the literature to find them, it is quite often difficult to locate a specific number or value in the millions of pages of scientific literature. Of equal importance is the fact that once the number or value is located, it is difficult to determine just how reliable such information is. Only a specialist in the field can tell which number is most likely to be correct, and it is these specialists who, working with the National Bureau of Standards, select a single value or range of values as the best or "standard" value to be incorporated in the standard data system. The data may then be used with maximum confidence, and scientists and engineers may depend upon the reliability of the measurements without having to again conduct the experiments.

Standard reference data are used daily as basic reference materials by scientists and engineers in Government, industry, and universities, and are necessary for such diverse fields as transportation, electronics, construction, and the manufacturing of commercial goods, medicines, and products. (House of Representatives: H. Rept. No. 92-974, 92d Cong., 2d sess. 4-5 (1972)).

Thus, the objective of the act is to "make critically evaluated reference data readily available to scientists, engineers and the general public." 15 U.S.C. 290. In order to accomplish this purpose, the Secretary of Commerce is authorized and directed (15 U.S.C. 290b):

* * * to provide or arrange for the collection, compilation, critical evaluation, publication, and dissemination of standard reference data.

Section 5 of the act (15 U.S.C. 290d) states in pertinent part:

Standard reference data conforming to standards established by the Secretary may be made available and sold by the Secretary *or by a person or agency designated by him.* To the extent practicable and appropriate, the prices established for such data may reflect the cost of collection, compilation, evaluation, publication, and dissemination of the data, including administrative expenses * * *. [Italic supplied.]

Section 6(a) of the act (15 U.S.C. 290e(a)) authorizes the Secretary to receive copyright on behalf of the United States in any standard reference data which he prepares or makes available and he "may authorize the reproduction and publication thereof *by others.*" [Italic supplied.]

Thus, we do not find an express provision in the act requiring the use of commercial publishing houses in the dissemination of the data. We agree with the administrative position that, on its face, the act commits certain discretion to the Secretary of Commerce in that the standard reference data can be made available and sold by the Secretary or by a person or agency he may designate, and that he may make the data available or authorize the reproduction thereof by others.

We now turn to the legislative history of the act to discern whether "a person or agency designated by him" and "by others" in sections 5 and 6(a) of the act, respectively, were intended by Congress (insofar as private publishers are concerned) as exclusive references to commercial publishing houses, or whether these terms include other organizations such as professional societies.

On June 28 through 30, 1966, hearings were held before the Subcommittee on Science, Research, and Development, of the House Committee on Science and Astronautics, on a bill (H.R. 15638, 89th Cong., 2d sess., superseded by H.R. 16897) prior to the one (H.R. 6279) eventually enacted as the Standard Reference Data Act. The prior bill contained the same language as that quoted above from 15 U.S.C. 290d and 290e(a). The first witness before the subcommittee was Dr. Donald Hornig, Director, Office of Science and Technology. In discussing the effort required to support the proposed Standard Reference Data System (SRDS), Dr. Hornig stated (pages 6 and 7 of the hearings):

The level of activity should be one which will result in a viable program; that is, one where the solutions or rate of improvement at least exceed the rate of growth of the problem or activity. The projections that the National Bureau of Standards has made, which you will hear about from them, to attain a fully operational level are consonant with my own experience in dealing with this kind of data and my feelings as to a viable level of effort.

It would take time to build to such a level due to organizing and staffing requirements and the limited number and availability of qualified people. The cost of such a program would be small compared to the research and development effort itself. In my judgment, it is still premature to decide that the Federal Government will operate at least all of the information distribution part of the standard reference data system in all its aspects and forms. Perhaps the private publishing industry would be willing to undertake a large share of the information dissemination responsibility. *Professional scientific and engineering societies may also wish to participate.* [Italic supplied.]

Dr. Hornig continued in his prepared remarks (page 9):

* * * it is not expected that the Federal departments and agencies would operate the national information systems, although in some cases they might. The SRDS enlists the cooperation of all sectors of our scientific and technical community in this planning, support and operation of the system. *I consider it very important to encourage and support the information-handling activities in the private sector.* [Italic supplied.]

At the conclusion of Dr. Hornig's prepared remarks, the following colloquy occurred with the subcommittee Chairman, Mr. Daddario (pages 10 and 11):

Mr. DADDARIO. Thank you, Dr. Horning.

I have a question that involves the idea that you express at the bottom of page 7. You say:

I consider it to be very important to encourage and support the information handling activities in the private sector.

Could you give this committee an idea as to what you mean, and how you think it might develop?

Dr. HORNIG. Well, for instance, and I am now speaking of information in general, rather than just the Standard Reference Data System, the chemical literature is published by the American Chemical Society. I don't know the exact count, but they publish some 15 or so different journals in various areas of chemistry.

In physics there is the American Physical Society that publishes the original literature. The American Biological Society publishes biological literature. The Engineering Society publishes engineering journals. So these are all private activities. In fact, the primary scientific literature publication is entirely in private hands. But they have great difficulties. There are many problems of coordination.

The most difficult one is—I mean information that is published in the chemical literature—how does it get into the hands of an engineer who doesn't read the very specialized publications of the Chemical Society, for example. This is what produces the problem.

So we have very many journals, but most practicing engineers and very few scientists, even if they read 20 or 30 journals a month, can even dent the total amount of literature publication.

Then there are many inventions to deal with this. The Chemical Society, for example, publishes something called Chemical Abstracts. The Physical Society publishes Physics Abstracts. These are attempts to publish small abstracts of the journals and classify them by author, subject, and so on, so people can find them. Well, the number of abstracts gets so excessive that they then publish annual indexes to the abstracts.

They used to publish 10-year indexes to the indexes but now the volume of data has gotten so great that the Chemical Society has simply decided it can't publish any more decennial indexes. It is just overwhelmed. It can't afford it.

The question is they are giving up. So we are working together. There is now a program between the Science Foundation, the National Institutes of Health, the Department of the Army, and Chemical Abstracts to work on means of developing computerized ways of handling this information. So this is an example of Federal-private cooperation. This indexing is absolutely essential because otherwise the people who need it, who are the engineers, the people in industry, the people in universities, won't have access to the work we have paid quite a lot of money for.

Mr. DADDARIO. You see nothing in this bill which would bar the private sector from participating in this activity?

Dr. HORNIG. Oh, no. There are, of course, excellent examples in the past of the cooperation of the Bureau of Standards with the American Petroleum Institute in putting together critical data (thermodynamic data), the data on hydrocarbons. It was the Petroleum Institute which collected the standard samples of hydrocarbons from which the data were taken—that made the compilation. So there are many examples of cooperation.

A subsequent witness was Dr. J. Herbert Hollomon, Assistant Secretary of Commerce for Science and Technology. During Dr. Hollomon's testimony, Congressman Vivian inquired whether the standard reference data should not be published by the Government Printing Office. This exchange followed (page 51):

Mr. VIVIAN. It seems to me the question of whether all Government publications should go through the Government Printing Office at all is itself a question, because there are pretty stringent laws already existing requiring that they be published through the Government Printing Office.

Mr. DADDARIO. If you would yield, the example you have given, Dr. Hollomon, the means to get that done seems already to be available to you.

Dr. HOLLOMON. How?

Mr. FELTON. Under contract.

Dr. HOLLOMON. If we did all that work under contract, that would be so. But if the work happened to be done in the Bureau of Standards—

Mr. FELTON. I thought most of this work was going to be done out-of-house by experts in the field.

Dr. HOLLOMON. Both. We intend to do both. It depends on whether we have the expertise. Other Government agencies can do likewise. For example, AEC does certain publications that meet their criteria and some are printed privately at this time.

Another witness was Dr. Frederick Seitz, President, National Academy of Sciences, who stated (pages 79–80):

Certainly the most notable effort to provide critical tables of standard reference data is the International Critical Tables of Numerical Data of Physics, Chemistry, and Technology. * * *.

The entire enterprise was made possible by the cooperation of the American Chemical Society and the American Physical Society, together with essential support from industry, which contributed funds totaling $200,000. This famous collection of numerical data was the result of cooperative efforts by some 400 scientists in 18 different countries. Seven volumes with a total of approximately

3,500 pages were published in the years 1926–30, constituting the longest single compilation of critical data in the history of science up to that time. These volumes provided scientists and engineers with a compact set of authoritative tables giving them the data needed in their research, development, and engineering activities.

The next witnesses before the subcommittee were Curtis G. Benjamin, Chairman of the Board, McGraw-Hill Book Co., and W. Bradford Wiley, President of Wiley. At the inception of Mr. Benjamin's testimony, the subcommittee Chairman, Mr. Daddario, and member, Mr. Waggonner, observed (page 87):

Mr. DADDARIO. Well, I am pleased to hear that, Mr. Benjamin, because during the course of the testimony it seemed to me there was some definite indication as to private participation and dissemination of the material. What the process to bring it about would be was not clear, which gave us concern here in the committee. You have recognized, I think, that this was the case. I am pleased that you have had this discussion. We will also, as a committee, look at this matter very carefully. I have indicated time and time again that we are not bound to the language of this bill.

Mr. BENJAMIN. Yes. Mr. Wiley will have a little more to say to this point specifically.

Mr. WAGGONNER. Mr. Chairman, I don't believe the testimony of yesterday does any more than show that it would be possible to contract with private industry. It doesn't state any real intention of so doing.

Mr. DADDARIO. If you will recall, Mr. Waggonner, during the first day of testimony Dr. Hornig made some remarks about the participation by private publishers in the dissemination of the information.

As shown above, Dr. Hornig's statement was concerned with publications of professional societies, which Congressman Daddario equated to private publishers. Further, Mr. Benjamin stated during the course of his testimony (page 96):

Mr. BENJAMIN. I will say this, and this follows Mr. Wiley's statement. With our concern over this whole problem of Government monopoly of scientific and technical information, we technical publishers would prefer to have everything possible done outside of Government agencies. The prospect of inhouse programs of scientific and technical information—publishing programs—that would be directly in competition with publishers, gives us nightmares. Mr. Wiley and I have served on the Science Information Council, in San Francisco, and a number of other Government committees, and we know how often this sort of thing is proposed, and it is knocked down usually one way or another.

In general we say from [our] point of view everything possible should be done out of the Government agency. *We would much prefer to see this done in a professional society than in a Government agency, because a professional society obviously has much more flexibility than a Government agency. It has flexibility in arranging publication and distribution, getting royalties, and this sort of thing.* [Italic supplied.]

Report No. 1836, of the House Committee on Science and Astronautics, which accompanied H.R. 16897 contained the following statement (page 8):

In those cases where the Secretary holds the copyright, he could enter into a contract with a commercial publishing organization providing the latter a license to publish and disseminate the data. In contracting for the publication of standard reference data by commercial publishers, the committee expects that the Secretary will take full advantage of competitive bidding and will seek the greatest monetary return for the Government, while at the same time endeavoring to have the data published at the lowest price consistent with the overall objectives

of the program. If the Government itself publishes the material under copyright, it may either sell the material under the authority of the bill or enter into a contract with a private distributor for the distribution, depending upon the best means for reaching the prospective users of such data. It should be pointed out, however, that this bill in no way modifies or supersedes the laws relating to public printing and documents codified in title 44, United States Code, and the regulations promulgated thereunder.

The bill passed the House but was not acted upon by the Senate during the 89th Congress. In 1967, Congressman Miller introduced H.R. 6279, which was identical to the prior bill except for a minor technical amendment. The report accompanying H.R. 6279 contained the same statement quoted immediately above from Report No. 1836 (House of Representatives: H. Rept. No. 260, 90th Cong., 1st sess. 8 (1967)). Following its passage by the House, H.R. 6279 was referred to the Senate Committee on Commerce. The committee report upon the bill spoke of "encouraging participation of private publishing houses to provide for the widest possible dissemination of reference data at minimum cost to the Government" (Senate: S. Rept. No. 1230, 90th Cong., 2d sess. 2 (1968)), and referred (page 6) to the dissemination of some kinds of reference data by "private publishers" and "private channels." The bill, as amended in a respect not relevant to this protest, was passed by the Senate on June 18, 1968. The House agreed to the Senate amendments on June 27, 1968, and the measure was approved on July 11, 1968.

Our examination of the legislative history of the act leads us to the conclusion that it was the intention of Congress to vest the Secretary of Commerce with considerable discretion in the administration of the act. In addition, we do not find that Congress intended that all standard reference data be published and disseminated under contract with private, as opposed to governmental, organizations. In those instances where the data is to be made available through private sources, we agree with the observation of the Department of Commerce that:

> * * * there is no language in the legislative history which may reasonably be construed to restrict the Secretary's discretion requiring him to use only for-profit publishing companies or precluding him from using nonprofit associations in the dissemination and sale of the data products.

In summation, we do not find that the act or its legislative history supports the view that the terms "person or agency designated by him" and "by others" in sections 5 and 6(a) of the act, respectively, should be limited (as it relates to private publishers) to commercial publishing houses, such as Wiley, to the exclusion of professional societies.

Furthermore, we observe that on two occasions subsequent to the execution of the AIP/ACS contract, representatives of the Department of Commerce testified before the House Subcommittee on Science, Research, and Development of the Committee on Science and Astro-

nautics, with reference to an extension of the authorization of appropriation in the act (15 U.S.C. 290f). This is the same subcommittee which initially considered the proposed legislation which became the act.

This subcommittee was informed of the AIP/ACS contract and, in the report accompanying the bill to authorize further appropriations (H.R. 13034), recognized the arrangement, without objection, in the following statement:

> As to the distribution of Standard Reference Data documents, since 1964, the Standard Reference Data Program has published forty three compilations of data in its primary series, the NSRDS–NBS series. The total number of documents produced on behalf of the Standard Reference Data System (including the NSRDS–NBS Series identified above, plus bibliographies, monographs, computer programs, expository publications and status reports) is 122. The total distribution of all documents is estimated to be approximately 270,000 copies.
>
> Most of these documents have in the past been published and disseminated through the Government Printing Office. The National Bureau of Standards has recently formalized a cooperative program with the American Institute of Physics and the American Chemical Society under which these two organizations will handle the printing, distribution and marketing of a Journal of Physical and Chemical Reference Data. This Journal will be similar in appearance to other scientific journals. Initially, it will appear four times a year and will provide a minimum of 1200 pages of compilations of reference data. Compilations on individual subjects will probably also be available for individual purchase as hard-bound books. It is anticipated that this new form of publication will provide not only wider distribution of the output of the Standard Reference Data Program but a substantially higher level of actual use by the scientists and engineers who need this kind of technical information. (House of Representatives: H. Rept. No. 92–974, 92d Cong., 2d sess. 5 (1972)).

The Senate report accompanying H.R. 13034 is silent concerning the AIP/ACS contract. (Senate: S. Rept. No. 92–832, 92d Cong., 2d sess. (1972)). The appropriation authorization was subsequently enacted. (Section 2 of the act of June 22, 1972, Pub. L. 92–317, 86 Stat. 234).

You next contend that the award to AIP/ACS was violative of the requirement of competition contained in Federal Procurement Regulations (FPR) 1–1.301–1, and that request for proposals No. NBS–1089–71 (RFP –1089) to which several commercial publishing houses responded did not disclose that it was for informational or planning purposes, and was issued without a definite intention to award a contract. You maintain that failure to make an award under RFP –1089 was, therefore, a violation of FPR 1–1.314.

The record shows that NBS considers the Standard Reference Data Program to have three major objectives:

> 1. To provide reliable reference data on physical and chemical properties. This involves retrieval of experimental measurements reported in the primary scientific literature, evaluation of these results by experts, and selection of recommended values with an estimate of their accuracy.
> 2. Dissemination of these reference data in a form which will reach those scientists and engineers who need them.
> 3. Upgrading the quality of experimental measurements by pointing out sources or error and other defects in measurement techniques. If the general practice of measurement science and technology can be improved, there will be less need for costly evaluation of conflicting results, and the overall efficiency of the national investment in research and development will be raised.

The initial distribution channel for standard reference data was the Superintendent of Documents, Government Printing Office. However, it was concluded that the limited accessibility of this data provided little incentive for experienced scientists to voluntarily participate in evaluation efforts. The limited circulation of the published material also impeded the standards of practice in measurement laboratories. Additionally, it was concluded that the cost recovery provisions of the act could not be satisfied under the traditional policy of the Superintendent of Documents, in which the selling price reflects only the direct cost of printing and distribution.

Alternative approaches to the dissemination of standard reference data included commercial publishing houses, professional societies and the National Technical Information Service (NTIS). Unique advantages were seen in a possible effort with one or more professional societies. It was thought that a suitable cooperative program with a professional society might encourage its members to voluntarily contribute compilations and reviews and would provide a suitable medium for society members to make substantive contributions to critical evaluation of data. Another benefit which was anticipated related to the difficulty of deciding which technical areas were to be emphasized with the limited funds available. It was thought that a close coupling to a large group of users of reference data through their professional societies might provide responses indicating in which areas data was needed. Furthermore, cooperation with professional societies appeared to offer an opportunity to improve quality control over the primary measurements of physical property data. The ability of the societies to reach generators of experimental data was considered of value in this respect.

It is administratively reported that the majority of the data currently being produced under the Standard Reference Data Program is classified as "physical and chemical properties." Most of the measurements which provide the raw material of the program are conducted by physicists and chemists. Additionally, a survey of buyers of NSRDS publications showed 70 percent to be physicists or chemists. Therefore, NBS looked first to the physics and chemistry community in considering societies. The American Chemical Society and the American Institute of Physics with its affiliated societies have a combined membership of approximately 160,000, which comprises over 85 percent of the estimated 183,000 physicists and chemists in the United States. Therefore, NBS decided that AIP and ACS should form the nucleus of any cooperative arrangement.

On September 18, 1970, the Director of NBS wrote to the Directors of AIP and ACS, proposing discussions concerning a cooperative rela-

tionship with the professional societies which would include the publication and distribution of reference data. It was the opinion of NBS that such an arrangement would best accomplish the objectives of the Standard Reference Data Program. However, there was no assurance that the professional societies would participate in the program or establish an effective working relationship with each other.

In view of the uncertainty of participation by the professional societies, and the need to revise NBS' publication policy, NBS simultaneously pursued the more limited goal of obtaining publication and distribution of standard reference data by commercial publishing houses. This was done by the issuance on October 1, 1970, of RFP 1089 to a number of such concerns, including Wiley. The record shows that at about the same time, the possibility of using NTIS or the Superintendent of Documents was also examined. Thus, several alternative methods for the publication and distribution of standard reference data were being explored at approximately the same time.

RFP –1089 was not issued to AIP and ACS. In the judgment of the contracting agency, there was no satisfactory alternative to treating the professional societies and the commercial publishing houses separately. As indicated above, NBS viewed the professional societies as being uniquely capable of achieving certain objectives of the Standard Reference Data Program. It is the administrative position that:

> * * * if the societies had been required to respond to the RFP, as written, since it dealt only with publication services, NBS would have had no legitimate basis for including in its evaluation of the proposals the broader objectives it hoped to reach through an association with the societies. On the other hand, broadening the terms of the RFP to include the maximum objectives under the program * * * would have made it virtually impossible for the for-profit publishers to respond at all to the solicitation.
> * * * It was always contemplated that if the RFP resulted in an advantageous and responsive proposal and the society aspect did not materialize, a contract would be awarded to that publisher. If the societies agreed to work together, and they came forth with a proposal predicated upon the terms of the RFP, that proposal together with the other advantages that NBS believed would accrue from its association with the societies, would be competitively evaluated with the responsive proposals resulting from the RFP, and a contract awarded to the prevailing party. * * *.

Four proposals were received by November 25, 1970, the due date established by RFP–1089. By letter of January 20, 1971, NBS sought clarification of Wiley's proposal, which was supplied on February 2, 1971.

By letter of May 27, 1971, AIP and ACS submitted a joint proposal for the publication and dissemination of a "Journal of Physical and Chemical Reference Data." Upon the receipt thereof, NBS did not "simply put aside" the proposals of the commercial publishing houses as you allege, but evaluated the various options available to it. NTIS was eliminated as a publication mode since its ability to meet the market for the standard reference data output was not comparable

to commercial publishing houses or the professional societies. The Superintendent of Documents was also removed from consideration in view of a determination that funds collected from the sale of Government Printing Office publications could not be returned to NBS, eliminating the possibility of cost recovery.

The AIP/ACS proposal was then evaluated in conjunction with those of the commercial publishing houses submitted under RFP-1089. Primary and equal emphasis in the evaluation was given to: (1) the ability of the publisher to achieve maximum dissemination of the standard reference data system output to the scientific community, and (2) to the predicted cost recovery to the Government. Wiley's proposal was deemed acceptable in regard to the first factor, it being recognized that Wiley has an effective promotion and sales organization. However, it was thought that AIP/ACS had a substantial advantage over a commercial publishing house in that those societies have direct access to approximately 160,000 members, who constitute a large fraction of the individuals to whom the present standard reference data system output is directed. In comparing ability to reach the institutional market, figures submitted by the publishers showed that institutional subscriptions to AIP and ACS journals were two-to-three times greater than those to the journals of commercial publishing houses. Another advantage of the AIP/ACS proposal was the inclusion of the "Journal of Physical and Chemical Reference Data" in the comprehensive information service of the societies, including microfilm editions of society journals, abstract and current title journals and magnetic tape announcement services. In view of the above, the evaluators concluded that AIP/ACS could most effectively disseminate the standard reference data system output to the market to which it is directed.

In regard to the second factor, it was concluded that the AIP/ACS proposal would result in significantly greater recovery of costs to the Government. You observe that the AIP/ACS contract provides that the subscription price of the "Journal of Physical and Chemical Reference Data" will be "$20 per year to members of AIP and ACS for their personal use and $60 per year to all others." You suggest that this defeats the congressional purpose underlying section 5 of the act, 15 U.S.C. 290d, to recover "the cost of collection, compilation, evaluation, publication, and dissemination of the data * * *." However, the contracting agency was of the opinion that the low subscription price to AIP and ACS members, combined with the societies' built-in access to a large membership, would result in returns from individual subscriptions considerably in excess of those available from commercial publishing houses.

A lesser evaluation factor was the degree of flexibility offered in the forms of published output and the degree of control of NBS over these forms. NBS was particularly interested in assuring that reference data be made available both in a journal-type format and as separate monographs which could be used in laboratories and offices. The AIP/ACS proposal guaranteed the availability of every data compilation in separate offprint form, as well as in the journal itself. AIP/ACS would also undertake to publish as a supplement to the journal every long monograph the technical validity of which was approved by an Editorial Board. The proposals of the commercial publishing houses carried no provision for marketing the shorter compilations as separate publications, and the publisher would make the decision on acceptance of the longer monographs based on considerations of commercial marketability. It was the opinion of NBS that the latter arrangement would be unduly restrictive of the objective of making the standard reference data available to the scientific and technical community. While NBS would retain the option of publication through the Government Printing Office of any item rejected by a commercial publishing house, as indicated above, this was not viewed as resulting in any cost recovery to NBS. Therefore, the AIP/ACS proposal was deemed superior in this respect.

The final consideration by NBS was the degree to which the publication medium would attract high-quality contributions which were not directly supported by the standard reference data program. It was recognized that Wiley publishes respected journals in the fields of physics and chemistry. However, it was thought that by virtue of the AIP and ACS journals' long tradition, larger circulation and general reputation for quality, a standard data reference system publication by AIP/ACS would provide greater incentive for distinguished scientists to carry out critical data evaluations on their own initiative, without the necessity for full financial support of NBS. This would enable NBS to increase the amount of evaluated data without a corresponding increase in expenditure of money.

The AIP/ACS proposal thus was deemed superior to those of commercial publishing houses in all of the areas discussed above, and it was recommended that a contract be negotiated with AIP/ACS. A contract was then negotiated with AIP/ACS under the authority of 41 U.S.C. 252(c)(4).

As indicated above, we regard the Secretary of Commerce as being vested with considerable discretion in the administration of the Standard Reference Data Act. Pursuant to a delegation of authority from the Secretary, NBS explored several potential sources for the publication and dissemination of standard reference data, including the Government Printing Office (GPO), National Technical In-

formation Service (NTIS), commercial publishing houses, one or more professional societies, or a combination thereof. The examination of these sources occurred roughly in parallel. The GPO and NTIS were ultimately eliminated from further consideration for reasons set forth above.

Although a consortium of AIP/ACS possessed certain inherent charactertistics, which in the judgment of NBS uniquely qualified those professional societies, you observe that FPR 1-1.301-1 requires all contracts to "be made on a competitive basis to the maximum practicable extent." In view of the particular objectives and circumstances involved, as outlined above, we do not believe the record clearly demonstrates that this provision of FPR was not adequately observed by NBS in its efforts to obtain proposals from qualified sources, and in the awarding of the contract to the professional societies. Even where an award was made to a nonprofit professional organization under a sole source solicitation, we held that the standard to be applied in determining the propriety of the award is one of reasonableness and unless it is shown that the contracting officer acted arbitrarily, there is no legal basis to question the award. B-175953, July 21, 1972. From our review of the record, we are unable to conclude that the negotiation of the contract with AIP/ACS represented an arbitrary action by the contracting officials involved.

Although, as shown above, AIP/ACS was regarded as uniquely qualified to accomplish the purposes of the Standard Reference Data Act, there was no assurance that AIP/ACS would participate in the program when RFP -1089 was issued to the commercial publishing houses. You maintain that RFP -1089 should have contained a statement that it was for informational or planning purposes only, as provided by FPR 1-1.314, which states:

> It is the general policy of the Government to solicit bids, proposals, or quotations only where there is a definite intention to award a contract. However, in some cases requests for informational or planning purposes may be justified. In such cases the request shall clearly state its purpose, explaining that the Government does not intend to award a contract on the basis of the request, or otherwise pay for the information solicited; * * *.

The record shows that in the event AIP/ACS had been unable to form a cooperative arrangement or submit an acceptable proposal, award would have been made to one of the offerors under RFP -1089. Moreover, upon receipt of the AIP/ACS proposal, it was evaluated in conjunction with the proposals received from commercial publishers under the RFP. Only after the completion of this evaluation, and the finding that the AIP/ACS proposal was the most advantageous to the Government, was it recommended that award be made to AIP/ACS. Under these circumstances, we do not agree that RFP -1089 was issued for informational or planning purposes since there had been

no decision not to make the award to a commercial publisher at the time of the solicitation.

In view of the foregoing, your protest is denied.

[B-172594]

Travel Expenses—Reemployment After Separation—Liability for Expenses—Different Activities Within Same Agency

When an employee separated within the United States from service in one component of the Department of Defense (DOD) due to a reduction in force or transfer of functions is reemployed at a different location by a different component within DOD after a break in service of not more than one year, the transfer expenses that the employee is entitled to pursuant to 5 U.S.C. 5724a(c) are payable by the activity acquiring the employee's services as prescribed by 5 U.S.C. 5724 (e), which provides that when an employee transfers from one agency to another, the agency to which he transfers pays the expenses to the new duty station. The further authority in 5 U.S.C. 5724(e) and paragraph C1053-2b(1)(b) of the Joint Travel Regulations permitting either the losing or acquiring agency to pay relocation expenses is for application only in cases of transfer without a break in service.

To the Assistant Secretary of the Air Force, December 14, 1972:

Reference is made to your letter dated July 19, 1972, assigned PDTATAC Control No. 72-34 by which you request an advance decision concerning the proper method for the funding of transfer expenses when an employee who has been separated from service in one component Department within the Department of Defense (DOD) due to a reduction in force or transfer of function is reemployed at a different location by a different component within DOD after a break in service of not more than 1 year and is entitled to reimbursement of transfer expenses under 5 U.S. Code 5724a(c).

You note that our decisions in 51 Comp. Gen. 14 (1971) and B-172594, June 8, 1972, which involved separations at overseas stations and reemployment in the continental United States in circumstances covered by 5 U.S.C. 5724a(c), authorized a method of "split-funding" with respect to the total costs of the "transfer." The question you now raise concerns the funding requirements in similar circumstances but with the difference that the employee is separated and reemployed at duty stations in the continental United States.

You indicate that in cases involving transfer caused by reduction in force or transfer of function it has been the general policy of DOD that the losing activity will pay the necessary travel and transportation expenses. This policy is implemented by paragraph C1053-2b(1)(b) of the Joint Travel Regulations (JTR). However, DOD did not intend that regulation to cover cases in which there is a break in service with "transfer" costs payable under 5 U.S.C. 5724a(c). *See* 51 Comp. Gen. 14, *supra*.

5 U.S.C. 5724a(c) provides:

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

The obligation to fund or pay employee transfer expenses which are otherwise allowable is subject to the provisions of 5 U.S.C. 5724(e) which are as follows:

(e) When an employee transfers from one agency to another, the agency to which he transfers pays the expenses authorized by this section. However, under regulations prescribed by the President, in a transfer from one agency to another because of a reduction in force or transfer of function, expenses authorized by this section and sections 5726(b) and 5727 of this title (other than expenses authorized in connection with a transfer to a foreign country) and by section 5724a(a), (b) of this title may be paid in whole or in part by the agency from which the employee transfers or by the agency to which he transfers, as may be agreed on by the heads of the agencies concerned.

In our decision of June 8, 1972, we were confronted with a virtually identical situation to the one here involved except that the separation was from an overseas duty station. Nevertheless, there still existed at that time a proposal to amend the JTR so as to require the losing activity to pay all the travel and transportation expenses to the new duty station in the United States.

In denying the proposed amendment, we were, and still are, of the view that there is imposed by statute upon the department to which an employee transfers an obligation to fund the requisite travel and transportation costs to such new duty station. By so holding, we take the position that the second sentence of 5 U.S.C. 5724(e) and JTR par. C1053–2b(1)(b) are for application only in cases of transfer *without* a break in service and that they are not applicable to reemployment situations in which "transfer" costs are payable under 5 U.S.C. 5724a(c).

In such light, and consistent with our decisions of June 8, 1972, and 51 Comp. Gen. 14 (1971), we do not feel that the losing department or agency may properly pay relocation expenses as authorized in 5 U.S.C. 5724a(c).

[B–176217]

Contracts—Negotiation—Competition—Award Under Initial Proposals

The fact that an award was made on the basis of initial proposals as provided by the requests for proposals soliciting maintenance services and issued under 10 U.S.C. 2304(a)(10), which authorizes negotiation when it is "impracticable

to obtain competition," does not mean the adequate competition required by paragraph 3-807.1(b)(1) of the Armed Services Procurement Regulation was precluded, even though this exception to formal advertising makes no reference to competition. Moreover, the evaluation formula of 80 points for technical compliance and 20 points for price that did not verify wage conformance by analysis of cost and pricing data (ASPR 12-1005) and that conducted a price analysis (ASPR 3-807.2(b)) instead of a cost analysis (ASPR 3-807.2(c)) did not result in a pricing uncertainty that warranted negotiation as the price analysis based on cost data indicated wage rates were realistic and the cost analysis requirement in ASPR 3-807.2(c) does not apply since adequate competition was achieved.

To the Dynalectron Corporation, December 14, 1972:

We refer to your letters of June 12 and September 7, 1972, protesting against the award of a contract to the Bell Aerospace Company under request for proposals (RFP) No. DAAGO5-72-B-0198, issued by the United States Army, San Francisco Procurement Agency, Oakland, California.

The RFP covered maintenance services for the United States Army Combat Developments Experimentation Command and provided for award of a cost-plus-award-fee contract, to be negotiated pursuant to 10 U.S. Code 2304(a)(10), for a 1-year period with an option to the Government for two extended periods of performance of 1 year each. As of April 21, 1972, the closing date for receipt of proposals, the proposals of 12 of the 57 prospective offerors solicited had been received. These proposals, as requested in the RFP, were submitted in two separate parts—one containing the technical proposal and the other containing the cost proposal. Each proposal was to be evaluated with a possible 80 points allotted to the technical proposal and a possible 20 points to the cost proposal.

The technical portion of each proposal was submitted to the Technical Evaluation Board for its study and evaluation. Five proposals were found by the Board to be technically acceptable. Of the possible 80 points allotted to this portion of the evaluation, Bell Aerospace received 73.454 points and the Dynalectron Corporation 78.139 points. Subsequently, the cost portion of each proposal was evaluated according to a formula adopted prior to the issuance of the RFP for such evaluation. Under the cost evaluation, the Bell Aerospace proposal received 16.57 points for a total score of 90.024 and the Dynalectron proposal received 9.27 points for a total score of 87.409. Following the evaluations, the contracting officer made an analysis of all the proposals from both a price and technical aspect. He then met with key personnel involved with the procurement to further review the proposals and to discuss the desirability of making award on the basis of the initial proposals without negotiations. The result of this discussion was the decision to make award to Bell Aerospace, whose proposal had received the highest total evaluation score, without negotiation. In view of this decision, the contracting officer on May 25, 1972, referred

the proposed award to the procurement agency Board of Awards. The Board recommended award to Bell Aerospace, and award was made to that firm on May 26.

It is your position that the procurement activity, in violation of Title 10 of the U.S. Code and paragraph 3 of the Armed Services Procurement Regulation (ASPR), illegally awarded the contract to Bell Aerospace without conducting negotiations with Dynalectron and all other offerors as required by law. You contend that because this procurement was initiated under 10 U.S.C. 2304(a)(10), authorizing the negotiation of a contract when it is impracticable to obtain competition, it would be inappropriate to make award without negotiation inasmuch as 10 U.S.C. 2304(g) and ASPR 3-805.1(a)(v) state that award without negotiations may be made only where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the item that acceptance of an initial proposal without discussion would result in fair and reasonable prices. You contend in this respect that the very use of the "impracticable to obtain competition" exception to the requirement for formal advertising presupposes that competition, sufficient to allow award without negotiation is lacking. As a further indication that competition sufficient to warrant award without negotiation was neither achieved nor contemplated, you point out that the RFP required the submission of cost and pricing data, required under ASPR 3-807.3(f) only where there is no adequate price competition. In addition to your arguments as to the adequacy of the competition achieved in this instance, you point out that ASPR 3-805.1(a)(v) requires negotiation where pricing uncertainty exists and you advance two reasons for concluding that pricing uncertainty did in fact exist in this case.

First, you contend that because certain types of labor will be used under the contract which were not specifically described in the applicable Department of Labor wage determination, the contracting officer was required by ASPR 12-1005 to verify by analysis of cost and pricing data the conformance of wages proposed for those types of labor by each offeror with similar labor categories specified in the wage determination and that the failure to do so resulted in uncertainty as to pricing. Second, you maintain that the procurement activity failed to conduct a proper evaluation of the cost proposals in that it conducted only a price analysis under ASPR 3-807.2(b) instead of the cost analysis which you contend was required in this situation by ASPR 3-807.2(c). You conclude that this alleged deviation from regulatory requirements also results in pricing uncertainty. Finally, you contend that the formula used to score the cost proposals should have averaged only the proposals of the technically acceptable offerors

rather than including in the average the cost proposals of technically unacceptable offerors. Accordingly, you request that either the award to Bell Aerospace be set aside and discussions with all offerors be held on the basis of a proper evaluation of cost proposals or that the award be canceled and the procurement be resolicited.

Respecting the propriety of a negotiated contract award without discussions as a general proposition, you acknowledge that the RFP in paragraph 10(g) of the Solicitation Instructions and Conditions provided that the Government could award the contract based on the initial offers received without any discussion with the offerors of their offers. In this regard, ASPR 3-805.1(a)(v), implementing 10 U.S.C. 2304(g), provides as follows:

> (a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors (including technical quality where technical proposals are requested) considered, except that this requirement need not necessarily be applied to:
>
> * * * * * * *
>
> (v) procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. (*Provided, however,* that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government. In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. * * *.

As indicated above, however, your protest assumes that because the justification for negotiation was that it was "impracticable to obtain competition" and because cost and pricing data, which is not to be required unless adequate price competition is lacking, was called for, there was, in fact, no competition sufficient to support an award without negotiation. This position is not in accord with the facts. As you know, 12 proposals were received in response to the instant RFP, five of which were determined to be technically acceptable so as to allow evaluation in accordance with the RFP terms. In this instance, ASPR 3-210.2(vii) was relied on in a Determination and Findings made final by 10 U.S.C. 2310(b) to justify the use of exception 10. That subparagraph is set out below:

> When the contemplated procurement is for technical non-personal services in connection with the assembly, installation, or servicing (or the instruction of personnel therein) of equipment of a highly technical or specialized nature; * * *.

This subparagraph obviously does not preclude competition among qualified concerns; neither does reliance on the negotiation authority of exception 10 presuppose an absence of adequate competition, since

that exception merely states that competition by means of the preferred method of formal advertising is impracticable.

Finally, ASPR 3–807.1(b)(1) defines "adequate price competition" as follows:

> a. Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's (e.g., the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of the solicitation. * * *.

While requirement (iii) of the above definition is for literal application only in the fixed-price environment, we think it obvious that "competition" was obtained here.

While it is true, as you point out, that ASPR 3–807.3(a) dictates that cost and pricing data should not be requested when the price negotiated is based on adequate price competition, that section is for application only after proposals have been received and a determination as to whether or not competition has in fact been achieved is possible, since the requiring of cost and pricing data is contemplated at any time prior to the award of a contract. That cost and pricing data may be required at the time offers are solicited in situations where it is later determined that competition exists is evidenced by ASPR 3–807.3(g)(2), which states that in such situations, no certificate of cost and pricing data should be required.

We note also that in addition to the existence of adequate competition, the administrative report takes the position that "prior solicitation on same basis and two and one-half years of performance of the incumbent contractor under a CPAF contract including the negotiation of prices for two follow-on option periods" provides the accurate prior cost experience stipulated by the statute and regulations as sufficient justification for award on the basis of initial proposals.

With respect to your argument concerning the contracting officer's alleged failure to verify the conformance of wage rates for work categories not enumerated in the applicable Department of Labor wage determination to similar categories covered by the wage determination by analysis of cost and pricing data, the administrative report states that on the basis of the cost data furnished, the contracting officer by price analysis reached a judgment that the offeror's conformed rates were realistic. However, the actual conformance agreement on wage rates of personnel not specifically described in the applicable wage determination can only occur after award when the contractor and its employees are ascertainable. Prior to award, the contracting officer can only make a judgment as he did, as to whether the average hourly rates, as proposed by each offeror, appear to include realistically conformed rates. In this regard, ASPR 12–1005 requires only that such

rates be conformed in accordance with the contract clause required by the Service Contract Act of 1965 which by its terms requires only that conformance be accomplished after award by means of agreement between the contractor, the affected contractor employees, and the Government. Our review of the record indicates that this area of proposed costs was carefully examined by the contracting officer during proposal evaluation. We therefore conclude that his subsequent determination as to the realism of the pricing therein, and consequently as to the certainty of the pricing, is not subject to question.

Regarding your contention that a cost analysis, instead of merely a price analysis, should have been made on the Bell Aerospace proposal prior to any award, we note ASPR 3–807.2, which states in part:

> (a) *General.* Some form of price or cost analysis is required in connection with every negotiated procurement action. The method and degree of analysis, however is dependent on the facts surrounding the particular procurement and pricing situation. Cost analysis shall be performed * * * when cost or pricing data is required to be submitted under the conditions described in 3–807.3; however, the extent of the cost analysis should be that necessary to assure reasonableness of the pricing result, taking into consideration the amount of the proposed contract and the cost and time needed to accumulate the necessary data for analysis. Price analysis shall be used in all other instances to determine the reasonableness of the proposed contract price.* * * *.

Inasmuch as the cost and pricing data called for in the RFP were not required because adequate competition was achieved, the requirement in ASPR 3–807.2(c) for cost analysis by its own terms does not apply. Further, the quoted ASPR section clearly reserves to the contracting officer's discretion the nature and extent of cost analysis to be conducted.

Finally, we see no reason to object to the use of the cost evaluation formula adopted for and applied to the procurement. We have previously held, in spite of the contention that a more equitable method of evaluation could have been adopted, this exact method of evaluation to be proper and acceptable in view of the thorough consideration of all available evaluation methods by competent technical personnel which preceded its adoption for the particular procurement and in view of the equal and unbiased application of this evaluation formula to all offerors. B–174003, February 10, 1972. Also, as concerns the application of the formula, while it might have been more desirable, as you contend, for the activity to have computed the mean price offered from only the price of those proposals found to be acceptable technically instead of the prices offered by all 12 orginally submitted proposals, we do not feel the activity's action in this respect to have prejudiced the interests of Dynalectron. Any increase or decrease in the price offered would have affected the cost proposals of Dynaelectron and Bell Aerospace in an equal manner and in no way would have affected the evaluation point differential between the two pro-

posals on this portion of the evaluation scoring. Additionally, the administrative report states that the validity of the evaluation formula was tested by comparison with a Government prepared estimate and, as indicated earlier, by cost experience under a prior contract. Hence, the formula provided a reasonable measure of cost estimate reasonableness.

In view of the above considerations, the protest is accordingly denied.

[B-176409]

Bids—Evaluation—Delivery Provisions—Guaranteed Shipping Weight—Estimate Acceptability

The non-use of postbid corrected shipping data under an amended invitation for bids that required bidders to furnish guaranteed maximum shipping weights and dimensions for use in the evaluation of transportation costs on air compressors mounted on Government-furnished trailers rather than skid-mounted - a change that was not misleading to the bidder—was proper either on the basis the exceptions in paragraphs 2-304 and 2-305 of the Armed Services Procurement Regulation permitting bid modification do not apply or that correction as a bid mistake is unacceptable since the mistake is not ascertainable from the bid. Furthermore, the contracting officer in accepting a transportation expert's shipping dimensions, which were based on standard procedures because the Government can only require the contractor to use standard loading and shipping procedures, rather than the bidder's special loading arrangements, made use of the best information available.

To Baker & McKenzie, December 14, 1972:

Reference is made to your letter dated October 6, 1972, and prior correspondence, on behalf of Ingersoll-Rand Company, protesting against the award of a contract to Davey Compressor Company under invitation for bids (IFB) No. DSA700-72-B-2434, issued by the Defense Supply Agency (DSA), Defense Construction Supply Center (DCSC), Columbus, Ohio. Essentially, the protest is directed to the alleged improper evaluation of freight rates based on shipping data furnished by Ingersoll-Rand as part of its bid.

For the reasons hereinafter stated, the protest of Ingersol-Rand is denied.

The IFB solicited bids for 150 air compressors in accordance with a military specification, as modified. Contract line item (CLIN) 0001 called for a price on an f.o.b. origin basis for one compressor, nominated the maintenance capability model, to be mounted on a Government-furnished trailer. CLIN 0002 requested prices for the remaining 149 compressors. Bidders were apprised of the possibility that the Government might exercise an option to require the contractor to mount or install all compressors to be furnished under the contract on Government-furnished trailers. Clause C21 of the IFB informed bidders that five Government trailers, each weighing 1500 pounds,

would be furnished—one for the above-mentioned maintenance capability model, one for first article testing by the Government (the first article testing requirement was subsequently waived), and three for initial production units shipped to the Government at contractor expense for testing and inspection.

The "ORDERING DATA" clause of the IFB set forth the class and size of the desired compressor as "Class 1, Size 250 CFM at 100 PSI, skid mounted as modified. (See para. 3.17.3.3 of Modifications, dtd 6 Jan 72)." By amendment 0001 Class 1 was deleted and Class 2 compressors were substituted. The applicable military specification states that Class 2 compressors shall be mounted on Government-furnished trailers as distinguished from Class 1 which are skid-mounted.

The f.o.b. origin evaluation clause of the IFB prescribed by paragraph 2-201(a)D(vi) of the Armed Services Procurement Regulation (ASPR) provided that the cost of transportation from the bidder's shipping point to destination would be added to the bid price in determining the over-all cost of the supplies to the Government. Section B05 of the IFB required bidders to furnish guaranteed maximum shipping weights and dimensions for use in the evaluation of transportation costs. If the bidder failed to state guaranteed weights and dimensions, the Government was to use its own estimated weights and dimensions stated in the IFB. For CLIN 0001 there were included an estimated maximum shipping weight of 8,650 pounds and estimated dimensions in terms of the size of the container in inches as 140" x 80" x 65". For CLIN 0002, the Government estimates were 7,150 pounds and 110" x 70" x 40", respectively.

The bid submitted by Ingersoll-Rand contained the following guaranteed maximum shipping weights and dimensions: CLIN 0001—8,650 pounds and 220" x 96" x 90", and CLIN 0002—7,150 pounds and 220" x 96" x 90". Beneath these insertions, the Ingersoll-Rand bid stated: "Note: 0002 Weight based on skid unit less government furnished trailer." Seven days after bid opening, Ingersoll-Rand sent a telegram to DCSC, which reads, as follows:

DIMENSIONS OF 0002 AS SHOWN INCLUDE TRAILER FURNISHED AND SPECIFIED ON PG. 6 OF 31. DIMENSIONS OF COMPRESSOR LESS TRAILER ARE 145"×94×54 MAXIMUM. NORMALLY 3 UNITS ARE SHIPPED ON 40 FT. FLATBED REGARDLESS OF SKIDDED OR WHEELED. NORMAL SHIPMENT OF WHEELED UNITS IS POSSIBLE BECAUSE OF OVERLAPPING TONGUES.

The DCSC contracting officer, after consultation with legal personnel, refused to consider for evaluation the dimensions given in the Ingersoll-Rand telegram based on his consideration that the bidder was attempting correction of a mistake in bid before award. In such circumstances, it was believed that correction could not be made since

evaluation of the newly proffered dimensions, not ascertainable from its bid, would have altered the computation of transportation costs sufficiently to displace Davey Compressor, the otherwise low bidder. Consequently, the evaluation of the Ingersoll-Rand bid by transportation specialists utilized the dimensions for CLIN 0002 as contained in its bid, not the dimensions given in the postbid opening telegram. Thereafter, award was made to Davey Compressor as the lowest evaluated bidder.

Your initial letter of protest contends that the evaluation of freight costs for Ingersoll-Rand at a higher cost was based upon DCSC's improper assumption that only 2 of its compressors could be shipped on a 40-foot flatbed trailer and that DCSC concluded at the same time that 3 compressors of Davey Compressor could be shipped on such a trailer. In addition, you state that 3 trailer-mounted compressors with the critical dimension being the length of the Government-furnished trailer which, according to the applicable military specification, is 220″ x 96″ x 90″ can be mounted on a 40-foot flatbed trailer. You support this by referring generally to a DCSC procurement of identical Ingersoll-Rand Compressors mounted on identical Government-furnished trailers shipped 3 to a 40-foot flatbed trailer. Therefore, you state that, even should DCSC argue that differences in calculating freight costs are due to information supplied by Ingersoll-Rand it was incumbent on DCSC to make its evaluation based on the lowest shipping cost where loading characteristics are obvious on the face of the bid, and where they are known to the Government through prior procurements of the same item.

By letter dated August 31, 1972, in response to the DSA administrative report on the protest to our Office, you state several new positions in support of the protest, as follows:

(1) The solicitation issued by DCSC was misleading in that it is not possible to determine for what configuration guaranteed measurements are to be given;
(2) Ingersoll-Rand submitted guaranteed measurements based upon a reasonable interpretation of the solicitation;
(3) Ingersoll-Rand notified the Contracting Officer of the alternative measurements for skid-mounted compressors which should have been used in the evaluation;
(4) The measurement of the compressor was used only for evaluation of freight rates and did not in any way go to the responsiveness of Ingersoll-Rand's bid;
(5) The guaranteed measurements were not an essential factor in determining anything other than the freight rates, which determination was the responsibility of the Contracting Officer and not of Ingersoll-Rand;
(6) The Contracting Officer is charged by law and by regulation as well as by Decisions of the Comptroller General, to use the best information available in calculating freight rates;
(7) The Contracting Officer, in performing his evaluation, should have used the best information available to him whether appearing on the face of the bid or not.

You also argue that the issuance of amendment 0001, deleting skid-mounted and inserting trailer-mounted compressors coupled with the Government option to require mounting of the compressors on Government-furnished trailers, necessitated the insertion of guaranteed dimensions to reflect shipment of the compressors on Government-furnished trailers. We note here that the dimensions inserted in the Ingersoll-Rand bid for CLIN 0001 and CLIN 0002 are the same dimensions as those given for the Government-furnished trailer in the specifications.

In conclusion, you point out that the Davey Compressor bid was nonresponsive because its bid for CLIN 0001 showed nonspecification dimensions of 145″ x 94″ x 52″. This point and your further complaint that the Davey Compressor bid in that it did not offer to furnish air cleaner elements in the overpack kit for each end item will not be considered since they were untimely raised. *See* 4 CFR 20.2.

We do not subscribe to your position that the transportation evaluation could have utilized alternative guaranteed shipping information submitted by Ingersoll-Rand by telegram after bid opening. If we view the telegram as an attempt to modify the bid, it is clear that the information cannot be considered. ASPR 2–304 and –305 permit bid modification so long as it is received prior to bid opening or, is late, acceptable under the late bid rules. Exception is also permitted if the late modification is tendered by the otherwise successful bidder. None of these exceptions apply here particularly in view of the fact that the utilization of the alternative dimension would have displaced a lower bidder. *See* B–164362, June 28, 1968.

Neither can we regard the late offer of alternative dimensions as correcting a mistake in bid. The correction of a mistake in bid resulting in the displacement of a lower bidder can be effected only where the existence of the mistake and the bid actually intended are ascertainable substantially from the bid itself. *See* ASPR 2–406. There is no question that the alleged correct measurements submitted after bid opening cannot be ascertained from the Ingersoll-Rand bid. *See* B–172899, August 23, 1971, where we held that corrected guaranteed shipping data submitted apart from the bid could not be considered.

Our conclusion is not affected by the fact that another contracting officer had knowledge of the weight and dimensions of the same items because it is the transportation data in the bid supplied timely by the bidder which govern the evaluation of f.o.b. bids. *Cf.* 49 Comp. Gen. 718 (1970); B–172899, *supra.*

The tenor of your letters characterizes the non-use of the postbid opening corrected shipping data as a failure on the part of the contracting officer to use the best information available whether bid data or not. However, to allow bidders to supply after the opening of bids

information crucial to the evaluation of bids would compromise the integrity of the competitive bidding system. We have stated in the past that guaranteed shipping data clauses are material conditions which affect contract cost and performance, and that information submitted in response thereto is essential to proper bid evaluation.

We now turn to the alleged improper evaluation of shipping dimensions. You claim that the administrative assumption that the dimensions represented a rectangular box placed end-to-end on a flatbed truck trailer was wholly erroneous and contrary to the best information available. A drawing and photographs were submitted to us to demonstrate that an L-shaped box and piggy-back arrangement makes shipment of 3 compressors to a 40-foot flatbed trailer truck possible, thereby resulting in a transportation cost evaluation with Ingersoll-Rand as the low bidder.

The contracting officer relied on DCSC transportation personnel insofar as the evaluation of transportation costs is concerned. A DCSC transportation expert concluded in a report—previously furnished to you—that "there is no way that more than two unmounted compressors measuring 220" x 96" x 90" could be shipped on forty-foot flatbed trailer if standard packing and shipping procedures are used." The transportation expert considered several possible shipment methods for a compressor of those dimensions within a rectangular box, but concluded that "Estimates of transportation costs on bids are based on standard procedures and not the special loading arrangements considered above, * * *. Under the usual contract provisions, the Government can only require the contractor to use standard loading and shipping procedures."

While DCSC transportation personnel may not have considered your proffered shipping method, nothing in the record reveals that the transportation evaluators did not, in good faith, rely on the best information available at the time the evaluation was made. In this regard, it is reported that no information from prior procurements indicated to the transportation evaluators that a compressor of the specified dimensions had been shipped 3 to 40-foot flatbed trailer. Moreover, the contracting officer has a right to rely on freight evaluations by agency transportation experts, and the record indicates that his reliance on their judgment was in accordance with established procedures. *See*, generally, 46 Comp. Gen. 123, 132, 133 (1969); and B-168310, February 13, 1970.

Finally, you maintain that Ingersoll-Rand submitted a bid based on a reasonable interpretation of the specifications by giving guaranteed dimensions of a trailer-mounted compressor. In effect, also, it is argued that the IFB was ambiguous as to the configuration shipping dimensions requested.

The IFB originally called for the furnishing of skid-mounted compressors, which apparently, for shipping purposes, add no appreciable weight or dimensions to the compressor. But amendment 0001, deleting skid-mounted compressors, significantly affected the weight and dimensions of the item for shipment. The Government-furnished trailer adds 1,500 pounds to the weight of the compressor and measures 220″ x 96″ x 90″. In contrast, the length, width and height of the compressor alone appear to be approximately 140″ x 90″ x 65″, taking into account the various estimates in the record. If Ingersoll-Rand had inserted the correct dimensions of the compressor without the trailer it could well have been the low evaluated bidder.

While it might appear that bidders were required to submit dimensions for the 149 compressors for CLIN 0002 to be mounted on Government-furnished trailers, the record requires a different conclusion.

The IFB gave the Government an option to require mounting of all compressors to be furnished under the contract. The contracting officer was to exercise the option by mailing or otherwise furnishing to the contractor a written notice at the time of award or at later specified periods. However, the option was not to be considered in the evaluation of bids unless exercised at time of award. Therefore, we believe that a reasonable bidder would not have viewed the issuance of amendment 0001 as an exercise of the option. A more reasonable interpretation, we believe, of the effect of the amendment was to apprise bidders of the Government's need for compressors capable of being mounted on trailers if such option were exercised at some later date. In this regard, modifications to the specifications of the IFB, prior to amendment 0001, informed bidders that the Government would not furnish trailers and required the furnishing of kits to enable the Government to mount the compressors conforming to Class 2 compressors on trailers.

The completion of the guaranteed shipping weight and dimension clause by Ingersoll-Rand militates against any conclusion that it was misled into submitting trailer-mounted compressor dimensions. The Government's estimated weights and dimensions for CLIN 0001 and CLIN 0002, 8,650 and 7,150 pounds, and 140″ x 80″ x 65″ and 110″ x 70″ x 40″, respectively, reflected the non-trailer-mounted feature of CLIN 0002. The estimated poundage difference (1,500) reflected the weight of the Government-furnished trailer. While the dimension estimated for CLIN 0001, trailer-mounted, seems to be understated in view of the 220 inch length of the trailer, it showed a shipping dimension in excess of that for CLIN 0002.

In response to these estimates, Ingersoll-Rand guaranteed the estimated Government weights in the 2 CLINs and gave identical dimensions for CLINs 0001 and 0002. As noted before, the dimensions given are identical to those of the Government-furnished trailer. Of partic-

ular significance, Ingersoll-Rand inserted a note advising the Government that the weight was based on a skid-mounted unit less the trailer. This indicates to us that the dimensions were based on a non-trailer-mounted air compressor for shipment. In such circumstances, we find it difficult to perceive that the terms of the IFB misled Ingersoll-Rand into submitting the larger dimensions. We have often held that bidders may either guarantee a weight less than the actual weight rather than reduce the item price or submit a guaranteed weight in excess of actual weight as protection against having its contract price docked for excess shipping costs. *See* 49 Comp. Gen. 558 (1970), with reference to B–172899 *supra;* and B–175514, June 29, 1972.

The protest of Ingersoll-Rand is therefore denied.

[B–176182]

Contracts—Negotiation—Competition—Discussion With All Offerors—Actions Not Requiring

Under a request for proposals contemplating a cost-plus-incentive fee contract for the design, development, fabrication, test, and furnishing of prototypes of four different truck- and trailer-mounted satellite communications terminals, a plant visit by a team subsequent to the submission of best and final offers to assure equitable treatment in cost realism evaluation did not effect the reopening of negotiations since the plant visits involved unilateral presentations, no offeror was afforded an opportunity to revise its proposal, and final technical merit ratings had been assigned prior to the plant visits. The selection of the proposal that achieved the highest technical merit rating and was judged to be most cost realistic, where the offeror had a satisfactory record of past performance, represents the greatest value to the Government rather than the proposal based on a lower estimated total cost, plus proposed fee.

To Sellers, Conner & Cuneo, December 20, 1972:

Further reference is made to your letter of June 8, 1972, and subsequent correspondence, protesting on behalf of International Telephone and Telegraph Corporation, Defense Communications Division (ITT-DCD), against the award of a contract to any other firm under RFQ DAAB07–72–Q–0141 (RFQ –0141), issued by the Army Electronics Command, Fort Monmouth, New Jersey.

Your initial letter of protest made the sole contention that a certain action of the procuring activity constituted the conduct of negotiations after the ostensible receipt of best and final offers. Subsequent to receipt of the initial administrative report, you made the additional principal contention that award to ITT–DCD would represent the greatest value to the Government. Several arguments in support of this contention were also advanced.

Award under the above-referenced solicitation has been withheld pending a decision by our Office.

RFQ –0141, issued on November 10, 1971, contemplates a cost-plus-incentive fee (CPIF) contract for the design, development, fabrica-

tion, test and furnishing of prototypes of four different truck- and trailer-mounted satellite communications terminals. The solicitation, as amended, established January 10, 1972, as the closing date for offerors' Technical, Test, Management and Support proposals, and January 24, 1972, for receipt of cost proposals. Four firms submitted timely proposals.

During evaluation of those portions of proposals other than cost, discussions were held with each offeror to clarify the Government's requirements and the offerors' proposals. Upon completion of discussions, each offeror was permitted to submit revisions to its technical, test, management and support proposals. The completed evaluation of the technical area, furnished to the contracting officer on April 6, 1972, concluded that the proposal of RCA Corporation (RCA) had the highest technical merit.

At this point, one offeror withdrew its proposal, and negotiations were conducted with the remaining three firms, who were advised to submit their best and final offers on April 26, 1972. Upon receipt thereof, technical revisions were evaluated and, although some slight changes were made in the technical merit ratings, the relative standing of the offerors was not altered. Evaluation of the offerors' past performance and cost realism were then initiated.

It is administratively reported:

> Early in the evaluation of cost realism, the Government became concerned that the number of direct labor hours quoted by each firm was significantly less than that estimated by the Government as being necessary to complete the program. It was apparent that part of the difference was due to claims made by each firm in its proposal regarding work accomplished on independent research and development projects and other contracts which had direct application to the instant procurement. It was also noted that the bulk of the work claimed by each firm was in the same areas. To assure equitable treatment in the cost realism evaluation, it was deemed advisable to have a team visit each firm to determine the exact status of this work and the amount of work accomplished which would in fact have direct application to this procurement. * * *.

On May 5, 1972, each offeror was advised of an impending team visit by the following telegram:

> 1. A team representing the Contracting Officer will visit your facility at * * *. A unilateral presentation is requested which will permit the team to assess the status of the solid state, micro wave integration, and strip line design and packaging techniques for the Frequency Synthesizer and up and down converters; and the high power amplifier design which you have proposed as being available to apply to the development of "Small Terminals" per our RFQ No. DAAB07-72-Q-0141.
>
> 2. This visit is not to be construed as a reopening of negotiations, nor will any further revision to your proposal be required or permitted.

The plant visits were conducted on May 8 through 10, 1972, and the team's conclusions therefrom were furnished the contracting officer on May 18, 1972. The past performance and cost/cost realism evaluations were completed on May 15 and 22, 1972, respectively.

ITT-DCD's contemporaneous reaction to the visit made at its plant is shown by a letter written to the contracting officer on May 25, 1972. Therein, ITT-DCD stated that it was "very pleased to have [had] the opportunity to host the team"; recounted its presentation, which it considered to have "actually verified the information contained in our technical proposal"; confirmed "that the intent of the plant visit as expressed in the telex, was accomplished"; and took "this opportunity to thank you for your visit." It was also emphasized that ITT-DCD had valuable experience in areas not demonstrated during the plant visit.

On June 8, 1972, 14 days after this letter was written and a month after the visit occurred, ITT-DCD protested to our Office, stating:

> The final paragraph of the Contracting Officer's telegram to the contrary, it is our firm conviction that these facility visits, the one at ITT DCD taking place on May 9, 1972, were, in fact, *used to alter the cost and technical evaluations of the competitors* and that in view of the very limited scope of the visit inquiries were solely intended for that purpose.
>
> Therefore, after three months of technical and cost negotiations and submission of last and final bids, the Contracting Officer did in fact thereby reopen negotiations. It is our contention that award must be based upon results as of submittal of last and final bids. [Italic supplied.]

In regard to this basis for protest, we first observe that you have not contended, nor does the record indicate, that the plant visits involved "bilateral" as opposed to "unilateral" presentations. Second, you have not maintained, and the record does not reflect, that any offeror was afforded an opportunity to revise its proposal as a result of the plant visits. Third, the factual premise upon which the initial protest was based is incorrect. Final technical merit ratings had been assigned prior to the plant visits and were not altered as a result of the visits. The cost/cost realism evaluation was not completed before the visits and thus there was no existing cost/cost realism evaluation to be "altered" by the visits. Indeed, it is the administrative position that the plant visits, which were intended to provide verification of factual representations in offerors' proposals, "were considered to be necessary in order to complete the cost/cost realism evaluation."

What constitutes "negotiations" or "discussions" was examined in our decision 51 Comp. Gen. 479, 481 (1972), wherein we stated:

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

therefore, that a determination that certain actions constitute discussions must be made with reference to the opportunity for revision afforded to offerors by those actions. If the opportunity is present, the actions constitute discussions.

In view of the absence of any evidence that the offerors under the instant procurement were extended an opportunity for proposal revision pursuant to the plant visits, we are unable to conclude that those visits constituted a reopening of negotiations, and therefore the initial contention of your protest is without merit.

The remainder of your protest is principally devoted to a request that our Office instruct the procuring agency that award to ITT–DCD, not RCA, would represent the greatest value to the Government. Alternatively, you ask that we direct the Army to reopen negotiations for the purpose of providing offerors an additional opportunity to clarify the status of their independent research and development programs and furnish other information concerning the cost realism of their proposals.

You do not contend that RFQ–0141 contained an inadequate expression of the criteria for evaluation of proposals and their relative importance, nor do you maintain that the evaluation deviated from the statement of criteria and their importance in the solicitation. Simply put, your argument is that the substantive determinations of the evaluators do not support a conclusion that award to RCA would represent the greatest value to the Government.

RFQ–0141, as amended, contained the following statement of the criteria for proposal evaluation and their relative importance:

> D.1 Evaluation Areas. Evaluation will be in three areas:
>
> 1. Technical (See Subsection D.7)
> 2. Past Performance (See Subsection D.8)
> 3. Cost/Cost Realism (See Subsection D.9)
>
> To receive consideration for award a rating of no less than "Acceptable" must be achieved in each area. The technical area is by far the most important and constitutes over sixty percent (60%) of the total evaluation. The past performance area is of lesser importance than technical but greater than cost. For relative importance of factors and subfactors in each area, refer to the referenced subsections. * * *.
>
> D.2 Basis for Award. Any award to be made will be based on the best overall proposal with consideration given to:
>
> (i) technical merit;
> (ii) contractor's past performance; and
> (iii) cost/cost realism, in that order (see D.1 for relative order of importance).
>
> The prime objective is to select the offer which represents the greatest value to the Government. * * *.
>
> * * * * * * *
>
> D.7 Evaluation Factors (Technical Area)
>
> The Government's principal objective in the SHF Satellite Communications Terminal program is to obtain equipments which meet the required performance, within the specified time frame, while meeting the criteria of an equipment design which results in the lowest cost in production. The same thinking must be applied to the consideration of life cycle costs. In this respect, equipment designs which are unduly complex should be avoided and the use of

non-standard components should be held to an absolute minimum. Proposals will be evaluated by a selected team of qualified technical personnel to determine the extent that each bidder is capable of successfully accomplishing the contractual requirements. Each bidder must establish his capability with a proposal that completely covers all evaluation factors and specifically addresses each deliverable item and all contractual clauses. Factors to be used in the evaluation and the relative importance of each are as follows:

(NOTE: Factors of equal importance are listed horizontally)

First Priority—Technical (Proposal Volume I)
Second Priority—Test (Proposal Volume II)
Third Priority—Management—Support (Proposal Volumes III and IV)

NOTE: The technical factor constitutes over ½ of the total technical area evaluation score. To achieve a rating of "Acceptable" in the technical area a rating of no less than acceptable must be achieved for each of the above five [sic] factors.

The order of each subfactor below is indicated by numerical listing under their associated factors with Number 1 indicating the highest relative importance of each subfactor group. Subfactors having the same number are of equal importance. The subfactor groups for each factor are:

TECHNICAL:

The subfactors itemized below will be evaluated on the basis of the understanding of stated requirements, the adequateness/completeness of the proposal, and the degree to which the design meets the stated requirements:

*1—System Trade-offs
*2—Antenna
*2—Transmitter
*2—Receiver
*2—Modem
3—Electrical integration
3—Mechanical integration
4—Product assurance
5—Echo suppressors

*To achieve a rating of "Acceptable" in the technical factor a rating of no less than acceptable must be achieved for each of these subfactors.

TEST PROGRAM:

The subfactors itemized below will be evaluated on the basis of the completeness/adequateness of the proposal, the basis of understanding of technical requirements, and the manner of implementation:

1—Methods of test/checkout
1—Understanding of testing requirements
2—Test equipment
2—Reliability and Maintainability demonstration

MANAGEMENT:

The subfactors itemized below will be evaluated on the basis of the completeness/adequateness of the proposal and the basis of understanding of Government requirements:

1—Program Management plan to include the Program Management Control and Reporting System
1—Personnel
2—Company experience
3—Make or Buy

SUPPORT:

The subfactors itemized below will be evaluated on the basis of the completeness/adequateness of the proposal and the basis of understanding of the technical requirements:

1—Documentation
2—Spare parts, provisioning, RPSLs and RPSTLS.
3—Training

D.8 Evaluation of Contractor's past performance will be based upon information required to be furnished under Subsection D.5 as verified or supplemented by information obtained from other Government agencies. In the event quoter indi-

cates that it does not have a record of past performance, this area will be evaluated through an overview of his potential for satisfactory performance.

(NOTE: Provision of this solicitation requiring *full, accurate,* and *complete* information).

D.9 Cost/Cost Realism.

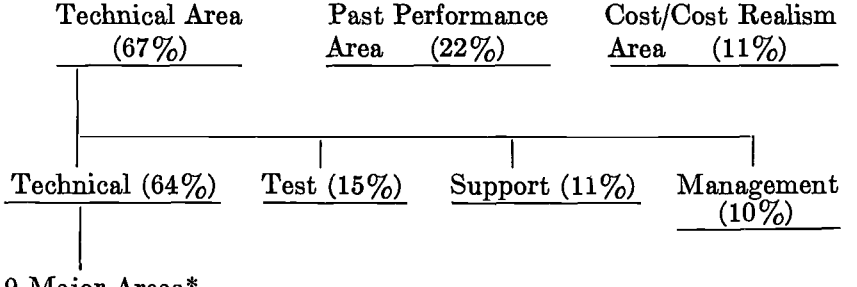
As part of proposal evaluation and in order to minimize potential or built-in cost growth, the Government intends to evaluate the realism of offerors' proposed costs in terms of the offerors' proposed approach. Proposals may be penalized to the degree that the proposed costs are unrealistically low.

The factors itemized below will be evaluated on the basis of the completeness/adequateness of the proposal and the basis of understanding of stated requirements:

1—Validity of proposed cost in relation to the specific technical approach to include:
  (a) proposed man hours,
  (b) proposed materials, subcontracts and other direct charges.
1—Adequacy of contractor's estimating system
2—Adequacy of cost estimates in areas of high technical risk.
2—Areas of significant cost variation indicative of quoter's lack of understanding of the problem or capacity to perform.
3—Contracts of comparable complexity and size.

The relative importance of the above factors is indicated by the number preceding the factor with the number 1, indicating the highest relative importance. Factors having the same number are of equal importance.

A diagrammatic summarization of these provisions, including the precise weight of each factor, is as follows:



9 Major Areas*

Relative Importance	Factor
1	System Trade-Offs
2	Antenna
2	Transmitter
2	Receiver
2	Modern
3	Electrical Integration
3	Mechanical Integration
4	Product Assurance
5	Echo Suppressors

*Each of the 9 major areas was divided into sub-areas. Each sub-area was evaluated for completeness of proposal, technical approach, and the degree the proposed design meets technical requirements. These 3 criteria were applied to each sub-area in regard to each of the 4 configurations in which the equipment was required.

Each proposal was numerically scored under every factor in the "Technical Area." We are advised by the Army that it considers the "technical" portion thereof to be the "major area of technical risk," and the "test," "support," and "management" portions to bear "minimal technical risk." In regard to the nine evaluation factors under the major technical areas portion, RCA and ITT–DCD achieved identical scores under "System Trade-Offs." However, RCA was considered superior to ITT–DCD in each of the remaining eight factors, under which the difference in score between the two offerors ranged from approximately 1 to 25 points. It is the Army's position that these scoring differences reflect its opinion that the ITT–DCD proposal represents a substantially higher technical risk than the proposal of RCA.

When the scores of the nine evaluation factors were weighted and averaged, RCA's total score under the "technical" portion exceeded that of ITT–DCD's by 4 points. RCA also attained higher scores in the "test" and "management" portions by margins of 2.4 and 10.7 points, respectively. ITT–DCD's proposal was assigned a score under the "support" portion which was above that of RCA's by 9.9 points. Thus, for the entire "Technical Area," RCA's total weighted score exceeded that of ITT–DCD's by 3 points.

The "Past Performance" and "Cost/Cost Realism" Areas were not numercially scored, although respectively they were approximately one-third and one-sixth as important as the "Technical Area." RCA and ITT–DCD were deemed to have equally satisfactory records of past performance. The procuring activity concluded that ITT–DCD's proposal was minimally cost realistic, while that of RCA was most cost realistic.

Upon consideration of the evaluation results, the contracting officer selected the proposal of RCA as representing the greatest value to the Government since it achieved the highest technical merit rating, had a satisfactory record of past performance, and was judged to be most cost realistic. The Fort Monmouth Procurement Branch Board of Awards concurred in the contracting officer's selection.

We preface our discussion of your contention that an award to ITT–DCD would represent the greatest value to the Government, with the observation that your protest often speculates upon the difference in "bidders' prices." Of course, in this negotiated procurement, which contemplates a cost-plus-incentive-fee contract, competitors were requested to submit quotations of estimated total cost, plus proposed fee. RCA's final quotation of estimated total cost plus proposed fee substantially exceeded ITT–DCD's.

Your initial argument is that where two offerors are essentially equal in technical and other areas, award must be made to the offeror

proposing the lowest cost to the Government. It is your position that the evaluation results have established RCA and ITT–DCD as essentially equal in the "Technical" and "Past Performance" areas, and therefore the greatest value to the Government would result from an award to ITT–DCD, which has quoted the lower estimated total cost plus proposed fee.

In support of this argument you cite as a "similar" case our decision reported at 50 Comp. Gen. 246 (1970), which involved a negotiated procurement for research and development services to be performed on a cost-plus-a-fixed-fee basis. In that case an award was made to the offeror (TI) which had proposed the lower estimated cost, even though a competitor (SRL) received a higher technical merit rating. In denying SRL's protest against the award to TI, we stated:

> In response to SRL's allegation that the lower cost estimate submitted in the technically inferior TI proposal was considered as controlling, we are advised that the technical differences in the two proposals did not warrant the incurrence of additional costs that would have been occasioned by accepting SRL's proposal. In fact, the technical evaluation team considered the difference in point scores to be insignificant. * * * In this regard, we are advised that:
>
> "* * * Both bidders were rated relatively high which indicated a high technical capability to perform the requirements of the contemplated contract and the additional 6 point rating assigned to [SRL's] proposal did not justify the expenditure of extra money. The 78 point rating assigned to the [TI] proposal established that they were quite capable of performing the required work, and to place undue emphasis on the 84 point rating of [SRL] would have been superfluous to the requirements of the [Government] and did not warrant the expenditure of additional funds."
>
> Where, as here, two offerors are essentially equal as to technical ability and resources to successfully perform a research and development effort, the only consideration remaining for evaluation is price. In such a situation, we believe that the lower priced offer represents an advantage to the Government which should not be ignored. Indeed, ASPR 4–106.4 makes it clear that awards should not be for capabilities that exceed those determined to be necessary for successful performance of the work.
>
> We view the award to TI as evidencing a determination that the cost premium in making an award to SRL, based on its slight technical superiority over TI, would not be justified in light of the acceptable level of effort and accomplishment expected of TI at a lower cost. The concepts expressed in ASPR 3–805.2 and 4–106.5(a) that price is not the controlling factor in the award of cost-reimbursement and research and development contracts relate, in our view, to situations wherein the favored offeror is significantly superior in technical ability and resources over lower priced, less qualified offerors. * * *. 50 Comp. Gen. at 248–49 (1970).

The determinative element in our 1970 decision was not the difference in technical merit scores *per se*, but the considered judgment of the procuring agency concerning the significance of that difference. This was recognized in our decision B–170633(1), May 3, 1971, in which we upheld the award of a Time and Material and Labor Hour type of contract to a technically superior offeror which had submitted the higher price proposal. Our 1970 decision was distinguished as follows:

> We agree that the point ranges in the two situations are not radically different. However, in the earlier case the contracting activity specifically determined that the differences in the technical proposals, which were regarded as insignificant, did not justify paying a price differential. It was further stated that the firm

receiving the 78 point score was quite capable of performing the required work and that to place undue emphasis on the higher score "would have been superfluous" to the agency's requirements and "did not warrant the expenditure of additional funds." In contrast, the findings in this case were that your proposal and the [successful offeror's] proposal were not equal and that acceptance of the higher priced offer was more advantageous to the Government.

We believe the situation in the instant case is analogous to that in the decision quoted immediately above. The "Past Performance" of RCA and ITT–DCD was regarded as equivalent. However, there is no indication of record that in regard to the "Technical" area, the procuring agency has regarded the proposals as "essentially equal" or the differences between the two to be "insignificant." The technical superiority of RCA's proposal has been consistently recognized and we are advised that ITT–DCD's proposal "represents a substantially higher technical risk" than that of RCA. The contracting officer stated in his supplemental administrative report:

Upon receipt of the technical evaluation and during his deliberations leading to the selection of the offer representing the greatest value to the Government, the Contracting Officer was assured by his technical advisors that the higher score assigned to the RCA proposal represented significant value to the Government. This finding was reassessed upon receipt of the ITT DCD protest in June 1972 and has again been reviewed in view of [ITT–DCD's] 7 August 1972 letter. In each case, the technical advisors have even more strongly reaffirmed their original recommendation that the technical differences in the two proposals should be regarded as being of paramount importance. As a result of numerous discussions with his technical advisors, the Contracting Officer has concluded that the ITT DCD proposal contains areas of higher technical risk than the RCA proposal. This increased technical risk greatly increases the potential for cost growth (overrun) under any resultant contract. Therefore, the Contracting Officer has concluded that the cost growth potential in the ITT DCD proposal more than offsets any apparent savings in the amount for which the contract would be awarded.

Additionally, the record before us does not support the contention that RCA and ITT–DCD were "essentially equal" technically or that the technical differences in their proposals were "insignificant." Accordingly, we must reject your argument that award must be made to ITT–DCD because it has quoted a lower estimated total cost plus proposed fee.

In your letter of September 6, 1972, you contend that the contracting officer's supplemental statement reveals two improprieties; (1) the contracting officer has changed the basis upon which RCA was selected for award, and (2) the Army has "rescored" the technical proposals after the filing of your protest and is improperly relying upon this revised evaluation in justifying the proposed award to RCA.

The initial administrative report did not dwell upon the technical merits of the two proposals, and properly so, because the sole basis for protest at that time was that the May 1972 plant visits constituted a reopening of negotiations. The alleged technical equivalency of the two proposals was first asserted in your response to the initial admin-

istrative report. The contracting officer's statement quoted above represented the first opportunity of the Army to address the contention that the two offerors were "essentially equal" technically. In our view, the contracting officer's statement does not reveal any "rescoring" of proposals; it merely asserts that upon receipt of the ITT–DCD protest, the Army's existing determination of the merits of the proposals was "reassessed," as a result of which his technical advisors have "reaffirmed their original recommendation." In view thereof, we are unable to agree with your contention that the contracting officer has changed the basis on which RCA was selected for award.

Your remaining arguments are directed to the "Cost/Cost Realism" area of evaluation and the conclusions of the procuring agency thereunder. The first of these arguments is that ITT–DCD's final quotation of estimated costs was not only realistic, but was more realistic than the proposal of RCA. This assertion is at variance with the procuring agency's determination that the RCA cost proposal was "most" realistic and that of ITT–DCD was "minimally" realistic.

The theme of your first argument is that the procuring activity had engaged in an evaluation of cost realism prior to the submission of best and final offers, as a result of which your cost proposal was deemed "realistic." You observe that in its best and final offer of April 26, 1972, ITT–DCD left unchanged its quotation for direct labor hours and changed other elements of its estimated cost and proposed fee. These changes were explained in ITT–DCD's best and final offer, and to our Office. You allege that the plant visits in May 1972 were in conjunction with a "new," or second, evaluation of cost realism, in which it was concluded that your cost proposal was "unrealistic." You question the propriety of such a conclusion since ITT–DCD had explained the basis for the alterations in estimated costs and proposed fee made in its final offer, and since its quotation for direct labor hours (with which the plant visits were concerned) remained unchanged. In essence, you contend there was no rational basis upon which ITT–DCD's cost proposal could be deemed "realistic" before submission of its best and final offer, and "unrealistic" thereafter. This "before-and-after" theory is expressed as follows in your letter of September 6, 1972:

> The contracting officer's contention that a *new* evaluation of cost realism was appropriate after the submission of best and final offers, *because of* ITT DCD's reduction in proposed costs, is misleading. The important fact in rebutting this generalization is that the reduction in ITT DCD's estimated costs did not affect its projected costs for direct labor. Since the proposed direct labor costs remain the same as those negotiated earlier, the reduction at the time of best and final offers cannot be used as a justification for taking *another* look at ITT DCD's experience in three relatively minor areas and making a *new* evaluation concerning technical risks, i.e., additional hours required to complete development. In other words, since the reduction in price did not affect direct labor hours, it could not have been the cause of a *new* evaluation of the realism of proposed direct labor costs. [Italic supplied.]

This argument rests upon several misconceptions. First, there were not two evaluations under the "Cost/Cost Realism" evaluation criterion. As we stated above, there was only one evaluation, conducted after receipt of best and final offers. Thus, before the submission of best and final offers, there was no evaluation in existence of ITT-DCD's cost proposal deeming it "realistic," to be subsequently changed to a determination that the proposal was "unrealistic." We regard it as logical to withhold the evaluation of cost realism until the offerors' best and final offers are submitted, for reasons stated as follows by the contracting officer:

ITT DCD has expressed surprise that the cost realism evaluation was not initiated prior to receipt of best and final offers. The reason for this becomes obvious when one considers the fact that from the time of submission of original proposals in January 1972 through submission of best and final offers in April 1972, ITT DCD effected approximately a forty-percent (40%) reduction in proposed costs. Further, of the forty-percent (40%), approximately fifteen-percent (15%) was effected between completion of negotiations on 14 April 1972 and close of negotiations on 26 April 1972. From this it may be seen that an evaluation of cost realism prior to receipt of best and final offers would be of questionable value. * * *.

Your protest also is inclined to equate the evaluation of the realism of its proposed direct labor hours to the entire "Cost/Cost Realism" evaluation criterion, set forth in section D.9. of RFQ -0141, quoted above. An examination of that section shows that proposed man-hours constituted only one subfactor, of 1 of 5 factors, within the "Cost/Cost Realism" area. The protest, in our opinion, places considerably more emphasis on the importance of this subfactor than was attributed to it by the contracting agency. As indicated above, the sole initial basis of the instant protest was that the plant visits constituted an improper reopening of negotiations. The plant visits grew out of concern about the accuracy of offerors' proposed direct labor hours. While an explanation of the plant visits necessarily involved a discussion of this concern, it did not mean that other evaluation factors in the "Cost/Cost Realism" area had been ignored or were of no consequence. The other factors simply were not considered in issue in the initial administrative report on your protest. Within this context, we view as erroneous your subsequent statements such as:

We note again that the contracting officer's concern about cost realism is apparently confined to the area of direct labor hours necessary to complete the program.

Finally, the procuring agency did not determine, as you maintain, that ITT-DCD's cost proposal was "unrealistic." The contracting officer has explained his opinion as follows:

The Contracting Officer has not at any time determined the ITT-DCD Best and Final Offer to be unrealistic. However, as in the case of the technical area where there can be a differential in the merit of acceptable technical proposals, there can also be variations in the degree to which cost proposals are realistic. In

the instant case, the ITT proposal was considered to be minimally cost realistic while the RCA proposal exhibited a much higher degree of cost realism.

In view of the foregoing, we are unable to agree with your contention that, before submission of best and final offers, the procuring agency determined ITT–DCD's cost proposal to be "realistic" and later changed that determination to "unrealistic"; your contention that it was improper to have initiated the evaluation of cost realism only after receipt of best and final offers; or with your equation of direct labor hours to the entire "Cost/Cost Realism" evaluation area.

Your argument that the cost realism of ITT–DCD's proposal is greater than that of RCA's is dependent, in part, upon consideration of the latter's performance under the SHF Ground and Airborne Tactical Satellite Communication Terminals program. Both ITT–DCD and RCA have alleged that the other has experienced, under prior Government contracts, cost growth of such magnitude as to cast serious doubt upon the credibility of the other's cost proposal. Each party has stated that the portrayal to this Office of its performance by the other is factually inaccurate. Apart therefrom, RCA and ITT–DCD have each stated to our Office that its proposal under RFQ –0141 included an account of its performance under prior contracts, and we have no reason to believe that such accounts were inaccurate. It is axiomatic that the procuring agency has the expertise and the primary responsibility for the evaluation of this information, and the record indicates that the agency evaluated RCA and ITT–DCD as equally satisfactory on Past Performance, based upon the information submitted with their proposals. In view thereof, and in the absence of any evidence that such information was inaccurate or that the evaluations were arbitrary, we are not in a position to advise the Army that we find the ITT–DCD cost proposal to be more cost realistic than that of RCA.

Your next contention is that the contracting officer erred in determining that ITT–DCD's projection of direct labor cost was "unrealistic." We are advised by the contracting officer that a more accurate expression of his determination is that ITT–DCD's "projection of direct labor cost, particularly the specific man-months proposed was * * * considered to be extremely optimistic in view of the areas of technical risk disclosed during evaluation of the technical area."

You state that in determining the realism of an offeror's projected direct labor costs, consideration should be given to independent research and development (IR&D) and prior related Government contracts which it has performed, because the Government will not be charged for direct labor to the extent an offeror has completed development work applicable to the instant procurement. You then identify eleven areas, in addition to those which were the subject of the plant

visits, in which ITT–DCD has performed applicable development work. You also refer to related work ITT–DCD has performed in connection with the Navy's AN/WSC–2 satellite program and the Air Force's AN/GSQ–119 communications program. Therefore, you maintain, any determination of the realism of ITT–DCD's projected direct labor costs, which is based solely upon the observations made at the plant visits, did not take into consideration the totality of ITT–DCD's prior efforts and therefore cannot be sustained.

We have been advised by the Department of the Army that in the evaluation of the realism of offerors' projected direct labor costs, emphasis was placed upon the areas examined at the plant visits because those areas were of significant technical risk, entailing the possibility of a large increase in labor hours if an offeror's development was not as advanced as it had represented in its proposal. In regard to the areas of IR&D which are set forth in your protest, and which you were not requested to show during the plant visits, we are informed that the Army either considered them to be of such low technical risk as to justify the conclusion they would require little additional effort, or that the subitem involved was to be obtained through subcontract rather than being developed and manufactured by the offeror itself.

In this connection, ITT–DCD's performance under the AN/WSC–2 and AN/GSQ–119 programs was extensively set forth in its proposal, and we are advised by the Army that its evaluation of the ITT–DCD proposal included consideration of its experience thereunder.

Under these circumstances, we are aware of no basis upon which our Office would be warranted in disturbing the administrative conclusions regarding the realism of ITT–DCD's projected direct labor costs.

Your final argument is that even if the contracting officer were correct in determining that ITT–DCD's cost proposal was "unrealistic" in the direct labor area, award to ITT–DCD would represent the greater value to the Government.

Of the total effort required to design, develop, fabricate and test the small satellite terminals, you attribute 10 percent to "Development of Brassboards in New Design Areas." The items of equipment examined in the May 1972 plant visits, you assert, constitute no more than 50 percent of the brassboards required in new design areas. Therefore, the plant visits were concerned with only 5 percent of the total projected costs for the entire project. You then present two hypothetical situations: one in which RCA's development of the items seen at the plant visits was 20 percent beyond that of ITT–DCD's, and the other in which ITT–DCD had completed no development whatsoever in the

areas which were the subject of the plant visits. In either case, you maintain, ITT–DCD's projected costs would still be lower than RCA's and therefore ITT–DCD's offer represents the greater value to the Government.

The record indicates that, after the plant visits, the evaluators at the using agency advised the procuring activity that RCA had completed more of the tactical synthesizer, high voltage power supply, down converter, up converter and strategic synthesizer than any of the other offerors. This conclusion was supported by charts summarizing each offeror's percentage of completion of these subsystems. The percentage of completion was then translated to an equivalent reduction in the Independent Government Cost Estimate (IGCE). In view of the extensive work accomplished by RCA, the IGCE was reduced by $879,000. The less extensive work completed by ITT–DCD resulted in a reduction of the IGCE of approximately $346,000, creating a difference of approximately $533,000 in the amount the IGCE was reduced as a result of the Government's assessment of the status of the work seen at the plant visits. This difference of $533,000 is less than the difference between ITT–DCD's and RCA's final estimated total costs plus proposed fee. Thus, the plant visit report would appear to support ITT–DCD's contention that the additional work required of it on the tactical synthesizer, high voltage supply, down and up converters and strategic synthesizer would result in a cost increase less than the difference between its final estimated total cost plus proposed fee and that of RCA.

However, this does not compel the conclusion that the total costs incurred by ITT–DCD during the performance of the contract would be less than those of RCA, which is the basis upon which you claim an award to ITT–DCD would represent the greater value to the Government. The tactical and strategic synthesizers, down and up converters, and high voltage supply are only part of the work to be accomplished under RFQ –0141, and the evaluation of offerors' development of these items constituted only a portion of the "Cost/Cost Realism" evaluation. As the contracting officer stated in his supplemental report:

> * * * ITT DCD is of the apparent belief that the plant visits and the subsequent inputs to the evaluation of cost realism was a significant factor in selection of the successful offeror. Such was not the case. As previously stated, the primary factor in selection of the successful offer was the technical merit of the proposal. Further, the plant visits were but a portion of the overall cost/cost realism evaluation. * * *.

We note, for example, from the cost realism evaluation that the difference between the very favorable overhead rate projected by ITT–DCD and that adopted in the IGCE *alone* would virtually extinguish

any advantage enjoyed by ITT–DCD over RCA in their final cost proposals.

In our decision reported at 50 Comp. Gen. 390, 410 (1970), we stated:

> Our Office has noted that the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic concerning the proposed costs and technical approach involved. B–152039, January 20, 1964. We believe that such judgment must properly be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess "realism" of costs and technical approaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis.

From our review of the record in the instant case, we are unable to conclude that the Department of the Army has arbitrarily exercised the discretion committed to it in evaluating the offers or in proposing to make award to RCA.

Accordingly, your protest is denied.

[B–176466]

Bids—Prices—Below Cost—Effect on Bidder Responsibility

The administrative determination that the low bidder, a subsidiary of a corporation undergoing a Chapter XI Bankruptcy Act reorganization (11 U.S.C. 701), did not possess the financial strength to perform a multi-year contract for transducers and parts at the low price bid is a determination that is within the contemplation of paragraph 1–902 of the Armed Services Procurement Regulation (ASPR) to the effect that any doubt as to the financial strength of a bidder that cannot be resolved affirmatively requires a determination of nonresponsibility. The record confirms that the price bid would result in a loss, that the contracting agency's estimate of costs on separate yearly quantities is not contrary to the terms of the solicitation or ASPR 1–322.1(b)(3), and that the refusal to rely on the bidder's material and labor cost estimates was not arbitrary and, furthermore, consideration of the parent corporation's reorganization in determining its subsidiary's responsibility was within administrative discretion.

To Cole and Groner, December 20, 1972:

We refer to your letter dated October 31, 1972, and prior correspondence in connection with a protest filed on behalf of Massa Division, Dynamics Corporation of America (Massa), under invitation for bids N00024–72–B–3372, issued by the Naval Ship Systems Command, Washington, D.C.

The invitation, issued on March 27, 1972, with bid opening, as extended, on May 3, 1972, solicited bids for a multi-year (4 years) procurement of 69 AN/SQS–23, 208A transducers, with additional transducer elements, maintenance repair parts and data. The following five bids were received:

Bidder	Multi-Year Prices			
	Offer A (Without First Article)		Offer B With First Article)	
	Unit Cost	Total	Unit Cost	Total
1. Massa	$35, 400	$2, 457, 079. 20		
2. Hazeltine	36, 577	2, 533, 583. 00		
3. Harris ASW Division General Instrument			$37, 700	$2, 615, 400. 00
4. Honeywell, Inc.			41, 083	2, 843, 566. 95
5. Marine Resources, Inc.			42, 200	2, 918, 190. 00

The contracting officer determined that Massa was not a responsible bidder and proposed to award the contract to Hazeltine as the next low bidder. By letter dated July 10, 1972, Massa protested this determination to our Office. In response to the initial protest the activity has provided us with the following rationale in support of the determination:

Background

It is believed that a brief review of this Command's procurements of the 208A Transducer, an improved, refined version of the earlier 208 is pertinent. The first purchase of the 208A was in 1967 under Contract N00024–67–C–1406, issued 16 May 1967, for 29 208A transducers at a unit price of $65,700 for domestic use (24 units) and a unit price of $66,200* for foreign use (5 units) was sole source from Massa.

In 1968, having acquired a data package for competitive procurement under the 1967 procurement, an IFB was issued for 54 208A transducers. Because of an early delivery requirement, prospective bidders were advised at a bidder's conference, and in writing, that, if anyone other than Massa were selected for award, it would be necessary to make a sole source award to Massa for 12 equipments. Thus, in this 1968 procurement, Massa had the advantage of bidding a larger quantity than any other bidder as well as a waiver of preproduction requirements as the only prior producer. Bids were opened in October 1968 with the following results:

Bidder	Unit Price
Hazeltine	$36, 926
General Instrument	46, 168
Edo Western	47, 294
Honeywell	51, 296
General Dynamics	54, 343
Chesapeake Instrument	55, 490
Massa	61, 300
Sangamo Electric	64, 711

*The difference in price was because of the more stringent requirements for packaging for overseas shipment.

Award was made to Hazeltine on 25 October 1968 and its performance under the contract has been satisfactory.

After the award was made to Hazeltine under the 1968 IFB as indicated, a sole source award was made to Massa for 12 transducers under Contract N00024–70–C–1009, at a unit price of $63,500. This award was necessary to meet production delivery requirements before delivery could be made by Hazeltine because of the first article testing required of Hazeltine, but waived for Massa.

Discussion

From the foregoing, it is clear that Massa's price under the present IFB is far less than its 1968 bid price ($35,400 vs $61,300) and its price for the 12 units awarded it in 1968 ($35,400 vs $63,500), raising the question whether award of this multi-year procurement would not result in a loss contract which Massa could not afford. The financial breakdown for the parent company, Dynamics Corporation of America (DCA) * * * clearly established that Massa is in no position to absorb a loss. In this situation this Command considered it its duty to make full inquiry of Massa regarding its actual costs of producing the 208A under the 1967 contract (unit price $65,700) and the 1968 contract (unit price, $63,500) and how Massa had arrived at its bid price under the present IFB. Accordingly, on 5 June 1972, Massa's parent corporation, DCA was requested to furnish the actual costs incurred under these earlier contracts and any figures used to develop Massa's bid price for the present procurement. At a meeting held at this Command on 14 June 1972, Mr. Frank Paradise, Group Vice President of DCA presented the figures for unit costs/pricing * * *. This presentation demonstrates that Massa's bid price of $35,400 per unit represents a loss of at least some $10,000 per equipment, for a total loss of some $700,000. From DCA's financial breakdown * * * it was clear that DCA was in no position to sustain such a loss. Accordingly, the Contracting Officer determined in accordance with ASPR 1-903.1 and 1-904.1 that he could not make a positive determination that Massa/DCA was a responsible contractor for this procurement.

In addition, the Navy points out that on August 2, 1972, DCA, Massa's parent corporation, filed a petition under the provisions of Chapter XI of the Bankruptcy Act, 11 U.S. Code 701, in the United States District Court for the Southern District of New York. Subsequently, on August 14, 1972, a meeting was held between agency personnel and representatives of Massa, at which time that firm's representatives submitted information regarding the company's financial status as of June 30, and an additional cost breakdown of its bid. After a review and analysis of this material the procuring activity reaffirmed its determination that Massa's bid price would result in a loss and that it does not possess the financial resources to perform the subject contract.

You assert that the procuring activity's conclusion that Massa's bid price would result in a loss is erroneous. You contend that the procuring activity's projected loss of $700,000 contained in its administrative report dated August 3, is not explained and cannot be supported by the cost analysis furnished by Massa, which merely lists its costs for this procurement and its two previous contracts. In addition, you cite the reduction of the projected loss figure to $500,000 in the Navy's report dated August 25, as indicative of the unreliability of both reports.

It appears from the record that the different projected loss figures resulted from the fact that additional cost figures were made available after the initial report was completed. The procuring activity's evaluation of Massa's proposed costs submitted on August 10, 1972, contains the following overall conclusion:

Review of reference (a) (Massa's cost Data) indicates several serious deficiencies relative to financial risk which may adversely affect the bidder's performance on a potential contract for the subject equipments. Namely, the omission of

inflation factors, the use of four year (multi-year) quantities and increased productivity of labor beyond experienced norms. * * *.

In addition to making corrections for these omissions, the analysis includes a determination of the learning/cost curve trend for materials, assembly labor, and engineering labor under the prior contracts and application thereof to Massa's cost figures for this procurement. From this analysis, it is concluded that the loss will be in excess of $500,000.

It appears from the record that much of the difference between Massa's estimated costs of performance and the Navy's estimates of these costs turns on the projected costs of material and assembly labor. For example, on the first year's requirement of 20 units, the Navy's estimate of material costs exceeds Massa's by over $6,300 per unit, and for assembly labor, the Navy's estimate exceeds Massa's by more than $4,100 per unit.

You contend that Massa's cost projections should have been accepted by the Navy because Massa based its material cost estimate on firm vendor quotations for the entire 69 units and its labor costs were determined in accordance with a fixed wage rate schedule in its union contract which you state is effective until 1975.

The Navy reports Massa has not verified its alleged vendor quotations and wage rates to the Navy's satisfaction. Accordingly, the Navy developed its own estimates based on actual unit costs incurred by Massa under its prior 12 unit contract, as adjusted by a learning curve and by a factor for inflation. Based on the evidence contained in the record before us we are unable to conclude that the Navy's refusal to rely upon Massa's material and labor cost estimates was arbitrary.

You also contend that the Navy's cost projections are unrealistic because these projections are computed on the basis of the four separate annual quantities rather than the full 69 unit quantity. You believe that ASPR 1-322.1(b)(3), which states in part that multi-year procurements are appropriate in situations where they provide an opportunity for savings through continuity of production over long periods of time, dictates that total quantity projections should be made. Further, you state that the Navy's entire analysis is predicated upon a delivery schedule extending over a 4-year period, whereas Massa's manufacturing cycle is only 28 months, plus an 8-month contingency period. You contend that Massa's projected manufacturing cycle is more realistic than Navy's projected cycle.

It is evident from the terms of the invitation that the Navy is not bound to order the total 4-year quantity, nor is the contractor bound to incur costs necessary to produce the entire quantity unless sufficient funds are available for subsequent years. See clause No. 85 of the solicitation entitled "Limitation of Price and Contractor Obligation." Accordingly, the Navy decided to base its cost estimates on separate yearly

quantities. In this regard we note that the Navy's cost estimates do reflect a downward trend for each succeeding year based on the continuity of production. Thus, the projected unit cost (exclusive of G&A) for the last yearly quantity is approximately 30 percent lower than the projected unit cost for the first year. It is our opinion that the Navy's method of estimating the costs of performance on the basis of yearly quantities is not contrary to either the terms of the solicitation or ASPR 1-322.1(b)(3).

You also contend that the specifications for the transducers called for by the subject invitation have been relaxed resulting in reduced production costs. While the procuring activity agrees that the impedance tolerance requirement and the scatter test tolerance limit have been relaxed, it states that other changes, consisting of requirements for molding of the element cap to the element cable, for a longer cable, and for X-ray of the aluminum casting, result in a more stringent overall specification than called for in the previous procurements and at least negate any reduction in costs.

You also argue that Massa's much lower bid ($35,400) in this procurement as compared to its earlier contract prices ($65,700 and $63,500, respectively) is not indicative of a loss because of the greater quantities called for under this solicitation, which is 69 units over a 4-year period. You point out that the first contract was for only 29 units and Massa's price of $65,700 included its original design effort, production engineering and tooling, as well as manufacturing costs. With regard to Massa's next contract, you point out that while the quantity called for was only 12 units, it bid a lower unit price of $63,500. However, in connection with this second procurement, we note that Massa bid $61,300 on 66 units, but Hazeltine got an award for 54 units at a price of $36,926, and Massa received a negotiated award for 12 units at the $63,500 price. Therefore, we are unable to fully accept your argument that the larger quantity in this procurement accounts for the much lower price, without indicating a loss.

The agency has also determined, based on a review of DCA's 1971 annual report and interim financial statement current as of June 30, 1972, that DCA, and consequently Massa, does not possess the requisite financial strength to perform the subject contract. It is also the procuring activity's position that DCA's involvement in the Chapter XI proceedings compounds this problem since a reorganization plan has yet to be approved by the creditors or the court. The procuring activity fears that if award is made to Massa either the court or the creditors might elect not to perform on what Navy believes to be a loss contract.

You urge that the pendency of the Chapter XI proceedings cannot be relied on as a basis for denying the award to Massa. In this connection, you cite B-153478, January 18, 1965, and B-169549, July 8, 1970,

wherein this Office upheld awards to contractors subject to similar proceedings. It is clear that in both of the above-cited cases our sustaining of the agency determination that the contractors were financially responsible despite the pendency of these proceedings was based upon our recognition of the broad administrative discretion in such matters. Those cases do not stand for the proposition that procurement personnel may not reach the opposite conclusion. It is our opinion that the procuring activity did not act improperly in relying on the Chapter XI proceeding as a factor underlying its determination that Massa is not a responsible contractor, especially since a reorganization plan has yet to be approved.

Although you have pointed out that both the cost analysis of Massa's bid and the analysis of DCA's financial condition are subject to some criticism, we believe that a reading of the entire record supports the administrative determination that DCA/Massa does not possess a strong financial capability and it is at least doubtful whether Massa could successfully perform a multi-year contract of the amount involved here. In this regard, the applicable regulation provides, in part, that contracts shall be awarded only to responsible prospective contractors; that a prospective contractor must demonstrate affirmatively his responsibility; that the contracting officer shall make a determination of nonresponsibility if the information obtained does not indicate clearly that the prospective contractor is responsible; and that doubt as to financial strength which cannot be resolved affirmatively shall require a determination of nonresponsibility. ASPR 1–902. In recognition of the administrative discretion involved in such determinations, we see no basis for this Office to substitute its judgment for that of the contracting officer in the circumstances reported here. B–172061(2), August 24, 1971.

Accordingly, there is no legal basis for us to object to the proposed award to Hazeltine.

[B–176596]

Contracts—Subcontractors—Disputes With Prime Contractor—Government's Obligations

A subcontractor's claim for the value of the inventory delivered to the Government following partial termination of the prime contract and suspension of all subcontracting work may not be paid since the Government met its contract obligations by payment to the prime contractor even though the prime failed to satisfy subcontractor claims within 10 days from payment by the Government as stipulated in the termination settlement agreement. The contention that the contracting agency held itself out as the final customer is not for consideration in view of the fact paragraph 8–209.1 of the Armed Services Procurement Regulation (ASPR) denies subcontractors any contractual rights against the Government, and the circumstances involved do not negate the "no privity" rule, and furthermore a subcontractor's termination inventory is required to be disposed of in accordance with sections VIII and XXIV of ASPR.

To the Prentice Corporation, December 20, 1972:

Reference is made to your letter of May 1, 1972, to the Assistant Counsel, Defense Supply Agency, Cameron Station, Alexandria, Virginia, in which you expressed your desire that our Office review your claim arising from the termination of Defense Supply Agency (DSA) contract No. DSA100-70C-2086, with Interstate Manufacturing Corporation, Highspire, Pennsylvania.

The subject contract was partially terminated for the convenience of the Government in December 1970, and Interstate was instructed to suspend all work and terminate subcontracts. Interstate was further advised of its duty under Armed Services Procurement Regulation (ASPR) 8-205(vii) to settle all outstanding liabilities and claims arising from the termination of subcontracts, obtaining any approval required by the Termination Contracting Officer (TCO).

A letter from your counsel dated April 16, 1971, advised the TCO that:

> I have this day sent an original and five copies of the enclosed form DD 540 and the enclosed form DD 543, executed by Prentice Corporation for processing.
>
> * * * * * * *
>
> We are aware that Interstate and its corporate president are unwilling to pay or even sign a note for amounts already delivered to them against the same government contract. They don't contest the liability but decline to sign a note providing for payment and indicate that their company may not be in a position to pay. Under the circumstances and being aware of the fact that they are bidding on additional work under a different corporate entity, we feel it advisable to make you, as the termination officer and person responsible for seeing that subcontractors are paid from the contract termination payments, aware of the fact that we have submitted these claims to Interstate for further processing.

The record reveals that in July 1971 Interstate presented the TCO with a proposed settlement of its subcontract with your firm in the amount of $16,970; that the TCO accepted the settlement by letter of August 11, 1971; and that Interstate finalized this claim on August 13, 1971.

In the meantime, you were requested by the Defense Contract Administration Services District (DCASD), Hartford, Connecticut, by letter of June 23, 1971, to ship your termination inventory, consisting of 228,000 FSN 3698 Keepers with Slides, to the Defense Depot, Mechanicsburg, Pennsylvania. The value of this termination inventory was stipulated at $10,260. Payment to Interstate, including the $16,970 allocated to the settlement of your terminated subcontract, was completed by the Finance Office on October 22, 1971. Your present claim is based upon Interstate's failure to pay you the value of your termination inventory.

The record indicates that, by letter of October 13, 1971, your counsel advised the TCO that:

My client would not have delivered additional goods to Interstate against which it has a suit pending for nonpayment of goods previously delivered if it had to rely on Interstate for payment. My client is relying on your responsibility for seeing that sub-contractors are paid to insure that any funds disbursed are applied in payment of our invoices.

Your counsel states in his letter of November 16, 1971, to DSA in Philadelphia, that in conversing with the TCO, he was repeatedly reminded that the DSA deals only with prime contractors. The counsel also contends that the DSA "participated in a deliberate deception" to induce you to make a shipment you would not otherwise have made. It is contended that DSA held itself out as final customer of the shipment, concealing the fact that Interstate was the actual final customer, and in so doing, became responsible for payment.

By letter of November 24, 1971, the DSA Philadelphia Office replied that ASPR 8-209 denies subcontractors any contractual rights against the Government regarding the termination of a prime contract and that all subcontracted termination inventory is required to be disposed of in accordance with section XXIV of the ASPR, which sets forth the policies and procedures to be followed by property disposal officers in the disposition of termination inventory. The letter advised that the Government had satisfied its contractual obligation of payment to the prime contractor, and could not contemplate the tender of a duplicate payment to Prentice Corporation, with whom the Government did not have a contractual relationship. You were advised that your remedy was an action against Interstate.

Your letter of May 1, 1972, to the Assistant Counsel, DSA Headquarters states, *inter alia*, that:

(1) Prentice Corporation made every reasonable effort to prevent further losses by alerting the TCO to the situation and putting him on notice that you could not expect payment from Interstate.

(2) You would not have released the material had you known that, contrary to your advice, you would have to look to Interstate for payment.

(3) Since the Government entered into a settlement agreement with Interstate agreeing that Interstate would pay its subcontractors within 10 days after receipt of payment by the Government, the Government has an obligation to subcontractors to insure payment by the prime.

(4) Interstate entered into the settlement agreement with fraudulent intent, and you believe the FBI should investigate the matter.

(5) DSA agrees that Prentice has been harmed but that under the present regulations there was no way in which Prentice could have avoided the loss.

(6) DSA agrees this is an unusual case and, as such, it is your position that the ASPR regulations were not meant to cover this situation, and therefore you should be afforded relief by the Government.

With regard to your first two contentions, we are unable to conclude that the letter of April 16, 1971, indicated with any degree of clarity that you were conditioning your shipment of the subject inventory upon a guarantee of payment therefor by DSA. Our perusal of that letter indicates that your counsel was merely advising the TCO that you had submitted your inventory claims to Interstate for further processing, and of your payment difficulties with Interstate, because you believed the TCO was responsible for seeing that subcontractors are paid by the prime contractor once the contract termination payments were made to the prime contractor.

Nowhere does that letter apprise the TCO that you would not submit the subject inventory items to the property disposal procedures set forth in sections VIII and XXIV of the ASPR, and incorporated into the prime contract, without an express Government guarantee of payment. In view thereof, and while any misunderstanding that may have ensued therefrom is indeed unfortunate, we are unable to conclude that the letter of April 16, 1971, was worded in a manner which would place the TCO on notice that your offer of the inventory listed on the inventory forms you submitted, or any shipment of inventory in response to a request by the DCASD, Hartford, would be contingent upon a DSA guarantee of payment. If that was your intent, we cannot agree that your letter constituted a reasonable effort to place the TCO on notice that your shipment was so conditioned, nor can we conclude that the TCO was obligated, on the basis of that letter, to advise you to withdraw the subject inventory from the processing procedures set out in the prime contract, under which the payment of terminated subcontracts was to be made through the medium of the prime contractor.

While we do agree that your counsel's letter of October 13, 1971, was sufficient to notify the DSA of the fact that you would not have shipped the subject inventory if you had known you would have to rely on the prime contractor for payment, it appears that DSA had already allocated the subject inventory to the terminated portion of the contract and had made provisions in the settlement agreement of late September, 1971, for the inclusion of this claim in the payment to Interstate.

Had your letter of October 13 been received prior to the order of the DCASD to effect shipment, it may have imposed an obligation upon DSA to advise you that it intended to pay you only through Interstate. However, without the benefit of the letter of October 13, we cannot

conclude that the request of DCASD, Hartford, to ship inventory which you had submitted for allocation to the terminated contract, was intended to deliberately deceive you, contrary to your allegations.

With regard to the effect of your letter of October 13 on the proposed payment to Interstate, it should be noted that the settlement agreement had, at that time, already been consummated with Interstate. In similar circumstances we denied a request by a subcontractor holding a State court judgment against a prime contractor (terminated by the Government for convenience) that the Government withhold from its payment to the prime contractor the money owed to the subcontractor, and require it to be paid directly to the subcontractor. In that case, we held that since there is no privity of contract between the Government and the subcontractor under prime Government contracts, there was no legally permissible way for the Government to enforce the subcontractor's rights against the prime contractor, or for the subcontractor to make a claim directly against the Government. *See* B–160329, November 7, 1966. Thus, even if it is known that there are outstanding claims against the prime contractor when final payment is made by the Government, the Government is unable to condition payment to the prime on the payment by the prime of outstanding obligations, or to make payment directly to the subcontractor to whom the prime owes money.

Nor do we view the circumstances here to be so unusual as to take the matter out of the "no privity" rule. The mere fact that the Government is instrumental in inducing a subcontractor to do something is insufficient to establish privity in the absence of an express promise by the Government to guarantee payment to the subcontractor. *See* B–171255, January 5, 1972. Our review of the record relative to your claim fails to reveal any such express promise.

We believe that the foregoing is also dispositive of your third contention. However, in this connection, your attention is also directed to ASPR 8–209.1, which expresses a clear mandate that:

> A subcontractor has no contractual rights against the Government upon the termination of a prime contract. The rights of a subcontractor are against the prime contractor or intermediate subcontractor with whom he has contracted * * *.

In view thereof, and notwithstanding the existence in the termination settlement agreement between the DSA and Interstate of a stipulation that the prime contractor agreed to pay the claims of its subcontractors within 10 days from payment by the Government, the ASPR clearly refutes any inference of the existence of contractual rights by a subcontractor against the Government with regard to termination settlement agreements. To the contrary, the ASPR clearly

indicates that the 10-day provision must be construed as enforceable only by the subcontractor against the prime.

Your fourth contention attributes Interstate with fraudulent intent in entering into the settlement agreement, and requests an FBI investigation. We find no evidence of such intent in the present record, and we must therefore decline to refer the matter to the Department of Justice. However, if it is still your sentiment that such was the case, you may forward your allegations directly to that Department and request further action.

With regard to your contention that DSA agrees that you have been harmed, and there was no way you could have prevented your loss under the present regulations, the record reveals merely an acknowledgement by DSA that Interstate has not complied with the payment provision of the settlement agreement, and the statement that DSA is unable to pursue the matter further since Interstate is no longer in business. We therefore find nothing in the record to substantiate your understanding of DSA's position.

Your sixth contention alleges that you believe DSA agrees that this is an unusual case, and the ASPR was not meant to cover this situation. Accordingly, you contend that you should be afforded relief by the Government.

Our review of the record fails to indicate any such concession by the DSA. To the contrary, DSA maintains it was acting properly under the ASPR regulations pertaining to the termination of contracts for the Government's convenience, and there is nothing to indicate that DSA considered the circumstances of this case to be excepted from the ASPR's termination procedure. In view of your election to submit your claim through the prime contractor, and your inventory to the Government under the procedures set out in both ASPR and the prime contract, we are unable to conclude that this is an unusual case not meant to be covered by the regulation, or that DSA would have been warranted in ignoring the termination procedures set forth in ASPR.

While we are sympathetic to your difficulty in obtaining satisfaction of your claim from Interstate, we are unable to discern any basis upon which the Government has incurred a legal obligation to pay your claim. Accordingly, it must be denied.

[B-174870]

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Technical Acceptability

The resolution of a technical dispute as to the acceptability of an offer under a request for proposals for Uninterruptible Power Systems is not the function

of the United States General Accounting Office when the administrative judgment is not arbitrary or unreasonable, and the fact that the contractor's past performances were acceptable does not make the determination arbitrary or unreasonable. Furthermore, when the unacceptability of a proposal involves omitted information that relates to basic technical requirements, the procuring agency does not have the duty to request information or clarification; nor is the use of a predetermined cut-off score to determine competitive range improper when a score is low in comparison with others; and also when a technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require the consideration of price in determining whether a proposal is within a competitive range.

To Paul & Gordon, December 21, 1972:

Reference is made to the Teledyne Inet (Teledyne) telegram dated January 24, 1972, and subsequent correspondence from your firm on behalf of Teledyne, protesting against award of contract to any other offeror for Uninterruptible Power Systems (UPS) under request for proposals (RFP) WA4M-1-0622, issued August 20, 1971, by the Federal Aviation Administration (FAA), United States Department of Transportation.

The RFP required submission of technical proposals by October 20, 1971, and a separate pricing proposal by November 20, 1971. Teledyne's technical proposal was submitted in a timely manner and a preliminary review was conducted to determine if any minor clarifications were required prior to submission for technical evaluation. The results of the preliminary review were favorable and the technical proposal was submitted for evaluation. By letter dated December 29, 1971, Teledyne was notified that its proposal was technically unacceptable due to insufficient detail and omissions in the modularity, reliability, functionability and vendor capability sections of the proposal, and therefore would not be included in the forthcoming contract negotiations. Teledyne's protest telegram to this Office followed. A technical debriefing conference was held on January 20, 1972, at which time Teledyne was notified of the reasons for declaring the technical proposal unacceptable, and you have been furnished with a report on the technical deficiencies found within Teledyne's proposal which was submitted to this Office. Protests were also filed by Avtel Corporation and by TMC Systems and Power Corporation, two other firms whose proposals were found technically unacceptable under this procurement. FAA, citing the urgency of its requirements, awarded a contract to AiResearch Division of Garrett Corporation on June 9, 1972, while these protests were pending. We denied the Avtel and TMC protests in B-174870 (1) and (2), dated July 3, 1972.

You allege that Teledyne submitted enough technical data to be in the competitive range, so as to require FAA to conduct negotiations with Teledyne and that the agency failed to take price into consideration in determining if the proposal was within the competitive range. Our decisions published at 45 Comp. Gen. 417 (1966) and at 47 Comp.

Gen. 29 (1967) are cited in this regard. In addition, you assert that Teledyne should have been allowed to correct any deficiencies in its proposal and that Teledyne was found to be outside the competitive range on the basis of an improper predetermined scoring method.

As a result of the evaluation of the technical proposals submitted, three firms were considered to be acceptable, while three other firms, including Teledyne, were rated unacceptable. FAA has reported to us that the Teledyne proposal did not meet the requirement that the module isolate and protect itself in the event of an internal failure. According to the FAA, Teledyne's module will only isolate and protect the circuitry between the line bus and the SCR; it will not isolate and protect the circuitry between the SCR and the load bus. FAA also reports that the Teledyne proposal deviates from the specification requirement that the UPS shall be capable of clearing a distribution system fault and returning critical voltage to at least 90 percent in less than 8 milliseconds. The Teledyne discussion of fault-clearing characteristics (page 3–9 of its proposal) states that the voltage dips to 30 percent for one-half cycle and recovers to 90 percent "by next half cycle," and FAA interpreted this to mean that up to one full cycle (16.7 milliseconds) would be required to return the voltage to 90 percent at the distribution point. Additionally, the FAA reports there are several "suspect areas" which could not be evaluated due to a lack of a detailed presentation. For example, the FAA points out that Teledyne did not demonstrate how future units could be added without turning off the entire operating system, and the requirement that connecting cables enter and exit from the bottom of UPS cabinet is not met in that Teledyne's proposal only mentions rear entrance cables and the photo of the Teledyne system only shows top connections.

In reply, Teledyne states that it either meets the technical requirements and/or does not take exception to the requirements. It alleges that its system has been proven to be reliable and capable of meeting the FAA standards on module isolation, module protection and fault clearing. It also claims that it was found to be within the competitive range on two prior FAA procurements for "virtually identical" equipment, thus making suspect the determination in this case that its proposal was so technically deficient so as not to be in the competitive range.

Much of the disagreement between FAA and Teledyne in these areas turns on Teledyne's proposed technique of using the inverter power silicon controlled rectifiers (SCR) as a solid-state disconnect switch to isolate failures and protect the system. It is FAA's view that a separate high speed disconnect device is necessary rather than the "relatively slow Government furnished circuit breakers not intended

for this proposal" which Teledyne proposes to rely upon. On the other hand, Teledyne argues that its proposed technique is a "superior and more reliable method as compared to use of a separate solid-state disconnect switch." For example, with regard to the issue of module isolation Teledyne states the respective positions of the parties as follows:

> FAA contends that a solid-state switch must be electrically positioned directly at the output of a module and implies that this is a Specification requirement. Inet points out that this is *not* a Specification requirement and contends that the switch position should not be at the output terminals, but rather ahead of the filter and output power transformer.
> The Inet position is supported by mathematical failure mode analysis which demonstrates that there is a lower overall failure rate for the UPS with the Inet placement and therefore a higher MTBF [mean time between failure] for the UPS. Inet's position is likewise proven by the comparative *much* higher reliability of Inet UPSs in the field than the FAA sponsored AiResearch UPS design. For example, the New York Stock Exchange UPS used as the basis for Teledyne Inet's Proposal has operated continuously for eighteen (18) months without a single system failure; whereas the AiResearch UPSs at Islip and Kansas City have had numerous failures and have dropped the FAA critical load a number of times.

It is not our function to resolve technical disputes of this nature. The determination of whether a proposal is technically acceptable is a matter of administrative judgment, and we will not disturb that judgment absent a clear showing that the agency acted arbitrarily or unreasonably. 48 Comp. Gen. 314 (1968). Although the record contains correspondence noting Teledyne's acceptable performance for various Naval procurements, we cannot conclude that the FAA's judgment as to the unacceptability of the Teledyne proposed system for FAA's purposes is arbitrary or unreasonable.

It is your contention that even if Teledyne's proposal was deficient, FAA should have allowed Teledyne to correct its proposal. You point out that Avtel Corporation was requested to supply information to clarify its proposal and you consider this to be unfair treatment. You cite B–173716, December 7, 1971, as standing for the proposition that the procuring agency has a duty to request omitted information from an offeror when that offeror is experienced in producing the item to be purchased, and assert that this duty was breached in the instant case.

We have held that a proposal must be considered to be within the competitive range so as to require negotiations unless it is so technically inferior that meaningful negotiations are precluded. 48 Comp. Gen. 314, *supra*. However, in that same case, we also recognized that the determination of competitive range, particularly with respect to technical considerations, is a matter of administrative discretion which will not be disturbed absent a clear showing that the determination was arbitrary or capricious.

In the present situation, Teledyne's proposal was found to be technically unacceptable for a number of reasons, some of which involved

the omission of certain information from the proposal. In FAA's view, these omissions were related to basic requirements of the system to be procured and warranted rejection of Teledyne's proposal. Under these circumstances, your reliance on B–173716, *supra*, is misplaced, since in that case we found that the rejected proposal was merely "informationally deficient" and not technically unacceptable. *See* B–169908, July 31, 1970.

Furthermore, we do not believe that a duty should be imposed on the procuring activity to request information or clarifications regarding material omitted from a proposal when that omission is related to a basic requirement. B–174056, June 1, 1972.

We believe the cases you cite are easily distinguishable from the instant situation. In 45 Comp. Gen. 417 (1966), the agency elected to conduct negotiations only with one offeror, who was determined to be technically superior to the other offeror. We concluded that it was improper to exclude the other offeror from negotiations based on a determination that the offeror's proposal was merely *technically inferior and not technically unacceptable.* In 47 Comp. Gen. 29 (1967) the protestant (Honeywell) was excluded from negotiations because it failed a "benchmark" or live test demonstration. Since there was a substantial price savings between the Honeywell proposal and the only proposal found to be in the competitive range and it appeared that Honeywell was capable of passing the benchmark test within a relatively short time we held that its proposal should not be deemed technically unacceptable merely because of failing the benchmark test. Here, of course, there was an administrative determination that the Teledyne proposal was technically unacceptable as compared to the three proposals found to be acceptable. While you contend that the Teledyne proposal offers a substantial price savings to the government, we are unable to conclude that the Teledyne proposal was readily capable of being made technically acceptable.

Concerning the FAA request for additional information from Avtel, our review of the record indicates that the information requested, pursuant to the preliminary review and not during or after the technical evaluation, was for the purpose of clarifying Avtel's experience record rather than submission of technical data (Avtel had previously submitted experience information but the submission was vague). In any event, Avtel's proposal was also declared technically unacceptable.

You urge that in the evaluation of the technical proposal a predetermined score for unacceptability was employed rather than making a determination based on the actual array of scores achieved. The technical evaluation criteria was described in Exhibit B to the RFP, which

states that there are two equally weighted categories, system design and vendor capability, and each of these categories would be subdivided into three subcategories for a total of six categories of equal importance. The evaluation process included a "normalization" value system whereby the highest rated proposal was equated to 100 points and the remaining proposals were then converted to a normalized point rating by formula. The FAA decided that a proposal should obtain a rating of at least 85 points in order to be considered technically acceptable.

Teledyne received a score which fell well below the acceptable cutoff point of 84. While we have objected to the use of a predetermined cutoff score to determine competitive range, 50 Comp. Gen. 59 (1970), in view of Teledyne's low score in comparison to the array of scores achieved by the other offerors, we do not find that the agency's decision to exclude Teledyne from negotiations was improper.

You also claim that the determination that Teledyne was not within the competitive range was improper because price was not taken into account. You assert that consideration of price is required by 10 U.S. Code 2304(g), which states that "proposals, including price, shall be solicited from the maximum number of qualified sources * * *" and requires negotiations to be conducted with all responsible offerors "within a competitive range, price and other factors considered." You point out that while 10 U.S.C. 2304(g) applies to military procurements, we have treated its requirements as being applicable to civilian procurements as well. 50 Comp. Gen. 110 (1970). In support of your assertion, you refer to the legislative history of the Department of Defense Appropriation Authorization Act of 1969, September 20, 1968, Public Law 90–500, Title IV, sec. 405, 82 Stat. 851, 10 U.S.C. 2304, which added the requirement that price be included in all proposals solicited from qualified sources. You also have furnished us with a letter from Congressman Richard H. Ichord who, as Chairman of The Special Subcommittee on the M–16 Rifle Program, was directly involved with the 1968 amendment. Congressman Ichord states his belief that the purpose of the amendment was to prevent a determination of whether or not a firm was within or without a competitive range without consideration being given to price.

The words "including price" were added to 10 U.S.C. 2304(g) in response to an Army procurement of M–16 rifles in which awards were made to two offerors on the basis of the technical superiority of their proposals, without regard to price. The history of that procurement reveals that the Army originally evaluated four proposals as technically acceptable, but subsequently determined that it would be

best assured of having its needs satisfied by accepting the two highest rated technical proposals, regardless of price. The Army then awarded letter contracts to those offerors without looking at the price proposals of the other two offerors. Because the contract prices were significantly higher than the price proposals of the unsuccessful offerors, concern was expressed in Congress that public funds were unnecessarily expended, and legislation was introduced "for the express purpose of prohibiting in the future the waste of public funds which occurred * * * in the M–16 Contract awards." 114 Cong. Rec. 20736. This was more fully explained as follows:

> The purpose of this section is to close the loophole which allowed the Army to make the recent awards for the procurement of M–16 rifles without considering price proposals from all qualified bidders. It would insure that on future negotiated procurements of this type mentioned the military departments will have to consider at least ceiling prices proposed by all qualified bidders. H. Rept. No. 1869, 90th Congress, 2d sess. 10.

Although we respect the views of Congressman Ichord and recognize that there is some support for the position you take, we do not believe that 10 U.S.C. 2304(g) requires that price must be considered in all instances in determining what proposals are in a competitive range. To accord such an interpretation to the law would place procurement officials in the unreasonable position of having to consider the price proposals of all offerors, no matter how deficient or unacceptable the accompanying technical proposals might be. We do not believe that Congress intended such a result. Rather, it seems to us that Congress wanted to insure that the prices proposed by qualified offerors who submit acceptable proposals would be considered prior to the making of awards to higher priced offerors on the basis of technical considerations alone.

We think this view is supported by our previous decisions, including those you cite in your letters. We have stated, both before and after enactment of the 1968 law, that competitive range encompasses both price and technical considerations, 45 Comp. Gen. 417 (1966); 47 *id.* 29 (1967); 50 *id.* 1 (1970), and that the negotiation of a contract without price competition on the basis that a particular offeror would furnish services of a higher quality than any other offeror was contrary to 10 U.S.C. 2304(g). 50 Comp. Gen. 110 (1970). Our concern in these cases stemmed from the absence of either meaningful or actual price competition as required by statute, and we objected to the elimination from competition of all but one offeror without appropriate consideration of price.

These decisions do not indicate, however, that price must be con-

sidered in all instances in determining competitive range. Our statements that both price and technical considerations are encompassed in "competitive range" mean that in appropriate cases either factor can be determinative of whether an offeror is in a competitive range, and we have frequently recognized that price need not be considered when a totally unacceptable technical proposal is submitted. B–168190, February 24, 1970; B–169908, July 31, 1970; B–160671, August 31, 1970; B–170317, February 2, 1971; *see, also*, 49 Comp. Gen. 309 (1969) and 50 *id.* 565 (1971). Accordingly, we respectfully disagree with your position on this point.

Finally, you state that the procuring activity did not adequately inform you of the evaluation criteria and related weight thereof. You cite 50 Comp. Gen. 59 (1970), where this Office stated that sound procurement policy dictates that offerors be informed of all evaluation factors and of the relative importance of each factor. We believe that the information provided in Exhibit B to the RFP was sufficiently clear and adequate to inform Teledyne of the major evaluation factors and weights thereof.

For the reasons stated above, the Teledyne protest must be denied.

[B–176206]

Bidders—Responsibility *v.* Bid Responsiveness—Information

The requirement that bids under an invitation soliciting custodial services be accompanied by an outline of the bidder's proposed method of operation as to job and work force, method of supervision, types and quantities of equipment, and performance schedules is a matter of bidder responsibility and not bid responsiveness, notwithstanding an invitation provision for the mandatory rejection of bids that failed to furnish the required information, since the method of operation pertains to "know-how," which is an element of responsibility as the specifications form the basis for the actual work requirement. However, should it be deemed desirable to require an outline of a bidder's method of operation, the invitation should state the purpose of the requirement and how the outline will be considered in the selection of the successful bidder and in the administration of the contract.

Bids—Evaluation—Method of Evaluation—Change Propriety

The holding in *Albano Cleaners, Inc.* v. *United States*, 197 Ct. Cl. 450, does not require the conclusion that a procuring activity's established treatment of the outline of a bidder's proposed method of operation as a matter of bid responsiveness rather than bidder responsibility must be adhered to and is not subject to change as the court recognized that a contracting agency is not estopped from ceasing a particular treatment employed in prior procurements in awarding new contracts.

To Lewis, Mitchell & Moore, December 21, 1972:

Further reference is made to your protest on behalf of Nationwide Building Maintenance, Inc. (Nationwide), under invitations for bids

(IFBs) Nos. DAHC-30-72-B-0107 and -0138, issued by the Military District of Washington, Cameron Station, Alexandria, Virginia. Originally you had protested against any award to other than your firm under four IFBs issued by the same command, but two of the protests were withdrawn inasmuch as your client received the awards under those solicitations.

The subject invitations solicited bids for supplying custodial services at the Tri-Service Barracks, Fort Myer, Virginia, and 16 buildings at Fort McNair, respectively, for the period of July 1, 1972, through June 30, 1973. Award has been made under IFB 0107 to Kentucky Building Maintenance, Inc. (Kentucky), and to Kleen-Rite Janitorial Services, Inc., under IFB 0138, notwithstanding the protest. In this regard, you question whether the Department of the Army has followed the requirements of paragraphs 2-407.8(b) (2) & (3) of the Armed Services Procurement Regulation (ASPR) in making the referenced awards. While it is regrettable that you did not learn of the award under IFB 0107 until August 25, 1972, our Office was informally advised of the Army's intention to make the award on July 27, 1972, which notification was followed by our receipt on August 1, 1972, of copies of the written determination to make the award on the ground of urgency. Similar reasons were given for the award on October 20, 1972, under IFB 0138, which action you have protested directly to the Army. We therefore have no basis to question the awarding of the contracts prior to the resolution of your protest, as it appears that the referenced regulations were followed.

Essentially, your protest is on the basis that bids submitted without a satisfactory outline of a proposed "method of operation" were nonresponsive, and such a defect therefore could not be corrected after bid opening. You also contend that failure to reject such bids changed the evaluation criteria set out in the invitations.

In this connection, both invitations provided, in pertinent part, substantially as follows:

EACH BIDDER SHALL submit with his bid an outline of his proposed method of operation. The outline shall be subject to review and approval by the Contracting Officer and shall include, but not be restricted to, the following:

(a) Organization of the job and work force;
(b) Method of supervision, including number of supervisors and their qualifications;
(c) Types and quantities of equipment; and
(d) Schedules of performance of non-daily tasks including dates work is to be performed.

Outlines will be returned to the unsuccessful bidders after award of the contract. Failure to submit such outline shall result in rejection of bid as non-responsive.

Failure to submit a method of operations meeting with the approval of the Contracting Officer shall result in rejection of bid.

* * * * * * *

SECTION D EVALUATION FACTORS FOR AWARD

1. Award will be made to one responsive, responsible low bidder.
2. Bidders failing to submit the Method of Operations as required in Section C will be rejected as non-responsive. The Government reserves the right to reject bidders on the basis of their Method of Operations.

It is your position that:

The information solicited by the instant "method of operation" relates to what specifically the contractor is offering in response to the IFB. It would indicate whether he understood what was required of him, and whether he intended to supply that which was required. Thus the "method of operation" requirement would appear to be a response to the specific problem of bidders not offering what the IFB was soliciting and any bid which does not contain it should be rejected as non-responsive.

You therefore contend than since neither Kentucky's bid, under IFB -0107, nor Kleen-Rite Janitorial Services, Inc. (Kleen-Rite), bid under IFB -0138, included a completely satisfactory plan of operation, their bids under each referenced solicitation should have been rejected as nonresponsive, and you cite several of our decisions as support for this contention.

We have reviewed most carefully your citations and arguments in support of your position, but we are of the view that the information called for under the above-quoted provisions of the invitations concerns the responsibility of the bidders. Such information as organization of job and work force, method of supervision, type and quantities of equipment and schedule of performance of nondaily tasks, generally relates to a bidder's *ability* to perform in accordance with the contract terms, and not to his *obligation* to perform the janitorial services in exact conformity with the extensively detailed specifications included in the invitation. In the instant case the requirement for a bidder to submit with his bid an outline of his proposed method, or plan, of operation clearly pertains to a demonstration of the bidder's "know how" to perform the required services, and the matter of "know how" has been held to be an element of responsibility. 38 Comp. Gen. 864 (1959); 45 *id.* 4 (1965).

While the requirement for the above information was stated in mandatory terms, it does not appear that this information was intended to operate to define or limit the bidder's obligations under the contract to be awarded. Neither may a matter of responsibility be treated as one of responsiveness merely because of a statement to that effect in the solicitation. 42 Comp. Gen. 464 (1963). We view these IFBs as solicitations for contracts for the performance of definitely described and enumerated janitorial services, and not for the furnishing of

equipment, employees, or organization as such, other than as those factors may be incidental to the proper performance of the required services. 37 Comp. Gen. 143 (1957); 42 *id.* 728 (1963); 43 *id.* 77 (1963); 51 *id.* 329 (1971); B–165689, January 29, 1969; B–165094, October 18, 1968 (a case in which your client had initially failed to furnish similar information); and B–168396, February 2, 1970. Thus, the failure of the low bidders to submit acceptable outlines with their bids is not fatal to consideration of their bids, inasmuch as the bidders' ability or responsibility may be determined on the basis of information submitted after the opening of bids. 39 Comp. Gen. 247 (1959); *id.* 881 (1960); 41 *id.* 555 (1962). We have also held that the failure of a bidder to submit information with his bid, even when specified by the invitation, as in this case, does not render his bid nonresponsive. 42 Comp. Gen. 464 (1963).

While we have recognized in certain cases involving a product that technical data, necessary for determining whether the specifications would be satisfied by the item offered, may be required with a bid for the purposes of bid evaluation, 40 Comp. Gen. 132 (1960), under the terms of the subject invitations bidders were required to bid on performing the work as set forth in the specifications, and the outlines were not necessary for the purpose of determining whether the services offered were the same as those specified. Since the specifications form the only basis for the actual work requirements of the contracts awarded, or to be awarded, bidders' outlines of their methods of operation could properly be used in the awarding of the contracts only to evaluate the bidders' "know how" to perform such requirements, an element of responsibility, and not to determine whether they were offering to perform the required work.

Furthermore, we are of the view that permitting the bidders to submit, after bid opening, supplemental or modified outlines of their methods of operation, even though the outlines vary from the original data submitted, is not synonymous with allowing a bidder to change his bid after bid opening. Since the bidders agreed to comply with the specifications in all respects, the bidders legally could not have refused to accept award of the contract on the ground that their bids were defective because they did not contain complete or adequate information. *Cf.* 37 Comp. Gen. 143, 146 (1957). In this regard, there is no evidence that any bidder was afforded an opportunity to copy another bidder's outline of his method of operation or was otherwise afforded an unfair competitive advantage.

In view of the foregoing, we are troubled that the invitations pro-

vided that the method of operation would be considered in evaluating the bids, since the work requirements which the successful bidder would be contractually bound to perform were set forth in the specifications, and an evaluation of responsiveness could properly be made only on the basis of what was advertised for inclusion in the contract. There was no indication that a bidder's outline of his proposed method of operation would be included as a provision to be adhered to in any resultant contract. We are therefore suggesting to the Secretary of the Army that in future solicitations, when it is deemed desirable to require an outline of the bidders' proposed method of operation, there be included in the invitation a definite statement as to the purpose of such requirement and, particularly, how the outlines will be considered both in the selection of the successful bidder and in the administration of the contract.

Finally, we cannot construe the holding in the case of *Albano Cleaners, Inc.* v. *United States*, 197 Ct. Cl. 450, as requiring the conclusion that the procuring activity's alleged established treatment of the outline of a bidder's proposed method of operation, i.e., as a matter of responsiveness, must be adhered to and is not now subject to change. In that case the court recognized that even where certain qualifications in bids had received a particular treatment by an agency in prior procurements, that agency was not estopped from ceasing such treatment of bids in the awarding of new contracts. Therefore, even if the procuring activity had previously considered the submission of an acceptable outline with the bid to be a matter of responsiveness, we do not regard the cited case as supporting your contention that the procuring activity could not now properly consider the outline requirement as a matter of responsibility in the awarding of the subject IFBs.

For the foregoing reasons, we conclude that no legal basis exists for objecting to the award of the contract to Kentucky, the lowest responsive, responsible bidder under IFB –0107 or to the proposed award to Kleen-Rite under –0138.

Accordingly, your protest on behalf of Nationwide is denied.

[B–176438]

Contracts—Negotiation—Limitation on Negotiation—Propriety

The award of a contract for retrofit kits under 41 U.S.C. 252(a)(10), which permits negotiation where it is impracticable to obtain competition, to other than the contractor who submitted the low final offer on the basis the guarantee clause requirement and the technical requirements of the specifications were not met, without affording the low offeror additional opportunity to negotiate the

areas of unacceptability of the offer, will not be overturned in the absence of proof that agreement was reached during negotiations concerning the disputed differences as the self-serving statements of the contractor incident to its best and final offer that all aspects of revision had been agreed to during negotiations may not be the means of forcing the reopening of negotiations, and since no significant uncertainties remained for resolution, the contracting officials under their vested authority properly determined when to terminate negotiations.

Contracts—Specifications—Conformability of Equipment, Etc., Offered—Administrative Determination—Negotiated Procurement

Under the well-settled rule that the drafting of specifications to meet the Government's minimum needs, as well as the determination of whether items offered meet the specifications, is properly the function of the procuring agency, absent arbitrary action, the fact that the United States General Accounting Office (GAO) staff electrical engineer's evaluation indicated that only two and not the four areas relied upon by the procuring agency were technically unacceptable is not tantamount to arbitrary action on the part of the agency. Therefore, on the basis of this honest difference in technical opinions, the GAO will not substitute its judgment for that of the procuring agency, which in B-176438(2) was advised that a contemporaneous and complete written record should be required in future procurements as an aid in the resolution of disputes.

To vom Baur, Coburn, Simmons & Turtle, December 27, 1972:

By letter dated November 6, 1972, and by prior correspondence, you protested on behalf of Collins Radio Company the award of a contract to Microwave Engineering Inc., under request for proposals (RFP) WA5M-2-7492, issued by the Federal Aviation Administration, Department of Transportation (FAA).

The subject RFP was for retrofit kits for solid state IF amplifier and video modulator kits to replace existing tube type equipment and was negotiated under the authority of 41 U.S. Code 252(c)(10), which permits negotiation where it is impracticable to obtain competition. Award was made to Microwave Engineering as the low, technically acceptable offeror on June 30, 1972, notwithstanding the fact that the final Collins offer in the amount of $2,566,925 was some $116,000 lower than the contract price on which award to Microwave was based.

This protest is concerned with the manner in which negotiations were conducted with Collins and peripherally with the substantiveness of certain exceptions taken by Collins during negotiations to the RFP requirements. The pertinent facts in this matter may be briefly summarized. Three of the four proposals submitted by January 18, 1972, the closing date for proposal submission, including that of Collins, were determined to be within a competitive range so as to qualify for negotiation. Initial offers of the three qualified offerors for the amended RFP quantities were as follows:

Microwave Engineering, Inc.	$3,114,329
Terracom	3,558,176
Collins Radio Company	5,053,810

The Government estimate for these quantities was $2,735,000.

Negotiations were conducted with all three offerors within the competitive range with the offers of Microwave and Terracom ultimately determined to be technically acceptable and the Collins proposal rejected as technically unacceptable. Negotiations leading to the determination of unacceptability of the Collins proposal were conducted with Collins on April 11, 1972, and in the words of FAA's administrative report "completed by telephone on 25 April 1972." The substance of the April 25 telephone negotiations is not disclosed by the record before us and there is a factual dispute between Collins and FAA as to what was agreed at the April 11 negotiation meeting.

FAA's position in this regard is that Collins was informed of numerous technical qualifications in its proposal which would render the proposal technically unacceptable unless withdrawn or modified and Collins maintains, on the other hand, that it was informed during negotiations that its proposal, including the various technical qualifications, was technically acceptable without change. What is undisputed, however, is that by letter dated April 24, 1972, hand delivered to the contracting officer before issuance of FAA's April 26 telegraphic request for best and final offers, Collins reduced its price and stated that its proposal was subject to technical and other qualifications itemized therein, which qualifications were alleged to have been agreed to at the April 11 negotiation conference.

The FAA administrative report indicates that although the contract negotiator scrutinized Collins' April 24 letter from the standpoint of the Collins price reduction contained therein, as he did the May 1 letter from Collins containing Collins' best and final price offer and reiterating the technical reservations taken by Collins, these letters were not evaluated from an engineering standpoint until May 13, 1972, when the letters were referred to the Chief of FAA's Long Range Radar Branch, notwithstanding the request following receipt of the April 24 Collins letter for best and final offers. On May 9, 1972, some 12 days before award was made to Microwave, the Chief, Long Range Radar Branch advised the contracting officer that the Collins' proposal was technically unacceptable because it deviated substantially from RFP requirements in that it offered a guarantee clause different than that called for by the RFP, and failed to meet specification technical requirements in the areas of bandwidth, linearity, envelope delay, and design qualification tests. On the basis of this engineering report, and without extending any additional opportunity to negotiate these exceptions to Collins, the Collins proposal was rejected as technically unacceptable and, as indicated above, award was made to Microwave

at a price higher than that finally offered by Collins (i.e., a $2,683,239 final offer from Microwave as opposed to a $2,566,925 final offer from Collins, a difference of $116,314).

The Collins protest is to the effect that all of the deviations from RFP requirements are minor both from the standpoint of their impact on performance and from the standpoint of their impact on price, and that in any event, such deviations were discussed during negotiations and agreed to by FAA. In the alternative, Collins argues that even if it is conceded that some or all of the deviations were properly determined by FAA to have been substantial, the failure of FAA to advise Collins of this determination before requesting Collins' best and final offer or, failing that, to reopen negotiations before awarding a contract to Microwave, was such a serious breach of applicable statutory and regulatory procedures as to warrant termination of the Microwave award. In this regard, Collins now contends that in view of what it considers to be the minor nature of the exceptions taken, it would have freely withdrawn any or all of them had it been informed during negotiations that they were unacceptable to FAA, and that the price impact of such withdrawal would have been insignificant so that Collins' favorable position as low offeror would not have been affected.

In our opinion, the crux of this case lies in the resolution of the factual dispute between FAA and Collins as to what transpired during negotiations because it is our opinion that if, in fact, it were to be determined that Collins was not advised of the unacceptability of its proposal qualifications during negotiations, the failure to so advise the company before requesting best and final offers would have represented an unacceptable deviation from regulatory requirements concerning negotiations. As discussed in greater detail below, however, we are unable to resolve conclusively this factual dispute. Therefore, and since the undisputed record is clear that a reasonable negotiation opportunity was extended to Collins, we must decline Collins' suggestion that we overturn the award to Microwave.

Federal Procurement Regulations (FPR) 1-3.804, "Conduct of Negotiations," requires that "complete agreement of the parties on all basic issues shall be the objective of the contract negotiations," and that "Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid." As indicated above, Collins points to its April 24 letter as proof that agreement was reached during negotiations that its various exceptions were acceptable or in the alternative as establishing a duty on the part of the contracting officials

to reopen negotiations in order to resolve the "uncertainties" caused by Collins' stated position that its exceptions had been agreed to during negotiations and to achieve the "complete agreement" envisioned by FPR 1–3.804.

However, we cannot conclude on the basis of the record before us that Collins has proven that the agreement which it contends was reached, i.e., that all of its technical exceptions were acceptable to FAA, was in fact reached. In this regard, while Collins contends that its April 24 letter indicating agreement serves to prove its contention that such agreement was reached as to the acceptability of the Collins technical exceptions, we note that letter states in the first paragraph that "the *revisions/comments* to the technical and contractual portion of the proposal were agreed to by both parties and represent the contractual baseline for issuance of a contract for the subject Retrofit Kits." The fact that "revisions/comments" were considered to be necessary by Collins indicates to us that the items revised or commented on were questioned by the contracting officials during negotiations and therefore were not agreed to as it would seem only logical to leave any portions of the proposal which were acceptable as originally submitted without comment and certainly without "revision." Therefore, our resolution of this protest must be on the basis that the technical exceptions here involved were questioned during negotiations and that as a result of such discussions, Collins submitted the April 24 "revisions/comments" letter. However, the April 24 letter contains no evidence of the agreement of the parties as to the nature and extent of such revisions other than Collins' self-serving statement that the contents of its letter represent the revisions agreed to by the parties. In our opinion, this self-serving statement cannot be considered convincing in view of FAA's contrary assertion and the lack of any documentation in the file before us as to agreements reached during negotiations. [Italic supplied.]

Furthermore, we cannot conclude, in the absence of proof that agreement was, in fact, reached at negotiations as to the acceptability of the Collins exceptions or revisions that there was any duty on the part of the contracting officials to consider further the Collins proposal after receipt of the April 24 letter.

In this regard, the authority to determine when to terminate negotiations on the ground that no significant uncertainties remain for resolution properly is vested in the contracting officials. *See* B–174327, May 12, 1972, wherein it was held that no obligation to reopen negotiations existed where an offeror merely defended its originally sub-

mitted system by attempting to broaden the definition of certain technical requirements and that rejection of the proposal as technically unacceptable at that point without further discussion was not subject to question. *See also* B-169633(1), January 4, 1972; B-174436, April 19, 1972; B-171591, November 17, 1971.

We do not think it is appropriate for an offeror to force the reopening of negotiations by submitting a proposal revision following negotiations containing the self-serving statement that all aspects of the revision were agreed to during negotiations when that statement is disputed by the contracting officials, particularly where the offeror after the fact and notwithstanding the submission of such revisions contends that its proposal was determined to be technically acceptable during negotiations. Nor do we perceive any obligation on the part of the contracting officer to ascertain the materiality of exceptions taken in such an after-negotiation modification, or whether or not they were in fact agreed to during negotiations, before requesting best and final offers, so long as their materiality is ascertained before award, particularly where, as here, the technical exceptions are somewhat voluminous and are placed in the hands of a nontechnical contracting official literally hours before solicitation of best and final offers. Further, given the FAA position that the Collins technical exceptions were not agreed to during negotiations, the contract negotiator's apparent assumption that the "agreement" referenced in the April 24 letter had reference to the revision by Collins of those technical aspects of its proposal considered by FAA at negotiation to be unacceptable would not appear to be unreasonable. While an offeror certainly has the right in a negotiated procurement to offer deviations from specifications which he feels are appropriate, the Government has a corresponding right to determine whether those deviations in fact meet the Government's minimum needs.

Therefore, once having been informed of unacceptable proposal qualifications during negotiations, which we must assume to have been the case in this instance in view of the factual dispute previously mentioned, it seems to us that an offeror assumes the risk of proposal rejection if he refuses to withdraw or substantially revise the exceptions upon submission of his best and final offer. The fact that best and final offers were requested without advising Collins a second time that its exceptions (amplified but not changed by the April 24 letter) were unacceptable was not prejudicial to Collins in our opinion. Collins, if it was unwilling to withdraw its exceptions, could still submit a reduced best and final offer in the hope that FAA, in the light of Collins'

reduced final price offer, would reconsider its determination that the exceptions were substantial and reopen negotiations with competing offerors. This FAA did not do, however, and we cannot conclude that its action in this regard is subject to question.

Accordingly, we conclude that the failure to reopen negotiations with Collins was not improper and that the "error" conceded in the supplemental administrative report with regard to the failure to advise Collins again of its proposal unacceptability was not material. While rejection of Collins' proposal as technically unacceptable before requesting best and final offers might have been preferable to allowing Collins to submit its final offer based on its unacceptable technical qualifications, such notification would not have provided any basis for Collins to request that negotiations be reopened, nor would it have resulted in any change in the ultimate decision to award to Microwave.

The question of the substantial nature of the four Collins exceptions relied on by FAA for proposal rejection (i.e., bandwidth, linearity, envelope delay, and design qualification tests), was submitted to a GAO staff electrical engineer for comment, pursuant to your request. The GAO engineering evaluation concluded, in essence, that the FAA specification requirements for linearity and envelope delay were sufficiently broad and indefinite so as to allow the approaches proposed by Collins in these areas. With respect to the areas of design qualification tests and bandwidth, however, the evaluation concluded that "Collins' proposal, as amended by their April 24, 1972, letter was not responsive to reasonable FAA design qualification tests and bandwidth requirements," and stated that a Collins proposal error in the stated bandwidth parameters of the proposed Collins equipment, not discovered until after award, was "inexcusable." Although the engineering evaluation parenthetically comments that all of the Collins technical qualifications "should have been easily resolved during negotiations," this comment is not germane in view of the factual dispute with respect to the nature of the agreement reached during negotiations discussed above. Thus, the import of the GAO engineering evaluation is that the Collins proposal was technically unacceptable in two of the four areas advanced by FAA.

Further, the well-settled rule of our Office is that the drafting of specifications to meet the Government's minimum needs, as well as the determination of whether items offered meet the specifications, is properly the function of the procuring agency, absent arbitrary action. B–169633(1), *supra.* We do not think that an honest difference of technical opinion is tantamount to arbitrary action on the part of a

procuring agency so that we would be reluctant to substitute our judgment for FAA's in this case even if our engineering evaluation disagreed with the FAA position in all respects.

On the question of the materiality of Collins' insistence on the use of its own guarantee clause, it may well be that the price impact of such a deviation is minimal on a statistical basis, as argued by Collins. Nevertheless, the terms of the Collins guarantee clause are significantly less stringent than those of the FAA clause and we cannot conclude that FAA's insistence on its own clause was unreasonable.

Although we conclude in accordance with the above discussion that the Collins protest must be denied, our review of this case has revealed deviations from good procurement practice which we are calling to FAA's attention by letter of today to the Secretary of Transportation toward the end that such deviations not be repeated in future similar situations. A copy of that letter is enclosed for your information.

[B–176326]

Bids—Mistakes—Recalculation of Bid—Correction *v.* Withdrawal

A bidder who, when contacted by telephone to confirm unit prices quoted and the basis for delivery, referred to an earlier telegram which the procurement agency never received that increased unit prices based on delayed supplier final quotations, and then furnished a copy of the telegram to the agency, does not have the option of withdrawing or correcting its bid because of mistake. Correction of the bid may not be permitted since the revised prices represent a recalculation of the bid based on factors not considered until after the bid was prepared and submitted, a situation that does not come within the rule that permits bid correction upon the establishment of evidence of mistake and the bid intended if the correction does not displace lower bids. However, as the evidence does establish a mistake occurred but not the bid intended, the bid may be withdrawn.

To the Director, Defense Supply Agency, December 29, 1972:

Further reference is made to the protest by Henry Spen & Company, Incorporated (Spen), against the award of a contract to any other firm under invitation for bids (IFB) No. DSA700–72–B–2207, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio, which was the subject of a report dated August 18, 1972, from the Assistant Counsel, Headquarters, Defense Supply Agency.

The IFB was issued on April 21, 1972, for a total quantity of 67 lubrication and servicing units (items 1 through 4), together with first article testing and related data (items 5 through 17). Bids were opened on June 6, 1972. Of the four (4) bids received, Spen submitted the lowest bid of $6,000 each on items 1 through 4 and is the lowest aggregate bidder on all items.

Spen's unit price of $6,000 for items 1 through 4 was considered out of line with the other bids received, and the prices bid on items 1

through 5 on page 12 of its bid were misaligned so that it could not be determined whether the bid was on an f.o.b. origin or f.o.b. destination basis. Spen was therefore contacted by telephone on June 9, 1972, and requested to confirm the unit price of $6,000 and the delivery basis. Spen confirmed that it was bidding f.o.b. origin, but stated that it had sent a telegram on June 5, 1972, increasing the unit price of items 1 through 4 by $1,982, and the total price of item 5 by $9,437. Spen mailed a copy of the telegram referred to in this telephone conversation, which was received by DCSC on June 13, 1972.

By letter of June 15, 1972, DCSC advised Spen that the telegraphic amendment had not been received from the telegraph company, and Spen was advised of the procedure to be followed in requesting the withdrawal or correction of its bid because of mistake. Reply was requested to be made not later than June 23, 1972. By letter of June 19, 1972, Spen advised that it would reply to the letter of June 15, 1972, after review by its attorney. On June 22, 1972, Spen was further informed that it must reply to the letter of June 15, 1972, by the close of business on June 26, 1972. By its telegram of June 23, 1972, Spen filed its protest with our Office.

By letter of July 10, 1972, from its attorneys the basis of Spen's protest was detailed. It is reported that Spen submitted its bid by mail on June 2, 1972, prior to receiving final quotes from suppliers, in order to make a timely submission. At Spen's final bid review conference on June 5, 1972, after which most suppliers had responded, it was discovered that some components and items had either been omitted from or erroneously priced in its bid. A telegram, correcting the omissions, was reportedly dispatched at 5:45 p.m. on June 5 via telephone to the IFB-designated location for bid opening. After it was informed that the telegram had not been received by DCSC, Spen made inquiries of Western Union and was informed that for some unexplained reason their Columbus, Ohio, facility had no record of said telegram, although the sending office did.

It is contended that Spen should be allowed to correct its bid and should receive the award, since the telegram, worksheets, affidavits, and supporting exhibits attached to your letter clearly and convincingly demonstrate, as required by Armed Services Procurement Regulation (ASPR) 2-406.3(a)(2), that a mistake was made by Spen in the preparation of its bid and what its intended bid price was.

On August 18, 1972, the Defense Supply Agency forwarded its report to our Office wherein it recommended that Spen be authorized to correct its bid by increasing the unit price of items 1 through 4 to $7,982, and that no correction be authorized on the first article testing requirements covered by item 5 of Spen's bid.

By letter of October 25, 1972, Spen's attorneys dispute the contracting officer's conclusion that no mistake was made on the price originally submitted for item 5 for the cost of the preproduction unit to be delivered and the cost of 200 hours for running time tests. It is stated that Spen's normal practice is not to refurbish the first article and then deliver it as a production unit, but rather to include the cost of an end item as a portion of its cost for a first article. Therefore, it is contended that Spen has established the making of a mistake in omitting the cost of a production unit ($7,982) from item 5. In addition, affidavits and worksheets are submitted to establish that Spen adheres to an industry practice of adding a factor of approximately 40 percent to 50 percent for running time tests to reflect the actual anticipated costs of the test, and that the sum representing this factor in the amount of $1,500 was omitted from its June 2 submission. It is contended, therefore, that Spen should also be authorized to correct its bid of $12,500 for item 5 by the additional amount of $9,437.

Under the applicable regulation, ASPR 2-406.3, where a bidder alleges a mistake after the opening of bids and prior to award, and clear and convincing evidence establishes both the existence of the mistake and the bid actually intended, the bid may be corrected, provided such correction will not displace lower bids. If the evidence is clear and convincing as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

With respect to item 5, your agency believes that while the telegram of June 5 establishes that Spen intended to increase its price by $9,437, the evidence of record does not clearly and convincingly establish that the original bid of $12,500 was in fact occasioned by a mistake. This determination is based primarily upon the fact that since the applicable first article clause does not require that the preproduction unit be delivered as part of the contract quantity, there is not sufficient evidence to support the claim that Spen inadvertently omitted the cost for an additional production unit. Also, the contracting officer points out that there is no objective evidence to support the claim that it is an industry practice to include a 40 to 50 percent factor for running time tests and that such factor was inadvertently omitted.

On items 1 through 4, your agency proposes to allow correction of the unit price from $6,000 to $7,982 on the basis that the $6,000 price was predicated on cost estimates that were substantially erroneous and did not include the cost of packing. In this connection, the bidder's affidavits reveal that the unit price of $6,000 was prepared on the basis of a previous bid which was believed to cover a substantially

identical item, and that when the bid was reviewed by the bidder on June 5, 1972, it was discovered that the cost of the lubrication equipment and the compressor had been seriously underestimated and that the cost of crating had not been included in the price. Since the Western Union has acknowledged that the Spen telegram was filed on June 5, your agency believes that this telegram may be considered as proof that Spen would have bid a unit price of $7,982 (f.o.b. origin), in the absence of a mistake, citing B–165434, dated December 2, 1968, and B–170311, June 3, 1971.

Based on the evidence of record, we do not believe it would be proper to permit correction of any part of Spen's bid. As stated, Spen's bid of $6,000 was prepared and submitted on the basis of a previous bid which was believed to cover a substantially identical item. Spen's evidence of mistake includes a "Preliminary B/M" (bill of materials), dated June 1, 1972, showing how the $6,000 was computed. The bill of materials reveals that the lubrication equipment cost was estimated on the basis of a 1968 vendor quote presumably furnished to Spen in connection with its previous bid for the "substantially identical item." The 1968 vendor quote indicates a cost of $1,306 per unit for the lubrication equipment. To this cost, Spen added a factor of 25 percent (apparently to reflect price increases and design changes in the equipment since 1968) to arrive at an estimated cost of $1,650 per unit for this equipment. The same pattern was followed by Spen in connection with the compressor, indicating a unit cost of $780 (including motor). On the last page of this June 1 bill of materials the following statements appear: "Bid $6,000" and "adjust when quotes are furnished." On June 5, 1972, after verbal quotes on the lubrication equipment and compressor components were received, Spen prepared a revised bill of materials to reflect unit costs of $2,947 and $887, respectively, for these components, or a total cost of $1,404 more than the costs estimated for these components on the initial bill of materials. Spen subsequently received written confirmation of these verbal quotes from its suppliers, which it has submitted with its claim of mistake. We have examined these written quotes and compared them to the 1968 quotes used by Spen in preparing the initial bill of materials; however, we are unable to determine from these quotes the extent to which the increased costs of $1,404 may be attributed to price increases since 1968, design differences in the equipment covered by the prior and current quotes, or to other factors. In addition to these increased component costs, the revised bill of materials includes crating costs of $300. This element of cost appears to have been entirely omitted from the June 1 bill of materials.

In any event, it is clear that the revised price of $7,982 per unit (and the increased price of $9,437 on item 5) represents a recalculation of bid

based on factors not considered by the bidder until after the bid was prepared and submitted. We have held that the rule which permits bid correction upon the establishment of evidence of mistake and the intended bid does not extend to permitting a bidder to recalculate and change its bid to include factors which the bidder did not have in mind when the bid was submitted. 50 Comp. Gen. 655, 660 (1971). In the cited case, a bidder overlooked certain applicable union wage rates in preparing its bid. We refused to allow correction since the wage rates were never a factor in the preparation of the bid, although the bidder was permitted to withdraw the bid. Similarly, in B–174620, February 2, 1972, a bidder erroneously bid one model of camera and after discovery of the error offered to furnish another model which met specifications, but at a higher price. Correction was not permitted since it would have allowed the bidder to recalculate and change its bid in violation of the rule. As noted in that decision, the bidder was not merely seeking to have the bid corrected so as to include a previously calculated cost item which had been inadvertently omitted from the amount of the submitted bid. *See also*, B–176899, November 24, 1972.

We are aware of our holding that a telegram received too late to be considered as a bid modification may nevertheless be considered as evidence in establishing the existence of a mistake and the bid actually intended. B–176314, December 4, 1972, B–165434, *supra*, and B–170311, *supra*. In B–176314, however, an award was made to the bidder based on its submitted bid price, despite the bidder's claim of error. We found that the late bid modification, when considered in conjunction with the other evidence of record, was adequate to establish the existence of a mistake and the intended price, and we concluded that the contract could properly be amended to reflect the intended bid price. Our decision of June 3, 1970 (B–170311) involved a similar situation (an award was made despite the bidder's claim of error). And in B–165434, it appears that the evidence of record was considered sufficient to permit bid correction under ASPR 2–406.3, but the bid was nevertheless rejected by the contracting officer because he felt that since the late bid modification could not be considered under the late bid rules, it should not be considered under the rules applicable to mistake. We do not believe that these decisions are applicable to the instant situation.

For the reasons stated above, we do not find that the evidence of record justifies correction of Spen's bid. On the other hand, we find a sufficient basis to allow withdrawal of the bid. In this connection, we have recognized that the degree of proof required to justify withdrawal of a bid before award on the basis of mistake is in no way comparable to that necessary to allow correction. 36 Comp. Gen. 441, 444 (1956). Accordingly, the bid may be withdrawn from consideration for award.

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Determination of Secretary of Agriculture to uphold denial by Regional Forester of claim for additional road construction costs under timber sales contract—denial reversed and restored administratively and then appealed to Secretary by contractor—was in conformance with 36 CFR 221.16(a), which provides for modification of timber sales contracts only when modification will apply to unexecuted portions of contract and will not be injurious to U.S., is final administrative determination within purview of 36 CFR 211.28(b), and Supreme Court ruling in *S. & E. Contractors, Inc.* v. *U.S.*, 406 U.S. 1, concerning finality of administrative determinations and, therefore, Secretary's decision is final and conclusive insofar as other agencies of Govt. are concerned, and it is not subject to review by GAO 196

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Holding in *Albano Cleaners, Inc.* v. *U.S.*, 197 Ct. Cl. 450, does not require conclusion that procuring activity's established treatment of outline of bidder's proposed method of operation as matter of bid responsiveness rather than bidder responsibility must be adhered to and is not subject to change as court recognized that contracting agency is not estopped from ceasing a particular treatment employed in prior procurements in awarding new contracts 389

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Bid transmitted by Telex system because amendment advancing bid opening date was not received until within 4 hours of bid opening time due to incorrect listing of bidder's address was properly rejected, even though bidder was advised during telephonic inquiry to use whatever means were available to transmit bid and had subsequently confirmed bid, since invitation for bids did not authorize telegraphic bids and late receipt of confirmation bid was not excusable. Although amendment changes are required to be furnished everyone sent invitation,

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Deletion of data identified as separate contract line items (CLINs) from solicitations contemplating award of multi-year contracts for urgently needed portable shelters and ward containers in order to avoid canceling solicitations because low bidder had qualified its bids by statement no charge would be made for several data CLINs provided Govt.'s drawing package met requirements for data item was in accord with terms of invitations for bids and thus was not prejudicial to other bidders. With the deletion, low bids became responsive since a bid need not be rejected for pricing response if item to which it was nonresponsive is not included in award. Furthermore, under circumstances, there was no impropriety in fact that the deletion was prompted by substantial difference in price between two lowest bids..... 190

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Erroneous

Improper *v.* illegal award

Partial cancellation of contract erroneously awarded for handling of surplus butter made available to Dept. of Defense by Dept. of Agriculture because erroneous freight rate evaluation resulted in award to other than low bidder should be changed to partial termination for convenience of Govt. since, while award was improper, it was not plainly or palpably illegal for displaced contractor had not contributed to use of erroneous freight rate furnished by Govt. activity and, therefore, it could successfully maintain action for damages computed under termination for convenience of Govt. clause of contract. 37 Comp. Gen. 330 and B–164826, Aug. 29, 1968, overruled 215

Labor surplus areas

Price differentials

Foreign bid price

Bid under invitation for bids that offered to furnish foreign source end items in response to solicitation for circuit breakers and related items, properly was evaluated by adding 12 percent factor required by sec. 1–6.104–4(b) of Federal Procurement Regs. (FPR) when bidder submitting low acceptable domestic bid is small business concern or labor surplus area concern, or both, as defined in FPR 1–1.801. The fact that low domestic bidder failed to indicate which labor surplus area it was claiming did not limit adjustment factor to 6 percent since location of performance information submitted by domestic bidder permitted determination that contract would be performed in substantial labor surplus area and, furthermore, for purposes of Buy-American preference, domestic bidder was not required to be "certified-eligible concern." .. 265

Propriety

Status of bidder, offeror, etc.

Award of contract to consortium of American Institute of Physics and American Chemical Society by National Bur. of Standards for publication and marketing of physical and chemical reference data

CONTRACTS—Continued
Awards—Continued
Propriety—Continued
Status of bidder, offeror, etc—Continued Page

using compilations presented in camera-ready form by National Standard Reference Data System is not in conflict with objectives of Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and general public" since neither language of act nor its legislative history evidences use of commercial publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, award was not violative of competition required by sec. 1-1.301-1, FPR, since requests for proposals were issued to commercial houses and all proposals received were properly evaluated---------- 332

Small business concerns
Set-asides
Postal service procurements

Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon---------- 306

Bids, generally. (*See* **BIDS**)
Bonds. (*See* **BONDS**)
Breach of contract
"Cardinal change" doctrine

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with undertsanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine---------- 253

Data, rights, etc.
Subcontractors
End *v.* precursor formulas

In development of second source subcontractor for Short Range Attack Missile (SRAM) propulsion subsystem of SRAM rocket motor, release to selected subcontractor of end formulas for SRAM liner,

CONTRACTS—Continued
Data, rights, etc—Continued
Subcontractors—Continued
End *v* precursor formulas—Continued Page

insulation, and adhesive materials, did not violate proprietary rights of primary subcontractor in precursor formulas since end formulas furnished second source subcontractor were wholly new and independent and not just routine extensions of precursor formulas. Furthermore, contracting agency had acquired more than limited rights to end formulas even though technical data requirements of both prime contract and subcontract were broadly stated, and administrative determinations that precursor formulas did not comprise basic end formulas for SRAM liner, insulation, and adhesive materials or components thereof were neither arbitrary nor capricious 312

Default
Monies owing contractor
Disposition

Claim of surety for amount owing defaulting contractor which had been paid to Internal Revenue Service for taxes due under contracts other than defaulted contract may not be certified for payment. A third party and not surety completed defaulted contract and hence surety's claim, which represents withholding taxes from wages of laborers, is under payment bond and not under performance bond or as completing surety and, therefore, rule of *U.S.* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), is for application, a rule reaffirmed in subsequent cases in situations where Govt.'s right of setoff is challenged by surety under its payment bond 262

Disputes
Administrative determinations
S. & E. Contractors, Inc., **case effect**

Although holding in *S. & E. Contractors, Inc.* v. *U.S.*, 406 U.S. 1, that Federal agency's settlement of claim under Disputes clause of contract is binding on Govt., that there is not another tier of Federal or administrative review and that, save for fraud or bad faith, agency's decision is "final and conclusive" involved review by other agencies of Govt. of final "Disputes" decision in favor of contractor, ruling is applicable equally to final agency decision against contractor 196

Contracts Appeals Board decision
Review by General Accounting Office
S. & E. Contractors, Inc., **case effect**

Determination of Secretary of Agriculture to uphold denial by Regional Forester of claim for additional road construction costs under timber sales contract—denial reversed and restored administratively and then appealed to Secretary by contractor—was in conformance with 36 CFR 221.16(a), which provides for modification of timber sales contracts only when modification will apply to unexecuted portions of contract and will not be injurious to U.S., is final administrative determination within purview of 36 CFR 211.28(b), and Supreme Court ruling in *S. & E. Contractors, Inc.* v. *U.S.*, 406 U.S. 1, concerning finality of administrative determinations and, therefore, Secretary's decision is final and conclusive insofar as other agencies of Govt. are concerned, and it is not subject to review by GAO 196

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Dual system of contracting

Construction and financing

Public building Page

The so-called "dual system" of contracting proposed to carry out purchase contracting authority contained in sec. 5 of Public Buildings Amendments of 1972 that provides for financing acquisition, construction, alteration, maintenance, operation, and protection of public buildings, is legally within framework of sec. 5, since section does not prohibit use of such plan which contemplates separate contracts secured through competitive bidding—"Construction Contract" for building projects on Govt. sites and "Purchase Contract" for financing projects, funds for payment of construction to be obtained by Trustee through issuance and competitive sale of Participation Certificates—presumably to be reoffered to public investors—to be redeemed by Govt. within 30 years by installment payments of principal and interest, with title in property vesting in U.S---------- 226

Labor surplus areas. (*See* **CONTRACTS, Awards, Labor surplus areas**)

Leases. (*See* **Leases**)

Mistakes

Allegation before award. (*See* **BIDS, Mistakes**)

Modification

Consideration

Waiver of a legal right

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine---------- 253

Multi-year procurements

Validity

Deletion of data identified as separate contract line items (CLINs) from solicitations contemplating award of multi-year contracts for urgently needed portable shelters and ward containers in order to avoid canceling solicitations because low bidder had qualified its bids by statement no charge would be made for several data CLINs provided Govt.'s drawing package met requirements for data item was in accord with terms of invitations for bids and thus was not prejudicial to other bids. With the deletion, low bids became responsive since a bid need not be rejected for pricing response if item to which it was nonresposive is not included in award. Furthermore, under circumstances, there was no impropriety in fact that the deletion was prompted by substantial difference in price between two lowest bids---------- 190

CONTRACTS—Continued

Negotiation

Competition

Award under initial proposals Page

Fact that award was made on basis of initial proposals as provided by requests for proposals soliciting maintenance services and issued under 10 U.S.C. 2304(a)(10), which authorizes negotiation when it is "impracticable to obtain competition," does not mean adequate competition required by par. 3-807.1(b)(1) of ASPR was precluded, even though this exception to formal advertising makes no reference to competition. Moreover, evaluation formula of 80 points for technical compliance and 20 points for price that did not verify wage conformance by analysis of cost and pricing data (ASPR 12-1005) and that conducted price analysis (ASPR 3-807.2(b)) instead of cost analysis (ASPR 3-807.2(c)) did not result in pricing uncertainty that warranted negotiation as price analysis based on cost data indicated wage rates were realistic and cost analysis requirement in ASPR 3-807.2(c) does not apply since adequate competition was achieved ---------- 346

Commercial sources *v.* professional societies

Propriety of separate treatment

Award of contract to consortium of American Institute of Physics and American Chemical Society by National Bur. of Standards for publication and marketing of physical and chemical reference data using compilations presented in camera-ready form by National Standard Reference Data Sysem is not in conflict with objectives of Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and general public" since neither language of act nor its legislative history evidences use of commercial publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, award was not violative of competition required by sec. 1-1.301-1, FPR, since requests for proposals were issued to commercial houses and all proposals received were properly evaluated ---------- 332

Discussion with all offerors

Actions not requiring

Under request for proposals contemplating cost-plus-incentive fee contract for design, development, fabrication, test, and furnishing of prototypes of four different truck- and trailer-mounted satellite communications terminals, plant visit by team subsequent to submission of best and final offers to assure equitable treatment in cost realism evaluation did not effect reopening of negotiations since plant visits involved unilateral presentations, no offeror was afforded opportunity to revise its proposal, and final technical merit ratings had been assigned prior to plant visits. Selection of proposal that achieved highest technical merit rating and was judged to be most cost realistic, where offeror had satisfactory record of past performance, represents greatest value to Govt. rather than proposal based on lower estimated total cost, plus proposed fee ---------- 358

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Evaluation factors
Factors other than price
Technical acceptability Page

Resolution of technical dispute as to acceptability of offer under request for proposals for Uninterruptible Power Systems is not function of U.S. GAO when administrative judgment is not arbitrary or unreasonable, and fact that contractor's past performances were acceptable does not make determination arbitrary or unreasonable. Furthermore, when unacceptability of proposal involves omitted information that relates to basic technical requirements, procuring agency does not have duty to request information or clarification; nor is use of predetermined cutoff score to determine competitive range improper when score is low in comparison with others; and also when technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require consideration of price in determining whether proposal is within competitive range---- 382

Propriety of evaluation

Determination by Source Selection Authority that incumbent contractor was technically superior and should be awarded another contract at its higher price for operation and maintenance services to be performed at Remote Tracking Stations based on recommendations of Source Selection Board composed of Evaluation Board and Advisory Council responsible for preparing request for quotations and evaluating offers is supported by record since cost considerations played subordinate role; elimination of incumbent contractor's advantages is not required; reasonable judgment of selection officials is entitled to great weight; rule that there is no obligation to hold discussions if unacceptable proposal would have to be completely revised applying equally to proposals within competitive range; and use of numerical scores for evaluation purposes is not required by statute---------- 198

Where U.S. Court of Appeals for District of Columbia Circuit deferred action at request of contractor awarded contract to perform operation and maintenance services for Remote Tracking Stations to reverse or stay District Court's injunctive order until U.S. GAO ruled on protest of unsuccessful offeror that had been filed prior to request for injunctive relief, findings of fact and conclusions of law of District Court are not entitled to comity, for Court of Appeals made it plain that District Court's opinion was not to be considered on merits and, therefore, consistent with GAO's function as described in *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306, Court will be advised of GAO's independent views and conclusions---------- 198

Limitation on negotiation
Propriety

Award of contract for retrofit kits under 41 U.S.C. 252(a)(10), which permits negotiation where it is impracticable to obtain competition, to other than contractor who submitted low final offer on basis guarantee clause requirement and technical requirements of specifications were not met, without affording low offeror additional opportunity to negotiate areas of unacceptability of offer, will not be overturned in absence of proof that agreement was reached during negotiations concerning

CONTRACTS—Continued
Negotiation—Continued
Limitation on negotiation—Continued
Propriety—Continued Page

disputed differences as self-serving statements of contractor incident to its best and final offer that all apsects of revision has been agreed to during negotiations may not be means of forcing reopening of negotiations, and since no significant uncertainties remained for resolution, contracting officials under their vested authority properly determined when to terminate negotiations---------- 393

Record of negotiation

Under well-settled rule that drafting of specifications to meet Govt.'s minimum needs, as well as determination of whether items offered meet specifications, is properly function of procuring agency, absent arbitrary action, fact that U.S. GAO staff electrical engineer's evaluation indicated that only two and not four areas relied upon by procuring agency were technically unacceptable is not tantamount to arbitrary action on part of agency. Therefore, on basis of this honest difference in technical opinions, GAO will not substitute its judgment for that of procuring agency, which in B-176438(2) was advised that contemporaneous and complete written record should be required in future procurements as aid in resolution of disputes---------- 393

Sole source basis
Replacement contract for diverted items
Military assistance to foreign countries

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine---------- 253

Payments
Conflicting claims
Surety *v.* Internal Revenue Service

Claim of surety for amount owing defaulting contractor which had been paid to Internal Revenue Service for taxes due under contracts other than defaulted contract may not be certified for payment. A third party and not surety completed defaulted contract and hence surety's claim, which represents withholding taxes from wages of laborers, is under payment bond and not under performance bond or as completing surety and, therefore, rule of *U.S.* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), is for application, a rule reaffirmed in subsequent cases in situations where Govt.'s right of setoff is challenged by surety under its payment bond-- 262

CONTRACTS—Continued

Privity

Subcontractors

Prime contractor nonresponsible

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Subcontractor's claim for value of inventory delivered to Govt. following partial termination of prime contract and suspension of all subcontracting work may not be paid since Govt. met its contract obligations by payment to prime contractor even though prime failed to satisfy subcontractor claims within 10 days from payment by Govt. as stipulated in termination settlement agreement. Contention that contracting agency held itself out as final customer is not for consideration in view of fact par. 8–209.1, ASPR, denies subcontractors any contractual rights against Govt., and circumstances involved do not negate "no privity" rule, and furthermore subcontractor's termination inventory is required to be disposed of in accordance with secs. VIII and XXIV of ASPR 377

Proprietary, etc., items. (*See* **CONTRACTS, Data, rights, etc.**)

Protests

Court injunction denied

Effect on merits of complaint

Where U.S. Court of Appeals for District of Columbia Circuit deferred action at request of contractor awarded contract to perform operation and maintenance services for Remote Tracking Stations to reverse or stay District Court's injunctive order until U.S. GAO ruled on protest of unsuccessful offeror that had been filed prior to request for injunctive relief, findings of fact and conclusions of law of District Court are not entitled to comity, for Court of Appeals made it plain that District Court's opinion was not to be considered on merits and, therefore, consistent with GAO's function as described in *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306, Court will be advised of GAO's independent views and conclusions 198

Timeliness

Fact that penal sums of performance and payment bonds are required in lesser amounts than sum stated for bid guarantee in invitation for bids is not indicative that bid guarantee requirement was excessive where contracting officer exercised discretion under par. 10–102.3 of Armed Services Procurement Reg. by requiring bid bond to be in amount not less than 20 percent of bid price. Furthermore, complaint in matter having been filed after bid opening, it is untimely under sec. 20.2 of the Interim Bid Protest Procedures and Standards of the U.S. GAO (Title 4 of Code of Federal Regs.) which prescribes that protest of an impropriety that is apparent before bid opening must be filed prior to bid opening. 184

Since U.S. GAO bid protest regulations in effect prior to Feb. 7, 1972, effective date of "Interim Bid Protest Procedures and Standards," did not set specific limitation for filing of protests, contractor who protested July 29, 1971, award of contract to contracting agency on December 1, 1971, which was denied Feb. 16, 1972, may have subsequent protest filed with GAO within 5 days of notification of adverse agency action considered timely filed under bid protest procedures made effective Feb. 7, 1972, 4 CFR 20.2(a) 332

Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

CONTRACTS—Continued

Specifications

Adequacy

Legal *v.* technical acceptability considerations

Page

In absence of clear and convincing evidence that contracting officials erred in judging minimum needs of Govt., U.S. GAO will not substitute its judgment as to sufficiency of technical data package furnished under invitation for radio sets, nor is invitation considered to be legally defective since fair competition was not precluded where bidders were informed contractor would be required to succsssfully manufacture contract end items and to bear cost of attaining stated functional or performance requirements, which is adequate notice to sophisticated bidders to scrutinize technical requirements and to price any significant unknowns for which they and not Govt. would be responsible for correcting, and which is sufficient allocation of performance risk to assure competition 219

Operational methods requirement

Requirement that bids under invitation soliciting custodial services be accompanied by outline of bidder's proposed method of operation as to job and work force, method of supervision, types and quantities of equipment, performance schedule is matter of bidder responsibility and not bid responsiveness, notwithstanding invitation provision for mandatory rejection of bids that failed to furnish required information, since method of operation pertains to "know-how," which is element of responsibility as specifications form basis for actual work requirement. However, should it be deemed desirable to require outline of bidder's method of operation, invitation should state purpose of requirement and how outline will be considered in selection of successful bidder and in administration of contract 389

Amendments

Furnishing requirements

Bid transmitted by Telex system because amendment advancing bid opening date was not received until within 4 hours of bid opening time due to incorrect listing of bidder's address was properly rejected, even though bidder was advised during telephonic inquiry to use whatever means were available to transmit bid and had subsequently confirmed bid, since invitation for bids did not authorize telegraphic bids and late receipt of confirmation bid was not excusable. Although amendment changes are required to be furnished everyone sent invitation, procurement activity is not insurer of prompt delivery and, therefore, cancellation of amendment is not required because it was inadvertently misdirected. Propriety of procurement rests on obtaining adequate competition and reasonable prices and not on affording every possible prospective bidder opportunity to bid 281

Changes, revisions, etc.

After bid opening

Price, quantity, or quality effect

Deletion of data identified as separate contract line items (CLINs) from solicitations contemplating award of multi-year contracts for urgently needed portable shelters and ward containers in order to avoid canceling solicitations because low bidder had qualified its bids by state-

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Specifications—Continued
Changes, revisions, etc—Continued
After bid opening—Continued
Price, quantity, or quality effect—Continued Page

ment no charge would be made for several data CLINs provided Govt.'s drawing package met requirements for data item was in accord with terms of invitations for bids and thus was not prejudicial to other bids. With the deletion, low bids became responsive since a bid need not be rejected for pricing response if item to which it was nonresponsive is not included in award. Furthermore, under circumstances, there was no impropriety in fact that the deletion was prompted by substantial difference in price between two lowest bids---------- 190

"Cardinal change" doctrine

Determination that it was proper to negotiate sole source replacement contract with contractor who had diverted aircraft production to satisfy requirements of foreign military sale pursuant to modification of Army contract that had been accepted by contractor with understanding it would receive separate negotiated replacement contract at price that would constitute foreign sale price was not erroneous conclusion of law for had change order procedure been used, contractor's refusal to accept equitable price adjustment would not have constituted question of fact under disputes clause since diversion was cardinal change beyond scope of contract placing contractor in position to institute action for breach of contract damages under "cardinal change" doctrine---------- 253

Conformability of equipment, etc., offered
Administrative determination
Negotiated procurement

Under well-settled rule that drafting of specifications to meet Govt.'s minimum needs, as well as determination of whether items offered meet specifications, is properly function of procuring agency, absent arbitrary action, fact that U.S. GAO staff electrical engineer's evaluation indicated that only two and not four areas relied upon by procuring agency were technically unacceptable is not tantamount to arbitrary action on part of agency. Therefore, on basis of this honest difference in technical opinions, GAO will not substitute its judgment for that of procuring agency, which in B-176438(2) was advised that contemporaneous and complete written record should be required in future procurements as aid in resolution of disputes---------- 393

Technical deficiencies
Negotiated procurement

Resolution of technical dispute as to acceptability of offer under request for proposals for Uninterruptible Power Systems is not function of U.S. GAO when administrative judgment is not arbitrary or unreasonable, and fact that contractor's past performances were acceptable does not make determination arbitrary or unreasonable. Furthermore, when unacceptability of proposal involves omitted information that relates to basic technical requirements, procuring agency does not have duty to request information or clarification; nor is use of predetermined cutoff score to determine competitive range improper when score is low in comparison with others; and also when technical proposal is totally unacceptable, 10 U.S.C. 2304(g) does not require consideration of price in determining whether proposal is within competitive range---------- 382

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies—Continued
Negotiated procurement—Continued Page

Award of contract for retrofit kits under 41 U.S.C. 252(a) (10), which permits negotiation where it is impracticable to obtain competition, to other than contractor who submitted low final offer on basis guarantee clause requirement and technical requirements of specifications were not met, without affording low offeror additional opportunity to negotiate areas of unacceptability of offer, will not be overturned in absence of proof that agreement was reached during negotiations concerning disputed differences as self-serving statements of contractor incident to its best and final offer that all aspects of revision had been agreed to during negotiations may not be means of forcing reopening of negotiations, and since no significant uncertainties remained for resolution, contracting officials under their vested authority properly determined when to terminate negotiations 393

Delivery provisions
Conflict

In evaluation of f.o.b. origin shipment of barbed wire coils to Far East under invitation that contained two delivery provisions, use of clause providing for evaluation by adding lowest *land* transportation cost rather than clause using term "lowest laid down cost to Government at overseas port of discharge," which would have made protestant low bidder on basis of using barges for inland transportation, was proper under rule intent and meaning of invitation is not to be determined by consideration of isolated section or provision but, rather, from consideration of invitation in its entirety, and two clauses read together indicate bids must be evaluated on lowest laid down cost to Govt. based on, among other things, *land* transportation for inland shipping costs 278

Deviations
Informal *v.* substantive
"May" or "will" result in bid rejection effect

Failure to furnish separate prices for subitems in bid to furnish circuit breakers and related items under solicitation stating that offers which do not show unit prices *will* be rejected as not responsive is immaterial as deviation does not affect price, quantity or quality. Bidder by inserting word "included" in spaces available for all subitems will be obligated to furnish subitems as well as basic circuit breakers at price bid for basic circuit breakers. Furthermore, requirement in solicitation is not necessarily material simply because it was expressed in positive terms with warning that failure to comply "may" or "will" result in rejection of bid as nonresponsive 265

Subcontractors
Disputes with prime contractor
Government's obligations

Subcontractor's claim for value of inventory delivered to Govt. following partial termination of prime contract and suspension of all subcontracting work may not be paid since Govt. met its contract obligations by payment to prime contractor even though prime failed

CONTRACTS—Continued
Subcontractors—Continued
Disputes with prime contractor—Continued
Government's obligations—Continued Page
to satisfy subcontractor claims within 10 days from payment by Govt. as stipulated in termination settlement agreement. Contention that contracting agency held itself out as final customer is not for consideration in view of fact par. 8–209.1, ASPR, denies subcontractors any contractual rights against Govt., and circumstances involved do not negate "no privity" rule, and furthermore subcontractor's termination inventory is required to be disposed of in accordance with secs. VIII and XXIV of ASPR 377
Termination
Convenience of Government
Cancellation converted to termination
Partial cancellation of contract erroneously awarded for handling of surplus butter made available to Dept. of Defense by Dept. of Agriculture because erroneous freight rate evaluation resulted in award to other than low bidder should be changed to partial termination for convenience of Govt. since, while award was improper, it was not plainly or palpably illegal for displaced contractor had not contributed to use of erroneous freight rate furnished by Govt. activity and, therefore, it could successfully maintain action for damages computed under termination for convenience of Govt. clause of contract. 37 Comp. Gen. 330 and B–164826, Aug. 29, 1968, overruled 215
Recommendation that partial cancellation of contract awarded to bidder erroneously determined to be low bidder should be changed to partial termination for convenience of Govt. and settlement made with contractor in accordance with termination for convenience of Govt. clause of contract is recommendation for corrective action pursuant to sec. 236 of Legislative Reorganization Act of 1970, Pub. L. 91–510, and contracting agency is required to submit written statements of action taken with respect to recommendation to House and Senate Committees on Govt. Operations not later than 60 days from date of recommendation and to Committees on Appropriations in connection with first request for appropriations made more than 60 days after date of recommendation 215
Timber sales. (*See* **TIMBER SALES**)
COURTS
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Effect on General Accounting Office's protest consideration
Where U.S. Court of Appeals for District of Columbia Circuit deferred action on request of contractor awarded contract to perform operation and maintenance services for Remote Tracking Stations to reverse or stay District Court's injunctive order until U.S. GAO ruled on protest of unsuccessful offeror that had been filed prior to request for injunctive relief, findings of fact and conclusions of law of District Court are not entitled to comity, for Court of Appeals made it plain that District Court's opinion was not to be considered on merits and, therefore, consistent with GAO's function as described in *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306, Court will be advised of GAO's independent views and conclusions 198

COURTS—Continued
Judgments, decrees, etc—Continued
Interest
Civil Service retroactive annuity payments
Account chargeable with interest Page

Interest included in awards of retroactive payments of Civil Service annuities to plaintiffs in 338 F. Supp. 1141, from date of eligibility to date of judgment—awards based on fact that so-called Hiss Act, as amended, 5 U.S.C. 8311 *et seq.* under which payments were withheld was an *ex post facto* law that punished plaintiffs for conduct that occurred prior to its enactment—is payable, together with annuities, from Civil Service Retirement and Disability Fund and not from permanent indefinite appropriation for judgments contained in 31 U.S.C. 7124a, since interest is part of damages awarded. However, as interest is payable only when provided for in statutes and contracts, in absence of court decision to contrary, obligation to pay interest does not extend to those individuals who did not sue but by virtue of 338 F. Supp. 1141 are entitled to retroactive payment of annuity 175

Jurors
Fees
Government employees in State courts
Travel expenses in lieu of fees

When jury services are performed in courts of Calvert, Charles, Prince George's and St. Mary's counties in State of Maryland by Federal employees who are granted court leave pursuant to 5 U.S.C. 6322(a), and are required under 5 U.S.C. 5515 to turn over jury fees for credit against salary payments for periods of court leave, expense money received as authorized by article 51, section 19(f) of Maryland Code may be retained by such employees on basis moneys received are traveling expenses within contemplation of section 12 of article 51 of Code rather than jury fees and as traveling expenses payments are not within purview of 5 U.S.C. 5515 325

DEFENSE DEPARTMENT
Teachers employed in overseas areas
Compensation
Severance pay

Superintendent-Principal of Air Force Dependents' School whose employment under 20 U.S.C. 241(a) for period of approximately 10 years was terminated on basis of management's perogative not to employ as provided in par. 8b, sec. 9833, Air Force Civilian Personnel Manual, is entitled to severance pay prescribed by 5 U.S.C. 5595. Employee held indefinite tenure appointment, even though he was granted limited access to procedural rights, and was involuntarily separated from service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, requirements that establish eligibility to receive severance pay provided by 5 U.S.C. 5595 291

DEPARTMENTS AND ESTABLISHMENTS

Services between

Procurement of supplies and services

Postal Service

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Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon 306

Status

Federal Judicial Center

As Federal Judicial Center is considered part of judicial branch, its employees are within scope of 5 U.S.C. 5721 *et seq.*, regardless of fact Center is not specifically listed in statute which authorizes reimbursement for travel and transportation expenses incurred in reporting to position determined by CSC to be in manpower shortage category. However, since Center under authority in 28 U.S.C. 625(e) to incur expenses incident to operation of Center and not Commission determined position of Director of Continuing Education and Training was manpower shortage position, expenses incurred by Director in moving to first duty station are not reimbursable under 5 U.S.C. 5723, and rule in 22 Comp. Gen. 885 that officer or employee of Govt. must place himself at first duty station at own expense applies 268

FEES

Jury. (*See* **COURTS, Jurors, Fees**)

Passports

Locally hired overseas employees

Expense of obtaining passports and photographs for passports for himself and dependents, where no immediate travel is contemplated, by locally hired employee with whom transportation agreement was executed in accordance with par. C4002-3 of Joint Travel Regs. (JTR), Vol. 2, and who has earned renewal agreement travel (C4001, JTR), is reimbursable pursuant to C9010-2, JTR, even though actual travel may not occur and regulation does not expressly cover locally hired American citizens or their dependents, in view of fact that locally hired employee who meets conditions of eligibility for renewal agreement travel is generally entitled to same benefits as employee recruited stateside who is required to renew his passport as result of continued employment in foreign area 177

FOREIGN SERVICE

Dependents

Advance travel

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Reimbursement to employee for advance return travel to U.S. of spouse and/or minor children who traveled to foreign post as dependents but ceased to be dependents as of date employee became eligible for return travel because of divorce or annulment of marriage may be provided and sec. 126.2, Vol. 6, FAM, amended accordingly under authority of 22 U.S.C. 1136—amendment to prescribe that reimbursable travel may not be deferred more than 6 months after employee completes travel. Govt. has obligation to return dependents at Govt. expense since employee and family are sent to overseas post for convenience of Govt. and, furthermore, amendment will bring regulation in harmony with 6 FAM 126.3 and sec. 1.11f of OMB Cir. A-56..... 246

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As natives of Alaska—ultimate beneficiaries of Alaska Native Fund established by Alaska Native Claims Settlement Act, Pub. L. 92-203, approved Dec. 18, 1971, for distribution to regional corporations—are aboriginal groups, legal position of individual Alaskan native is assimilated to that of other Indians in U.S. Therefore, lack of formal tribal organization of natives is not determinative of status of fund, and it may be properly classified as Indian tribal trust fund that is eligible for interest payments under 25 U.S.C. 161a, and for investment pursuant to 25 U.S.C. 162a, pending enrollment of natives and distribution of fund to regional corporations established by act..... 248

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Reimbursement to employee for advance return travel to U.S. of spouse and/or minor children who traveled to foreign post as dependents but ceased to be dependents as of date employee became eligible for return travel because of divorce or annulment of marriage may be provided and sec. 126.2, Vol. 6, FAM, amended accordingly under authority of 22 U.S.C. 1136—amendment to prescribe that reimbursable travel may not be deferred more than 6 months after employee completes travel. Govt. has obligation to return dependents at Govt. expense since employee and family are sent to overseas post for convenience of Govt. and, furthermore, amendment will bring regulation in harmony with 6 FAM 126.3 and sec. 1.11f of OMB Cir. A–56 ---------- 246

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The second-step bid, a turnkey project, submitted under two-step invitation for bids to design and construct family housing by group composed of architects, engineers, land planners, and builders, who was joined in second-step by construction firm who had not participated in first step—an invitation requirement—but was only principal named in bid bond, was properly rejected since construction company, separate legal entity, had no authority to bind coventurers responsible for design, and bid bond coverage being incomplete was defective. Furthermore, information submitted prior to second-step bid identifying construction company as coventurer, which was erroneously held to have no legal significance, served notice construction firm had no authority to bind its coventurers 223

INDIAN AFFAIRS

Trust funds

Alaska Native Claims Settlement Act

As natives of Alaska—ultimate beneficiaries of Alaska Native Fund established by Alaska Native Claims Settlement Act, Pub. L. 92–203, approved Dec. 18, 1971, for distribution to regional corporations—are aboriginal groups, legal position of individual Alaskan native is assimilated to that of other Indians in U.S. Therefore, lack of formal tribal organization of natives is not determinative of status of fund, and it may be properly classified as Indian tribal trust fund that is eligible for interest payments under 25 U.S.C. 161a, and for investment pursuant to 25 U.S.C. 162a, pending enrollment of natives and distribution of fund to regional corporations established by act 248

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General rule

Interest included in awards of retroactive payments of Civil Service annuities to plaintiffs in 338 F. Supp. 1141, from date of eligibility to date of judgment—awards based on fact that so-called Hiss Act, as amended, 5 U.S.C. 8311 *et seq.* under which payments were withheld was an *ex post facto* law that punished plaintiffs for conduct that occurred prior to its enactment—is payable, together with annuities, from Civil Service Retirement and Disability Fund and not from permanent indefinite appropriation for judgments contained in 31 U.S.C. 724a, since interest is part of damages awarded. However, as interest is payable only when provided for in statutes and contracts, in absence of court decision to contrary, obligation to pay interest does not extend to those individuals who did not sue but by virtue of 338 F. Supp. 1141 are entitled to retroactive payment of annuity 175

LEASES

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Public buildings equitable distribution

Requirement in Public Buildings Act of 1959, as amended on June 16, 1972 (40 U.S.C. 607), that prospectuses of proposed leases be submitted to Public Works Committees when average annual rental will exceed

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Public buildings equitable distribution—Continued Page
$500,000 is interpreted to mean rental amount excludes cost of heat, light, water, and janitorial services, and to mean congressional approval is not required retroactively for leases entered into prior to June 16, 1972, in absence of express statutory provision; for lease amendments that would bring leases within prohibition; and for leases renewed as part of interim housing plan. However, since determination whether or not to exercise option is tantamount to making new lease, options exercised on leases entered into prior to June 16, 1972, that would cause rental to exceed $500,000, require presentation to Committees unless option was included in initial congressional approval 230

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Sales
Bid mistake
Under sales invitation for bids on surplus ships, which provided for bid deposit equal to 25 percent of bid, bidder who after bid opening alleged bid price increase was overstated by Western Union, and that excessive bid deposit made was in anticipation of offering another increase, may be permitted to withdraw its bid or waive mistake. Bidder unable to establish by clear and convincing evidence existence of mistake and bid actually intended as required by sec. 1–2.406–3 of Federal Procurement Regs. and applicable to sale pursuant to 40 U.S.C. 474(16), may not be permitted to correct its bid, but mistake having been made, bidder may be allowed to either withdraw bid, since degree of proof justifying withdrawal is in no way comparable to that necessary for bid correction, or to waive mistake under exception to rule against waiver of mistake 258

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Interstation travel *v.* travel within limits of duty station Page

Travel of Marine officer who was verbally directed to travel by privately owned vehicle from permanent duty station at Quantico to Marine Headquarters in Arlington, as well as to various locations in Washington, D.C., incident to temporary duty—travel subsequently approved for reimbursement—is interstation travel within purview of 37 U.S.C. 404 and reimbursable at 7 cents per mile rate prescribed by par. M4203–3b of Joint Travel Regs. rather than at higher rate provided by par. M4502–1, pursuant to 37 U.S.C. 408, for travel within limits of member's station. Although 37 U.S.C. 404 requires travel to be authorized by written orders, confirmation of verbal orders by competent authority shortly after performance of travel as being advantageous to Govt. may be accepted for purpose of reimbursing officer---------- 236

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Refunds of transportation charges paid from funds appropriated to former Post Office Dept. for fiscal year 1970, and obligated funds for 1970 and prior fiscal years transferred to the Postal Service and then deobligated are for reversion to general fund of the Treasury pursuant to 31 U.S.C. 701(a)(2) and not to Postal Service Fund as 39 U.S.C. 410(a) of the Postal Reorganization Act, which exempts Postal Service from Federal laws dealing with budgets or funds, was not effective until July 1, 1971, and, therefore, appropriations to former Post Office Dept. are subject to 31 U.S.C. 701–708 prescribing closing of appropriation accounts available for obligation for definite period, and providing for reversion to general fund of Treasury, and lapsed appropriations of Post Office Dept. may not be considered assets of Postal Service in absence of specific provisions in act to this effect---------- 179

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Foreign service. (*See* FOREIGN SERVICE)
Jury service. (*See* COURTS, Jurors)
Moving expenses. (*See* OFFICERS AND EMPLOYEES, Transfers, Relocation expenses)
Overseas
Hired locally
Benefits entitlement

Expense of obtaining passports and photographs for passports for himself and dependents, where no immediate travel is contemplated,

OFFICERS AND EMPLOYEES—Continued
Overseas—Continued
Hired locally—Continued
Benefits entitlement—Continued Page

by locally hired employee with whom transportation agreement was executed in accordance with par. C4002–3 of Joint Travel Regs. (JTR), Vol. 2, and who has earned renewal agreement travel (C4001, JTR), is reimbursable pursuant to C9010–2, JTR, even though actual travel may not occur and regulation does not expressly cover locally hired American citizens or their dependents, in view of fact that locally hired employee who meets conditions of eligibility for renewal agreement travel is generally entitled to same benefits as employee recruited stateside who is required to renew his passport as result of continued employment in foreign area ---- 177

Reemployment or reinstatement
Travel and transportation expenses

When employee separated within U.S. from service in one component of Dept. of Defense (DOD) due to reduction in force or transfer of functions is reemployed at different location by different component within DOD after break in service of not more than 1 year, transfer expenses that employee is entitled to pursuant to 5 U.S.C. 5724a(c) are payable by activity acquiring employee's services as prescribed by 5 U.S.C. 5724(e), which provides that when employee transfers from one agency to another, agency to which he transfers pays expenses to new duty station. Further authority in 5 U.S.C. 5724(e) and par. C1053–2b(1)(b) of Joint Travel Regs. permitting either losing or acquiring agency to pay relocation expenses is for application only in cases of transfer without break in service ---- 345

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Eligibility
Overseas teachers

Superintendent-Principal of Air Force Dependents' School whose employment under 20 U.S.C. 241(a) for period of approximately 10 years was terminated on basis of management's perrogative not to employ as provided in par. 8b, sec. 9833, Air Force Civilian Personnel Manual, is entitled to severance pay prescribed by 5 U.S.C. 5595. Employee held indefinite tenure appointment, even though he was granted limited access to procedural rights, and was involuntarily separated from service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, requirements that establish eligibility to receive severance pay provided by 5 U.S.C. 5595 ---- 291

Transfers
Relocation expenses
House purchase
Not consummated

Employee who incident to transferring to another agency and location terminated contract to purchase residence and its supplemental "Use and Occupancy Agreement" is considered to have occupied residence under lease arrangement and to be entitled to reimbursement for expenses incurred within terms of lease as provided by sec. 4.2h

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
House purchase—Continued
Not consummated—Continued Page

of OMB Cir. A–56. Under agreement, employee's claim for credit costs and cancellation fee may be recognized but not cost of cleaning and repairing residence since this obligation would be incurred by employee regardless of station change. Furthermore, property improvements are not provided under 5 U.S.C. 5724(a) or Cir. A–56 and, therefore, costs of erecting fence and installing bathroom vanity are not reimbursable 275

Travel expenses. (*See* **TRAVEL EXPENSES**)

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Confirmation
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Timeliness

Travel of Marine officer who was verbally directed to travel by privately owned vehicle from permanent duty station at Quantico to Marine Headquarters in Arlington, as well as to various locations in Washington, D.C., incident to temporary duty—travel subsequently approved for reimbursement—is interstation travel within purview of 37 U.S.C. 404 and reimbursable at 7 cents per mile rate prescribed by par. M4203–3b of Joint Travel Regs. rather than at higher rate provided by par. M4502–1, pursuant to 37 U.S.C. 408, for travel within limits of member's station. Although 37 U.S.C. 404 requires travel to be authorized by written orders, confirmation of verbal orders by competent authority shortly after performance of travel as being advantageous to Govt. may be accepted for purpose of reimbursing officer 236

PAY
Active duty
While under civil arrest

Member of uniformed services under sentence of confinement by civil authorities who while paroled to custody of military authorities on daily basis performed duties with his unit in accordance with court's work release recommendation, satisfactorily serving in capacity of noncommissioned officer squadron leader, position commensurate with his grade, military specialty, and length of service, is pursuant to 37 U.S.C. 204(a) and 101(18), which govern entitlement to basic pay, eligible to receive pay and allowances commensurate with his grade and specialty for each day of full-time duty performed while paroled to military authorities 317

PAYMENTS

Contracts. (*See* **CONTRACTS, Payments**)

POSTAL SERVICE, UNITED STATES

Appropriations

Transferred from Post Office Department

Lapsed appropriations disposition

Page

Refunds of transportation charges paid from funds appropriated to former Post Office Dept. for fiscal year 1970, and obligated funds for 1970 and prior fiscal years transferred to the Postal Service and then deobligated are for reversion to general fund of the Treasury pursuant to 31 U.S.C. 701(a)(2) and not to Postal Service Fund as 39 U.S.C. 410(a) of the Postal Reorganization Act, which exempts Postal Service from Federal laws dealing with budgets or funds, was not effective until July 1, 1971, and, therefore, appropriations to former Post Office Dept. are subject to 31 U.S.C. 701–708 prescribing closing of appropriation accounts available for obligation for definite period, and providing for reversion to general fund of Treasury, and lapsed appropriations of Post Office Dept. may not be considered assets of Postal Service in absence of specific provisions in act to this effect 179

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Competitive system applicability

Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon 306

PRINTING AND BINDING

Purchases from other than public printer

Commercial sources *v.* professional societies

Award of contract to consortium of American Institute of Physics and American Chemical Society by National Bur. of Standards for publication and marketing of physical and chemical reference data using compilations presented in camera-ready form by National Standard Reference Data System is not in conflict with objectives of Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and general public" since neither language of act nor its legislative history evidences use of commercial publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, award was not violative of competition required by sec. 1–1.301–1, FPR, since requests for proposals were issued to commercial houses and all proposals received were properly evaluated 332

PROPERTY

Leases. (*See* **LEASES**)

Private

Acquisition

Relocation expenses to "displaced persons" Page

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, approved Jan. 2, 1971, in prescribing relocation benefits for persons displaced when Govt. acquires real property provides that date of moving from property is controlling regardless of whether date of acquisition was before or after Jan. 2, 1971, effective date of act and, therefore, priority lessees—former land owners and tenants who remained on acquired Federal property on priority basis as lessees—are entitled to benefits of act. However, when priority lessees physi cally vacate properties, displacements will be those of tenants rather than homeowners and, therefore, those lessees who sold their homes before enactment of Pub. L. 91-646 are not entitled to extra benefits afforded homeowners under act 300

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Damage, loss, etc.

Shortages

Second delivery effect on cost

On shipment of wooden boxes of ammunition for cannon with explosive projectiles weighing 795 lbs. and subject to freight charges computed on minimum of 2,500 lbs., additional charges claimed by delivering and billing carrier on basis of second freight movement of boxes found astray at origin carrier's terminal because Govt. prepared bill of lading and incorrectly showed quantity shipped as five boxes instead of 15 boxes properly was disallowed since pursuant to sec. 219 of Interstate Commerce Act, 49 U.S.C. 319, carrier and not shipper is responsible for issuing appropriate bill of lading, and fact that shipper prepared bill of lading does not relieve carrier of duty of ensuring bill of lading was correctly prepared 211

Real. (*See* **REAL PROPERTY**)

PUBLIC BUILDINGS

Construction

Financing of construction

Dual system of contracting

The so-called "dual system" of contracting proposed to carry out purchase contracting authority contained in sec. 5 of Public Buildings Amendments of 1972 that provides for financing acquisition, construction, alteration, maintenance, operation, and protection of public buildings, is legally within framework of sec. 5, since section does not prohibit use of such plan which contemplates separate contracts secured through competitive bidding—"Construction Contract" for building projects on Govt. sites and "Purchase Contract" for financing projects, funds for payment of construction to be obtained by Trustee through issuance and competitive sale of Participation Certificates—presumably to be reoffered to public investors—to be redeemed by Govt. within 30 years by installment payments of principal and interest, with title in property vesting in U.S. 226

PUBLIC BUILDINGS—Continued

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Congressional approval

To insure equitable distribution of buildings Page

Requirement in Public Buildings Act of 1959, as amended on June 16, 1972 (40 U.S.C. 607), that prospectuses of proposed leases be submitted to Public Works Committees when average annual rental will exceed $500,000 is interpreted to mean rental amount excludes cost of heat, light, water, and janitorial services, and to mean congressional approval is not required retroactively for leases entered into prior to June 16, 1972, in absence of express statutory provision; for lease amendments that would bring leases within prohibition; and for leases renewed as part of interim housing plan. However, since determination whether or not to exercise option is tantamount to making new lease, options exercised on leases entered into prior to June 16, 1972, that would cause rental to exceed $500,000, require presentation to Committees unless option was included in initial congressional approval 230

RAILROADS

Reorganization

Government to maintain services

Option obtained from Central Railroad of New Jersey by Secretary of Transportation pursuant to sec. 3(b)(4) of Emergency Rail Service Act of 1970 incident to guaranteeing trustee certificates issued in reorganization proceedings of railroad, which option provides that Secretary acquire by purchase or lease trackage rights and equipment to maintain railroad services in event of actual or threatened cessation of such services, may not be exercised without further action by Congress. Legislative history of act contains no indication Secretary is authorized to take over railroad and operate it, but rather evidences that he may exercise option, following favorable congressional action, without awaiting outcome of proceedings before reorganization court or Interstate Commerce Commission 309

REAL PROPERTY

Acquisition

Relocation costs

Effective date of entitlement

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, approved Jan. 2, 1971, in prescribing relocation benefits for persons displaced when Govt. acquires real property provides that date of moving from property is controlling regardless of whether date of acquisition was before or after Jan. 2, 1971, effective date of act and, therefore, priority lessees—former land owners and tenants who remained on acquired Federal property on priority basis as lessees—are entitled to benefits of act. However, when priority lessees physically vacate properties, displacements will be those of tenants rather than homeowners and, therefore, those lessees who sold their homes before enactment of Pub. L. 91-646 are not entitled to extra benefits afforded homeowners under act 300

RECORDS

Agency

Procedural requirements

Page

Under well-settled rule that drafting of specifications to meet Govt.'s minimum needs, as well as determination of whether items offered meet specifications, is properly function of procuring agency, absent arbitrary action, fact that U.S. GAO staff electrical engineer's evaluation indicated that only two and not four areas relied upon by procuring agency were technically unacceptable is not tantamount to arbitrary action on part of agency. Therefore, on basis of this honest difference in technical opinions, GAO will not substitute its judgment for that of procuring agency, which in B–176438(2) was advised that contemporaneous and complete written record should be required in future procurements as aid in resolution of disputes 393

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Applicability

Postal Service

Procurement by Corps of Engineers on behalf of U.S. Postal Service pursuant to Memorandum of Understanding is not subject to small business set-aside in absence of approval of set-aside by Postal Service as required by Memorandum. According to Dept. of Defense, Postal Service funds are not appropriated funds to require application of ASPR which governs all purchases and contracts by DOD for supplies and services, including set-aside procedures—view entitled to great weight. However, it is immaterial whether or not funds are considered appropriated funds since 39 U.S.C. 410(a) exempts Postal Service procurements from Small Business Act, as well as all other Federal laws dealing with Federal contracts, and 39 U.S.C. 411 permits executive agencies to furnish services to Postal Service on such terms and conditions as agreed upon 306

RETIREMENT

Civilian

Annuities

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Persons convicted of certain offenses

Interest included in awards of retroactive payments of Civil Service annuities to plaintiffs in 338 F. Supp. 1141, from date of eligibility to date of judgment—awards based on fact that so-called Hiss Act, as amended, 5 U.S.C. 8311 *et seq.* under which payments were withheld was an *ex post facto* law that punished plaintiffs for conduct that occurred prior to its enactment—is payable, together with annuities, from Civil Service Retirement and Disability Fund and not from permanent indefinite appropriation for judgments contained in 31 U.S.C. 724a, since interest is part of damages awarded. However, as interest is payable only when provided for in statutes and contracts, in absence of court decision to contrary, obligation to pay interest does not extend to those individuals who did not sue but by virtue of 338 F. Supp. 1141 are entitled to retroactive payment of annuity 175

SALES

Bids

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Withdrawal *v.* bid correction

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Under sales invitation for bids on surplus ships, which provided for bid deposit equal to 25 percent of bid, bidder who after bid opening alleged bid price increase was overstated by Western Union, and that excessive bid deposit made was in anticipation of offering another increase, may be permitted to withdraw its bid or waive mistake. Bidder unable to establish by clear and convincing evidence existence of mistake and bid actually intended as required by sec. 1–2.406–3 of Federal Procurement Regs. and applicable to sale pursuant to 40 U.S.C. 474(16), may not be permitted to correct its bid, but mistake having been made, bidder may be allowed to either withdraw bid, since degree of proof justifying withdrawal is in no way comparable to that necessary for bid correction, or to waive mistake under exception to rule against waiver of mistake 258

Timber. (*See* **TIMBER SALES**)

SETOFF

Authority

Challenged by contractor's surety

Claim of surety for amount owing defaulting contractor which had been paid to Internal Revenue Service for taxes due under contracts other than defaulted contract may not be certified for payment. A third party and not surety completed defaulted contract and hence surety's claim, which represents withholding taxes from wages of laborers, is under payment bond and not under performance bond or as completing surety and, therefore, rule of *U.S.* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), is for application, a rule reaffirmed in subsequent cases in situations where Govt.'s right of setoff is challenged by surety under its payment bond 262

STATION ALLOWANCES

Military personnel

Excess living costs outside United States, etc.

Members subsisted at Government expense

Leave period within United States

Enlisted men without dependents assigned to permanent duty station outside continental U.S. and subsisted at Govt. expense and, therefore, not entitled to cost-of-living allowance authorized by 37 U.S.C. 405 for purpose of defraying average excess costs experienced by members on permanent duty outside U.S. do not gain entitlement to allowance while on leave in U.S. on basis Govt. mess is not available to them in view of fact par. M4301–3b(1) of Joint Travel Regs. prescribes member at permanent overseas duty station without dependents is not entitled to cost-of-living allowance while absent on leave in U.S. or while being subsisted at Govt. expense at permanent duty station 273

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Functions prescribed by Pub. L. 92–318, approved June 23, 1972, for National Advisory Council on Extension and Continuing Education, which was established by and its authority and responsibility stated in sec. 109 of Higher Education Act of 1965, as amended (20 U.S.C. 1009), do not constitute new "project or activity" within purview of prohibition in sec. 106 of Continuing Resolution, approved July 1, 1972 (Pub. L. 92–334) since primary effect of new functions is to require Council to evaluate educational programs and projects which theretofore were more or less discretionary and, therefore, funds provided by Continuing Resolution, pending passage of Dept. of Health, Education, and Welfare appropriations (HEW), may be made available by HEW to implement Council's functions under sec. 106 270

Standard Reference Data Act

Award of contract to consortium of American Institute of Physics and American Chemical Society by National Bur. of Standards for publication and marketing of physical and chemical reference data using compilations presented in camera-ready form by National Standard Reference Data System is not in conflict with objectives of Standard Reference Data Act to "make critically evaluated reference data readily available to scientists, engineers and general public" since neither language of act nor its legislative history evidences use of commercial publishing houses is required. Moreover, even though professional societies were treated separately in negotiation, award was not violative of competition required by sec. 1–1.301–1, FPR, since requests for proposals were issued to commercial houses and all proposals received were properly evaluated 332

STORAGE

Household effects

Military personnel

Temporary storage

Conversion to nontemporary storage

When Air Force members ordered to mobile Navy units are unable because of operational requirements to take delivery of household goods that had been shipped and placed in temporary storage at new home ports, temporary storage may not be converted to nontemporary storage, nor may 180-day limit on temporary storage be extended for period equivalent to period of member's absence. Temporary storage authorized in connection with shipment of household goods incident to permanent change-of-station and nontemporary storage prescribed in lieu of shipment are incompatible under 37 U.S.C. 406 and, therefore, combinations of shipment and nontemporary storage may not be authorized. Furthermore, as section does not contemplate temporary storage in excess of 6 months, 180-day limit on such storage may not be extended without congressional approval 213

TIMBER SALES

Access roads

Excess cost claims

Page

Determination of Secretary of Agriculture to uphold denial by Regional Forester of claim for additional road construction costs under timber sales contract—denial reversed and restored administratively and then appealed to Secretary by contractor—was in conformance with 36 CFR 221.16(a), which provides for modification of timber sales contracts only when modification will apply to unexecuted portions of contract and will not be injurious to U.S., is final administrative determination within purview of 36 CFR 211.28(b), and Supreme Court ruling in *S. & E. Contractors, Inc.* v. *U.S.*, 406 U.S. 1, concerning finality of administrative determinations and, therefore, Secretary's decision is final and conclusive insofar as other agencies of Govt. are concerned, and it is not subject to review by GAO---------- 196

TRANSPORTATION

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Issuance

By shipper

Effect on carrier liability

On shipment of wooden boxes of ammunition for cannon with explosive projectiles weighing 795 lbs. and subject to freight charges computed on minimum of 2,500 lbs., additional charges claimed by delivering and billing carrier on basis of second freight movement of boxes found astray at origin carrier's terminal because Govt. prepared bill of lading and incorrectly showed quantity shipped as five boxes instead of 15 boxes properly was disallowed since pursuant to sec. 219 of Interstate Commerce Act, 49 U.S.C. 319, carrier and not shipper is responsible for issuing appropriate bill of lading, and fact that shipper prepared bill of lading does not relieve carrier of duty of ensuring bill of lading was correctly prepared---------- 211

Carriers

Railroad. (*See* **CARRIERS, Railroad**)

Overseas employees

Advance travel of dependents

Divorce, etc., prior to employee's eligibility

Reimbursement to employee for advance return travel to U.S. of spouse and/or minor children who traveled to foreign post as dependents but ceased to be dependents as of date employee became eligible for return travel because of divorce or annulment of marriage may be provided and sec. 126.2, Vol. 6, FAM, amended accordingly under authority of 22 U.S.C. 1136—amendment to prescribe that reimbursable travel may not be deferred more than 6 months after employee completes travel. Govt. has obligation to return dependents at Govt. expense since employee and family are sent to overseas post for convenience of Govt. and, furthermore, amendment will bring regulation in harmony with 6 FAM 126.3 and sec. 1.11f of OMB Cir. A–56---------- 246

Facilities other than Government

Travel expense reimbursement

Military personnel. (*See* **TRAVEL EXPENSES, Military personnel, Use of other than Government facilities**)

TRANSPORTATION—Continued

Household effects

Drayage

Between non-Government quarters overseas

Page

Both military members and civilian employees at overseas permanent duty stations who are required to vacate local housing leased because no Govt. quarters were available may be paid drayage costs to move their household goods to other housing on local economy when quarters they occupy are declared by medical personnel to no longer meet established health and sanitation standards on basis military members must obey orders and civilian employees move for convenience of Govt. However, neither military members nor civilian employees are entitled to drayage when move to other non-Govt. quarters results from landlord refusing to renew lease or otherwise permit continued occupancy as such change of quarters is not for convenience of Govt---------- 293

Vessels

American

Cargo preference

Applicability

Prohibition in 10 U.S.C. 2631, Cargo Preference Act of 1904, as amended, to effect that "only vessels of U.S. or belonging to U.S. may be used in transportation by sea of supplies bought for Army, Navy, Air Force, or Marine Corps," does not apply to towage of empty barge by foreign-flag tug since tug is not supply item and language of act as well as court cases which distinguish between contracts of affreightment and contracts for tonnage services indicate preference granted U.S. vessels by 1904 Cargo Preference Act is limited to transportation by sea of military supplies under contracts of affreightment and preference does not extend to towage of empty vessels under ordinary towage contracts. Therefore payment under towage contract from appropriated funds was proper---------- 327

TRAVEL EXPENSES

First duty station

Manpower shortage

No determination of shortage

As Federal Judicial Center is considered part of judicial branch, its employees are within scope of 5 U.S.C. 5721 *et seq.*, regardless of fact Center is not specifically listed in statute which authorizes reimbursement for travel and transportation expenses incurred in reporting to position determined by CSC to be in manpower shortage category. However, since Center under authority in 28 U.S.C. 625(e) to incur expenses incident to operation of Center and not Commission determined position of Director of Continuing Education and Training was manpower shortage position, expenses incurred by Director in moving to first duty station are not reimbursable under 5 U.S.C. 5723, and rule in 22 Comp. Gen. 885 that officer or employee of Govt. must place himself at first duty station at own expense applies---------- 268

TRAVEL EXPENSES—Continued

Military personnel

Retirement

To selected home

Residence establishment Page

Selection of place as home by member of uniformed services upon retirement without traveling to home of selection within 1-year period prescribed by par. M4158–1a and 2a of Joint Travel Regs. for establishing bona fide residence does not create entitlement to travel and transportation allowances to home selected. Therefore, Air Force officer retired under 10 U.S.C. 8911, effective July 1, 1970, who selected Marco Island, Fla., as home of selection but traveled with dependents from last permanent duty station to home of record, also shipping household effects to that point, where he continued to reside beyond 1-year period following retirement awaiting construction of home on Marco Island, is only entitled to travel and transportation allowances under 37 U.S.C. 404 and 406 on basis home of record was home of selection---------- 242

Travel status

Interstation travel *v.* travel within limits of duty station

Travel of Marine officer who was verbally directed to travel by privately owned vehicle from permanent duty station at Quantico to Marine Headquarters in Arlington, as well as to various locations in Washington, D.C., incident to temporary duty—travel subsequently approved for reimbursement—is interstation travel within purview of 37 U.S.C. 404 and reimbursable at 7 cents per mile rate prescribed by par. M4203–3b of Joint Travel Regs. rather than at higher rate provided by par. M4502–1, pursuant to 37 U.S.C. 408, for travel within limits of member's station. Although 37 U.S.C. 404 requires travel to be authorized by written orders, confirmation of verbal orders by competent authority shortly after performance of travel as being advantageous to Govt. may be accepted for purpose of reimbursing officer---------- 236

Use of other than Government facilities

Authorizing *v.* directing travel

Enlisted Navy man who had served in Vietnam and was separated in Philippines where Govt. transportation to U.S. was available but who upon discharge returned to Saigon at personal expense to be married and then traveled by American commercial airline from Saigon to California is considered to have been authorized rather than directed to travel by Govt. conveyance to U.S. and he may be reimbursed for commercial air transportation as provided in par. M4159–4a of Joint Travel Regs., reimbursement not to exceed cost to Navy to transport him by Govt. air from Philippines to continental U.S. subsequent to discharge---------- 297

TRAVEL EXPENSES—Continued

Overseas employees

Locally hired

Passport fee Page

Expense of obtaining passports and photographs for passports for himself and dependents, where no immediate travel is contemplated, by locally hired employee with whom transportation agreement was executed in accordance with par. C4002–3 of Joint Travel Regs. (JTR), Vol. 2, and who has earned renewal agreement travel (C4001. JTR), is reimbursable pursuant to C9010–2, JTR, even though actual travel may not occur and regulation does not expressely cover locally hired American citizens or their dependents, in view of fact that locally hired employee who meets conditions of eligibility for renewal agreement travel is generally entitled to same benefits as employee recruited stateside who is required to renew his passport as result of continued employment in foreign area 177

Reemployment after separation

Liability for expenses

Different activities within same agency

When employee separated within U.S. from service in one component of Dept. of Defense (DOD) due to reduction in force or transfer of functions is reemployed at different location by different component within DOD after break in service of not more than 1 year, transfer expenses that employee is entitled to pursuant to 5 U.S.C. 5724a(c) are payable by activity acquiring employee's services as prescribed by 5 U.S.C. 5724(e), which provides that when employee transfers from one agency to another, agency to which he transfers pays expenses to new duty station. Further authority in 5 U.S.C. 5724(e) and par. C1053–2b(1)(b) of Joint Travel Regs. permitting either losing or acquiring agency to pay relocation expenses is for application only in cases of transfer without break in service 345

TURNKEY DEVELOPERS

(*See* **HOUSING, Turnkey developers**)

VESSELS

Cargo preference. (*See* **MARITIME MATTERS, Vessels, Cargo preference**)

WAGE AND PRICE STABILIZATION

Wage changes

Federal employees

Administratively fixed employees

Postal employees of Canal Zone Govt. whose pay rates and increases pursuant to 2 C.Z.C. 101 are administratively determined and were in past fixed to conform with rates prescribed for Post Office Dept. employees who may not be granted same pay increases provided for Postal Service employees, even though compensation of Postal Service employees is used as measure of compensation to be paid Canal Zone postal employees, as increases exceeded percentage limitation imposed by wage-price freeze instituted on Aug. 15, 1971. Canal Zone employees are executive branch employees who come within scope of 5 U.S.C. 5307, thus making them subject to guidelines on pay increases prescribed in Jan. 11, 1972 Presidential Memorandum 188

U.S. GOVERNMENT PRINTING OFFICE : 1973 O - 499-612