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[B-127318]

Leaves of Absence—Civilians on Military Duty—Entitlement—ROTC Training

A civilian employee attending ROTC advanced camp under the authority of 10 U.S.C. 2109, which is not considered active duty in the Armed Forces, may be allowed the annual leave available to him for the period he was performing field training as an ROTC cadet since the longstanding rule that actual military service is incompatible with concurrent Federal service is not for application in view of the fact that ROTC training is distinct in many respects from active military service, and as the performance of ROTC field training does not involve the holding of a civilian position for purposes of 5 U.S.C. 5533a, which prohibits the receipt of basic pay for more than one position for more than an aggregate of 40 hours in any 1 calendar week.

To Gilbert H. Dawson, National Security Agency, May 1, 1973:

We refer to your letter of January 18, 1973, Serial: N41/0085F, by which you request our decision whether Mr. Joseph Mitola III, an employee of the National Security Agency, may have part of his absence from duty from June 24 to August 4, 1972, while he was attending ROTC advanced camp, charged to annual leave rather than leave without pay.

You say that Mr. Mitola was not allowed the annual leave available to him during the period he was participating in ROTC advanced camp in view of the decision in 35 Comp. Gen. 531 (1956). You now request our advice as to whether that decision under which ROTC cadets are denied entitlement to annual leave with pay from civilian positions while participating in summer camp is still controlling since the Dual Compensation Act in force at the time that decision was rendered and which was cited therein as the controlling provision of law has been superseded by the Dual Compensation Act of 1964, now 5 U.S. Code 5533. As you indicate, current statutory provisions do not limit the compensation which may be received by an individual holding military and civilian offices concurrently except with respect to retired military officers as provided in 5 U.S.C. 5532. This is so because the dual compensation provision of 5 U.S.C. 5533 now applies only to the holding of two civilian positions under the definition of position as contained in 5 U.S.C. 5531(2).

However, it was held in 46 Comp. Gen. 400 (1966) that the enactment of the Dual Compensation Act of 1964 did not change the longstanding rule that active military service is incompatible with concurrent Federal civilian service. *See also* 49 Comp. Gen. 444 (1970). On the other hand ROTC field training under 10 U.S.C. 2109, which is here involved, is not considered active duty in the Armed Forces. 45 Comp. Gen. 103, 111 (1965). See also *Allison* v. *United States*, 426 F. 2d 1324 (Cir. 1971) in which the Court of Appeals held that ROTC field training is not active military service.

Since field training performed by ROTC cadets is not active military service such duty is not subject to the incompatibility rule as presently stated which prohibits only the performance of service as a civilian by an individual who is subject to active military service. We find no reason to extend the incompatibility rule to ROTC cadet field training since such training is distinct in many respects from active military service. Of particular note is that ROTC cadets are not subject to the Uniform Code of Military Justice. 10 U.S.C. 802; *Allison v. United States, supra.*

Finally, we do not consider that the performance of ROTC field training involves the holding of a civilian position for purposes of 5 U.S.C. 5533(a) which prohibits the receipt of basic pay for more than one position for more than an aggregate of 40 hours in any one calendar week.

For the reasons stated Mr. Mitola may be allowed any annual leave available to him during the period he was performing field training as an ROTC cadet. Your submission is answered accordingly.

[B-177716]

Bids—Evaluation—Aggregate *v.* Separable Items, Prices, Etc.—All or None Bids

Under an invitation for bids (IFB) which provided for the preparation of personal property for shipment under three schedules—outbound services; inbound services; and intra-city and intra-area moves—each schedule further divided into three distance areas, and for the evaluation of bids on the total aggregate price of all items within an area of performance under a given schedule, and that a bidder must bid on all items within a specified area of performance for a given schedule, the acceptance of an "all or none" bid which was not low in all areas was not precluded, and the award to the bidder submitting the low, responsive bid for the combined Schedules I and II was proper. Furthermore, the bidder erroneously informed that "all or none" bids must be low in all areas of all schedules, who made no effort to see that a clarifying amendment was issued, assumed the risk that resolution of the question of law raised would not be sustained upon review.

To Gray, Cary, Ames & Frye, May 3, 1973:

Reference is made to the telegram dated December 27, 1972, from Mission Van & Storage Company and to your subsequent correspondence on their behalf protesting the contract award to DeWitt Transfer & Storage Company under invitation for bids (IFB) M00681-73-B-0022, issued by the Marine Corps, Purchasing and Contracting Office, Oceanside, California. Similar protests also have been filed here by AAA Van & Storage Company (AAA) and Sullivan Storage & Transfer Company (Sullivan).

The IFB covered requirements during calendar year 1973 for services and materials for the preparation of personal property of Department of Defense personnel in the Camp Pendleton area for

shipment or storage and intra-city or intra-area moves. As prescribed by Armed Services Procurement Regulation (ASPR) 22–602, the required services are broken down into three schedules: I. Outbound services; II. Inbound services; and III. Intra-city and intra-area moves. Each schedule is further divided into three areas, which are based on distances from Camp Pendleton.

The IFB's General Instructions contained the clause prescribed by ASPR 22–600.3, for evaluation of bids, which provides as follows:

EVALUATION OF BIDS (1970 MAY) (ASPR 22–600.3)

(a) Bids will be evaluated on the basis of total aggregate price of all items within an area of performance under a given schedule. A bidder must bid on all items within a specified area of performance for a given schedule. Failure to do so shall be cause for rejection of the bid for that area of performance of that schedule. Any bid which stipulates minimum charges or graduated prices for any or all items shall be rejected for that area of performance within the Schedule.

(b) In addition to other factors, bids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards). For the purpose of making this evaluation, it will be assumed that the sum of $50 would be the administrative cost to the Government for issuing and administering each contract awarded under this invitation, and individual awards will be for the items and combinations of items which result in the lowest aggregate price to the Government, including such administrative costs.

* * * * * * *

(c) Notwithstanding (a) above, when "additional services" are added to any schedule, such "additional services" items will not be considered in the evaluation of bids.

The General Instructions also included the clause in ASPR 22–600.4, which provides for making award to the qualified low bidder by area under each of the specified schedules to the extent of his stated guaranteed daily capability and reserves the right to award additional contracts to the extent necessary to meet its estimated maximum daily requirements.

The Solicitation Instructions and Conditions, Standard Form 33A, paragraph 10, provides in pertinent part:

(a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.

* * * * * * *

(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations.

The report states that the same ASPR clause concerning evaluation of bids was contained in the prior IFB issued for requirements during calendar year 1972, and that bidders had inquired of the contracting officer as to whether or not the clause precluded "all or none" bids. In connection with the procurement of calendar year 1972 requirements the contracting officer issued a letter to all bidders stating that "all or none" bids "could be considered *only* if the bid(s) were low in all areas of all schedules," and that a lower responsive bid

for any area under any schedule, multiple-award factor of $50 included, would receive the award and nullify the "all or none" bid. In connection with the subject procurement, Mission Van inquired (orally and by letter) of the contracting officer as to the proper interpretation of the IFB provisions in connection with "all or none" bids. Mission Van was advised, both orally and by letter, that the written advice furnished in the prior year was still applicable. The record does not indicate that any other bidder received such advice in connection with this year's procurement.

DeWitt submitted an "all or none" bid for the combined Schedules I and II and was the lowest aggregate bidder for those schedules. However, other companies submitted lower bids on Areas I and II of Schedule I. Faced with a protest by DeWitt against the rejection of its "all or none" bid, the contracting officer apparently reconsidered his position and awarded DeWitt the primary contract upon all areas of Schedules I and II. Mission Van was awarded a secondary contract on all areas of Schedules I and II and Sullivan was awarded a tertiary contract for all areas of Schedule II. There is no tertiary contract under Schedule I.

Paragraph 3 of the Solicitation Instructions and Conditions provides for explanations to offerors as follows:

Explanation to Offerors. Any explanations desired by an offerors regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors.

You contend that Mission Van was misled to its prejudice by the contracting officer's actions in this case and that the written representations of the contracting officer, together with the terms of the invitation, required rejection of the "all or none" bid since lower bids existed in two areas of Schedule I. You submit that the failure to reject DeWitt's bid was arbitrary, capricious, and an abuse of discretion exhibiting bad faith. You also contend that the award to DeWitt was in violation of the statutory directive requiring award only to "the responsible bidder whose bid conforms to the invitation" and therefore is void. 10 U.S.C. 2305(c). Finally, it is suggested that either an award be made to the low bidders consistent with the contracting officer's advice, or bids be resolicited.

While both AAA and Sullivan have protested because of the contracting officer's advice during the prior year's procurement, we believe a proper resolution of this matter should be based upon the

treatment accorded Mission Van, particularly since there was no difference in the contracting officer's actions directed toward AAA, Sullivan and DeWitt.

As a general rule, a low bid on an "all or none" basis is responsive and must be accepted in the absence of a provision to the contrary in the solicitation. *See* 42 Comp. Gen. 748 (1963) and ASPR 2-404.5. As shown above, provisions in the invitation required bidders to bid on all items within an area of performance for a given schedule and provided for evaluation of bids and award on the basis of the total aggregate price of all items in an area of performance under a given schedule. We believe it is reasonably clear that the pertinent effect of these standard provisions, which are prescribed by ASPR 22-600.3 and 4, is to require acceptable bids to include prices for all items within an area to eliminate the prerogative which the Government otherwise would have under paragraph 10(c) of the Solicitation Instructions and Conditions to award contracts for individual items or group of items within an area of performance for a given schedule. Accordingly, we do not consider that such provisions may be reasonably construed as negating the provision of paragraph 10(c), which permits a bidder to qualify his bid by specific limitations, or to preclude considerations of bids for aggregate of areas or schedules (provided that any such bid covers all items within the areas bid) since any award on the basis of such a bid would also meet the requirement for an award of no less than all items in an area.

Although ASPR 22-600.4 refers to awards by areas under each of the schedules, this reference is made in the context of defining the extent of the award which would be made to a low bidder in relationship to his capability, rather than providing a restriction on the method of determining that bidder which is entitled to the award as having submitted the bid "most advantageous to the Government, price and other factors considered." In this connection, we note that none of the protestors, nor the communications from the contracting officer, has suggested that the IFB provisions precluded a bidder from submitting an "all or none" bid for more than one area or schedule. It is contended (based on the position of the contracting officer) only that such a bid may not be accepted unless it contains the low price for each individual area of all schedules. This position is considered defective in that it would have the obvious effect of forestalling the submission of "all or none" bids permitted by paragraph 10(c) of the Solicitation Instructions and Conditions, and thereby deny to the Government the most advantageous contract which could be derived from a bid offering an aggregate price for the combined quantities involved in several areas, when the aggregate bid is lower than the total price

of the individual bids on those areas but is based on a higher individual price in one or more of the areas concerned.

We must conclude, therefore, that in the absence of an amendment the IFB did not preclude acceptance of an "all or none" bid which was not low in all areas included therein; that DeWitt was justified in relying upon the invitation as issued in submitting its bid; that DeWitt submitted the low responsive bid for the combined areas under Schedules I and II; and that DeWitt's contract is not subject to legal objection on the issues presented.

On the other hand, we must recognize the effects of the contracting officer's erroneous written interpretation of the IFB provisions given to Mission Van pursuant to paragraph 3 of the Solicitation Instructions and Conditions. The fact that Mission Van requested an interpretation of the bidding terms of the IFB, regarding whether "all or none" bids must be low in all areas of all schedules for acceptance, is an indication that this bidder placed some importance on that factor in preparing its bid. Moreover, we are inclined to agree with the contention of Mission Van that a requirement for an "all or none" bid to be low in all areas of all schedules in order to be acceptable would be a material factor which could affect bidding strategy and prices. Since Mission Van apparently relied upon the contracting officer's interpretation as to the "all or none" bid requirements in the preparation of its bid, it also appears that Mission Van could have been prejudiced in its bidding, as it contends, by the actions of the contracting officer.

The question therefore arises as to whether termination of DeWitt's contract is appropriate in these circumstances.

Whether an "all or none" bid must be low in all areas for acceptance under the IFB requires an interpretation of the IFB's clauses and provisions and, as such, involves a matter of law. It is not uncommon for the conclusions of well-qualified lawyers to differ in such legal interpretations and, in our opinion, when a prospective bidder asks for the contracting officer's views on a question of law, as in the case at hand, the bidder should be regarded as being on notice of the possibility that the contracting officer's views may not be sustained upon review by other authority. In addition, the IFB indicates a means by which a prospective bidder can seek to protect himself against a reversal by reviewing officials of a contracting officer's interpretation of the legal significance of an IFB's clauses and provisions. Standard Form 33A, paragraph 3, clearly requires that material information furnished one prospective bidder be subsequently issued in the form of an amendment to the IFB. When an amendment, effecting the contracting officer's position as to the conditions under which an "all or none" bid would be acceptable, was not forthcoming, we believe a prudent bidder

would have been reluctant to rely thereon and should have taken appropriate steps to obtain compliance by the contracting officer with the IFB requirement for issuance of an amendment. We have recognized that Standard Form 33A, paragraph 3, imposes no *legal* duty on bidders to assure that the contracting officer follows the prescribed procedures (B-169205, June 23, 1970). However, where a prospective bidder has made no effort to see that a material clarifying interpretation of IFB clauses and provisions given him by the contracting officer is thereafter issued to all prospective bidders in the form of an amendment, it is our view that the bidder may be fairly held to have accepted the risk of the contracting officer's interpretation not being sustained upon a review after bid opening.

Since there is no indication that Mission Van took appropriate steps to seek an amendment to the IFB, we believe that as a matter of procurement policy Mission Van may be fairly regarded as having accepted the risk and consequences of the contracting officer's interpretation not being adopted by reviewing officials. We therefore do not find that an adequate basis has been presented for terminating DeWitt's contract for any prejudice which Mission Van may have suffered by having relied upon the contracting officer's interpretation in the preparation of its bid.

Accordingly, your protest is denied for the reasons shown above.

[B-178104]

Patents—Devices Used by Government—License Agreements—Authority of Government to Execute

In the absence of specific authority to resort to additional methods for compensating patent holders for infringements by the Government, such as the authority granted the Department of Defense to purchase license agreements or administratively settle patent infringement claims, 28 U.S.C. 1498 prevails and the only remedy available to a patent owner for unauthorized patent infringement by the Government is by action in the Court of Claims for recovery of reasonable and entire compensation for the use and manufacture of a patented item, and since section 3 of the Royalty Adjustment Act of 1942 has expired, the Department of Transportation has no authority to enter into a royalty-bearing nonexclusive patent license based on past and future departmental procurements to avoid the disruption incident to litigation in the Court of Claims.

To the Secretary of Transportation, May 4, 1973:

Reference is made to a letter dated February 27, 1973, from your General Counsel, requesting our decision as to the authority of the Department of Transportation (DOT) to enter into a nonexclusive patent license with International Telephone and Telegraph Corporation (ITT) under ITT U.S. Gloess Patent No. 2,807,016, issued September 17, 1957, and scheduled to expire on September 15, 1974, relating to plan-position indicator radar.

To summarize, the license would be effective as of the date on which ITT first lodged a claim for compensation with DOT. The license would be royalty-bearing based on past and future departmental procurements. The General Counsel considers it to be necessary and in the best interests of DOT to take the license to recognize a deserving patent and avoid the disruption incident to litigation in the Court of Claims.

It is pointed out that two agencies of DOT use the patent without license; that ITT has offered and apparently has the authority to grant the license proposed; that the patented invention has been used in DOT radar procurements; and that the Department of Defense (DOD) has been a licensee under the instant patent for its radar procurements. Reference is made to a 1961 DOD license agreement covering future royalties and providing for a lump-sum payment to ITT for a release of all Government agencies for past infringement prior to the effective date of the agreement. Also, all known domestic manufacturers of radar have accepted a license under the instant patent. The royalty rate proposed would be the same now paid by DOD.

The General Counsel presents several legal arguments to support the proposed execution of the license agreement with ITT--(1) the fact that other Government agencies as a matter of course either take patent licenses or allow royalty charges in the procurement of supplies; (2) the considered inherent authority of a Government agency having procurement responsibility to enter into such an agreement to provide compensation for procurements made after the date when license negotiations are commenced; (3) the opinions of legal commentators that patent infringement claims can be settled more amicably without resort to litigation in the Court of Claims under 28 U.S. Code 1498; and (4) the position of some authorities that a Government agency, other than the Department of Defense, does have the authority to settle a claim for past infringement of a patent. With respect to the latter argument, the General Counsel refers to the alleged viability of section 3 of the Royalty Adjustment Act of 1942, 56 Stat. 1013, 1014, 35 U.S.C. 89–96, 1946 Edition. In the alternative, your General Counsel states that, as here, procurements taking place during a period of discussion between a proposed licensor and a Government agency are not "past infringement."

28 U.S.C. 1498 provides that the remedy of a patent owner for unauthorized patent infringement occurring during the use or manufacture by or for the Government shall be by action against the Government in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture. We have often iterated the interpretation of that act by the courts to the effect that

the remedy provided therein is exclusive and comprehensive in nature. The Congress has specifically authorized certain Government agencies to resort to additional methods for compensating patent holders such as the purchase of license agreements or the administrative settlement of patent infringement claims. But, with respect to your Department, your General Counsel has not cited, nor are we aware of, any such specific statutory authority which would permit the execution of the proposed license agreement by your Department. Moreover, in 37 Comp. Gen. 199, 201 (1957), cited by your General Counsel, we made the following comments which are directly pertinent to a portion of the rationale employed by your General Counsel to support the execution of the proposed license:

> With specific reference to the authority to acquire by contract a patent or a license to use it, the Attorney General advised the Secretary of the Navy in 19 Op. Atty. Gen. 407, dated October 4, 1889, that no such authority could be deduced from an annual appropriation providing for the furnishing of manufacturing of an article used in the naval service. And, with respect to the authority to adjust by contract a claim for the infringement of patent rights by or for the Government without obtaining the consent of or a license from the owner, it was held in a decision of our Office to the Secretary of War dated August 4, 1931, 11 Comp. Gen. 44, that since this involved the settlement of a claim after the infringement had taken place such adjustment was not within the authority of the department, that the owner's remedy against the United States was restricted to a suit in the Court of Claims, and that any adjustment to avoid such a suit was for consideration of the contractor who had obligated itself to protect the Government against such claims under the provisions of the "hold harmless" clause of the supply contracts involved. *Cf.* 5 Comp. Gen. 713, 13 *id.* 173, and 22 *id.* 904.

In this regard, your attention is invited to page 124 of Volume 4, Part I, Chapter 2, of the Report of the Commission on Government Procurement (December 1972) wherein two recommendations for the consideration of Congress particularly pertinent to the instant request for decision are made to correct the recognized lack of uniformity in the area of patent infringement.

> Recommendation 6. Authorize all agencies to settle patent infringement claims out of available appropriations prior to the filing of suit.
>
> Recommendation 7. Grant all agencies express statutory authority to acquire patents, applications for patents, and licenses or other interests thereunder.
>
> Another way to facilitate appropriate monetary relief for the use of patented inventions by or for the Government is to widen administrative authority to settle claims for such use. Only the Department of Defense has clear authority in this area. We have concluded that this should be rectified and that there is a need for authority in all agencies to settle claims that could be brought under 28 U.S.C. § 1498. The granting of such authority would be a significant measure in ensuring the equitable treatment of patent owners.
>
> Agencies should also have clear authority to acquire patents or rights thereunder. This would allow agencies to follow procedures similar to NASA's "pre-procurement licensing" approach rather than relying on after-the-fact suits or settlement.

In 37 Comp. Gen. *supra.*, our Office noted, but did not resolve the question as to whether section 3 of the Royalty Adjustment Act of 1942 was viable. That section of the act authorized the head of any Government agency to settle claims of owners or licensors of inventions

arising out of Government use thereof, and to enter into agreements for compensation for future Government use. However, the provisions of the act were completely deleted from the U.S. Code as a result of the 1952 revision, codification and enactment into law of Title 35, U.S.C. 1 (Patents) by P. L. 82-593, 66 Stat. 792. The table preceding the current Title 35 shows the distribution of all sections of the former Title 35. Sections 89 through 96 (Royalty Adjustment Act of 1942) are listed as "Expired." Also see, "Use of Patented Inventions by or for the Government," R. Peters; *Patents and Technical Data*, Government Contracts Monograph No. 10, The George Washington University (1967), where at page 77, footnote 37, it is stated:

> The Royalty Adjustment Act expired on April 1, 1953, and several months later section 609 of the Department of Defense Appropriation Act of 1954, 67 Stat. 350, was passed to provide express authority for making the [license] agreements previously authorized by section 3 of the Royalty Adjustment Act, and for making agreements covering past use of "infringement" alone.

Similarly, in 37 Comp. Gen., *supra.*, at page 202, we observed that insofar as the 1954 appropriation act is concerned:

> * * * It seems abundantly clear from the legislative history and the provisions of this legislation that this section was enacted by Congress for the purpose of providing express authority for making the acquisitions previously authorized by section 3 of the Royalty Adjustment Act, *supra.* * * *.

We are of the view that section 3 of Royalty Adjustment Act of 1942 has no present effect.

Therefore, we believe that no clear authority exists for your Department to enter into the proposed license agreement.

[B-177617]

Credit Cards—Use—Service to Public

The National Technical Information Service (NTIS), the central clearinghouse for the collection and dissemination of scientific, technical, and engineering information and for the establishment of fees under 15 U.S.C. 1153 for making the results of technological research available to industry, business, and the general public, may arrange to accept payment by means of credit card services since there is no statutory prohibition against the Government providing services on credit, although the Government ordinarily does not provide goods or services on a credit basis. Therefore, the NTIS may contract with a national credit card company for use of its credit card service as a means of paying for purchases from NTIS, an arrangement under which the Government's interest will be adequately protected, and which will provide NTIS customers with more rapid and convenient service.

To the Secretary of Commerce, May 7, 1973:

By letter dated December 8, 1972, your Acting Assistant Secretary for Administration requested our opinion as to whether the National Technical Information Service (NTIS) may contract with a national credit card company for customer use of its credit card services as a means of payment for purchases from NTIS.

NTIS is the central clearinghouse for the collection and dissemination of scientific, technical and engineering information and under section 1152 of Title 15, U.S. Code, is responsible for making the results of technological research readily available to industry, business and the general public. The Secretary is authorized by section 1153 of Title 15 to establish, from time to time, schedules of reasonable fees for services or documents furnished.

The proposed credit card plan is not to result in increased prices to the public nor is it expected to escalate the administrative costs of NTIS above the level experienced under existing procedures. Payment of all authorized charges will be guaranteed by the credit card company.

There is no statutory prohibition against the Government providing services on credit. Nevertheless, though there are statutes which specifically authorize certain sales by the Government on a credit basis, the Government ordinarily does not provide goods or services on a credit basis. *See* 40 U.S.C. 484(c).

The proposed arrangement would further the statutory mandate by providing more rapid and convenient service to NTIS customers than is now possible. Recognizing there is a diversity of buyers of relatively small individual amounts, it is apparent that the interests of the Government are adequately protected by the credit card company guarantee. Under the circumstances, we find no basis for objection to the proposed procedure or to the implementing Mail Order Agreement with the American Express Company which the Acting Assistant Secretary forwarded with his letter.

We understand that credit card companies other than American Express are not participating because of conditions they imposed which were unacceptable to NTIS. We assume that execution of the agreement with American Express will not impede participation by other major credit card companies upon relaxation of the unacceptable conditions.

[B-177875]

Transportation—Household Effects—Military Personnel—After Acquired—Purchased Overseas for Delivery in United States

Where the furniture ordered or contracted for overseas by a member of the uniformed services from a United States firm conducting an overseas sales program for delivery and use of the furniture at the member's next permanent duty station in the United States is not available for shipment at the time of the effective date of the member's change-of-station orders, the member is not entitled under 37 U.S.C. 406(b) to the transportation of the effects ordered but not available as the furniture is not considered as having been acquired by the member prior to the effective date of his permanent station change within the contemplation of paragraph M8000-2 of the Joint Travel Regulations in the

absence of evidence that title to the furniture still in the possession of the manufacturer had passed to the member prior to the effective date of the permanent change-of-station orders.

To the Secretary of the Air Force, May 7, 1973:

Further reference is made to letter dated December 29, 1972, from the Assistant Secretary of the Air Force, Manpower and Reserve Affairs, in which a decision is requested concerning the definition of the word "acquired" as used in the Joint Travel Regulations in connection with the shipment of household effects at Government expense. The submission has been assigned PDTATAC Control No. 72-60 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter the Assistant Secretary indicates that certain furniture companies located within the United States conduct overseas sales programs, which are primarily directed to members of the uniformed services. It appears that under these programs, members of the services and their families are visited by salesmen for the purpose of selling them furniture for delivery and use at their next permanent duty station in the United States. It is said that furniture purchased in this way is not delivered outside the United States, but remains with the manufacturer until the member returns from his overseas assignment.

At the time these programs were established the Assistant Secretary says it was contemplated that when a member made a purchase, the furniture would be placed in storage for him by the manufacturer for shipment on a Government bill of lading within his legal weight limitation, incident to his next permanent change of station within the United States.

It is stated in the Assistant Secretary's letter that inquiries by Government transportation officers directed to the furniture companies where purchases have been made, reveal that in many cases the furniture is not available for shipment at the time of the effective date of the member's permanent change-of-station orders. Among the reasons advanced for this are the following: the furniture is not yet manufactured; the furniture is only partially completed; the member's credit has not been approved; or, only a portion of the total order is ready.

Due to the nonavailability of the furniture for shipment, the question has been raised as to whether the furniture in such cases is acquired by the member prior to the effective date of the permanent change-of-station orders. In this regard, it is pointed out by the Assistant Secretary that the word "acquired" has been interpreted variously to mean:

a. when ordered, or contracted for,
b. when final payment is made,
c. when taken into the physical possession of the member.

In view of the above, our decision is requested as to whether a, b, c, above, or some other time may be used in determining the proper application of the word "acquired" in connection with household goods.

Under the provisions of 37 U.S. Code 406(b) a member of a uniformed service is entitled to the transportation of his household effects, within weight allowances prescribed by the Secretaries concerned, in connection with a change of temporary or permanent station. The Government's maximum obligation is the cost of a through shipment of a member's household goods within his prescribed weight limitation in one lot between authorized places at a valuation equivalent to the lowest applicable rate established in the carrier's tariffs. Paragraph M8007–2, Joint Travel Regulations.

Paragraph M8009–3 authorizes deviation from the regulations so that shipments may be made to and from any points. However, the member must agree to pay any additional costs resulting from such shipments.

Paragraph M8000–2, item 9 of the regulations provides that the term "household goods" does not include articles of household goods acquired subsequent to the effective date of permanent change-of-station orders except in certain circumstances not here relevant.

Generally, in order to pass title under a contract for the sale of an article to be manufactured, there must be not only a completion of the article, but also a delivery, or at least something equivalent thereto, a tender, or a setting apart for the buyer and an appropriation to the contract. The intention of the parties will, however, govern, and if such intention appears the title to the property will pass before or without delivery. 77 C.J.S. Sales § 257.

The Uniform Commercial Code provides that title cannot pass prior to identification of the goods to the contract, and further provides that title passes with reference to physical delivery of the goods in the absence of explicit agreement otherwise. Thus, in the absence of explicit agreement, title does not pass until physical delivery, as distinguished from mere completion of manufacture or production of the goods. However, identification to the contract may take place prior to physical delivery, since it may take place when the goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers. 67 Am Jur 2d, Sales, § 239.

Where a Department of Defense employee paid part of the purchase price of new furniture upon placement of a purchase order, the remainder to be paid on delivery, and the furniture was shipped subsequent to the effective date of his travel authorization, in the absence of evidence indicating that title passed to him on or before such date, his

claim for reimbursement for transportation of the furniture was disallowed. *See* decision B–166028, April 22, 1969, copy enclosed.

Thus, we find no basis for the view that a member has "acquired" furniture that he has ordered or contracted for if it is not yet manufactured, or is only partially completed, on the effective date of his permanent change-of-station orders. Whether title to the furniture would vest in the purchaser after completion or production, but before delivery or shipment of the goods to him, would depend on the terms of the purchase contract.

In the absence of evidence that title to the furniture still in the possession of the manufacturer had passed to the member prior to the effective date of his permanent change-of-station orders, we are of the opinion that he would not be entitled to shipment of such items at Government expense incident to his charge of station.

Your question is answered accordingly.

[B–178425]

Bids—Acceptance Time Limitation—Computation—Saturdays, Sundays, and Holidays

The acceptance of a bid, subject to acceptance within 60 calendar days from the date of receipt of the offer, on Monday, February 5, 1973, the 62nd day because the 60th calendar day occurred on Saturday, February 3, 1973, did not consummate a valid contract, notwithstanding the law of the situs—New York State—provides that when an act is authorized or required to be performed on a Saturday, Sunday, or a public holiday, it may be done on the next succeeding business day, since the applicability of the statute is academic in view of the incorporation of Standard Form 33A in the invitation for bids, which provided that "Time if stated as a number of days, will include Saturdays, Sundays and holidays." Modifies 38 Comp. Gen. 445 and B–137634, dated July 5, 1963.

To the Acting Administrator, General Services Administration, May 8, 1973:

We are in receipt of a letter dated April 10, 1973, from your General Counsel, requesting an opinion as to the validity of a contract awarded to The Crowell Corporation under invitation for bids (IFB) FPNSO–E2–2349–A, issued by the New York Regional Office.

By the terms of the offer, the Crowell bid was subject to acceptance within 60 calendar days from the date of receipt of offers—the 60th calendar day being Saturday, February 3, 1973. However, award of the contract was made on Monday, February 5, 1973, the 62nd day. Crowell immediately declined the award contending that no contract came into being because its offer was not accepted within the time specified in the bid. On the other hand, GSA contends that the award was valid since N.Y. Gen. Constr. Law secs. 25 and 25–a (21 McKinney 1972–1973 SUPP.) provides that when an act is authorized or required

to be performed on a Saturday, Sunday or a public holiday, it may be done on the next succeeding business day.

In a somewhat similar case, our Office held that, in the absence of Federal law, State law will apply. 38 Comp. Gen. 445 (1958), reconsidered B–137634, July 5, 1963; but see *The Padbloc Company, Inc.* v. *United States*, 161 Ct. Cl. 369 (1963).

However, unlike the situation described in 38 Comp. Gen., *supra*, this IFB provides on page 3 that Standard Form 33A is incorporated by reference. Standard Form 33A states in section 2(f) that: "Time, if stated as a number of days, will include Saturdays, Sundays, and holidays." In view of the IFB statements regarding time, the applicability of the State statute becomes academic. We believe that the last day for acceptance of the bid under the IFB was the 60th calendar day after bid opening or Saturday, February 3, 1973. Since the purported award made on February 5, the succeeding Monday, was declined by Crowell, no valid contract was consummated.

The decision at 38 Comp. Gen. 445 no longer will be followed by our Office in cases where the IFB incorporates Standard Form 33A.

[B–175359]

Transportation—Dependents—Military Personnel—Advance Travel of Dependents—Prior to Issuance of Orders

Members of the uniformed services whose dependents travel long in advance of permanent change-of-station orders or release of members from active duty may not be reimbursed travel expenses under 37 U.S.C. 406(a) since paragraph M7000–8 of the Joint Travel Regulations, promulgated pursuant to 37 U.S.C. 406(c), prohibits reimbursement when dependents travel prior to the issuance of orders directing a station change, or prior to receipt of official notice such orders would be issued, unless the travel is supported by a statement of the commanding officer, or his designated representative, of the order-issuing headquarters that the member was advised orders would be issued. However, certificates issued as much as 6 months prior to orders are not acceptable, unless there is a showing a determination actually had been made to issue orders to a member, as the relatively short period contemplated between the time of a change-of-station determination and the time required to issue the orders would be exceeded.

Transportation—Household Effects—Military Personnel—Advance Shipments—Prior to Issuance of Orders

Although the household effects of the members of the uniformed services may be moved at Government expense within prescribed weight allowances under the authority of 37 U.S.C. 406(b) incident to a permanent change-of-station, paragraph M8015–1 of the Joint Travel Regulations precludes shipment at Government expense when shipment occurs prior to the issuance of orders, except upon certification by proper authority that shipment was due to an emergency, exigency of the service, or required by service necessity. The authority in 37 U.S.C. 406(e) for the transportation of dependents, baggage and household effects between points in the United States in unusual or emergency circumstances when incident to military operations or need may not be extended to authorize transportation long prior to issuance of permanent change-of-station orders solely on the basis of dependents' need. However, erroneous payments will not be questioned, but procedures should be corrected.

To the Secretary of the Navy, May 14, 1973:

This is in reference to what would appear to be certain improper procedures of administration in the area of travel of dependents of members of the Navy and the shipment of members' household effects at Government expense, it being doubtful that such movements may be regarded as incident to a change of permanent duty station.

Enclosed is a copy of our decision of today to Lieutenant (j.g.) C. W. Gebhardt, Disbursing Officer, concerning the legality of such payments for dependent travel and the transportation of household effects at Government expense, long in advance of orders releasing a member from active duty.

We have been informally advised that numerous cases involving the shipment of household goods prior to the issuance of orders are now pending at the Navy Regional Finance Center, Washington, D.C. Thus, it appears that the situation and practices considered in our decision of today may be extensive.

Under the provisions of 37 U.S. Code 406(a) a member of the uniformed services who is ordered to make a change of permanent station is entitled to transportation for his dependents. This entitlement is subject under the provisions of subsection 406(c) to regulations prescribed by the Secretaries concerned.

This entitlement is set forth in paragraph M7000 of the Joint Travel Regulations promulgated pursuant to 37 U.S.C. 406(c). However, certain limitations on this entitlement are set forth in the Joint Travel Regulations. One of the exceptions to such entitlement is that travel of dependents performed at personal expense prior to the issuance of orders directing a permanent change of station or prior to receipt of official notice that such orders would be issued, will not be reimbursed. Paragraph M7000-8, Joint Travel Regulations.

In regard to the phrase "or prior to the receipt of official notice that such orders would be issued," paragraph M7003-4 of the regulations provides that the entitlement to transportation of dependents prior to the issuance of orders must be supported by a statement of the commanding officer, or his designated representative, of the headquarters issuing the change-of-station orders that the member was advised prior to the issuance of orders that such orders would be issued.

In this connection, as pointed out in the enclosed copy of decision of today, we have repeatedly and consistently held that this provision contemplates the relatively short period between the time when a determination is made to order a member to make a change of permanent station and the date on which the orders are actually issued. General information as to the time of eventual release from active duty has

consistently been held to be insufficient to meet the requirements of the regulations. *See* 34 Comp. Gen. 241 (1954); B–160968, April 14, 1967; B–169612, June 29, 1970.

Paragraph 7151 of the Navy Travel Instructions provides that certificates for travel of dependents prior to the issuance of orders will not be issued for travel more than 6 months prior to the prospective date of the change involved.

In commenting on this provision in an endorsement dated March 28, 1972, accompanying the request for the decision, which was rendered today, the Chief of Naval Personnel noted that no time limitation is imposed by paragraph M7000–8 of the Joint Travel Regulations and that the limitation in the Navy Travel Instructions was imposed by the Navy to meet personnel assignment considerations.

Generally, it is our view that the issuance of certificates for dependents' travel as much as 6 months prior to the issuance of permanent change-of-station orders to the member exceeds the relatively short period between the time when a determination is made to order a member to make a change of permanent station and the time ordinarily required to issue such orders. We believe that such certificates generally are issued on the basis of a prospective change of station, indefinite as to date, or on the basis of the date of expiration of the term of service, date of eligibility for retirement, etc., rather than on a firm determination at the time to issue such orders.

Hence, it has been our opinion that travel of dependents performed as much as 6 months in advance of the issuance of permanent change-of-station orders, even though supported by the prescribed certificate, generally may not be regarded as having been performed incident to the member's ordered change of station as required by section 406(a) of the statute. Consequently, reimbursement for such travel is not authorized in the absence of a showing to support the certificate in such cases that a determination actually had been made to issue such orders to the member.

As was stated in the enclosed copy of our decision, under the provisions of subsection (b) of 37 U.S.C. 406, a member is entitled to the transportation of household effects at Government expense incident to a permanent change of duty station, within weight allowances prescribed by the Secretaries concerned. Paragraph M8015–1 of the Joint Travel Regulations provides that the shipment of household effects prior to the issuance of orders (except in the case of emergency, exigency of the service, or when required by service necessity, as determined by the appropriate authority of the service concerned) is not authorized.

As pointed out in our decision, NAVSUP Publication 490, imple-

menting the above provision of the Joint Travel Regulations provides that only when a written statement is obtained from the order-writing activity certifying that the shipment is required due to emergency, exigency of the service, or service necessity, will the shipment of household goods prior to receipt of permanent change-of-station orders be approved by officers commanding personal property shipping activities.

As indicated above, we have been informally advised that numerous actions concerning the shipment of household effects in advance of orders apparently without the requisite certification, are pending in the Navy Regional Finance Center, Washington, D.C. Even if the certifications are attached, it seems highly unlikely that emergencies, etc., have actually occurred in all such cases pending in the Regional Finance Center, which would afford a proper basis for the movement.

Section 406(e) of Title 37, U.S. Code, provides that when orders directing a permanent change of station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of dependents, baggage and household effects, the Secretaries may authorize the movement of dependents, baggage and household effects and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, in cases involving unusual or emergency circumstances including circumstances as there set forth.

This provision was considered in our decision of June 1, 1970, 49 Comp. Gen. 821, in which the question was presented whether it provides authority for the movement of dependents, baggage and household effects of members of the uniformed services in unusual or emergency circumstances arising at duty stations in the United States. The discussion of the problem indicated that the primary concern was the movement of dependents and household effects incident to natural disasters, such as that resulting in the Gulf Coast area from hurricane Camille in 1969.

As pointed out in that decision, we have recognized that while section 406(e) was mainly concerned in the return of dependents from overseas stations prior to orders, we have also recognized that it provides authority in unusual or emergency circumstances for the movement of dependents and household effects between points in the United States when the movements are incident to military operations or military need. 45 Comp. Gen. 159 (1965) and 45 Comp. Gen. 208 (1965). *Also see* decision of November 27, 1972, 52 Comp. Gen. 293, copy enclosed.

We concluded, however, that section 406(e) affords no authority for such movements incident to natural disasters even though the

movements may be in the best interest of the member or the dependents and the United States.

Apparently, section 406(e) and paragraph M8015–1 of the regulations are being viewed as providing authority for the transportation of dependents and household effects between places in the United States long prior to the issuance of permanent change-of-station orders and solely on the basis of the needs of the dependents, the movement not resulting from any military operation or military need as was the case in the two 1965 decisions cited above. We find no legal basis for that view and are of the opinion that such practice should be discontinued.

In view of the misunderstanding that apparently has existed in this area, we will not question payments, otherwise proper, for such movements that have been made. However, it is requested that appropriate action be taken promptly to correct the practice referred to above.

We would appreciate being advised of the action taken.

[B–176764]

Contracts—Data, Rights, Etc.—Use by Government—Basis

The revised purchase description issued by the Navy which eliminated the restricted drawings of a subcontractor that had been contained, contrary to paragraph 4–106.1(e) of the Armed Services Procurement Regulation (ASPR), in a canceled request for technical proposals to furnish engine trim test sets, but which included information depicted in the drawings—information readily disclosed by physical examination of the sets, and which did not detail how the components would be manufactured or assembled—does not violate the subcontractor's proprietary rights since the disputed information is contained in the subcontractor's manual furnished to the Navy by the prime contractor with unlimited rights by reason of the fact the "Rights in Technical Data" clause prescribed by ASPR 9–203(b) and included in the prime contract was incorporated by reference in the manual, thus giving the Navy the right to use the information for procurement purposes.

To McGown, Godfrey, Decker, McMackin, Shipman & McClane, May 14, 1973:

We refer to your letter dated August 8, 1972, and subsequent correspondence, on behalf of Howell Instruments, Incorporated (Howell), protesting against the Department of the Navy's use for procurement purposes of data which you contend is proprietary to Howell.

On June 22, 1972, request for technical proposals (RFTP) N00156–72–RFTP–0496 was issued by Naval Air Engineering Center, Philadelphia, Pennsylvania. The solicitation called for technical proposals for furnishing 60 engine trim test sets in accordance with the requirements of purchase description 35 (PD–35), dated June 12, 1972. These sets are used to determine whether an engine is performing efficiently and to determine what adjustments to the engine are required. The requirements included indicators to read revolutions per

minute (RPM), temperature and pressure, and circuitry for correcting RPM and temperature to a standard day condition (59°F.) and for computing engine pressure ratio.

As background, it is reported that the general requirements for the test unit were set at a meeting held on February 3, 1971, between technical personnel from Howell, Navy and Pratt & Whitney Aircraft (PW). The record indicates that it was concluded at this meeting that a test set was to be furnished by Howell, under a subcontract with PW, to be delivered to the Navy pursuant to PW's prime contract (No. N00019-70-C-0208) with the Navy for TF30-P-412 engines and support equipment for the F-14A aircraft. At this time Howell provided the Navy with three drawings which depicted the configuration of the control panel, external dimensions of the test set, and the cables connecting the test set to the engine. Each of these drawings was marked with a Howell legend which indicated that it represented a proprietary device.

After 15 of these test sets (H236) had been furnished to the Navy by PW pursuant to its purchase order No. 807153 to Howell, dated April 28, 1971, the Navy concluded that any additional procurement of these devices should be on a competitive basis.

In early May 1972, Howell was informed of the Navy's intent to solicit competitive proposals. Howell expressed its concern to the Navy that the specification to be released in the solicitation might contain data which Howell considered proprietary and requested an opportunity to review the Navy purchase description before its release. This request was denied by the Navy on the basis that a prior release of the purchase description to Howell could give it an unfair competitive advantage over other prospective offerors. The Navy then issued solicitation N00156-72-RFTP-0496 on June 22, 1972, which incorporated the three restricted Howell drawings previously provided to the Navy.

On August 8, 1972, you protested to this Office against RFTP-0496. Meanwhile, the Navy had canceled RFTP-0496 and on August 1, 1972, issued a new solicitation (RFTP-N00156-73-RFTP-0104), which included a revised purchase description (PD-35A) eliminating the three Howell drawings. Howell states that it received this solicitation soon after August 8, 1972. With regard to the cancellation of RFTP-0496, Navy concluded that its use of the Howell drawings was contrary to the policy established in Armed Services Procurement Regulation (ASPR) 4-106.1(e) because they bore a restrictive legend and were not furnished to the Navy pursuant to the terms of any contract which gave it any rights to the drawings. However, the Navy also concluded that while use of the Howell drawings themselves was

restricted by the legend on the drawings, the information depicted in the drawings was not proprietary to Howell.

In this connection, the Navy reports that the drawings depict only information which is readily disclosed by physical inspection of the item itself, such as the external dimensions, the layout of the control panel, and the connecting cables, and not detailed information as to the component's manufacture or assembly. The Navy takes the position that such requirements are not proprietary because they are based upon information which had been previously published or furnished to the Navy without restriction by Howell, Pratt & Whitney, and other manufacturers; that some of the components are commercially available; and that each of the requirements in PD–35A was established on the basis of the performance of the engines to be tested as indicated by engine trim charts prepared by the engine manufacturer, the equipment in the fleet which will be used in conjunction with the test sets, and general military specifications governing such equipment. Finally, the Navy has furnished the following statement as to why it considers the information included in PD–35A as not being proprietary to Howell:

* * * * * * *

2. The specification as now worded merely describes the purpose of the equipment and the functions desired to be performed by it. The specification includes no information detailing how the component parts are to be manufactured or assembled in combination with each other; nor does the specification contain detailed descriptions of the circuitry involved. The information contained in the specification—performance parameters, physical characteristics, quality assurance tests, etc.—consists of functional statements describing the desired diagnostic capability of the test set in order that the performance capabilities of various engines can be accommodated and determined.

3. Accordingly, since details of specific designs or features are not disclosed in the specification PD 35A, it is considered to be a performance-type specification and therefore not containing technical information that can be properly considered to be proprietary to a single firm.

By letter dated August 23, 1972, you reasserted your protest, this time objecting to the new solicitation. It is your position that the information depicted on the Howell drawings, improperly included in the canceled solicitation and purchase description (PD–35), has been converted to a narrative form and included in the new solicitation and PD–35A. Accordingly, you conclude that PD–35A incorporates the same proprietary information included in PD–35 and, therefore, the current solicitation must likewise be canceled. You assert that the specifications included in both PD–35 and PD–35A are design specifications detailing types of circuits to be used, dimensional outlines of boxes, weights, switch functions, panel layouts, types of connectors, cable details, and test specifications, which you contend are almost an exact copy of the H236 trim test set and, therefore, violative of Howell's proprietary rights. To substantiate these charges, you have

furnished a detailed comparative analysis of what you consider the most "apparent and flagrant" similarities between the solicitation specifications and the Howell H236 specifications. You point out that while PD-35A omitted the most obvious appropriations of H236 design specifications, it continues to contain proprietary data.

You state that Howell already has been injured by the Navy's actions and has an immediate course of action for damages against the Government. You urge, however, that a cancellation of the pending procurement is the proper remedy. In this regard, you refer to a number of our decisions to support your argument that the instant solicitations should be canceled.

In addition, the record contains a letter dated November 27, 1972, from the Division Assistant Counsel, United Aircraft Corporation, Pratt & Whitney Aircraft Division, which expresses that firm's opinion that PW was unable to provide the Navy unlimited rights to the requirements for the test set since a substantial part of the specification was proprietary to Howell. The Navy has taken exception to PW's position, stating the view that its prime contract with PW obligates that firm to provide the Navy with unlimited rights in certain drawings and that the drawings which PW has thus far provided do not fulfill that firm's contractual requirements.

The Navy points out that it possesses "Handbook, Operation, Service and Overall Instruction" (PWA24365), dated April 1, 1972, which contains all of the disputed requirements included in PD-35A. This handbook, which contains a Howell proprietary legend, was furnished PW by Howell pursuant to purchase order No. 807153, and in turn delivered to the Navy by PW in accordance with the prime contract. The record indicates that the prime contract between the Navy and PW contains the clause entitled "Rights in Technical Data (Feb. 1965)" set forth in paragraph 9-203(b) of the ASPR. The clause provides, in part, as follows:

* * * * * * *

(b) Government Rights
(1) The Government shall have unlimited rights in:

* * * * * * *

(v) manuals or instructional materials prepared for installation, operation, maintenance or training purposes.

Section (g) of the clause entitled "Acquisition of Data from Subcontractors," provides that whenever any technical data is to be obtained from a subcontractor, the contractor shall use the same clause in the subcontract, without alteration.

Paragraph 9 of the "Terms and Conditions of Purchase," included in the PW purchase order for the H236 test sets and manuals provides, in part, as follows:

* * * There are hereby incorporated by reference and made a part hereof the following Armed Services Procurement Regulation clauses as in effect at the date hereof: * * * ASPR 9-203.1 "Basic Data Clause"* * *.

Although the undated form included in the purchase order references the "Basic Data Clause," you have agreed that Howell's subcontract is governed by the "Rights in Technical Data" clause of 1965, referred to above.

It is the Navy's position that as a result of the express provisions concerning rights in technical data contained in both the prime contract and the purchase order, it contracted for and obtained unlimited rights in the subject manual notwithstanding any legend which Howell affixed thereto.

You argue that the subject data clause only entitles the Navy to unlimited rights in the manual for the purposes of installation, operation, maintenance or training. You assert that any use of the manual for procurement purposes is contrary to the intent of the rights in data clause and in the instant case, where the manual carries a restrictive legend, amounts to "confiscation."

In this regard, we note that paragraph (a)(3) of the subject data clause provides that "unlimited rights" means rights to "use, duplicate or disclose technical data, in whole or in part, in any manner and for *any purpose whatsoever*." [Italic supplied.] It is clear, therefore, that "unlimited rights" in the subject manual would include the right to use the material contained therein for procurement purposes.

We recognize that the owner of proprietary data may protect itself against the unauthorized use of such data, but the owner of the data may also contract to obligate itself to deliver such information for unrestricted use as a part of the contract consideration—then such unrestricted use is not unauthorized. *See generally*, B-167365, November 14, 1969 and B-156959, December 6, 1965.

As you have pointed out, this Office has held that the Government should not disclose or use proprietary data for procurement purposes without the consent of the owner of such data. 43 Comp. Gen. 193 (1963). In this case, however, the Navy contends that the procurement in question does not include data of a proprietary nature and that, in any event, the disputed requirements are contained in a manual which was furnished to the Navy with unlimited rights. It has offered forceful arguments in support of its position. Although you have strongly disputed the Navy's position, we are not persuaded that Howell's proprietary rights are being violated by the Navy. In the absence of clear and convincing evidence that Howell's proprietary rights are being violated, we do not believe that our Office would be justified in disturbing a competitive procurement.

Accordingly, your protest must be denied.

[B-177115]

Contracts—Data, Rights, Etc.—Acquisition by the Government—Reverse-Engineering Procedure

The inclusion in a request for proposals of a stationary brake disc drawing furnished without restriction to the Air Force under sole-source contracts in order to create competition or for reverse engineering purposes did not violate proprietary data rights where Government contracts law in recognizing data rights also recognizes such data may be lawfully obtained by reverse engineering when the data is not restricted and the Government acquires title, and since it is incumbent upon the contracting agency to maximize competition where the assurance of reliability and interchangeability of spare parts may be obtained through competitive procurement as well as from sole-source buys from the current manufacturer of the item. Furthermore, the contracting officer in making an award is not obliged to consider possible foreign patent problems since such a possibility is too speculative, complex, and burdensome.

Contracts — Specifications — Tests — Difference Between Sole-Source and Subsequent Sources

While the stationary brake discs to be used as spare parts which were furnished by a sole-source contractor to the Air Force were initially subject to more stringent testing than those of subsequent sources competing for the procurement, this inequality is attributable to the fact the initial testing was necessary to prove the design, composition, and functional characteristics of the newly designed component, whereas subsequent sources were required to demonstrate only that their parts would meet the specifications and functional characteristics of the accepted component previously proven through more rigorous qualification testing. The responsibility to determine the amount of testing necessary is a matter of administrative discretion, and the United States General Accounting Office is not equipped to consider the technical sufficiency of the administrative determination.

Bidders—Qualifications—Capacity, Etc.—Qualifications *v.* Qualified Products

The issuance of a request for proposals for stationary brake discs to be used as spare parts to the "only known qualified sources" does not mean the item being procured involves a qualified product. The establishment of procedures to determine the qualifications of a source to manufacture a part in accordance with required specifications is discretionary and within the ambit of the expertise of the cognizant technical activity, whose responsibility it is to determine the criteria necessary to insure the safety, dependability and interchangeability of the part on an *ad hoc* basis.

To the Goodyear Tire and Rubber Company, May 14, 1973:

Reference is made to your telegram dated September 26, 1972, and subsequent letters, protesting the issuance of request for proposals (RFP) No. F42600-72-R-6565, by the Ogden Air Materiel Area, Hill Air Force Base, Utah, to parties other than Goodyear, for a stated quantity of stationary brake discs to be used as spare parts, and the resulting award of a contract to Nasco Engineering, Incorporated.

Prior to the issuance of the subject RFP, the stationary brake discs, P/N 9533565, were procured from Goodyear on a sole-source basis. However, in April 1972 the cognizant technical personnel determined that any subsequent procurement of the brake discs should be done on a competitive basis. Consequently, Purchase Request No. FD2020-73-

42603 was coded 2C, designating the suitability of the procurement for competition for the first time, in accordance with Air Force Regulation (AFR) 57–6. Nine firms were designated as the "ONLY KNOWN QUALIFIED SOURCES," and of the nine sources solicited, only Goodyear and Nasco responded. Since Nasco was the low proposer, but had not previously produced the brake disc, a preaward survey was conducted by the Defense Contract Administration Services Office (DCASR) in Los Angeles. At the conclusion of the survey, a complete award to Nasco was recommended. After your protest was filed with our Office, the contracting officer, on January 5, 1973, in accordance with Armed Services Procurement Regulation (ASPR) 2–407.8(b)(3), determined that it was necessary to award the contract for the procurement of the brake disc. The contract was awarded to Nasco on January 12, 1973.

In your letter dater October 5, 1972, you challenge the legality of the Air Force's utilization of your drawings for competitive procurement or reverse engineering. You state that the drawings and other data are proprietary and the right to their use had not been acquired by the Government even though the proprietary legends had been crossed out by unknown persons.

The drawings in question were reportedly delivered by Gooodyear to the Government under contracts AF33(657)–8177 and AF33(657)–9716. Each contract included a Data Clause, the pertinent portions of which follow:

> (a) The term "Subject Data" as used herein includes * * * drawings or other graphical representations * * * (whether or not copyrighted) which are specified to be delivered under this contract * * *.
> (f) * * * the Government may duplicate, use, *and disclose in any manner and for any purpose whatsoever*, and have others so do, all Subject Data delivered under this contract. [Italic supplied.]
> (h) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government shall have the right *at any time* to modify, remove, *obliterate* or ignore any marking not authorized by the terms of this contract on any piece of Subject Data furnished under this contract. [Italic supplied].

Furthermore, in Part IV (b) in each of the said contracts it was agreed that:

> The rights obtained by the Government in Subject Data are set forth in the Data Clause incorporated in this contract [above], and nothing elsewhere in this contract or in any documents incorporated by reference in this contract shall be construed as in any way altering such rights.

Consequently, we are of the opinion that the Government acquired unlimited rights to the drawings in question and, irrespective of which party crossed out the proprietary legends on the drawings, none of Goodyear's proprietary rights in the data were violated by including the drawings with the subject RFP. In this connection, it should be noted that the Air Force states that the legends were crossed out when the drawings were received from you.

In your letter of January 25, 1973, you state, in reference to material and processing specifications for discs and friction elements, that:

> The subject disc *cannot be manufactured without such data*, however, and the Government did not receive it from Goodyear. Therefore, this data, *if* available for reprocurement, *has* to be the result of Reverse Engineering on the part of the Air Force. The data could be obtained in no other way.

Therefore, you contend that by engaging in reverse engineering, the Air Force has unlawfully gained possession of, and wrongfully used, your proprietary data.

Protection of one's rights in proprietary or technical data is recognized throughout the area of Government contracts law. *See* B–156727, October 7, 1965. However, the law clearly recognizes that, by the process of reverse engineering, one may lawfully gain possession of a product fabricated through the use of proprietary data and, thus, through inspection, experimentation and analysis, create a duplicate. The product then loses its proprietary character. B–166071, September 18, 1969. Since Goodyear did not explicitly restrict the use of the brake discs sold to the Government under contracts AF33(657)-8177 and AF33(657)–9716, the Government acquired title to the items and the right to use them however it wished. B–166071, *supra*. Furthermore, the Data Clauses included in those contracts stated in part that:

> (i) * * * For the purpose of this clause, "proprietary data" means data providing information concerning the details of a contractor's secrets of manufacture, such as may be contained in but not limited to his manufacturing methods or processes, treatment and chemical composition of materials, plant layout and tooling, *to the extent that such information is not disclosed by inspection or analysis of the product itself* and to the extent that the contractor has protected such information from unrestricted use by others. [Italic supplied.]

Since restrictions on the use of the brake discs procured under the aforementioned contracts were not stipulated in the contracts, it seems clear that the Air Force procured and received the discs delivered under those contracts free of any restriction on their use and was able to engage in reverse engineering without incurring any liability to Goodyear. However, it should be noted that it is not clear from the record to what extent, if any, reverse engineering was accomplished.

In a letter of October 16, 1972, your patent counsel lists the patents (which cover the brake structure) that Goodyear owns in certain foreign countries. He states that the Government has no license under these patents since the brake was developed solely with Goodyear funds and urges us to consider the possible patent problems which may arise from the procurement of this type of brake disc from unlicensed sources and from its ultimate use in any of the countries where the device is patented.

In this regard, we are of the opinion that the contracting officer should not have to take into consideration the possible patent problems involving foreign patents when making an award. Whether or not such problems will occur after award, and what liabilities, if any, will be incurred, are matters so speculative and complex that it would be unreasonable to impose such a burden on the contracting officer.

Your contention that the RFP should have been canceled or placed as a sole-source procurement because it violated the Memorandum of Agreement between Wright-Patterson Air Force Base and Hill Air Force Base is apparently without merit. It appears from the record that the cognizant engineering activity under the Agreement assumed responsibility for technical acceptability of the parts being procured under the subject RFP.

You also question the procurement facility's determination that the other eight companies were, in fact, qualified sources. It is reported that the companies in question were considered qualified because they had previously furnished satisfactory aircraft wheel/brake components of equivalent complexity and functional criticality. Furthermore, it is reported that components tested by OOAMA in accordance with material and process requirements developed by OOAMA/MME met all test requirements of the applicable Air Force drawing and military specification. Therefore, it is the Air Force's position that parts manufactured by qualified sources in accordance with the manufacturing data furnished in the RFP will meet all requirements. The establishment of procedures to determine the qualifications of a source to manufacture a part in accordance with required specifications is discretionary and within the ambit of the expertise of the cognizant technical activity. Thus, the activity assigned responsibility over a given part, in this case the Ogden Air Materiel Area, "may determine those criteria necessary to insure the safety, dependability and interchangability [sic] of the part on an *ad hoc*-basis." B–172901, B–173039, B–173087, October 14, 1971. While it is true that the testing procedures to which Goodyear was initially subjected were more stringent than those to which subsequent contractors will be subjected, this inequality is attributable to the fact that the Goodyear tests were necessary to prove the design, composition and functional characteristics of the newly designed component, while any subsequent sources will be required to demonstrate only that their parts will meet the specifications and functional characteristics of the accepted component previously proven through more rigorous qualification testing. Ogden Air Materiel Area was charged with the responsibility of determining the amount of testing necessary, if any, to assure specification compliance. Since our Office is not equipped to consider the technical sufficiency of

such determinations, and since such determinations are matters primarily of administrative discretion, we will not substitute our opinion for that of the technical activity assigned the duty to oversee component acceptability. B–172901, B–173039, B–173087, *supra.*

In your letter of October 5, 1972, you contend that changing from a sole-source procurement method to a competitive method for procuring brake discs will cause a degradation of the industry. You state:

> All of these programs require engineering talent and we maintain this talent by selling spare parts. It seems eminently unfair to start a program one way and then switch to a new method of procuring parts that could eliminate the entire wheel and brake industry from proposing on new aircraft.

In your letter dated December 19, 1972, you state that:

> * * * we feel that the Government must maintain an industry base for future development of wheels and brakes for the next generation of military aircraft. This can only be done by buying spare parts from the original designer and manufacturer.

You contend that it would be in the Government's best interest to continue procuring the brake discs on a sole-source basis from Goodyear.

We are of the opinion that competition will not eliminate the entire industry from proposing on brake discs for new aircraft. To the contrary, we believe it may encourage new firms to enter the market, thereby enhancing rather than degrading the industry. For the same reason, we fail to see how elimination of the entire wheel and brake industry, other than Goodyear, from competing on spare parts will "maintain an industry base for future development of wheels and brakes."

We have consistently held that absent sufficient documented reasons, competition in all aspects of procurement is the desired goal and that continued vigilance should be exercised in an effort to maximize competition. 50 Comp. Gen. 184 (1970). Further, 10 U.S.C. 2304(g), as implemented by ASPR 3–102(c), requires competition to the maximum extent practicable. AFR 57–6, section 1–300 is to the same effect. Also, see ASPR 1–313(a), with respect to the competitive procurement of parts. We feel that in many instances the assurance of reliability and interchangeability of spare parts may be obtained through competitive procurement procedures as well as from sole-source buys from the current manufacturer of the item. Therefore, when the Air Force became aware of other qualified sources, it was incumbent upon it to solicit those firms to attain maximum competition. B–172901, B–173039, B–173087, *supra;* B–166435, July 1, 1969.

Finally, in your letter of January 25, 1973, you cite our decision of September 19, 1972, 52 Comp. Gen. 142, for the proposition that an offer to supply a product to be produced at a plant other than the one

at which the previously qualified item was produced is an offer to supply an unqualified product and is nonresponsive in a material aspect. The cited case is not applicable to the situation here because the procurement concerned there was restricted to bidders listed on a Qualified Products List (QPL) and involved the effect of a bidder having QPL status failing to accomplish transfer of QPL production facility designation from the approved facility to another facility prior to bid opening as provided for in the solicitation and regulations. Although the procurement here involved was restricted to certain qualified sources, it did not involve a QPL item.

In view of the foregoing, your protest is denied.

[B-177220]

Bids—Two-Step Procurement—Evaluation—Experience

An offeror under the request for technical proposals (RFTP) of a two-step procurement for the design, construction, and performance testing of nitric acid-sulfuric acid concentration plants who possesses "in-depth" technological skill and experience but who had never designed and constructed a plant exactly like that outlined in the RFTP—the position of the protestant, the only other responsive bidder—satisfied the experience requirements of the solicitation and was, therefore, acceptable for advancement to step two, and having submitted the lowest bid, as the protestant's bid errors could not be waived as a minor informality, properly was awarded a contract. The experience provisions of the solicitation only required a showing that the components offered had performed satisfactorily in an operating plant of similar design for 2 years and not that all components had been put together in a facility and operated successfully in that facility for 2 years.

Records—"Public Information Law"—Refusal to Disclose Information Procedure

An unsuccessful company under a two-step procurement for the design, construction, and performance testing of nitric acid-sulfuric acid concentration plants who when refused the name and location of facilities built by the successful bidder should have appealed its contention of entitlement to the information under 5 U.S.C. 552—the Public Information Act—as provided in 32 CFR 286.1 *et seq.* since the United States General Accounting Office has no authority under the act to determine what information must be disclosed by other Government agencies.

To Hercules, Inc., May 14, 1973:

Further reference is made to your letter dated October 10, 1972, and subsequent correspondence, protesting on behalf of your firm and J. A. Jones Construction Company, a Joint Venture (Hercules-Jones), against the award of contracts to Chemical Construction Company (Chemico) under the second step of formal two-step procurements, issued on May 5, 1972, by the District Engineer, United States Army Engineer District (Corps of Engineers), Mobile, Alabama.

Requests for technical proposals (RFP) DACA01-72-R-0013,

DACA01-72-R-0014, and DACA01-72-R-0015 were issued on December 12, 1971, January 3, 1972, and January 4, 1972, respectively, and all were opened on February 17, 1972. The enumerated RFPs, step one of the referenced two-step procurements, requested proposal for the design, construction and performance testing of nitric acid-sulfuric acid concentration plants (NAC-SAC) at Badger Army Ammunition Plant (AAP), Baraboo, Wisconsin; Radford AAP, Radford, Virginia and Sunflower AAP, Lawrence, Kansas. At this juncture we think it will be helpful to quote the contracting officer's layman's explanation and description of the services and facilities being procured. At page 7 of his report to our Office he stated:

> Without getting into the complicated chemistry involved, the Nitric Acid-Sulfuric Acid Concentration Plant, as outlined in the RFTP (0013), consists of Nitric Acid Concentration Units and Sulfuric Acid Concentration Units combined into a single plant to describe a general process requirement. The nitric acid concentration side is capable of taking a blended feedstock containing nitric acid, or a weak nitric acid feedstock, and concentrating the nitric acid to higher strength. Likewise, the sulfuric acid concentration side is capable of taking a blended feedstock containing sulfuric acid, or a weak sulfuric acid feedstock, and concentrating the sulfuric acid to higher strength. When the two processes are erected side by side as a single plant and are fed a blended feedstock containing amounts of both nitric acid and sulfuric acid, two physically separated products are obtained, i.e., strong nitric acid on one side and strong sulfuric acid on the other.

Of the four technical proposals received under the first step, only the proposals of Hercules-Jones and Chemico were found acceptable and, in the second step, these firms were invited to submit priced bids under invitations Nos. DACA01-72-B-0085, -0088 and -0090 for Badger, Radford and Sunflower, respectively.

When bids were opened on June 15, 1972, Hercules-Jones was the apparent low evaluated bidder under -0085 (Badger AAP), while Chemico was the apparent low bidder under -0088 (Radford AAP) and -0090 (Sunflower AAP).

By a telegram dated June 16, 1972, and supplemented by its letter of June 22, 1972, Hercules-Jones protested to the Corps of Engineers any award because of alleged discrepancies between the values assigned by the two bidders in the evaluation format in the IFBs. In a letter dated July 21, 1972, your firm questioned whether Chemico met the experience requirements outlined in the solicitation. Consequently, the three proposals and bids of both firms were reviewed by technical personnel of the Mobile District and Catalytic, Inc., the retained Architect-Engineers, to determine the validity of the protest and the responsiveness of the bids. As a result of the review it was determined that Chemico had submitted bids which were in accordance with their previously accepted technical proposal and were responsive to the requirements of the invitation for bids. The review

also disclosed that Hercules-Jones' bids were nonresponsive under all three invitations because they had understated the HNO_3 feed acid and net consumption of H_2SO_4 by a considerable amount for all three projects and the stated yield of H_2SO_4 was in excess of 100 percent on all three bids.

Following a conference held on July 13, 1972, between representatives of your firm and the Corps of Engineers, Hercules-Jones was formally notified by the Corps on August 14, 1972, that its bids were determined to be nonresponsive because of the above-stated reasons. By letter of the same date your firm was advised that the Corps had considered the merits of your protest and had found Chemico's bids to be responsive to the terms of the invitations, and should Hercules-Jones desire to pursue further its protest that it should do so within 10 days of receipt of the letter. There followed an additional conference on August 28, 1972, between the interested parties, and on October 4, 1972, the Corps officially denied your protest and on that date award was made to Chemico on all three projects.

Since the issues raised by your protest can be resolved in principle by considering only one of the three two-step solicitations, we will confine our consideration of the merits of the case to the Badger project.

As amended, RFP -0013 devoted some eighty pages to "Technical Criteria" under Appendix B, and under Appendix C, 10 pages of the solicitation dealt with the "Method of Evaluation" to be employed in selecting the bid which would result in the lowest total annual cost to the Government at the design capacity specified. RFP -0013 contained in pertinent part the following provisions concerning offerors' experience:

Section 1, paragraph A.(3):

* * * Offeror should cite his specific experience in the design and construction of facilities of the type being proposed. * * * The technical proposal shall also include a list of plants, which the offeror has completed, that use a similar process to manufacture the same product from similar raw materials. * * *

Appendix B, Section II. General Requirements.

Paragraph A.:

Equipment and Materials of Construction. All equipment and material intended for incorporation in these units shall be new; of good quality; manufactured by companies regularly engaged in the manufacture or production of such equipment or materials and designed for the purpose intended. Standard items of equipment are preferred, and the offeror must be prepared to demonstrate satisfactorily to the Evaluation Board that any design, equipment, materials or metallurgy he intends to employ has had at least two years' successful operation in a facility of the same general type and service as that proposed in the technical proposal.

Appendix C, Sections II, A.5 and 6:

5. *Offeror's experience*: The offeror must demonstrate to the satisfaction of the Evaluation Board, that his organization has the required specific experience in nitric sufuric acid concentration plant design and construction to accomplish the work to the best interests of the Government.

6. *Process Experience*: The offeror must demonstrate, to the satisfaction of the Evaluation Board, that the process and the equipment proposed are based on

proven technology, and that all components have performed satisfactorily in an operating plant of similar design in commercial or government operation for a period of not less than two (2) years.

Concerning blended feedstock requirements, RFP 0013 contained the following relevant statements:

Section I, paragraph A.4:

4. The technical proposal shall describe in detail the facility to be furnished by the offeror. It shall include but not be limited to process flow diagrams, plot plans, equipment lists, summaries of connected and used utilities, operating procedures, piping and instrumentation flow diagrams, raw materials and other consumables needed, finished product quality, yields on feedstocks, range of capacity and any other pertinent data all in sufficient detail to allow a complete technical evaluation of the facility.

Appendix B—Technical Criteria—Section III.

Design Basis, Paragraph C, 1.d.

d. Blended feed to concentrator.

The AOP-derived nitric acid, the fume nitric acid, and the spent mixed acid shall be fed to the extractive distillation tower, either separately or combined, in suitable proportion to provide the following blended feed composition. The unit design capacity shall be based on this feed blend.

	Percent
Nitric Acid (wt)	42
Sulfuric Acid	32
Nitrosylsulfuric Acid	1
Water	25
Temperature	Ambient

Appendix C—Method of Evaluation, III.B.

Feedstocks: The technical proposal shall indicate the feed acid consumption of each NAC–SAC unit under the guaranteed design capacity operating conditions. Offeror shall state the feed acid consumption in short tons per ton 100% product nitric acid for both nitric acid and sulfuric acid in the blended design feedstock. Yield losses for each unit shall be assessed by the Government as a normal annual operating cost based on the following acid unit prices:

Nitric Acid	$100.00 per short ton (2000 lbs.) 100% HNO_3
Sulfuric Acid	$30.00 per short ton (2000 lbs.) 100% H_2SO_4

While technical personnel of the Corps were of the view that the the above-quoted provisions made it clear that the Government was interested in determining the total overall amount of feed acids going into the plant (including nitrosylsulfuric acid), the total overall amount of product and/or by-product acids coming out, and the losses of nitric and sulfuric acid going through, in an attempt to answer questions raised by your firm concerning how the constituents of the feedstock should be entered in the bidding schedule of step two, Amendment No. 2 to the IFB was issued on June 5, 1973, which added a new paragraph 5 to Section E of Appendix B of the RFP, which stated:

5. All losses of sulfuric acid and nitric acid shall be stated and guaranteed in Step II.

A complete material balance showing all guaranteed figures of blend feedstock, losses, product and by-product sulfuric and nitric acids must be provided by the successful offeror within 30 days after award of contract. Nitrosylsulfuric acid in the blended feedstock shall be calculated as separate streams of equivalent 100% HNO_3 and 100% H_2SO_4. These equivalents shall be added to the respective

nitric and sulfuric acid feed quantities of the blended feedstock for the purpose of establishing the total amount of each acid entering the NAC–SAC units and for determining the applicable acid recovery yields of the NAC–SAC units.

You submit that there are three issues raised by your protest, namely: 1. Was Chemico responsive? 2. Was Hercules-Jones responsive? 3. If both were responsive, which bidder was low? Since we have concluded that the first two questions must be answered in the affirmative and in the negative, respectively, the third question becomes academic.

1. *Is Chemico responsive?*

You state that by far the single most important paragraph in the RFP bearing upon this protest is Section II. A., Appendix B at page B–2 of –0013 (which we again quote in pertinent part), showing the following requirement:

> * * * the offeror must be prepared to demonstrate satisfactorily to the Evaluation Board that any design, equipment, materials or metallurgy he intends to employ has had at least two years' successful operation in a facility of the same general type and service as that proposed in the technical proposal.

Thus you argue:

> Two parts of this requirement deserve particular attention. First is the language ". . . must be prepared to demonstrate satisfactorily. . . ." These words establish the fact that while the act of demonstrating to the Board is discretionary with the Board, the ability to demonstrate is mandatory. The offeror *must be prepared* to demonstrate two years of successful operation, and unless he can do so he cannot respond to the invitation.
>
> Second, attention is invited to the words ". . . a facility of the same general type and service as that proposed. . . ." These words make it clear that success with various items of the equipment, materials or metallurgy (chemistry) proposed is not enough. To meet this test, an offeror must have put them all together in *a facility* and operated them successfully in that facility for two years.
>
> Hercules Incorporated has been in the business of operating nitric acid-sulphuric acid concentration plants for over fifty years, and has sufficient business contacts and sources of information in the industry that if Chemico has, in fact, operated a facility of the general type and service it has proposed, Hercules would know of it. No such facility is known to exist. The District Engineer has verbally informed Hercules-Jones that he has satisfied himself that Chemico's proposed design complies with the requirement. Citing the so-called Freedom of Information Act (Pub. Law 89–487; 5 U.S.C. 552), Hercules-Jones has asked the District Engineer for the name and location of the facility but he has refused to do so on the surprising basis that such information is proprietary or confidential.

It is therefore urged that if Chemico did not satisfactorily demonstrate that its design, equipment and materials have had 2 years' successful operation in a facility similar to that it proposed, our decision in 48 Comp. Gen. 291 (1968) (*DeLaval* case) is remarkably similar to the instant protest and is dispositive of this issue.

It should be observed, with respect to your contention that you are entitled under 5 U.S.C. 552 to obtain the name and location of facilities built by Chemico, that we have no authority under that act to determine what information must be disclosed by other Government agen-

cies. B–165617, March 16, 1969. Also, it does not appear that you availed yourself of the appeal procedures for review of refusals to release such information, as provided in 32 CFR 286.1, *et seq.* In any event, we do not believe that you have shown that you have been unduly prejudiced in questioning Chemico's qualifications, and it appears that because of your role as operating engineers for existing AAP facilities at Radford and Sunflower, as well as from your own stated independent investigation, you are well aware of Chemico's experience in this area. It is also noted that in those plants cited by the contracting officer as meeting the same general type and service as those proposed by Chemico in its technical proposal, you have detailed at some length the dissimilarities that you believe to exist between the plants in operation as opposed to the ones offered, as well as the alleged unsatisfactory performance at these plants by Chemico.

In direct response to the issue of whether Chemico met the above-cited experience requirements, the administrative report to our Office advised:

> Chemico meets these general requirements [experience] in the same sense that Hercules-Jones does, in that neither company has designed and constructed a plant exactly like that outlined in the RFTP. However, it was recognized that both companies possess "in-depth" technological skill and experience, and, in keeping with the "Design Philosophy" expressed on page B–1, Appendix B of the RFTP, both Chemico and Hercules-Jones were considered acceptable for advancement to Step Two.
>
> The design philosophy cited was developed to conform to ASPR 2-501 General, last paragraph. Significant quotes are, "Since facilities incorporating these features to meet the following technical criteria are without precedent in Government plants, two-step formal advertising is the method employed to obtain the best offer from industry. Because the Government wishes to grant all offerors the greatest flexibility in their technical proposal or proposals for furnishing this plant, the criteria included in this Request for Technical Proposal are not intended to be unduly restrictive to the offeror but to be a guide of the minimum standards of engineering design, construction, operation, safety, and maintenance that are acceptable to the Government for this facility."
>
> Both offerors were granted exceptions to the RFTP based on this premise.
>
> * * * * * * *
>
> Hercules-Jones was told on numerous occasions that Chemico's proposed design met the general requirements of the RFTP concerning experience in the same way the Hercules-Jones T.P. did. It was told also that the Evaluation Board (Contracting Officer) had proof of satisfactory experience with the Chemico units involved, and that there was no RFTP requirements, law, or regulation that required the Contracting Officer to prove this to the satisfaction of other bidders.
>
> Attached as Tab "D" are vendors' lists from both Chemico and Hercules-Jones. As is evident from the lists, both offerors buy and install technically proven equipment of standard design and manufacture from the same vendors. It is noted that such names as Duriron Company, Pfaudler Company, Nooter, Vulcan, John Zinc, Marley, Fansteel, etc., appear in both lists. RFTP 0013 specifically requires (see 2.b.(2)) . . .; "manufactured by companies regularly engaged in the manufacture or production of such equipment and material and designed for the purpose intended." This provision was enforced upon Chemico and Hercules-Jones alike. Since there is no RFTP requirement that offerors prove each individual piece of equipment until performance tests after the plants are mechanically complete—and since both offerors would normally purchase and install equipment and materials from essentially the same ven-

dors, it was determined Chemico was as technologically capable of putting the pieces together as Hercules-Jones. An evaluation of the data sheets concerning equipment and materials indicates that the Chemico Technical Proposal contained all the necessary experience record at Step I.

* * * * * * *

In accordance with the provisions of ASPR, Part 5, Section II, paragraph 2-503.1, Step One, RFTP-0013 was distributed to qualified sources in accordance with 1-302.2. There has never been any doubt that Hercules-Jones was a qualified source. The Parlin, New Jersey plant is listed in its Technical Proposal. Based on the above, Chemico was also considered a qualified source, and after proper evaluation of its Step I documents, was advanced to Step II.

As we interpret the experience requirements in the instant case, the emphasis is placed upon the offeror's experience in nitric sulfuric acid concentration plant design and construction capability to accomplish the required work to the satisfaction of the Government. The offeror must be prepared to show that the *components* offered have performed satisfactorily in an operating plant of similar design for 2 years as that proposed in its technical proposal; and not as you urge, that an offeror must have put them all together in a *facility* and operated them successfully in *that* facility for 2 years.

In the *DeLaval* case (48 Comp. Gen. 291) the experience requirements were concerned with the reliability of the *item* offered rather than the *capability* of the manufacturer and we held that such requirements went to the responsiveness of the bids rather than to bidder responsibility. It appears that the Evaluation Board did not specifically consider whether the experience requirements of the instant procurement went to responsibility or responsiveness. In our view these requirements in the RFP went for the most part to the question of responsibility of the offeror and his overall ability to construct satisfactory plants, rather than to the responsiveness of his bid under the second step, and, to this extent, your arguments concerning the "responsiveness" of Chemico's bid under the second step are misplaced. To the extent that responsiveness is involved, we find no basis for concluding that the Chemico bid did not meet the literal requirements of the second step. Thus *DeLaval* is not dispositive of this issue.

We do not question an agency's determination of a contractor's qualification in the absence of either clear evidence of bad faith or a convincing showing that no substantial grounds exist for the administrative determination. 45 Comp. Gen. 4, 6 (1965); 37 Comp. Gen. 430, 435 (1957). We do not find that you have presented sufficient persuasive evidence to meet this burden of proof, or to sustain your allegation that "Hercules-Jones meets this requirement [experience]; Chemico does not." Rather, our review of the record, and consideration of the evidence and arguments advanced at the conference attended by all parties in interest, have uncovered no basis upon which we might prop-

erly conclude that the agency acted unreasonably or in bad faith in finding Chemico responsible and its bid responsive.

You have also questioned, under your designated issue Number 3, whether the Corps properly analyzed the comparative operating costs in the Evaluation Formula of step two, in that you allege Chemico's guaranteed yield of 99.8% (as opposed to your guarantee of 98.5%) has never been attained by Chemico and is "nothing more than a gleam in Chemico's eye." You say the entire price advantage gained by Chemico under the second step is achieved by its stated yield and treatment of liquid waste effluent. We do not accept the premise upon which this argument is based because it seems to be no more than an essertion that Hercules-Jones' operating costs should be accepted as the standard of realism. However, you have presented no persuasive reason why Chemico's costs, which were the lowest overall, are not an equally valid standard of realism. The administrative report, in answer to this contention, observes:

> Catalytic, Inc., the MDO consultant for these projects, has completely evaluated Chemico Bid Items #1 and #2 from both technological and accuracy of quotations standpoints. The consultant states that technically Chemico can probably do what they have guaranteed in the quotations, and that the guaranteed feed acid requirements of Chemico are accurate to within negligible limits of error.
>
> * * * * * * *
>
> In discussing these items, Hercules, Inc. states briefly their inability to ascertain what Chemico is offering that Hercules, Inc. is not offering. No doubt it is difficult for Hercules, Inc. to verify the extremely small effluents quoted by Chemico, based on what the Hercules, Inc. staff believes Chemico to be offering. The extremely small guaranteed liquid effluent streams were the subject of a study of Chemico's Technical Proposal and amendments, aside from the Hercules protest. It was undertaken to assure this office that Chemico was indeed bidding their Technical Proposals. The consultant states, and it has been verified by this office: "Chemico's T.P., revised and admissible, stated that Chemico was adding capital equipment which function specifically was to reduce or eliminate liquid waste effluent." The purpose of including Item #9 Radford, #10, Badger and #11 Sunflower in the Bid Evaluation Formula was to force Designer-Constructors to bid plants with the least possible liquid effluents, or have high annual operating charges for these items assessed against them. Rather than go the route of higher operating assessments, Chemico chose to add additional equipment "inside" their plants; hence their low liquid effluent quotations. Chemico bid their Technical Proposals in this respect.

2. *Is Hercules-Jones responsive?*

As stated earlier, it was determined by the Corps that Hercules-Jones did not bid its technical proposal when it did not include the nitric and sulfuric acid equivalents in the nitrosylsulfuric acid when establishing the total amount of each acid entering the NAC–SAC units.

While admitting that you misstated the yield on sulfuric acid in the Evaluation Formula, you argue:

> At the outset, it should be emphasized that Hercules-Jones did *not* understate the HNO_3 feed acid or the net consumption of H_2SO_4 in its technical proposal, which necessarily is included as a part of the bid. The District Engineer does not disagree with that assertion. In making the allegation of nonresponsiveness

by virtue of understatement of nitric acid feedstock and net consumption of sulphuric acid, the District Engineer is referring to the calculations made by Hercules-Jones in completing the Evaluation Formula. Principally, the confusion arose in the lines calling for "Nitric Acid in blended Feedstock Short Tons/Yr. 100% HNO_3 × $100.00/Short Ton 100% HNO_3" and "Sulphuric Acid in blended Feedstock Short Tons/Yr. 100% H_2SO_4 × $30.00/Short Ton 100% H_2SO_4;" more particularly, attention is invited to the terms "100% HNO_3" and "100% H_2SO_4" in those lines. The Hercules chemical engineers interpreted these terms literally and entered the amount of HNO_3 and H_2SO_4 in the feedstock. They did not include the equivalent amount of these acids which is contained in the nitrosylsulphuric acid (HNO SO_4) which constitutes 1% of the feedstock. It is submitted that this is the response most chemical engineers would give when asked to enter the amount of "100% HNO_3" and "100% H_2SO_4" rather than the amount of "Equivalent HNO_3" and "Equivalent H_2SO_4." Not to be ignored is the fact that while the Evaluation Formula for all three bids was to be completed *in the same way*, the three solicitations described how to account for the nitrosylsulphuric acid *in three different ways*. Hercules-Jones asked for an interpretation before the due date for bids and was told in effect "Its all there. Do it the way it reads."

However, be that as it may, the real point to be made is that the completion of the Evaluation Formula was a mathematical exercise whose only real purpose was to assist the District Engineer in determining the lower bidder. When he checked the Hercules-Jones calculations and concluded that we had understated the HNO_3 feed acid and net consumption of H_2SO_4, he found all the information he needed in the Hercules-Jones total technical proposal and bid. He made his own calculations from what he found there (and incidentally also made some errors in applying the figures to his own requirements). The mistake made by Hercules-Jones was analogous to a mathematical error in extending a unit price to get the total price, and it is well-established that such a mistake does not *per se* render a bid nonresponsive.

In determining responsiveness, your office has said many times that "any deviation from the requirements of the invitation which affects the price, quantity or quality of the materials to be furnished are material deviations and render the bid nonresponsive." 44 Comp. Gen. 461, 463, citing 30 Comp. Gen. 179. The Hercules-Jones deviation, if such it was, did not affect price, quantity or quality but only one manner of calculating comparative operating costs using price, quantity and quality data in the bid itself.

While many technical arguments have been made to support the views of both parties in deciding this issue, the simple fact exists that Hercules-Jones is not disputing Catalytic's calculation but the *basis* for the calculations. The apparent discrepancy arises from the fact that Hercules-Jones has and continues to ignore the nitrosylsulfuric equivalent in the feed stock, and that your bid indicated a yield of 102.5 percent for By-Product Sulfuric Acid Export (a credit); yet your technical proposal lists a conversion efficiency for sulfuric acid feed at 99.41 percent, for an understated net consumption (a charge) of H_2SO_4 by 2,142.3 tons/year. Likewise, the annual production of nitric acid feed stock quantity in your bid calculates out to 99.66 percent, whereas your technical proposal indicates a yield of 98.5 percent for an understated HNO_3 feed by 1,081 tons/year.

These mistaken entries clearly affect the evaluated prices under the second step and could not be waived as a minor informality. In any event, Catalytic (treating your bid as responsive) reconstructed your bid by using the conversion efficiency for sulfuric acid feed of 99.41 percent as stated in your technical proposal in lieu of the 102.5

percent as bid, and on this basis your firm would not have been the low bidder on the net adjusted bid.

For the foregoing reasons, your protest is denied.

[B-177721]

Contracts—Protests—Timeliness

A protest against the cancellation of an invitation for bids and the resolicitation of the procurement which was filed with the United States General Accounting Office 6 months after the cancellation and resolicitation, and only after the protestant was unsuccessful in obtaining an award for the resolicited procurement, was untimely filed pursuant to section 20.2(a) of the Interim Bid Protest Procedures and Standards (4 CFR 20.2(a)), which provides that "bid protests shall be filed not later than 5 (working) days after the basis for the protest is known or should have been known, whichever is earlier."

Contracts—Protests—Remedial Relief Requirement

A bidder whose letters to the contracting agency protesting the successful contractor had submitted a nonresponsive bid were ignored and whose protest was filed with the United States General Accounting Office (GAO) after completion of the contract did not file a timely protest under section 20.2(a) of the Interim Bid Protest Procedures and Standards (4 CFR 20.2(a)), which provides a means by which protests may be expeditiously received at a stage in the procurement when some effective remedial action may be taken on meritorious protests, and which states the intent of the section is to secure the resolution of the matter when some meaningful relief may be afforded, and since the contract has been completely performed, and GAO is unable to grant any meaningful relief, the untimely protest will not be considered.

To Dalux, Inc., May 14, 1973:

We are in receipt of letters dated December 25, 1972, January 30 and February 27, 1973, from you and your principal, Quality Outdoor Lighting, Inc. (Quality), protesting the action of the Bureau of Prisons with regard to invitations for bids 2-9184 and 2-9222.

After award was made to Electrical Wholesalers under invitation 2-9184, the contracting agency canceled the contract and resolicited the procurement under invitation 2-9222, dated June 30, 1972, because of a determination that the original specifications were proprietary. Only after Quality had participated in the new solicitation and was unsuccessful in obtaining an award thereunder did you, as an authorized representative of Quality, protest by letter of December 25, 1972, to our Office the cancellation of the original invitation and the resolicitation.

Since section 20.2(a) of the Interim Bid Protest Procedures and Standards provides that "* * * bid protests shall be filed not later than 5 [working] days after the basis for protest is known or should have been known, whichever is earlier," we must conclude that the protest filed 6 months after the resolicitation was issued is untimely.

The protest against the determination that Quality was nonresponsive under invitation 2-9222 also is untimely. The award was made to

the next low bidder on September 13, 1972. The contract provided for delivery in 12 to 14 weeks after award (December 6 to 20, 1972). A September 15, 1972, letter of protest from Quality against the award was received by the agency within the 5-day period prescribed by section 20.2(a) of the Interim Bid Protest Procedures and Standards. The protest was repeated in a second letter of September 20, 1972, to the agency which requested advice as to the forms to be utilized to process the protest. Neither of these letters was answered by the contracting agency. However, subsequent to the September 20, 1972, letter, no effort was made until more than 3 months later to protest to our Office.

Section 20.2(a) provides that a "* * * protest to the General Accounting Office filed within 5 [working] days of notification of adverse agency action will be considered provided the initial protest to the agency was made timely." We have held that "adverse agency action" may consist of a procurement action such as the award of a contract despite the pendency of a protest. 52 Comp. Gen. 20, 22 (1972). Similarly, the contracting agency's acquiescence in and active support of continued and substantial contract performance also may constitute adverse agency action. A protestant will be charged with notification of this adverse action when he has reason to know that the agency has permitted the contract to be performed substantially toward completion.

Quality's protest to our Office after the date set for completion of the contract is not timely under these standards and procedures. Quality should have protested to our Office promptly when its letters to the agency were ignored and when contract performance was proceeding to a point where our Office would be unable to grant any meaningful relief.

In 52 Comp. Gen., *supra*, our Office held that the purpose of section 20.2(a) is to provide a means by which "* * * protests may be expeditiously resolved at a stage in the procurement when some effective remedial action may be taken on meritorious protests." In that connection, it was stated: "* * * The intent of this provision [20.2(a)] also is to secure the resolution of the matter when some meaningful relief may be afforded, not—as in this case—after the contract is completely performed."

Accordingly, we are closing our file on the matter today without any consideration of the protest.

[B-175275]

Compensation—Overtime—Standby, Etc., Time—Trial Vessel Trips

The service of a civilian employee assigned aboard a vessel for the purpose of conducting post repair testing vibration surveys of equipment to determine the feasibility of the equipment for operation in the vessel does not constitute standby time to entitle the employee to the overtime authorized in 5 U.S.C. 5542, notwithstanding Navy regulations provide that an employee on a trial trip to test equipment is considered to be in a standby status since the regulations are invalid as they do not meet the criteria established in Federal Personnel Manual Supplement 990-2, Book 610, Subchapter S1-3d, to the effect that "standby time consists of periods in which an employee is officially ordered to remain at or within the confines of his station, not performing actual work but holding himself in readiness to perform actual work when the need arises or when called."

To John A. Carlson, May 15, 1973:

We make further reference to your letter of October 19, 1972, regarding your entitlement to overtime compensation for standby duty while aboard the vessel USS HEWES.

By travel order number T-027025 you were directed to conduct "Post Repair Vib. Surveys on P/M and Hub; Op. Ant.Mts. Nos. 2-4 and 2-5 on USS HEWES" from February 7 to February 8, 1972. For the period of that temporary duty assignment you were not paid overtime compensation for time which you allege to have performed standby duty in accordance with paragraph A-1c(5) of Civilian Manpower and Management Instruction (CMMI) 610.S1 and paragraphs 4 and 5 of BNSINST 7230.1B.

The Department of the Navy's regulation to which you refer, CMMI 610.S1-A, provides in pertinent part as follows:

(5) *Duty on vessels underway.* Employees will be considered to be in a standby status when assigned to duty aboard vessels on trial trips. As used herein the term "trial trips" applies to shakedown cruises or other sea trials which are usually of short duration and made solely to test different types of material or equipment in connection with overhaul, repair, or installation in order to determine the effectiveness or acceptability of such components as they affect the operational needs of the specific vessel. The employees in (a) and (b) below receive payment of night differential for actual work or standby duty in accordance with the provisions of NCPI 610.7-2.

(a) Employees assigned to make trips aboard vessels for general orientation purposes or to conduct studies and/or tests of equipment or structures for the purpose of determining their feasibility for operations in that and other vessels are considered to be in a travel status. In such cases, appropriate temporary duty travel orders should be issued.

(b) Employees will be considered to be in standby status when on a "trial trip" as defined above. The standby status will begin at the time of embarkation and end at the time of disembarkation. Employees performing such standby duty will be paid in accordance with the provisions of (4) above.

(6) *Authorization in advance or approval.* Standby duty must be ordered in advance or approved after it has been performed, by the individuals indicated in CMMI 610.1-1a, in order to be compensable.

The implementing instruction of the Boston Naval Shipyard, paragraphs 4 and 5 of BNSINST 7230.1B, further provides:

4. *Trial Trips.* The term "trial trips" applies to shakedown cruises or other sea trials which are usually of short duration and made solely to test different types of material or equipment following overhaul, repair or installation in order to determine the effectiveness or acceptability of such components as they affect the operational needs of the specific ship. The standby status will begin at the time of embarkation and end at the time of disembarkation. For trial trips lasting twenty-four hours or longer, employees will be paid under the two-thirds rule as defined in Section 4–3.e of reference (a). For trial trips lasting less than twenty-four hours or for actual work performed for more than sixteen of the twenty-four hours, they will be paid an hour's basic or overtime pay, as appropriate, for each hour of standby duty, the same as if they were performing actual work. In such cases, time allowed for sleeping and eating is not compensatory.

5. *Temporary Duty Involving Travel.* When work is to be performed outside the boundaries of the Shipyard or its annexes, excluding trial trips as defined above, travel orders shall be issued and the provisions of reference (b) applied. In accordance with the provisions of Section 7–2 of reference (a), employees engaged in temporary duty involving travel will, while traveling, be entitled to pay as follows:

a. Graded and ungraded employees are entitled to their usual rate of pay while performing temporary duty travel within the hours of their scheduled workweek.

b. Ungraded employees, in addition, are entitled to their usual rate of pay for hours corresponding to their regular shift hours on scheduled nonworkdays.

As indicated in his letter of June 19, 1972, addressed to you, the Commander, Boston Naval Shipyard, found that your assignment aboard the USS HEWES on February 7 and 8, 1972, was to conduct vibration surveys of equipment for the purpose of determining its feasibility for operation in the ship and that the circumstances of your assignment did not meet the criteria for standby duty set forth in the above-quoted instructions. You state that this conclusion amounts to an inversion in interpretation of the above-quoted authorities since your function aboard the USS HEWES was to check out equipment in connection with its recent repair. You point out that personnel of another division assigned to the same trip were compensated for standby duty under the above instructions.

In view of the statement in your orders that your assignment aboard USS HEWES was for the purpose of conducting post repair vibration surveys, there would appear to be a basis for your view that you were on a trial trip as defined in CMMI 610.S1–A1c(5) and BNSINST 7230.1B. In this regard we understand the Boston Naval Shipyard's ultimate conclusion regarding your entitlement stems from the fact, notwithstanding your assignment may have involved post repair testing, that you were not in fact required to hold yourself in a position of readiness while aboard ship to perform actual work in accordance with the definition of standby duty as discussed below.

The authority for payment of overtime compensation for time spent in a standby status on other than a regular basis derives from 5 U.S. Code 5542, which 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 pro-

fessional 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:

In *Edward William Rapp* v. *United States*, and *Ward Roland Hawkins* v. *United States*, 167 Ct. Cl. 852 (1964), the Court of Claims held that standby duty, as now defined in 5 U.S.C. 5545 and for which premium compensation on an annual basis is not authorized, is compensable as "hours of work" under what is now 5 U.S.C. 5542, *supra*. The definition of standby duty under 5 U.S.C. 5545, which definition is also applicable to standby duty compensable under 5 U.S.C. 5542, is set forth at Federal Personnel Manual Supplement 990–2, Book 610, Subchapter S1–3d as follows:

* * * Standby time consists of periods in which an employee is officially ordered to remian at or within the confines of his station, not performing actual work but holding himself in readiness to perform actual work when the need arises or when called.

The Department of the Navy's instructions, GMMI 610.S1–A and BNSINST 7230.1B, attempt to delienate what constitutes standby duty in terms of the characterization of a particular trip rather than in terms of the individual employee's responsibilities, as contemplated by the controlling statue. As is evidencd by he facts in your case, the Navy's instructions are overly broad in that they include within the definition of standby duty assignments which do not meet the applicable criteria set forth in the controlling statutes and basic regulations of the Civil Service Commission.

The Navy is authorized to issue instructions defining standby duty for particular purposes only to the extent that those instructions are in harmony with and do not alter, extend or limit the statutes or basic regulations being administered. 18 Comp. Gen. 285 (1938), 36 *id.* 111 (1956) and 41 *id.* 217 (1961). See also *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129 (1936) and *United States* v. *Maxwell*, 278 F. 2d 206 (1960). Therefore, to the extent that CMMI 610.S1–A and BNSINST 7230.1B extend the definition of standby duty to include activity clearly not within the scope of 5 U.S.C. 5542, as interpreted by decisions of the Court of Claims and this Office, those instructions are invalid, 36 Comp. Gen. 111 (1956).

We therefore hold that since your assignment aboard USS HEWES did not require you to hold yourself in readiness to perform work you are not entitled to overtime compensation for any time aboard ship during which you did not perform actual work. In regard to those

employees who you indicate received overtime compensation for standby duty aboard the same trip, we assume that they were required during the cruise to remain in a standby status, as discussed above.

[B-176892]

Military Personnel—Retirement—Revocation—New Evidence

A member of the uniformed services whose temporary disability retirement effective December 1, 1971. was canceled as of February 24, 1972, because of continued hospitalization and the member was restored to the temporary disability list effective June 1, 1972, is entitled to active duty pay for the period December 1, 1971, to May 31, 1972, since the indicated need for further extensive hospital care of the member prior to the contemplated December 1, 1971, retirement date comprised substantial new evidence sufficient to support revocation of the first retirement orders, and the delay in initiating the revocation of the retirement orders under the circumstances of the hospitalization is not considered unreasonable. Furthermore, commencing June 1, 1972, the member became entitled to receive retirement pay under 10 U.S.C. 1202, computed under Formula 2, 10 U.S.C. 1401, using the rates of basic pay authorized by Executive Order 11638, effective January 1, 1972.

To C. R. Davies, Department of the Navy, May 15, 1973:

Further reference is made to your letter dated August 1, 1972 (file reference XO:MTP:mlj 7220/581 58 97-418 22 7359), with enclosures, requesting an advance decision in the case of SH2/c Dan Jones, Jr., USN (retired), 418-22-7359, concerning the computation of his retired pay and his entitlement to receive active duty pay and allowances in the circumstances described therein. Your letter was forwarded to this Office by second endorsement of the Comptroller of the Navy, dated August 28, 1972 (file reference NCF-4 7220/MPAC), and has been assigned Submission Number DO-N-1165 by the Department of Defense Military Pay and Allowance Committee.

Naval Message 180952Z, dated November 18, 1971, issued by the Chief of Naval Personnel, directed that Mr. Jones be placed on the Temporary Disability Retired List with a 40 percent disability effective December 1, 1971, and you say that on that date he had accrued 20 years and 12 days of active service.

On December 19, 1971, the United States Naval Hospital, Portsmouth, Virginia, advised the Chief of Naval Personnel that Mr. Jones had been hospitalized on November 27, 1971; that he remained on the sick list and as a result could not comply with those retirement orders.

On January 6, 1972, the Naval Hospital further advised the Chief of Naval Personnel that the member continued to be hospitalized; that such hospitalization would continue for 1 more month, and requested that his physical disability retirement order be canceled, pending an addendum report of his current hospitalization.

On January 17, 1972, the Chief of Naval Personnel requested of the Judge Advocate General of the Navy that the action of the Secretary

of the Navy placing Mr. Jones on the Temporary Disability Retired List be rescinded in view of the member's hospitalization on November 27, 1971, and his requirement for further medical treatment. On February 11, 1972, the Physical Review Counsel advised the Secretary of the Navy that in its opinion, substantial new evidence existed in the member's case to warrant the initiation of a petition canceling the member's temporary disability retirement orders, setting aside his retirement and retaining him in an active duty status pending completion of treatment and further disability evaluation. On February 22, 1972, the Secretary of the Navy approved rescission of the retirement orders and cancellation action was taken on February 24, 1972.

By Naval Message 180951Z, dated May 18, 1972, issued by the Chief of Naval Personnel, Mr. Jones was released from active duty on May 31, 1972, and placed on the Temporary Disability Retired List with a disability rating of 100 percent effective June 1, 1972.

You say that the member has received active duty pay through May 31, 1972, and his retired pay account was established effective June 1, 1972, and at the time of that release from active duty the member was credited with 20 years, 6 months and 12 days active duty.

You also say that in view of our decision, 46 Comp. Gen. 671 (1967), wherein we ruled that in order to establish a proper basis for the application of the "substantial new evidence" rule, prompt administrative action to revoke or modify the retirement orders must be taken "either contemporaneously or within a short period of time following the effective date of retirement;" you express doubt as to the validity of the action dated February 24, 1972, canceling the member's November 1971 retirement orders. You report that the member is currently receiving retired pay at the rate of $256.98 monthly based on the 40 percent disability rating given him in the original TDRL orders and the service which accrued as of December 1, 1971, computed under Formula 2, 10 U.S. Code 1401, using the rates of basic pay effective January 1, 1971 (Executive Order 11577, approved January 8, 1971), plus the appropriate Consumer Price Index increases authorized by 10 U.S.C. 1401a.

In this regard, you say that if the action taken to cancel Mr. Jones' initial retirement orders is proper, his current monthly rate of retired pay will be $395.87, also computed under Formula 2, 10 U.S.C. 1401, using the rates of basic pay effective January 1, 1972 (Executive Order 11638, approved December 22, 1971), plus the Consumer Price Index increase of 1 percent, authorized effective July 1, 1972, under the provisions of 10 U.S.C. 1401a.

You also ask that if the time element in this case (2 months, 23 days between the member's initial retirement date and cancellation of his retirement orders) is not to be viewed as coming within the mean-

ing of the stipulation in 46 Comp. Gen. 671, may the member's service after November 30, 1971, be regarded as active service in a *de facto* status so as to permit him to retain the active duty pay and allowances received by him subsequent to that date. Further, should that question be answered in the affirmative, you ask whether the provisions of 10 U.S.C. 1402(a) would be for application in computing the member's retired pay entitlement.

Additionally, you request a ruling on what constitutes "a short period of time" within the meaning of 46 Comp. Gen. 671, in order to assist in the processing of accounts under circumstances similar to the case of Mr. Jones.

The general rule is that when a member of the uniformed services is retired and such retirement has become otherwise legally accomplished, the retirement orders cannot be revoked in the absence of (1) fraud, (2) substantial new evidence, (3) mistake of law, or (4) mathematical miscalculation.

The substantial new evidence rule was the basis for our decision of January 17, 1961, 40 Comp. Gen. 419, concerning the cases of Major Eli S. Fowler, Sergeant James C. Humphries and Sergeant First Class Barney Krieger, each of which involved the discovery of a physical disability after initial retirement orders were issued but before actual retirement which served as a basis for a change in the member's retirement. In arriving at the conclusion that the substantial new evidence rule had been met, thereby authorizing revocation of the initial retirement order in each case, it was determined that there was prompt notification by the appropriate medical authorities to The Adjutant General's Office upon discovery of the condition and that the revocation action taken following receipt of the information which comprised the new evidence was reasonably contemporaneous with the effective date of the retirement orders.

In our decision of February 23, 1967, 46 Comp. Gen. 671, the cases of Master Sergeant William D. Biggs and Specialist Walter J. Jones were considered. In the Biggs case the initial orders directed his retirement for physical disability effective October 11, 1965. The Adjutant General's Office apparently received information that he had been hospitalized on October 7, 1965. While it was unclear as to the exact date when the information was actually received, the record showed that no action had been taken to revoke or otherwise modify the initial retirement orders for more than 15 months after their effective date.

In the case of Specialist Jones, the initial orders directing his retirement for length of service were issued effective July 1, 1965. By message dated October 25, 1965, The Adjutant General's Office was

notified that the member was hospitalized on May 1, 1965, and that on the effective date of his retirement he was physically disqualified for retirement for length of service. The record showed that the member died on November 20, 1965, but there was no indication that any action had been initiated to revoke his retirement orders prior to his death.

While it was indicated in that decision that the information concerning physical disability constituted substantial new evidence and might serve as a basis for a change in the retirement in each case, we held that the use of the substantial new evidence rule should be confined to situations where prompt administrative action to revoke or modify the retirement orders is taken either contemporaneously or within a short period of time following the effective date of a member's ordered retirement, since an effective administrative remedy is readily available in all other cases under the provisions of 10 U.S.C. 1552, which relates to Secretarial correction of records.

What constitutes a short period of time for the purposes of applying the substantial new evidence rule is not readily susceptible of a precise definition. Such a concept turns largely on the facts in each case. As expressed in both of the before-mentioned decisions, however, there are two aspects which must be considered in such matters. They are, (1) the prompt and timely action of appropriate medical authorities in notifying the order-issuing authority and (2) the prompt and timely action by the order-issuing authority to revoke or otherwise modify the member's retirement orders following receipt of the information.

Thus, in cases where virtually no delay exists in either the notification by the appropriate medical authorities to the order-issuing authority from the time the member was hospitalized or in the administrative action to revoke the initial retirement orders thereafter, we view such procedures as appropriately constituting a short period of time.

In the present case, the indicated need for further extensive hospital care of the member prior to the contemplated retirement date comprised substantial new evidence sufficient to support revocation of the first retirement order. While the records show that there was a 19-day delay by hospital administrative personnel beyond the member's initially ordered retirement date, and a further delay of approximately 1 month before action was taken to initiate the revocation of the retirement orders, based on our understanding of the facts in this case we will not view such a delay as being unreasonable.

In these circumstances, we will not question the action taken to cancel Mr. Jones' initial retirement orders on February 24, 1972, and the substitution of retirement orders dated May 18, 1972, which placed

the member on the Temporary Disability Retired List with a disability rating of 100 percent effective June 1, 1972. Accordingly, Mr. Jones may be considered as having continued in an active duty status during the period December 1, 1971, to May 31, 1972, so as to entitle him to active duty pay for that period. Commencing June 1, 1972, he became entitled to receive retired pay under the provision of 10 U.S.C. 1202, computed under Formula 2, 10 U.S.C. 1401, using the rates of basic pay authorized by Executive Order 11638, effective January 1, 1972.

Accordingly, Mr. Jones' pay account may be adjusted on the basis indicated, if otherwise correct.

[B-175988]

Contracts—Research and Development—Practices and Procedures—Created Noncompetitive Situation

The award of the interim procurement for a less than optimum individual emergency breathing device to one of the developers of the device under a basic order agreement pursuant to a determination and findings (D&F) under 10 U.S.C. 2304(a)(2), which was followed by a Navy implementation of a research and development program to significantly increase the effectiveness of the device for eventual procurement on a competitive basis, although not legally questionable as the D&F authority is final, the determination based upon the D&F is. The practices and procedures involved in the testing, evaluation, and eventual award indicates informalities that generated a noncompetitive situation and, therefore, it is recommended that other qualified firms be given the opportunity to submit emergency escape devices for approval as interim sources of supply pending the results of the research and development program.

To the Secretary of the Navy, May 16, 1973:

Reference is made to letter SUP 022 dated March 5, 1973, from the Deputy Commander, Procurement Management, Naval Supply Systems Command (NAVSUPP), reporting on the protest of Mine Safety Appliances Company (Mine Safety), against the award of, and a subsequent order under, contract No. N00104-72-A-0309, a basic ordering agreement, to Lear Siegler, Inc. (Lear Siegler), by the Navy Ships Parts Control Center.

The award represented the culmination of over 4 years of testing and evaluation to procure a suitable emergency breathing device, following several fires on board aircraft carriers causing over 200 deaths. Asphyxiation caused many of the casualties and it is reported that a substantial number of lives might have been saved if crew members trapped in smoke-filled spaces had been equipped with emergency escape breathing devices. In October 1967, the Chief of Naval Operations (CNO) assigned to the Chief of Naval Material (CNM), on an urgency priority basis, the responsibility to develop a new, small, lightweight, easily donned and operated individual emergency breath-

ing device which would have a minimum oxygen supply of 10 minutes. On March 12, 1968, the Naval Ship Engineering Center (NAVSEC), acting as technical agent for the Naval Ship Systems Command (NAVSHIPS), polled the industry to determine the possible availability of such equipment for immediate issuance to shipboard personnel. The letter reads, in pertinent part, as follows:

Specifically, the Navy is interested in securing a self-contained closed-cycle device which will allow a man to escape from any smoke filled section of a ship. The following set of operational characteristics is being sought in the device:

(1) Support life for a minimum of ten (10) minutes under heavy labor conditions

(2) Eye protection against smoke irritants

(3) Conveniently carried by a man as he performs his daily work; in this respect, a package size of 8"×4"×2" appears reasonable

(4) Device must be easy to don and simple to operate

(5) Device must have a long "shelf" life—be ready for instant use but not require periodic maintenance

(6) Weight must be low enough to not degrade normal working performance

(7) Carrying case must be of a durable, fire resistant material.

Quantity-wise, the Navy's initial procurement would be for about one hundred thousand (100,000), units. The delivery period desired would be as short as possible, in terms of a few months.

It is requested that any products you have that meet, surpass, or approach the requirements cited above be identified. In addition, it is requested that availability, unit cost and an estimated delivery schedule be provided for any devices which you identify. This information is desired by 1 April 1968. In order to gain a complete picture of the availability and state of the art regarding such devices, negative replies are also desired.

Following are quotations from reports of CNM and NAVSEC submitted to our Office summarizing key occurrences in the program history of the equipment:

As the result of this letter several commercial devices were offered for testing by the Navy. Testing eventually narrowed to concentrated evaluation of products manufactured by Mine Safety Appliances Co. (named Self Contained Oxygen Breathing Escape Apparatus, or SCOBEA) and a device manufactured by Scott Aviation Corporation, and was carried on by the Navy over several months at the Naval Research Laboratory (NRL). Both units were scheduled for side-by-side operational evaluation (OPEVAL) by COMOPTEVFOR [Commander, Operational Test and Evaluation Force] in Norfolk in July 1969, however, in February of that year, the Naval Ship Engineering Center (NAVSEC) reported that, as a result of tests conducted at NRL, the Scott Aviation device was unsafe for OPEVAL. Subsequently, the SCOBEA was sent to OPEVAL by itself.

In the OPEVAL report dated 12 November 1969 several major and minor discrepancies were pointed out. The next several months were spent in trying to correct these discrepancies. In the meantime the Naval Safety Center, who had reservations with respect to safety aspects of the SCOBEA, recommended, in April 1970, that a Survival Support Device (SSD) manufactured by Lear Siegler, Inc., of Anaheim, Calif. be evaluated and tested for use aboard ship as an emergency system.

After a successful demonstration of the SSD at NRL on 1 September 1970, the Chief of Naval Operations (CNO) recommended to the Chief of Naval Material that the SSD be included as an additional candidate in the search for an emergency escape breathing apparatus.

Various tests on both devices were conducted at the Naval Research Laboratory, the Naval Medical Research Institute (NMRI) and by COMOPTEVFOR over the next several months. These devices were progressively modified by each firm to meet performance problems and deficiencies as they were encountered during

testing. These tests culminated with a final side-by-side test at NMRI in May 1971. * * * The results of this test showed that, although both devices had liabilities, both were within the physiological parameters which had been established with respect to cardiovascular strain and carbon dioxide.

Since both devices were considered adequate and safe, and both could perform the function of an emergency escape device, it was decided to arrange for a side-by-side OPEVAL to determine which device was more suitable for Fleet use. The CNO concurred and the OPEVAL was scheduled for October 1971.

COMOPTEVFOR, in June 1971 outlined the scope of the side-by-side tests and recommended minimum criteria to be used in determining the acceptability of the devices. Subsequently, the Chief of Naval Material (CNM) indicated that failure to meet the goal of 10 minute duration should not in itself be disqualifying and CNO concurred.

* * * In general, COMOPTEVFOR found discrepancies in both devices and indicated that both devices would support a person for 8 minutes in escaping from or through an irrespirable atmosphere. The SSD, however, was considered to be the most suitable of the two as an emergency escape breathing apparatus. * * *.

After the OPEVAL was over, COMNAVSHIPS questioned some safety aspects of the SSD device and recommended further testing. Without being asked, the Bureau of Medicine and Surgery (BUMED) stated that both devices were considered to be adequate and safe as an interim rescue breathing device and that no further testing of either prototype device is considered necessary. Based on this information, the CNM indicated non-concurrence with the recommendations of COMNAVSHIPS and recommended to CNO that the Lear Siegler SSD be approved for service use and for immediate procurement. This occurred on 30 November 1971.

The CNO, on 10 February 1972, approved the 8-minute Lear Siegler SSD for service use provided that certain improvements recommended by COMOPTEV FOR were incorporated. * * *

NAVSHIPS was requested to prepare a modified performance specification for the Lear Siegler unit. The specification was prepared by NAVSEC, and reviewed by concerned activities. The specification was published but subsequently recalled at the direction of NAVMAT, with no procurement to be made by this specification.

PROCUREMENT PHASE:

In mid-April 1972, the CNM informed COMNAVSHIPS of the intent of OPNAV to procure the Lear Siegler device. CNO directed proceeding to point of contract with the procurement of the Lear Siegler SSD and specified the details of the program, including the use of the Lear Siegler specification, a specification requiring tests but lacking the definite quality assurance test procedures of [the recalled specification]. Subsequently a request for procurement was prepared by NAVSEC, funding obtained and the document reviewed by NAVMAT, NAVSHIPS and BUMED prior to release to the SHIPS PARTS CONTROL CENTER, Mechanicsburg.

Initial BUMED reservations, based on physiological aspects were not pressed and were not disqualifying. On 18 May 1972 funds were recalled and the program temporarily halted. Upon receiving additional guidance from NAVMAT on 23 May 1972, and the decision reaffirming the selection of the (SSD) by [the Assistant Secretary of the Navy (Installations and Logistics)], a new request for procurement was prepared, funding obtained and the program restarted. NAVMAT again cited the urgent need for the device. * * *.

The present situation on emergency breathing devices embodies two actions:

1. The procurement of a limited number, approximately eight aircraft carriers worth, of Lear Siegler SSD's as an interim device to be supplied on an urgent basis. The devices are to be rigorously tested and their performance characteristics promulgated to their introduction to the fleet.
2. In parallel with this interim action, a long range development program, has been initiated to produce through competition, a device or devices to meet all the Navy's requirements for emergency breathing equipment.

Order No. 0001 under the basic ordering agreement contract was issued to Lear Siegler on June 8, 1972, despite the pendency of the protest at our Office, based on the urgent need for 25,300 devices for use by aircraft carriers on tactical missions in Southeast Asia. The order was issued pursuant to the following determination and findings under 10 U.S. Code 2304(a) (2) which authorizes the negotiation of contracts where the public exigency will not permit the delay incident to formal advertising:

DETERMINATION AND FINDINGS

Authority to Negotiate Individual Contract When the Public Exigency Will Not Permit the Delay Incident to Formal Advertising.

Upon the basis of the following findings and determination, the proposed contract described below may be negotiated without formal advertising pursuant to the authority of 10 U.S.C. 2304(a)(2).

FINDINGS

1. The proposed contract calls for the furnishing of Emergency Breathing Devices for all ships in the United States Navy. It is proposed to furnish these devices to those aircraft carriers in the combat zone in Southeast Asia, on a priority basis. These Emergency Breathing Devices shall then be supplied to other aircraft carriers and thereafter to all ships in the Fleet. The supplies being procured shall provide ships' personnel with an emergency breathing device for use in high-risk areas aboard ship where the incidence of fire or explosion is high. Such high-risk areas are more prevalent on aircraft carriers than on other ships in the Fleet.

2. Because of the safety-of-life factor without these devices, aircraft carriers in Southeast Asia have curtailed the performance of operational tasks. These aircraft carriers will be unable to fully accomplish their assigned missions without having the Emergency Breathing Devices available for use by ships' personnel, in the event of a catastrophe.

3. The use of formal advertising for this procurement is impractical, because such method would cause substantial delay in the availability of the material and would prevent aircraft carriers from fully complying with their assigned missions during said period.

DETERMINATION

The use of a negotiated contract, without formal advertising, is justified because the public exigency will not permit the delay incident to formal advertising.

It is quite evident from the record that the Navy utilized an approach based on the testing and evaluation of then existing commercial devices with the expectation that, with only slight modification, those devices could be made suitable for actual use. The award of the interim procurement to Lear Siegler was followed by a Navy implementation of a research and development program to significantly increase the effectiveness of emergency escape breathing devices. The research and development contemplates a program from August 1972 through June 1974 whereunder steps will be taken to approve, develop, test, and evaluate devices, and develop specification for eventual procurement on a competitive basis if possible. The request for proposals accom-

panied by a detailed specification to accomplish this research and development program was issued on March 8, 1973.

We note at this juncture that neither the Lear Siegler SSD nor the Mine Safety SCOBEA entirely meets the design, operational and performance characteristics of the optimum emergency breathing apparatus desired by the Navy. At least as early as the final side-by-side OPEVAL in October, 1971, which recommended testing and evaluation to advance the state-of-the-art, the Navy's goals had not been reached. At that time, a research and development program would have been appropriate as contemplated by Armed Services Procurement Regulation 4–101 and 4–102.

In expressing the foregoing view, we do not mean to negate the Navy's belief that an interim supply of admittedly less than optimum devices was of the utmost urgency which could not await the completion of a research and development program. Faced with this urgency, the Navy contracted with Lear Siegler for its less than optimum device. Mine Safety argues that its device was technically acceptable and immediately available and questions the determination of urgency in light of the 4-year procurement program. However, we find no basis in the record to question the urgency determination supporting the negotiation of Order 0001. In this regard, the following extract from 52 Comp. Gen. 57, 62 (1972) is pertinent:

* * * the D&F cited 10 U.S.C. 2304(a)(2) as authority to negotiate the contemplated contract. The provisions of 10 U.S.C. 2310(b) make the findings of the D&F final; therefore, we are precluded from questioning the legal sufficiency of the findings. In our decision 51 Comp. Gen. 658 (1972), our Office concluded that we are not precluded from questioning whether the determination, based upon the findings, is proper. We recognize that while reliance upon the "public exigency" exception to formal advertising does not *per se* authorize a sole-source award, it does clothe the contracting officer with considerable latitude to determine the method best suited to satisfy the urgent needs of the Government. 46 Comp. Gen. 606 (1967).

At the time of the October 1971 final OPEVAL, only Lear Siegler and Mine Safety were qualified suppliers. Concerning the technical rejection of the Mine Safety device, the Assistant Secretary of the Navy (Installations and Logistics) was advised as follows by the CNM:

Subject: Emergency Escape Breathing Device

1. In reply to your question as to why the Lear Siegler Survival Support Device (SSD) was selected as being more suitable for the Navy than the Mine Safety Appliance Self Contained Oxygen Breathing Escape Apparatus (SCOBEA), the following information is provided as documented in the COMPOTEVFOR report:

a. The donning time of the SCOBEA is twice as long as the SSD (32–38 seconds vice 15–17 seconds).

b. Activation of the SCOBEA requires an unnatural movement; an outward pull on a lanyard vice a downward pull.

c. Trouble was experienced in opening the SCOBEA container.

d. The SCOBEA hood is too fragile—two hoods ripped during the donning sequence.

2. In addition the following characteristics were noted during the OPEVAL by Navy observers (NAVMAT and NAVSEC):

a. Due to the relatively complicated donning sequence of the SCOBEA, much more training of personnel would be required.

b. The SCOBEA presents a dangerous explosive hazard when exposed to oil. This was demonstrated at the Fire Fighting School at Norfolk during the OPEVAL.

c. Communications are curtailed when wearing the SCOBEA unless the mouthpiece is removed from the mouth.

d. The wearer has no way of knowing if the unit is activated. (SCOBEA)

3. Probably the most significant factor was that 80% of the test subjects (10 men who wore both devices in 80 tests) preferred the Lear Siegler SSD because of its simplicity and shorter donning time.

Disregarding the explosive hazard allegedly presented by the Mine Safety SCOBEA, the memorandum points out certain valid human engineering and operational advantages characteristic to the use of the Lear Siegler device. We have viewed specifications prescribing features utilizing such advantages as proper statements of the actual needs of the Government. *See* 51 Comp. Gen. 247 (1971); B-174140, B-174205, May 16 and November 17, 1972. Therefore, in our view, the choice of the SSD over the SCOBEA would have been justified in October 1971.

However, our review of the practices and procedures involved in the testing, evaluation and eventual award to Lear Siegler indicates that the informalities which permeated those practices and procedures generated a noncompetitive situation to the prejudice of an otherwise qualified second source of supply.

The Deputy Chief of Naval Material (Procurement and Production) furnished our Office with the following information relating to the treatment of the Mine Safety device during test and evaluation:

There was a considerable discussion of the side-by-side operational evaluation conducted by the Navy's independent test and evaluation agency, [COMOPTEV FOR], in October 1971, particularly with respect to the Chief of Naval Material message of June 1971 to COMOPTEVFOR to the effect that failure to provide ten minutes breathing duration should not in itself be considered disqualifying. The implication was that this represented a change in requirements from those established by the original Navy expression of interest in March 1968. However it is noted that the original expression of interest set forth only general characteristics and asked that the industry submit devices that "meet, surpass, or approach" those characteristics. The objective of the test was to provide a comparison of the overall operational suitability of available devices. No one of the characteristics enunciated in the original expression of interest was of such importance that it should be permitted to override all others. While the Lear Siegler device provides less duration it was judged by COMOPTEVFOR to be superior in terms of overall operational suitability. In this respect it is noted that the test criteria were not ranked in order of importance nor assigned weights as would be the case in a formal procurement source selection process. In retrospect the informality of the testing process might seem regrettable. However, the matter must be viewed in the light of circumstances which Navy management faced at the conclusion of the side-by-side operational evaluation in October 1971. It was obvious that the Navy's ultimate needs were for a better device than either of those which had survived the testing program. This need could best be met by a formal development program. Such a program was instituted and * * * is being pursued. However, this would require a considerable period of time and shipboard personnel continued to face unprotected the hazards of smoke inhala-

tion from shipboard fires. In order to prevent further loss of life it was necessary to procure a device to provide protection during the interim until a fully suitable device could be developed and produced. There were only the two candidates to choose from. It is arguable that both of them could have been further improved by providing the results of the side-by-side operational evaluation to both contractors, permitting them to make further modifications, and then conducting further tests. In this regard it is noted that the explosive hazard presented by the MSA SCOBEA device is only susceptible of correction by a complete change in the basic design and operating principle of the device which would entail considerable time and effort. In any event to test further would have necessitated a further continuation of a program which had already been prosecuted for over three years. The degree of improvement demonstrated in the devices during that extended period did not appear to offer a promise of further improvement sufficient to warrant further delay in providing the needed protection to shipboard personnel. As pointed out in the previous reports the need for such a protective device had been known for almost five years during which loss of life had continued and further delay in providing the needed protection was considered intolerable. Accordingly it was decided that the test program would be pursued no further and the device most operationally suitable would be procured on an interim basis. An additional factor in the selection was the explosive hazard presented by the MSA SCOBEA. This hazard is well known and Navy training courses have included precautions regarding the use of devices of this design for many years. Although it has been tolerated in the past it is nevertheless a genuine hazard and a drawback in comparison with a device such as the SSD which does not present the hazard. Since the test program was not to be pursued further no purpose would have been served by providing the test report to the companies. The record does not indicate that the test report was furnished to either company.

* * * However, all parties who participated in the preceding test and evaluation were treated equally with respect to knowledge of the requirement and afforded equal opportunity to submit devices for testing. Those, including the protestant, who submitted devices appearing to offer sufficient promise to warrant further consideration were afforded equal opportunity to attempt minor modifications in order to meet the requirements.

The foregoing would seem to indicate that the Navy was faced with a fait accompli in October 1971 which precluded further modification and testing. Neither the OPEVAL test criteria nor the report setting forth the need for further modification of both devices was furnished to either Mine Safety or Lear Siegler. Insofar as the test criteria are concerned, the relaxation of the 10 minute breathing requirement to 8 minutes represented a concession to accommodate the Lear Siegler SSD. But Mine Safety was unaware of this relaxation. However, up to and including the final OPEVAL, the equality of treatment of both companies is evident from the record.

But, in the 8 months subsequent to the final OPEVAL and the award to Lear Siegler on an exigency basis, the record is replete with examples of opportunities extended to Lear Siegler to modify its device to comply with the Navy's requirements. In contrast, Mine Safety was eliminated from consideration and thus had no opportunity to modify its device to a point where Navy approval might have been extended. By way of example, the CNM in a memorandum to the CNO following the OPEVAL set forth various actions that could be taken to implement the recommendations made during the OPEVAL with respect

to the SSD. In a memorandum from CNO to CNM dated February 10, 1972, it was stated:

1. Commander, Operational Test and Evaluation Force, in the final evaluation report on the Lear Siegler Survival Support Device, reference (a), recommended that the device be accepted for service use provided that certain improvements were accomplished. By reference (b), Commander, Naval Ship Systems Command recommended that further acceptability tests be conducted. In the first endorsement on reference (b), the Chief of Naval Material stated that sufficient tests had been conducted to support acceptance of the device. Reference (c) supports the CHNAVMAT position on reference (b).
2. The Lear Siegler Survival Support Device is approved for service use *provided that the improvements recommended for accomplishment by reference* (*a*) (with the exception of anti-fogging measures beyond the state of the art as discussed in paragraph 4b. (1) of the first endorsement to reference (b)) *are incorporated in the production equipment.* [Italic supplied.]

Subsequently, the CNM requested that NAVSHIPS provide a modified performance specification in consonance with the OPEVAL report and suggested modifications. The specification was prepared, reviewed, and published, but subsequently recalled without procurement action by CNM. The record contains no explanation for the recall except for a NAVSUPP letter to our Office to the effect that the specification was in excess of the needs of the Government. Thereafter, the CNO requested the CNM to proceed to contract for the SSD, as described in a Lear Siegler specification dated March 27, 1972, incorporating the OPEVAL recommendations for modification. On the basis of the Lear Siegler specification, the basic ordering agreement and the order thereunder were executed. The Deputy Chief of Naval Material has advised that in several respects the Lear Siegler specification contains less stringent requirements than those in the recalled specification. Most notably, such requirements as a specific breathable gas flow rate, exertion by user, and carbon dioxide buildup are not found in the Lear Siegler specification.

The record does not show that Mine Safety was advised by the Navy that its SCOBEA presented a dangerous hazard. To the contrary, in May 1969, NAVSEC stated as follows:

1. Reference (a) states that the subject "SCOBEA" has not been properly evaluated or tested and, therefore, is not ready for OPEVAL. It also mentions that the oxygen generating material is potassium peroxide whereas the chemical is potassium superoxide. All components used in the chemical operation of the "SCOBEA" units have been used by the Navy in their OEAs for many years. In fact, the "SCOBEA" is a miniature "OBA." The MSA CHEMOX, which has Bureau of Mines approval, is the commercial version of the Navy OBA. *Problems encountered in the MSA "SCOBEA" were not those of hazard and explosion but rather the parameters of weight, size, cost, comfort and simplicity of operation.* [Italic supplied.]

Furthermore, Mine Safety points out that:

The Navy has used the MSA OBA (Oxygen Breathing Apparatus) for approximately 30 years with no accidents. This is supported by the Navy's own file (reference NRL letter dated 15 May 1969, enclosure #8 with MSA letter of 1 August 1972). This is the same type of chemical system that the SCOBEA

employs. The new R & D specification has no requirement for testing any apparatus by dumping it in gasoline/oil/water; but according to all previous correspondence, this is the paramount overriding reason why the SCOBEA was rejected. It should be pointed out that paragraph 3.2.14 of the new specification is concerned about fragmentation when containers are filled to high pressures, as is the SSD.

There is no information of record that the human engineering defects which disqualified the SCOBEA could not have been corrected if such data were communicated to Mine Safety.

We believe that Mine Safety should have been apprised of the Navy's objections to the SCOBEA and that such company should have been given an opportunity to respond to such objections within the necessary time constraints. In view of the lengthy period from final testing until award, it is conceivable that Mine Safety, a supplier of such devices to other Government agencies, could have developed an acceptable device for the interim procurement.

In retrospect, the Government's interests might have been better served had the Mine Safety device received the same consideration as the Lear Siegler SSD during the period subsequent to the final OP EVAL. Had this been the case, the Government probably would have had the benefits of competition when the interim buy became urgent. Though we believe that the present state of the emergency breathing device program reflects the prior imperfections in the administration of the program, we cannot point to a violation of law or regulation.

Concerning the urgency buy and possible future interim buys, the Deputy Chief of Naval Material advises:

> Further procurements of the interim device will be kept to a minimum consistent with safety requirements and the progress of the research and development program. However, future deliveries of the interim device will have no effect on the quantity of items to be procured upon completion of the research and development program. Because the interim device is not entirely satisfactory and because of its shelf life (maximum of five years) all of the interim devices will be replaced by the item resulting from the research and development program within a relatively short period.

We recommend that Mine Safety and other qualified firms be given the opportunity to submit emergency escape devices for approval as interim sources of supply pending results of the research and development program. We would appreciate being advised as to our recommendation and as to contemplated procurement actions subsequent to the evaluation of the research and development effort.

[B–95832]

Transportation—Vessels—Foreign—United States Registry—Carriage of Military Cargoes

The carriage of military cargoes in foreign-built vessels entitled to registry in the United States (U.S.), and engaged in foreign trades or trade with trust territories, is not precluded by the basic cargo preference statutes—the act of

April 28, 1904, as amended, and the act of August 26, 1954, as amended. The objectives of the 1904 act—to aid U.S. shipping, to foster employment of U.S. seamen, and to promote the U.S. shipbuilding industry- do not exclude foreign-built vessels registered in the U.S., as such vessels are considered vessels of the U.S. and entitled to the benefits and privileges appertaining to U.S. vessels, to the extent participation is limited to foreign commerce and the trust territories, and is not precluded by the act of 1954, which insures that at least 50 percent of all Government cargo, whether military or civil, will be transported in privately owned "U.S.-flag commercial vessels," a term that is not limited to vessels built in the U.S.

Vessels---Foreign—United States Registry—Status

Foreign-built vessels which are documented under the registry laws of the United States (46 U.S.C. 221) subsequent to the issuance of bids or offers for transportation of military cargoes to foreign ports may be used to satisfy contract commitments pursuant to such bids or offers, provided the use of the vessels is consistent with their registry, provided the use does not compromise the tonnage limitation of the act of August 26, 1954, as amended, and provided the requests for bids or offers, or the contracts entered into pursuant thereto, do not prohibit such use.

To Nicholas D. Pasco, May 17, 1973:

We refer to your letter of January 31, 1973, and earlier letter, asking for decision whether foreign-built vessels are ineligible for carriage of military cargoes. A memorandum of law was enclosed with your letter of January 31. This memorandum examines the legal foundation for American Export's claim that foreign-built vessels are ineligible to carry military cargoes.

Resolution of the question requires consideration of two basic cargo preference statutes: Act of April 28, 1904, Chapter 1766, 33 Stat. 518, as amended, 70A Stat. 146, 10 U.S. Code 2631, and Act of August 26, 1954, Chapter 936, 68 Stat. 832, as amended, September 21, 1961, 75 Stat. 565, 46 U.S.C. 1241(b). The former provides that only vessels of the United States or belonging to the United States shall be used in the transportation by sea of supplies bought for use of the military departments. The latter requires that at least 50 percent of all Government cargo, whether military or civil, be transported in privately owned United States-flag commercial vessels. The 1961 amendment in part provided that a vessel built outside the United States subsequent to September 21, 1961, could not be considered a privately owned United States-flag commercial vessel within the meaning of the statute until the vessel had been documented under the laws of the United States for a period of three years.

The memorandum of law is devoted primarily to showing that the cargo preference granted by the 1904 act, insofar as it applies to private carriage is restricted to vessels built in the United States as well as registered in the United States. Three basic contentions are advanced:

(a) that the 1904 Act was viewed by the Congress which enacted it as an aid to *both* the U.S. shipbuilding and ship-operating industry, and had as its specific purpose the restriction of military ocean cargoes carried on private vessels to

U.S. constructed as well as U.S. registered ships; (b) that this was the authoritative interpretation of the statute throughout its first 60 years, an interpretation accepted by the Comptroller General as recently as in 1968; and (c) that this interpretation finds added support in the Congressional policy, most recently expressed in a series of legislation spanning the period 1954–1961, to foster American shipbuilding and shipping by reserving cargoes subject to government control for U.S. constructed and registered vessels to the maximum practicable extent.

We would readily agree that the 1904 act was viewed by the Congress which enacted it as an aid to both the U.S. shipbuilding and ship-operating industry. We are not convinced, however, that the act had as its specific purpose the exclusive restriction of military ocean cargoes carried on private vessels to U.S.-constructed as well as U.S.-registered ships.

The extensive Senate debate on the bill that ultimately was passed (S. 2263) indicates that the act was intended to aid United States shipping, to foster employment of United States seamen, and to promote the shipbuilding industry in the United States. Undoubtedly the preference granted by the act contributed to all three objectives, but we do not believe that the preference, as enacted, was limited exclusively to vessels built in the United States. If this had been the primary intention, express language to that effect could have been employed. In this connection, two other cargo preference bills, both of which used the term "American-built ships," had been considered by the Congress (S. 2437 and H.R. 14441), but they were passed over in favor of S. 2263.

The preference granted by the 1904 act, insofar as it applies to private carriage, is expressly limited to "vessels of the United States" and it is clear that the term was intended to have the same meaning that it has in the navigation laws. In the Senate debate on the bill, this discussion is reported, 38 Cong. Rec. 2408:

Mr. COCKRELL. I should like to have a definition of what are "vessels of the United States." Does that mean that the United States must be the owner of the vessel?

Mr. HALE. This only applies to those; it does not at all go into the general question. It is only the simple question that when the Government transports stores or goods to foreign ports it shall be done by vessels of the United States.

Mr. BERRY. Not belonging to the United States?

Mr. HALE. No; but vessels that are papered by the United States.

Mr. ALLISON. Registered.

Mr. HALE. Yes; registered. It is understood in business very well. They are to be vessels of the United States and not foreign tramps. That is all there is of it.

And, 38 Cong. Rec. 2594:

Mr. BACON. I suggest to the Senator from Maine that the term "vessels of the United States" has a technical meaning.

Mr. HALE. Yes.

Mr. BACON. It does not mean vessels owned by the United States.

Mr. HALE. It does not.

Mr. BACON. It is found under the navigation laws, and means vessels of American registry.

It is significant that none of the answers to direct questions about the meaning of the term "vessels of the United States" indicated that it encompassed only ships built in the United States. And it seems clear that the bill under discussion was not intended to define the term but that its meaning was to be ascertained by reference to other laws.

Since the earliest days of the Republic, the navigation laws of this country have defined vessels of the United States as those registered or enrolled according to law. Act of December 31, 1792, Chapter 1, Sec. 1, 1 Stat. 287. The current definition, substantially unchanged from earlier times, is codified in 46 U.S.C. 221, in relevant part, as follows:

> Vessels registered pursuant to law and no others, except such as shall be duly qualified according to law for carrying on the coasting or fishing trade, shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels * * *.

At the time the 1904 law was enacted, all vessels built in the United States were entitled to registry provided they were owned by United States citizens. Revised Statutes, Section 4132. But registration was not limited exclusively to such vessels; there were exceptions, although admittedly narrow ones. Vessels wherever built, captured in war by citizens of the United States and lawfully condemned as prize, could be registered. Similarly, vessels adjudged to be forfeited for a breach of the laws of the United States, whether built within or without the United States, could be registered. Wrecked vessels could be registered provided they were substantially rebuilt in the United States. (Revised Statutes, Section 4136.) And, of course, then as now, foreign-built vessels could be admitted to registry under special acts of Congress granting that right to specific vessels.

It must be concluded, therefore, that the Congress which enacted the 1904 law was aware that some classes of foreign-built vessels were entitled to registry under the navigation laws and thus were to be deemed "vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels." If the Congress had intended to limit the preference in the 1904 act to vessels built in the United States, it could have said so, and it seems probable that the term "vessels of the United States" was used intentionally in order to accord the preference not only to ships built in the United States but also to such limited classes of foreign-built vessels as might be then or thereafter admitted to registry under the law. In any event, we see no compelling reason to read the act as granting a preference to one class of vessels and denying it to another class when both classes consist of duly registered vessels which are, by statutory definition, "vessels of the United States," and entitled to the benefits and privileges appertaining to such vessels.

In 1912, Congress amended the registry laws to permit registry of foreign-built vessels engaged in trade with foreign countries, and the amendment has remained in effect since that time. Act of August 24, 1912, Chapter 390, Sec. 5, 37 Stat. 562, 46 U.S.C. 11. Since then, foreign-built vessels engaged in the foreign trades "registered pursuant to law" must be deemed "vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels," 46 U.S.C. 221. And we believe one of the benefits and privileges appertaining to such vessels is the cargo preference accorded by the 1904 act since the preference is extended to vessels of the United States and is not limited either expressly or by necessary implication to vessels built within the United States.

While the Congress which passed the 1904 act obviously had power to limit the preference therein to vessels built within the United States had it chosen to do so, it could not bind succeeding Congresses in the determination of what were or were not to be deemed vessels of the United States:

> Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to [law]. *White's Bank* v. *Smith*, 74 U.S. 646, 655 (1868).

It is our opinion, therefore, that foreign-built vessels engaged in the foreign trades (or in trade with some trust territories), and duly registered pursuant to law as vessels of the United States, are entitled to participate in the cargo preference granted by the 1904 act to the extent such participation is limited to foreign commerce and the trust territories and is not precluded by the limitations of the act of August 26, 1954, as amended, 46 U.S.C. 1241(b), discussed further below.

It is said in your memorandum that interpretation of the 1904 act as being restricted to U.S.-built vessels as well as U.S.-registered vessels was the authoritative interpretation of the statute throughout its first 60 years, an interpretation accepted by the Comptroller General as recently as 1968. So far as we know, the military departments have always administered the 1904 act as requiring shipment of military supplies in vessels owned by the Government or in vessels registered or enrolled under the laws of the United States. If there has been an administrative practice limiting application of the 1904 act to U.S.-built vessels, except insofar as shipment in the coastwise trades has required such application, we are not aware of it.

This Office has never held that the application of the 1904 act is limited exclusively to U.S.-built vessels. Our decisions frequently have referred to the fact that stimulation of American shipbuilding was one of the purposes of the act but we also have stressed the other purposes: protection of United States shipping interests and the employ-

ment of United States seamen. The train-ship decision (43 Comp. Gen. 792), referred to in your memorandum of law as supporting your position in this case, involved use of a foreign-registered as well as foreign-built vessel, engaged in a coastwise trade obviously limited to U.S.-built vessels, and the question presented did not require consideration of the question whether the 1904 act limited carriage of military cargo in foreign trades to U.S.-built vessels. The 1968 decision (48 Comp. Gen. 429), concerning shipment of cargo from Great Lakes ports, also did not involve the question; the question there was whether military cargo could be shipped to Great Lakes ports for transshipment to foreign-flag vessels when United States-flag vessels were available for carriage of the cargo at Atlantic and Gulf coast ports.

Finally, it is said that your interpretation finds added support in congressional policy, most recently expressed in a series of legislation spanning the period 1954–1961, to foster American shipbuilding and shipping by reserving cargoes subject to Government control to U.S.-constructed and -registered vessels to the maximum practicable extent. In 1954, legislation was enacted to insure that at least 50 percent of all Government cargo, whether military or civil, be transported in privately owned United States-flag commercial vessels. Act of August 26, 1954, 68 Stat. 832, 46 U.S.C. 1241(b). There is nothing in the legislation or its history to indicate that the term "United States-flag commercial vessels" was then limited to vessels built within the United States. We are informed by the Military Sealift Command (MSC, formerly Military Sea Transportation Service, MSTS) that this act was construed as a limitation on the amount of military cargo that could be shipped in Government-owned vessels and that at least 50 percent of military cargo must thereafter be shipped in privately owned United States-flag vessels.

In 1961, the act was amended to provide, *inter alia*, that a vessel built outside the United States subsequent to September 21, 1961, could not be deemed a privately owned United States-flag commercial vessel within the meaning of the statute until the vessel had been documented under the laws of the United States for a period of three years. The plain inference is that vessels built outside the United States before that time, if documented under the laws of the United States, could be considered to be privately owned United States-flag commercial vessels within the meaning of the statute. MSC informs us that the amount of cargo transported in United States-flag, foreign-built vessels is carefully monitored in order to assure compliance with the 1961 proviso.

In view of the foregoing, it is our opinion that foreign-built vessels documented under the laws of the United States are eligible to carry

military cargoes in the circumstances and subject to the limitations prescribed by law as described above. In answer to your question whether such vessels documented subsequent to issuance of bids or offers for transportation of military cargo can be used to satisfy contract commitments pursuant to such bids or offers, our answer is in the affirmative, provided the use of such vessels is consistent with their registry, provided such use does not compromise the tonnage limitation of the 1954 act, as amended, and provided the requests for bids or offers, or the contracts entered into pursuant thereto, do not prohibit such use.

[B-178154]

Bids—Competitive System—Specifications—Restrictive

A Forest Service invitation for bids (IFB) to furnish brush chippers that called for a "braking system that will stop the cutter blades instantly" without defining "instantly," but the contracting officer stated a willingness to accommodate reasonable tolerances from the normally accepted meaning of the word is unduly restrictive of competition and should be canceled since the needs of the Government were overstated, and there is no evidence the low bid, held nonresponsive on the braking time, would not satisfy the actual needs of the Government as well as the bid being considered for award. The IFB should be readvertised, eliminating the restrictive specification feature and stating a reasonable time tolerance for the braking of the cutter, and also eliminating the minor deviation clause used since deviation clauses have no place in formally advertised procurements as they do not generally permit free and equal competition.

To the Secretary of Agriculture, May 17, 1973:

Reference is made to a letter (6320 Contracting) dated March 23, 1973, from the Director of Administrative Services, Forest Service, and prior correspondence, requesting our decision with respect to the protest filed by the Wayne Manufacturing Co. (Wayne) against any award of a contract to the Edward R. Bacon Company (Bacon), under invitation for bids (IFB) No. R5-73-149, issued by the Forest Service, San Francisco, California, for furnishing six brush chippers.

The contracting officer proposes to sustain the Wayne protest, reject the low bid of Bacon ($3,950 each) as nonresponsive, and award the contract to Wayne ($4,101 each), the only other bidder responding to the IFB. For the reasons hereinafter stated, we conclude that the IFB should be canceled and the requirements thereunder readvertised. In reaching this conclusion, we have considered comments from both Wayne and Bacon which took into account the possible cancellation of the IFB.

The bidding schedule of the IFB called for a brush chipper in accordance with an attached specification which provided in section 220 as follows:

Power transmission from engine to the cutter head shall be of a sufficient amount of multiple V-belt drive to insure adequate speed and power of cutter for chipping a 6 inch minimum log. Design shall allow for easy adjustment and re-

placement of the V-belts. A suitable guard shall enclose the drive unit. An emergency cut-off switch shall be included which shall be connected to a control located within easy reach of the operator in the feeding apron area. The switch must be able to turn off the cutter head assembly upon activation of the control.

That section of the specification is supplemented in the bidding schedule as follows:

A braking system will be provided that will stop the cutter blades instantly upon activation of a control switch that is easily reachable from the apron feeding area.

Wayne's original protest to the contracting officer stated that the Bacon bid was nonresponsive in several respects. But the protest has crystallized to encompass the effect of the above-quoted section 220, as supplemented. The contracting officer reports that an engineering division equipment specialist reviewed the protest file and found no reason to disagree with the Wayne position that the positive braking system called for in section 220, particularly in the supplementary language, is not a feature of the brush chipper offered by Bacon.

The Bacon brush chipper features an electrical push switch which when activated breaks the electric circuit, severs the engine's electrical functions, and thereby stops the cutter blades. With respect to the requirement that the cutter blades stop instantly, Bacon states that depending on the load in the cutting blades, its equipment will stop in from 3 to 15 seconds. Wayne's equipment, employing a responsive positive hydraulic brake system, as opposed to Bacon's use of only an electrical cut-off feature, stops the cutter blades in 2 seconds, regardless of load conditions.

The contracting officer recounts a prebid opening conversation with a representative of Bacon's supplier and his interpretation of the information imparted as follows:

In clause "220—Drive" above, Bacon refers to a 12/18/72 telephone conversation between Karl Schoeppner of KPS Manufacturing, Inc., (KPS) and the undersigned. KPS confirmed the conversation in its letter of 1/19/72. The caller wanted to know if, under Clause 220, a hydraulic or electric braking system was required. He was informed that since the clause made no distinction, any system that produced the stated results would be in compliance. This conclusion could be reached independently by any bidder. While Clause 220, as supplemented, calls for a "braking system that will stop the cutter blades instantly," the word "instantly" was not defined and a reasonable interpretation will suffice whether the result is reached by hydraulic or electric means.

As the contracting officer states, the word "instantly" in section 220 was not defined therein. In our view the word "instantly" as used in the specification leaves no room for the contracting officer's stated willingness to accommodate reasonable tolerances from the normally accepted meaning of the word. Viewed in this light, both bids might very well be considered nonresponsive to the "instantly" requirement. Furthermore, we agree with the contracting officer, despite his seemingly erroneous but inoperative advice given to Bacon's supplier be-

fore bid opening that an other-than-positive braking system would be acceptable, that the Bacon bid is nonresponsive in that regard.

In any event, the contracting officer advised our Office that the positive braking system and instant stoppage of the cutter blades requirements contained in section 220 exceed the needs of the Government and would be deleted upon reprocurement. Even though such is the case, we could not permit the stated requirement to be waived for the low bidder, Bacon. This is so because a waiver could represent a departure from the advertised specifications and would operate to the competitive prejudice of Wayne whose optional braking system costs $265 and the two bids are only $151 apart. *See* B–174391, April 5, 1972, 51 Comp. Gen. 237, 240 (1971), and paragraph 1–2.405 of the Federal Procurment Regulations (FPR).

The contracting officer has admitted that the needs of the Government are overstated. Moreover, Bacon, one of the only two bidders responding to the IFB, is clearly nonresponsive thereto because of the reflection of that overstatement in the IFB. Therefore, and in the absence of any evidence that the Bacon equipment would not satisfy the actual needs of the Government, the specifications are unduly restrictive of competition. In these circumstances, while it is regrettable that bid prices have been exposed, the IFB should be canceled and the requirement readvertised with specifications deleting the restrictive requirement. *See* B–169919, June 16, 1970, and FPR 1–2.404–1(b)(1). The specifications on readvertisement should specify whatever reasonable tolerances are acceptable to the Government with respect to the time period for the stopping of the cutter blades. *See* 51 Comp. Gen., *supra*, at page 242.

One further matter deserves comment. Section 111 of the specifications states:

> Minor deviations from this specification may be allowed where bidder has indicated in detail the manner in which his offered units differ from this specification. The Contracting Officer's decision will be final as to acceptability.

We have stated that clauses allowing deviations have no place in formally advertised procurements since they do not generally permit free and equal competitive bidding. *See* 51 Comp. Gen. 518, 522 (1972), and B–177532, March 26, 1973. Therefore, we believe that, on readvertisement, the section should be eliminated.

[B–178170]

Pay—Retired—Computation—Limitations Imposed by Statute

The retired pay of military personnel, upon initial retirement, whose basic pay rates as established by Executive Order (E.O.) 11692 are in excess of $3,000 per month may not be computed at the prescribed 75 percent of basic pay on an amount in excess of $3,000, as the limit imposed by 5 U.S.C. 5308 on civilian em-

ployees is equally applicable to military personnel, since Footnote 1 of the E.O. indicates the pay grade 0–10 officers enumerated are subject to section 5308, and nothing in 10 U.S.C. 8991, providing for the computation of retired pay "at rates applicable on date of retirement" warrants the conclusion the $3,000 monthly limitation is removed for the purpose of computing the retired pay of officers whose basic salary rate exceeds $36,000. This conclusion is applicable to officers in all branches of the armed services, despite the language differences in the governing law provisions. However, the pay limitation does not apply to retired pay adjustments for the cost-of-living increases authorized by 10 U.S.C. 1401a.

To the Deputy Secretary of Defense, May 17, 1973:

We refer to letter dated March 7, 1973, of the Acting Assistant Secretary of Defense (Comptroller) requesting a decision as to whether retired pay of military personnel may be computed on basic pay rates in excess of $36,000 per annum contained in Executive Order 11692, and subsequent cost of living increases computed on that amount, or must such computation be based on the $36,000 per annum limit applicable to civilian employees as prescribed by section 5308 of Title 5, U.S. Code.

There was enclosed copies of Committee Action No. 470 of the Department of Defense Military Pay and Allowance Committee setting forth and discussing the following questions:

1. Where monthly basic pay, as established by EO 11692, is in excess of $3,000, may retired pay, upon initial retirement, be computed on the basic pay rates stated in the Executive Order?
2. If question 1 is answered in the affirmative, would the restriction imposed by Section 5308, Title 5, U.S. Code, as amended, apply to adjustments of retired pay for cost of living increases authorized under Section 1401a, Title 10, U.S. Code?

As stated in the Committee Action discussion, military retired pay is computed in accordance with specific statutory authority as set forth in Title 10, U.S. Code, and upon initial retirement such pay is limited to 75 percent of the monthly basic pay of the grade to which the member is entitled. Executive Order 11692 dated December 19, 1972, effective January 1, 1973, establishes the monthly basic pay of grade 0–10 at rates in excess of $3,000; however, a footnote specifies that the rate of basic pay for military personnel at these rates is limited by 5 U.S.C. 5308 to the rate of level V of the executive schedule ($36,000 per annum or $3,000 per month).

Footnote 1 of Executive Order 11692, pertaining to officers in pay grade 0–10 (General-Admiral) states that "While serving as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, basic pay for this grade is $3,745.20 * * *." The footnote indicates, however, that personnel serving in these positions are subject to the above-mentioned restriction in 5 U.S.C. 5308.

It is pointed out in the Committee Action that while the basic pay rate established may exceed $3,000, the retired pay in no case would

exceed that figure. As an example, it is pointed out that the rate of basic pay established by Executive Order 11692 for an officer in pay grade 0-10 with over 26 years of service is $3,394.20, whereas his retired pay computed at 75 percent of that amount is $2,545.65. In the case of a Chief of Staff, it is stated that the rate of basic pay established by the Executive order is $3,745.20, whereas his retired pay computed at 75 percent would be $2,808.90.

The Committee Action discussion also points out that while 10 U.S.C. 1401a provides for subsequent adjustments of retired pay to reflect changes in the Consumer Price Index (CPI), the statute contains no reference to the pay limitation provision of 5 U.S.C. 5308, nor does it place any other limit on the amount of retired pay adjusted by application of the CPI formula.

It is provided in 5 U.S.C. 5301 that it is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that, among others, Federal pay rates be comparable with private enterprise pay rates for the same levels of work and pay levels for the statutory pay systems be interrelated. Subsection 8(a) of the act of December 16, 1967, Public Law 90-207, 81 Stat. 654, 37 U.S.C. 203 notes, provides that unless otherwise provided by law enacted after January 1, 1968, whenever the General Schedule of compensation for Federal classified employees is adjusted upwards, there shall immediately be placed in effect a comparable upward adjustment in the monthly basic pay authorized members of the uniformed services.

Subsection 8(b) of the 1967 act provides that such adjustments in the various tables establishing the rates of monthly basic pay for members of the uniformed services shall provide all personnel of the uniformed services with an overall average increase in regular compensation which equates to that provided General Schedule employees. Subsection 8(c) defines "regular compensation," for the purposes of that section, as meaning basic pay, quarters and subsistence allowances (either in cash or in kind), and the tax advantage on those allowances.

The limitation of $3,000 per month or $36,000 per annum in Executive Order 11692 (pursuant to 5 U.S.C. 5308) is imposed on the active duty pay, not on the retired pay, of those officers in pay grade 0-10 with over 20 years' service and officers serving as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps. In computing retired pay, it is necessary to look to the applicable retirement law in order to determine the basis for computing retired pay.

An Air Force officer who retired for years of service under 10 U.S.C. 8911 or 8918 as indicated in the example stated in Committee Action No. 470, is entitled to have his retired pay computed under the provisions of 10 U.S.C. 8991, which provides in part as follows:

Formula	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
*	*	*	* *	*	*
B	8911 8918 8920 8924	Monthly basic pay [2] of member's retired grade.[1]	2½% of years service credited to him under section 1405 of this title.		Excess over 75% of pay upon which computation is based.

1. For the purposes of this section, determine member's retired grade as if section 8962(b) did not apply and, *for an officer who has served as Chief of Staff, compute at the highest rates of basic pay applicable to him while he served in that office.*
2. *Compute at rates applicable on date of retirement.* [Italic supplied.]

Similar provisions applicable to the Army are contained in 10 U.S.C. 3991.

As noted, footnote 1 in section 8991 refers to the "member's retired grade" and expressly provides that in the case of an officer who has served as Chief of Staff, retired pay will be computed "* * * at the highest rates of basic pay applicable to him while he served in that Office." Footnote 2 of section 8991 has reference to the member's "monthly basic pay" as provided in column 1 and reads, "Compute at rates applicable on date of retirement."

Thus, the active duty pay rates established in Executive Order 11692 must be read in conjunction with the language of section 8991 of Title 10, namely, "Compute at rates applicable on date of retirement." While the monthly active duty rates of basic pay for certain officers established in Executive Order 11692 exceed $3,000 per month, the rates actually payable to them while serving on active duty, as imposed by 5 U.S.C. 5308, and the Executive order, in conjunction with the above-mentioned act of December 16, 1967, is limited to $3,000 per month.

We find nothing in the language of footnotes 1 or 2 of section 8991 which would warrant the conclusion that the phrase "Compute at rates applicable on date of retirement" means the greater rate of basic pay established in the Executive order which the member was precluded by law from receiving while serving on active duty. Compare

the answer to question d in 47 Comp. Gen. 696, 699 (1968) where the language in footnotes 1 and 2 are discussed and interpreted.

While the provisions of law with respect to the retirement of Navy and Marine Corps officers are stated in language somewhat different from the provisions concerning Army and Air Corps officers, we find no sufficient basis for making any distinction between the different services in applying the $3,000 limitation in the computation of retired pay.

Moreover, certain civil service employees, like certain military personnel, are subject to the same statutory pay limitation of $36,000 per annum as imposed by 5 U.S.C. 5308. *See* Executive Order 11691 dated December 15, 1972, which establishes the basic pay and salary rates for civilian personnel beginning on or after January 1, 1973. In this connection, H.R. 6336, 93rd Congress, which was introduced on March 29, 1973, would amend Title 5, U.S. Code, to provide that employees subject to certain pay limitations shall be credited, for civil service retirement and life insurance purposes, with the pay which would be received if such pay limitations were not applicable. No action has been taken on this bill as of this date.

It is our view that in the absence of specific statutory authority authorizing the computation of retired pay based on the rates of active duty pay that a member would be entitled to receive (as set forth in Executive Order 11692) but for the pay limitation provision in 5 U.S.C. 5308, there is no authority to compute retired pay based on basic pay rates in excess of $3,000 per month.

Accordingly, question 1 is answered in the negative. In the light of the answer to question 1 no answer is required for question 2. In connection with question 2, however, the active duty pay limitation provision would not appear to be applicable to adjustments of retired pay for cost of living increases authorized under 10 U.S.C. 1401a.

[B–177423]

Contracts—Protests—Timeliness—Adverse Action Basis Determination

The contention that the low offeror under step one of a two-step procurement was unfairly granted additional time to qualify its initial unacceptable proposal and, therefore, should not have been permitted to participate in step two of the procurement not having been filed with the United States General Accounting Office within 5 days of notification of adverse action (4 CFR 20), the contention may not be considered as a timely protest, nor may the untimely protest be considered either for "good cause," since there was no compelling reason which prevented the protestant from filing its protest within the required time, or on the basis that the protestant raised issues significant to procurement practices or procedures, which refers to the presence of a principle of widespread interest.

Bids—Two-Step Procurement—Offers and Bids—Same Source Requirement

Where the low bid under the step-two solicitation of a two-step procurement for a peak power calibration system was submitted in the name of the parent corporation and an activity that formally became a division of the corporation prior to the issuance of the step-one proposal and remained a division throughout the procurement, there is no question that the technical proposal and bid were submitted by the same firm, and that the low bid is eligible for consideration. Furthermore, the bid is responsive as submission of the firm name and the technical proposal number and date satisfied the requirement that the firm state its bid was in accordance with the technical proposal found acceptable by the Air Force; as failure to acknowledge receipt of a corrected amendment to step one was properly waived as a minor informality; and as the deviation from the first article test sample requirement did not qualify the bid but assured the contracting office it would receive a quality product.

To Cole and Groner, May 18, 1973:

This refers to your letter of April 2, 1973, and prior correspondence, on behalf of Weinschel Engineering Co., Inc. (Weinschel), protesting award of a contract to any bidder other than Weinschel under invitation for bids (IFB) F41608-73-B-0037, dated July 18, 1972, issued by Kelley Air Force Base, Texas. The solicitation is for a peak power calibration system and is the second step of a two-step formally advertised procurement, which was initiated by the issuance of the first-step letter request for technical proposals (LRTP) F41608-72-R-G246 on August 10, 1971. The protest is directed at the conduct of both the first and second steps of the procurement. Since the issues concerning each step of the procurement are largely unrelated, we shall consider your step-one arguments independently of the step-two grounds.

Step One

The main thrust of your argument concerning the step-one proceedings is that Applied Microwave Laboratory (AML), the ultimate low bidder, was unfairly granted additional time to qualify its initially unacceptable proposal. You contend that the Air Force's determination that AML's proposal was unacceptable should have precluded any further discussion between AML and the Air Force, and that, therefore, AML should not have been permitted to participate in step two.

You state in your letter of November 16, 1972, that Weinschel first became aware of the alleged improprieties in the conduct of step one upon inspection of the IFB, which was issued on July 18, 1972. By letter dated July 28, 1972, Weinschel protested to the contracting officer and requested that AML be disqualified from further competition. During consideration of the protest, the bid opening date was suspended indefinitely. Weinchel's protest was denied in a letter of September 27, 1972, from Philip N. Whittaker, Assistant Secretary of the Air Force. The grounds for the denial of the protest were detailed

in a letter dated September 29, 1972, from Colonel Thomas Keheley, Chief, Contract Management Division, Headquarters, Department of the Air Force. By amendment dated October 4, 1972, bid opening was set for November 6, 1972.

Thereafter, Weinschel proceeded to contact various Air Force personnel in an attempt to have step two postponed to permit a reconsideration of its protest. Weinschel was advised on November 2, 1972, that the bid opening, scheduled for November 6, would take place as planned and that the Air Force would not reconsider its denial of Weinschel's protest. By telegram dated November 9, 1972 (received November 10, 1972), Weinschel protested to this Office.

The time for filing a protest with this Office is set forth in our "Interim Bid Protest Procedures and Standards," 4 CFR 20. Section 20.2 provides in pertinent part that:

> (a) Protestors are urged to seek resolution of their complaints initially with the contracting agency. * * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was timely filed. * * *.
>
> (b) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

In 52 Comp. Gen. 20, 22–23 (1972), we stated that:

> Our bid protest regulations * * * provide that following "adverse agency action" upon a protest, the protestor seeking a decision of our Office must file his protest in a timely manner. * * *.
>
> * * * We realize that a protestor may consider an agency's initial adverse action to be ill-founded or inadequately explained, leading the protestor to engage in further correspondence with the agency. * * * it then becomes difficult to identify the "final" adverse agency action. For this reason, we regard it as obligatory upon a protestor to file his protest with our Office within 5 days of notification of *initial* adverse agency action, if it is to be considered timely.

Weinschel was initially notified of adverse agency action by letter of September 27, 1972, from Assistant Secretary Whittaker, and notified by amendment dated October 4, 1972, that bids would be opened on November 6, 1972. Since its protest was not filed in this Office until November 10, 1972, it is clear that such protest was untimely.

Moreover, we do not agree with your contention that 4 CFR 20.2(b), which permits the Comptroller General to consider untimely protests, is for application here. An untimely protest may be considered for "good cause" or where the Comptroller General "determines that a protest raises issues significant to procurement practices or procedures." "'Good cause' * * * generally refers to some compelling reason, beyond the protestor's control, which has prevented him from filing a timely protest." 52 Comp. Gen. 20, 23, *supra*. We are not aware of any compelling reason which prevented Weinschel from filing its

protest with this Office within the required period. Nor do we think the other exception is pertinent. As we stated in the above cited case, "'Issues significant to procurement practices or procedures' refers * * * to the presence of a principle of widespread interest." We do not think that the issues presented in your step-one protest fall within this category. Accordingly, that portion of the protest dealing with step one is dismissed as untimely.

Step Two

In regard to step two of the procurement, you make four arguments which you contend require the rejection of AML's bid.

First, you contend that the low bid under step two was submitted not by AML but by EPSCO, Inc., and since EPSCO., Inc., was not a participant in step one, the Air Force should not have accepted its bid. You note that on page 1 of EPSCO's bid under item 17, "OFFEROR NAME & ADDRESS," the following is listed:

EPSCO, Inc.
Applied Microwave Division
411 Providence Highway
Westwood, Massachusetts 02090

You also point out that on page II-1, of the bid where bidders were asked to acknowledge that the bid was in accordance with the accepted first-step technical proposal, the name "Applied Microwave Laboratory" appears. Finally, you note that the cover letter transmitting the bid was signed "Applied Microwave, a Division of EPSCO, Inc."

You also contend that AML has not complied with paragraph 26, part 4 of Armed Services Procurement Regulation (ASPR), which contains special provisions relevant to novation agreements and changes of name agreements. However, ASPR 26-4 is not applicable here because it applies only where there is already a contract in existence.

You also cite 43 Comp. Gen. 353, 372 (1963), for the proposition "that transfer or assignment of rights and obligations arising out of proposals is to be avoided, as a matter of public policy, as well as sound procurement policy, unless the transfer is effected by operation of law to a legal entity which is the complete successor-in-interest to the original offeror." We do not think, however, that this principle is applicable. Counsel for AML states that AML formally became a division of EPSCO on October 8, 1971, and has remained a division of EPSCO throughout the procurement. Since step-one proposals were not submitted until November 12, 1971, we do not perceive how there could be any "transfer of rights and obligations arising out of proposals" involved in the instant case.

Finally, as the contracting officer points out, "* * * the title page of the original step one technical proposal submitted by Applied Microwave Laboratory (AML) contains the following, 'Prepared by AML Division of EPSCO, Inc.' It is clear that the technical proposal and the bid were submitted by the same firm." We concur in the conclusion of the contracting officer that AML and EPSCO are one and the same firm for the purpose of determining the eligibility of the AML–EPSCO bid. Your protest on this ground, therefore, is denied.

You next contend that AML is not entitled to award because it failed to acknowledge, as required by the IFB, that its bid was in accordance with the technical proposal found acceptable by the Air Force. Page II–1 of the IFB states that bids "will be accepted and considered only from those firms who have submitted acceptable Technical Proposals pursuant to Letter Request for Technical Proposals F41608–72–R–G246 issued 71 Aug 10 and Amendments 0001 thru 0005 thereto." The acceptable proposals are then listed as follows:

a. Applied Microwave Laboratory proposal Q–355, dated 71 Nov. 12, as clarified by letter dated 72 Feb 15, and Addendum 1, dated 72 Jun 02, with the remote sensing head housed in a temperature control oven as proposed in Addendum 1.
b. Weinschel Engineering Co., Inc. proposal 9–174, dated 71 Oct 28, as clarified by letters dated 72 Feb 15 and 72 Mar 17.

Finally, the solicitation requires that:

The bidder will acknowledge in the space provided that his bid is in accordance with his Technical Proposal as submitted.

Beneath this sentence, a space was provided for the bidder to complete the required acknowledgment. AML filled in the blanks in the following manner:

Applied Microwave Laboratory	Q355 dated 71 Nov. 12
(FIRM)	(TECHNICAL PROPOSAL NO. & DATE)

It is your position that AML's bid should have been rejected because AML merely listed the technical proposal and date without specifically stating that its bid was in accordance with that technical proposal. You also argue that AML's attempted acknowledgment was ineffective because AML included in the appropriate space only the technical proposal number and date, but omitted the clarifying letter of February 15, 1972, and Addendum 1, dated June 2, 1972. Consequently, you contend that the Air Force could not legally require AML to supply a product in accordance with these subsequent clarifications.

We disagree with these contentions. First of all, we think it would be unreasonable to expect a bidder to conclude that, in the limited

space provided, it was required to recite that its bid was in accordance with its technical proposal. The more reasonable conclusion, we think, was the one adopted by AML—simply listing the firm name and technical proposal number and date in the appropriate blanks. This is sufficient to satisfy the requirement for an acknowledgment. Nor do we think that AML was obligated to list its clarifying letter of February 15, 1972, and Addendum 1, dated June 2, 1972. The space in question requires the bidder to fill in the "Technical Proposal No. & Date." It makes no mention of any supplemental material. We think it was clearly the intent of AML to commit itself to perform in accordance with its acceptable amended proposal, as listed on page II–1 of the IFB. Weinschel's protest based on this allegation is, therefore, denied.

You also contend that AML's bid should be declared nonresponsive because of a failure to acknowledge an amendment having a significant impact on price, delivery or quality, citing 42 Comp. Gen. 491, 493 (1963). The instant IFB required bidders to acknowledge receipt of all amendments. AML correctly acknowledged receipt of Amendments 0002 and 0003. Instead of acknowledging receipt of Amendment 0001 to the IFB, however, AML acknowledged Amendment 0001 to the step-one letter request for technical proposals. Since AML attached to its bid copies of the amendments it purported to acknowledge and included a copy of Amendment 0001 to the LRTP, you argue that AML evidently intended to acknowledge that amendment rather than Amendment 0001 to the IFB.

We think that AML's failure to acknowledge the correct Amendment 0001 is clearly waivable. The contracting officer in his statement of facts and findings notes that:

> Amendment 0001 to the IFB added one page of amendment 0001 to the technical proposal [purchase description], which was inadvertently omitted. The purchase description was amended during step one and this three page amendment was distributed to all potential bidders by amendment 0002 to the RFP. This amendment to the RFP was acknowledged by signature of Herbert K. Clark, President of AML, on 9 Nov 1971.

It is reported that the technical proposal of AML specifically addressed paragraphs of the purchase description, as amended, and therefore, it is established that AML intended to be bound by the terms thereof. Therefore, we fail to see how the failure to acknowledge receipt of Amendment 0001 to the IFB requires the determination that AML's bid was nonresponsive. Accordingly, since the material in amendment 0001 to the IFB was a part of step one, the failure of AML properly to acknowledge its receipt may be waived as a minor informality. *See* 51 Comp. Gen. 293 (1971).

Finally, you contend that AML's bid is nonresponsive because it was "qualified by a condition directly in contradiction to the terms of the IFB." You note that in its transmittal letter, AML stated that:

> The units will be designed to meet the requirements of Paragraph 3.2.3 as amended. *Only one (1) unit will be tested to verify that the design is adequate.* [Emphasis added by you.]

It is your position that this statement conflicts with the requirements of paragraph 4.2.2, which states in pertinent part:

> The First Article test sample shall consist of four instruments, each representative of production instruments. *A minimum of two instruments* from the sample *shall be subjected to each test required* by 4.2.1 [Emphasis added by you.]

You contend that AML has offered to test only one unit for electromagnetic compatibility, whereas paragraph 4.2.2 requires that First Article tests be conducted on a minimum of two units.

The Air Force takes the position that AML's statement in its transmittal letter did not qualify its bid but rather notified the Air Force that AML intended to undertake an additional test in the early stages of the equipment's development to determine the adequacy of its design for electromagnetic compatibility. This test, according to the Air Force, was not required under the contract but was, in the opinion of the contracting officer, an attempt to inform the Government that AML "would do everything in [its] power to assure a quality product would be received by the Air Force."

We think there is merit to the Air Force's argument. You note that a bidder in a two-step procurement "expends more effort and resources than a bidder who competes in a single-step advertised procedure." We have recognized, therefore, that a bidder found to be acceptable under step one would not likely disqualify its step-two bid by inserting a condition in contradiction with its accepted step-one proposal and the requirements of the specifications. 45 Comp. Gen. 221, 224 (1965); 50 *id.* 337, 342 (1970). The alleged qualification in AML's transmittal letter must be read in light of the presumption that it intended to bid in accordance with the requirements of the purchase description. When considered in this light, we feel that we must concur in the contracting officer's determination that AML's transmittal letter did not contain a qualification.

Accordingly, for the reasons set forth above, your protest on behalf of Weinschel Engineering is denied.

[B-177519]

Contracts—Specifications—Ambiguous—Conflicting Specification Provisions—Brand Name or Equal and Descriptive Literature Clauses

The cancellation after bid opening of an invitation for bids for marine sanitary facilities because the brand name or equal clause required by section 1-1.307-6 (a)(2) of the Federal Procurement Regulations had been omitted, and the

inclusion of the clause in the reissued invitation was proper as the clause provides a vehicle for identifying and evaluating the product offered. However, the inclusion of a descriptive literature requirement in the new invitation for the purpose of determining the "general overall compliance with the specifications and drawings" is not in consonance with the brand name or equal requirement and the nonresponsiveness of bidders to the requirement is symptomatic of the deficiencies in the invitation. In addition, because the use of the descriptive literature clause was unnecessary, and because the invitation contained no specific component designation of the equal product, the second invitation was ambiguous and misleading and also should be canceled and readvertised under revised specifications.

General Accounting Office—Recommendations—Implementation

The corrective recommendation that an ambiguous and misleading invitation for bids should be canceled and the procurement readvertised under revised specifications requires the contracting agency pursuant to section 236 of the Legislative Reorganization Act of 1970 to submit written statements to the Committees on Government Operations of both Houses not later than 60 days after the date of the recommendation and to the Committees on Appropriations in connection with the first request for appropriations made more than 60 days after the date of the recommendation.

To the Secretary of the Interior, May 18, 1973:

We refer to the letter of January 26, 1973, from the Acting Director of Survey and Review, furnishing a report on the protests of the Hydraprise Corporation against the cancellation after bid opening of National Park Service (NPS), Denver Region, invitation for bids No. DSC–3, and the proposed award to Alandale Construction Co. under revised invitation for bids No. DSC–4. Kendall Sloan Company has also protested against the rejection of its bid under the revised invitation.

The initial invitation, DSC–3, requested that bids on a brand name or equal basis be submitted by August 16, 1972, for furnishing certain marine sanitary facilities. After bids had been opened, it was discovered that the brand name or equal clause required by paragraph 1–1.307–6(a)(2) of the Federal Procurement Regulations (FPR) had been inadvertently eliminated from the Supplemental Provisions of the invitation. In addition, the bid prices received exceeded the amount of funds available for the procurement. Consequently, the contracting officer canceled the invitation and revised the specifications by including the required brand name or equal clause and by deleting certain schedules of work. This was accomplished by the issuance of invitation DSC–4.

Hydraprise protests the cancellation of invitation DSC–3 on the basis that the omission of the brand name or equal clause did not restrict competition and, consequently, it should not have been used as a ground for cancellation. It also believes that if the bid prices submitted were higher than the amount of funds available for the procurement, the contracting officer could have remedied this situation simply by awarding a contract for fewer work schedules.

We cannot take exception to the contracting officer's determination to cancel DSC–3 for the stated reason. As noted in the contracting officer's report, a large percentage of the work is identified by reference to brand name items. When end items or components are identified in a solicitation by brand name or equal descriptions, the brand name or equal clause prescribed in FPR 1–1.307–6 must be included. The clause is necessary because it provides a vehicle for identifying the product a bidder proposes to furnish and insures that the procurement activity will receive data sufficient to determine whether non-brand name items will meet the specified needs of the Government. Since the omission of the brand name or equal provision was a proper reason for canceling invitation DSC–3, we need not consider the additional reason advanced in support of cancellation.

In addition to revised brand name or equal coverage and the deletion of certain work schedules, invitation DSC–4 also contained a requirement for the submission of descriptive literature.

Paragraph 1–03 of the General Requirements imposed the following requirements for the submission of descriptive literature by all bidders:

1–03 *CONTRACTORS SUBMITTALS:* a. *General:* Descriptive literature shall be submitted to the Contracting Officer for review and approval covering all materials and equipment to be provided under this contract. Submittals shall be made for the following:

1. Floating Comfort Stations
2. Boat Sanitary Stations
3. Dock Launching and Beaching Dollies
4. Waste Transfer Tank Trailers
5. Gangways
6. Mooring Cable and Fittings
7. Electrical Cable
8. Hoses and Hose Connections

b. *Pre-contract award submittals:* With reference to Clause 30, REQUIREMENT FOR DESCRIPTIVE LITERATURE, of Form 10–275, one complete set of descriptive literature shall be submitted to the Contracting Officer at or before the time set for opening of bids. This descriptive literature shall include such data as catalogue cuts, general drawings and specifications which will permit evaluation with regard to general overall compliance with the drawings and specifications included as part of the Invitation for Bids.

c. *Post-contract award submittals:* After award of the contract, detailed submittals shall be made to the Contracting Officer. These submittals shall include catalogue cuts, specification sheets, capacity data sheets, performance curves, manufacturers certified dimensional drawings, general assembly drawings, subassembly drawings, details, diagrams and other data as may be required for full evaluation to ensure that all parts will conform fully with the provisions and intent of the drawings and specifications. Submittals shall all be furnished in quadruplicate, clearly identified, and shall be complete and legible. One copy of each submittal will be returned to the contractor within 14 days, with comments and/or approval. If re-submittals are required, such resubmittals shall be made within 14 days after notification that resubmittal is required. Any manufacture, fabrication, procurement, or assembly accomplished prior to the approval of post-contract award submittals will be at the contractor's risk. One complete set of full size reproducibles of the approved shop drawings shall be furnished to the Contracting Officer prior to manufacture, fabrication or procurement.

d. *Optional submittal:* If at the bidder's option detailed data as required under (c) above is submitted together with or in lieu of the data required under (b)

above, the Government reserves the right to evaluate the material for purposes of contract award on the basis of general overall compliance only as set forth in (b) above.

Detailed evaluation will be made only after the award of the contract as specified in (c) above.

Clause 30 of the Supplemental Provisions, "Requirement for Descriptive Literature," referenced in subparagraph b of paragraph 1-03, advised bidders that:

(a) Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purposes of bid evaluation and award, details of the products the bidder proposes to furnish as to (*).

*Contracting officer shall insert significant elements such as design, materials, components, or performance characteristics, or methods of manufacture, construction, assembly, or operation, as appropriate.

(b) Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements, of this Invitation for Bids will require rejection of the bid. Failure to furnish the descriptive literature by the time specified in the Invitation for Bids will require rejection of the bid except that if the material is transmitted by mail and is received late, it may be considered under the provisions for considering late bids, as set forth elsewhere in this Invitation for Bids.

With respect to the submission of brand name or equal items, bidders were advised on page 7 of the Schedule that:

Major components including the floating docks, holding tanks, restroom assemblies, pump out units and service units for the Boat Sanitary Stations and Floating Comfort Stations are specified by brand name or equal. If the offer is based on equal products for these major components, the Manufacturer's name, brand and number shall be inserted in the spaces provided below:

a. Floating Docks—Equal Product
Manufacturer's Name_____
Brand _____
No. _____
b. Restroom Assemblies—Equal Product
Manufacturer's Name_____
Brand _____
No. _____
c. Holding Tanks—Equal Products
Manufacturer's Name_____
Brand _____
No. _____
d. Pump Out Units and Service Units—Equal Products
Manufacturer's Name_____
Brand _____
No. _____

Unless equal products are indicated for these major components the offer will be considered as offering the specified brand names.

Paragraph 24 of the Supplemental Provisions contained the standard brand name or equal clause prescribed by FPR sec. 1-1.307-6(a)(2). In addition, paragraph SP-06 of the Special Provisions, entitled "Trade Names," advised bidders that:

* * * Equal products for brand name or equal specified major components of the Boat Sanitary Stations and Floating Comfort Stations will be evaluated prior

to the award of the contract as specified in Clause No. 24 [of the Supplemental Provisions] * * * Equal products for all other brand name or equal specified items will be evaluated after the award of the contract.

Four bids were received on the readvertisement. The low bid, an alternate bid of $184,100 submitted by the Alandale Construction Co., was rejected as nonresponsive based on a review of Alandale's descriptive literature. The second low bid, a bid of $193,681 submitted by the Kendall Sloan Company, was also rejected because Sloan failed to include sufficient descriptive literature to permit a determination of exactly what was being offered. Alandale's basic bid, in an amount of $196,369, was the third low bid. The fourth low bid was submitted by the Hydraprise Corporation in the sum of $204,999. NPS determined that the descriptive literature accompanying the basic bid of Alandale established that the equipment proposed was substantially in compliance with the specifications. The literature accompanying Hydraprise's fourth low bid of $204,999 was also reviewed and found to be adequate.

Sloan questions the rejection of its bid on the ground that adequate descriptive literature was furnished with its bid. Alternatively, it maintains that if its literature is inadequate, Alandale's literature is also inadequate. Hydraprise, in turn, supports the contracting officer's rejection of Sloan's bid, but questions his determination that Alandale's basic bid was responsive. (The propriety of the rejection of Alandale's alternate bid is not in issue.)

In our view, the descriptive literature accompanying both the Sloan and Alandale bids was inadequate to permit a determination whether the bids were responsive to the material requirements of the specifications.

Sloan identified itself as the manufacturer of the major components. In lieu of the model designation, Sloan noted that the items would be furnished in accordance with the invitation drawings and specifications. To satisfy the literature requirements, Sloan simply enclosed with its bid the invitation drawings with a Sloan identification. While Sloan also furnished data of other manufacturers for several minor components, the contracting officer had no alternative but to determine that the descriptive literature submitted was insufficient for determining whether the items offered were in compliance with the specifications. Moreover, Sloan's failure to furnish sufficient literature on its equal product cannot be overcome either by a general promise to furnish items conforming to the specifications or by an offer to supply additional data after bid opening. 50 Comp. Gen. 193, 201–202 (1970).

With respect to Alandale's descriptive literature, we note that the contracting officer's report states that the data submitted with the Alandale bid establishes that the equipment and materials offered by the

bidder are "substantially in compliance with the specifications." A memorandum dated November 10, 1972, from the Chief, Plans and Design Services, to the contracting officer, indicates the basis for couching the determination of adequacy in these terms. In advising the contracting officer that Alandale's literature was adequate, the following comment was made:

> The appraisal was made on the basis of general configuration and quality of materials. The contractor will still be required to comply in full with the plans and specifications issued with the invitation for bids.

In our view, the foregoing quite clearly suggests that Alandale's literature was insufficient for purposes of determining exactly what Alandale proposed to furnish and what the Government would be binding itself to purchase. Any doubt we might have on this matter is resolved by an examination of the Alandale bid and descriptive literature.

Alandale identified itself as the manufacturer of equal items for the major components and in response to the request for model numbers, it stated: "Basically per N. P. S. details." The first page of its descriptive literature submission contains the following statement:

> The attached brochures, specifications and drawings are intended to show the various products manufactured by Alandale Marine to be modified in size and configuration and furnished under the above solicitation. Those portions that apply specifically to this project are marked.
>
> This submittal is intended to basically describe the products to be furnished. A representative of Alandale is available prior to award to make a more complete presentation including material samples, photographs of installation and details.

Wherever check marks appear in the remainder of Alandale's submission, they are either preceded or accompanied by legends stating "Typical Only," or "Typical—Not Applicable."

While we believe that the Alandale and Sloan bids were nonresponsive as a result of their failure to furnish adequate descriptive literature, we also believe that their responses are symptomatic of the deficiencies in invitation DSC–4.

FPR sec. 1-2.202-5(d)(2) provides that when brand name or equal purchase descriptions are used, the requirements of section 1-2.202-5 are met by inserting in the invitation for bids the brand name provision set forth in FPR sec. 1–1.307–6. Since a brand name or equal clause was included, it was unnecessary to add a further requirement for descriptive literature. B–168189(2), April 27, 1970. Indeed, the request for descriptive literature appears to overlap, in large part, the brand name or equal request. This duplication and the tenor of the request for descriptive literature, as spelled out in paragraph 1-03 of the General Requirements, explain, in part, the generality of the Alandale and Sloan replies and their offers to provide additional

information. Initially, bidders are required to decide what data they will furnish at bid opening and what data they will furnish at a later date, if successful bidder, unless they elect to furnish data in accordance with subparagraph "d" of paragraph 1–03. More importantly, bidders were, if anything, encouraged to submit general information, since subparagraph "b" of that paragraph states that the literature submitted with the bid will be evaluated for "general overall compliance with the drawings and specifications." This approach is inconsistent with obtaining the detailed data necessary for determining exactly what the bidder proposes to furnish and in our view influenced Alandale's and Sloan's responses to the brand name or equal requirements.

The brand name or equal clause states that the bidder must furnish information sufficient to allow the establishment of "exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award." The requirement for the submission of literature allowing an evaluation of the "general overall compliance" of the bid with the specification and drawings is not in consonance with the brand name or equal requirement, nor, for that matter, is it in consonance with the standard descriptive literature clause. Further, FPR 1–2.202–5(d) requires the invitation to clearly state what descriptive literature is required with the bid for evaluation, something which was not done here.

Apart from the descriptive literature requirements, the brand name or equal coverage is also deficient. The invitation does provide appropriate spaces for notation of the equal product to be furnished for the floating docks, for the restroom assemblies, for the holding tanks, and for the pump-out units and service units. In this portion of the invitation the bidder is appropriately advised that:

> Major components including the floating docks, holding tanks, restroom assemblies, pump out units and service units for the Boat Sanitary Stations and Floating Comfort Stations are specified by brand name or equal. If the offer is based on equal products for these major components, the Manufacturer's name, brand and number shall be inserted in the spaces provided * * *.

However, the major components also consist of items which are individually named in the specification by a brand name or equal description, some of which at least are separate and distinct from the major component, and some of which might be considered to fall within the major component.

FPR sec. 1–1.307–6(b) states that:

> Where a component part of an end item is described in the invitation for bids by a "brand name or equal" purchase description and the contracting officer determines that application of * * * [the brand name or equal requirements] to such component part would be impracticable, the requirements * * * shall not apply with respect to such component part. In such cases, if the clause is included in the invitation for bids for other reasons, there also shall be included

in the invitation a statement identifying either the component parts * * * to which the clause applies or those to which it does not apply. This paragraph (b) also applies to accessories to an end item where a "brand name or equal" purchase description of the accessories is a part of the description of an end item.

The invitation contains no specific component designation and, in our view, paragraph SP-06, "Trade Names," is inadequate for the purpose of complying with FPR sec. 1-1.307-6(b). A bidder offering an equal product for a major component would be required to guess whether the equal items which were associated with each major component required descriptive literature.

For these reasons, it is our opinion that the present invitation is ambiguous and misleading. Accordingly, we recommend that the invitation be canceled and the procurement readvertised under revised specifications.

As this decision contains a recommendation for corrective action to be taken, your attention is directed to section 236 of the Legislative Reorganization Act of 1970, 84 Stat. 1140, 1171, 31 U.S. Code 1176, which requires that you submit written statements to certain committees of the Congress as to the action taken. The statements are to be sent to the Committees on Government Operations of both Houses not later than 60 days after the date of this decision and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this decision.

The enclosures to the contracting officer's report are returned as requested.

[B-177520]

Officers and Employees—Training—Expenses—Reimbursement

The family domicile established by an employee, transferred from Fairbanks, Alaska, at Ann Arbor, Michigan, where he will attend graduate school before reporting to his new duty station, Washington, D.C., does not constitute a permanent change of station within the meaning of Office of Management and Budget Circular No. A-56, and the A-56 allowances become payable only when the employee relocates in Washington. Since both the old and new stations are not within continental United States, the employee is not entitled to a house-hunting trip, and the cost of shipping his household effects to Ann Arbor is for deduction from his constructive cost entitlement to transportation of his effects from Fairbanks to Washington. Per diem is payable during the training period in lieu of transporting family and effects to Ann Arbor (39 Comp. Gen. 140), and the payment of mileage at 6 cents per mile for the employee's travel to Ann Arbor by privately owned automobile, is upon completion of the transfer to be deducted from the entitlement to 12 cents per mile for travel from the old to the new station, and to 6 cents per mile for the excess travel due to the training.

To William S. Downey, Department of the Interior, May 18, 1973:

This refers to your letter, reference 1386 (520), of November 22, 1972, in which you request our decision as to certification for payment

of a travel voucher presented to you by Mr. Richard D. Freel, an employee of the Bureau of Land Management (BLM).

The record shows that by a Travel Authorization dated July 18, 1972, Mr. Freel was ordered to transfer from his official station at Fairbanks, Alaska, to a new location at Washington, D.C., with delay en route to attend graduate school at Ann Arbor, Michigan. Mr. Freel arrived at Ann Arbor on August 19, 1972, to undertake training which he expects to complete in June 1973 at which time he will proceed to Washington, D.C.

Your letter states that:

> Travel and per diem for his wife and two children and shipment of his household goods were authorized in accordance with Public Law 89-516 to Washington, D.C. Government Bill of Lading F7,141,757 was issued July 17, 1972, at Fairbanks, Alaska for transportation of household goods to Ann Arbor, Michigan where the employee rented a house and together with his wife and children established a domicile. This office was put on notice of the establishment of the domicile through receipt for payment of the Government Bill of Lading. Per diem was authorized in accordance with Departmental provisions as set forth in Bureau Manual 1382.32A 3h while attending the University.

The voucher in question covers a period of 42 days beginning with August 20, 1972, the day following arrival at Ann Arbor. The employee computes his per diem at the rate of $20 per day for 30 days from August 20, 1972, to September 19, 1972, and at $12.50 per day for the remaining 12 days. Your letter computes the per diem due Mr. Freel on a constructive basis wherein by reason of controlling regulations the per diem for travel to the training point is stated as part of the 30 days to which a $20 rate is applicable with a reduction to a $12.50 rate thereafter.

We note that Mr. Freel has presented an additional voucher, supplied to us informally, on which he claims mileage for travel from Fairbanks to Ann Arbor and per diem for himself and his dependents for the time spent in this travel.

The questions you raise are as follows:

> 1. Does the establishment of a domicile at Ann Arbor constitute a change in permanent duty station as contemplated in OMB Circular A-56 so as to entitle the employee for the costs therein enumerated at the time he reports for duty in Ann Arbor?
> 2. If your answer to the one above is affirmative may the employee be reimbursed also for the costs enumerated in OMB Circular A-56 when he relocates his domicile from Ann Arbor to Washington, D.C?
> 3. If your answer to one above is negative may the employee be paid per diem at the rate authorized for the period he is temporarily located in Ann Arbor?
> 4. Since the employee was accompanied by his wife and two children is he entitled to a mileage payment at 12 cents per mile or is mileage limited to a constructive rate normally allowed employees who use their personal automobile in traveling to a temporary duty location?

Essentially, your questions concern the relationship between transfer of station allowances to which employees are entitled under sections 5724 and 5724a of Title 5, U.S. Code, and those authorized in

connection with training under provisions of Chapter 41 of Title 5, *supra* (with specific reference to section 4109), in a case such as Mr. Freel's where the transfer of station is interrupted by a period of training at an intermediate point.

The following are our answers to your specific questions:

1. The establishment of a domicile at the training site at Ann Arbor does not constitute a permanent change of duty station within the meaning of provisions of Office of Management and Budget (OMB) Circular No. A–56, which implements sections 5724 and 5724a of Title 5, *supra*. B–162756, February 5, 1968, copy enclosed. Mr. Freel is not entitled to the allowances provided by Circular No. A–56 incident to his training assignment at Ann Arbor.

2. At the time Mr. Freel completes the transfer from Fairbanks to Washington, D.C., he will be entitled to those allowances (including per diem for family) authorized by OMB Circular No. A–56 in the case of transfers from Alaska to the continental United States. *See* B–162756, *supra*, and B–162915, February 1, 1968, copy enclosed. In this connection we note that subsection 5724a(a)(2) of Title 5, *supra*, providing for an advance house hunting trip in connection with a transfer requires that both the old and new duty stations must be within the continental United States to permit authorization of that allowance. In view of the fact the household effects have already been shipped to Ann Arbor on a Government bill of lading (presumably in accordance with subsection 6.4 of Circular No. A–56), the expense attributable to this should be offset against the amount of reimbursement for constructive cost of shipment of household effects direct from Fairbanks to Washington to which Mr. Freel will be entitled upon consummation of the transfer.

3. With respect to Mr. Freel's entitlement to the per diem which has been authorized for the period in which he is receiving training, we call attention to the following excerpts from our decision 39 Comp. Gen. 140 (1959):

> Under section 10 [now section 4109 of title 5, *supra*] the "head of each department in accordance with regulations issued by the Commission" is authorized to pay per diem in lieu of subsistence in accordance with the Standardized Government Travel Regulations or, in lieu thereof, to pay the cost of transportation of the employee's immediate family and household goods and personal effects whenever the estimated cost of such transportation is less than the estimated aggregate per diem covering the period of payment. Under section 39.401 of the training regulations promulgated by the Civil Service Commission (Federal Personnel Manual T–1–22), the head of each department is granted broad authority to determine which expenses constitute necessary training expenses under section 10 of the act. We find nothing in section 10 of the act or in the regulations of the Commission precluding the head of a department from issuing a regulation granting an election to an employee selected for training to be paid the costs of transportation of his immediate family and household goods and personal effects rather than his receiving a per diem in lieu of subsistence whenever the costs of such transportation are determined to be less than the estimated aggregate per diem payments covering the period of training.

Under the rationale of this decision we believe the BLM may pay the per diem authorized during the training period in lieu of the expense of transporation of Mr. Freel's family and household effects from Fairbanks to Ann Arbor. We view your computation of the per diem for the initial travel and while at training site up to October 1, 1972, as correct. We assume this is a situation where the lodgings-plus method of determining per diem rates is not applicable. See section 6.3c of the Standardized Government Travel Regulations, effective October 10, 1971.

4. With respect to Mr. Freel's mileage entitlement for travel by privately owned automobile, his travel from Fairbanks to Ann Arbor may be regarded as part of his transfer of his official station with temporary duty being performed en route thereto. Since his family traveled with him to Ann Arbor, their travel may be considered as travel in anticipation of the transfer to Washington. Upon that basis the employee could be allowed at this time the mileage from Fairbanks to Ann Arbor at the rate of 6 cents per mile as though he had traveled alone. Upon completion of the transfer, the mileage reimbursement should be recomputed in accordance with the provisions of Circular No. A–56 so as to allow him 12 cents per mile for the direct mileage from Fairbanks to Washington plus 6 cents for mileage in excess thereof to cover the additional mileage necessitated by the training in Ann Arbor. Of course the mileage previously allowed would be for deduction from the final mileage computation.

The vouchers are returned herewith for handling in accordance with the foregoing.

[B–177531]

Bids—Evaluation—Computer Method—Mistake Detection

A bidder who after performance of a contract awarded for cut-up chickens alleges the omission of freight charges on one delivery destination out of 50 bid on, and that the error would have been discovered but for the fact the computer evaluation of bids made impossible comparison with prices submitted by firms in the same general locality is not entitled to a price increase since the Government did not have actual notice of the error before award, and the computer evaluation method used is practicable and feasible in view of the multiple offers and destinations involved, and the severe week-to-week time constraints imposed on a contracting agency in this type procurement. Moreover, the computer method does provide for preaward checks to protect bidders from the consequences of their bid mistakes, and in addition all bids are compared with weekly market prices of whole chickens delivered in New York adjusted to reflect cutting, packing and transportation, and the range of prices submitted by all offerors to all desinations.

To B. C. Rogers & Sons, Inc., May 18, 1973:

This is in reply to your letter of December 18, 1972, and prior correspondence, requesting relief from an error alleged to have been made in your firm's offer in response to invitation to offer No. 16

issued by the Poultry Division Agricultural Marketing Service (AMS), Department of Agriculture.

The invitation covered the purchase of fresh frozen cut-up chickens for use in the National School Lunch Program. Offers were received from 17 firms on a delivered basis to 56 destinations. Awards were made to 11 firms. The delivered prices submitted by all offerors ranged from $0.3118 to $0.3388 per pound depending on the geographic locations of particular destinations. Due to the number of offerors and destinations, and in accordance with the standard procedure employed by AMS to evaluate offers received in this type of procurement, all offers were fed into a computer which printed out the lowest offeror for each destination for purposes of award.

Your firm submitted a timely wire offer on the bid opening date, November 17, 1972, covering 50 destinations with prices ranging from $0.3176 to $0.3385 per pound, and confirmed those prices by letter of that same date to AMS. Award was made to you on November 21, 1972, for three destinations at the following prices per pound:

Corsicana and Amarillo, Texas	$0.3305
Birmingham, Alabama	0.3223
Rama, North Carolina	0.3176

You allege that an error was made in your bid for the Rama, North Carolina (Rama), destination in that the freight charges of $1.03 per hundredweight were omitted from your offer. Notice of the mistake was given to the contracting officer by telephone on November 22, 1972, the day after award. Since the contract has been performed, your request for relief entails an upward adjustment in the contract price for the freight charges. AMS recommends against granting relief since the error was not an obvious mistake that the contracting officer should have detected.

The record shows that three offers were received for delivering chickens at Rama as follows:

Southeastern	$0.3305
Rogers	0.3176
Green Acre Farms	0.3321

However, this comparative information of prices offered at Rama or any other destination was not available to the contracting officer prior to the award of the contract to your firm since the computer utilized for evaluating offers is not programmed to disclose such information.

The record also reveals that Rogers is located in Morton, Mississippi, within close proximity to Southeastern, 11 miles away, and Green Acre Farms, 21 miles away. We note that the above-quoted offers of Green Acre Farms and Southeastern were $0.16 per hundred-

weight apart while Rogers' offer was $1.45 and $1.29 less than the other offerors' prices, respectively. With respect to these two firms, you refer to the fact that they received awards for destinations near Rama at prices well in excess of your offer price for Rama. Due to the proximity of all three firms, you intimate that this should have placed the contracting officer on notice of possibility of error. Furthermore, you point out that your other two awards were for higher prices than the award for Rama, but that the freight charges are significantly less than the freight charges to Rama. Similarly, you refer to higher prices bid for destinations not awarded to your firm in close proximity to Rama. Also, you contend that an analysis of the awards you received for the week should have alerted the contracting officer of the possible error because the bids showed your firm was charging less to transport chickens to Rama, North Carolina, than to Birmingham, Alabama, a destination nearer the location of your firm.

The general rule regarding allowance of an upward price adjustment arising from an error in bid alleged after award, as here, is that acceptance of the bid results in a valid and binding contract unless the contracting officer had actual or constructive notice of the probability of error in the bid at or prior to the time of the award. 45 Comp. Gen. 700, 706 (1966).

Our Office requested information from AMS as to the computer procedure utilized in making awards of this type of procurement to determine if bidders were adequately protected against receiving contract awards where obvious or other mistakes might have been made. It is clear that the procedure used does not permit the contracting officer to make certain preaward comparisons of offers, such as are mentioned by you, for purposes of ascertaining the possible existence of a mistake. But, as can be seen from the following quote below from a supplemental report to our Office from AMS dated March 15, 1973, the system utilized is the only practicable and feasible method for evaluating offers for chickens and similar products in consideration of the multiple offers and destinations involved, and the severe week-to-week time constraints imposed upon AMS. Moreover, we note that, in fact, this method does provide for various preaward checks which, in our view, adequately protect bidders from the consequences of mistakes in their bids.

The contracting office is equipped with data processing equipment, including a Remote Access Computer Terminal (RAX). Awards (acceptances) are made by linear programmed computer. This means each offer must be properly and accurately coded so that absolute accuracy is attained. The linear program guarantees that the Department's costs is the lowest possible considering the number of possibilities expressed in each offer.

Purchase units (72,000 pounds in the case of chicken) are bought at more than 400 destinations and combination of destinations located throughout the United States. Only about 50 destinations are normally listed in a weekly invitation to offer.

Several checks are made in order to assure the necessary accuracy. Each offer is examined to determine obvious mistakes and to make sure the information supplied conforms to all requirements as indicated in the announcement containing details of the program.

Apparent mistakes of a serious nature such as on prices, discounts, volume offered, etc., are corrected by a telephone call to the vendor to ascertain the facts. These calls are made before the data are entered in the computer. The contracting officer's action is guided by Article 9 of C&MS Purchase Document No. 1 and the applicable provisions of the contracting handbook containing Agency policy, copy of which is enclosed. Mistakes of a less serious nature such as parent company identification, etc., are corrected as time permits but before new offers are received. Legal counsel is solicited on these matters when appropriate.

It would be very difficult and impractical for us to establish a verification system which would eliminate mistakes such as the one made by the B. C. Rogers Company. The chicken purchase program operates on a tight time schedule. Offers are received by 1 p.m. on a Friday, acceptances are made by a press release on Tuesday afternoon (which also lists our needs for the following period), and offers based on these needs are received again the following Friday. In addition, we also operate other programs (canned boned poultry, turkey, etc.) in a similar manner during the same time we are buying chicken.

Extending the time frame so as to allow sufficient time for the calling of each vendor so that he could verify his written offer would not avoid mistakes and would not be in the best interest of the Department. The broiler industry does business on a weekly basis. We have to follow this format if we are to get the quantities needed in our program. Within the time period in which we work, we cannot call each of the 15 to 30 vendors to verify the lengthy offers submitted each week. Even if we could do this, such a procedure would not necessarily prevent the kind of mistake made by the B. C. Rogers Company.

Furthermore, AMS has informally advised our Office that all offer prices are compared for purposes of detecting possible mistakes with the weekly market price of whole chickens delivered at New York adjusted to reflect cutting, packaging and transportation and the range of prices submitted by all offerors to all destinations.

There is no evidence of record to indicate that the Government had actual notice of the mistake prior to award. Insofar as constructive notice of error is concerned, we do not believe that your offer price, when subjected to the various comparisons and other checks employed by AMS, placed the contracting officer on such notice. Your price for Rama of $0.3176 per pound was within the range of prices submitted by all offerors to all destinations. Furthermore, the adjusted weekly market price was computed by AMS to be $0.3320 per pound, reflecting a 4½-percent difference.

Moreover, even if the contracting officer had for comparison the three offer prices at Rama, the disparity between your price and the next lowest was approximately 4 percent. In this regard, we quote again from the AMS supplemental report:

It has also been suggested that we array the offerings by destination, hoping that such an array would point out mistakes. We have done this in the past but found it served no useful purpose. It has been our experience that a wide difference (1 cent per pound in the case of B. C. Rogers) in price by firms at the same destination does not necessarily indicate that a mistake was made. Wide differences in price at the same destination occur frequently due to rapid changes in market prices and conditions and the respective position (long or short) of each vendor. * * *

We do not believe that a change in our system would prevent the kind of error claimed by B. C. Rogers Company, which, incidentally, is the first of this kind in many years of operation.

The AMS procedures for the examination and evaluation of offers reflect the time limitations inherent in the purchase program whereunder a detailed examination of offers is impossible. In view of this consideration, we believe that the contracting officer exercised reasonable prudence and judgment when he reviewed your offer under the procedures and found no indication of mistake.

Therefore, acceptance of the bid in these circumstances constituted a valid and binding agreement for which no relief may be granted.

[B-177593]

Travel Expenses—Temporary Duty—Cancellation After Early Departure on Leave

Under the rule that an employee assigned to temporary duty who departs prematurely for an alternate destination on authorized annual leave, which he would not have taken but for the temporary duty, should not be penalized by reason of a subsequent cancellation of the temporary duty assignment, and that the employee is entitled to travel expenses limited to the expenses that would have been incurred had he traveled from headquarters to the temporary duty station and returned by the usually traveled route, an employee whose temporary duty assignment at points in Louisiana is canceled while he is on annual leave in St. Louis is entitled to reimbursement for the full cost of the travel performed, notwithstanding the circuitous route travel via St. Louis, since the employee's expenditures did not exceed the amount the Government would have paid for direct travel to the temporary duty station and return to headquarters in Arlington, Virginia.

To H. A. Leibert, Department of Transportation, May 18, 1973:

We refer further to your letter of November 27, 1972, reference 15-05.2, which transmitted for our advance decision a voucher involving travel expenses in the amount of $64.50 for Donald L. Neumann.

You indicate that Mr. Neumann was scheduled to perform temporary duty at points in Louisiana away from his permanent duty station in Arlington, Virginia, to begin on September 25, 1972, and that he was authorized to take annual leave at St. Louis, Missouri, for the period September 18 through 22, 1972, while en route to Louisiana. However, on September 19 while on annual leave in St. Louis Mr. Neumann was notified that his temporary duty had been canceled and he was directed to return by September 25 to his permanent station for duty. In his voucher Mr. Neumann states that he paid the excess fare for travel via St. Louis, Missouri, which apparently amounted to $35 ($114 one-way air fare via the indirect route less $79 the direct route air fare). He states further that the return fare from St. Louis was paid for by turning in the unused part of the original one-way ticket plus personal funds. Personal funds use apparently

amounted to $8, the value of the ticket turned in being $53 ($114 less $61, the St. Louis to Washington fare) and the cost of the ticket from St. Louis to Washington being $61. Since the direct route costs for the travel originally authorized would have been at least $179.50 consisting of $158 air fare plus $21.50 taxi fares, Mr. Neumann claims reimbursement for the full cost of the travel as performed. His claim for $64.50 apparently represents $35 for excess fare initially paid, $8 for the cost of the return flight which was paid in cash, and $21.50 for taxi fares between residence and airport. He also indicates on his voucher that he would not have traveled to St. Louis for leave but for the temporary duty assignment.

We have consistently held that an employee assigned to temporary duty who departs prematurely for an alternate destination on authorized annual leave which he would not have taken but for the temporary duty should not be penalized by reason of a subsequent cancellation of the temporary duty assignment. In such cases reimbursement to the employee for travel expenses incurred is limited to the expense that would have been incurred had he traveled from headquarters to the temporary duty station and returned by the usually traveled direct route. *See* 36 Comp. Gen. 421 (1965) and decisions cited therein; B–171804, March 2, 1971, B–175427, April 14, 1972, copies enclosed.

Mr. Neumann's claim is less than the cost the Government would have paid for direct travel incident to the authorized temporary duty. Under the cited decisions his full claim may be allowed. We are aware that such payment will include reimbursement of the $35 Mr. Neumann paid from his own funds as excess fare incident to what would have been circuitous travel via St. Louis. However, since he would not have traveled to St. Louis but for the temporary duty assignment and since the costs incurred for travel incident to the planned temporary duty do not exceed the amount the Government would have paid for direct travel to the temporary duty point and return we consider it reasonable to allow all expenses claimed.

The voucher which is returned herewith may be certified for payment if otherwise correct.

[B–177879]

Bids—Acceptance Time Limitation—Dissimilar Provisions—Cross-Referencing

Three invitations for bids soliciting vehicle operation and maintenance services which stated a 90-day bid acceptance period without requiring further action by the bidder, and which included a Standard Form 33 indicating a 60-day bid acceptance period would result unless a different period was inserted by the bidder, without cross-referencing the provisions, were defective as evidenced by 10 out of 13 bids being nonresponsive, thus indicating the conflicting provisions

were misleading, and although bidders are expected to scrutinize carefully the entire solicitation package and to timely request assistance, the Government has the initial responsibility of clearly stating what is required. The two invitations under which awards were withheld should be canceled and readvertised, clearly stating the bid acceptance terms, but the award made in reliance on previous Comptroller General decisions will not be disturbed.

General Accounting Office—Recommendations—Implementation

The recommendation that conflicting bid acceptance periods in invitations should have been cross-referenced to avoid misleading bidders requires corrective administrative action pursuant to section 232 of the Legislative Reorganization Act of 1970, Public Law 91–510, and therefore copies of the Comptroller General decision containing the recommendation are being transmitted to the appropriate congressional committees. Also, section 236 of the act requires written statements by the administrative agency of the action to be taken with respect to the recommendation to be submitted to the House and Senate Committees on Government Operations not later than 60 days after the date of the recommendation and to the Committees on Appropriations in connection with the first request for appropriations made more than 60 days after the date of the recommendation.

To the Secretary of the Air Force, May 18, 1973:

Reference is made to letter LGPM, dated February 28, 1973, with enclosures, from the Deputy Chief, Contract Management Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, which reported on the protest of R & R Contractors, Inc. (R & R), against awards to any other bidders under invitations for bids (IFB's) F09607–73–B–0022, –0025, and –0040, issued at Moody Air Force Base, Georgia.

IFB –0022 was issued October 16, 1972, for aircraft refueling/ defueling and service station operation services; IFB –0025 was issued November 15, 1972, and called for photographic services; and IFB –0040 was issued November 17, 1972, calling for vehicle operations and vehicle maintenance services. In each IFB, paragraph 28 of section "C," "Solicitation Instructions and Conditions," provided:

BIDS–ACCEPTANCE PERIOD (1960 APR.)
BIDS OFFERING LESS THAN 90 DAYS FOR ACCEPTANCE BY THE GOVERNMENT FROM THE DATE SET FOR OPENING OF BIDS WILL BE CONSIDERED NONRESPONSIVE AND WILL BE REJECTED.

This 90-day bid acceptance period requirement was stated in bold type and by its terms did not appear to require further action on the part of the bidder to bind himself. However, each IFB also included Standard Form (SF) 33 (November 1969 edition), entitled "Solicitation, Offer, and Award," which stated in small print:

* * * the undersigned offers and agrees, if this offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule

On November 30, 1972, five bids received in response to IFB –0022 were opened, with the following results:

	Net Price
C. T. Bone, Inc.	$102,771.88
R & R	109,480.67
James & James Company (J&J)	112,268.80
Technical Service Enterprises, Inc.	113,619.12
W. H. Stevens Corp.	1,037,400.00

All bids, except J&J's, were found to be nonresponsive for failure to comply with the 90-day bid acceptance period specified in the IFB.

The two bids received on IFB -0025 were opened December 20, 1972:

	Net Price
R & R	$21,712.70
Dwain Fletcher Co.	29,142.00

Both bids were found to be nonresponsive—R & R for failure to comply with the 90-day bid acceptance period, and Dwain Fletcher for failure to sign its bid bond.

Six bids received in response to IFB -0040 were opened January 4, 1973:

	Net Price
Jets Services	$401,551.50
R & R	436,308.78
Motor Service Co	438,994.12
J&J	463,090.12
Southeastern Services	473,952.13
Technical Service Enterprises	569,698.22

All bids, except J&J's were found to be nonresponsive for failure to comply with the 90-day bid acceptance period required by the IFB.

In short, of a total of 13 bids submitted in response to these three solicitations, 10 were found to be nonresponsive for failure to comply with the 90-day bid acceptance requirement. On all 10 of these bids, the space provided on SF 33 for indicating a bid acceptance time of other than 60 calendar days was left blank.

Based upon a determination that Moody Air Force Base was unable to extend the current contract for vehicle operations and vehicle maintenance services at the same price and that delay beyond March 1, 1973, in awarding a new contract for these services would have a serious impact on mission performance, the procuring agency accepted the bid of James & James Company under IFB -0040 and awarded contract No. F09607-73-C-0027 to that concern on February 28, 1973. Awards under IFB's -0022 and -0025 are being withheld pending the decision of our Office on the instant protest.

R & R has protested the rejection of its bids essentially on the bases that paragraph 28, Section "C," providing for a minimum 90-day bid acceptance period, and the acceptance period provision of SF 33 constitute a dual requirement and that the Air Force should have taken action to eliminate this inconsistency before issuing the IFB's. The administrative report of February 28, 1973, recommends denial of the protests in view of our decision reported at 47 Comp. Gen. 769 (1968).

In that decision, we considered the question whether a bid could be accepted under almost the exact circumstances presented here; that is, where the invitation required a 90-day bid acceptance period, the SF 33 in the invitation indicated that a 60-day bid acceptance period would result unless a different period was inserted by the bidder, and the low bidder left blank the space on the bid with regard to the bid acceptance period. The low bidder pointed out that it left the bid acceptance period blank since it always accepted whatever number of days was specified in the schedule. Nine out of 11 bidders failed to fill in the bid acceptance blank. Our Office found that the failure to submit any bid acceptance period, thus automatically resulting in a 60-day bid acceptance period, resulted in a nonresponsive bid which could not be considered for award in the circumstances.

For the reasons which follow, we sustain R & R's protest because the IFB bid acceptance period provisions misled bidders and rendered the solicitations fundamentally defective.

Neither the bid acceptance provisions of SF 33 nor those of paragraph 28 advised bidders of the affirmative action required to submit a responsive bid insofar as bid acceptance time is concerned. The bid acceptance provisions of SF 33 standing alone, are self-executing and require no action by a bidder who is satisfied with the 60 calendar day period. Likewise, paragraph 28 does not specifically require the bidder to take any action on his own initiative; it informs him that he must offer 90 days for acceptance in order to be responsive.

Significantly, the solicitations were not cross-referenced to alert bidders that SF 33 and paragraph 28 had to be considered together and affirmative action taken with respect thereto. Our Office has previously recommended that where an invitation contains language specifying a bid acceptance period and another separate provision located elsewhere in the invitation sets forth a minimum bid acceptance period, the two provisions should be cross-referenced in such manner as to specifically direct bidders' attention to the fact that insertion of a shorter period will cause the bid to be rejected. *See* letter B-154793, September 21, 1964, copy herewith. *See, also*, our decisions B-164851, October 17, 1968, and 46 Comp. Gen. 418 (1966), copies enclosed. While we have recognized that such action would be desirable since it would assist bidders in submitting responsive bids, in 47 Comp. Gen., *supra*, at 772 we stated:

> * * * We have recognized in previous decisions that the terms of minimum bid acceptance provisions may vary, and it is the bidder's responsibility to consider such terms in the preparation of its bid and respond accordingly. See B-160224, January 25, 1967, B-161628, July 20, 1967.
>
> Admittedly, any questions of responsiveness arising out of the instant invitation could have been avoided if the procuring activity had struck out the parenthetical "60 calendar days" in the "Offer" portion of standard form 33 and inserted in lieu thereof the "90" day minimum acceptance period specified in

paragraph 34, or other appropriate action. Further, when a minimum acceptance period is specified, we acknowledge that it is unlikely that a bidder will intentionally offer less than full compliance therewith. * * * While the procuring activity's inaction has perpetuated a situation which places a premium on attentiveness, such circumstance is not in our opinion a proper basis for finding an "inconsistency" to alter thereby the operative effect of a failure to insert "90" calendar days in the bid acceptance space.

That decision, which considered an IFB that contained identical bid acceptance provision as involved here, recognized that the IFB was a pitfall for the unwary bidder in that "it places a premium on attentiveness."

Though we acknowledge that bidders are expected to scrutinize carefully the entire solicitation package and to request assistance timely if interpretation problems arise, we believe that the Government has the initial responsibility of stating what is required in reasonably clear fashion. Communication of the minimum bid acceptance period under the instant solicitations and the one considered in 47 Comp. Gen. 769, *supra*, was clearly inadequate, as exemplified by the overwhelming number of bidders who obviously either failed to appreciate the 90-day requirement or failed to take proper steps to establish responsiveness to that requirement.

We have observed that a sense of fairness and impartiality should imbue the Federal procurement effort. These solicitations reasonably must be viewed as having contained a trap to ensnare the average bidder into a state of nonresponsiveness as to the bid acceptance period imposed. We must assume that only a grossly misleading invitation would have caused almost all bidders—who expended considerable time and money to compete for the Government's business—to fail to hold their bids open as required.

In view of the misleading nature of the solicitations, we recommend that IFB Nos. -0022 and 0025 be canceled and the procurement resolicited in bid acceptance terms which clearly state the Government's desire in that regard. As for contract No. F09607-73-C-0027, in view of the fact that the procuring activity, in its use and interpretation of the bid acceptance period provisions, was acting in accordance with the previous decisions of our Office, and also the fact that award was made several months ago, we do not feel that cancellation of the contract would be in the best interests of the Government.

The February 28, 1973, report advises that the Air Training Command (ATC) has instructed its procurement activities to cross-reference the "Offer" portion of SF 33 with any separate provision specifying a minimum bid acceptance period. The ATC directive, dated January 15, 1973, states:

* * * When it is considered necessary to specify a minimum bid acceptance period, the following entries shall be made in the solicitation in addition to complying with ASPR 2-201(A) Sec C (XVIII): A. In offer portion of Standard

Form 33 enter an asterisk adjacent to space provided for bidder to enter bid acceptance period and include following note: "See paragraph (identify number) of Section C." B. Immediately following "Bids—Acceptance Period (1960 Apr)" provision in Section C include a statement reading: "To be responsive a bidder must insert in the offer portion of Standard Form 33 a bid acceptance period of (specify number) calendar days or more. It is cautioned that if the bidder makes no entry a bid acceptance period of 60 calendar days will automatically be applied and should 60 days be less than the specified mimimum the bid will be rendered nonresponsive." The number of days entered by the Contracting Officer in first sentence of above statement shall coincide with minimum bid acceptance period specified in accordance with ASPR 2-201(A) Sec C (XVIII).

We believe that the implementation should go far to correct the situation discussed above.

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

We would appreciate being advised on whatever action is taken on our recommendations.

[B-177435]

Transportation—Dependents—Military Personnel—Advance Travel of Dependents—Employment Opportunities Lacking

The advance return from overseas to the United States (U.S.) of those dependents of members of the uniformed services unable to locate acceptable employment overseas may be authorized at Government expense under the broad authority for advance returns when in the best interest of the individual and the U.S. which was added by Public Law 88-431 as subsection (h) to 37 U.S.C. 406 because section 406(e) limited advance returns to "unusual or emergency circumstances," and paragraph M7103-2 of the Joint Travel Regulations (JTR) may be amended accordingly. However, 37 U.S.C. 406(h) authority does not contemplate the advance return of dependents because they "lack suitable recreational activities" at the overseas station. Furthermore, advance returns are also authorized by paragraph M7102, JTR, when situations embarrassing to the U.S. are to be avoided, and by paragraph M7103-2, item 7, JTR, in situations which have an adverse effect on a member's performance of duty.

To the Secretary of the Air Force, May 21, 1973:

Further reference is made to letter dated October 26, 1972, from the Assistant Secretary of the Air Force, Manpower and Reserve Affairs, requesting a decision as to whether this Office would object to amending the Joint Travel Regulations to provide for the advance return of dependents of members of the uniformed services at Govern-

ment expense from overseas to the United States due to the "lack of suitable recreational activities and acceptable employment opportunities" for dependents at overseas stations. The request has been assigned Control No. 72–51 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary indicates that because of limited job opportunities and a lack of recreational activities, families frequently discover that certain overseas areas do not provide suitable environment for dependent children over 18 years of age. Thus, the Assistant Secretary indicates, because of idle time, some dependents become involved with narcotics and drugs thereby creating embarrassing situations for the United States. Further, he states, some dependents in this category cause additional administrative problems because of truancy, vandalism, and other instances of societal protest. The Assistant Secretary also notes that if a member's dependents are unhappy in overseas areas, for whatever reason, their misery has a direct impact and bearing on the member's duty performance and morale.

For these reasons the Assistant Secretary asks whether we would be required to object to amending the Joint Travel Regulations to authorize the advance return at Government expense of members' dependents under the circumstances discussed above. The proposed amendment would be an additional condition under paragraph M7103–2 of the regulations, which lists the types of cases and conditions under which such advance travel of dependents is authorized.

As the Assistant Secretary indicates, in our decision 38 Comp. Gen. 28 (1958), we considered the provisions of section 303(c) of the Career Compensation Act of 1949, 63 Stat. 802, 814, now codified in 37 U.S. Code 406(e), under which the Secretary concerned may "under unusual or emergency circumstances," authorize the movement at Government expense of the dependents, baggage and household effects of a member when orders directing a change of permanent station for the member have not been issued, or when they have been issued but cannot be used as authority for the transportation of dependents, baggage and household effects.

In that decision we indicated that basically the statute authorized the Secretary concerned to issue regulations providing for the early return of dependents and household effects of members only because of actual conditions of an emergency nature arising at overseas duty stations which justified such return and which generally could not arise, or are most unlikely to arise in the case of members serving in the United States. On that basis we expressed the view that conditions such as financial difficulties, marital troubles, a member's desire to return dependents to the United States to attend school, illness of relatives, etc.,

are not conditions which the law intended to be used as a basis for giving such preferential treatment to overseas personnel in the matter of transportation of dependents and household effects, these conditions being no different than those encountered by members on duty in the United States.

However, as the Assistant Secretary also notes, the act of August 14, 1964, Public Law 88–431, 78 Stat. 439, broadened the Secretaries' authority to authorize advance return of dependents from overseas stations by adding to 37 U.S.C. 406, subsection (h) which provides in pertinent part as follows:

(h) In the case of a member who is serving at a station outside the United States or in Hawaii or Alaska, if the Secretary concerned determines it to be in the best interests of the member or his dependents and the United States, he may, when orders directing a change of permanent station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage, and household effects—

(1) authorize the movement of the member's dependents, baggage, and household effects at that station to an appropriate location in the United States or its possessions and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, as the case may be, as authorized under subsection (a) or (b) of this section; and

(2) authorize the transportation of one motor vehicle owned by the member and for his or his dependents' personal use to that location by means of transportation authorized under section 2634 of title 10.

As to the need for Public Law 88–431, its legislative history shows that in the hearing [No. 10] before Subcommittee No. 1, Committee on Armed Services, House of Representatives, on H.R. 4739 which became Public Law 88–431, Major T. M. Twisdale U.S. Army, testified on behalf of the armed services. His testimony is in part (pages 3005–3006) as follows:

Under the present provisions of section 406(e) of title 37, United States Code, authority for advance return of dependents and household goods of members is limited to "unusual or emergency circumstances." These limitations have been found undesirable, and too restrictive to meet the needs of the services. The advance return of dependents under circumstances which under present law and rulings of the Comptroller General may not be regarded as "unusual or emergency" in nature is considered essential from the standpoint of the morale and welfare of members and their dependents.

Unforeseen family problems, changes in a member's status, and *changing economic* and political *conditions* in the various oversea areas at times require the advance return of dependents, household goods, and privately owned vehicles from an oversea area to the United States, as being in the best interest of the individual and the Government. Such instances, however, often do not satisfy the "unusual or emergency circumstances" requirement of the present law. Dependents who are confronted with compelling personal problems for which advance return is not now authorized place an additional administrative burden on oversea commanders. Those dependents may also have an adverse effect on the sponsor's performance of duty and the operational readiness of our combat forces. In certain instances in the past they have caused incidents prejudicial to the best interests of the United States. Examples of situations warranting advance return of dependents would include such compelling personal reasons as marital difficulties, extreme financial difficulties brought about by circumstances such as confinement or reduction in grade of the member, which preclude the furnishing of adequate support for dependents, death or serious illness of close relatives, *and other situations in which the appropriate commander determines that the best inter-*

ests of the Government and the member or dependent will be served. It is normally best to permit, or if necessary require, these dependents to be returned to locations in the United States in advance of the return of the sponsors. [Italic supplied.]

It is pointed out in the legislative history of 37 U.S.C. 406(h) that this authority is not to be abused and that the advance return of a dependent at Government expense is a one-way proposition, precluding return travel at Government expense to the overseas station unless the member receives a permanent change of station or unless it is for the convenience of the Government.

Concerning the Assistant Secretary's remarks regarding dependent children over 18 years of age who might become involved with narcotics and drugs and thereby create an embarrassing situation for the United States, we note that currently the commanding officers of overseas areas appear to have sufficient authority under paragraph M7102 of the Joint Travel Regulations to authorize the advance return from overseas stations at Government expense of dependents who become involved in situations embarrassing to the United States.

There is also for noting that paragraph M7103–2, item 7, authorizes advance return of one or more of a member's dependents at Government expense when the member requests such return and his commanding officer determines that the best interests of the member or his dependents and the Government will be served by such return for compelling personal reasons including among others, "unforeseen family problems" or "for reasons of a humanitarian or compassionate nature, and in other situations which have an adverse effect on the member's performance of duty."

It is our view that in enacting 37 U.S.C. 406(h) the Congress did not contemplate that advance return of the category of dependents here involved from overseas areas at Government expense would be authorized merely for the reason that there is a "lack of suitable recreational activities" at the overseas station. We do not believe this type of situation is within the purview of the law or the legislative intent. It is our view, therefore, that 37 U.S.C. 406(h) does not provide such authority and, accordingly, we would be required to object to amending the Joint Travel Regulations which would include, as a condition for the advance return of dependents at Government expense, a lack of suitable recreational facilities.

We are of the view, however, considering the language of the statute and its legislative history, that the authority granted in 37 U.S.C. 406(h) is sufficiently broad to authorize the inclusion in the regulations, as a reason for advance return of dependent children (18 years or older), because of the lack of acceptable employment opportunities at the overseas station. To meet this condition, the regulations should

require that the appropriate commander determine that because of the lack of employment opportunity at the overseas station and the resulting idleness, the dependent child or children are likely to become involved in situations as described in the Assistant Secretary's letter which place additional administrative burdens on the overseas commander or have adverse effects on the member's duty performance, and that such advance return is in the best interests of the member or his dependents and the United States.

Accordingly, we would not be required to object to such an addition to the regulations.

[B–177076]

Transportation—Contractor Shipments—Prepaid—Government's Liability for Freight Charges

A carrier's claim for transportation charges on a shipment of furniture to a Veterans Administration Hospital which was purchased f.o.b. destination and shipped on a commercial bill of lading prepared by the shipper and executed by the carrier as required by 49 U.S.C. 319, where the bill of lading although marked "prepaid" also indicated delivery to the consignee was without recourse on the consignor and the carrier should not make delivery without payment of freight and other lawful charges, may not be allowed since the inconsistent "no recourse" and "prepaid" clauses mean some payment was made by the consignor, and as the claim is not for supplemental freight charges, the Government's liability has not been established. Furthermore, the shipper no longer is in business and the carrier failed to notify the Government of the difficulty in collecting the freight charges until payment had been made to the contractor-consignor.

To the North American Van Lines, May 22, 1973:

There has been referred here your letter of January 26, 1973, in which you request that our Transportation and Claims Division reconsider its denial of your company's (hereafter North American's) claim for transportation charges in the amount of $954 on a shipment of furniture from National Industries, Inc. (National), Odenton, Maryland, to the Veterans Administration Hospital in Omaha, Nebraska, which was delivered on August 23, 1971.

The furniture was purchased by the Government f.o.b. destination, freight to be borne by National. National shipped the furniture on a commercial bill of lading executed by North American, so marked that the freight was shown as "prepaid" but also indicating that the shipment was to be delivered to the consignee without recourse on the consignor and the carrier should not make delivery without payment of the freight and all other lawful charges. Your company, after attempting without success to collect the freight charges from National which you say went out of business—and subsequent to the Government paying it the contract price for the furniture—made claim against the United States for the freight charges.

You indicate that the division cited cases holding that the obligation rests on carriers' agents to refrain from executing bills of lading which cannot lawfully be complied with or which contain conflicting or erroneous entries. It is your contention, however, that a review of our records will confirm that the bill of lading was executed by the shipper and not North American.

While our records indicate that the bill of lading was *prepared* by the shipper, as indicated in the division's letter, it is the responsibility and duty of the carrier, and his alone, to *execute* the bill of lading. Section 219 of the Interstate Commerce Act, 49 U.S. Code 319, incorporates into Part II of the Act, section 20, paragraphs (11) and (12) of Part I, 49 U.S.C. 20(11) and 20(12), which paragraphs provide, among other things, that a common carrier receiving property for transportation in interstate or foreign commerce shall issue a proper bill of lading for each shipment of goods delivered to the carrier for transportation. See, also, *Valco Mfg. Co.* v. *C. Richard & Sons*, 92 A. 2d 501, 504 (1952). Also, the very definition of a bill of lading indicates it is a document issued to a shipper by a transportation agent. *See*, for example, Uniform Commercial Code, section 1–201.

Thus, the fact that it is not uncommon for shippers to *prepare* bills of lading for *execution* by carriers' agents does not relieve the carriers of their duty of ensuring that the bill of lading prepared by the shipper is correct in all respects. A shipper may prepare a bill of lading, but the carrier must execute it. *Exposition Cotton Mills* v. *Southern Ry. Co.*, 234 I.C.C. 441, 442 (1939). The issuance of the bill of lading is the responsibility of the carrier, not the shipper or consignee. See *United States* v. *Southern Pacific Co.*, 325 I.C.C. 200, 209 (1965), and *Combined Bill of Lading—Freight Bill Allowance*, 323 I.C.C. 168 (1964).

It is also your contention that the facts in this case are dissimilar to those considered in *United States* v. *Mason & Dixon Lines*, 222 F.2d 646 (1955). The bill of lading considered therein was marked prepaid, whereas the bill of lading here involved contains both the notations indicating freight was prepaid and the initialed no recourse clause which may have put the Government on notice of the possibility that it might be called upon to pay transportation charges not paid by the shipper.

In *Chicago Great Western R. Co.* v. *Hopkins*, 48 F. Supp. 60 (1942), and in *Illinois Steel Co.* v. *Baltimore & Ohio R. Co.*, 320 U.S. 508 (1943), wherein both the no recourse and prepaid clause were included in the bill of lading contract, the courts gave effect to both clauses stating that any apparent inconsistency must be reconciled, if possible. However, both cases hold that the consignor was not liable for an addi-

tional amount in addition to the freight already paid, and therefore did not involve liability for the full amount of the transportation charges, as is the case here.

By stamping the bill of lading "prepaid," your company at least represented that some part of the charges were prepaid whether or not the Government because of the inclusion of the no recourse clause could be held liable for any supplemental freight charges not paid by the shipper at origin. But the freight prepaid notation at least amounted to a representation that some part of the freight was paid. Your claim is not for any supplemental freight charge but the whole of the freight charges on the shipment. Therefore, it is our position that in this instance the Government's liability has not been established, and the carrier is estopped from collecting the freight charges. See *Southern Pacific Company* v. *United States*, 243 F. Supp. 834 (1960); *Missouri Pacific Railroad Co.* v. *National Milling Co.*, 409 F. 2d 882 (1969).

It is also your contention that *Consolidated Freightways Corporation of Delaware* v. *Admiral Corporation*, 442 F. 2d 56, 60 (1971), is not relevant in that such case involved a failure of the carrier to bill the shipper-consignor within the 7-day credit limitation, and North American billed National within the 7-day period. We agree that the additional evidence furnished us indicates that North American Van Lines repeatedly attempted to obtain payment from National, but the carrier, by its action in so treating the shipment as prepaid and its failure to promptly notify the Government of the difficulty in collecting its charges from the shipper until after payment was made to the contractor, deprived the Government of ample notice so that it could protect itself by withholding the freight charges from monies otherwise due the contractor.

We also note that your letter states only 90 days elapsed before the Government was billed, and hence the notice was not unreasonably delayed. However, our records indicate that approximately 140 days elapsed from the delivery date of August 23, 1971, and the date your invoice dated January 5 or 6, 1972, was received. At any rate the notice of your claim was received after the date the contractor-consignor had been paid, and if as you contend the Government as consignee is liable for the freight charges, the Government would in effect be paying twice for the transportation charges.

It is also to be noted that the *Consolidated Freightways* case, *supra*, states at page 61:

> We discern nothing in the language or policies of Section 223 (Section 223 of the Motor Carriers Act, 49 U.S.C. 323) to suggest that Congress intended to impose absolute liability upon a consignee for freight charges. Nor do we believe that the application of equitable estoppel against plaintiff's claim circumvents the policies of that Section.

Therefore, it is our view that the action taken by our Transportation and Claims Division in disallowing North America's claim was correct and it is sustained.

[B-177206]

Bids—Two-Step Procurement—Use Basis—Specifications Unavailable

The use of the two-step procurement method authorized by paragraph 2-501 of the Armed Services Procurement Regulation to obtain services and facilities for the management and operation of an Air Force (AF) Publications Distribution Center because of inability to adequately specify technical needs to meet the requirements of a single-step procurement was a proper exercise of administrative authority where the AF was unable to specify its requirements in the areas of automatic data processing equipment and software for the operation, notwithstanding its ability to state requirements in other work areas, since the regulation states the word "technical" has a broad connotation and includes engineering approach, special manufacturing processes and special testing techniques, and further provides that the management approach, and manufacturing plan, or facilities to be used may also be clarified in the technical proposals.

Bids—Two-Step Procurement—First-Step—Evaluation Criteria

Under the first step of a two-step procurement to obtain services and facilities for the management and operation of a Publications Distribution Center, the fact that offerors are required to show understanding of the work and their management capability, and to observe the current contractor's operations for 30 days, and that the Government will assist with traffic matters does not affect the validity of the two-step procurement. An understanding of work requirements, prior experience, and the qualifications and capabilities of an offeror although relating to contractor responsibility are proper for consideration in evaluating proposals as the matter of responsibility will not be determined until after second-step bids are received; a 30-day observation period is not inappropriate considering the complexity of the work; and in the absence of supervising the contractor's employees, the proposed transportation assistance is not improper. Moreover, the provision for the protection of Government property is reasonable, and the omitted service contract requirements were not needed to prepare first-step technical proposals.

To the Hewes Engineering Company, Inc., May 22, 1973:

We refer to your telefax of October 5, 1972, and subsequent correspondence, concerning your protest under Letter Request for Technical Proposal (LRTP) No. 74-USAF/DAPS-1, issued on September 22, 1972, by the Department of the Air Force as the first step of a two-step procurement to procure services and facilities for complete management and operation of the Department's Publications Distribution Center, Baltimore, Maryland, from July 1, 1973, to June 30, 1974.

You maintain that the procurement does not meet the requirements in Armed Services Procurement Regulation (ASPR) 2-501 for two-step formal advertising, since complete specifications allegedly exist for the operation and the required services are not technical in nature; that proposals should not be evaluated on the basis of understanding of the work requirements and effective management capability since

these factors relate to a firm's responsibility and not to responsiveness to technical requirements; that the LRTP provision requiring the contractor to observe the present contractor's operations for 90 days is unreasonable; that the provision making the TMO the final arbiter on all transportation matters creates an improper employer-employee relationship; and that the LRTP does not contain the clauses applicable to service contracts under the Service Contract Act of 1965, 41 U.S. Code 351, thereby making it impossible for the contractor to submit an adequate first-step proposal.

The LRTP stated that offerors were required to submit technical proposals under the first step of the procurement which would clearly show that the offeror had (1) a thorough and complete understanding of the work requirements, and (2) an effective management capability to accomplish the work and discharge the responsibilities outlined.

The statement of work for the operation was set forth in Exhibit II of the LRTP and provided, among other things, that the contractor, under the cognizance of the Department's Traffic Management Office (TMO) at the Center, would normally provide the clerical, administrative, and technical tasks for the receipt and movement of materials; that the TMO would make final determinations on all transportation and traffic management matters including modes of transportation and carriers to be used, certification of demurrage/detention charges, distribution of completed Government bills of lading, proper packaging and labeling of shipments, Military Airlift Command (MAC) shipment clearance, and issuance of Certificate in Lieu of Certified True copies of Government bills of lading; and that the TMO would be the first point of contact for all transportation and traffic management advice or guidance required by the contractor. The LRTP further provided that prospective offerors were required to observe the present contractor's operations for a 90-day period prior to July 1, 1973, in order to understand thoroughly all aspects of the work.

Offerors were also advised that their proposals should follow a proposed outline, which was set forth on page 4 of the LRTP in pertinent part, as follows:

(1) *Organizational and Functional Chart* for the proposed operation of the Center.

* * * * * * *

(2) *History of Company and Relationship of Center to other Branches or Divisions of the Company.*

* * * * * * *

(3) *Experience*

* * * * * * *

(4) *Experience of Key Personnel*
(5) *Personnel Management Plan*

* * * * * * *

(6) *Automatic Data Processing Equipment (ADP):* Detailed descriptions of the Automatic Data Processing Equipment (ADPE) proposed for use, including the Manufacturer's Name, Model Number, List of Components, and all Supporting Equipment. If it is proposed to use different ADP equipment than is presently being used, include in the Technical Proposal your detailed conversion plans.

(7) *System Control and Management:* Detailed instructions, policies, and standard operating procedures that personnel would use to:

(a) Process AF Form 124, DD Form 1629, DD Forms 1149, and DD Forms 1142.

* * * * * * *

(8) *Equipment:* A list of equipment, other than ADPE and Supporting Equipment and Government Furnished Property, which the offeror proposes to use in the Center operation.

In reply to your contention that the procurement should not be made under two-step formal advertising procedures, the Air Force points out that ASPR 2–501 provides that the two-step method is useful in procurements requiring technical proposals where inadequate specifications preclude the conventional formal advertising; that the regulation also states that the word "technical" has a broad connotation and includes engineering approach, special manufacturing processes and special testing techniques; and that it further provides that management approach, manufacturing plan, or facilities to be used may also be clarified in the technical proposals. Relating these provisions to the facts here, the Air Force states that the Government was unable to adequately specify its requirements in the areas of automatic data processing equipment and software for the operation, notwithstanding its ability to state its requirements in other work areas, and that it believes the former areas must be considered "technical" under the broad connotation of that term as used is ASPR 2–501.

We have held, in this connection, that an agency's decision to use two-step procedures because it is unable to adequately specify its technical needs to meet the requirements of a single-step procurement is one within the authority of the agency, and such decision, when supported by the facts, will not be questioned. *See* B–174737, April 12, 1972. Based on our review, we cannot conclude that the Air Force improperly decided to use two-step procedures on the basis that it lacked an adequate technical description of the data processing equipment, and the attendant software, which will be required to successfully operate the center.

Concerning your collateral objection that this method of procurement will give the present contractor an unfair advantage because of the "climate and closeness" of "being on the job," the Air Force states that this would be true in any type of procurement. In this regard, we are unaware of any restriction on the Government's selection of the method of procurment merely because an incumbent contractor may have a greater understanding of the work requirements. Conse-

quently, we see no basis for questioning the validity of two-step procedure because of this circumstance.

With respect to your allegation that the requirement for proposals to demonstrate a thorough understanding of the work requirements and an effective capability to do the work relates to matters of responsibility which should not be considered by the Air Force in evaluating first-step proposals, it is not uncommon in procurements involving the furnishing of services to require that offerors show in their proposals and understanding of the work requirements, and the prior experience, qualifications and capabilities of the offerors' proposed organizations which will perform the work. When required to be set out, these factors, which also relate to a proposed contractor's responsibility, are generally regarded as proper for consideration in a comparison evaluation of the proposals received. *See* B–176538, January 12, 1973. The contracting officer advises that these general standards will be used in deciding how well an offeror has scored in the areas set forth in the proposed outline of data to be included in the technical proposal, and that the responsibility of the apparently successful offeror will not be formally determined until after second-step bids have been received. We must therefore conclude that the criteria set out in the LRTP are appropriate for evaluating the first-step proposals.

Concerning your allegation that it is unreasonable to require prospective offerors to observe the incumbent's operations for the 90-day period prescribed in the LRTP, the Air Force has recently advised this Office, in response to your objection, that it has reduced the observation period to 30 days. On the present record, we cannot conclude that a 30-day observation period is inappropriate considering the complexity of the work requirements.

With respect to your argument that the provision making the TMO the final arbiter on all transportation matters would create an improper employer-employee relationship between the Government and the contractor, the administrative report states that it is not the intent of the Air Force to actively engage in the daily routine work of the contractor, but that its traffic management officer will be present to render assistance in resolving transportation problems. However, in this regard, the Air Force has recently advised this Office that the Statement of Work has been amended to delete the statement that the TMO would make final determinations on all transportation and traffic management matters.

Our Office has noted that the Civil Service Commission has taken the position that a service contract is to be questioned if the terms of the contract permit or require detailed Government supervision over

the contractor's employees. 51 Comp. Gen. 561, 563 (1972). Based on our review of the amended statement of work concerning the duties of the TMO, we cannot conclude that the LRTP permits or requires detailed Government supervision over the contractor's employees as you suggest.

With respect to your statement that the LRTP does not contain the clauses required by the Service Contract Act of 1965, the Air Force states that the required services are covered by the act and that the invitation for bids (IFB) which will be issued under the second step of the procurement will cover bidders' responsibilities under the act.

Concerning your statement that prospective bidders would not be able to submit adequate first-step proposals without this information, we must point out that the Service Contract Act requirements primarily relate to the costs a contractor will incur in meeting the minimum levels of compensation, and related fringe benefits, for personnel employed under the contract. *See* ASPR 12–1004(a). In this regard, ASPR 2–503.1(a)(v) states that the step-one LRTP shall contain a statement that the technical proposals shall not include prices or pricing information. Since the regulation requires that an offeror's first-step proposal omit pricing information, we do not believe an offeror would need to know the Service Contract Act requirements in order to prepare his first-step technical proposal. Consequently, we cannot disagree with the Air Force's intention to place these requirements in the second-step IFB.

You also question the right of the Air Force to adjust the compensation paid to the contractor for stock shortages and for failure to consolidate shipments. You further question the agency's right to require the contractor to place certain markings on shipping documents. In this regard the contracting officer has replied as follows:

> The contractor is required to protect Government property in accordance with sound Industrial practices. Surveillance of incoming and outgoing personnel is the responsibility of GSA and removal of Government property requires written authorization.
>
> * * * * * * *
>
> Lack of consolidation could result in excessive transportation costs; therefore consolidation must be enforced.
>
> * * * * * * *
>
> The statement "will be required to show his identity on each document" or "container" has been set forth for sound reasons. The statement reflects sound management practices and is included as a means of Quality Assurance by the contractor and the contracting officer.

Based on our review, we cannot conclude that the Air Force unreasonably determined that these requirements are necessary for proper contract administration.

For the reasons set forth above, your protest must be denied.

[B-178122]

Foreign Service—Grievance Proceeding—Legal Fees Reimbursement

The legal fees awarded a former Foreign Service Officer of the Department of State in a grievance proceeding brought under section 1820 of Volume 3 of the Foreign Affairs Manual are not reimbursable since neither the authority in 22 U.S.C. 810 to procure legal services for the protection of the interests of the Government or to enable an officer or employee of the Service to carry on his work efficiently, nor the authority in Public Law 84–885 to incur expenses in unforeseen emergencies arising in the diplomatic and consular services apply in the circumstances of a grievance proceeding.

To the Secretary of State, May 22, 1973:

This refers to the letter of February 28, 1973, with enclosures, from Mr. Charles N. Brower, Acting Legal Adviser, requesting an advance decision from our Office as to the propriety of paying the legal fees of Mr. John D. Hemenway, a former Foreign Service Officer of the Department of State, under the circumstances related below.

Mr. Hemenway, formerly a Foreign Service Officer, initiated a grievance proceeding on September 26, 1969, under section 1820 of Volume 3 of the Foreign Affairs Manual. A grievance committee was established as of October 22, 1969. On September 26, 1972, after lengthy hearings, the committee issued its report recommending, among other things, that Mr. Hemenway be reimbursed legal fees incurred by him in the prosecution of his grievance provided the Department had the necessary legal authority. This was concurred in by the Deputy Secretary of State.

Your acting legal adviser stated in letter of February 28, 1973, that in connection with a previous grievance proceeding where the issue of legal expenses was raised, the office of the legal adviser considered the question of the State Department's authority to pay such expenses. The legal adviser's opinion discussed the provisions of section 1031 of the Foreign Service Act of 1946, 22 U.S. Code 810, and section 4 of Public Law 84–885, as amended, 22 U.S.C. 2671. Section 1031 is an exception to the prohibition contained in 5 U.S.C. 3106 against departments other than the Justice Department employing attorneys for the conduct of litigation in which the United States is a party. Section 1031 as codified in 22 U.S.C. 810 provides as follows:

§ 810. Retention of attorneys by Secretary.

The Secretary may, without regard to sections 49 and 314 of Title 5, authorize a principal officer to procure legal services whenever such services are required for the protection of the interests of the Government or to enable an officer or employee of the Service to carry on his work efficiently.

Sections 49 and 314 of Title 5 were repealed and reenacted as 5 U.S.C. 3106.

The legal adviser stated that it was clear from the legislative history that section 1031 was not intended to authorize payment of attorney's fees in the circumstances of grievance proceedings. The legislative history referred to indicates that the primary purpose of that provision was to permit the utilization of attorneys overseas in connection with questions pertaining to local laws.

Section 4 of Public Law 84–885, 70 Stat. 890, provides in part as follows:

> The Secretary of State is authorized to—(a) make expenditures, from such amounts as may be specifically appropriated therefor, for unforeseen emergencies arising in the diplomatic and consular service and, to the extent authorized in appropriation Acts, funds expended for such purposes may be accounted for in accordance with section 291 of the Revised Statutes (31 U.S.C. 107) * * *.

The purpose of the authorization is explained in H. Report No. 2508, 84th Congress, 2d Session, at page 13, as follows:

> Authority for an appropriation to the President for unforeseen emergencies arising in the diplomatic and consular service appears in the Appropriation Act of 1887 (24 Stat. 481). Prior to that time other amounts had been appropriated to be spent on the certificate of the Secretary of State for expenses in connection with the Neutrality Act.
>
> This subsection limits expenditures "from such amounts as may be specifically appropriated therefor" for unforeseen emergencies in the diplomatic and consular service. * * *.

In connection with Public Law 84–885, the legal adviser indicated that it would be difficult to say that payment of attorney fees in a grievance proceeding amounts to "unforeseen emergencies arising in the diplomatic and consular service."

We concur in the views of the legal adviser as to the statutory provisions which he considered. Moreover, we are not aware of any other authority whereby attorney fees incurred by an employee in a grievance hearing such as here involved may be reimbursed.

[B–178514]

Officers and Employees—Overseas—Home Leave—RIF Separation and Reinstatement—Accrual and Grant of Leave

An employee whose separation in a reduction-in-force action from a position with the Trust Territories of the Pacific Islands in Saipan prior to the completion of 2 years' service on April 15, 1972, was found to be invalid and he was reinstated to a position in Saipan or an equivalent position but in lieu he accepted a position with the Bureau of Reclamation in Denver, and his last day on the rolls of the Trust Territories was September 10, 1972, is entitled pursuant to the back pay statute, 5 U.S.C. 5596, to the home leave credit authorized under 5 U.S.C. 6305(a) through September 10, 1972. Although the employee may count the time he did not spend at his foreign post due to his erroneous separation for the purpose of fulfilling the 24 months overseas service requirement, the limitations imposed on granting home leave disqualified the employee for home leave at the time he accepted the Denver position since there was no intent to return him overseas, and he will not qualify for home leave until he has served another qualifying period overseas.

To the Secretary of the Interior, May 22, 1973:

We refer to the letter of the Chief, Division of Fiscal Services, Office of the Secretary, U.S. Department of the Interior, dated April 20, 1973, concerning the use and amount of home leave which may be granted or credited to Mr. Lawrence D. Morderosian, an employee of the Bureau of Reclamation in Denver, Colorado, incident to his service with the Trust Territory of the Pacific Islands with duty at Saipan, Mariana Islands, in view of the facts set out below.

Mr. Morderosian entered on duty in Saipan on April 15, 1970. On February 25, 1972, he departed that station for return to the United States as a result of his separation by reduction in force (RIF). Upon appeal of the RIF action to the Civil Service Commission, the separation was found to be invalid and reinstatement to a position in Saipan or an equivalent position was ordered. Subsequently, Mr. Morderosian was offered and accepted the position he now holds in Denver in lieu of the position in Saipan which the Commission determined he should have been offered at the time of the RIF. The following questions are presented with respect to Mr. Morderosian's accrual of home leave and the grant of home leave properly accrued:

1. Since Mr. Morderosian was not physically in his foreign duty assignment on April 1972, through no fault of his own (erroneous RIF action), is he in fact entitled to have leave accrual through:
   (a) April 1972 (completion of two-year agreement).
   (b) September 10, 1972 last day on rolls of Trust Territory of the Pacific Islands before entering on duty in Bureau of Reclamation, Denver, Colorado.
2. If it is contemplated that the Department returns Mr. Morderosian to a foreign duty assignment in the near future, can Mr. Morderosian use the home leave to which he would have been entitled in (a) or (b) above?
3. If it is not contemplated that Mr. Moderosian returns to a foreign duty assignment, but in fact is given an assignment in the continental United States after his Reclamation-Denver assignment, can he use the home leave to which he would have been entitled in (a) or (b) above?

Home leave is accrued and granted under 5 U.S. Code 6305(a) and the regulations promulgated by the Civil Service Commission pursuant thereto as contained in 5 CFR 630.601–630.607. Those regulations provide for the accrual of home leave in appropriate amounts for employees who are assigned to overseas posts at which home leave may be earned. An employee's accrual of such leave is without regard to his later entitlement to a grant of some or all of the home leave so accrued. Regarding your first question, 5 U.S.C. 5596, which authorizes back pay and related benefits for employees who have undergone unjustified or unwarranted personnel actions, provides in part that employees improperly separated shall, upon reinstatement, be deemed for all purposes "to have performed service for the agency during that period, except that the employee may not be credited * * * leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of leave authorized for the employee by law or

regulation." It is well settled that an employee who has been improperly separated is entitled to include in his back pay the foreign or territorial (now nonforeign) differentials he was receiving at the time of his improper separation even though he may not have remained at the post where such differential was payable during the period of separation. *Vitarelli* v. *United States*, 150 Ct. Cl. 59 (1960); 40 Comp. Gen. 479 (1961). In view of the fact that the statutory provision quoted above allows the crediting of leave to employees during periods of erroneous separation and in view of the cited decisions, we conclude that the employee should be credited with home leave for the period of his erroneous separation. Therefore, the conclusion stated in question 1(b) is correct.

With respect to questions 2 and 3, it follows from the answer to question one that an employee may count time he did not spend at his foreign post because of an erroneous separation for the purpose of fulfilling the 24 months overseas service requirement of 5 U.S.C. 6305(a) and 5 CFR 630.606(a). However, the grant of home leave is limited in 5 CFR 630.606(c) in the following terms.

> (c) *Limitations.* An agency may grant home leave only:
> (1) For use in the United States, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and
> (2) During an employee's period of service abroad, or within a reasonable period after his return from service abroad when it is contemplated that he will return to service abroad immediately or on completion of an assignment in the United States.
>
> Home leave not granted during a period named in subparagraph (2) of this paragraph may be granted only when the employee has completed a further substantial period of service abroad. This further substantial period of service abroad may not be less than the tour of duty prescribed for the employee's post of assignment, except when the agency determines that an earlier grant of home leave is warranted in an individual case.

As indicated in our decision of February 5, 1962, B–147031, copy enclosed, those limitations on the use of home leave were in keeping with the treatment of home leave grants under prior authorities and were contemplated by the Congress when it enacted the Overseas Differentials and Allowances Act (Public Law 86–707), part of which is now 5 U.S.C. 6305(a).

Since the Chief, Division of Fiscal Service, has advised us in his submission that after Mr. Morderosian accepted the position in Denver there was no intention on the part of the Department to return him to a foreign assignment, he did not qualify for a grant of home leave at that time. Further, in view of the final paragraph of the quoted regulation, the home leave credited to Mr. Morderosian may not be granted to him until he has served another qualifying period overseas.

Accordingly, your second and third questions are answered in the negative. We have considered the contentions in Mr. Morderosian's

telegram of April 12, 1973, to your Department which contentions were expanded in his letter to us of April 30, 1973. However, we do not find that any delay which might have occurred in his reinstatement could change the conclusion reached herein. Further, the fact that the duties performed in the position in Denver are not the duties specified in the job description which might require a further transfer would not entitle him to a grant of home leave under the controlling regulations.

[B-177165]

Bids—Acceptance Time Limitation—Extension—Protest Determination

Although in 50 Comp. Gen. 357 it was held that the protest of a procurement to the United States General Accounting Office within the offeror's acceptance period would be viewed as continuing the protestant's bid in being, pending disposition of the protest and, if proper, for a reasonable time thereafter, even without an express extension of the bid, the period for which an extension should be considered binding upon the protesting bidder must be decided on the basis of all of the circumstances involved. Therefore, in view of the contention of a protestant that due to changes in production and manufacturing economics its bid was not extended beyond the last extension of the bid acceptance time period, which expired on the date of the Comptroller General's decision sustaining its protest, because to accept an award at its bid price would result in a loss contract, the contracting agency's attempt to award a valid contract on the basis of the original bid price was ineffective.

To the Secretary of the Navy, May 23, 1973:

This is in reply to the letter dated March 28, 1973, reference ELEX OOC/ER:cmc Ser 94-OOC, from the Director of Contracts, Naval Electronic Systems Command (NAVELEX), requesting our opinion as to the validity of the award of contract N00039-72-C-0274 to R. F. Communications, Inc. (RFC).

We believe the solution to this problem turns on whether there existed a valid subsisting offer which NAVELEX could have accepted on February 28, 1973, the date the contract document was executed by the contracting officer.

RFC's bid was the only one received prior to the scheduled bid opening on August 29, 1972, in the second step of the two-step formally advertised procurement. The RFC bid was, by its terms, valid for 60 days. RFC protested to this Office by telegram of October 2, 1972, the Navy's cancellation of the solicitation prior to contract award and the proposed resolicitation of bids which the Navy considered necessary because of certain alleged ambiguities in the solicitation. Prior to our decision to you of January 31, 1973, B-177165, sustaining the protest, RFC submitted a number of unsolicited extensions of its bid. The validity of its bid was successively extended to the following dates: November 17, 1972; December 1, 1972; December 31, 1972; January 15, 1973; January 25, 1973; and January 31, 1973.

520-840 O—73——8

On the day of our decision of January 31, NAVELEX placed a call to RFC's Washington Office to request a 30-day extension and since the firm's representative was unavailable, a message requesting such extension was left for him. The record before us does not show that RFC expressly granted such extension. Instead, its representatives visited NAVELEX on February 5, 1973, and inquired as to what action the Navy intended to take in view of our decision sustaining the protest. RFC was advised that Navy intended to award a contract. The record also indicates that at the February 5 meeting it was RFC's position that its bid had expired on January 31, 1973, that it would not be extended beyond that date and that the bid could no longer be accepted.

The NAVELEX letter states that, pursuant to the decision of January 31, it prepared to award a contract to RFC and requested funds from the cognizant comptroller organization in the amount of the original bid by RFC. As a result of interim reprogramming actions, funds in that amount were not immediately available but were made available on February 28, the date the contract was executed. While it was understood that RFC believed that an award after January 31 did not result in a binding contract, NAVELEX has taken the position that in submitting the protest to this Office for resolution RFC impliedly granted a bid extension for the period of time necessary to implement a decision which is favorable to the protestor. It is suggested that any other result would make a sham of the protest procedure.

We have taken the position that the protest of a procurement to this Office within the offeror's acceptance period could be viewed as continuing the protestor's offer in being, pending disposition of the protest (50 Comp. Gen. 357 (1970)) and, if proper, for a reasonable time thereafter, even without an express extension of the bid. As a general proposition we believe this position is essentially sound since a bidder's entry of a protest would be meaningless if his bid were allowed to expire on the following day. B–154236, June 26, 1964. However, it is our opinion that the period for which such an extension should be considered binding upon the protesting bidder must be decided on the basis of all of the circumstances involved.

An award may be made to a protestor who indicates an intent to keep his bid open, by virtue of his timely filing of a protest or by actual bid extensions or by both of such measures. However, circumstances which dictate the time required for a decision and its fulfillment cannot always be predicted with any certainty when the protest is filed. When that time is long, changes in conditions may cause the protestor to terminate an offer which was being continued in effect by

reason of his protest or to cease granting extensions beyond the original acceptance period.

In the present case, RFC expressly granted extensions of its bid for more than 3 months beyond the original 60-day acceptance period. The last two extensions, for 10 and 6 days, respectively, indicated that time was becoming critical. From the record, we are unable to find any affirmative evidence of an intent by RFC to extend its offer beyond January 31. In its letter to NAVELEX of March 14, RFC explained in detail the changes in production and manufacturing economics surrounding its bid which would result in a loss contract to RFC if an award was accepted at the bid price. These contentions have not been disputed by the Navy.

Accordingly, in view of the particular circumstances of this case, we conclude that the RFC offer was not effectively extended beyond January 31, contrary to the firm's wishes, solely by virtue of the protest filed with this Office. It is therefore our opinion that the attempt on February 28 to award a valid contract to RFC on the basis of its original bid price was ineffective.

[B-177184]

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

The low proposal to furnish occupational and environmental health support services at the Manned Spacecraft Center, Houston, Texas, in which the offeror promised the work would be done but made no creditable demonstration of how it would be accomplished contained weaknesses of such magnitude and nature so that the offer was not within the competitive range for the procurement and, therefore, conducting the written or oral discussions required by NASA Procurement Regulation 3.805–1(a), or definitive negotiation, would not be meaningful or advantageous, since the proposal was so materially defective that it could not be made acceptable without major revisions. Furthermore, the solicitation did not provide for minority-owned business preference; the low offeror was not nonresponsible for reasons of capacity to require referral to the Small Business Administration; the Source Evaluation Board was knowledgeable of requirements; and the protest against a solicitation impropriety was not timely filed.

To the Space Center Medical Associates, May 23, 1973:

We refer to your telefax of October 4, 1972, and subsequent correspondence concerning your protest under request for proposals (RFP) 9–BB42–78–2–16P, issued by the National Aeronautics and Space Administration (NASA) on April 6, 1972, for the furnishing of occupational medicine and environmental health support services at the Manned Spacecraft Center (MSC), Houston, Texas.

You maintain that you should have been considered in the competitive range for the procurement since you submitted the lowest cost proposal for the procurement and you are a small, minority-

owned business with demonstrated ability to do the work; that the Chairman of NASA's Source Evaluation Board (SEB) was not sufficiently expert to evaluate your proposal and was biased in favor of the incumbent; and that the RFP requirement for an offeror to state whether his key personnel were committed in writing to accept employment if the offeror obtained the contract was prejudicial to your concern.

Five major evaluation criteria for the requirement were set forth in the RFP in order of relative importance as follows:

Most Important—Operating Plan and Key Personnel
Important—Recruitment and Staffing
Less Important—Corporate Capabilities, and Organization and Management

Man-years requirements and the areas of responsibility for the services were also described, as follows:

Occupational Medicine Clinic	30
Manned Test Support	11
Cardiopulmonary Laboratory	5
Industrial Hygiene	5
Environmental Health Laboratory	3
Radiological Health/Space Radiation Dosimetry	6
Spacecraft Sanitation	6
	66

Further, the RFP presented an outline which included the following factors to be covered in a proposal to allow the SEB to determine the proposer's understanding of the requirements:

1. *Operating Plan*

a. Describe the * * * managerial, administrative, or procedural factors within your operational plan for each area of responsibility.

2. *Key personnel*

a. The Source Evaluation Board will evaluate the quality and pertinence of the background and experience of the key personnel you propose to assign to manage the work of this contract. Resumes will be submitted * * * for * * * positions that you consider key to this effort.

Information should include at least the following:

* * * * * * *

State whether each key person * * * is committed to accept assignment if your company obtains this contract * * *.

3. *Recruitment and Staffing*

a. Describe recruitment and employment methods your company will use to man the effort * * *.

b. Discuss the availability of personnel required for this effort and the means by which the individual will be obtained.

* * * * * * *

4. *Corporate/Company Capabilities*

a. Related experience
b. Availability of Resources

5. *Organization and Management*

a. Organization

Submit an organization chart which shows the organization you propose to establish at MSC.

* * * * * * *

b. Management

* * * * * * *

Proposals were received from your association and Kelsey-Seybold Clinic (KSC) by the closing date set for receipt of proposals, May 10, 1972. The contracting officer reports the results of the SEB evaluation of your proposal in pertinent part, as follows:

* * * No logical plans were submitted for conduct of the Cardiopulmonary Laboratory or Manned Test Support operations. Changes in the Spacecraft Sanitation program shown in the RFP were completely ignored in their proposal with the general comment, "This is an on-going program in which SCMA will pick up familiarity and further the effort." Managerial factors lacked substance, reporting policies and procedures were not clearly identified, and cross-training provisions were not detailed. In summary, the SCMA proposal contained promises that the work would be done but was devoid of creditable demonstration of how the proposer planned to provide the required services.

* * * The SCMA proposal was submitted with none of the required commitments, other than the part-time services of the two officers of the company and their controller. SCMA proposed seven incumbent key personnel in the Environmental Health area but at significantly lower salaries thus posing a question of retention. Not one complete reference was submitted for any key personnel as required in the RFP. Addresses were incomplete or incorrect which made it impossible for the SEB to contact these references. The SCMA response did not propose people to fill all key positions. Absent were two and one-half staff physicians. In addition, the proposed project manager and deputy project manager were considered unacceptable to the SEB as shown in the Source Evaluation Board Report. This would further impact the lack of coverage in key personnel areas by increasing the physician vacancies to four and one-half. * * *

The SCMA recruitment and staffing plan was rated "unsatisfactory" since it was not clearly defined and only "anticipated" that the incumbent key personnel and support staff could be retained. The RFP listed 66 positions identified by title. SCMA left 16 of these, including the two and one-half critical physician spaces, unfilled with no assurance that personnel would be available at the start of the contract. Failure of SCMA to provide these physicians would severely limit the Manned Test program and Clinic operations. There was no backup plan presented to cover these 16 positions and the SCMA capability for interim coverage is virtually non-existent.

Recruitment methods are not described for nonmedical professionals, thus making the proposal unclear in this area. Additional personnel called for in Spacecraft Sanitation were not recognized in the recruitment plan or provided for in the staffing requirements.

Because of this evaluation NASA advised you, by letter of September 21, 1972, that your proposal contained weaknesses of such magnitude and nature that neither written or oral discussions or definitive negotiations would be meaningful or advantageous.

NASA Procurement Regulation 3.805–1(a) requires that after receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors within a competitive range, price and other factors considered. We have also held that the determination of competitive range is primarily a matter of administrative discretion which will not be questioned absent a clear showing of arbitrary abuse of discretion. B–166052, May 20, 1969.

Based on our review, we cannot conclude that NASA arbitrarily determined that your proposal contained weaknesses of such magnitude that it was not within the competitive range for the procurement, notwithstanding the slightly lower estimated cost (relative to KSC's proposed cost) which you proposed to do the work. Nor can we question NASA's position that your proposal, while promising that all work aims of the contract would be accomplished, did not show how you planned to provide services for the Cardiopulmonary laboratory, the Manned Test Support Operations, and the Spacecraft Sanitation program.

Informational deficiencies may properly be considered in determining whether a proposal is so materially deficient that it could not be made acceptable without major revisions, and where a proposal is so materially deficient that it could not be made acceptable without major revisions, there is no requirement that discussions be conducted with the offeror. B-176294, October 27, 1972. The present record does not indicate that minor revisions in the above areas would have been sufficient to have placed your proposal within the competitive range or that the required time frame was sufficient to permit the necessary corrections, even if we were to asume that it should have been considered acceptable in all other areas.

With respect to your allegation that NASA did not give sufficient weight to the status of your company as a minority-owned concern, the contracting officer points out that this was not a minority business enterprise procurement, and therefore no preference could be given your company because it is minority-owned. We must agree with NASA's position.

Concerning your allegation that NASA's evaluation of your proposal amounted to a finding that your concern lacked the capacity to do the work and that NASA should have therefore submitted its negative findings to the Small Business Administration (SBA) for that Administration's review, NASA states that its finding related to a decision that your proposal was not within the competitive range because of informational deficiencies, rather than a finding that your firm lacked the capacity to do the work. We note, in this connection, that you were rated "good" in corporate capabilities, "excellent" in organization and management, and "excellent" in your related experience in occupational medicine. On this record, we must conclude that NASA's evaluation of your proposal did not constitute a determination that your firm was nonresponsible for reasons of capacity and therefore it was not required to have referred the question of your capacity to SBA.

Concerning your position that the Chairman of the SEB was not sufficiently expert in occupational medicine to evaluate proposals,

NASA states that the SEB chairman has a comprehensive knowledge of all areas of MSC's requirements in Occupational Medicine and Environmental Health Support Services; that he is a Diplomate of the American Board of Preventive Medicine with extensive training in Aerospace Medicine, Occupational Medicine, and Public Health; that he has filled many important management positions within NASA over the years and is currently responsible for the management of the Occupational Medicine Program at MSC; and that these factors show that the Chairman was competent to judge proposals. It therefore does not appear that NASA's selection of the person concerned for the SEB constituted an abuse of the broad administrative discretion vested in the agencies in such matters.

Regarding your allegation that the requirement in the Key Personnel Resume for offerors to state whether their key personnel were committed in writing to employment under the contract was prejudicial to your concern, we note that you did not formally protest the requirement before you submitted your proposal. In this connection, section 20.2(a) of our Interim Bid Protest Procedures and Standards, as set forth in Title 4 of the Code of Federal Regulations, requires that protests against alleged improprieties in any type of solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to such time for consideration by this Office. In view of the foregoing, your protest on this aspect of the RFP is considered to be untimely.

You also allege that the SEB improperly evaluated KSC's proposal in the key personnel category by concluding that KSC could absorb all key personnel currently working under contract into its clinic in Houston (assuming that KSC should not be awarded the contract), and that KSC therefore offered prospective employees an incentive to accept employment and remain with the company. You question whether KSC has actually absorbed personnel affected by reductions in force.

Our review of the SEB's report on KSC's proposal in the key personnel area shows that KSC received an excellent rating in that area largely because the clinic had all key positions filled and committed to the program in writing at specific salaries. Consequently, we cannot conclude that KSC's score in this area primarily resulted from the alleged ability of KSC to recruit and retain personnel as you suggest.

For the reasons set forth above, your protest must be denied.

[B-177542]

Contracts—Cost Plus—Evaluation Factors—"Realism" of Costs and Technical Approach

The fact that the negotiations pursuant to 10 U.S.C. 2304(a)(11), which contemplated a cost-plus-fixed-fee contract (CPFF) for systems engineering and research analysis investigation to develop a technical interface plan in support of the General and Amphibious Military Operations Program at Fort Monmouth, were limited to price on the basis technical discussions would compromise proposals through transfusion of ideas, methology, and concepts, and the most advantageous CPFF proposal was determined on evaluated rather than proposed costs, does not reflect adversely on the award to the offeror who received the highest technical rating and offered the only realistic, although highest, cost since the written or oral discussion prescribed in 10 U.S.C. 2304(g) is required only when there is an opportunity for meaningful discussion and when discussion will not result in preferential treatment or disclose one offeror's innovative solution to another.

To Braddock, Dunn and McDonald, Inc., May 23, 1973:

Reference is made to your letter dated April 2, 1973, and prior correspondence, protesting against an award to another firm under request for proposals (RFP) No. DAAB07-72-R-0469, issued June 30, 1972, by the United States Army Electronics Command, Fort Monmouth, New Jersey.

The solicitation was for systems engineering and research analysis investigation to develop a technical interface plan in support of the General and Amphibious Military Operations Program (GAMO). The procurement called for approximately 6 man-years of labor during a 12-month period and a cost-plus-fixed-fee contract was contemplated. The procurement was negotiated pursuant to 10 U.S. Code 2304(a)(11), which authorizes negotiation of a contract where experimental, developmental or research work is involved. Braddock, Dunn and McDonald, Incorporated (BDM) was one of three firms who submitted an acceptable proposal. Although cost negotiations were held with each offeror who submitted an acceptable proposal, no technical negotiations were held. Logicom, Incorporated (Logicom) received the highest technical rating and was awarded a contract, although its negotiated cost proposal was highest of the three technically acceptable offerors.

The RFP included the following provision relative to the basis for award:

BASIS FOR AWARD

Any award to be made will be based on the best over-all proposal with appropriate consideration given to Technical Proposal, Past Performance/Management, and Cost Consideration in that order of importance.

Of the three factors set forth above, Technical Proposal is by far the most important, and is of greater weight than the other two factors combined.

Of the last two factors, Past Performance/Management bears the greater weight.

To receive consideration for award, a rating of no less than "acceptable" must be achieved in each of the three factors.

You contend that since BDM's technical proposal was acceptable and its cost proposal was substantially lower than Logicom's, no award should have been made without first conducting technical negotiations with BDM. In this connection, you contend that based upon informal discussions with agency personnel subsequent to award, it is evident that some areas of your technical proposal were misinterpreted and that negotiations would have clarified your intent and improved your technical score. Furthermore, you contend that the RFP provisions relative to "Statement of Work," "Basis for Award," and the listed technical factors and subfactors, provided the basis for technical discussions. Therefore, you contend that the agency's position that technical discussions were not practicable because of the possibility of transfusion of another offeror's methodology indicates that either the above RFP provisions were inadequate for evaluation purposes or the proposals were evaluated against a revised Statement of Work. Finally, you contend that your cost proposal is realistic and, therefore, award to BDM, either on the basis of the present technical evaluation or after technical discussions, would result in the most advantageous contract.

It is reported, and confirmed in the file furnished our Office, that prior to the receipt of proposals an evaluation plan was developed for application by each of the evaluators from each of the services and the two agencies participating in the GAMO program. Under this plan each evaluator was required to evaluate the proposals on the basis of each of the six technical factors listed in the RFP, describe the strengths and weaknesses in each of the six areas, and assign a raw score within a stated range. The raw score was then multiplied by the weight assigned to the six areas for the total weighted score. Based upon this analysis, you received a technical merit rating of 68, compared to 85 for Logicom and 82 for Computer Sciences Corporation (the third firm in the competitive range).

It was the contracting officer's decision, after discussion with technical personnel, that negotiations should be limited to price because it was felt that technical discussions would have compromised the proposals of the offerors through transfusion of ideas, methodology, and concepts. In this connection, the GAMO Management Office advised the contracting officer that since there was no predetermined approach or methodology for accomplishment of the task of developing the technical interface concepts, the evaluation involved comparing the methodologies proposed by the various offerors. Therefore, it was felt that any effective technical negotiations would result in a discussion of com-

parative weaknessses and strengths and possibly divulge an offeror's approach. For example, it is pointed out that it became obvious during evaluation that technical interface concepts could be developed without the development of an extensive cost-effectiveness model as proposed by you. However, it was felt that discussion of this point with you would likely provide you information gained from review of other proposals. Furthermore, it is reported that it became obvious that your approach placed a major dependence upon the GAMO Management Office for definition of methodology, and it was believed that discussion of this weakness would reveal that other offerors indicated that they would develop the methodology. It is also reported that the same rationale applied to your commitment of personnel which was not considered adequate, but the discussion of which would have alerted you to the approach of other offerors.

Furthermore, a cost analysis of each of the acceptable proposals was conducted and only Logicom was considered realistic. It is reported that your proposal was considered unrealistic primarily because it was felt that you understated the composite labor. When adjustment was made for this and other deficiencies, your evaluated costs exceeded the evaluated costs of both Logicom and CSC. Therefore, it was concluded that you would be in line for award only if both Logicom and CSC were rejected.

The requirement that written or oral discussions be held with all offerors within the competitive range is found in 10 U.S.C. 2304(g), and it is our view that such negotiations should be conducted under competitive procedures to the extent practical and that they be meaningful in order that competition is maximized. However, in 51 Comp. Gen. 621 (1972), we recognized that the statute should not be interpreted in a manner which discriminates against or gives preferential treatment to a competitor and that the disclosure to other offerors of one offeror's innovative solution to a problem is unfair. Thus, where there is a research and development procurement and the offeror's independent approach to solving a problem is the essence of the procurement, technical negotiations must be curtailed to the extent necessary to avoid technical "transfusion."

The instant procurement calls for a research and development effort, requiring the development of a technical interface concept plan. The statement of the evaluation criteria (particularly "understanding the work required, the problems involved, and proposed approach to fulfillment of contract") and the "*Engineering Approach*" (completeness, understanding of problems, and feasibility of approach) make it clear that the specifications are primarily performance oriented in order to obtain the respective offerors' independent ap-

proaches in attaining the performance desired. Therefore, it is clear in our opinion that the failure to engage in technical discussions resulted not from a lack of adequate standards for evaluation in the RFP, but rather from the fact that the agency was interested in the offerors' independent approaches and out of concern that discussions would result in technical transfusion.

While we view the decision to conduct no technical discussions in a given case as a matter requiring close scrutiny, we believe that the validity of such decision must be determined in light of all the circumstances and with regard to whether there is an opportunity for such discussions to be meaningful. Although your technical proposal had been determined acceptable, we note that it received a score of only 68 as compared to 85 and 82 for the other acceptable proposals. Also, the Chairman of GAMO Interface Coordinating Committee stated in a memorandum to the Chief, JCS Executive Agent's Management Office—GAMO, that your proposal should be considered only "if Logicom and Computer Sciences Corp. are found to be unacceptable by the Contracting Officer for reasons other than technical." In these circumstances, and in view of the fact that the list of deficiencies furnished our Office indicate that your proposal was considered as evidencing a lack of understanding of the problem and was weak in approach to the problem based upon comparison with the two higher rated proposals, we believe that inclusion of your proposal in the competitive range was of doubtful validity. Moreover, while we are of the view that certain deficiencies or clarifications could have been discussed with you, we are also of the view that such discussions would not have been meaningful insofar as improving your position in view of the restraints on such discussions necessitated by the risk of technical transfusion and in view of your marginally acceptable proposal. In this connection, as noted above, the major weaknesses in your proposal were deficiencies only in comparison with relative strengths in other proposals. As stated in the above cited case, we believe it would be unfair to "help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal." In these circumstances, we do not believe the failure to conduct technical discussions with your firm provides our Office a basis for objecting to the award as made. 52 Comp. Gen. 198 (1972).

Furthermore, the fact that your cost proposal was the lowest does not, in our opinion, require the conclusion, as you contend, that it was to the Government's advantage to either conduct technical discussions

with your firm or award you the contract on the basis of your technical proposal. In view of the fact that the contract will be performed on a cost-plus-fixed-fee basis, evaluated costs rather than proposed costs provide a sounder basis for determining the most advantageous proposal. Since the Logicom cost proposal was determined the most realistic as provided in the RFP, there is no basis for our Office to agree with your contention.

Accordingly, your protest is denied.

[B-177118]

Contracts—Labor Stipulations—Nondiscrimination—"Affirmative Action Programs"—Commitment Requirement

Although the Federal Government is not a party to the contract awarded by the recipient of a construction grant from the Department of Health, Education, and Welfare (HEW) under the Hill-Burton Act (42 U.S.C. 291 *et seq.*), HEW had the responsibility of determining whether the conditions of the grant had been met, and review of the records supports the advice of HEW to the grantee that the low bidder on the hospital addition solicited failed to meet competive bidding requirements because certification of the part I affirmative action requirements for equal employment opportunity only committed the bidder to the local, Cleveland Plan, and because the bidder had not committed itself to the part II affirmative action requirements of the solicitation, which involved trades not covered by part I, by merely signing the bid, since nothing in the bid would bind the bidder to conform to the part II criteria, and no independent commitment to that part had been submitted by the bidder.

To Arent, Fox, Kintner, Plotkin & Kahn, May 24, 1973:

This is in reply to your letter of September 27, 1972, and subsequent correspondence, protesting on behalf of W. M. Passalacqua Builders, Incorporated, the rejection of its bid by St. Luke's Hospital, Cleveland, Ohio, a recipient of a construction grant from the Department of Health, Education, and Welfare (HEW) under the Hill-Burton Act, 42 U.S. Code 291 *et seq.*

The solicitation, for the "St. Luke's Hospital Addition, Cleveland, Ohio, Project No. Ohio 391," contained a 27-page section entitled BID CONDITIONS—AFFIRMATIVE ACTION REQUIREMENTS—EQUAL EMPLOYMENT OPPORTUNITY, which specified that its provisions were applicable to Federal and federally assisted contracts in the Cleveland area. This section required bidders to commit themselves to either part I or part II of the bid conditions for each trade to be used on the project. Part I involved a commitment to the local affirmative action plan known as the Cleveland Plan. Part II involved a commitment to various goals and specific affirmative action steps set forth in the IFB. Bidders were required to complete and sign certificates for both part I and part II to establish the required commitments. In lieu of signing the part II certification bidders could submit their own affirmative action plan.

At bid opening on August 1, 1972, the Passalacqua bid was found to be low. It is reported that Passalacqua's bid, as originally submitted, did not contain any affirmative action certification. Our file indicates that after the first bid was opened, but before the bid price was announced, the project architect, who was opening the bids, noted that the bid did not contain the required affirmative action certifications and then asked other bidders present if they had also failed to comply with the affirmative action provisions. Four of the eight bidders, including Passalacqua, so indicated. The architect then allowed the four to complete the certifications, without objection from any of the bidders. Passalacqua signed the part I certification, but did not complete the part II certification. Passalacqua asserts that it did not complete the second certification because its representative was told at the time that it need not do so if it were signatory to the Cleveland Plan. HEW reports, however, that this is "greatly in dispute" since the architect denies that he gave any such advice and other personnel present do not recall having heard such advice being given. The hospital, through the Ohio State Department of Health, subsequently requested HEW's opinion so as to the responsiveness of Passalacqua's bid, and was informed that neither the Passalacqua bid nor the next low bid was responsive to the equal employment opportunity requirements of the solicitation. Award was made to the third low bidder (Albert M. Higley Company) on September 27, 1972.

Although we have not been requested to decide if the bid opening procedures were appropriate, we do not believe that, in the context of this procurement, the procedures were improper. In any event, we note that Higley was not one of the four bidders which were permitted to complete the certifications in the bid opening room. Thus, the only significant issue raised in this protest is whether Passalacqua was bound to the material provisions of the solicitation.

You assert that Passalacqua bound itself to all provisions of the IFB when it signed the bid, and that the requirement for signing the part II certification was superfluous. You claim that Passalacqua was not required to sign the part II certification because the Passalacqua bid must be read as a commitment to use only trades covered by the Cleveland Plan. You further assert that the equal opportunity clause of the solicitation obligated the bidder to comply with all regulations and orders of the Secretary of Labor, and that by signing the bid Passalacqua became bound to comply with these requirements.

At the outset, we point out that the Federal Government is not a party to the contract awarded in this case. It is the responsibility of HEW, however, to determine whether the conditions of the grant, including the requirement that competitive bidding be used in the award-

ing of contracts, have been met. We have recognized that under the Hill-Burton Act, it is within the discretion of that Department to determine if withholding of grant funds is required in the event it finds non-adherence to the grant conditions. B–168784, April 13, 1970; B–166366, May 14, 1969. Thus, our role in this case is limited to a review of the facts and circumstances to determine if HEW correctly advised the grantee that competitive bidding requirements compelled the rejection of Passalacqua's bid.

We have consistently held that the failure of a bidder to commit itself, prior to bid opening, to affirmative action requirements of a solicitation requires rejection of the bid. 50 Comp. Gen. 844 (1971); B–176487, September 28, 1972; B–176328, November 8, 1972. We have also recognized that a bidder could commit itself to such requirements in a manner other than that specified in the solicitation, and that a bidder's failure to meet the literal requirements of an IFB could be waived so long as it was otherwise fully bound to the material affirmative action provisions. B–176260, August 2, 1972; 51 Comp. Gen. 329 (1971). However, we have not held that a bidder commits itself to affirmative action requirements of a solicitation merely by signing the bid when the IFB requires something more. *See* B–176328, *supra; Northeast Construction Co.* v. *Romney*, Nos. 71–1891 and 71–1893, March 6, 1973 (D.C. Cir. 1973).

Here we are unable to see how Passalacqua was committed to all of the solicitation's affirmative action requirements. There is nothing in the bid which would bind Passalacqua in any way to comply with the part II requirements for trades not covered by the Cleveland Plan. The part II certification was not signed, a separate affirmative action plan conforming to the part II criteria was not submitted, and there was no other statement or document submitted with the bid which committed Passalacqua to the part II provisions. Thus, this case is distinguishable from those in which we found sufficient commitments from bidders who did not strictly adhere to solicitation requirements. For example, in B–176260, *supra*, we held that a bidder's failure to return with its bid the affirmative action plan page of the IFB was not material since it submitted a properly executed bidder's agreement by which it agreed to comply with the plan provisions. *See also* B–177846, March 27, 1973, in which we held that the bidder's failure to properly complete an affirmative action provision was cured by the submission of the bidder's own affirmative action plan which met the requirements of the solicitation.

We do not agree with your contention that Passalacqua was not required to commit itself to part II because it did not intend to use trades not covered by the Cleveland Plan on the project. We have held

that affirmative action requirements of a solicitation may not be regarded as material if they relate to trades which clearly will not be used to perform the work called for by the invitation. B–177509, April 13, 1973. However, in this case HEW has informed us that both operating engineers and sheetmetal workers, two trades not covered by the Cleveland Plan, must be utilized to perform the contract. You have offered no rebuttal with respect to HEW's position on this point. *See* B–176487, *supra.* You state, however, that these trades, although not covered by the plan at the time of bid submission, might become part of the plan and that the part I certification covers this contingency. Paragraph (f) of the certification states:

> (f) with regard to any trade under this prime contract now proposed (paragraph (b) of this certification) to be covered by the Cleveland Plan, and with regard to any trade not now proposed to be used on the project, if, in the future, work in such trade on this project is in fact being performed by a contractor or subcontractor who is not a participant, with a labor organization for which there are OFCC-approved minority utilization goals, in the Cleveland Plan or other affirmative action plan acceptable to the Director of the Office of Federal Contract Compliance, such contractor or subcontractor shall be deemed committed to an affirmative action plan meeting the criteria of Part II of these "Bid Conditions."

The above provision is applicable to trades which might no longer be covered by an approved affirmative action plan and to trades "not now proposed to be used on the project" which would not be covered by an approved plan. You claim that at the time of bid submission Passalacqua did not propose to use any trade not covered by the Cleveland Plan. We think the record suggests otherwise.

As indicated above, HEW states that the work called for by the solicitation clearly requires the use of two trades not covered by the Cleveland Plan, sheetmetal workers and operating engineers. In this regard, we note that the specifications contain a specific section dealing with sheetmetal work. We also note that Passalacqua, while signing the part I certifications, did not properly complete the certification to indicate what trades it did propose to use and which of those trades were and were not covered by the Cleveland Plan. Furthermore, the record shows that Passalacqua has claimed its failure to sign the part II certification was due to advice received from the project architect and not because of its intention not to use trades covered by the part II certification. Finally, you admit, in your letter of October 4, 1972, that "some work normally performed by trades that are not part of the Cleveland Plan is included in the job," but state that these trades "might become part of the plan * * * or subcontractors might be able to work around" them. This, of course, does not mean that Passalacqua did not plan to use such trades. Under these circumstances, we do not believe that the Passalacqua bid can be read as a commitment to use only trades covered by the Cleveland Plan.

We also do not agree that because the equal opportunity clause of the solicitation obligated the bidder to comply with all orders and regulations of the Secretary of Labor that Passalacqua would be bound to the part II requirements by its bid signature. It is well established that a bidder is not bound to the goals, timetables and affirmative action steps for trades not covered by a local plan unless there is a specific, independent commitment to such requirements. 50 Comp. Gen. 844, *supra; Northeast Construction Co.* v. *Romney*, *supra.*

Accordingly, we believe that HEW's advice to the grantee that the Passalacqua bid should be rejected was not contrary to Federal competitive bidding principles.

[B-178114]

Foreign Differentials and Overseas Allowances—Separate Maintenance Allowance—Divorced Employee Jointly Responsible for Children

The separate maintenance allowance (SMA) authorized in 5 U.S.C. 5924 to be paid to an employee when he is assigned to a post in a foreign area that is dangerous, unhealthful, or where living conditions are adverse in order to enable him to meet the additional expense of maintaining his wife and/or dependents elsewhere, may be paid to an employee whose minor children incident to a divorce decree have been placed jointly in his care and his former spouse since the children are his "dependents" within the meaning of the term as defined in section 040m of the Standardized Regulations (Government Civilians, Foreign Areas). However, an employee must establish his child or children would have resided with him but for the circumstances warranting payment of SMA, and an affidavit to this effect from an employee's former spouse is sufficient to establish entitlement to SMA.

To the Secretary of State, May 25, 1973:

Reference is made to a letter from Mr. James F. Campbell, Assistant Administrator for Program and Management Services, Agency for International Development (AID), dated February 26, 1973, requesting a decision as to whether certain AID employees are entitled to a separate maintenance allowance (SMA), where pursuant to a divorce decree, joint custody of the minor children is vested in both parents. The factual circumstances of each of four AID employees who have requested SMA are summarized as follows:

Mr. Fred C. Hagel was transferred to Vietnam from USAID/Magadiscio in December 1966 and began receiving SMA. His family moved from the United States to the Taipei, Taiwan safehaven in June 1967 and the SMA was continued. During the summer of 1969 Mr. and Mrs. Hagel returned to the United States and entered into a separation agreement on August 26, 1969, which was followed by a divorce decree on October 22, 1970, awarding both parties joint custody and control of their minor son. The SMA was terminated retroactively to the

date of the separation agreement; however, the employee claims he was entitled to the allowance for his minor son until he departed Vietnam on a mid-tour transfer to Brazil on March 23, 1971. It is noted that the employee's son did not join him at his new post.

Mr. Alwin V. Miller received a final divorce decree on June 30, 1969, which ordered that the minor children of the marriage were to remain under custody of their parents. His minor son resided with him at his post in Monrovia after the divorce until he was transferred to Vietnam in December 1970. The child then joined his mother who has provided the employee with a signed affidavit that when allowed by the Government, the child has her permission to reside with his father again for an indefinite period of time. Mr. Miller claims he is entitled to SMA for his son for the period he has been stationed in Vietnam.

Mr. A. Maurice Pare received a final divorce decree in December 1968 which awarded the parents joint custody of their four minor children. The employee was transferred to Vietnam in June 1969. He claims he is entitled to SMA for his minor children residing with their mother, and has submitted an affidavit signed by her granting permission for the children to live with the employee for at least a 1 year period.

Mr. William E. Wanamaker was transferred to Vietnam in August 1967 and began receiving SMA. He arranged for his wife and family to move to the Manila safehaven in August 1968. The employee and his family returned to the United States on home leave in November 1969 where the family remained when the employee returned to the post. Mr. Wanamaker and his wife entered into a property settlement agreement in September 1970 and SMA was terminated. Subsequently, the employee received an interlocutory divorce decree in October 1970 which awarded the husband and wife joint custody of the minor children. Mr. Wanamaker claims he is entitled to SMA for his children during the period he has been in Vietnam, since his divorce decree.

In recent years a new and innovative concept has emerged in awarding custody of a child upon separation or divorce of the parents. The essence of the concept is joint legal custody of the child and joint resolution of all custodial issues. This concept, based as it is on the agreement of the parents, is entirely different from conventional exclusive and divided or partial custody. Under the joint custody arrangement, upon separation or divorce, the parents agree that neither of them shall have an exclusive right to custody and that the best interest of the child is paramount. They accept the responsibility to mutually agree on all facets of the child's upbringing such as where the child is to live, with whom and for what duration. Should an impasse develop the parents agree to arbitrate the question. This flexible approach con-

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cerning the difficult question of child custody has found acceptance in many courts which have increasingly begun to award joint custody. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 Yale L. J. 1197 (1964).

Inasmuch as both divorced or separated parents remain in the same legal relationship to the child with respect to custody as before the divorce or separation, a question is raised as to whether entitlement of an employee-parent, with joint custody of a child, to allowances and other benefits under Government regulations would also remain unchanged. Specifically the problem presented by this case is whether the above-described USAID employees who are or were stationed in Vietnam, the only post where SMA is currently authorized, are entitled to SMA. The USAID Mission to Vietnam has refused to pay separate maintenance allowances in joint custody cases pending authorization by USAID Washington. This authorization is being withheld until a decision can be secured from our Office.

Separate maintenance allowances are authorized by 5 U.S. Code 5924 which provides in pertinent part:

§ 5924. Cost-of-living allowances

The following cost-of-living allowances may be granted, when applicable, to an employee in a foreign area:

* * * * * * *

(3) A separate maintenance allowance to assist an employee who is compelled, because of dangerous, notably unhealthful, or excessively adverse living conditions at his post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining, elsewhere than at the post, his wife or his dependents, or both.

The implementing regulations for this statute are in subchapter 260 of the Standardized Regulations (Government Civilians, Foreign Areas). Section 262.3 outlines the conditions not warranting a separate maintenance allowance which includes the situation where the child's legal custody is vested wholly, or in part, in a person other than the employee. We do not think the terms of this provision covers joint custody inasmuch as joint custody is an undivided equal right to custody in both parents which is the same right the parents enjoyed before the divorce, as distinguished from a divided or a partial right to custody in a particular parent. *See* 92 A. L. R. 2d 695 (1963) and 98 A. L. R. 2d 926 (1964).

Section 261.1(b) of the regulations states that "dependents," with certain exceptions not here applicable, for the purpose of the above-quoted statute are members of the family as set forth in section 040m of the Standardized Regulations, which section provides in pertinent part as follows:

m. *"Family"* means one or more of the following relatives of an employee residing at his post, or who would normally reside with him at the post except for the existence of circumstances cited in section 262.1 warranting the grant of a

separate maintenance allowance, but who does not receive from the Government an allowance similar to that granted to the employee and who is not deemed to be a dependent or a member of the family of another employee for the purpose of determining the amount of a similar allowance:

* * * * * * *

(2) Children who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support. The term shall include, in addition to natural offspring, step and adopted children and those under legal guardianship of the employee or the spouse when such children are expected to be under such legal guardianship at least until they reach 21 years of age and when dependent upon and normally residing with the guardian.

The above definition is sufficiently broad to include children whose custody, incident to a divorce decree, has been placed jointly in the employee and his former spouse. Therefore, provided that it could be reasonably established that such children would have resided with the employee at his post but for the circumstances warranting SMA, we would not be required to object to the payment of SMA to employees having joint custody of minor children. In our view an affidavit of the former spouse stating that the child would be residing with the employee at post were it not for the Government prohibition would ordinarily be sufficient to establish entitlement.

The cases described herein may be handled accordingly.

[B-178240]

Storage—Household Effects—Nontemporary

An employee who incident to reinstatement to a permant position at an isolated duty station in the continental United States within 1 year after separation by reduction-in-force action overseas places his household effects in nontemporary storage, although entitled to the benefits provided in 5 U.S.C. 5724a(c) as though he had been transferred in the interests of the Government without a break in service to the location of reemployment from the separation location, may not be reimbursed for the cost of the nontemporary storage occasioned by the isolated duty station assignment since this expense is specifically excluded by section 1.3a(7) of the Office of Management and Budget (OMB) Circular No. A-56, which implements 5 U.S.C. 5724a(c). However, pursuant to 5 U.S.C. 5724(a)(2), 60 days temporary storage, limited to the authorized weight prescribed by section 6, OMB Circular No. A-56, may be paid to the employee.

To W. W. Bahle, Department of the Army, May 25, 1973:

This refers to your letter of December 13, 1972, with enclosures, reference MRODC-F, forwarded here by the Per Diem, Travel and Transportation Allowance Committee on March 15, 1973, PDTATAC Control No. 73-9, requesting an advance decision as to the propriety to pay Mr. Guy Thornton $1,323 representing nontemporary storage of household goods and related costs while assigned to an isolated duty station under the circumstances related below.

The papers accompanying the claim show that Mr. Thornton was separated by reduction-in-force (RIF) action from his position with the Naval Facilities Engineering Command, Bangkok, Thailand, on

November 21, 1969, and returned to his home of record which was Memphis, Tennessee. On October 10, 1970, Mr. Thornton was reinstated with the Department of the Army as a Construction Representative, U.S. Army Engineer District, Omaha, with his duty station at Langdon, North Dakota. He reported for duty on or about October 12, 1970. His family remained in Memphis, Tennessee, until March 1, 1971, when they placed their household goods in nontemporary storage and joined Mr. Thornton in North Dakota. His household goods were in storage from April 29, 1971, to September 29, 1972.

The file was reviewed by the DOD Per Diem, Travel and Transportation Allowance Committee and a copy of its report dated September 21, 1972, was forwarded with your letter. After considering the applicable statute and regulations it was suggested that in view of the separation and placement within 1 year it was possible that the prohibition in the regulation on nontemporary storage of household goods may relate only to the period the individual was in a nonemployment status by reason of the RIF. The travel statutes and the implementing regulations in Office of Management and Budget Circular No. A–56 have reference to travel and transportation expenses and other allowances to civilian employees of the United States upon transfer of official station. The term "employee" is defined in section 1.2b of Circular No. A–56 to mean a civilian officer or employee of a department as defined therein. During the period Mr. Thornton was in a nonemployment status he could not be considered as an employee of the United States and accordingly the travel status would not be applicable to him. Hence we do not believe the regulation may be viewed as relating to the period Mr. Thornton was in a RIF status.

Section 5724a(c) of Title 5 of the U.S. Code reads:

> 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.

Section 1.3a(7) of Circular No. A–56 in implementation of 5 U.S.C. 5724a(c) reads:

> A former employee separated by reason of reduction in force or transfer of function who, within one year of the date of separation, is reemployed by a department for a nontemporary appointment effective on or after July 21, 1966, at a different permanent duty station from that where the separation occurred, may be allowed and paid the expenses and other allowances (excluding nontemporary storage when assigned to an isolated permanent duty station within the continental United States) in the same manner as though he had been transferred in the interest of the government to the permanent duty station where reem-

ployed, from the permanent duty station where separated, without a break in service, and subject to the eligibility limitations as prescribed in these regulations.

Paragraph C4101c of the Joint Travel Regulations (JTR), Volume 2, concerning nontemporary storage of household goods of a former employee affected by a RIF and who is reemployed provides in part that:

* * * In connection with reemployment after separation, nontemporary storage of household goods is not authorized when the employee is assigned to an isolated duty station within the continental United States.

Section 5724a(c) of Title 5 of the U.S. Code only allows reimbursement of expenses that are authorized by specific sections of Title 5 of the U.S. Code to an employee who is separated by reason of a RIF and is reemployed by a nontemporary appointment within 1 year after the date of separation. One of the referenced sections, section 5726(b), pertains to storage but only covers storage of household goods when an employee is assigned to a permanent duty station outside the continental United States. Since section 5726(c), the authority for nontemporary storage expenses of employees assigned to a permanent duty station at an isolated location in the continental United States, is not included as one of the sections to which section 5724a(c) applies, there is no basis under the law to reimburse employees in Mr. Thornton's circumstances for nontemporary storage.

Section 5724(a)(2) of Title 5 of the U.S. Code authorizes the expenses of transporting, packing, crating, temporarily storing, drayage, and unpacking household goods and personal effects not in excess of 11,000 pounds of an employee who is transferred. Mr. Thornton under that provision of law would be entitled to 60 days temporary storage of his household goods not to exceed the authorized weight limitation as provided in section 6 of Office of Management and Budget Circular No. A–56, implementing section 5724(a)(2) of Title 5 of the U.S. Code.

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

[B–177896]

Sales—Bids—Discarding All Bids—Price Acceptability—Late Bid Price Comparison

The discarding of all bids received under a sales invitation for the disposal of reels of used magnetic tape as being in the best interest of the Government because the prices received were unreasonable by comparison with the higher priced late bid opened by mistake and returned, and because the estimated quantity used in the invitation was excessive, was justified under the terms of the invitation and 40 U.S.C. 484(e)(2). While it was improper to open the late bid, consideration of the price offered in evaluating timely bids was not, as the pur-

pose of regulations concerning late bids is to protect the bidder against public disclosure where the bid is not eligible for consideration, and there is no prohibition against using, after bid opening, information received in a late bid for price comparison. Moreover, the reduction of reels offered for sale could result in a higher price per reel because of the smaller lot offered.

To Merritt L. Murry, May 30, 1973:

We refer to letter dated January 24, 1973, from your client, National Trend-In Corporation, and subsequent correspondence, protesting the rejection of all bids under sales invitation No. 3DPS-73-112, issued by Region 3, Property Management and Disposal Service, General Services Administration (GSA). The basic issue presented by the protest is whether the grounds for the discretionary action taken by the contracting officer constituted cogent or compelling reasons to support the rejection of all bids.

The invitation was sent to 16 prospective buyers requesting quotations for the purchase of approximately 300,000 reels of used magnetic tape. The figure was the estimated quantity to become available during the 1973 calendar year from the National Aeronautics and Space Administration (NASA). Item No. 3 of the invitation states that "The Government in no way guarantees this estimate [300,000 reels] and payment must be made on actual reels of tape delivered." The tape was offered on a sealed-bid, term-contract basis for the period January 1 through December 31, 1973. Quotations were required on a per-reel basis. The time and date of the bid opening was January 4, 1973, at 11 a.m. local time.

At the time specified, the two bids received were opened and recorded. National Trend-In Corporation's bid of $0.057 per reel was the high bid followed by that of Robert Work at $0.00757. During the afternoon of January 5, 1973, a late bid was received from DAK Enterprises of North Hollywood, California, in the amount of $0.165 per reel. The bid envelope was opened by mistake and was returned to DAK, stamped as having been received too late for consideration.

After considering the bids, the contracting officer determined that all bids should be rejected in the best interest of the Government. She stated that her decision was based upon 5 months of research of the surplus tape market. She discovered that the experience in other GSA regions had been that used magnetic tape should bring anywhere from 32 to 90 cents per reel.

On January 17, 1973, prior to the rejection of all bids, officials of GSA Region 3 met with officers of National Trend-In Corporation and its attorney at its request. GSA explained that the prices received were considered unreasonable and admitted that the late bid received from DAK had been opened through administrative error. It was further explained that the estimated quantity of 300,000 reels used in the invitation was excessive and that the then current estimate was

approximately 30,000 reels. At the conclusion of the meeting, National Trend-In and its attorney were advised that letters rejecting all bids would be mailed to the two responsive bidders and that, in view of the smaller quantities of tape than originally estimated, GSA did not anticipate selling the tape on a term-contract basis. The letter formally notifying National Trend-In of the rejection was received by National Trend-In on January 22, 1973. National Trend-In Corporation's letter dated January 24, 1973, formally protesting the rejection of its bid was received by our Office on January 29, 1973.

National Trend-In, in its letter of January 24, 1973, contends that the late bid by DAK was clearly invalid and should never have been opened and it concludes that:

> * * * GSA's decision resulted from the improper opening of DAK's invalid, late bid. GSA cannot cancel and reissue the same IFB once the bids were publicly opened and allow other bidders to have an improper advantage. So, rejecting all bids and reverting to the miscellaneous bid basis, GSA is attempting to do indirectly what it is forbidden to do directly; sell these tapes to one other than the highest responsive bidder. Such action is "detrimental to the Government's interest in maintaining the integrity of the competitive bidding system."

While it was clearly improper for the contracting officer to open the late bid, we cannot agree with your contention that the contracting officer acted improperly when she gave consideration to this late bid for the purpose of determining whether National Trend-In's timely bid represented a fair return to the Government.

We believe that the primary purpose of the regulations concerning late bids is to protect the bidder against public disclosure of the information contained therein where the bid is not eligible for consideration for award. B–173175, September 13, 1971. Furthermore, there is no prohibition against the use, after bid opening, of information received in a late bid for the purposes of price comparison. Although we believe that the fair market value of an item is best established through competition and not by the use of information of a speculative nature, we cannot conclude that such information should not be considered by the contracting officer in comparing prices. B–173175, August 11, 1971.

Paragraph 1 of the Special Conditions of the invitation provided in part that:

> * * * The Government reserves the right to reject any and all bids or to waive any informality in bids received, as the interests of the Government may require. * * *.

Also, 40 U.S. Code 484(e)(2) provides, with reference to the sale of surplus property, that the advertisement for bids shall be made on such terms and conditions as shall permit that full and free competition which is consistent with the value and nature of the property involved and that:

(C) award shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when it is in the public interest to do so.

While the offer submitted by National Trend-In seemed to be in line with prices received on sales of similar property in GSA Region 3, it was substantially lower than prices received in other areas. National Trend-In contends, however, that GSA should not have considered prices received by its other regions in its decision to reject all bids.

We agree with GSA's General Counsel's statement, in his letter of March 9, 1973, that "We do not believe that the prior sales action in Region 3 created a vested right in National Trend-In to continue receiving awards * * *." It has long been recognized that, in connection with the awarding of public contracts, no bidder acquires an absolute right to an award of public business. 26 Comp. Gen. 49 (1946). We do not believe that a valid determination of what is in the Government's best interest can be made by considering only the prior sales history in a limited geographic area. This is especially true since the substantially higher late bid was submitted by a firm outside Region 3. Consequently, we are of the opinion that the contracting officer was acting properly when she considered prices received outside the area in reaching her conclusion that the offers received were unreasonable.

Concerning the revised estimate of the number of tapes from 300,000 to 30,000, you state in your letter of April 23, 1973, that "By offering the same unit price for 30,000 reels as for 300,000 reels, Trend-In still remains the high responsive bidder and injures no otherwise responsive bidder." While that may be true, it does not preclude the possibility that a higher price per reel may be received where a smaller lot is offered for sale. Prior history supports such a possibility and National Trend-In acknowledges this in footnote (2) of its letter dated March 28, 1973. It may be that a readvertisement will not result in an increased price, but on the present record it seems clear that the contracting officer's action was fully justified and was taken in good faith and that it could not reasonably be considered arbitrary or capricious. B–159925, October 24, 1966.

For the reasons stated, we find no legal basis for objecting to the rejection of all bids and the protest is therefore denied.

[B–175633]

Bids—Omissions—Prices in Bid—Material Deviation

A bid on radio sets and receiver-transmitters that failed to insert a price or evidence "no charge" for first article testing and test reports, where the bidder did not have previous experience and the lack of space for the insert is not excusable, properly was rejected since the omission may not be waived as a

minor deviation, or corrected as a clerical error. The fact that the omitted price was intended to be $2,000 on a $14,000,000 contract, and that the relative standing of bidders would not be affected by waiver or correction of the omission is not for consideration since paragraph 2-405 of the Armed Services Procurement Regulation does not define waivable or correctible deficiencies only in terms of price impact and relative standing but requires that the deficiency have no or merely a negligible effect on quality, quantity, or delivery, and the first article testing was a critical necessity. Furthermore, the omission may not be corrected as a bid mistake as the bid does not establish what the corrected amount should be.

Contracts—Awards—Small Business Concerns—"Independently Owned and Operated" Test

The low bidder on the non-set-aside portion of a procurement for radio sets and receiver-transmitters, with 50 percent set aside for labor surplus area concerns, whose bid was signed by the same official as the bid submitted by the third low bidder who was negotiating to sell the low bidder the performance activity may not be given priority on the set-aside portion of the procurement since on the date of bid opening the low bidder was not a "going concern" as it had no place of business of its own, and although meeting the size limitation for a small business concern, it did not meet the "independently owned and operated" test required for a small business by Section 3 of the Small Business Act. Both firms having the same officials are affiliated through common management within the meaning of Section 121.3-2(a) of the SBA Size Standards Regulations, and the low bidder on the non-set-aside does not qualify for set-aside priority on the basis of a subsequent novation agreement.

Bidders—Qualifications—Manufacturer or Dealer—Determination

Whether the low bidder on the non-set-aside portion of a procurement with a 50 percent set aside for award to labor surplus area concerns who on the date of bid opening is negotiating to acquire the performance activity from a large business concern is eligible as a manufacturer or regular dealer ("going concern") for purposes of award under the Walsh-Healey Contracts Act (41 U.S.C. 35-45) is for determination initially by the contracting officer subject to review by the Department of Labor (ASPR 12-601, *et seq.*). To qualify as a manufacturer a firm newly entering into manufacturing activity must show before award that it has made all necessary prior arrangements for space, equipment, and personnel, and if qualifying commitments are made prior to award for entering into the manufacturing business, a new firm is not barred from receiving an award because it has not yet done any manufacturing.

Bids—Options—Price Higher Than Basic Bid

A bid that contains higher prices for the option than those offered on basic quantities does not disqualify the bidder where the invitation for bids (IFB) provision states that "Evaluation of bids or offers for award will be made on the basis of the quantities to be awarded exclusive of option quantities," and in the absence of a provision calling for evaluation of option prices, the evaluation of option prices would not be proper in determining the low bid. Where the IFB contains no prohibitions against quoting a higher price for option quantities, pursuant to paragraph 7-104.47(b) of the Armed Services Procurement Regulation, the option price may reflect recurring costs and a reasonable profit necessary to furnish additional option quantities, and it is the responsibility of the contracting officer to monitor the contract awarded to assure compliance with the price escalation clause.

Contracts—Awards—Small Business Concerns—Size—Basis for Determination

The determination by the SBA Size Appeals Board that two of the firms bidding on a procurement containing a 50 percent set aside for award to labor surplus area concerns were affiliated through common management and the low bidder on the non-set-aside, one of the two firms, could not be classified as a small business

concern as of the date of bid opening for the purposes of the set-aside priority is a "conclusive" determination that will not be reviewed by the United States General Accounting Office (GAO) since no evidence or argument was presented that was not considered by the Board. Furthermore, a protest to the Board without a prior decision thereon by the cognizant SBA regional office is permitted pursuant to 13 CFR 121.3-6(b)(1)(ii); allegations that protest procedures were not followed should have been presented to the Board; and the delayed protest filed with GAO is untimely under 4 CFR 20.2(a) and will not be considered.

Contracts—Awards—Small Business Concerns—Set-Asides—Eligibility

The fact that the sale by a large business concern to a small business firm of the activity needed to manufacture radio sets and receiver-transmitters solicited under an invitation for bids with 50 percent set aside for award to labor surplus area concerns is not consummated before bid opening and, therefore, both firms submitted bids on the non-set-aside portion of the procurement which were signed by the same officer does not require rejection of the bids since the multiple bidding is not prejudicial to other bidders; the possibility that the common manufacturing facilities might preclude one of the firms from performing is not disqualifying; and a preaward survey will protect the Government's interest. However, because of the affiliation of the two firms, the small business concern, the low bidder on the non-set-aside, does not qualify for participation in the set-aside as a small business labor surplus concern, notwithstanding its good-faith self-certification, nor does it qualify on the basis of acquiring the involved facilities in a post-bid-opening sale.

Contracts—Awards—Small Business Concerns—Subcontracting Limitation

The participation by a large foreign business concern in the performance of the proposed contract award to a self-certified small business concern, either by way of joint venture or subcontract, does not change the "small business" status of the bidder where the cognizant SBA regional office found no evidence of improper affiliation through common ownership, personnel, management, or contractual relationship as precluded by SBA 121-Small Business Size Standards; where the small business concern in subcontracting a major portion of the work to be performed to large business meets the requirement to make a significant contribution to the manufacturer or production of the contract end item; where the Buy American Act restrictions are satisfied by the bidder's certification that the end product to be supplied will be a domestic source end product; and where compliance with the act, as well as military specifications, is one of contract administration and properly the responsibility of the contracting agency.

To the Secretary of the Army, May 31, 1973:

We refer to letter AMCGC-P dated March 16, 1973, and prior correspondence, from The Deputy General Counsel, Headquarters United States Army Materiel Command, reporting on protests of Transvac, Inc., Cincinnati Electronics Corporation, Sentinel Electronics, Inc., and Bristol Electronics, Inc., under invitation for bids (IFB) No. DAAB05-72-B-0012.

The IFB covered the procurement of a quantity of radio sets and receiver-transmitters on a 3-year multiyear basis with 50 percent set aside for award to labor surplus area concerns. On the non-set-aside portion of the IFB, the four lowest bidders in ascending order were as follows: Transvac (small business but not a labor surplus area concern), Cincinnati (small business and a labor surplus area concern),

Sentinel (small business and a labor surplus area concern), and the Avco Corporation (Avco) (large business and a labor surplus area concern). Bristol submitted the sixth low bid on the non-set-aside portion of the IFB. In accordance with the IFB provision setting forth the standard notice of labor surplus area set-aside prescribed by paragraph 1–804.2(b) of the Armed Services Procurement Regulation (ASPR), Cincinnati as a certified-eligible concern is entitled to priority negotiation opportunity under the set-aside portion of the IFB. However, the contracting officer rejected the bids of Transvac and Cincinnati as nonresponsive. Pending a favorable responsibility determination, the contracting officer proposes to award the non-set-aside portion to Sentinel and extend to Sentinel, a certified-eligible concern and low responsive bidder on the non-set-aside portion, first priority for negotiation of the set-aside portion.

For the reasons set forth in detail below, we concur with the contracting officer's rejection of the Transvac bid as nonresponsive, but do not agree that the Cincinnati bid is nonresponsive. However, we do not believe that Cincinnati should be afforded an opportunity to participate in the set-aside negotiations as a small business concern. Moreover, we find no merit to the Bristol protest against any award to Sentinel.

TRANSVAC BID

The rejection of the bid as nonresponsive concerned that firm's failure to quote a price for first article testing and test report or to indicate that there would be no charge for item 0008 of IFB amendment No. 0009. According to the contracting officer, first article testing may not be waived in the case of Transvac which has no previous experience in producing the required equipment. Amendment 0009 significantly increased the first-year quantity of the sets, provided a revised delivery schedule reflecting the increased quantity, and provided for a superseding of the previous eight IFB amendments by incorporating all prior changes. The amendment reads in pertinent part as follows:

* * * *BIDDERS MUST INSERT BID PRICES IN THIS AMENDMENT NO 0009* * * *

* * * * * * *

For the purpose of evaluating bids, Item Nos. 0001, 0002, 0005 thru 0014 [including item No. 0008], 0017 and 0018 will be considered as a single group and awarded as a unit; however, the Government reserves the right to waive the requirement for First Article Test and Report, Item 0008 for any particular bidder/offeror.

* * * * * * *

Enter prices where space is provided above in the Unit Price or Amount Column for all items. If an item is offered at no charge, enter N/C. DO NOT LEAVE BLANK. Failure to follow this instruction will render the offer nonresponsive.

The first page of the bid submitted by Transvac obligates it to furnish "* * * any or all items upon which prices are offered, at the price set opposite each item * * *."

Counsel for Transvac argues that a price for item 0008 in amendment 0009 was not inserted because no space was provided. Citing the above-quoted language of the amendment requiring the entry of prices or a no-charge notation where space is provided, counsel points out that no space was provided in the "Unit Price" and "Amount" columns of item 0008. In further support of his argument, counsel notes that Transvac quoted a price of $2,000 for the identical first article testing and test report requirement where such space was provided in the original IFB and amendment 0003 under a different item number. It is asserted that this established beyond a reasonable doubt an intention to bid on the first article requirement.

It is clear that all items were to be priced by bidders where a space, more specifically, "$——" is provided. In the case of item 0008, such space was not provided. But, we have held that such circumstances will not excuse a bidder from omitting essential information in a bid where IFB language similar to that quoted above is present. *See* B–144112, January 13, 1961, wherein we stated:

> We cannot agree with the contention that Molded should be excused for its failure to specify brand name or equal because the Government failed to include blank spaces after the item descriptions in the form prescribed by ASPR 1–1206 (c) (2) (i). It is noted that adequate space was available after the item descriptions to permit compliance with the requirements of the "brand name or equal" clause. This is borne out by the fact that two of the bidders (Bendix and General Instrument Corporation) found ample room to indicate their intentions in that regard. The requirements of the "brand name or equal" clause are clear and unambiguous. The clause specifically warned bidders in bold type that bids would be rejected for failure to comply with its requirements. Consequently, we believe that Molded's failure to comply with the invitation requirements was primarily due to its own negligence rather than the Government's failure to include blank spaces after the item descriptions in the specific form prescribed by the Armed Services Procurement Regulation. For the same reason we cannot conclude that the invitation was defective because of ambiguity.

All of the bidders, but Transvac, inserted prices for item 0008. Furthermore, we note that adequate space adjacent to the item in question was available for the insertion of a price or no charge notation. And, it is pertinent to note that 4 "Xs" were used throughout the bidding schedule to indicate that no insertions were required of bidders. This blocking symbol of 4 "Xs" is not present in item 0008. These facts, plus the cautionary language of the IFB quoted above, in our view, lead us to the conclusion that Transvac failed to comply with the pricing terms of the IFB, as amended, and it may not be said that it (Transvac) was justified or was misled into failing to insert a price for item 0008. The fact that Transvac did insert a price for an identical first article requirement in the basic IFB and amendment 0003 is

irrelevant since the only first article requirement in the IFB now is included in amendment 0009.

In the alternative, counsel for Transvac argues that, even if we should conclude that a price was required to be inserted in amendment 0009, the failure to do so was a minor informality or irregularity under ASPR 2–405 or an obvious clerical error under ASPR 2–406.2 and 2–406.3 which can be waived or corrected. Counsel points out that Transvac is obligated by the terms of its bid to perform the first article requirement even though no price was inserted in item 0008. As to this latter point, counsel also refers to a post-bid opening telegram to the contracting officer which verified and confirmed the first article obligation; stated an intention to charge $2,000 therefor; and suggested that the probable legal effect of the noninclusion of a price for item 0008 bound it to perform such work at no cost to the Government.

ASPR 2–405 permits a contracting officer to waive or permit a bidder to correct bid deficiencies resulting from a minor informality or irregularity where the relative standing of bidders would not be affected. In part, a minor informality or irregularity is defined as one which is merely a matter of form or some immaterial variation from the exact requirements of an IFB, having no effect or merely a trivial or negligible effect on price and no effect on quality, quantity or delivery of supplies being procured. Counsel contends that the omission of a $2,000 item on a $14,000,000 contract would patently have merely a trivial or negligible effect on price. Also, he notes that the relative standing of bidders would not be affected by correction or waiver of the price omission since the Transvac bid is more than $1,000,000 lower than that of the second low bidder taking into account both the non-set-aside and set-aside portions of the IFB.

However, the foregoing ignores the fact that ASPR 2–405 does not define waivable or correctible deficiencies only in terms of their impact on price and relative standing. Rather, that section further requires that the deficiency have no or merely a negligible effect on quality, quantity or delivery. There is nothing of record which contradicts the critical necessity for the first article testing requirement in the case of Transvac. We believe, therefore, that the failure to submit a price for first article testing is neither a waivable nor correctible deficiency.

Counsel further contends that Transvac is required to perform first article testing and furnish a test report under the terms of its bid. In support of this contention, counsel refers to its insertion of bid prices for items 0001 and 0002 of amendment 0009. Those items call for radio sets and receiver-transmitters to be furnished by Transvac in accordance with "Specification MIL–R–55499A(EL) with Amendment No. 1." Counsel points out that the specification imposes an obligation on Transvac to perform first article testing and submit

a test report irrespective of item 0008. Counsel then refers to the post-bid-opening telegram as reinforcement for this obligation. Counsel further supports his position by bringing our attention to a prior contract awarded requiring the furnishing of similar equipment where no separate line item was set forth in the IFB for first article testing.

The telegram submitted by Transvac after bid opening is extraneous to the bid and may not be considered in determining the responsiveness of the bid. *See* 51 Comp. Gen. 352, 355 (1971). However, counsel for Sentinel correctly states that the cited military specification, by its terms, requires the furnishing of preproduction samples (first articles) for approval *if required in the IFB and contract.* It is noted that item 0008 prescribes the first article requirement to be in accordance with a supplemental technical instruction in the IFB. That instruction incorporates by reference the first article quality assurance provisions of the specification, the pertinent ASPR first article testing clause, and the paragraph in the specifications calling for first article performance if required in the IFB and contract. Counsel for Sentinel states that the specification provisions were not viable with respect to the first article requirement without the submission of a price for item 0008.

To sustain the argument of Transvac's counsel, we must be able to conclude that the bid of Transvac unambiguously imposed an obligation to comply with the first article requirement. We cannot so conclude. At the best, the bid is ambiguous. The IFB, as amended, specifically called for performance in accordance with the military specification prescribing first article requirements. But, on the other hand, item 0008 clearly called for a price to provide first article testing and a test report. And, as quoted above, a bidder is only obligated to furnish items upon which prices were offered at the price set opposite each item. Thus the acceptability of a bid must be based on the bid documents themselves and not on what a prior solicitation may or may not have required.

Counsel for Transvac's argument concerning the "obvious clerical error" nature of the omission likewise must fail. We have already concluded that the Transvac bid was nonresponsive. It is well settled that a nonresponsive or otherwise defective bid cannot be made responsive through the "mistake" procedure. *See* 51 Comp. Gen. 255, 261 (1971). An allegation of error and correction of a price omission in a bid is proper for consideration only where a bid is responsive and otherwise proper for acceptance. *See* 52 Comp. Gen. 604 (1973). In that case, however, we restated a very limited exception to this rule. Even though a bidder fails to submit a price for an item in bid, that omission can be corrected if the bid, as submitted, indicates not only

the probability of error but also the exact nature of the error and the amount intended. To ascertain the existence of an error and the bid intended, we have looked to the consistency of a bidding pattern in particular cases. In this regard, counsel for Transvac draws attention to our decision B–173129, December 6, 1971 (published at 51 Comp. Gen. 352 *supra*), and a decision cited with approval therein, B–157429, August 19, 1965.

However, we cannot find that a legally enforceable obligation is imposed upon Transvac by its bid to furnish the first article testing. Clearly, there is nothing in the bid to establish, as was the case in the above-cited decisions, what amount Transvac would have utilized to correct the alleged obvious clerical error. Its prior pricings of $2,000 for the first article related to superseded bid schedules of the IFB. And there is nothing in the bid as reflected on the schedule in amendment 0009 which would afford a reasonable basis to say that the $2,000 superseded pricing or for that matter any specific amount for the requirement was carried forward into any other parts of the bid where prices were to be inserted. Moreover, an examination of the entire bid does not allow any interpretation with respect to the existence of a consistent bidding pattern which might serve to cure the deficiency in Transvac's bid.

For these reasons, we conclude that the contracting officer properly rejected the Transvac bid as nonresponsive for failure to quote a price or insert a no-cost notation adjacent to item 0008 of amendment 0009. *See* B–176071, December 27, 1972; and B–176254, September 1, 1972.

CINCINNATI BID

This bidder is now the apparent low bidder on the non-set-aside portion of the IFB. Its bid, signed by A. J. Murray, Secretary, totaled $7,247,109.92 for the non-set-aside portion of the IFB. The $7,837,-487.60 non-set-aside bid, now third low, submitted by Avco was signed by A. J. Murray as Director of Business Development-Planning and Services. Both bids listed as the office address and place of manufacture, the offices and manufacturing facilities of Avco located in Cincinnati, Ohio. At this point, certain background information should be related. It is reported that Cincinnati was incorporated on September 13, 1972, about 5 weeks before bid opening, as an electronics firm which would utilize the resources of Avco (Evendale Operation). At the time of incorporation, Avco's Evendale Operation had over 100 Government contracts amounting to more than $30,000,000. In a letter to the contracting officer dated 9 days after bid opening, the individual who signed both bids explained the reason for the submission of the two bids:

Several key Avco Electronics Division executives have made a proposal to purchase the Evendale Operation from Avco Corporation, and discussions to this end are presently under way.

The offer to purchase the Evendale Operation was made on 23 August 1972 and Mr. James R. Kerr, President of Avco, agreed in principle on 18 September 1972 to accept the offer. Mr. Kerr's acceptance was subject to the new organization providing assurance that adequate financing to complete the proposed purchase had been arranged and that novation arrangements could be worked out with the customers.

The financing necessary to consummate the purchase has been completed, and the matter of novation of outstanding contracts is now being worked on with the cognizant Government personnel.

Both Avco and Cincinnati Electronics are targeting to complete the transaction on 30 November 1972, which is the end of the Avco fiscal year.

During this interim period there are five (5) Avco Evendale Operation employees who are also officers and/or shareholders in Cincinnati Electronics Corporation. * * *

* * * * * * *

Avco Electronics has bid on a prior procurement of the AN/PRC–77 and has indicated its interest in the current procurement by letters to your agency on 10 July and 15 August 1972. The position of Avco Electronics is one of "business as usual" during the time required to complete the sales transaction. In the event that the sale is not consummated, Avco will continue to operate the Evendale Operation and does not want to lose any new business opportunities while the sale/purchase arrangements are being completed. Therefore, Avco submitted a bid on the AN/PRC–77 on 18 October 1972.

On the other hand, if the sale is consummated, Avco will have no interest in obtaining the AN/PRC–77 award, but Cincinnati Electronics, the successor company, is very desirous of obtaining the award and will then possess all of the assets formerly owned by Avco that will be required to perform the contract. Therefore, in order to use the competitive advantage which Cincinnati Electronics has, a separate bid was submitted by Cincinnati Electronics on the AN/PRC–77. The lower price offered by Cincinnati Electronics was principally due to the elemination of Corporate Assessments and the fact that a lower profit margin is made possible by an improved cash flow position resulting from the improved progress payment position as a small business.

A letter of understanding of September 18, 1972, from Avco to Cincinnati, stated in part:

Of course, you will understand that neither your group nor Avco will be legally bound until a definitive agreement shall have been negotiated, approved by Avco's Board of Directors and your group and executed by both parties. Before commencing to negotiate and prepare such a definitive agreement, however, we would like to be assured that your group has arranged in principle for adequate financing to complete the proposed purchase and to carry on the business and that appropriate novation arrangements satisfactory to Avco can be worked out with the principal customers of the Evendale operation. Please let us know when you have arranged for adequate financing and we would then be able to support your efforts to work out satisfactory novation arrangements with Evendale's customers.

Prior to the submission of the Cincinnati bid, that firm requested and received from the Chicago Regional Office of the Small Business Administration (SBA) a determination that it qualified as a small business concern. The SBA office made that determination based on a full disclosure by Cincinnati of the contemplated purchase of the Evendale Operation from Avco. Sentinel protested Cincinnati's eligibility as a small business 5 days after bid opening. The Size Appeals Board on November 29, 1972, reversed the decision of the regional office and determined that Cincinnati was not an eligible small business concern for the purposes of the instant procurement. One month later, the Board issued its findings and decision, in pertinent part, as follows:

Negotiations between the officials of Cincinnati Electronics Corporation and AVCO Corporation have been in progress for a considerable period of time. There is of record a copy of a resolution of the Board of Directors of AVCO Corporation dated November 6, 1972 [over 3 weeks after bid opening], acknowledging that an agreement in principle had been reached by the partners, and providing further that:

"Resolved that the officers of this Corporation be and they hereby are authorized to negotiate a formal agreement with Mr. Mealey (President and majority stockholder of Cincinnati Electronics Corporation) and his associates providing for the sale to them (or a satisfactory corporate designee) of the business and assets of the Evendale Operation on the general basis outlined in the foregoing correspondence, *it being understood that neither party will be legally bound until the specific terms of such agreement have first been approved by this Corporation's Board of Directors or Executive Committee and the agreement has been executed by both parties.*" [Italic supplied.]

The formal agreement of purchase and sale covering the assets of the Evendale Operation was said by Counsel for purchaser on November 16, 1972, to be in the final stages of negotiation and both parties anticipated signing the agreement on November 30, 1972.

* * * * * * *

Inasmuch as the purchase-sale agreement has not been formalized, and since it is the intent of the parties that neither party shall be legally bound until this act occurs, the Evendale Operation of the AVCO Electronics Division remains a part of the AVCO Corporation and was so on October 18, 1972, the date of bid opening.

On that date, Cincinnati Electronics Corporation was merely a shell corporation with three to five employees and no facilities or equipment to perform a Government contract. Its officials were at the time officers and employees of AVCO Corporation and actively engaged in pursuing the business interests of their employer.

Cincinnati Electronics Corporation has no place of business except within the AVCO organization. All attempts to reach its principals other than through AVCO were unsuccessful.

Under these circumstances, the Board must conclude that although Cincinnati Electronics Corporation was itself within the size limitation for small business concerns on the date of bid opening, it did not meet the "independently owned and operated" test required for a small business by Section 3 of the Small Business Act.

Since the officials of Cincinnati Electronics Corporation and the officials of the Electronics Division of the AVCO Corporation are the same, the Board finds that the Cincinnati Electronics Corporation is affiliated with the AVCO Corporation through common management within the meaning of Section 121.3–2(a) of the SBA Size Standards Regulations previously quoted.

It is a well settled rule of Government contract law that a bidder on a set-aside procurement must be a small business both on the date of the bid opening and the date of award. (See 40 Comp. Gen. 550 and B–161216, May 22, 1967.)

On the record before the Board, no clear line of fracture had been effected between the Electronics Division of the AVCO Corporation and the prospective purchaser by the date of bid opening. One was merely the alter ego of the other.

To accord a bidder small business size status under these circumstances would be to sanction form over substance and permit an ineligible bidder to avail itself of small business preferential treatment with the intent of taking affirmative steps to remove its disability prior to award. This would not be within the spirit and intent of the Small Business Act, and would be manifestly unfair to other qualified small business concerns.

For the foregoing reasons, the SBA Size Appeals Board finds that the Cin-

cinnati Electronics Corporation was not a small business concern for the purpose of receiving priority in negotiation for the set-aside portion of the contract either on the date of bid opening or at the present time.

On February 27, 1973, the Board denied on procedural grounds the Cincinnati request for reconsideration. On March 9, 1973, the assets of the Evendale Operation were purchased by Cincinnati, the appropriate noyation agreement was executed and the Cincinnati officials severed all ties with Avco. Despite this fact, and a recertification of Cincinnati as a small business for future procurements by the regional office, the Size Appeals Board refused to grant a Cincinnati request for recertification for purposes of the instant procurement.

Returning to the events which transpired after bid opening, on November 17, 1972, the contracting officer advised Cincinnati that:

1. Your company is not considered to be a "going concern" as you are not in a position to commence operations unless and until a sale of "all the assets owned by AVCO that will be required to perform the contract" are actually transferred to Cincinnati prior to award.
2. The management of the Evendale Operation has submitted two bids in response to solicitation DAAB05-72-B-0012. Since the timing of the sale of the Evendale Operation is a matter solely within the control of AVCO's management, you are in a position to alter Cincinnati's position in relation to the other bidders. Since Cincinnati's eligibility for award can be controlled by AVCO's management, the Contracting Officer has no alternative but to consider your bid non-responsive.

Whether a bidder is eligible as a manufacturer or regular dealer ("going concern") for purposes of award under the Walsh-Healey Public Contracts Act (41 U.S. Code 35-45) is for determination initially by the contracting officer subject to review by the Department of Labor. *See* ASPR 12-601, *et seq.* To date, the contracting officer has made no determination as to Cincinnati's eligibility or ineligibility under ASPR 12-604. We expect that determination will be made as to the current status of Cincinnati at the contemplated date of award. In this regard, insofar as Cincinnati is concerned, a firm, to qualify as a manufacturer, must be able to show *before the award*, *inter alia*, that if it is newly entering into such manufacturing activity, it has made all necessary prior arrangements for space, equipment, and personnel to perform the contract. *See* ASPR 12-603.1 which provides that "A new firm which, prior to the award of the contract, has made such definite commitments in order to enter a manufacturing business which will later qualify it, shall not be barred from receiving the award because it has not yet done any manufacturing."

Before discussing the contracting officer's second basis for disqualifying Cincinnati from consideration for award, one preliminary matter should be mentioned. Counsel for Sentinel points out that the Cincinnati bid should be rejected as nonresponsive since it bid higher prices for the option, as opposed to the basic, quantities. Counsel argues that the IFB provisions clearly indicate an intent that option quantities will be considered in determining the price most advantageous

to the Government. In answer to this, we note that special provision J.1 specifically states that "Evaluation of bids or offers for award will be made on the basis of the quantities to be awarded exclusive of the option quantities." In the absence of a provision calling for such evaluation, it is not proper to evaluate option prices in determining the low bid. *See* 52 Comp. Gen. 614 (1973), and cases cited therein. Furthermore, the IFB, as amended, contains no prohibitions against the quoting of a higher price for option quantities. *See* 51 Comp. Gen. 528 (1972).

Counsel for Sentinel also alleges that the higher option prices in the Cincinnati bid contain contingencies forbidden in the price escalation clause of the IFB and includes a contingency to recoup startup and other nonrecurring costs in violation of ASPR 7-104.47(b). Under the price escalation clause of the IFB, the contractor warrants that the prices set forth (including option prices) do not include allowance for any contingency to cover anticipated increased costs of performance to the extent that such increases are covered by the clause. The increases referred to in the clause involve possible upward price revisions as computed from an economic indicater concerned with wages to be paid employees. According to the clause prescribed by ASPR 7-104.47(b), referenced in the IFB, the contractor agrees not to include in the price for option quantities any costs of a startup or nonrecurring nature fully provided in the unit prices of the basic quantities of the various multi-year program years. Counsel, citing Cincinnati's 26-percent higher option price over the base price concludes that, since the escalation clause covers certain cost increases and expenses, it must be concluded that Cincinnati has added excludable items.

As stated above, there was no prohibition against submitting higher option than base prices. Furthermore, the clause at ASPR 7-104.47(b) contemplates that prices offered for option quantities may reflect recurring costs and a reasonable profit necessary to furnish additional option quantities. We have no information other than counsel's allegation that Cincinnati's option prices contain excludable items. Since the contracting officer has not responded to this argument, we would expect that the contracting officer would monitor any contract awarded to Cincinnati to assure compliance with the above-mentioned clauses.

The SBA Size Appeals Board decision, quoted above, concluded that Cincinnati and Avco were affiliated through common management and, therefore, Cincinnati could not be classified as a small business as of the date of bid opening. Counsel for Cincinnati vigorously opposes this conclusion and repeats the arguments previously advanced before the Board. In B-173301, June 28, 1972, wherein a protester challenged a Size Appeals Board decision, we noted that, under 15 U.S.C. 637(b)(6), a decision of SBA regarding the size status of a particular concern

is "conclusive" upon the procurement agency involved. We went on to state that our Office may not ignore a determination by SBA of the size status of a particular concern. With respect to that protester's request for review, we noted that there is no basis for our Office to question a Board decision where no evidence or argument is presented to GAO which had not been presented to and considered by the Board. With this in mind, we will consider Cincinnati to have been an affiliate of Avco at bid opening.

Council for Cincinnati also alleges that the Board should not have considered Sentinel's protest without a decision thereon by the cognizant SBA regional office, thus depriving Cincinnati of the right to appeal as prescribed by pertinent SBA regulations. While SBA regulations at 13 CFR 121.3–5 and 121.3–6 set forth a protest procedure, the latter section appears also to permit, as occurred here, an appeal directly to the Board from an adverse decision by a regional director. *See* 13 CFR 121.3–6(b) (1) (ii). In any event, counsel for Cincinnati did not raise this issue with our Office until March 1, 1973, over 4 months after the Sentinel appeal. Although counsel for Cincinnati was afforded and availed himself of the opportunity to participate in the Sentinel appeal before the Board, the alleged violation of regulations was never brought before the Board at least through the denial of the request for reconsideration on February 27, 1973. In these circumstances, the Cincinnati protest in this regard is untimely and will not be considered. *See* 4 CFR 20.2(a).

As quoted above, the contracting officer rejected Cincinnati's bid as nonresponsive because of the submission of its bid along with that of Avco, both of which were signed by the same individual, with a resultant option of control over the bidder's respective competitive position due to the impending sale of Avco's Evendale Operation. Our Office has considered the effect of multiple bidding by affilates under advertised procurements. Briefly restating our position, the bids of two affiliated concerns submitted in response to the same IFB are not required to be rejected merely because of that affiliation so long as the multiple bidding was not prejudicial to the United States or to other bidders. We have also recognized that it is not unusual for an individual or individuals to submit multiple bids on behalf of more than one commonly owned and/or controlled company where legitimate business reasons for such multiple bidding exist. *See* 51 Comp. Gen. 403, 404, 405 (1972); and 39 *id.* 892, 894 (1960).

Both Cincinnati and Avco submitted bids taking no exceptions to the terms of the IFB, while stipulating the same location as the place of performance. It is clear from the record that the sale of the Evendale Operation by Avco to Cincinnati was not irrevocable prior to or at bid opening and that, even after bid opening, the sale might or might not have taken place. But, the record does not disclose any in-

dication that pertinent SBA statutory or regulatory requirements were violated. In our view, legitimate business reasons dictated the submission of the two bids because of the uncertainty surrounding the sale. Finally, there is evidence to indicate that the sale negotiations were entered into and eventually concluded with every intention to effectuate its consummation. In this regard, counsel for Cincinnati explains the submission of the two bids as follows:

> In view of the necessity for developing business adequate to support Cincinnati Electronics Corporation's entry into the industry and the virtual certainty that purchase of the Evendale Operation will be completed well in advance of the ultimate award date for the subject procurement, Cincinnati Electronics Corporation submitted a bid in response to the solicitation. However, to protect against the possibility of some unforeseen event preventing completion of the sale, and to continue a business level of contracts substantial enough to assure efficient use of the Evendale Operation if the sale is not completed, AVCO prudently submitted its own bid. Since only one company would remain in control, it is clear that the bids were not in conflict, but constituted an either/or situation. Parenthetically, it should be noted that Cincinnati Electronics was able to offer the Government a significantly lower price than AVCO because of the elimination of corporate assessments, a lower profit margin and the increased progress payments to which it would be entitled as a small business.

Our Office has not objected to the submission of multiple bids by affiliated or otherwise related bidders where, as here, post-opening option may exist as to prospective responsibility or nonresponsibility. In these decisions, the distinct possibility that common manufacturing facilities of related bidders might preclude one or the other from performing, similar to the instant situation, has not been considered to be disqualifying.

In B–151459, July 8, 1963, a parent company submitted the third low bid while its controlled subsidiary, proposing in its bid to perform the contract by utilizing the parent's facilities to be transferred to it, submitted the low bid. The record showed that the purpose of the multiple bid submission was the possibility of an unfavorable preaward survey. Also, the subsidiary was able to bid lower due to less overhead and indirect costs than the parent. We took no exception to the award of a contract to either bidder so long as it was responsible. We concluded then that the consideration of the multiple bids submitted for legitimate business reasons by a parent and subsidiary company, knowingly bidding against one another and intending to use the same facilities and employees if awarded the contract, would not prejudice the Government or other bidders.

In B–161410, August 25, 1967, we responded to the suggestion that affiliated concerns could submit bids, select the highest low bid and collapse the other corporations. Related to that suggestion was a question as to what would be the result if the successful low bidder had not made an effort to qualify and the affiliated concern was next in line for consideration. In response thereto, we found no evidence that the affiliated concerns had not submitted bids in good faith. We recognized the pos-

sibility that a low bidder, whether affiliated or not, might not attempt to qualify as a responsible contractor. But, we did not believe that such possibility would necessarily preclude the consideration of multiple bids. Similarly, in 39 Comp. Gen. *supra*, the two low bidders were affiliated and contemplated using the facilities and personnel of both organizations if an award was made to either one or both concerns. We found legitimate business reasons for the submission of the two bids and remarked that it would be prejudicial to the Government to reject the lowest offers received. *See* also B-153687, July 7, 1964; B-154275, July 1, 1964; B-162187, January 9, 1969; B-169165, April 17, 1970; and 51 Comp. Gen. 403, *supra*.

Counsel for Sentinel cites 51 Comp. Gen. 145 (1971), wherein we held that it was not proper to permit a successor-in-interest to take over the bid of a firm that had ceased operations after opening and thereby become eligible for awards. We stated, at page 148, as follows:

> * * * To permit a party to enter into the competition after bids have been opened by virtue of taking over the bid of one whose situation makes its responsibility questionable would seem to provide an unwarranted option to the prejudice of other bidders.

Counsel further notes that counsel for Cincinnati explained the submission by that firm of a bid because of our holding in that decision.

We view the circumstances here to be substantially different from those in 51 Comp. Gen. 145, *supra*. In the cited case, a new party who failed to submit a bid enters the competition after the exposure of prices. Here, we have a bidder, Cincinnati, submitting an unqualified bid with every intention of performing based on the expected acquisition of facilities and personnel for purposes of attaining the status of a responsible prospective contractor. Whatever responsibility option is available to Cincinnati, by itself or in concert with Avco, is not, in our opinion, fatally defective to the consideration of the bid. In the circumstances here, we believe that the Government's interest will be adequately protected by the conduct of effective preaward surveys.

We now turn to the eligibility of Cincinnati for participation in the set-aside negotiations. As stated above, we will defer to the Size Appeals Board's determination that Cincinnati's affiliation with Avco at the time of bid opening caused it to be other than a small business concern. The sale transaction between Avco and Cincinnati, completed after bid opening, disaffiliated its officers from Avco. However, the Board refused to recertify Cincinnati as a small business for purposes of the instant procurement and, in support thereof, cites decisions of our Office to the effect that a bidder on a set-aside procurement must

be a small business both on the date of bid opening and the date of award.

In general, a self-certified bidder's status for the purposes of a particular procurement is for determination at the time of award rather than at the time of bid opening. *See* 49 Comp. Gen. 1, 3 (1969). That decision went on to cite specific dispositions by our Office where, as here, a bidder's size status has changed after bid opening but before award:

> * * * Accordingly, a self-certified small business bidder whose status changes from small to large between the opening of bids on a procurement set aside for small business and the time for award will be ineligible for award. 46 Comp. Gen. 898 (1967). Similarly, a bidder on a small business restricted procurement who certifies himself in good faith as a small business concern when he properly should have been classed as large business but who became small business between bid opening and the time for award because of a change in size standards will be qualified to receive an award. 42 Comp. Gen. 219 (1962). However, *where a bidder's change in status before award from large business to small business after a good faith self-certification is brought about by the bidder's affirmative acts, we have held that such a bidder may not be considered as a small business concern for purposes of a set-aside award because to do so would give the bidder an option after bids are opened of determining whether it would be in his best interest to take action, or not to take action, to become eligible for award.* See 41 Comp. Gen. 47 (1961). [Italic supplied.]

To the same effect, ASPR 1–703(b) reads, in pertinent part, as follows:

> * * * The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers (see 2–405(ii) with respect to minor informalities and irregularities in bids). A representation by a bidder or offeror that it is a small business concern will not be accepted by the contracting officer if it is known that (i) such concern has previously been finally determined by SBA to be ineligible as a small business for the item or service being procured, and (ii) such concern has not subsequently been certified by SBA as being a small business. If SBA has determined that a concern is ineligible as a small business for the purpose of a particular procurement, it cannot thereafter become eligible for the purpose of such procurement by taking affirmative action to constitute itself as small business.

See, also, 13 CFR 121.3–8.

Here, there is no doubt that Cincinnati's certification as a small business concern was a good-faith utilization of the self-certification procedure. The record discloses that, by letter dated just 5 days before bid opening, the cognizant SBA regional office determined that it qualified as a small business concern. Such being the case, the question remains whether Cincinnati's disaffiliation with Avco entitles it to be considered as a small business concern for the set-aside portion of the procurement. It should be kept in mind that even if we conclude that Cincinnati cannot be considered a small business for the set-aside as a certified-eligible small business labor surplus concern (priority

group 1), Cincinnati still would be entitled to negotiation opportunity as a bidder in priority group 2. But, the disaffiliation with Avco, if allowed to now qualify Cincinnati as a small business concern for purposes of the set-aside, would clearly displace Sentinel, Bristol, and at least one other certified-eligible small business concern in the order of priority for negotiations.

In 49 Comp. Gen., *supra*, we did not permit a bidder to preserve the efficacy of a good faith, but erroneous, small business self-certification by the post-bid-opening termination of a management agreement. In that decision, we applied the following rationale as to the type of affirmative acts sufficient to cause disqualification:

> While the bidder's good faith in the criterion for determining the acceptability of his self-certification as to small business status, the determining factor in deciding whether a bidder's actions after the opening of bids affecting his self-certification are permissible is whether those actions give him an undue advantage over other bidders by giving him an option to remain ineligible or to take steps which would preserve his small business status for award purposes. The rule against allowing a bidder such an option, therefore, is not dependent on the bidder's good faith or lack thereof in self-certifying his small business status, but rather the controlling factor is the deleterious effect the exercise of such options would have upon the integrity of the competitve bidding system. 41 Comp. Gen. 47, 55.

On reconsideration of 49 Comp. Gen., *supra*, reported at B-165795, August 21, 1969, it was maintained that the import of our decision was that *any* affirmative acts by self-certified bidders acting in good faith between bid opening and award—without regard to motivation—the effect of which is a change from large to small business status will cause disqualification from negotiation opportunity for the set-aside. After setting forth the above-quoted rationale from the decision, we stated:

> It is our position, therefore, that if the bidder's affirmative acts after the opening of bids have the effect of giving him the type of option, discussed above, such actions cannot serve to qualify the bidder for award. We do not view this position as an extension of the rule enunciated in [41 Comp. Gen., *supra*]. *While that case stated that the sole purpose of the affirmative acts therein involved was to effect a change in status, the decision was not bottomed on the criterion of a "sole" purpose. Rather, we view the decision as applying the established rule that a bidder should not be allowed the option of deciding after bid opening whether to remain eligible for award by taking steps to insure such eligibilty or by foregoing such steps to deny his eligibility for award.* [Italic supplied.]

Applying these principles, we conclude that the post-bid-opening sale of the Avco Evendale Operation to Cincinnati and the attendant disaffiliation of the two firms resulting in the current small business status of Cincinnati does not qualify it as a small business concern for the set-aside. We are not unmindful of the fact that the disaffiliation resulted from a bona fide transaction commencing before bid opening but unfortuitously not taking place until some months thereafter. We also note that the sale was not solely for the purpose of permitting Cin-

cinnati to perform the advertised contract but involved a novation agreement covering over $30,000,000 in other Government business.

But, there is no question from the record that the sale and disaffiliation was by no means irrevocable during the time period following bid opening. Thus, there existed a post-bidding option, forbidden under the above principles, which permitted Cincinnati to remain eligible as a small business or to forego the consummation of the sale to preclude set-aside priority. To this same effect, see the quoted findings and decision of the Size Appeals Board. This option directly affects Cincinnati's priority category for purposes of set-aside negotiation to the detriment of Sentinel and other bidders. *See* B-157921, November 29, 1965; B-152297, November 7, 1963; and ASPR 1-703(b), quoted above. *But see* B-156882, July 28, 1965.

SENTINEL BID

We turn now to the Bristol protest against any award to Sentinel. Bristol contends that the self-certified small-business status of Sentinel is in error because of Sentinel's plans to perform the contract, either by way of joint venture or subcontract with a foreign firm which is a "large business." The record shows that the contracting officer requested a size evaluation of Sentinel from the cognizant SBA regional office in response to the Bristol protest. Prior to responding to the contracting officer, SBA requested and received information from Sentinel concerning its relationship with the foreign firm. Thereafter, SBA determined that Sentinel was a small business concern for purposes of the procurement. SBA "* * * found no evidence of improper affiliation through common ownership, personnel, management, or contractual relationships as are precluded by SBA 121-Small Business Size Standards." In view of this, we find no basis for not considering Sentinel to be a small business concern for purposes of this procurement.

Bristol also contends that the end item will not be manufactured by a small business as required by the provisions of the IFB. Our Office has consistently held that so long as the small business firm, which has subcontracted a major portion of the work to large business, makes some significant contribution to the manufacture or production of the contract end item, the contractual requirement that the end item be manufactured or produced by small business concerns has been met. *See* B-175337, January 3, 1973. It is reported that the preaward survey on Sentinel found its subcontractor arrangements with the large foreign firm to be a normal contractor-vendor relationship. Apparently, the foreign firm will be acting as purchasing agent for Sentinel and will arrange for the delivery of all product material, foreign and domestic,

required to perform the contract. Furthermore, the contracting officer states that the preaward survey establishes that a substantial portion of the work required under the contract will be performed by Sentinel in its domestic facility. That being the case, we find no merit in Bristol's contention.

Bristol also argues that the purchasing function to be carried out by the foreign firm is a manufacturing function and, as such, contrary to the Buy American Act (41 U.S.C. 10a-d) and implementing regulatory requirements, requiring that a domestic end product be manufactured in the United States. In this regard, ASPR 6-101 defines a domestic source and product as an end product manufactured in the United States if the cost of its components mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. We note that, based on a review of Sentinel's bills of material for evaluation, the preaward survey team concluded that well over 50 percent of the components to be used by Sentinel will be of domestic manufacture. Therefore, Bristol's argument that Sentinel is offering a foreign end product and that a 50-percent evaluation factor should be added to the Sentinel bid cannot be sustained. *See* ASPR 6-104.4(b) and 6-104.5.

Neither the Buy American Act nor the applicable regulations define or provide criteria in the case of the purchase of foreign products as to what constitutes manufacture. But, in 39 Comp. Gen. 435, 437, 438 (1959), we stated:

> * * * In early times the word "manufacture" was generally related to the production of an article directly from raw materials, but it has now been held that even the mere assembly of parts previously manufactured may be regarded as a manufacture of the completed article. * * *.

In light thereof, and the fact that purchasing alone by the foreign firm would not seem to constitute a manufacturing function, we conclude that Sentinel will be manufacturing the required equipment in the United States. Of particular significance, the Sentinel bid contains the certification that the end product to be supplied is a domestic source end product. We have recently held that compliance with the provisions of the Buy American Act is one of the contract administration and properly the responsibility of the contracting agency. *See* B-177365, May 4, 1973. We expect that the cognizant administration contracting officer will take steps to insure that the provisions of the Buy American Act and implementing regulations are followed. This would encompass, of course, compliance with the military specification cited by Bristol. Finally, whatever extra costs will be incurred by the Government by possible inspections at a foreign location, if any, cannot properly be added to Sentinel's bid since the IFB contained no such factor for evaluation.

[B-177750]

Contracts—Protests—Timeliness—Untimely Protest Consideration Basis

Although the timeliness of a protest that a bid evaluation factor was unreasonable failed to meet the standard in paragraph 20.2(a) of the Interim Bid Protest Procedures and Standards (4 CFR 20.2(a)) that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening, the protest will be considered by the United States General Accounting Office since it raises issues significant to the practices and procedures utilized by the contracting agency.

Equipment—Automatic Data Processing Systems—Service Contracts—Cost of Changing Contractors

Adding the cost of program duplication and the time required to check out the time-sharing computer services program solicited to the bids submitted by new sources did not favor the current contractor, or prevent competition because of the high cost of the changeover as compared with bid prices, since the evaluation factor represents an accurate depiction of costs to the Government to change contractors, and the method of transferring services employed by the contracting agency is not subject to question in the absence of fraud or capricious action since the different practice used by business does not alter the terms of the invitation for bids. Furthermore, the quantum of service evaluation criteria was not misleading as the effect of the criteria on bid price was determinable by each bidder at bid preparation time. However, the substantial difference in bid prices received indicating inadequate competition to insure a reasonable price, future procedures should be revised so bidders can compete effectively against an incumbent contractor.

To the Computer Time Corporation, May 31, 1973:

Reference is made to your letters of February 26, 1973, and prior correspondence, protesting award to any other bidder under invitation for bids (IFB) NBS 10-73 issued by the National Bureau of Standards (NBS) Contracting Office, Boulder, Colorado.

The IFB, issued October 4, 1972, called for an estimated 7 months of time-sharing computer services. Six bids were opened on November 22, 1972. After evaluation of bids, it was determined that the Computer Sharing Services, Inc. (CSS), total evaluated price of $2,319.38 was the lowest received, and the Computer Time Corporation (CTC) bid evaluated at $2,600.36 was the second lowest. By letter dated December 4, 1972, CTC protested to NBS on the basis that the bid evaluation factor prescribed in paragraph 1.6.2 of the specifications was unreasonable. Paragraph 1.6.2 provided:

> Program duplication and the time required to check out the programs after transfer will be an added expense to the Government and the cost thereof will be a factor in the evaluation of bids. Accordingly, and for evaluation purposes only, the amount of $1,000.00 will be added to each bid which requires program duplication and check out after transfer.

CTC contended that this provision unduly penalized all potential suppliers except CSS, the current contractor.

By letter of December 22, 1972, NBS denied the protest, stating "that the evaluation factor represents an accurate depiction of the

costs that the Government will incur if a change in vendors is required." NBS also stated that the protest was untimely, since CTC had 49 days before bid opening to protest the evaluation factor but did not do so. As to the timeliness of the protest, we agree with NBS that your protest fails to meet the standard set forth in paragraph 20.2(a) of our Interim Bid Protest Procedures and Standards that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening. Nevertheless, since the protest raises issues significant to the procurement practices and procedures utilized by NBS, it will be considered on its merits. Paragraph 20.2(b) Interim Bid Protest Procedures and Standards.

Your contention concerning paragraph 1.6.2 is that the $1,000 evaluation factor is fallacious since it is based upon an archaic method of transfer of computer information--the preparation of a paper tape containing the computer program which will be supplied to the new contractor. You state that the actual method used will be the standard industry practice--that is, transfer of the program from the current vendor's disk to a magnetic tape (unloading) and thence from the tape to the new vendor's disk (reloading). Also, you state that CSS conducts this unloading and reloading procedure on its own machines daily and NBS does not find it necessary to conduct any checkout after these transfers. Furthermore, since CSS and CTC have identical equipment, transfer to CTC would be identical to the daily unloading-reloading procedure and no checkout would be necessary. Moreover, you maintain that since the Government owns the computer programs involved and that the CSS bid provides for charges for magnetic tape file transfers, it is clear that the Government has a legal right to force CSS to make the magnetic tapes available to another firm. Finally, you dispute the NBS figure used to support the checkout of the program after transfer to a new vendor.

We note that the specifications do not call for transfer to a new vendor by what you describe as the standard industry practice. Instead, paragraph 1.6.1 provides:

> The programs being used by the Government are currently stored in a computer being used by the Government on a "time share" basis under a FY1972 contract. If transfer of these programs to a new system is required, the Government will provide the successful bidder with copies of the programs to be transferred and he shall transfer the programs to his system without charge and within 10 days from the date of his receipt of the program copies. Changeover to a new system will require the transfer of approximately 180,000 characters of data. After program transfer has been accomplished, the Government will conduct such tests as may be necessary to satisfy using personnel that the programs have been transferred without error. If an error is detected, it shall be corrected by the bidder/contractor within 24 hours after receipt of notice of error. Connect time for checkout of program transfer shall be without charge to the Government.

The contracting officer has offered the following explanation of the rationale behind the method of transfer and the need for checkout:

> Mr. Sheftel is also incorrect in his contention that the only work involved in changing to a new vendor is a simple exchange of magnetic tapes between vendors. The Government neither owns the required magnetic tapes nor has any legal right to force the current vendor, Computer Sharing Services, Inc., to supply the magnetic tapes to another firm. There is no reason to assume that Computer Sharing Services, Inc., or any other vendor, would relinquish its property to benefit a competitor. Therefore, the Government must provide for the preparation of paper tape for each file to be transferred. Computer Time Corporation, or any successful offeror other than the present vendor, would be supplied a typed copy of the program rather than magnetic tape.
>
> The requiring activity has repeatedly determined that it must perform a thorough check-out of all work processed through a new vendor. The majority of the programs that would be transferred are for the preparation of calibration and other reports which are supplied to private contractors and other government agencies. The accuracy of the program transfer must be confirmed by NBS, since the end users of the reports have no method of determining the accuracy of the reports and, thus, must take them at face value. * * *

It is the well-established policy of our Office that an agency's determination of its needs will not be questioned in the absence of demonstrated fraud or clearly capricious action. 49 Comp. Gen. 857 (1970). On the present record, we see no basis to question the judgment of NBS regarding the need for the transfer and checkout procedures specified in paragraph 1.6.1. The fact that the standard business practice may be different does not supersede or alter the clear and unambiguous terms of the IFB. B–167993, October 28, 1969. Further, although you have questioned the $20 man-hour rate upon which the evaluation factor was based on the ground that it is more than a Government employee earns an hour, the contracting agency has explained that it was derived from the hourly salary rate, plus leave and employee benefits and overhead for a Government employee involved in the program duplication and checkout.

Also, you have contended that the $1,000 evaluation factor is unjustified no matter how it is calculated or derived since it prevents effective competition in a procurement of this size. You point out that where the evaluation factor equals nearly 50 percent of the evaluated price, although competition from other bidders may force the current contractor to lower its prices, it is unlikely that a competitor could underbid the incumbent vendor. In this regard, we note that your second low bid would have been $3,600.36 had not CTC offered a $1,000 usage credit to offset program transfer costs. Moreover, the other four bids were so high that the contracting officer did not develop their total evaluated prices. The prices offered by the four high bidders for the first item alone—50 hours per month of terminal time—were in excess of the total evaluated prices of CSS and CTC for terminal time, storage, central processor runs and special charges. We cannot say that the contracting officer should have canceled the IFB because the substan-

tial difference in bid prices indicated that competition had been inadequate to insure a reasonable price. However, we are suggesting by letter of today, copy enclosed, that the Department seek a procedure which will enable bidders to compete more effectively against the incumbent and to negotiate to insure price reasonableness where effective competition cannot be obtained.

An additional objection raised in your February 26, 1973, letter concerns the bid evaluation criteria set forth in paragraph 9.1 of the IFB. Paragraph 9.1 provided:

> During the evaluation of bids, and for evaluation purposes only, the following assumptions will be made:
> (a) 50 hours of terminal time, including data entry, will be used each month;
> (b) 150,000 characters of data will be stored each month;
> (c) The equivalent of 370 separate runs of the program "TEST" #2 will be made each month (to evaluate cost of CPU);
> (d) Of the required service, 90% will be required during prime time and 10% during non-prime time; (For the purposes of this solicitation/contract, "prime time" is hereby defined as those hours between 7:30 A.M. and 4:30 P.M. local time and "non-prime time" is hereby defined as those hours not included in prime time.) and
> (e) The number of users will be increased to a total of 20 during the term of the contract.

You state that if the CSS price under the current contract is applied to these assumptions, the estimated monthly charges would total $674.13. However, your review of the actual monthly charges for the 14 months prior to the issuance of the IFB reveals an average amount of $1,473 and from October 1972 through January 1973 an average amount of $1,093.70 showing that more work is involved than the factors in paragraph 9.1 would indicate. You conclude that these evaluation factors misled all the bidders except CSS and that the solicitation was defective in this respect.

It appears that the effect of these criteria on the bid prices was determinable by each bidder at the time the bid was being prepared; that is, they consisted of "objectively determinable factors from which the bidder may estimate within reasonable limits the effect of the application of such evaluation factor on his bid in relation to other possible bids." 36 Comp. Gen. 380, 385 (1956). While it may be that CSS had an advantage because of its prior work experience and knowledge that the actual work required might exceed the amount indicated by paragraph 9.1, this circumstance does not compel the conclusion that the criteria were not based on valid estimates of the agency's expected usage during the contract period. Our Office has recognized the administrative difficulties inherent in arriving at reasonable estimates of the quantum of services required in situations of this nature. 44 Comp. Gen. 392, 395 (1965). Further, it is not improper for an agency to base its estimates on current expectations instead of historical usage. B-175928, August 2, 1972.

In view of the foregoing, the protest is denied.

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