Decisions of The Comptroller General of the United States

VOLUME 52 Pages 175 to 252

OCTOBER 1972

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300103900

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price 45 cents (single copy) ; subscription price $4.00 a year ; $1 additional for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Edwin W. Cimokowski

John W. Moore

Paul Shnitzer

TABLE OF DECISION NUMBERS

Cite Decisions as 52 Comp. Gen.—.

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B–115505]

Retirement — Civilian — Annuities — Forfeiture — Persons Convicted of Certain Offenses

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

To the Chairman, United States Civil Service Commission, October 4, 1972:

Your letter of July 28, 1972, requests, in effect, the decision of this Office as to whether interest payments ordered by a United States District Court to be paid to Mr. Alger Hiss and Mr. Richard Strasburger should be made from the Civil Service Retirement and Disability Fund (Retirement Fund) or from the permanent indefinite appropriation for judgments contained in 31 U.S. Code 724a.

On March 3, 1972, a three-judge United States District Court in *Hiss* v. *Hampton*, 338 F. Supp. 1141 (D.C.D.C. 1972) determined that the so-called Hiss Act, as amended, 5 U.S.C. 8311 *et seq.* was an *ex post facto* law punishing the plaintiffs in that case, Alger Hiss and Richard Strasburger, for conduct which had occurred prior to September 1, 1954, the date of enactment of that law. The court therefore ordered the Civil Service Commission to pay annuities plus interest to the plaintiffs, computed from the date when Hiss and Strasburger became eligible, respectively, for Civil Service annuities. You state that the Commission interprets this case as rendering ineffectual any Commission imposed denials of annuities to individuals who violated the provisions of the Hiss Act prior to September 1, 1954. Accordingly, it is your position that these individuals are entitled to Civil Service annuities retroactively from the date each became eligible for receipt of his annuity, but that since the court ordered payment of the accrued annuity with interest only with respect to the plaintiffs in this case, the Commission, in the absence of a court decision to the contrary, does not believe the obligation to pay interest extends with respect to those individuals who did not sue.

The question raised in your letter is whether the funds to pay the interest owing to Hiss and Strasburger should come from the Retirement Fund or from the permanent indefinite appropriation for judg-

ments, 31 U.S.C. 724a. You state that the Commission's view is that while the accrued but unpaid annuities should be paid from the Retirement Fund, there is no authority to expend money from the Fund to pay interest on annuities. The Commission's reasoning, as described in your letter, is as follows:

> The Fund is appropriated for the payment of benefits as provided by subchapter III of chapter 83 of title 5, United States Code, by virtue of 5 U.S.C. § 8348(a)(1)(A). The benefits as provided by this subchapter include annuities and lump-sum benefits, which may include interest under circumstances such as are specified in 5 U.S.C. § 8331(8)(C). Since no provision exists for the payment of interest on annuities, such interest is not a benefit provided by said subchapter and the Fund is not appropriated for the payment of interest on annuities.
>
> We are presenting the Commission's interpretation of the retirement law for your consideration in the issuance of a settlement certificate by the General Accounting Office in the *Hiss* and *Strasburger* cases.
>
> It is our opinion that the interest due is payable under 31 U.S.C. § 724a, which states in pertinent part:
>
> "There are appropriated, out of any money in the Treasury not otherwise appropriated * * * such sums as may * * * be necessary for the payment, *not otherwise provide* (*sic*) *for*, as certified by the Comptroller General, of final judgments, * * * which are payable in accordance with the terms of section 2414, 2517, 2672, or 2677 of title 28, together with *such interest* * * * as may be specified in such judgments * * *" (The first proviso to section 724a is inapplicable here since the basis of the Court's jurisdiction in this case was 28 U.S.C. § 1331(a).) [Italic supplied.]
>
> Since payment of interest from the Fund is "not otherwise provide (sic) for" in this case, we think the interest should be paid from the Judgment Fund.

The Retirement Fund is appropriated by 5 U.S.C. 8348(a) for the payment of benefits provided in subchapter 3 of chapter 83 of Title 5, U.S. Code, and for the administrative expenses incurred by the Civil Service Commission in placing in effect each annuity adjustment granted under 5 U.S.C. 8340, and the Fund is made available, subject to such annual limitation as the Congress may prescribe, for any expenses incurred by the Commission in connection with the administration of this chapter and other retirement and annuity statutes.

The Retirement Fund has been held by this Office to be available for the payment of judgments. Therefore, as stated in your letter, the accrued but unpaid annuities due Hiss, Strasburger, and others similarly situated should be paid from the Retirement Fund. Moreover, it is our opinion that the interest due Hiss and Strasburger from what the court has determined to be a wrongful withholding of their annuity is a part of the damages awarded in the judgment and, as such, should also be paid out of the Retirement Fund. We might point out that this result would appear to be equitable since presumably the Retirement Fund earned interest through investments under 5 U.S.C. 8348(c) on the annuities withheld from Hiss and Strasburger. Of course, since it is well established that interest is payable by the Government only where provided for in statutes and contracts, we agree with the Commission that, in the absence of a court decision to the contrary, the obligation

to pay interest does not extend to those individuals here involved who did not sue.

Accordingly, it is our opinion that the court ordered interest due Hiss and Strasburger, computed from the date when each became eligible for Civil Service annuities until the date of the judgment, should be paid from the Retirement Fund and not from the fund authorized in 31 U.S.C. 724a for the payment of judgments not otherwise provided for.

[B-151106]

Fees—Passports—Locally Hired Overseas Employees

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

To Y. Nakashima, Department of the Air Force, October 4, 1972:

We refer to your letter of May 2, 1972, reference ACFPT, which was forwarded June 5, 1972, to this Office through the Per Diem, Travel and Transportation Allowance Committee, and assigned PDTATAC Control No. 72-20, regarding the entitlement of Mr. Shuichi Ono, presumably an American citizen, to reimbursement of amounts paid incident to obtaining passports for himself and his three sons. Mr. Ono is a local hire with whom a transportation agreement was executed in accordance with paragraph C4002-3 of the Joint Travel Regulations (JTR), Volume 2, and who has earned renewal agreement travel pursuant to the provision of paragraph C4001, JTR. He, however, contemplates no such travel at this time.

Mr. Ono has claimed reimbursement for the $12 passport fee for himself and for each of his three sons, as well as for the $3.23 per person cost of photographs incident to obtaining those passports. His claim is for a total of $60.90 and is made pursuant to the authority of paragraph C9010-2 of JTR, and paragraph 40250 of Air Force Manual (AFM) 177-103. You express doubt as to the propriety of reimbursement of those expenses under the cited regulations.

Paragraph C9010-2 of JTR provides for reimbursement of expenses of obtaining or renewing a passport as follows:

2. CONTEMPLATED OFFICIAL TRAVEL, PASSPORTS AND VISA FEES
a. *General.* Any employee who is officially required to obtain or renew a pass-

port or visa may be reimbursed for the expense incurred for the issuance or renewal of a passport or visa, notwithstanding that actual travel may not occur. This authority for reimbursement includes an employee required to renew his passport as a result of continued employment in an overseas area to which he was transported at Government expense. It also includes the type of employee described in subpar. b. Public Voucher for Purchases and Services Other Than Personal (Standard Form 1034) will be used for such reimbursement claims. Supporting authority will be included or attached. The appropriation citation will be that current at the time the expense is incurred. Prior fund citation approval is required.

b. *Passport and Visa for Emergency Technical Support Personnel.* When an activity is required to have emergency technical support personnel available for official travel on short notice, and such personnel are directed in writing by the responsible commanding officer to maintain current passports or visas in contemplation of such travel, claims for fees paid are allowable whether or not actual future travel is performed.

Paragraph 40250(c) of AFM 177–103 provides as follows:

c. *Voucher Forms.* When dependents' expenses are reimbursable, use DD Form 1351–4 for payment. When members perform the travel, use DD Form 1351–2. When members have obtained passports or visas pursuant to orders of commanders, for future travel per AFM 211–2 payment will be by SF 1034, "Public Voucher for Purchases and Services Other Than Personal," or through use of imprest funds. The rules for preparing and processing SF 1034 are similar to those in chapter 1, part four. SF 1034 is shown in figure 2–15, part two, AFM 177–102. Imprest fund payments are described in ASPR 3–607. Receipt will be required for any item claimed in excess of $15.

There is no indication that Mr. Ono has any official responsibility for emergency technical support. Thus, subparagraph (b) of paragraph C9010–2, JTR, is not here relevant and Mr. Ono's claim, if proper, would appear to fall within the scope of subparagraph (a). Had Mr. Ono been recruited in the United States rather than locally there would appear to be no question, in view of the language of the second sentence of subparagraph (a), but that he would be entitled to reimbursement for the expense of renewing at least his own passport.

Inasmuch as Mr. Ono was not transported at Government expense to the foreign area, but hired locally, the determination as to his entitlement to reimbursement of the amount claimed is dependent upon whether he was "officially required" to renew the passports, as that phrase is used in the quoted regulation. Variant views are expressed in in the file supporting the request for our decision. It is suggested on the one hand that the regulation requires as a condition to entitlement that travel be contemplated, or more narrowly construed, that it is restricted in application to employees who are required to travel in connection with their overseas employment. On the other hand, it is pointed out that the regulation may be construed to permit reimbursement to an employee who is officially required to renew or obtain a passport irrespective of whether any travel is undertaken or contemplated.

In regard to this latter view, we note that employees and dependents of employees of civilian components of the U.S. Forces in Japan are

required under the "Agreement Regarding Status of the United Nations Forces in Japan" (SOFA), 5 USTA 1123, TIAS 2995, February 19, 1954, to have valid passports in their possession for purposes of identification. Article III of SOFA provides in part as follows:

> 5. Members of civilian components shall have their status and the organization to which they belong described in their passports. Dependents shall have their status described in their passports.
> 6. For purposes of their identification while in Japan, members of the civilian components and dependents shall, on demand of the appropriate Japanese authorities present their passports within a reasonable time.

That requirement is implemented in 5 Air Force Regulation 30–3, effective April 20, 1970.

We point out that a U.S. citizen who is hired locally and who meets the conditions of eligibility for renewal agreement travel is generally entitled to the same benefits as an employee recruited stateside. By its express terms, the authority for reimbursement of passport fees includes employees recruited stateside who are required to renew passports as a result of their continued employment in the foreign area. Therefore, while not expressly covered by the regulation, our view is that passport expenses of U.S. citizens hired locally who are entitled to renewal agreement travel and/or return transportation are properly for payment.

While reimbursement for the expense of passports required to be renewed for dependents is not expressly authorized by the JTR, we consider that such is an appropriately reimbursable administrative expense.

Mr. Ono's voucher, with attachments, is returned herewith and may be processed for payment of the passport expenses in accordance with the above.

[B–114874]

Postal Service, United States—Appropriations—Transferred From Post Office Department—Lapsed Appropriations Disposition

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

496-301 O - 73 - 2

To the Postmaster General, October 5, 1972:

In looking into the values of assets and amounts of liabilities transferred to the Postal Service from the former Post Office Department, by letter of April 12, 1972, we requested your views regarding the disposition of refunds of certain transportation charges paid from funds appropriated to the former Post Office Department for fiscal year 1970. Also, we requested your views as to the disposition of funds remaining where obligations incurred in fiscal year 1970 and prior years are liquidated in amounts less than the amounts originally obligated (deobligations). The amounts originally obligated in those prior years but not expended were transferred to the Postal Service at the time of commencement of operations for the purpose of liquidating such obligations incurred by the former Post Office Department.

In reply thereto, your General Counsel by letter of September 12, 1972, states it to be the view of the Postal Service that both—the refunds and deobligations—are for payment into or remain a part of the Postal Service Fund (Fund), respectively, rather than to be subject to reversion to the general fund of the Treasury.

At the outset the General Counsel points out that one of the major purposes of postal reorganization was to eliminate restraints imposed on postal operations by laws relating to budgets and funds having Government-wide application as evidenced by 39 U.S. Code 410(a) of the Postal Reorganization Act which provides in pertinent part that "no Federal law dealing with * * * budgets, or funds * * * shall apply to the exercise of the powers of the Postal Service." Consequently, he states that if refunds or deobligations are subject to reversion to the general fund of the Treasury, a provision of law in the Postal Reorganization Act must be found which establishes the requirement that the funds revert. He notes that not only is there no such provision in the Postal Reorganization Act but that the act provides for the intermingling of moneys in the Fund and for the availability of moneys in the Fund generally "to carry out the purposes, functions, and powers authorized by this title." 39 U.S.C. 2003(a).

Concerning specifically the disposition of refunds the General Counsel refers to 39 U.S.C. 2003 which establishes the Fund and to 39 U.S.C. 2003(b)(5) which provides for deposit into the Fund of "any other receipts of the Postal Service." He contends that these refunds on postal contracts represent receipts of the Postal Service and thus are required to be deposited into the Fund and, once so deposited, may be withdrawn only "to carry out the purposes, functions, and powers" of the Postal Service. 39 U.S.C. 2003(a). In addition, he points out that the Postal Reorganization Act transferred to the Postal Service

"all contracts" and "all other property and assets of the former Post Office Department." 39 U.S.C. 2002(c)(5), (6).

In summary, it is stated these refunds constituted assets which, in the opinion of the Postal Service, were transferred to the Postal Service at the time of commencement of operations on July 1, 1971, and for the reasons stated above, must therefore remain with the Service.

The General Counsel states that the result as to deobligated funds is similar. Relative to such deobligations it is stated that—

> Section 2002(a)(2) of title 39, United States Code, provides for the transfer to the Postal Service at the time of the commencement of operations of certain appropriated funds and all liabilities chargeable thereto, which "shall become assets and liabilities, respectively, of the Postal Service." The Act explicitly provided for the deposit of the transferred appropriated funds in the Postal Service Fund, requiring that there "shall be deposited in the Fund, subject to withdrawal by check by the Postal Service * * * the balance in the Post Office Department Fund * * *" 39 U.S.C. § 2003(b)(6). As indicated above, the Act provides that moneys in the fund are available to the Postal Service "to carry out the purposes, functions, and powers authorized by this title." 39 U.S.C. § 2003(a). Obviously, one of the "purposes, functions, and powers authorized by this title" would be the liquidation of liabilities chargeable to appropriations transferred to the Postal Service under section 2002(a)(2). There is, however, clearly no requirement that all liabilities be liquidated in the amount at which they were valued at the time of the commencement of operations. To the extent that liabilities can be liquidated for lesser amounts, moreover, transferred funds would be available for expenditure on other valid postal purposes. The continuing availability of the moneys in the Postal Service Fund is underscored, moreover, by the provision in section 2003(a) that the moneys are available for expenditure for valid postal purposes "without fiscal-year limitation." It would appear that a requirement that deobligated funds revert to the general fund of the Treasury would have the effect of imposing a fiscal-year limitation on some of the moneys in the Postal Service Fund.

The matters here under consideration are closely related to the disposition of obligated and unobligated balances of fiscal year 1970 and prior appropriations made to the former Post Office Department, considered in our decision of June 28, 1971, 50 Comp. Gen. 863.

In that decision we referred to section 1(a) of the act of July 25, 1956, 70 Stat. 647, as amended, 31 U.S.C. 701, which provides as follows:

> (a) The account for each appropriation available for obligation for a definite period of time shall be closed as follows:
> (1) On June 30 of the second full fiscal year following the fiscal year or years for which the appropriation is available for obligation, the obligated balance shall be transferred to an appropriation account of the agency or subdivision thereof responsible for the liquidation of the obligations, in which account shall be merged the amounts so transferred from all appropriation accounts for the same general purposes; and
> (2) Upon the expiration of the period of availability for obligation, the unobligated balance shall be withdrawn and, if the appropriation was derived in whole or in part from the general fund, shall revert to such fund, but if the appropriation was derived solely from a special or trust fund, shall revert, unless otherwise provided by law, to the fund from which derived: *Provided*, That when it is determined necessary by the head of the agency concerned that a portion of the unobligated balance withdrawn is required to liquidate obligations and effect adjustments, such portion of the unobligated balance may be restored to the appropriate accounts.

In construing the above provisions of law we stated that—

Since the obligated balances of such prior year appropriation can be used only to liquidate such prior year obligations and since the unobligated balances thereof have reverted to the general fund of the Treasury, and thus are not available to the Post Office Department except as such amounts may be needed to liquidate such prior year obligations, the unobligated balances may not be withdrawn from the Treasury except pursuant to an appropriation made by law. See Article 1, section 9, Clause 7, of the Constitution of the United States. Consequently, and since section 2002(a)(2) does not in specific terms appropriate to the Postal Service the unexpended unobligated balances of fiscal year 1970 and prior year appropriations made to the Post Office Department and returned to the general fund of the Treasury as required by law, it may not be construed as having done so in view of section 9 of the act of June 30, 1906, 34 Stat. 764, 31 U.S.C. 627, which provides that no act of Congress shall be construed to make an appropriation out of the Treasury of the United States "Unless such act shall, in specific terms, declare an appropriation to be made." See 13 Comp. Gen. 77 (1933). The Postal Service, however, may exercise the right to have such unobligated balances restored to the extent provided in the cited act of July 25, 1956, for the liquidation of valid obligations against prior year appropriations. * * *

With respect to the purpose of section 2002(a)(2) of the Postal Reorganization our views are stated therein as follows:

In view of the fact that under the provisions of section 15(a) of the Postal Reorganization Act, the Board of Governors could have provided that the Postal Service begin operations during the course of a fiscal year as well as at the beginning of a fiscal year, it seems evident that the language contained in section 2002(a)(2) was primarily intended to permit the Postal Service to utilize the obligated and unobligated portion of appropriations that on the date of transition were otherwise available to the Post Office Department in order that the Postal Service might liquidate the obligations incurred against such appropriations and that it might finance its operations to the end of the fiscal year from the unobligated portion.

Concerning such decision the General Counsel states that—

Insofar as the argument for the reversion of funds under sections 701 and 703 of title 31, United States Code, rests upon the decision of the Assistant Comptroller General cited above that withdrawn unexpended unobligated balances are available to the Postal Service only as restorations and as limited by the provisions of sections 701–708 of title 31, United States Code, the position of the Postal Service would not be in agreement with the opinion of the Assistant Comptroller General. Section 2002(a)(2) requires the transfer to the Postal Service of all "unexpended balances of appropriations * * * available to the former Post Office Department * * *" The plain meaning of these words is, in our opinion, that appropriations which the former Post Office Department had available to it—including any withdrawn unexpended unobligated balances of appropriations which were available for restoration—would be transferred without limitation to the new Postal Service.

While we agree with the General Counsel that under 39 U.S.C. 410(a) laws concerning funds and budgets do not apply to the Postal Service so that sections 701–708 of Title 31, U.S. Code, are not applicable to funds of the Postal Service, section 410(a) was not effective until July 1, 1971, and consequently the appropriations of the former Post Office Department for fiscal year 1970 and prior years were subject to the provisions of law in effect prior to that date, section 410(a) having no retroactive effect.

Consequently, we cannot agree with the views of the General Counsel that 31 U.S.C. 701–708 is not applicable here in that the refunds and deobligations here involved represent collections and unexpended-unobligated balances relating to fiscal year 1970 and prior year appropriations and therefore were not assets of the former Post Office Department (except that the amounts could be restored, if appropriate, to liquidate obligations) and could not therefore be transferred to the Postal Service.

As noted above 31 U.S.C. 701(a)(2) provides that upon expiration of availability for obligation [June 30, 1970, or June 30 of prior years] the unobligated balance of the appropriation shall revert to the general fund of the Treasury.

We believe it also pertinent that 31 U.S.C. 701(c) provides that the obligated balance of an appropriation account [*see* 31 U.S.C. 701(a)(1)] as of the close of the fiscal year shall be the amount of unliquidated obligations applicable to such appropriations, *less the amount collectible* as repayments to the appropriation, and that collections not received until after the transfer of the obligated balance as required by 31 U.S.C. 701(a) shall be credited to the account ["M" account] into which the obligated balance has been transferred, and that 31 U.S.C. 701(d) requires that the withdrawals made pursuant to subsection (a)(2) be accounted for and reported as of the fiscal year in which the appropriations concerned expire for obligation. It thus is necessary to credit the repayments to such prior year merged obligated balances so that the amount thereof will be equal to the recorded obligations under each prior year appropriation.

We believe that these provisions together with 31 U.S.C. 703(a) which requires that these accounts be reviewed at least each fiscal year and any undisbursed amounts therein in excess of the obligated amounts pertaining thereto be transferred to the general fund of the Treasury, clearly require that any amounts otherwise properly creditable to the lapsed appropriations of the former Post Office Department may not be considered to be assets of the Postal Service. As indicated in our earlier decision referred to above we find no language in the Postal Reorganization Act that can be construed as making an appropriation of these unexpended and unobligated balances of prior year appropriations to the Postal Service.

To adopt the General Counsel's view that section 410(a) of the Postal Reorganization Act makes 31 U.S.C. 701–708 inapplicable to such lapsed appropriations of the former Post Office Department would be to require the nullification of all action theretofore taken with respect to such funds and to require that the unexpended and unobligated balances of all prior years' appropriations made to the

Post Office Department transferred to the general fund of the Treasury since 1956 now be withdrawn from the general fund of the Treasury and credited to the Postal Service Fund. It also would follow from the General Counsel's view that all liabilities chargeable to such prior year appropriations would become liabilities of the Postal Service. It would be inequitable to permit the Postal Service to keep the repayments and excess obligations on individual transactions, but require that any deficiencies under such merged accounts remain as liabilities of the United States.

We find nothing in the Postal Reorganization Act or in its legislative history to suggest such results. Accordingly, it is our view that unexpended and unobligated balances of fiscal year 1970 and prior years' appropriations, and refunds or collections applicable thereto, become assets of the Postal Service only to the extent that they were assets of the Post Office Department subject to the provisions of 31 U.S.C. 701–708. In other words, these 1970 and prior year funds were assets of the Post Office Department only to the extent needed to liquidate prior year obligations; all collections related to such prior year funds were required to be deposited into such merged prior year funds; any excess amounts not needed to liquidate such obligations being for deposit into the general fund of the Treasury; and the right to restore any unobligated amounts to meet any deficiencies under such prior year merged account.

[B–176392]

Bonds—Bid—Deficiencies—More Than One Surety

A bidder required to furnish a bid guarantee in the penal sum of only $300,000 who submitted a bond signed by two sureties—one having a net worth of $625,500, the other $27,500—was a responsible bidder whose bid should not have been rejected. Even though one of the sureties did not show on his Affidavit of Individual Surety at bid opening a net worth at least equal to the penal sum of the bid bond, the bond itself is enforceable and the bidder is considered to have tendered a valid bid bond, executed by sureties that are jointly and severally liable in a penal sum sufficient to satisfy the requirements of the solicitation. Moreover, as the net worth information does not relate to bid responsiveness but rather to the responsibility of the surety, the rejected bid may be considered on the basis of the corrected affidavit submitted by the deficient surety.

Bonds—Bid—Surety Requirements—At Least Two Individual Sureties

Absent the safeguards in the case of an individual surety that is prescribed by Treasury Department Circular 570 (31 CFR part 223), for a corporate surety, and covered by paragraph 10-201.2(a)(2) of the Armed Services Procurement Regulation, the Defense Department requirement that there be at least two individual sureties possessing the requisite worth is a valid and well-founded protective measure.

Bonds—Bid—Penal Sum—Performance and Payment Bonds Comparison

The fact that the penal sums of performance and payment bonds are required in lesser amounts than the sum stated for the bid guarantee in an invitation for bids is not indicative that the bid guarantee requirement was excessive where the contracting officer exercised his discretion under paragraph 10-102.3 of the Armed Services Procurement Regulation by requiring the bid bond to be in an amount not less than 20 percent of the bid price. Furthermore, the complaint in the matter having been filed after bid opening, it is untimely under section 20.2 of the Interim Bid Protest Procedures and Standards of the United State General Accounting Office (Title 4 of the Code of Federal Regulations) which prescribes that a protest of an impropriety that is apparent before bid opening must be filed prior to bid opening.

To the Secretary of the Army, October 10, 1972:

Reference is made to letter SAOAS(I&L)-MO dated July 18, 1972, from the Assistant Deputy for Materiel Acquisition, Office of the Assistant Secretary, reporting on the protest of Jets Services, Inc., against the rejection of its bid under invitation for bids (IFB) No. DABF07-72-B-0150, issued by the Department of the Army, Procurement Division, Fort Ord, California.

By reason of the withdrawal of the low bid, Jets Services became the low, eligible bidder at an estimated total bid of $1,505,866.80, or $253,234.80 less than that bid by the next eligible bidder. The contracting officer rejected the bid of Jets Services as nonresponsive for failure to comply with the bid guarantee provisions of the IFB and the Armed Services Procurement Regulation (ASPR).

Paragraph C-28 of the solicitation advised bidders that a bid guarantee in a penal sum equal to 20 percent of the bid price, or $300,000, whichever is less, was required with each bid. Since 20 percent of the price bid by Jets Services exceeded $300,000, the latter represents the penal amount of the bid guarantee for the firm. Jets Services elected to submit in response to the bid guarantee requirement a bid bond supported by two individual sureties in the penal amount of 20 percent of its bid price. The required affidavits of the individual sureties disclose that one individual surety listed a net worth in excess of the penal amount of the bond ($625,500) while the other listed a net worth less than the penal amount ($27,500). The rejection by the contracting officer of the Jets Services bid was bottomed on the failure of one of the individual sureties to have a net worth at least equal to the penal amount of the bond.

In support of this position, the contracting officer and legal officers of the Department of the Army invite our attention to the instructions on the reverse of the Affidavit of Individual Surety form which clearly advise that each individual surety must show net worth in a sum not less than the penal amount of the bond. Also, ASPR 10-201.2 provides in effect that the contracting officer must ascertain that each individual

surety justifies a net worth in a sum not less than the penal amount of the bond. Furthermore, the contracting agency advises that regulation provides that individual sureties, of which there must be at least two, are jointly and severally liable in the event of a default by the principal. It is also pointed out by the agency that ASPR 2-404.2(h), ASPR 10-102.5(a) and paragraph C-29 of the IFB require the rejection of a bid not complying with the bid guarantee requirements.

We do not subscribe to the rationale for bid rejection and, for reasons set forth in more detail below, we conclude that the bid of Jets Services should not have been rejected as nonresponsive.

Commencing with our decision at 38 Comp. Gen. 532 (1959), our Office has consistently held that the requirement for a bid guarantee or bond in a formally advertised procurement, as here, is a material requirement which cannot be waived. *See* B-175477, August 3, 1972; and 46 Comp. Gen. 11 (1966). Since our decision at 38 Comp. Gen. 532, we have been confronted with and ruled upon the legal effects of varying degrees of bid bond deficiencies. We have remarked that waivable deviations from full compliance with bid bond requirements may not be of a character which would result in the Government obtaining less than the same full and complete protection as it would have under a bond in complete conformity. *See* B-167787, November 4, 1969.

In this case, even though one of the two individual sureties proffered did not show on his Affidavit of Individual Surety at bid opening a net worth at least equal to the penal sum of the bid bond, the bid bond itself is enforceable. Jets Services tendered with its bid an apparently valid bid bond, executed by two individual sureties, jointly and severally, in a penal amount sufficient to satisfy the requirements of the IFB. The failure of one of the two individual sureties to possess the requisite net worth at bid opening does not detract from the joint and several liability of the sureties on the bid bond.

Looking further into the bid guarantee requirement, a review of the individual affidavit in question and the regulations discloses that the contracting officer is not constricted to the four corners of the affidavit submitted with the bid bond to determine whether or not a surety possesses the requisite net worth. For example, the affidavit of individual surety form calls for a certificate of sufficiency executed by, *inter alia*, a bank or trust company officer attesting to the responsibility of the surety. The instructions to the affidavit state that further certificates showing additional assets or a new surety may be required to assure protection of the Government's interest. Also, ASPR 10-201.2(d) permits the contracting officer to require an individual surety to furnish additional information on net worth, as well as the use of extrinsic evidence to assist in a determination of the net worth sufficiency of an individual surety.

Based on the above, we believe that the matter of the net worth of an individual surety on a bid bond is not one relating to the responsiveness of a bid but rather to the responsibility of the surety. The fact that an affidavit of an individual surety either has not been filed timely or has been filed timely but discloses assets insufficient to cover the penal amount of the bond does not affect the actual net worth of the surety. Since completion of the surety affidavit is solely for the benefit of the Government to disclose facts concerning the responsibility of the surety, we see no reason why contracting officials should not be able to ascertain, after bid opening but subject to the time restraints of the procurement, the acceptability of an individual surety based on required net worth. *See* B–172750, September 27, 1971.

By letter dated August 4, Jets Services forwarded to our Office a revised affidavit from the deficient individual surety (enclosed). We would have no objection to the consideration of the Jets Services bid if a review and investigation of that revised affidavit or any other relevant information disclose that the bid is, in fact, supported by at least two individual sureties possessing the requisite net worth.

We take this position notwithstanding the contentions by Jets Services that the Department of Defense arbitrarily requires two individual sureties with a net worth at least equaling the penal sum as opposed to the requirement of only one corporate surety.

To contrast the necessity for only one corporate surety, ASPR 10–201.2(a)(2) states that any corporate surety offered for a bond furnished the Government must appear on the Treasury Department List (TD Circular 570) and the amount of the bond must not be in excess of the underwriting limits stated in that list. Department of the Treasury regulations (31 CFR part 223) provide for strict compliance with specific requirements both before and after a corporate surety is issued a certificate of authority to do business with the Government on bonds and thereby placed on the approved surety departmental list—e.g., authorization under a charter or articles of incorporation to do business under the provisions of 6 U.S.C. 6–13 covering official and penal bonds; financial condition reflecting capital fully paid up in cash of not less than $250,000; solvency and financial qualifications; engagement in the business of fidelity insurance and suretyship and intention to participate actively in the execution of fidelity and surety bonds in favor of the United States; safely invested cash capital and other funds; filing of annual financial reports; and a limitation of risk on outstanding surety obligations. No such established qualifications or requirements are necessary when individual sureties are proffered in support of a bid bond. Absent these safeguards in the case of an individual surety, we believe that the Department of Defense

requirement that there be at least two individual sureties possessing the requisite net worth is a valid and well-founded protective measure.

In addition, the Jets Services complaint against the alleged excessive amount of the bid guarantee as opposed to the lesser penal sums of the performance and payment bonds is not persuasive. This is so because the contracting officer exercised his discretion under ASPR 10-102.3 by requiring a bid bond in an amount not less than 20 percent of the bid price. In any event, that complaint is untimely under section 20.2 of our Interim Bid Protest Procedures and Standards, published in Title 4 of the Code of Federal Regulations, which provides 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."

[B-176536]

Canal Zone—Employees—Postal—Compensation—Administratively Fixed

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

To the Governor of Canal Zone Government, October 10, 1972:

Reference is made to letter dated July 11, 1972, from Charles R. Clark, Acting Governor, with enclosures, requesting our decision concerning increases in compensation which may be prescribed administratively for postal employees of the Canal Zone Government.

You point out that the employees here involved are not within the purview of the statutes that govern the United States Postal Service (USPS), 39 U.S. Code 101 *et seq.*, but rather are covered by the Canal Zone Code (specifically, 2 C. Z. Code 101-149 and 1131-43).

In the past the pay rates for the postal employees of the Canal Zone Government were traditionally established and adjusted administratively to conform generally with those rates prescribed for the former United States Post Office Department. However, you say that since the establishment of USPS a problem has arisen in attempting to grant the same increases as those granted by USPS because of the wage-price guidelines set forth by the President and the Pay Board. Although USPS has granted more than one wage increase to its employees since the institution of the wage-price freeze (on August 15,

1971) with the aggregate thereof exceeding 5.5 percent (stated to have ranged from 4.8 percent to 11.5 percent) the Canal Zone Government has limited the increases for its postal employees to 5.5 percent of the pay rates in existence prior to August 15, 1971.

Since the Pay Board has permitted USPS to exceed the 5.5 percent increases as specified by the guidelines you ask whether such limitation likewise may be exceeded for the postal employees of the Canal Zone Government.

We first note that determinations with regard to wage rates and increases therein for Canal Zone Government employees are a matter of administrative discretion. 2 C.Z.C. 101. In such light (and as pointed out by your letter of July 11, 1972) resolution of the present question would appear to turn on whether the fourth paragraph of a Presidential Memorandum dated January 11, 1972, would be for application to the employees here involved. This paragraph stated as follows:

> Heads of executive agencies are authorized to adjust by administrative action the rates of pay which are subject to the provisions of section 5307 of Title 5 of the United States Code, consistent with the adjustments effected by Executive Order No. 11637 of December 22, 1971. Such adjustments shall also be consistent with the policies and pay increase guidelines issued by the Pay Board established under Executive Order No. 11627 of October 15, 1971.

5 U.S.C. 5307 provides in pertinent part as follows:

> (a) Notwithstanding section 665 of title 31—
> (1) the rates of pay of—
> (A) *employees in the legislative, executive, and judicial branches of the Government of the United States (except employees whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives)* and of the government of the District of Columbia, whose rates of pay are fixed by administrative action under law and are not otherwise adjusted under this subchapter;
> (B) employees under the Architect of the Capitol, whose rates of pay are fixed under section 166b–3 of title 40, and the Superintendent of Garages, House office buildings; and
> (C) persons employed by the county committees established under section 590h(b) of title 16; and
> (2) any minimum or maximum rate of pay (other than a maximum rate equal to or greater than the maximum rate then currently being paid under the General Schedule as a result of the pay adjustment by the President), and any monetary limitation on or monetary allowance for pay, applicable to employees described in subparagraphs (A), (B), and (C) of paragraph (1) of this subsection;
>
> may be adjusted, by the appropriate authority concerned, effective at the beginning of the first applicable pay period commencing on or after the day on which a pay adjustment becomes effective under section 5305 of this title, by whichever of the following methods the appropriate authority concerned considers appropriate—
> (i) by an amount or amounts not in excess of the pay adjustment provided under section 5305 of this title for corresponding rates of pay in the appropriate schedule or scale of pay;
> (ii) if there are no corresponding rates of pay, by an amount or amounts equal or equivalent, insofar as practicable and with such exceptions and modifications as may be necessary to provide for appropriate pay relationships between positions, to the amount of the pay adjustment provided under section 5305 of this title; or * * *. [Italic supplied.]

While the matter is not entirely free from doubt, we believe the better view is that the language of 5 U.S.C. 5307 was intended to include within its scope all Canal Zone Government employees since they are employees in the executive branch of the United States Government. Moreover, the fact that by practice or regulation the Canal Zone Government used the compensation of employees of USPS (which agency is not under 5307) as a measure of the compensation to be paid to postal employees of the Canal Zone Government does not serve to remove the latter from the scope of 5307.

It follows from the above that your agency was correct in following the guidelines on pay increases as set forth in the Presidential Memorandum of January 11, 1972, for the postal employees here involved and that you should continue to do so in the absence of any exemption therefrom by law or otherwise.

Your question is answered accordingly.

[B-176415]

Bids—Qualified—Specification Changes After Bid Opening—Not Prejudicial to Other Bidders

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

To the Director, Defense Supply Agency, October 11, 1972:

By letter dated August 4, 1972, and subsequent correspondence, the Assistant Counsel furnished our Office an administrative report on the protest of the Goodyear Aerospace Corporation against the Defense Construction Supply Center's (DCSC) award of multiyear contracts for portable expandable shelters and portable ward containers under invitations for bids (IFB) Nos. DSA700-72-B-2292 and -2296 to the Brunswick Corporation.

From our review of the record and after consideration of the submissions of the interested parties, we must conclude that there is no basis for our Office to interpose a legal objection to the awards. The circumstances and reasons requiring this conclusion are set forth below.

Both invitations requested bids for certain data terms identified as separate contract line items (CLIN's). The following preface to the schedule pricing provisions for the data CLIN's advised bidders that:

> Data must be furnished for [the] Item[s] * * * in accordance with contract line item nos. /CLINS/ listed below covering sequences included on DD Form 1423, Attachment No. 1. Offeror must indicate opposite each CLIN, a price or—No Charge—for each element of data required. Any refusal to furnish data, or any statement which creates a doubt whether data will be furnished, will render bids nonresponsive/offers unacceptable.

With respect to evaluation and award of these CLIN's, clause DO5, contained in section "D" of each invitation, provided, in part, that:

> a. If the offeror does not indicate a charge for data, the Government will consider and the offeror agrees that the data charge is included in the price of the end item.
>
> b. Separate awards will not be made for data CLINs, however, the right is reserved to make an award for the end item CLINs without awarding the data CLINs. If the same end item is listed in several separate CLINs (not on an "all or none" basis) and an offer is low on part but not all of the end item CLINs, the offeror's price for all data CLINs pertaining to the low CLINs will be considered for evaluation purposes to determine total cost to the Government and whether multiple awards will be made for the end item CLINs.

Bidders were advised that award would be on an "all or none" basis by the invitations' incorporation by reference of clause CO8 of the Defense Contract Supply Center Contract Provisions (January 1971). CO8 provides as follows:

> Notwithstanding paragraph 10.c., Standard Form 33A (March 1969), only one award will be made for the total quantity of all CLIN(s) listed. Offers will be evaluated and award will be made on an "all or none" basis for these CLIN(s). Offers submitted on a part of the CLIN(s) but not all will be rejected as nonresponsive. Should the Government's requirement for any or all of the CLIN(s) be reduced or cancelled prior to award. the solicitation will be cancelled with respect to the CLIN(s) involved and the requirement will be procured by a new solicitation.

That only one award would be made was reemphasized in paragraph 3C of section "D" of IFB–2292 and paragraph 3C of section "C" of IFB–2296.

Bids on both invitations were opened on June 14, 1972. Brunswick submitted the lowest bids and Goodyear was the second lowest bidder. The contracting officer advises that for the multiyear requirement under IFB–2292, Brunswick submitted a total price of $3,444,190.28, while Goodyear bid a total price of $3,588,995. On IFB–2296, Brunswick bid a total of $4,225,928.28 and Goodyear bid a total of $4,376,607. Brunswick also offered a further price reduction under each invitation provided it received awards under both invitations. On the basis of this offer, the contracting officer reports a difference of $574,782.74 in favor of Brunswick.

An examination of Brunswick bids drew into question the adequacy of its response to data CLIN 0011 on IFB–2296 and CLIN 0015 on

IFB-2292. Both CLIN's covered "Supplementary Provisioning Technical Documentation," and in response to these CLIN's, Brunswick indicated no charge for the items. However, in the case of IFB-2296, the schedule, page 23, included the following statement:

> No charge for Item 0011 provided existing Gov't. Drawing Package meets requirements of the Data Item (no cost is included for the making of any drawings).

With the exception of the parenthetical statement, the same statement was made in reference to CLIN 0015 on the schedule, page 24, of IFB-2292.

The contracting officer advises that these data CLIN's require the contractor to provide drawings of components that were not fully described or otherwise adequately identified in existing Government drawings. In light of the data requirements, the contracting officer interpreted the qualifying statements as offering the data CLIN's at no charge if the Government drawing package was adequate, but reserving the right to charge an additional, unspecified amount if additional drawings were required. The statements, so construed, were considered material qualifications and Brunswick's bids were administratively determined to be nonresponsive.

In view of the substantial difference between the total Brunswick and Goodyear bids, DCSC requested the United States Army Mobility Command (MECOM), the requisitioning activity, to review its needs for the data CLIN's. Alternatively, it was asked to consider the possibility of canceling the invitations on the ground of unreasonable prices and resoliciting the requirement. Balancing the speculative nature of the savings that might be realized by resolicitation against the urgent need for the units and the necessity of reprogramming the funds available if award was not made by June 30, MECOM recommended against cancellation. However, after a review of the requirements for the data CLIN's, MECOM informally advised DCSC on June 30 that the requirements were withdrawn. This advice was confirmed by telegram of the same date. With deletion of the data CLIN's, Brunswick's bids were considered responsive and the awards were made on June 30.

With respect to the responsiveness of Brunswick's bids, counsel urges that Brunswick was, as a matter of law, required to furnish the data CLIN's in question and since the Government received no consideration for the deletion of the CLIN's, the deletion can be treated as a mistake having no legal effect. Counsel traces Brunswick's obligation to furnish the data CLIN's to paragraph "a" of clause DO5 which provides that if an offeror does not indicate a charge for the data, "the Government will consider and the offeror agrees" that the charge is included in the price of the end item. It is counsel's view that a bidder

by signing the bid has expressly agreed to DO5a and may not escape the effect of the provision in the absence of an express and unequivocal exception. In our view, Brunswick's bids are, at least, ambiguous. We note Brunswick has not simply signed the bids and failed to make any pricing replies to the data CLIN's in question. Brunswick's responses were made in the face of DO5a and, when viewed from this perspective, it is reasonable to say that Brunswick's responses evidence an intent to avoid the operation of the clause. Moreover, we think it is reasonable to view the language used as reserving the right to charge an additional amount, albeit unspecified, upon a determination by Brunswick that the existing data package is inadequate. Since it is conceded that data CLIN's have a substantial price impact, the ambiguity in Brunswick's bids would support a determination of nonresponsiveness. *See* 50 Comp. Gen. 379 (1970). Consequently, we turn to the question of the propriety of the cancellation of the data CLIN's.

It is Goodyear's contention that Brunswick's bids could not in any event be accepted in view of the language of clause CO8 and the preface to the data pricing portion of the schedules. As counsel points out, CO8 clearly states that offers submitted on a part of the CLIN's but not all will be rejected as nonresponsive. With specific reference to the pricing of the data CLIN's, the preface to the data pricing portion of the schedule reemphasized this caution:

> * * * Any refusal to furnish data, or any statement which creates a doubt whether data will be furnished, will render bids nonresponsive * * *.

Notwithstanding the mandatory character of the language used, we have recognized that a pricing response which would render the bid nonresponsive does not necessarily require rejection of the bid if the item is not to be included in the award. *See* B–174880, April 19, 1972; B–175055, March 28, 1972; B–169352, June 30, 1970; B–143271, October 7, 1960; B–148081, March 5, 1962, and cases cited therein.

Goodyear, however, has raised the further question of whether under the terms of the invitation DCSC could delete the data CLIN's. While clause CO8 indicates that award will be made on an all or none basis, it further provides that if—

> The Government's requirement for any or all of the CLIN(s) be reduced or cancelled prior to award, the solicitation will be cancelled with respect to the CLIN(s) involved and the requirement will be procured by a new solicitation.

In addition, paragraph "b" of clause DO5 deals specifically with the deletion of data CLIN's in the following terms: "Separate awards will not be made for data CLINs, however, the right is reserved to make an award for the end item CLINs without awarding the data CLINs."

It is DCSC's position that paragraph "b" of clause DO5 and the above-quoted portion of CO8, taken together and read in harmony with

the cautionary language relative to the necessity for data CLIN pricing, mean, in effect, that the failure to bid on a data CLIN will result in the rejection of the bid, provided the data item is the subject of an award.

In its submission of August 18, Goodyear's counsel offers the following rejoinder:

> * * * Assuming for purposes of argument that DO5 is more specific than either of the other data provisions, even a cursory review of that clause reveals that its terms only go to the question of whether *award* will be made on an "all or none" basis and not to whether *evaluation* of the bids will be made on such a basis. Stated otherwise, clause DO5 does not address the question of what items must be bid on; nor does it speak to the obligations of DCSC regarding responsiveness of bids. Thus, nothing in clause DO5 conflicts with or contradicts the following statement in clause CO8:
>
> *Offers submitted on a part of the CLIN(s) but not all will be rejected as nonresponsive.* [Italic supplied.]
>
> Nor does anything in DO5 conflict with the provision above the data CLINs that "any refusal to furnish data, or any statement which creates a doubt whether data will be furnished, will render bids nonresponsive * * *"
>
> Even if we were to accept for purposes of argument only, the Government's two step argument that DO5 controls this case and that a bid need not be responsive to the IFB as advertised but only to the contract as awarded, the Government's position would still be untenable, DO5, the very clause relied on by the Government, states on its face that, "Separate awards will not be made for data CLINs." Award then, at least for the data items was stated to be on an all or nothing basis, and a bidder could have correctly bid a single price for the data items. Thus, the Government itself waived its rights to delete a single data CLIN under the IFBs.

We must take issue with Goodyear's interpretation. That portion of paragraph "b" of DO5 which Goodyear stresses is, in our view, simply a statement that one bidder will not be awarded an end item CLIN while another is awarded the data CLIN associated with that end item. In this regard, the remaining sentences of paragraph "b," which outline a procedure for evaluating and awarding end item and related data CLIN's where award is not on an "all or none" basis, make this clear. While the incorporation of CO8 negates the applicability of this evaluation procedure, it also reemphasizes the fact that separate awards will not be made. In addition, Goodyear fails to give complete recognition to the specific reservation in clause DO5 "to make an award for the end item CLINs without awarding the data CLINs." Considering this language alone, we would agree with the contracting officer's view that the right to eliminate all data items from consideration implicitly includes the right not to award a portion of the data.

Since paragraph "b" of DO5 deals specifically with data CLIN's and authorizes the deletion of these CLIN's, we need not consider the question whether CO8 standing alone would authorize the deletion of the data CLIN's for purposes of evaluation and award or whether, as Goodyear suggests, a reduction or cancellation of the Government's requirement for a particular CLIN necessitates a cancellation of the solicitation and readvertisement of the entire requirement. As we have in-

dicated, this argument would be viable only if the deletion of an end item CLIN was involved. And insofar as the right to delete end item CLIN's without readvertisement is concerned, the clause has been modified to eliminate any question. *See* clause "C–15—ALL OR NONE (1972 MAR)," DCSC Contract Provisions, which states in pertinent part that: "Should the requirement for a CLIN or part of a CLIN group be reduced prior to award, no award will be made for the CLIN or CLIN group involved * * *."

Thus, we must conclude that under the terms of the invitations, evaluation and award would be subject to the Government's right to delete the data CLIN's in issue. Given this right, we can see no basis for according any significance to the factual differences between this case and the cases previously cited for the proposition that nonresponsiveness with respect to an item which will not be the subject of award does not require rejection of the bid. Waiver of the defect, or nonresponsiveness, does not result in meaningful prejudice to the other bidders. In this connection, what we said in 40 Comp. Gen. 321, 324 (1960), and quoted with approval in 44 Comp. Gen. 386, 389 (1965), is pertinent:

> Whether certain provisions of an invitation for bids are to be considered mandatory or discretionary depends upon the materiality of such provisions and whether they were inserted for the protection of the interests of the Government or for the protection of the rights of bidders. Under an advertised procurement all qualified bidders must be given an equal opportunity to submit bids which are based upon the same specifications, and to have such bids evaluated on the same basis. To the extent that waiver of the provisions of an invitation for bids might result in failure of one or more bidders to attain the equal opportunity to compete on a common basis with other bidders, such provision must be considered mandatory. However, the concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids. It does not confer upon bidders any right to insist upon the enforcement of provisions in an invitation, the waiver of which would not result in an unfair competitive advantage to other bidders by permitting a method of contract performance different from that contemplated by the invitation or by permitting the bid price to be evaluated upon a basis not common to all bids. Such provisions must therefore be construed to be solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the rights of bidders to which the rules and principles applicable to formal advertising are directed. To this end, the decisions of this Office have consistently held that where deviations from, or failures to comply with, the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required of the bidder in the event he is awarded a contract, a failure to enforce such provision will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive.

With respect to the decision to delete the data CLIN's, during a conference in our Office on September 1, 1972, question was raised whether there was, in fact, no need for the data items in issue. At our request, the Assistant Counsel by letters, with enclosures, dated September 20 and 21, 1972, provided further clarification. Included in this correspondence is a telegram dated September 20, 1972, from MECOM which, in our view, confirms the lack of need for the data CLIN's:

IT WAS DETERMINED THAT DATA ITEM 0011 [IFB-2296] WAS NOT ESSENTIAL AND THAT DATA REQUIRED UNDER DATA ITEM 0015 [IFB-2292] WAS REDUNDANT BECAUSE THE INFORMATION COULD BE OBTAINED FROM OTHER DATA TO BE FURNISHED BY THE CONTRACTOR; NAMELY, CONTRACT DATA REQUIREMENT, SEQUENCE 0001, PROVISIONING LIST; SEQUENCE 0002, PARTS CHANGE NOTICE, DESIGN ENGINEERING CHANGE DOCUMENTATION; SEQUENCE 0005, EQUIPMENT PUBLICATIONS, DA TECHNICAL MANUAL (TM) PARTS.

Moreover, we find no impropriety in the fact the contracting officer's and MECOM's exploration of the alternatives of either canceling and readvertising or deleting the data items was prompted by the substantial difference in the Brunswick and Goodyear's bid prices. Since the invitations authorized deletion of the data CLIN's and the deletion could be accomplished without meaningful prejudice to other bidders, the contracting officer could not ignore the potential savings involved and still fulfill his obligation to act in the best interests of the United States.

Accordingly, the protest is denied.

[B-171728]

Administrative Determinations—Conclusiveness—Contracts—Amendments and Modifications

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

Contracts—Disputes—Administrative Determinations—*S. & E. Contractors, Inc.* Case Effect

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

To the Secretary of Agriculture, October 12, 1972:

We refer to your letter of August 3, 1972, with enclosures, requesting our decision as "to whether, under timber sale contract provisions, all or any part of amounts claimed by an appellant can be paid when there are no compensating advantages to the Government."

The appellant, Donald W. Lyle, Inc., initially filed the claim in question by letter of September 26, 1966, to the Regional Forester in the form of a request for modification of Forest Service Timber Sale Contract No. 3–215 to include the cost of placing additional subgrade reinforcement incident to the construction of the East Canyon road through swampy areas. By letter of November 9, 1966, the Regional Forester denied the company's request, and the contractor filed a timely appeal with the Board of Forest Appeals.

In its ruling of April 12, 1968, the Board concluded the requested relief could be granted within the "bounds of the contract," and that the Board therefore had the power to adjudicate the issues in dispute. In this regard, the Board ruled that the language of paragraph 2(g) of the general terms of the contract contemplated that the contract might be modified and provided authority which could be utilized if found appropriate on consideration of the merits of appellant's claim. Subsequently, the Board recommended on November 18, 1970, that the Forest Service grant the contractor relief by adjusting stumpage rates under the contract to reflect an increase of $4,100 in the estimated cost of the road.

By decision of March 26, 1971, the Chief, Forest Service, upheld the decision of the Regional Forester and stated that contract term 2(g) would not permit the adjustment in road cost estimates recommended by the Board.

Subsequently, the contractor appealed the Chief's adverse decision to the Secretary of Agriculture. By decision of July 12, 1972, you upheld the Chief's decision and stated that it was in conformance with the Secretary's regulations in the Code of Federal Regulations (CFR) at 36 CFR 221.16(a) which provide that "timber sale contracts may be modified only when the modification will apply to unexecuted portions of the contract and will not be injurious to the United States." However, your decision also indicated that, in view of the Board's recommendation, the matter would be submitted to this Office for a decision as to whether all or any part of the claimed amount could be paid.

Under the appeal regulations of the Forest Service, Department of Agriculture, at 36 CFR 211.28(b), the Secretary's decision appears to be the final administrative determination provided by the regulations for the claim in question. In this connection, the Supreme Court has recently held that a Federal agency's settlement of a claim under the Disputes clause is binding on the Government, that there is not another tier of Federal or administrative review and that, save for fraud or bad faith, the agency's decision is "final and conclusive." *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972). While the

situation in the cited case involved the review by other agencies of the Government of a final "Disputes" decision in favor of the contractor, we believe the Supreme Court's ruling is applicable equally to the situation at hand which concerns a final agency decision against the contractor. *See* B-174899, June 1, 1972.

In view of the foregoing, it is our opinion that your decision of July 12 must be regarded as "final and conclusive" insofar as other agencies of the Government are concerned, and that it would be inappropriate for this Office to review your decision.

The files forwarded with your letter are returned, as requested.

[B-175004]

Contracts — Negotiation — Evaluation Factors — Propriety of Evaluation

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

Contracts—Protests—Court Injunction Denied—Effect on Merits of Complaint

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

To Cole and Groner, October 12, 1972:

We refer to a letter dated January 19, 1972, from the General Electric Company (GE) and subsequent submissions from your firm on behalf of GE, protesting against the award of contract No. FO4701-72-C-003 to Philco-Ford Corporation (Philco) pursuant to request for quotations (RFQ) No. FO4071-71-Q-0183, issued by the Air Force Satellite Control Facility (AFSCF) Headquarters, Space and Missile Systems Organization (SAMSO), Los Angeles Air Force Station, Los Angeles, California.

This procurement calls for operation and maintenance services for six Remote Tracking Stations (RTS). The services encompass such tasks as commanding, controlling, and tracking of space vehicles; tracking of ballistic missiles; management, administration, and training of personnel; housekeeping and maintenance of buildings and grounds; maintaining physical and administrative security, and various other functions necessary to insure the effective operation and maintenance of the RTS.

Previously these services had been obtained by the Air Force through sole source contracts with Lockheed Aircraft Corporation (Lockheed) for two of the sites and Philco for the remaining four. In July 1970 a study group was appointed by SAMSO to determine whether a single contractor for all the sites could be selected competitively. The committee recommended in early 1971 that such competition be sought. In accordance with SAMSO regulation 70–10, a Source Selection Board (SSB) was established in April 1971 to prepare the request for quotations, evaluate the proposals and present its recommendation to the Source Selection Authority (SSA).

Under established procedures the SSB is divided into a Source Selection Evaluation Board (Board) and a Source Selection Advisory Council (SSAC). The Board first evaluates the proposals in accordance with guidelines and standards developed by the SSAC and then reports its findings and recommendations to the SSAC, which in turn conducts a further review. Finally, the SSAC reports its findings to the SSA, the individual who possesses the authority to make the ultimate decision.

On May 27, 1971, the subject RFQ, which contemplates a fixed price incentive (firm target) contract, was mailed to 31 prospective contractors. The RFQ covers four performance periods: (1) phase-in-period, December 10, 1971, to May 15, 1972; (2) basic period, February 15, 1972, to September 30, 1973; (3) first option period, October 1, 1973, to September 30, 1974, and (4) second option period, October 1, 1974, to September 30, 1975.

On August 4, 1971, seven proposals were received in response to the RFQ. The proposals were evaluated in accordance with the above-cited procedures resulting in a determination on October 6 by the SSA that four firms, including GE and Philco, were within the competitive range and therefore eligible for negotiations. On October 20, 1971, letters were sent to the four offerors setting forth what the Air Force considered to be deficiencies in the initial proposals and establishing November 8 as the deadline for receipt of revised proposals. The four firms submitted revised proposals which were evaluated by the Board and the SSAC. The results of these evaluations were then

presented to the SSA. On December 2, 1971, the SSA issued a memorandum finding which directed award to Philco based on that firm's alleged technical superiority. The contract was awarded to Philco on December 15, 1971.

On January 4, 1972, the Air Force conducted separate debriefing conferences with the three unsuccessful offerors. After its debriefing conference GE representatives reached the conclusion that their firm, which offered the lowest price, had been improperly denied the award. By letter dated January 19, 1972, GE protested to this Office, contending that the contract awarded to Philco should be canceled and the award made to GE.

Subsequent to the filing of the protest with this Office GE on February 8, 1972, filed Civil Action No. 248–72, *General Electric Company v. Robert C. Seamans, Jr.* The complaint requested relief as follows:

> Temporarily, *pendente lite* and permanently enjoining Defendant and each and all of his officers, agents, servants, employees and attorneys, and all those persons in active concert or participation with any of the foregoing, from taking further action, direct or indirect, to implement the December 1971 award of the contract under Air Force Request for Quotations No. FO 4701–71–Q–0183 to Philco-Ford Corporation for the Operation and Maintenance of the Remote Tracking Stations of the Air Force Satellite Control Facility, including but not limited to permitting Philco-Ford Corporation representatives to visit the RTS for the purpose or with the effect of terminating, transferring or otherwise uprooting RTS incumbent personnel; and if decision therein is in favor of GE, from failing or refusing to award the contract to GE * * *.

This request was based on the allegation that although "fully qualified to perform the contract," GE had been arbitrarily denied the award because of the Air Force view that GE's cost estimates were unrealistically low. In addition, GE contended that the negotiations conducted by the Air Force were not lawful because GE had not been notified that its cost estimate might be considered too low; that the Air Force arbitrarily withheld from GE information in the possession of two of GE's competitors regarding salaries and costs; and that Defense Contract Audit Agency (DCAA) and Air Force auditors who reviewed the cost aspects of the GE proposal did not indicate that the GE cost estimates were too low or questionable in any way. Finally, GE complained against the Air Force failure to score the revised proposals numerically.

GE moved for a Temporary Restraining Order in the District Court. However, after a hearing held on February 15, 1972, the District Court decided to consider the matter on GE's separate motion for a preliminary injunction upon fuller presentation by the parties. On February 22, 1972, Philco's motion to intervene, filed 4 days earlier, was granted.

On March 7, 1972, the District Court entered an order granting the preliminary injunction and issued findings of fact and conclusions

of law. The District Court's conclusions of law are set forth in pertinent part below:

2. The provisions, purposes and policy of the law with respect to the competitive procurement of Government contracts, and in particular those referred to in Findings of Fact 65–66, *supra*, require the Air Force to conduct itself impartially as among the various proposers and competitors and to conduct negotiations in good faith, meaningfully and fairly.

3. The said provisions of law were violated by the Air Force in this case, by virtue of its rejection of the GE proposal on the ground it believed GE's costs were unrealistically low without having clearly or fairly advised GE, during the negotiations or prior to the award of the Contract, that it did or might have that belief.

4. The said provisions of law were violated by the Air Force in this case by its failure or refusal to provide GE with information which GE needed to bid on a fair basis, and further, by its citing alleged GE deficiencies which reflected the lack of that information on grounds for downgrading or rejecting GE's proposal.

5. The said provisions of law were violated by the Air Force in this case by its acting as though costs were irrelevant, its disregard of costs, and its failure or refusal to give proper weight to costs, when costs were stated in the RFQ as a factor to be considered, were in fact considered, and actually were decisive.

6. ASPR 3–801.3(b)(4) was violated in this case because no Government auditor ever communicated to GE that there was anything inadequate, invalid or questionable with respect to the costs support for the proposal and the administration of the Contract.

7. Space and Missile Systems Organization, Air Force, Regulation 70–10, Paragraph 6(g), in particular, was violated in this case by the failure to score the revised proposals numerically. There appears in the record and in the regulation no sanction for avoiding numerical scoring at the second, decisive phase of the two-phase negotiations, nor is there in this record any authorization for deviations from the letter of the regulation requiring scoring.

8. Because of the violations of law in this case and upon the Findings of Fact, *supra* (e.g., Findings 33–37), there was no rational foundation for the consideration which the Air Force afforded the proposal of GE in this case, for its rejection of the GE proposal or its award of the Contract to Philco.

9. Inasmuch as there were violations of law in this procurement there is a very strong likelihood of success by GE in its Protest with the GAO and ultimately in this Court.

* * * * * * *

15. According full and proper weight to all pertinent factors and considerations, including the decisions of the Court or Appeals in, *inter alia*, *The Wheelabrator Corporation* v. *John H. Chafee, Secretary of the Navy, et al.*, U.S.App.D.C. Nos. 24, 705 and 24,729, Opinion filed October 14, 1971, *M. Steinthal and Co., Inc.* v. *Robert J. Seamans, Jr., Secretary of the Air Force*, U.S.App.D.C. No. 24,595, Opinion filed October 14, 1971, and *Scanwell Laboratories, Inc.* v. *Shaffer*, 137 U.S.App.D.C. 371, 424 F. 2d 859 (1970), this Court has concluded that a preliminary injunction should be issued enjoining the further effectuation and implementation of the award pending the GAO decision and the Air Force action in accordance with that decision; and that Defendant's motion to Dismiss or in the Alternative for Summary Judgment should be denied, the plaintiff's Amended Motion for Preliminary Injunction, granted.

Pursuant to its conclusions of law, the District Court ordered both the Air Force and Philco to cease implementation of the subject contract—

unless and until a decision is rendered by the General Accounting Office in Case No. B–175004; and if decision therein is in favor of Plaintiff, Defendant Robert C. Seamans, Jr., Secretary of the Air Force and each and all of his officers * * * are hereby, enjoined from failing or refusing to award the contract to Plaintiff * * *.

On March 8 further hearings were held in the District Court on motions of the Air Force and Philco for a stay pending appeal, for clarification of what activities Philco could pursue consistent with the injunction, and for an increase in the bond. These motions were denied by order of March 8.

Subsequently, the Air Force and Philco filed motions with the United States Court of Appeals for the District of Columbia Circuit requesting the Court of Appeals to reverse or stay the District Court's injunctive order. On March 29 the Court of Appeals declined to grant this relief, but directed an expedited appeal.

The appeal was heard on June 14, and on June 16 the Court of Appeals ordered "that action on these appeals be deferred until the General Accounting Office has ruled on General Electric Company's protest against the award of the Air Force contract in suit which is presently pending before it." The court further ordered "that the portion of the District Court's judgment directing that the contract be awarded to General Electric Company if the GAO decision is in its favor is hereby vacated." Finally, the court ordered "that the reference in the District Court's opinion indicating that its judgment might be considered as one on the merits should be disregarded."

As a result of this order all three parties, GE, Philco and the Air Force, have submitted briefs for our consideration. Prior to this order the Air Force had refused to file its position or submit the relevant documentation for our consideration because of its objection to that portion of the District Court order enjoining failure or refusal to award to GE in the event of a decision by our Office favorable to that firm.

Since most of the arguments set forth on behalf of Philco support the Air Force position they are not separately stated. However, they were considered in reaching our decision.

You urge that the District Court's findings of fact and conclusions of law must not be disregarded by this Office. It is your contention that in the unique circumstances of this case, the District Court's findings and conclusions are entitled to comity and that we should "not begin *ab initio*."

The Court of Appeals made plain that the District Court opinion was not to be considered as one on the merits. We therefore believe consistent with our function in these matters as described in *Wheelabrator Corporation* v. *Chafee*, U.S. App. DC 455 F. 2d 1306, 1316 (1971) that this Office should advise the court of our independent views and conclusions.

Offerors were advised by the RFQ that their proposals would be evaluated in accordance with the following "Source Selection Criteria:"

(1) Technical/Operations and Maintenance Area (Paramount Importance)

* * * * * * *

(2) Technical/Phase-In Area (Lesser, But Critical Importance)

* * * * * * *

(3) Management Area (Lesser, But Significant Importance)

* * * * * * *

(4) Cost Area (Lesser, But Significant Importance).

The record shows that while the cost proposals were examined, only the technical proposals were evaluated by Air Force in determining the competitive range. This was in accordance with the procedure established for this procurement. In view of the importance given to the technical aspects of the contract, the Air Force considered that any offeror submitting a potentially acceptable technical proposal should be included in the competitive range, regardless of cost considerations.

As previously stated, by letter of October 20, 1971, GE was invited by Air Force to participate in the negotiations for the award. GE was advised that during the evaluation of proposals, deficiencies, errors, and/or omissions were identified in the Technical, Management, and Cost Area of its proposal. The letter defined a deficiency as:

(1) A failure to meet the minimum requirement of the Government's established standard (2) an approach which poses unacceptable risk and/or (3) an omission of data which prevents the assessment of compliance with the minimum requirements of an established standard.

It was stated that "Deficiencies are presented as advisory guidance only, not as mandatory requirements. It is your election whether or not to make any revision in your initial proposal." The letter, seven pages in length, specified approximately 60 deficiencies divided among the technical, management, and cost categories. Deficiencies with cost area ramifications included the failure to provide information regarding the quantity of direct labor hours (straight time), quantity and percent of overtime hours, dollar amount of overtime and average number of hours per man-month, a breakdown of overhead expenses, and gross receipts taxes for certain activities. The letter to GE added: "Consideration of prevailing Union Wage Scale rates at applicable site(s) was not evident." No comment similar to the last was included in the equivalent letters to Philco and Lockheed, although these offerors were also asked for additional cost data.

In response to the Air Force letter, GE lowered its price further (but less than Philco) and reaffirmed its confidence in its cost proposal. Regarding the matter of union wage rates, the GE revised proposal stated as follows:

We are aware of the existence of a contractual arrangement between the site contractor and the RTS employees at the Hawaii Tracking Site. A copy of this contract (a matter of public record) was one of the tools we used in constructing our compensation package and approach to gaining an understanding of employee needs and expectations at that location.

At the culmination of the evaluation process the SSA issued a determination justifying the proposed award to Philco, which states in part:

> This Contractor offers the best assurance of providing flawless, uninterrupted support to the DOD space programs and other programs serviced by the AFSCF network, as stated in the Source Selection Criteria of the RFQ. His proposal was technically superior to all others; his price was competitive and realistic; and his past performance demonstrated that he can perform the tasks in a virtually flawless manner.
>
> One other offeror, [GE], submitted a bid significantly lower than WDL [Philco]. However, after considering all factors as above stated, I hereby determine that the technical superiority of the WDL proposal warrants the additional cost involved in an award of the contract to WDL. Furthermore, the significantly lower price proposed by [GE] is determined to be unrealistically low. In addition, the wage scales and personnel policies proposed by [GE] would create an unacceptably high risk of adverse impacts on network performance, both for the short and long term. Detailed rationale for nonselection of [GE] is contained in the Source Selection Board file.

While the SSA statement in support of the award cited "the technical superiority" of the Philco proposal, it is your contention that since technical and cost factors were so integrated in the SSAC evaluation of the GE final proposal, any conclusion to the effect that GE was technically inferior to Philco was inextricably bound up with the Air Force belief that GE's costs were unrealistically low.

The record shows that low costs were considered a negative factor in the evaluation of GE's revised proposal, particularly the low salary structure. The Air Force evaluators thought that the GE proposed salary rates and fringe benefit program for the employees at the sites were inadequate and would create a potential for labor unrest whether or not a union agreement was in force. In addition, the Air Force questioned whether the GE low wage rates would preclude "capture" of the proposed high percentage of incumbent RTS employees. The Air Force deemed it essential for the incoming contractor to retain a substantial portion of the existing work force, especially the key personnel.

Initially you contend that Air Force criticism of the GE cost proposal is without rational foundation. You assert that the Government's cost standards against which the GE proposal was evaluated were derived from the proposed costs of the two incumbents, thereby prejudicing offerors such as GE.

The record indicates that both a cost panel and the negotiation team prepared separate estimates, each based on different criteria. These estimates do not appear to have been based on the *proposed* costs of any of the offerors but they were, in part, based on varying combinations of the incumbent's *past* cost experience plus adjustment factors. An incumbent's prior experience may well give him an inherent advantage in preparing a proposal. As a practical matter, we

do not believe that it would be feasible to develop an evaluation procedure which could reasonably eliminate such advantage without adversely affecting the prospects of obtaining a contract in the Government's best interests; nor do we find that the law calls for such a procedure. Accordingly, we find no reason to object to the cost standards used by the Air Force in the evaluation of proposals.

You also contend that the Air Force's criticism of GE in regard to that firm's failure to pay prevailing union wage rates is arbitrary. You assert that the entire Air Force approach to this problem is erroneous in that the Air Force refers to two sites involving union contracts, when in fact only one site was affected. You allege that the Air Force legal position in this matter, namely, that the hiring of a union employee would obligate the contractor to honor the current union agreement, is also erroneous. Finally, you contend that the Air Force advocates unreasonably high salary rates which would, in effect, negate GE's right to bargain.

The Air Force acknowledges that at the time the proposals were evaluated only one site was subject to a union agreement, but states that a representation petition has since been filed at a second site. The Air Force also concedes that the Supreme Court has recently ruled that the refusal of a successor contractor to honor the terms of a preexisting collective bargaining agreement, although it hires members of the union which is party to the agreement, does not constitute an unfair labor practice.

The fact is that GE's wage rates were below the current union and prevailing wage rates. Although you may feel GE adopted the best approach to the matter, we think the Air Force could be legitimately concerned about GE's ability to capture the existing work force and about the possibility of labor unrest.

Whether the consequences feared by the Air Force would result from the low wage rates is a matter of conjecture. In this kind of situation the reasoned judgment of the selection officials is entitled to great weight. In our view that judgment may not be overruled, except by higher administrative authority, so long as it is not arbitrary and providing it is in substantial agreement with the evaluation criteria set out in the solicitation. The mere fact that a different conclusion is considered more reasonable is not a sufficient basis for overturning the administrative determination. It may be that a contractor with GE's resources could, if the Air Force concerns prove correct, overcome the problem by increasing the wage rates, in part at least at its own expense, or by other means. However, there is no assurance that such result would follow and we cannot say that the administrative judgment is unreasonable. *See* B-171391(2), February 26, 1971.

Your primary contention is that the Air Force had a duty to point out to GE during the course of negotiations what the Air Force regarded as deficiencies concerning proposed wage rates and related areas. The thrust of your argument is that if GE had been given the opportunity to satisfy the Air Force with respect to the wage rates and related areas this would have had a strong impact on the technical side of the evaluation and would have resulted in award to GE.

The Air Force insists that cost considerations played a subordinate role in the evaluation and that GE was advised in the October 20 letter of the technical matters which ultimately determined the award selection. It states that GE's revised cost proposal "served only to confirm the SSAC's determination that GE's proposal was technically inferior to the Philco-Ford proposal, because GE demonstrated a less secure grasp of the requirements of the procurement, threatened to require a greater input of Government supervision and assistance, presented greater risk of flawed, interrupted performance, and otherwise did not measure up." Air Force further states that GE's technical shortcomings were magnified when the SSAC compared them with GE's cost proposal. The Air Force states that it then became clear that certain technical aspects of the GE proposal were inferior, presenting an unacceptable risk. To emphasize the point Air Force states to us as follows:

* * * But even if GE's cost difficulties could be put aside—if GE had offered to spend enough to allay cost concerns—it nevertheless remains true that the GE proposal was technically inferior in such areas as the ability to provide cryptographic support, the recurring training programs, and so forth. And O&M areas were the paramount bases for award.

We have examined the evaluation documents and find that the rationale supporting the nonselection of GE is contained in the SSAC Proposal Analysis Report (PAR) on the revised proposals. The PAR presents an analysis of the revised technical and cost proposals of each of the four remaining offerors. A discussion of GE's proposal under the key O & M and Phase-In areas states as follows:

1. *Operations and Maintenance:* K [GE] demonstrated that he understood the job to be performed but completely failed to convince the SSAC that he could efficiently implement and sustain an operation that would provide the desired results. There were important deficiencies brought to his attention concerning the proposed recurring training program, crypto training, understanding of Government-furnished resources and underestimation of PPI requirements. These factors were addressed in the revised proposal but were still considered to be deficient, particularly since all would require additional expense for rectification; yet the revised proposal reduced total cost and did not address these elements from a financial point of view.

Personnel considerations were the most important in formulating the SSAC consensus. Key personnel qualifications were not at the level, insofar as SCF or RTS directly relatable experience is concerned, to assure the required confidence that K could efficiently take over and sustain the operation in the requested manner. In addition and of paramount importance is the fact that K proposed salary structures that would invite serious labor problems. This was particularly

significant with regard to Hawaii where he proposed an average hourly wage well below the union standard (greater than $.60/hr) now paid at this station. K stated that they "recognize the right of the employees to bargain collectively if a majority wish to do so." This was found to be a gross understatement after discussions with the AFSC Labor Relations Advisor who stated if one union employee is hired, the contractor must honor the current agreements. This area was considered to pose an unacceptable risk.

2. *Phase-In:* All of the aspects discussed under O&M and particularly the personnel/wage scale considerations are compounded during phase-in. Although K had the correct words in his phase-in proposal, the smooth implementation of his plan is not at all assured when management, training, and fiscal constraints are factored into the risk analysis. It was the consensus of the SSAC that phasing-in K would pose unacceptable risk when considering (1) lack of SCF or RTS related experience of those key personnel K can assure to the SCF, (2) the lower wage rates which could well degrade union relationships and the capture rate of incumbents, and (3) the resulting burdens on K's training and management.

In the "findings" section, the PAR concludes in part as follows:

Although all offerors can successfully accomplish the RTS O&M task, there is a definite gradation in their technical positions at this time—in the amount of detailed government guidance and supervision required, and in the risk associated with each. The incumbents have a definite lead technically, require minimum supervision, and offer little risk.

* * * * * * *

Offeror K [GE] presents a very high risk in the technical area, but especially so in view of his cost proposal. It is highly unlikely that Offeror K can accomplish the task within ceiling price and should, therefore, not be selected.

* * * * * * *

On the basis of all technical and cost considerations, the SSAC, therefore, believes that selection of Offeror T [Philco] is in the best interests of the Government.

Based on the record, we cannot disagree with the Air Force position that Philco's technical superiority (not GE's cost deficiencies) determined the award selection. Clearly, Philco's experience as a RTS contractor counted heavily in its favor. Also, as Air Force notes, Philco was superior to GE in the vital O & M areas. On the other hand, the record does indicate that GE was downgraded in various technical areas because of cost considerations. The Air Force evaluators believe, for example, that GE's low salary structure could compromise its ability to render uninterrupted performance. Certainly it is possible that GE might have been able to improve its proposal overall if the Air Force had informed GE of this belief during the course of negotiations. Thus it has been urged that the Air Force had a duty to point out these cost deficiencies to GE.

You have cited our decisions holding that offerors within the competitive range should be advised of the areas in which their proposals have been judged deficient so that they may have an opportunity to fully satisfy the solicitation requirements, thereby securing the most advantageous contract for the Government. *See* 51 Comp. Gen. 431 (1972); 47 Comp. Gen. 29, 52–53 (1967); *id.* 633 (1967).

In the decisions you have cited as well as others dealing with the matters of discussions under the procurement statute and implementing regulations, we have concluded that deficiencies had to be pointed out in order to have meaningful discussions. We have also held, however, that there is no obligation to hold discussions in order to improve an otherwise unacceptable proposal where acceptability can be obtained only through a complete revision of that proposal. *See* 51 Comp. Gen. 431 (1972); B–174125, March 28, 1972. While this rule has been ordinarily applied to situations where a proposal has been judged not to be within the competitive range, we believe the rule is applicable to the instant situation.

On the initial evaluation GE was determined to be within the competitive range. This may have been due to the fact that cost was not considered in reaching that determination. In any event, after the revised proposals were examined by the SSAC, serious misgivings arose concerning GE's ability to perform the contract successfully. Both cost and technical factors contributed to this conclusion. The GE proposal was found deficient in many areas. It is evident from the PAR that GE could have satisfied Air Force's misgivings only through completely revising its cost and technical proposals. Although the evaluation file does not state that GE was no longer considered to be within the competitive range, this conclusion is implied by the PAR findings that GE should not be selected for the award. We do not believe the Air Force was under a duty at this point to engage in the type of discussions which would have been necessary to make GE's proposal acceptable. Whether a proposal is initially determined to be within the competitive range or whether the proposal is initially rejected, the contracting agency should not be required to hold discussions with an offeror once it it determined that his proposal is outside the acceptable range. *See* B–174436, April 19, 1972, and B–173967, February 10, 1972, where we upheld administrative determinations to exclude firms initially determined to be within the competitive range from further award consideration after their revised proposals were found to be technically unacceptable and no longer within the competitive range.

For the reasons stated above, we do not find that the Air Force negotiations were conducted contrary to law.

You further contend that numerous additional defects are evident in the Air Force's procurement procedures. In this regard you assert that the Air Force violated its regulations by not using point scores in its evaluation of the revised proposals. The Air Force insists that SAMSO Regulation 70–10, section 6(g), merely required numerical scoring in the evaluation of initial technical proposals. The Air Force contends that since the regulations use the terms "score" and "scoring"

it follows that the "rescoring" of revised proposals, after the competitive range has been determined, is not required.

Although a fair reading of the applicable Air Force regulations could lead to a conclusion that numerical scoring is called for in all technical evaluations, we have held that the assignment of numerical scores or ratings to proposals is not required by statute or sound procurement practice; numerical ratings are simply an attempt to quantify what is essentially a subjective judgment for the purposes of realistic and fair proposal evaluation. *See* B–174799, June 10, 1972. There was compliance with a supportable, if not most reasonable, interpretation of internal Air Force regulations. In the circumstances, we cannot conclude that failure to score the revised proposals numerically is a valid basis upon which to question the award.

Next, you contend that the Air Force failed to conduct a fair procurement because of its refusal to honor GE's request for information on present base salaries for use as a standard for that firm's established wage rates. The Air Force based its refusal to provide this data on the premise that such information includes proprietary commercial or financial data which may be withheld pursuant to ASPR 1–329.3(c)(4).

The record indicates that GE was in fact able by other means to obtain the necessary information, including a copy of the union agreement applicable to the Hawaii site. Although it appears that GE may have had to expend more time and incur more expense than the incumbents in collecting this information, the Air Force action did not materially affect the award decision.

You also contend that the Air Force failure to provide GE with Volume III, Part I of "Personnel Planning Information for the Air Force Satellite Control Facility (SCF) During 1971" was prejudicial. The record indicates that Volumes I and II, which contain general information, SCF standards and specific information on manpower requirements at the six sites, were provided to all offerors. However, Part I of Volume III, which describes the personnel organization, manpower/skills requirements and operations support configurations of Satellite Test Center (STC) Test Control Teams (TCT) and was the only completed portion of Volume III, was considered not relevant to the instant procurement and, therefore, was withheld.

GE disputes this determination, contending that the GE proposal was downgraded for alleged deficiencies to which information in Volume III, would have been responsive. It is further pointed out that Philco, which had prepared all of these volumes for the Air Force, had access to this information.

You note that the performance of this contract requires interfacing or coordination among the six sites and a variety of other installations, including coordination between the contractor's headquarters

and the SFC. Accordingly, you assert that any information in regard to the functions of the STC is relevant to the interfacing requirements. You cite several examples from the statement of work illustrating the need for physical proximity and contact between the STC and the contractor's headquarters. Finally, you list several of the Air Force criticisms of the GE proposal which you allege could have been avoided had GE been given the information contained in Volume III.

Although it appears that Volume III does contain some information which relates indirectly to the subject procurement, the deficiencies you mention are directed at GE's relationship between the sites and its own headquarters located at Sunnyvale, rather than at GE's interface with the STC which is also located at Sunnyvale. Also, we do not find that the Air Force criticism which holds that the "Program Manager Office did not provide sufficient depth in the disciplines required to accomplish all of the operations and maintenance management functions" can be directly related to information contained in Volume III. Hence, we cannot conclude that GE was prejudiced in the competition by being denied access to this volume.

You have also alleged that Air Force violated the provision in ASPR 3-801.3(b)(4) which states as follows:

> * * * If the auditor believes that the contractor's estimating methods or accounting system are inadequate to produce valid support for the proposal or to permit satisfactory administration of the type of contract contemplated, this shall be stated in the audit report and concurrently made known to the contractor so that he may have the opportunity of presenting his views to the PCO and ACO.

This section in our view is not intended to require disclosure of deficiencies to offerors during the competitive range selection process. It deals primarily with the review of a contractor's estimating methods and accounting systems, and not with the validity of the judgments used in preparing his competitive cost proposal.

Throughout your argument you stress that it was clearly arbitrary for the Air Force to reject savings of approximately $5,700,000, a cost differential of nearly 15 percent. In support of this conclusion you submit the following comparison of the GE and Philco target prices. We must point out that $5,664,000 is a possible cost differential. It is also possible under the terms of the fixed price incentive contract for the actual differential to be greater or less.

	Philco	GE	Amount By Which Philco Bid Exceeded GE Bid
Phase-In Plus Basic Period	$16, 982, 261	$14, 322, 579	$2, 659, 682
First Option Period	11, 434, 219	9, 810, 061	1, 624, 158
Second Option Period	11, 507, 393	10, 127, 244	1, 380, 149
	$39, 923, 873	$34, 259, 884	$5, 663, 989

In the instant case Philco's proposal was selected on the basis that it best assured "flawless and uninterrupted support to the Department of Defense space programs." Based on our review of the records detailing the evaluation proceedings conducted by the SSB we cannot say that the SSA was not provided with a sound basis upon which to exercise his discretion to award the contract to Philco for "technical" reasons despite the purported GE cost advantage. *See* B–173199, February 22, 1972.

Finally, you question whether the SSA could have carefully reviewed and considered the SSAC report since the records of the Air Force evaluation reveal that the SSAC report was not delivered to the SSA until December 2, the same day that the SSA issued its final determination. We do not feel that this necessarily indicates a shortcoming in the SSA conduct of the evaluation since the SSA, in essence, accepted the final evaluation report of the SSAC. In the circumstances, we see nothing unusual in the fact that the SSA's evaluation was completed in one day.

During our consideration of this matter we reviewed those portions of the Air Force records which contain the SSAC's final evaluation of all the proposals. We have also received from the Air Force a document entitled, "Comparison of Technical/Management Proposals of Protestant and Awardee." Neither of these documents has been released to GE because Air Force states that they contain "a sensitive compilation of the Air Force work product" as well as data which may be proprietary to the offerors. In accordance with our longstanding policy in this regard, we have honored the Air Force's request that this information not be released to the parties, unless it has otherwise been made public.

After a consideration of the entire record before us, we conclude that your protest should be denied.

[B–176436]

Transportation—Bills of Lading—Issuance—By Shipper—Effects on Carrier Liability

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

To the C. I. Whitten Transfer Company, October 12, 1972:

Further reference is made to the request in your letter of June 19, 1972, for review of the settlement (TK–942130) which disallowed your claim (CB–6032 O/C 1–061) for $387.25 in additional freight charges on a shipment of 15 wooden boxes of ammunition for cannon with explosive projectiles weighing 795 pounds. The shipment was tendered on June 18, 1969, to Tri-State Motor Transit Company at Milan Army Ammunition Plant, Milan, Tennessee, for transportation under bill of lading E–6894349 to Camp Drum, Watertown, New York.

The payment record shows that for the transportation of this shipment your company, as delivering and billing carrier, already has been paid charges of $387.25 which were computed on a minimum weight of 2,500 pounds at the rates of $5.97 and $9.52 per hundred pounds published to and beyond Jeffersonville, Indiana. In urging payment of a like additional amount of $387.25, you state that a second freight movement was necessary because 10 of the boxes in the shipment were found astray at the origin carrier's terminal which resulted in your company not receiving those 10 boxes from the origin carrier at the Jeffersonville, Indiana, interchange until after the first five boxes already had moved forward to final destination. You contend that the additional charges claimed are due the carriers because the Government prepared the bill of lading and incorrectly showed the quantity shipped as five boxes instead of 15 boxes. It is apparent that 15 boxes were tendered to the origin carrier when it accepted Government bill of lading E–6894349.

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, 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 *Chicago, M. St. P. & P. R. Co.* v. *Acme Fast Freight*, 336 U.S. 465, 469 (1949); *Independent Lock Co.* v. *Acme Fast Freight*, 116 N.E. 2d 841, 843 (1953); and *Valco Mfg. Co.* v. *C. Richard & Sons*, 92 A. 2d 501, 504 (1952).

Thus, the duty for issuing an appropriate bill of lading is the responsibility of the carriers and not the shipper. See *United States* v. *Southern Pacific Co.*, 325 I.C.C. 200, 209 (1965). 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. The Interstate Commerce Commission has repeatedly found that an obligation lawfully rests on carriers' agents to refrain from executing

bills of lading that cannot lawfully be complied with or which contain conflicting or erroneous entries. See *Exposition Cotton Mills* v. *Southern Ry. Co.*, 234 I.C.C. 441, 442 (1939); *Ezee Flow Corp.* v. *Illinois Central R. Co.*, 287 I.C.C. 281 (1952); and *St. Louis Cooperage Co.* v. *Baltimore & Ohio R.*, 161 I.C.C. 258 (1930).

Since responsibility for the issuance and the accuracy of the bill of lading is the responsibility of the carriers, the Government, as a shipper, cannot be required to pay double freight charges on a shipment because the carriers failed in the performance of their duty to execute a proper bill of lading and transported the shipment as two separate freight movements.

Accordingly, the settlement issued to your company on March 22, 1972, which disallowed your claim for an additional $387.25 on this shipment appears to be correct and is sustained.

[B–176773]

Storage — Household Effects — Military Personnel — Temporary Storage—Conversion to Nontemporary Storage

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

To the Secretary of the Air Force, October 12, 1972:

Reference is made to letter dated July 28, 1972, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) requesting a decision as to whether the Joint Travel Regulations, Volume I, Chapter 8, may be changed to authorize nontemporary storage of household goods in cases where the household goods have been shipped and placed in temporary storage in the area of the member's new home port, but the member, because of an operational requirement of his unit, is absent from the area and unable to accept delivery prior to the expiration of the 180-day temporary storage period. If our reply is in the negative the Assistant Secretary asked whether the maximum period of temporary storage now authorized (180 days) may be extended by a period equivalent to the period of his absence due to operational requirements of his unit. The request has been assigned

Control No. 72–33 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary says that in support of the recommended change it was stated that members ordered to mobile Navy units (ships) normally make their personal plans relative to movement of their families and household goods based on their new duty station's deployment schedule and that when their unit is deployed away from its home port members often elect to place their household goods in temporary storage at the new home port and defer delivery until after the unit returns from deployment and they have had an opportunity to locate suitable permanent quarters for their families.

However, it is said that these plans are disrupted when for some reason after they have reported for duty their unit does not return as scheduled and the member is unable to take delivery of his household goods as planned. In many cases this involves storage beyond the maximum 180-day limit and the member is then faced with the alternatives of requesting his wife or someone else to locate housing and accept delivery of the household goods or personally pay for the excess storage charges.

The Assistant Secretary also states that similar problems may arise when it is necessary to deploy a unit with little or no advance notice. Then newly reported members or members en route are often unable to locate housing and to accept delivery of their household goods before departing the home port area. As a result they face the same alternatives as members attached to extended deployed units.

Section 406, Title 37, U.S. Code, provides for the transportation and storage of household effects of members of the uniformed services under such regulations as may be prescribed by the Secretary concerned. Subsection 406(b) authorizes temporary storage incident to a shipment while subsection 406(d) authorizes the nontemporary storage of baggage and household effects when it is considered more economical to the United States. The regulations relating to storage of household goods authorized to be prescribed are contained in the Joint Travel Regulations, Volume I, Chapter 8, paragraph M8100, referring to temporary storage and paragraph M8101 relating to nontemporary storage.

Temporary storage is storage authorized in connection with a shipment of permanent change-of-station weight allowance of household goods, the right to which may accrue at place of origin, in transit, at destination or any combination thereof; whereas, nontemporary storage is that storage other than temporary which is authorized in lieu of shipment of such effects. Under the regulations temporary storage may be converted to nontemporary storage only when the goods are

in temporary storage at the place of origin and the member is entitled pursuant to further permanent change-of-station orders to nontemporary storage or shipment as he may elect. Paragraph M8100–7, JTR.

Upon receipt of permanent change-of-station orders, a member is entitled to shipment of his household goods or, if authorized, may have his goods placed in nontemporary storage at Government expense. Thus, temporary storage in connection with a shipment and nontemporary storage which is in lieu of shipment are incompatible and combinations of shipment and nontemporary storage are not authorized.

In the circumstances described by the Assistant Secretary where the household goods have been shipped and placed in temporary storage at or near destination, the member has exercised his right of election to ship and there is no authority under the law to convert temporary storage to nontemporary storage which is in lieu of shipment, at the expiration of the 180-day temporary storage period allowed by the regulations.

With respect to extension of the 180-day temporary storage period of a member by a period equivalent to the period of his absence due to operational requirements of his unit, we are still of the view that storage in excess of 6 months, or the substantially similar period of 180 days, could not reasonably be considered as temporary within the contemplation of the statute. In our decision of December 12, 1961, 41 Comp. Gen. 402, regarding a proposal to extend temporary storage for more than 180 days, we said that any time limitation on the availability of a benefit may seem to be somewhat inequitable in that there will always be some individuals who, because of circumstances beyond their control, will be denied the benefit because of the limitation. However, without congressional approval, we do not believe the circumstances presented afford any basis for departing from the longstanding application of the limitation. *Also see* 48 Comp. Gen. 773 (1969).

Accordingly, it must be concluded that the Joint Travel Regulations, Volume I, Chapter 8, may not legally be amended in the manner proposed.

[B–176393]

Bids—Evaluation—Delivery Provisions—Freight Rates—Erroneous

The partial cancellation of a contract erroneously awarded for the handling of surplus butter made available to the Department of Defense by the Department of Agriculture because an erroneous freight rate evaluation resulted in an award to other than the low bidder should be changed to a partial termination for the convenience of the Government since, while the award was improper, it was not plainly or palpably illegal for the displaced contractor had not contributed

to the use of the erroneous freight rate furnished by a Government activity and, therefore, it could successfully maintain an action for damages computed under the termination for convenience of the Government clause of the contract, 37 Comp. Gen. 330 and B-164826, August 29, 1968, overruled.

Contracts—Termination—Convenience of Government—Cancellation Converted to Termination

The recommendation that the partial cancellation of a contract awarded to the bidder erroneously determined to be the low bidder should be changed to a partial termination for the convenience of the Government and a settlement made with the contractor in accordance with the termination for convenience of the Government clause of the contract is a recommendation for corrective action pursuant to section 236 of the Legislative Reorganization Act of 1970, Public Law 91-510, and the contracting agency is required to submit written statements of the action taken with respect to the recommendation to the House and Senate Committees on Government Operations not later than 60 days from 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 Director, Defense Supply Agency, October 13, 1972:

Reference is made to a letter dated August 3, 1972, reference DSAH-G, from your Assistant Counsel, furnishing a report concerning the protest of Dairy Sales Corporation against the partial cancellation of its contract under IFB DSA130-72-B-0910 (IFB-0910), issued by the Defense Personnel Support Center, Chicago, Illinois (SRH-Chicago).

The above-referenced solicitation was issued on March 15, 1972, in contemplation of requirements contracts to receive, store, print, package, and mark Government-furnished butter. SRH-Chicago, the national control point for butter printing services, solicits such services nationally, awards the contracts therefor, and issues all delivery orders under such contracts. The Government-furnished butter which is processed under these contracts is surplus butter made available to the Department of Defense by the Department of Agriculture (USDA). The butter is shipped on Government bills of lading (GBL) from preselected USDA warehouses to the printer and, upon completion of the processing, to preselected destination points.

Section D-IV of IFB-0910 provided that bids would be evaluated as follows:

> Bids will be evaluated on the basis of the lowest overall cost to the Government per pound. For the purpose of evaluating bids, the following will be used in determining the lowest overall net cost to the Government.
> 1. The unit price per pound less discount if applicable.
> 2. The most economic cost of transporting Government-owned bulk butter by truck and/or rail to the bidder's butter printing plant from any of the following points:
>
> Cold Storage Warehouse, Chicago, Illinois
> Cold Storage Warehouse, St. Paul, Minnesota
> Cold Storage Warehouse, Oakland, California
> Cold Storage Warehouse, New York, New York

3. Cost of transporting the printed butter by truck and/or rail from bidder's butter printing plant to the following delivery points set forth with respect to each area :

AREA	DELIVERY POINT
I. NORTHEAST	WILLIAMSBURG, VIRGINIA
II. MIDWEST	KANSAS CITY, MISSOURI
III. SOUTH	NEW ORLEANS, LOUISIANA
IV. WEST	OAKLAND, CALIFORNIA

4. The cost of transporting butter as specified in (2) and (3) above will be evaluated on the basis of shipments weighing 40,000 pounds net weight.

5. In determining the lowest bid for each item, the cost enumerated in 1 and 3 above will be added separately to the cost of delivery from the most advantageous of the four points listed in par. 2 above for the purpose of determining the lowest cost to the Government.

Item 0003 of the solicitation schedule was for the processing of an estimated 2,200,000 pounds of butter into pats for delivery to Williamsburg, Virginia. The protestant was the apparent low bidder at an evaluated price of $.0439 per pound. Bon Ton Foods, Inc., of Mamaroneck, New York, submitted an evaluated bid of $.0466 per pound.

The procuring activity proposed to make award of Item 0003 to Dairy Sales. However, Bon Ton advised SRH-Chicago that the freight rate from the New York USDA warehouse to Mamaroneck, used in the evaluation of its bid, was in error. SRH-Chicago verified that a lower rate was in existence, which when applied to Bon Ton's bid, placed it in a tie with Dairy Sales at a unit price of $.0439. In accordance with Armed Services Procurement Regulation (ASPR) 2-407.6, award of Item 0003 was made to Dairy Sales following a drawing by lot.

After award had been made to Dairy Sales, Bon Ton alleged that the freight rate from Mamaroneck to Williamsburg used in evaluating its bid also was in error. The corrected freight rate, subsequently verified by the contracting officer, reduced Bon Ton's evaluated unit tion of Dairy Sales' contract was effected by the award of Item 0003

Upon the advice of counsel, who regarded the matter as governed by our decision which is reported at 37 Comp. Gen. 330 (1957), the procuring activity determined that award of Item 0003 contravened 10 U.S. Code 2305(c) and therefore was a nullity. A partial cancellation of Dairy Sales' contract was effected by the award of item 0003 to Bon Ton to the extent of its capacity, 2,080,000 pounds, and by the issuance of a corrected award document to Dairy Sales, as the second low bidder, for the remaining 120,000 pounds. Dairy Sales protested this action on the basis that the Government had arbitrarily and capriciously canceled its contract for the processing of the total quantity of Item 0003.

Our decision reported at 37 Comp. Gen. 330 (1957), which was relied upon by the procuring activity, involved a situation similar to the instant one in that an erroneous freight rate evaluation by the contracting agency resulted in an award to other than the low bidder. Therein, we held that the award was in contravention of 10 U.S.C. 2305(c); that award of the contract contrary to the provisions of the statute was a nullity and conferred no rights on the contractor against the Government; and, therefore, the contract should be canceled. Similarly, in our decision B-164826, August 29, 1968, cited by your Agency as further justification for its action, we directed cancellation of a contract awarded to other than the low bidder as a result of a mathematical error by the contracting agency in the computation of freight rates. The partial cancellation of Dairy Sales' contract was therefore consistent with previous decisions of this Office.

However, upon further reflection and for the reasons set forth below, we are of the opinion that Dairy Sales' contract should have been partially terminated for the convenience of the Government, rather than canceled. We are in agreement with the position of the Court of Claims that "the binding stamp of nullity" should be imposed only when the illegality of an award is "plain," *John Reiner & Co.* v. *United States*, 325 F. 2d 438, 440 (163 Ct. Cl. 381) or "palpable," *Warren Brothers Roads Co.* v. *United States*, 355 F. 2d 612, 615 (173 Ct. Cl. 714). In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor (*Prestex, Inc.* v. *United States*, 320 F. 2d 367 (162 Ct. Cl. 620), or if the contractor was on direct notice that the procedures being followed were violative of such requirements (*Schoenbrod* v. *United States*, 410 F. 2d 400 (187 Ct. Cl. 627), then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of *quantum meruit*. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. *John Reiner & Co.* v. *United States*, *supra; Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (163 Ct. Cl. 465).

In the instant case, the freight rates used in the evaluation of bids were furnished by a Government activity, not by the bidders. There is no indication of record that Dairy Sales contributed to the erroneous information upon which Bon Ton's bid was evaluated or that Dairy Sales was on direct notice, prior to the initial award of Item 0003, that an incorrect rate from Mamaroneck to Williamsburg had been used

in the evaluation of Bon Ton's bid. Under these circumstances, we are unable to conclude that the initial award of Item 0003 to Dairy Sales, while improper, was plainly or palpably illegal, and we are therefore convinced that the contractor could successfully maintain an action for damages computed under the termination for the convenience of the Government clause of the contract. Accordingly, we recommend that the partial cancellation of Dairy Sales' contract be changed to a partial termination for the convenience of the Government and that settlement be made with the contractor pursuant to that clause. To the extent they conflict with the views expressed herein, our decisions 37 Comp. Gen. 330 (1957) and B-164826, August 29, 1968, are overruled, and should no longer be followed.

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

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

[B-175633]

Contracts—Specifications—Adequacy—Legal v. Technical Acceptability Considerations

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

To the Electrospace Corporation, October 18, 1972:

Reference is made to your protest that the technical data package furnished bidders under invitation for bids DAAB05-72-B-0012,

issued by the United States Army Electronics Command, Philadelphia, Pennsylvania, is so deficient as to render the invitation legally defective.

In addition to your protest under invitation -0012, an investigation is being performed by our Office pursuant to a congressional request concerning your contention that a retrofit program with respect to AN/PRC-77 radio sets previously furnished by Electrospace and occasioned by defective design, would be more economically performed by Electrospace than by the Army itself. That aspect will be covered in a separate report to the congressional source that made the request.

Invitation -0012 contemplates a firm fixed-price multiyear contract for stated quantities of AN/PRC-77( ) radio sets and RT-841( )/PRC-77 receiver-transmitters. Your protest is limited to the AN/PRC-77( ) radio sets. Although bid opening was originally set for April 24, 1972, it has been postponed on several occasions pending resolution of your protest and is currently set for October 18, 1972.

It is your position that the technical data package contains serious major design deficiencies not readily apparent to bidders without prior production experience, the effect of which will be that contract end items manufactured to the requirements of the technical data package will not meet the contract requirements for end item performance without costly modification. You contend that fair competition in this situation is impossible because uninformed bidders will not price necessary engineering design and modificaton work required to correct defects, although the cost of such work will ultimately be borne by the Government through the medium of after-award change orders. On the other hand experienced bidders, such as Electrospace, will be priced out of the competition because it will be necessary for them to take these unenunciated design defects into consideration in the formulation of a bid price.

As an indication that the design of this radio set is not perfected, you point out that "Four contractors have been involved in this program and all four have experienced serious technical difficulties which have resulted in production delays and cost increases to the Government." Also, as an indication of the complexity of the problems to be anticipated under the instant invitation by an uninitiated bidder, you state that "the data package is replete with design deficiencies and misleading requirements which cannot be apparent to even the most knowledgeable engineer except after he has considerable intimate experience with the hardware."

You further contend that specification changes made by invitation amendment since your protest was filed, while correcting some of the

problems of which you have complained, have not served to cure the major deficiencies contained in the data package. Finally, it is alleged that MEMCOR Division of E-Systems Inc., a contractor currently producing AN/PRC–77 radio sets, which production is relied on in the report of the Army Materiel Command (AMC) in this matter as proof that the questioned data package is in fact adequate, has, to the contrary, been experiencing serious production difficulties including rejection of certain production lots.

The position of AMC is simply that in the opinion of its engineering personnel, the technical data package—particularly as amended following your protest—is sound from a design standpoint and therefore suitable for competitive procurement. Concerning the allegation that the current contractor is experiencing serious difficulty, AMC has advised that while the contractor has been on "tightened inspection," as required by its contract because of difficulties in the "quality area," these difficulties have no bearing on the design of the radio sets as represented by the technical data package, and that they are being cleared up in due course by "re-work" of rejected lots. Inasmuch as no evidence has been presented to refute the Army's position on the latter point, we must accept it as valid.

During the development of this case, you have stated your position in great detail in several letters to our Office with respect to the various specification areas which you consider to be deficient. These letters have in turn been forwarded to AMC for comment. Also, we understand that your position in this regard has been discussed both with engineering personnel at the Electronics Command in Philadelphia and with Army officials in Washington. It seems clear, therefore, that your position in this matter has been given thorough consideration by the Army. However, as you know, the Army has continued to maintain that the technical data package is adequate and to recommend, therefore, that your protest be denied.

For reasons set out below, we must conclude that no basis exists for challenging the Army's determination that the instant technical data package is adequate for competitive procurement. Since we do not base this conclusion on an engineering determination as to the correctness, or lack thereof, of the respective opposing viewpoints, but rather on the basis of a legal determination, the specific areas of alleged technical data package inadequacy need not be discussed.

It has been a longheld and frequently stated rule of our Office that the drafting of specifications is primarily a function of the administrative agency as that agency is uniquely knowledgeable as to what will serve the Government's minimum needs in a given instance and

that where a difference of expert technical opinion exists as to specification adequacy, our Office will not substitute its judgment for that of the contracting officials in the absence of clear and convincing evidence that those officials are in error. *See* 40 Comp. Gen. 294 (1960). That there is no clear and convincing evidence of error in this case is exemplified, we think, by your statement, quoted earlier, to the effect that only prior contract experience would enable even the most knowledgeable engineer to perceive the defects inherent in the data package. If an engineer experienced in the technology involved in this case cannot perceive error in the data package, we do not think it can be said that evidence of error is clear and convincing.

With respect to your contention that fair competition is precluded in this procurement because bidders lacking prior production experience will seriously underprice their bids to your competitive detriment, we note that a special notice on page 31 of the invitation calls attention to provision F9g of the invitation supplemental technical instructions, entitled "Production Evaluation Concept," and points out among other things that the provision requires the contractor to bear the cost of implementing certain changes in technical data. The special notice then advises that the contractor in this instance will be required to expend production engineering effort in order to successfully manufacture the contract end items. Among the "other things" provided by the "Production Evaluation Concept" provision, however, is the agreement by the contractor to bear the cost of technical data changes determined to be essential to accomplishment of the following six tasks:

(a) Attainment of functional or performance requirements of specifications.
(b) Compatibility between specified quality assurance provisions and the mandatory physical or functional requirements of specifications and drawings.
(c) Compatibility between drawing parts lists and other technical data.
(d) Correction of an impossible manufacturing condition.
(e) Correction of an impossible assembly condition.
(f) Procurement of purchased parts and materials.

The above enumerated contractor-assumed responsibilities represent, we think, an admission that no data package or specification can be expected to be totally without defects. Furthermore, all bidders to this invitation can be considered to be sophisticated in the ways of Government procurement and in solving problems encountered in the construction of complicated radio sets so that the special notice provision, coupled with the "Production Evaluation Concept" provision, serves as adequate notice to them to scrutinize carefully the technical requirements and to price accordingly any significant unknowns for which they will bear the burden of correcting. The contract terms place the responsibility of anticipating such defects on the contractor, not the Government. While these contract terms might not with-

stand attack if specification defects encountered are substantially greater than could have been contemplated at the time of bidding, we think they are sufficient to reasonably allocate performance risk and to assure competition, particularly in view of the administrative position that no significant design defects exist. *See*, in this regard, B–165953, October 27, 1969.

In accordance with the above considerations, your protest must be denied.

[B–176138]

Bids—Two-Step Procurement—Bond Requirement—Coventurers

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

To the Aecon International Team, October 19, 1972:

We refer to your telefax of June 5, 1972, and subsequent correspondence, protesting the rejection of your bid as nonresponsive under the second step of two-step formally advertised invitation for bids (IFB) 77–17–72, issued by the U.S. Coast Guard, Department of Transportation (DOT).

Step I of the IFB was issued November 29, 1971, soliciting technical proposals for the design and construction of 75 units (66 base and 9 additive) of family housing, including plans and construction for all utilities, roads, landscaping and site development.

Six bidders submitted technical proposals which were determined acceptable. The proposal here in question was submitted in the name of "Aecon International, % Grimball, Grimball, Gorrondona, Kearney and Savoye, Architects, Engineers, and Planners, Inc.," and signed by Henry G. Grimball, Architect. The following statement accompanied the proposal:

> Aecon International is an organization consisting of registered architects, professional engineers, land planners, and contractors offering siting, building, design, construction development and supervision of planned residential communities.
>
> Specifically, it includes the following:
>
> "GRIMBALL, GRIMBALL, GORRONDONA, KEARNEY, & SAVOYE
> Architects, Engineers, and Planners, Inc.
> Component Home Manufacturers
> National General Contractors and their Subcontractors"
>
> * * * * * * *

Aecon International will submit a proposal under Step Two which will be a TURN KEY PROJECT * * *.

The Step II price competition, issued February 3, 1972, provided that "EACH BID IN THIS STEP #2 MUST BE BASED ON THE BIDDING SCHEDULE AND THE BIDDER'S OWN TECHNICAL PROPOSAL * * *." Further, the IFB required bid, payment and performance bonds.

Among the bids received was one from "Aecon International, 20th Century Construction Co., Inc.," signed by Morris A. Sarshik, President. The accompanying Representations and Certifications also named the bidder as "Aecon International, 20th Century Construction Co., Inc.," a New Jersey corporation. The bid bond in the required penal sum named the principal as "20th Century Construction Co., Inc.," a New Jersey corporation, and was signed by Morris A. Sarshik, President. The bond identified the IFB by number and description.

The Aecon International bid of $1,782,028 for the base bid and additives became the low bid after the bid of Brown Professional Engineers, Inc., was rejected as nonresponsive for failure to submit a bid bond. However, by letter of April 7, 1972, Nasco Products Company, the next low bidder at $1,950,806, questioned the Aecon International bid on the grounds that 20th Century Construction Co., Inc., was a separate legal entity from Grimball, Grimball, Gorrondona, Kearney & Savoye (Grimball) and had not submitted a technical proposal under Step I. The contracting officer rejected the bid for the reason suggested by Nasco. Thereafter, representatives of Grimball and 20th Century contended that Aecon International submitted the bid in Step II as a team and that the bid should not have been rejected. However, the contracting officer continued to view the bid as a 20th Century bid and sustained the rejection on the basis that 20th Century had not submitted a first step proposal.

However, even if we consider that the bid was an Aecon International bid, we would have to conclude that it should be rejected. The IFB was issued on February 3, 1972, with a March 22, 1972, bid opening date. In the interim, a letter of March 8, 1972, signed by Henry G. Grimball, as President of Grimball, and Harold B. Sarshik, as Vice President of 20th Century, was received by the contracting officer. That letter, referencing the IFB number and project description, advised that the parties would be acting as a team under the name of Aecon International in submitting a Step II proposal. The letter went on to delineate the separate responsibilities that each party in the team would have. The individual responsibilities of Grimball were listed as preparation and submission of the Step I technical proposal, preparation of working drawing and specifications for construction

and supervision of construction. On the other hand, it was indicated that 20th Century was to be the general contractor on the project and that it would prepare and submit the Step II bid. It was indicated further that bonds would be prepared in the name of 20th Century as the general contractor for the project and that it would execute the construction contract.

The contracting officer accorded the letter no legal significance. However, our Office has held that all documents received prior to bid opening constitute a part of the bid. 45 Comp. Gen. 397, 399 (1966); B–160659, June 9, 1967. It is our opinion that the letter was a part of the bid and provided a clear indication as to the identity of Aecon International.

However, no bid bond was received from Aecon International as indicated above; the only bid bond received was from 20th Century. We believe it is clear from the March 8 letter that 20th Century was only responsible for submitting bonds for itself as general contractor. However, the contract to be awarded is not restricted to construction, but includes design as well. The latter aspect of the work is the responsibility of Grimball. Therefore, if Aecon International consists of Grimball and 20th Century, the bid bond coverage is incomplete.

A bid bond requirement is a material part of the IFB and noncompliance renders a bid nonresponsive. 38 Comp. Gen. 532 (1959). A bid bond which names a principal different than the nominal bidder is deficient and the defect may not be waived as a minor informality. B–170361, July 27, 1970. This view is prompted by the rule of the law of suretyship that no one incurs a liability to pay the debts or perform a duty of another unless he expressly agrees to be bound. The law does not create relationships of this character by mere implication. 44 Comp. Gen. 495 (1965).

In this case Aecon International appears to be a joint venture. We recognize that each member of a joint venture acts as both principal and agent of his coventurers and each of several joint venturers has the power to subject the others to liability to third parties within the scope of the joint venture. However, one member of a joint venture, by acts in contravention of a restriction on his authority, cannot bind his coventurers to third parties who have knowledge of the limitation of his authority. *Wood* v. *Western Beef Factory, Inc.*, 378 F. 2d 96 (10th Cir. 1967). In our view, the March 8 letter served as notice of the limitation of the authority of 20th Century.

The determination of the sufficiency of a bid bond relates to whether the Government will receive the full and complete protection it contemplated in the event of a failure of a bidder to execute any required contractual documents or bonds. B–176787, November 4, 1969.

Our Office will not apply an overly technical interpretation of the applicable regulations to defeat the bid bond where the Government will receive the protection sought. Thus, where a bid bond named coventurers as principal, but only one was indicated on the bid as bidder, we concluded that the Government would receive full protection. There, the bid documents themselves established the relationship between the bid bond principals and intended bidder so as to subject the surety to liability in the event the bidder failed to execute the required contractual documents or bonds. B-176321, August 25, 1972; B-169369, April 7, 1970. In the present case, the Government would not be similarly protected.

In view of the fact that the IFB required both design and construction services, it is our opinion that the discrepancy between the bid bond principal and nominal bidder is a material deviation from the requirements of the IFB requiring rejection of the Aecon International bid as nonresponsive.

Accordingly, the protest is denied.

[B-177095]

Public Buildings—Construction—Financing of Construction—Dual System of Contracting

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

To the Acting Administrator, General Services Administration, October 19, 1972:

Reference is made to your letter of September 20, 1972, concerning a new contracting procedure that has been proposed for use in carrying out the purchase contracting authority contained in section 5 of the Public Buildings Amendments of 1972, approved June 6, 1972, Public Law 92-313, 86 Stat. 219, 40 U.S. Code 602a.

The proposed procedure, the so-called "dual system," is set out in a memorandum dated September 27, 1972, subsequently furnished to us. You state that you are scheduled to receive bids on purchase contracts totaling nearly $200 million on October 30, 1972, and you ask whether contracts to be entered into thereunder are authorized by law.

Under the plan the General Services Administration (GSA) will issue separate invitations for (a) bids for construction of individual projects and (b) bids to finance and sell to the United States a group of such projects. Following competitive bidding, GSA will accept the most favorable construction bid for each project by entering into a "Construction Contract," and accept the most favorable financing bid to provide the funds for the group of projects as a whole by entering into a "Purchase Contract" with a Trustee which would obtain the necessary funds through issuance of Participation Certificates (PC) to the successful financial bidders.

It is presumed that such successful bidders will reoffer to public investors (PCHolders) the Participation Certificates, each evidencing an undivided interest in the obligation of the United States to make payment of the purchase price under the purchase contract.

The Construction Contractor will be obligated to construct the project improvements (the Improvements) on the site owned by the United States in accordance with GSA's plans and specifications and under supervision provided by the GSA, and to furnish performance and payment bonds which will guarantee completion by the surety in the event of default by the Construction Contractor. The GSA will agree to cause monthly payments to be made to the Construction Contractor out of the proceeds of the financing to be supplied by the PCHolders, and as such payments are made, title to the Improvements will vest in the Trustee designated to hold title on behalf of the PCHolders.

The proposed procedure is further set forth in the memorandum as follows:

Determination of Amount To Be Financed and Disposition Thereof. (a) A target date for completion of all the projects in the group (the "Target Date") will be fixed by GSA and set forth in the Purchase Contract. The amount of the financing to be invited by GSA will be a specified amount approximately equal to the amount estimated by GSA as the maximum which might be required to cover all of the following: (i) the costs of construction ("Construction Costs") payable under all the Construction Contracts in the group, (ii) total applicable costs and expenses ("Construction Period Administrative Costs") to the Target Date, including fees and expenses of a financial advisor and special counsel, fees of the Architect-Engineer, printing costs, fees and expenses of the Trustee and Paying Agent, and local real estate taxes (if any), plus (iii) interest ("Construction Interest") to the Target Date on the amount of the financing to be capitalized at the rate stipulated in the winning financial bid. The United States acting through the GSA will enter into a contract with the Trustee on behalf of the PCHolders providing that the proceeds of the financing will be received by the Trustee and held in trust in a "Construction Fund" for the benefit of the PCHolders.

(b) During the period to the Target Date, sums will be disbursed monthly from the Construction Fund (i) upon order of the GSA by way of progress payments as construction is completed and upon submission of invoices for services performed, in payment of Construction Costs and Construction Period Administrative Costs approved by GSA, and (ii) in semi-annual payments of Construction Interest. On the Target Date GSA will estimate the amounts required to complete each uncompleted project, if any, and will cause such amounts

to be disbursed to a "Completion Fund." The total of all such payments out of the Construction Fund to the Target Date (consisting of (i) the payments of Construction Costs, Construction Period Administrative Costs and Construction Interest, and (ii) the payment to the Completion Fund) will become the principal amount (the "Principal Amount") to be included in the Purchase Price. Any sums left in the Construction Fund will be returned on the Target Date to the PCHolders by way of redemption of Participation Certificates by lot and will not become part of the Principal Amount.

(c) The Completion Fund will be held by the Trustee in trust for the PCHolders, to be disbursed upon order of the GSA to cover costs in connection with completion of the projects or interest on outstanding Participation Certificates or both. Any balance remaining in the Completion Fund must be disbursed for redemption of Participation Certificates by lot upon the earlier of (i) acceptance by the United States of all of the projects in the group, or (ii) the date of the first installment payment of the Principal Amount.

(d) Moneys held in the Construction Fund prior to the Target Date and in the Completion Fund after the Target Date will be invested in other U.S. Government securities upon the order of GSA, and income derived from such investments, after expenses, will be added to the Construction Fund prior to the Target Date and to the Completion Fund after the Target Date.

The Purchase Contract.

(a) The United States will agree to pay to the Trustee, on behalf of the PCHolders, the following amounts, which constitute the Purchase Price:

(i) the Principal Amount, in installments commencing in the ____ year and continuing for not more than 30 years from the date the Purchase Contract is entered into;

(ii) interest on the unpaid Principal Amount, in semi-annual installments commencing approximately six months after the Target Date;

(iii) all costs and expenses of the same nature as the Construction Period Administrative Costs but incurred at any time throughout the term of the Purchase Contract, to the extent they are not paid from the Construction Fund or the Completion Fund; and

(iv) in any event, such additional amounts (if any) as may be necessary to enable the Trustee to pay the principal and interest and premium, if any, on the Participation Certificates as specified therein. The United States will have the right to prepay Purchase Price in connection with any optional redemption of the Participation Certificates, and any redemption or payment of interest out of the Completion Fund will be treated as a payment or prepayment of Purchase Price. The obligation of the United States to pay the Purchase Price will be absolute and unconditional.

(b) The site owned by the United States will be leased to the Trustee for a nominal rental for a period exceeding the 30-year term of the Purchase Contract, which will automatically terminate upon payment in full of the Purchase Price. The Trustee will take title to the Improvements as they are constructed (as stated above under "The Construction Contracts"), and hold title thereto during the term of the Purchase Contract. Upon payment of the Purchase Price in full, title to all assets held by the Trustee will pass automatically to the United States. During the term of the Purchase Contract, the United States will occupy the Improvements and assume full responsibility for repairs, maintenance, operation, management and hazard risks.

Participation Certificates. In order to provide money for the purpose of the program at the lowest possible cost to the United States, the GSA proposes to invite competitive bids for the purchase of Participation Certificates. Such Certificates will evidence undivided interests in the obligation of the United States to pay the Purchase Price to the Trustee under the Purchase Contract. Each Participation Certificate will specify a principal amount ($5,000 or a multiple thereof) to which it is entitled, and the installments in which such amount will be payable. The initial aggregate principal amount of all Participation Certificates will be the amount of the financing (fixed as described above under "Determination of the Amount to be Financed and Disposition Thereof"). Each Participation Certificate will also specify that interest will be payable semi-annually on the unpaid portion of its principal amount, at a specified rate (the rate stipulated in the winning financial bid). The Participation Certificates will be redeemable at principal amount and accrued interest as contemplated

in paragraphs (b) and (c) under "Determination of Amount to be Financed and Disposition Thereof" and will also be subject to redemption at the option of the United States under certain conditions, at principal amount and accrued interest plus premium, if any.

The Trustee and Paying Agent. The _____ Bank ("Bank") will act as Trustee for the PCHolders and Paying Agent for the United States. As such Trustee it will (a) hold the proceeds of the sale of the Participation Certificates in trust for disposition as described above (see "Determination of Amount to be Financed and Disposition Thereof"), and (b) lease the site from the United States and hold title to the Improvements. The Bank, acting as Paying Agent for the United States, will receive from the United States payments on account of the Purchase Price of the projects, pay costs and expenses (if any) directed to be paid by the GSA under the Purchase Contract, and pay to the PCHolders the principal and interest, and premium, if any.

The Financial Bidders' Agreement. The successful bidders, which will be the financial bidders whose bid is accepted by GSA, will agree to purchase the Participation Certificates subject to the usual and customary conditions. It is expected that bidders would consist of groups of investment banking firms and banks.

The memorandum discloses that at the time bids are issued under the proposed "dual system" GSA will simultaneously seek combination construction and financing bids for each project under the so-called "package system" and will choose between the two systems on the basis of which is deemed most favorable to the United States.

The purpose of the Public Buildings Amendments of 1972 is stated in its title as being "* * * to provide for financing the acquisition, construction, alteration, maintenance, operation, and protection of public buildings * * *." Section 5 thereof authorizes GSA to provide space by entering into purchase contracts, the terms of which shall be not more than 30 years and which provide that title to the property shall vest in the United States at or before the expiration of the contract term and upon fulfillment of the terms stipulated in the purchase contracts. It is further provided that the terms and conditions shall include provision for the application to the purchase price agreed upon therein of installment payments made thereunder.

It is provided in section 5(b), 40 U.S.C. 602a(b), that no such purchase contract shall provide for any payments to be made by the United States in excess of the amount necessary, as determined by the Administrator of the GSA (1) to amortize the cost of construction of improvements plus the fair market value of the site, if not owned by the United States; and (2) to provide a reasonable rate of interest on the outstanding principal as determined under clause (1) above; and (3) to reimburse the contractor for the cost of any other obligations required of him, including such items as payment of taxes, costs of carrying insurance, and costs of repair and maintenance. For the purpose of purchase contracts for the erection by the contractor of buildings and improvements for the use of the United States, the Administrator of GSA is authorized in section 5(e), 40 U.S.C. 602a(e),

to enter into agreements with any person, partnership, corporation, or other public or private entity, to effectuate any of the purposes of section 5; and is further authorized to bring about the development and improvement of any land owned by the United States, by "providing for the construction thereon by others of such structures and facilities as shall be the subject of applicable purchase contracts * * *."

Section 5 also requires approval of a prospectus for each project by the Committees on Public Works of the Senate and the House of Representatives, and advance notification to the Committees on Appropriations of the Senate and the House of Representatives. You advise that such approval and notification for the projects covered by the proposed financing have been completed.

As noted above, under the proposed plan the Government will make installment payments for a period not exceeding 30 years, and will obtain title to the project within the specified period. Also, the payments will not exceed the limitations placed thereon by section 5(b) and will otherwise conform to the requirements of section 5. We also understand that the proposed plan will be disclosed to the interested committees of the Congress before it is adopted.

Consequently while the purchase contract authority and the contract requirements set out in section 5 of the Public Buildings Amendments of 1972 do not specifically provide for the method of financing construction as provided in the so-called "dual system," we find nothing in section 5 that must be considered as prohibiting the use of the proposed plan in carrying out the purposes of that section.

Accordingly, it is our opinion that the proposed contracting procedure ("dual system") may be considered legally as within the framework of section 5 of the Public Buildings Amendments of 1972.

[B-176843]

Public Buildings—Leases—Congressional Approval—To Insure Equitable Distribution of Buildings

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

To the Acting Administrator, General Services Administration, October 26, 1972:

Your letter of August 18, 1972 (and enclosures) sets forth your interpretation of section 7 of the Public Buildings Act of 1959, 40 U.S. Code 607, as amended by section 2 of the Public Buildings Amendments of 1972, Public Law 92–313, approved June 16, 1972. Section 7 as amended by section 2 provides, among other things, that "no appropriation shall be made to lease any space at an average annual rental in excess of $500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committees on Public Works of the Senate and House of Representatives respectively."

You intend to issue instructions to your operating personnel setting forth guidelines consistent with the interpretation—as set forth in your letter—of amended section 7 of the Public Buildings Act of 1959, unless our Office interposes any objections thereto. Your interpretation of section 7, as amended, and our views thereon are set forth below.

You state that the applicability of the requirements of amended section 7 of the Public Buildings Act to certain lease transactions involving the acquisition of space for Federal agencies has been under review by the General Services Administration (GSA) since enactment of the 1972 amendments. However, while you state that there is little helpful legislative history, you point out that section 7 as originally enacted and in its amended form has for its stated purpose to ensure "the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings." You also state that the apparent intent of the amended language is to permit legislative oversight with respect to the more significant GSA lease transactions. You further note that the Conference Report (House Report 92–1097, dated May 30, 1972), accompanying S. 1736, which became the Public Buildings Amendments of 1972, states on page 10 that amended section 7 requires GSA to submit a prospectus whenever its Administrator "proposes to secure leased space for which he proposes an average annual rental in excess of $500,000."

The first question raised relates to the proper interpretation of the term "average annual rental." You state in this regard:

In interpreting the term "average annual rental" as used in section 7, as amended, we have construed the word "rental" to be the amount of consideration for use of the land and buildings or portions of buildings during the firm term of the lease. The term excludes the cost of any services, such as heat, light, water, and janitorial services. This interpretation is consistent with the interpretation of the term "rental" as used in section 322 of the Economy Act of 1932

(40 U.S.C. 278a) made by your office, 12 Comp. Gen. 546. In this regard the following should also be pointed out: (1) while our practice is to lease on the basis of obtaining services and utilities, there are many occasions when leases are awarded on a net rent basis (i.e., unserviced); (2) services and utilities need not be included as part of the per square foot rental amount and can be contracted for separately from the lessor or others; and (3) if (2), above, were followed, there would be no question as to the dollar amount for the net rental as services and utilities would not be included therein.

We would prefer, however, to continue our usual practice of including charges for services and utilities in the per square foot rental rate in order to avoid dual contracting for space and services. It is a customary business practice to rent space at a single rate which includes all services. Fully serviced space also avoids the problems inherent in a division of responsibility between the Government and the lessor concerning maintenance and major repairs.

In leasing at a single rate inclusive of services and utilities, GSA now establishes a net rental as a basis to determine whether the same is within the limitations imposed by section 322 of the Economy Act, *supra*. Accordingly, GSA presently requires that an offer to lease be accompanied by a statement of the estimated annual cost of services and utilities to be furnished by the offeror as part of the rental consideration. The figures may be adjusted by the contracting officer if, in his judgment, and using the expertise of the appraiser and GSA's Buildings Management personnel, the figures are inaccurate. Enclosed are copies of GSA Forms 1217 and 387 which are used for determining the cost of services and utilities and the net rental.

As you point out, your construction of the word "rental" as it is used in the Public Buildings Amendments of 1972 (that it is the amount of consideration for use of the land and buildings, or portions of buildings, during the firm term of the lease, excluding the cost of any services such as heat, light, water, and janitorial services), would be consistent with the interpretation of the term "rental" used in 40 U.S.C. 278a, as interpreted in our decision 12 Comp. Gen. 546 (1933). Also, we were informally advised by members of your staff that the cost for such services is fairly uniform throughout the country (ranging approximately from $1.35 to $1.75 a square foot), and that it is the cost of renting space which varies greatly (from $4 to $10 a square foot). We were further advised that in soliciting offers for leased space, you require a "net" rental bid in order to have uniformity in evaluating proposed leases. Also, we were advised informally that when GSA submitted a lease prospectus to the Congress for approval prior to the amendment of section 7, the comparative costs of leasing versus purchasing were presented in net terms. In view of the above, we see no objection at this time to your proposed interpretation of the term "average annual rental."

The next question raised in your letter relates to the effect of amended section 7 with regard to the 92 leases GSA currently has in effect, which were entered into prior to the enactment of the legislation, at average annual rentals in excess of $500,000, as well as with regard to those cases in which GSA has entered into contracts—prior to the 1972 amendments—under which the Government is obligated

to enter into formal lease agreements, exceeding $500,000 per annum, upon delivery of the space. You state in this regard:

As discussed above, we do not interpret section 7 as intended to impair existing lease agreements entered into prior to enactment of the 1972 Act. Not only does the legislative history of the Act support this view, but Congress cannot repudiate Government contracts through a general statute, *Perry* v. *United States*, 294 U.S. 330 (1935); *CF John McShain Inc.* v. *District of Columbia*, 205 F. 2d. 882 (1953).

Accordingly, in cases where GSA long-term leases entered into prior to June 16, 1972, include a tax escalator clause which allows for an adjustment in the rent to become effective at certain times during the period of the leases, and by application of the clause, the amount of rent to be paid in the future may exceed $500,000, we do not intend to submit a prospectus. Further, in instances where contracts have been signed prior to the effective date of the amendment to section 7, requiring upon delivery of the space that GSA enter into a lease agreement in excess of $500,000, we do not believe that the Act requires the submission of a prospectus since the proposed lease has become a contractual obligation of the Government which the Act is not intended to impair.

It is a well-established canon of statutory construction that in the absence of an express statutory provision to the contrary, it is not to be presumed that Congress has intended in the enactment of a law to impair existing contracts. Therefore, we agree with your position that section 7 does not require congressional approval of leases entered into prior to the enactment date of Public Law 92–313 (i.e., June 16, 1972), which include a tax escalator clause, allowing for the adjustment of rent, the application of which (the tax escalator clause) subsequent to such date of enactment results in an average annual rental in excess of $500,000. We further agree that section 7, as amended, does not require congressional approval of leases entered into after the enactment date of the 1972 amendments pursuant to contracts entered into prior to such date requiring GSA upon delivery of the space to enter into a lease agreement with a rental in excess of $500,000.

You further ask about the applicability of amended section 7 to situations in which it becomes necessary or desirable to amend an existing lease with an average annual rental of less than $500,000 to cover additional space so that the total average annual rental will be in excess of that figure. You state in this regard:

We also have not interpreted amended section 7 to require submission of a prospectus in instances where the existing or proposed lease requires payment of an average annual rental of less than $500,000; but because of subsequent change in circumstances it becomes necessary to amend the lease covering additional space, increasing the average annual rental of the building to more than $500,000. Such an amendatory agreement requires all the elements of a new contract and could be accomplished by a separate contract document rather than by amendment. It is not uncommon for GSA to lease portions of a building and as a result of increased program requirements of Federal agencies to seek additional space in the same building.

In further amplification of the above, an amendment covering additional space in the same building could take place anytime during the term of the lease, and in most instances occurs more than one year from the date the lease is executed. The additional space could be used by one or more agencies in a building occupied by several agencies, for an agency moving into the building for the first time, or for the expanding needs of an agency occupying all of the Government leased

space in the building. In any event, the added space could be subject to a separate lease agreement which, if the average annual rental was under $500,000, would not be subject to a prospectus submittal. In any circumstances we would not extend the term of the existing lease and adequate steps would be taken, of course, to prevent the splitting of a space requirement for purposes of evading the requirements of section 7.

We are aware of no legal basis on which to object to the proposed treatment of amendments to existing leases. However, GSA should take whatever precautions are necessary to prevent the splitting of a space requirement for purposes of evading the requirements of amended section 7. This Office, in the course of its normal audits of GSA's activities, will, of course, review GSA's administration of this matter.

With respect to the exercise of options, you state:

The rationale of our interpretation of section 7, with respect to existing leases, does not apply, however, to renewal options contained in such leases. The options impose no rights on the lessor and are exercised only at the discretion of the Government. However, in most instances the lease option has considerable value. In future lease transactions where a prospectus must be approved and submitted under amended section 7, it is our intention to include in the prospectus a statement relative to the lease options in order that the approval would permit their exercise by the Government. In leases entered into prior to June 16, 1972, where upon exercise of the option the average annual rental would be in excess of $500,000, we do not construe section 7, as amended, as requiring the submittal of a prospectus. As pointed out above, the lease prospectus procedure is intended to ensure the equitable distribution of public buildings throughout the United States with respect to proposed lease transactions, rather than as a control over existing lease arrangements.

While we agree that the statutory language indicates that the lease prospectus procedure is intended, in part, to ensure the equitable distribution of public buildings throughout the United States, it is our view that one of the major purposes of amended section 7 is to allow the Congress, through the appropriate committees, to exercise a degree of control over leasing arrangements. Beginning in fiscal year 1963 and continuing until fiscal year 1972 (i.e., until enactment of the Public Buildings Amendments of 1972), the Congress included within the annual "Independent Offices Appropriation Act" a provision to the effect that no part of any appropriation contained in the Act could be used for the payment of rental on lease agreements for the accommodation of Federal agencies in buildings, and improvements which were to be erected by the lessor for such agencies at an estimated cost of construction in excess of $200,000 or for the payment of the salary of any person who executed such a lease, unless a prospectus for the lease construction of such space was submitted to the Congress and approval made in the same manner as for public building construction projects pursuant to the Public Buildings Act of 1959. The legislative history of that provision strongly indicated the desire of Congress to exercise some control over the Government leasing program and to encourage the construction rather than leasing of buildings for housing the Government. As indicated in reports prepared by this Office, it became

apparent that the aforementioned provision did not give the Congress the degree of control over the Government leasing program that it desired. *See*, for example, our report B–118623, dated April 19, 1972. Accordingly, the Congress amended section 7 of the Public Buildings Act in 1972 in order to give it greater control.

With respect to the specific question raised, while we agree that in most instances it may be advantageous for the Government to renew its option, your agency will need to compare the various alternatives available to determine which will be the most advantageous to the Government in any particular situation. Inasmuch as this evaluation will be tantamount to making a *de novo* decision as to the location of the building to be occupied by the Government, as well as tantamount to making a new lease, we feel the subject section requires that the prospectus procedure be carried through on all transactions involving the exercise of options in leases entered into prior to June 16, 1972, where the average annual rental will be an excess of $500,000. However, we agree that a lease prospectus need not be submitted for approval of the exercise of an option in those cases in which the initial prospectus, submitted under amended section 7 (i.e., after the date of enactment of the 1972 amendments), clearly and conspicuously states that approval of all the provisions of the prospectus constitutes approval of the exercise of any options to renew which are contained in the proposed lease.

The final question raised in your letter relates to the need for prospectus approval of interim housing plans. You state in this regard:

> Also, your opinion is requested on whether a prospectus is required under the following circumstances where the requirement for a prospectus is less clear from the language of amended section 7. For purposes of securing consideration of approval of prospectuses, section 7, in both its original and amended form, requires that a prospectus for a proposed public building include a statement of rents and other housing costs currently being paid by the Government for Federal agencies to be housed in the building to be constructed as well as a comprehensive plan for providing space for all Government officers and employees in the locality of the proposed project, having due regard for suitable space which may continue to be available in existing Government owned buildings and in rented buildings. This plan, referred to in the prospectus submission as a comprehensive housing plan is a part of the prospectus as approved by the Senate and House Committees on Public Works.
>
> The housing plan, among other things, advises the Committee of the amount of leased space then occupied by Federal agencies and the proposed housing upon completion of the proposed public building. In many instances, although the project is authorized by approval of the prospectus, construction funds are not appropriated immediately, and it becomes necessary to renew existing leases to provide for continued Federal occupancy. Since the housing plan is included in the approved prospectus, and is intended for the purpose of advising the Committees of the leasing arrangements to be continued until the public building is constructed, it is our opinion that such leases may be renewed without the submission of a prospectus where the average annual rental exceeds $500,000. Our reason for this view is that by approval of the prospectus for the proposed construction of the public building, the Committees have also approved the interim housing plan, and therefore the need for an additional prospectus upon expiration of a lease term does not exist.

Paragraph 5 of amended section 7, as did its predecessor, merely requires that the prospectus include a statement of the rent and other housing costs currently being paid by the Government for Federal agencies to be housed in the space to be constructed. We would agree that one of the purposes of this section is to advise the committees of the leasing arrangements to be continued until the public building is constructed, but we cannot agree that approval of the prospectus for the proposed construction of the public building necessarily constitutes approval of the interim housing plan. However, insofar as future leases are concerned (i.e., leases approved after June 16, 1972) where the prospectus clearly and conspicuously states that approval thereof will also constitute approval of the interim housing plan, and where the interim housing plan spells out in detail the possibility that certain specific leases involving average annual rentals in excess of $500,000 may have to be renewed pending completion of the public building, we would agree that the requirements of amended section 7 of the Public Buildings Act of 1959 have been complied with and that therefore no separate prospectus would need to be submitted for those leases being renewed as part of the interim housing plan.

In conclusion, except in those instances noted above, we have no objection at this time to your implementing the procedures spelled out in your letter.

[B–174207]

Mileage—Military Personnel—Travel by Privately Owned Automobile—Interstation Travel *v.* Travel Within Limits of Duty Station

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

To Major F. R. Hasler, United States Marine Corps, October 27, 1972:

Further reference is made to your letter of April 27, 1971, with enclosures, forwarded here on September 27, 1971, by the Per Diem, Travel and Transportation Allowance Committee, requesting an advance decision as to the propriety of making payment on a voucher in

the amount of $7 in favor of Major Robert W. Shaw, USMC, representing mileage at the rate of 10 cents per mile for travel performed by privately owned vehicle between Quantico, Virginia, and Arlington, Virginia, under the circumstances disclosed. Your request for decision was assigned PDTATAC Control No. 71–40 by the Per Diem, Travel and Transportation Allowance Committee.

The submitted voucher contains the approval of the Deputy Chief of Staff, Development Center, Quantico, Virginia, that the travel performed by privately owned vehicle was "advantageous to the Government."

You refer to the provisions of paragraph M4500–2, Part K, Chapter 4, Joint Travel Regulations, and you state that the question arises as to the legality of making payment in the instant claim and in similar claims at the rate of 10 cents per mile for use of private vehicle for travel between Quantico and Headquarters U.S. Marine Corps when, (1) travel involved is from the member's quarters to the temporary additional duty (TAD) point and return, and (2) travel is approved by competent authority on Standard Form 1164 in lieu of issuing orders. You say that while there is no question that reimbursement would be made under paragraph M4203–3, Joint Travel Regulations, when orders are involved, you express doubt as to the proper reimbursement when the member is verbally ordered to perform TAD which is subsequently approved for reimbursement.

You express the view that since it is a known fact that personnel commute daily to Washington, D.C., and Arlington, Virginia, from Quantico, and various locations adjacent to Quantico, Quantico could be considered as being in an "area" adjacent to Headquarters Marine Corps within the meaning of paragraph M4500–2 of the regulations. In support of this view, you point out that orders requiring personnel from Quantico to perform temporary duty at Headquarters Marine Corps invariably contain the statement in the orders (paragraph M4201–14) requiring the individual to commute and to incur no additional subsistence expense. In addition, you say that for purposes of the above-cited Part K of the regulations, as it pertains to travel of Reserve components, the commander at Quantico has established a radius of 50 road miles in which a Reserve must commute unless the nature of duties involved require otherwise.

By first endorsement dated May 10, 1971, the Commanding General, Marine Corps Development and Education Command, comments that personnel of that command are often required to utilize privately owned vehicles for travel to Headquarters Marine Corps, as well as to various locations in Washington, D.C. Requirements for such trips occur at all times during the day, and are normally performed within the span

of a few hours and are seldom covered by orders. It is further stated that some of the personel involved perform this travel frequently enough for the personnel expense to be meaningful and while confirmation orders could be issued, even the travelers feel the administrative burden and expense would outweigh the amount of money involved for such a trip.

In transmitting your request here, the Commandant of the Marine Corps in third endorsement dated August 30, 1971, states that the doubt expressed in your letter apparently stems for our decision of April 21, 1970, 49 Comp. Gen. 709. It is pointed out that the definition of "area" contained in paragraph M4500–2 of the regulations was amended June 1, 1970, to include areas adjacent to the place at which the permanent and/or temporary duty station is located from which personnel customarily commute daily to that place. In expressing the view that entitlement exists, Marine Corps Headquarters reiterates the fact that personnel commute daily between Quantico and Arlington and even more distant locations.

Section 408 of Title 37, U.S. Code, provides that a member of a uniformed service may be directed, by regulations of the head of the department or agency in which he is serving, to procure transportation necessary for conducting official business of the United States "within the limits of his station" and expenses so incurred by him for the use of a privately owned vehicle at a fixed rate a mile shall be defrayed by the department or agency under which he is serving, or he is entitled to be reimbursed for the expenses.

Part K, Chapter 4, Joint Travel Regulations, implementing the above law, prescribes the basis for reimbursement for travel within and adjacent to permanent and temporary duty stations. Paragraph M4500–1, included in Part K, provides that when determined to be advantageous to the Government, officials designated by the service concerned may authorize in advance, or subsequently approve, reimbursement for transportation expenses, as prescribed in Part K, which are necessarily incurred by members in conducting official business in and around their duty stations.

Paragraph M4502–1 of the regulations provided at the time involved that when authorized or approved under the conditions of Part K, members who travel by privately owned conveyance are entitled to reimbursement at a rate of 10 cents per mile (11 cents a mile effective November 30, 1971, Change 228) for the use of a privately owned conveyance.

In our decision of April 21, 1970, 49 Comp. Gen. 709, cited above, the officer was directed by written orders to commute between Quantico, Virginia, his permanent duty station, and Headquarters Marine Corps, Arlington, Virginia, his temporary duty station. The orders

further provided that he would incur no additional subsistence expenses, citing paragraph M4201–14 of the regulations. In that decision we held that the officer's travel from Quantico to his temporary duty station and return was not limited to the area surrounding such temporary duty station as defined in paragraph M4500–2 of the regulations, but constituted inter-station travel and payment of a travel allowance was governed by 37 U.S.C. 404 and the implementing regulations (citing 45 Comp. Gen. 30).

Therefore, we said the officer was entitled to reimbursement for the travel in question at the rate of 7 cents per mile under the provisions of paragraph M4203–3 of the regulations but he was not entitled to per diem for his temporary duty.

Therefore, there is no basis for authorizing reimbursement under section 408 of Title 37 for inter-station travel, as in the instant case, and any reimbursement for the travel in question is authorized only if it be viewed as coming within the purview of section 404 of Title 37 and paragraph M4203–3 of the Joint Travel Regulations.

Section 404 provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed under "orders" away from his designated post of duty regardless of the length of time he is away from that post. Paragraph M4203–3b of the regulations, implementing section 404, describes the policy of the uniformed services to authorize members to travel by privately owned conveyance whenever such mode of transportation is acceptable to the member and it is determined to be more advantageous to the Government. The same regulation also provides for reimbursement for such travel at the rate of 7 cents per mile provided certain conditions are met as there indicated.

Although the travel in the instant case was not performed pursuant to written orders, presumably it was performed pursuant to verbal orders and the voucher shows that the travel was approved by competent authority as being advantageous to the Government and such approval was made within four days after the travel was performed. In the circumstances, and since the travel was approved shortly after it was performed, we will consider the approval in this case as in effect a confirmation of the verbal orders and constituting written orders within the meaning of section 404 of Title 37 and paragraph M4203–3b of the regulations, for the purpose of authorizing reimbursement for such travel at the rate of 7 cents per mile.

Accordingly, the voucher is returned herewith and if the voucher is amended to conform with the foregoing, payment is authorized thereon if otherwise correct.

[B-176227]

Bidders—Qualifications—Capacity, Etc.—Determination

The determination a bidder was not responsible to perform a requirements contract to repair adding machines and calculators because he could not furnish loan equipment during periods of repair, and because operating from home there was little indication the bidder was regularly engaged in the repair business, is not an invalid determination as the contracting agency is vested with a considerable degree of discretion in deciding the responsibility of a prospective contractor. However, the bidder should have been given the opportunity to establish the ability to furnish loan equipment by performance time in view of the statement made during a preaward survey of ability to obtain equipment, and the award of a contract on similar terms to repair typewriters. It is, therefore, suggested that in the future information received in connection with a particular procurement should be utilized, where relevant, in a similar concurrent procurement.

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

We refer to a letter dated July 14, 1972, from your General Counsel transmitting a report in connection with the protest of United Office Machines (United) against the award of a contract to another firm under invitation for bids No. GS-06DP-(P)-2014, issued by your agency (GSA).

The subject IFB was issued by GSA, Region 6, on March 10, 1972, for indefinite quantity requirements type contracts for repair and maintenance of adding machines and calculators covering the period July 1, 1972, through June 30, 1973. Separate awards were to be made for bid schedules 1, 2, 3 and 4, designating the type of adding machine or calculator, for (a) "*Item 1, Hourly Rate—Repairs*" (excluding parts) for each service area specified and (b) "*Item 2, Annual Maintenance*" for each listed make and/or model for each service area. United was the apparent low bidder on 15 separate items.

An evaluation of United's plant facilities was initiated in order to assist the contracting officer in determining that firm's responsibility as a prospective contractor in accordance with Federal Procurement Regulations (FPR) 1-1.204-1, which provides that contracts be awarded only to responsible prospective contractors. The evaluation resulted in a negative recommendation, primarily because United lacked a sufficient number of machines which could be loaned to the ordering agency for use, when and if requested, while the agency's machines are being repaired. In addition it was noted that United's shop is located in the owner's home, which at the time of inspection had no sign identifying it as a business location. Therefore, the contracting officer determined that United was not responsible because of the lack of loan machines or written commitments for their purchase, and because there was little indication that United was regu-

larly engaged in the adding machine and calculator repair business as required by the invitation. The matter was not referred to the Small Business Administration under the Certificate of Competency procedure since the estimated amount of the procurement ($2,400) was under $2,500. FPR 1-1.708-2(a)(2). Award was made to another firm on May 22, 1972.

United protests the determination of nonresponsibility, stating that it was considered responsible by Region 6 to perform under a similar contract for typewriter repairs and maintenance. United contends that it should not have been determined nonresponsible for failure to have a sufficient number of loan machines at the time of the preaward survey as the surveyor was advised that they would be purchased as needed for this purpose.

We have recognized that the contracting agency has the duty of deciding the responsibility of a prospective contractor. In making this determination the agency is vested with a considerable degree of discretion. *See* 45 Comp. Gen. 4 (1965); 43 *id.* 257 (1963).

While we are unable to conclude from the record that the nonresponsibility determination was invalid, it is our view that United should have been afforded the opportunity to establish its ability to furnish loan machines prior to the negative determination. It is noted that although the advisory preaward survey was negative, the survey reported United as stating that it could buy machines as needed for loan purposes.

Paragraph 12 of the invitation provides that a bidder must be regularly engaged in the business, or if newly entering the field, he must submit written commitments for space, equipment, and personnel. Under section 1-1.1203-2 of FPR a prospective contractor must have "the necessary production, construction, and technical equipment and facilities, or the ability to obtain them." In this connection, our Office has held that a bidder may be regarded as responsible if he demonstrates the ability to obtain the requisite equipment by the time performance is to begin, plus any leadtime which is necessary in the particular case. B-162888, January 4, 1968; 39 Comp. Gen. 655 (1960). Therefore, we believe that the contracting officer should have determined whether United could have furnished the loan machines if requested to do so.

Furthermore, the record indicates that United received an award for repair and maintenance of typewriters under a Region 6 solicitation issued March 3, 1972, which also included a requirement for loaners. Your agency explains that this award was made to United without requesting a plant facilities report because of the small dollar value (estimated value of $300) of the contract involved. However, it

appears from the record that the subject survey report had already been performed by Region 6 before this other award was made, and that the same information concerning United was available for this procurement. It seems to us, therefore, that the same determination of responsibility should have been made on both procurements.

Although we can perceive of no legal basis to disturb the award to another bidder, we believe that information obtained in connection with a particular procurement should be utilized, where relevant, in a similar concurrent procurement.

[B-176348]

Travel Expenses—Military Personnel—Retirement—To Selected Home—Residence Establishment

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

To W. H. Meixler, Department of the Air Force, October 30, 1972:

Further reference is made to your letter (file reference ACFF) requesting an advance decision as to the propriety of making payment on vouchers totaling $335.79 in favor of Lieutenant Colonel Rowland G. Phillips, 221–12–6376, retired, representing travel and transportation allowances for himself and his dependents incident to his retirement from the United States Air Force on July 1, 1970. Your letter was forwarded to this Office by letter from the Office of the Assistant Comptroller for Accounting and Finance of the Air Force, ACF (XSPT), dated June 15, 1972, and has been assigned PDTATAC Control No. 72–26 by the Per Diem, Travel and Transportation Allowance Committee.

The record shows that by Special Order No. AC-18847, dated June 8, 1970, issued by Headquarters, Department of the Air Force, the member was relieved from active duty on June 30, 1970, and placed

on the retired list effective July 1, 1970, under the provisions of 10 U.S. Code 8911.

By letter dated May 6, 1971, the member advised that he chose Marco Island, Florida, as his home of selection and by letter dated June 28, 1971, he submitted DD Form 1351–2 and DD Form 1351–4, travel vouchers for himself and his dependents, for travel from his last permanent duty station, Plattsburgh Air Force Base, New York, to his indicated home of selection, Marco Island, Florida, which travel was certified as having been completed on April 11, 1971. An additional enclosure with the June 28 letter was a copy of a Purchase Agreement executed by the member and his wife dated November 19, 1970, which the member asserts in his letter as constituting "evidence of intent to establish a bona-fide residence" at that location.

You say in your letter that the member and his dependents continued to reside in Wilmington, Delaware, after the 1-year period following his retirement awaiting construction of their home in Florida. In letter dated January 10, 1972, signed by Second Lieutenant M. R. Shepherd, USAF, AFO, Plattsburgh Air Force Base, that statement was supported by providing copies of the envelope which contained the travel vouchers and Purchase Agreement, postmarked in Wilmington on June 28, 1971, and showed a return address in Wilmington, Delaware. You also say that the member's household goods were shipped to Wilmington, Delaware, and have provided a copy of the Government bill of lading establishing this shipment occurred in July 1970, shortly after the member retired. As a result, you express uncertainty whether the member is entitled to reimbursement for the travel allowances claimed for himself and his dependents from Plattsburgh Air Force Base to his claimed home of selection, Marco Island, Florida.

Subsection (c) of section 404, and subsections (c) and (g) of section 406 of Title 37, U.S. Code, provide that under uniform regulations prescribed by the Secretaries concerned, a member of the uniformed services who is retired in the circumstances described therein may select his home for the purposes of travel and transportation allowances payable under those sections.

Paragraphs M4158–1a and 2a of the Joint Travel Regulations provide that a member upon retirement may select his home and receive travel allowances thereto, provided the travel is completed to the selected home within 1 year after termination of active duty. Para-

graph M7010–1a contains similar provisions regarding the transportation of his dependents to the home of selection. Paragraph M8260–1 of the regulations provides for the shipment of household goods upon retirement from a member's last or any previous duty station, from a designated place, from storage or any combination thereof, to the home selected by the member under paragraph M4158, if such effects are turned over to a transportation officer or carrier for shipment within 1 year following termination of active duty.

In this connection, paragraph M1150–3(b) of the Joint Travel Regulations defines "home of selection" as being the place selected by a member as his home upon retirement.

In 36 Comp. Gen. 774 (1957), we stated that:

> The purpose of the statute and regulations is to authorize transportation at Government expense for a member, his dependents, and household effects, to the place where he goes to reside following retirement, and until such a place has been selected and travel to it for that purpose has been performed, no right to such travel and transportation allowances accrues.
>
> * * * * * * *
>
> Generally if a member upon retirement certifies that he selected a place as his home and travels to such place, his certification is accepted, in the absence of a clear indication to the contrary, as establishing his entitlement to the travel allowances authorized by the statute and regulations.

The intent to establish a home at the selected place, at the time of travel thereto by a member, is a necessary condition precedent to the right to travel and transportation allowance to such place. The best evidence, of course, that the travel for which a member seeks reimbursement was to a place selected by him as his home, is his actual and continued residence at that place. When, however, a member does not clearly establish his intention by taking up an extended residence at the place to which mileage is claimed, but continues to reside elsewhere, his intent necessarily must be inferred from the surrounding circumstances. In cases where a member's stay in a particular place does not exceed the span of an ordinary visit, vacation or business trip, the conclusion, in the absence of other clear and convincing evidence to the contrary, is that the travel involved was not travel to a selected home within the contemplation of the Joint Travel Regulations. *See* B–171962, March 9, 1962.

In the present case, the record shows that the member and his dependents traveled from Plattsburgh Air Force Base, New York, to Wilmington, Delaware, the member's home of record, following his retirement. The record also shows that the member's household effects

were shipped to that point, presumably as his designated home of selection. While the member states that he and his dependents completed home of selection travel to Marco Island, Florida, there is nothing in the record to show that such travel was for the purpose of establishing a residence at that location; rather, the file before us indicates that the member maintained residence in Wilmington, Delaware, at the time of the claimed travel and for an extended period thereafter.

In this regard, the photocopy of the Purchase Agreement which was signed by the member and his wife, bearing a date of November 19, 1970, shows that the member's home address at that time was 1816 Floral Drive, North Graylyn Crest, Wilmington, Delaware, and indicates that the instrument in question was prepared and signed in Wilmington. The return address on the envelope used by the member to submit his claim and postmarked "Wilmington, Del.," dated June 28, 1971, is the same as used on the Purchase Agreement. Additionally, information informally obtained shows that the member is currently residing in Wilmington, Delaware.

It would therefore appear that while the member may contemplate moving from Wilmington, Delaware, to Marco Island, Florida, there is nothing in the file to support the view that he completed travel there, or to any other location other than Wilmington, Delaware, within the 1-year limitation period, for the purpose of establishing a bona fide residence.

Consequently, on the basis of the record before us, payment of travel and transportation allowances to Marco Island, Florida, is not authorized. However, since the record shows that the member and his dependents did perform travel to Wilmington, Delaware, his home of record, within 1-year following his retirement, and have continued to reside there, such location may be accepted as his home of selection for the purposes of reimbursement for travel and transportation allowances under sections 404 and 406 of Title 37, U.S. Code.

Accordingly, the member may be reimbursed for the allowances authorized for himself and his dependents, from his last duty station prior to retirement, to Wilmington, Delaware, if otherwise correct. The vouchers enclosed with your submission are returned herewith.

[B-176759]

Transportation — Dependents — Overseas Employees — Advance Travel of Dependents—Divorce, Etc., Prior to Employee's Eligibility

Reimbursement to an employee for the advance return travel to the United States of a spouse and/or minor children who traveled to the foreign post as dependents but ceased to be dependents as of the date the employee became eligible for return travel because of divorce or the annulment of the marriage may be provided and section 126.2, Volume 6, Foreign Affairs Manual (FAM) amended accordingly under the authority of 22 U.S.C. 1136—the amendment to prescribe that the reimbursable travel may not be deferred more than 6 months after the employee completes his travel. The Government has the obligation to return dependents at Government expense since an employee and his family are sent to an overseas post for the convenience of the Government and, furthermore, the amendment will bring the regulation in harmony with 6 FAM 126.3 and section 1.11f of Office of Management and Budget Circular A–56.

To the Secretary of State, October 30, 1972:

Reference is made to the letter from your Assistant Secretary of Administration dated August 1, 1972, requesting our concurrence in a proposed revision of the Uniform State/AID/USIA Foreign Service Travel Regulations to permit reimbursement to an employee for the return travel expenses of a spouse and children transported overseas at Government expense although the marriage has been terminated by divorce prior to the time the employee becomes eligible for return travel.

The Assistant Secretary states that under certain circumstances a definite financial hardship results to the employee. He cites the following two examples of such circumstances:

(1) An employee with a wife and child are transferred overseas. At some point after arrival overseas, the wife and husband develop marital problems. The wife divorces her husband at the overseas post and gains temporary custody of the minor child. Under current regulations, this ex-wife and child cannot be returned to the United States at Government expense since they are no longer dependents of the employee when he becomes eligible to travel. Under the circumstances, it becomes an added expense for the employee to assume the costs in returning his ex-wife and child to the United States.

(2) An employee and wife are transferred to an overseas post for a two year tour of duty. After six months, during which time marital problems have developed, the wife returns to the United States at the husband's expense. Before the employee is eligible for home leave, his wife divorces him. Again, the employee cannot claim reimbursement for the expense of his wife's travel, because at the time he becomes eligible to travel, she is no longer his dependent.

The Assistant Secretary advises that he reviewed prior Comptroller General decisions, such as 26 Comp. Gen. 864; 29 *id.* 169; 30 *id.* 80; 32 *id.* 194; and 36 *id.* 116, which concern similar problems. He notes

that a family member's benefits are derived from those given the employee and, therefore, the dependents' travel is authorized incident to that of the employee or when it is in the Government's interest to provide travel for the dependents.

The Assistant Secretary is of the opinion that since an employee and members of his family are sent to an overseas post for the convenience of the Government, it would appear that the Government has an obligation to return them to the United States at Government expense. In order to alleviate the financial burden upon the employee when he and his spouse are divorced after the transportation of the dependents overseas at Government expense and prior to his eligibility for return travel, it is proposed to amend that part of section 126.2, Volume 6, Foreign Affairs Manual (FAM), which now reads as follows:

> No reimbursement will be made for advance travel of an individual who has ceased to be a member of the employee's family through a change in marital or dependency status (except as provided in 126.3) prior to the date the employee becomes eligible for return travel and such travel has been authorized for him.

Upon amendment the above would read:

> Reimbursement may be made for advance travel of return travel to the United States for a spouse and/or minor children of an employee who have traveled to the post as dependents even if such spouse and/or minor children cease to be dependents as of the date the employee becomes eligible for travel because of a divorce or an annulment. Reimbursable travel may not be deferred more than 6 months after the employee completes personal travel pursuant to the authorization.

Section 1136 of Title 22, U.S. Code, provides in pertinent part as follows:

> The Secretary may, under such regulations as he shall prescribe, pay—
>
> * * * * * * *
>
> (2) the travel expenses of the members of the family of an officer or employee of the Service when proceeding to or returning from his post of duty * * *.

We note that under this authority the Secretary has promulgated 6 FAM 126.3, which authorizes the return transportation of an employee's children who are over 21 years of age when the employee becomes eligible for return travel, provided such children were transported to the overseas post at Government expense when they were under 21 years of age. The current regulations, therefore, recognize to a partial degree an obligation on the part of the Government to return members of an employee's family who were transported overseas for the convenience of the Government although such members ceased

to be dependents of the employee when he becomes eligible for return travel. For similar provisions applicable to the children of overseas Government employees in agencies other than the Department of State see section 1.11f of Office of Management and Budget Circular No. A–56.

The proposed regulation, thus, would extend the above principle to other members of an employee's family whose transportation to the overseas post was at Government expense. Regarding the children, the proposed amendment would not be a radical departure from current travel regulations since the employee would, in many cases, be responsible for their support and they would remain members of his family. *See* B–163138, January 17, 1968. Although the wife would not be a member of the employee's family after the divorce, the employee would, in many cases, be responsible for her support and it would impose a financial hardship upon him to provide for her return travel. Also, as pointed out by the Assistant Secretary, the providing of return travel will avoid a potential embarrassment to the United States caused by the presence overseas of ex-family members who are unable to return home due to lack of funds.

In view of the above we do not object to the proposed amendment to the regulations.

[B–108439]

Alaska—Natives—Status—Claims Payment Purposes

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

To the Secretary of the Interior, October 31, 1972:

Our office has been requested to render a decision as to whether or not the Alaska Native Fund established by the Alaska Native Claims Settlement Act, Public Law 92–203, approved December 18, 1971, 85 Stat. 688, 43 U.S.C. 1061 note, may be properly classified as an Indian

tribal trust fund and thus be eligible for interest payments under the law found at 25 U.S.C. 161a and for investment under the law found at 25 U.S.C. 162a. Section 161a states that all Indian tribal funds with account balances exceeding $500 held in trust by the United States shall bear simple interest at the rate of 4 percent per annum unless another rate is otherwise authorized by law. Section 162a authorizes the Secretary of the Interior to withdraw any tribal trust funds from the United States Treasury and to deposit such funds in banks selected by him or to invest such funds in public debt obligations of the United States or obligations guaranteed by the United States.

Under sections 6 and 9 of Public Law 92–203 (43 U.S.C. 1605, 1608), the Alaska Native Fund is to consist of the following:

1. A total of $462,500,000 from annual congressional appropriations.

2. 4 percent interest per annum on any amount authorized to be appropriated by subsection 6a which is not appropriated within 6 months after the fiscal year in which payable.

3. A total of $500,000,000 from payments from the State of Alaska and from the United States for mineral royalties and lease rentals.

The Deputy Solicitor of the Department of the Interior has taken the position that the fund in question is an Indian tribal trust fund and thus entitled to the interest payments and investment provisions of 25 U.S.C. 161a and 162a, while the Assistant General Counsel of the Treasury Department has concluded that the fund may not be properly classified as an Indian tribal trust fund.

In support of the Interior Department's position the Deputy Solicitor argues that:

(1) All payments into the Alaska Native Fund may be expected almost immediately but the quarterly distribution of moneys in the fund which are to be paid to the certain regional corporations cannot, under subsection 6(c) of Public Law 92–203, be made until "after completion of the role prepared pursuant to section 5." Thus, the moneys in the fund are properly for classification as trust funds and are entitled to draw interest or to be available for investment, particularly during the two year period which it is anticipated will be needed to complete the preparation of the role.

(2) The natives of Alaska, including the three aboriginal ethnic groups of Indians, Aleuts and Eskimos, have long been recognized as wards of the United States and are treated in material respects the same as all the aboriginal tribes of the United States, and thus are entitled to the benefits of and are subject to the general laws governing the Indians of the United States; and,

(3) Affirmative support for the position taken is generally drawn from a colloquy between Senators Gravel and Bible during consideration of the Alaska Native Claims Settlement Act.

Regarding the remarks of Senators Gravel and Bible, the Congressional Record of December 14, 1971, shows that during Senate consideration of the conference report on the Alaska Native Claims Settlement Act, the following colloquy took place.

Mr. GRAVEL. * * *
Mr. President, before proceeding, I would like to clarify two minor points. According to the bill funds will be appropriated into the Alaska native fund beginning this fiscal year; that is before July 31, 1972. But no funds will be paid out from the Alaska Native fund to the regional or village corporations until the Secretary of the Interior has completed the Native enrollment. That procedure could take as long as 2 years. It is my understanding that in the interim the appropriated funds will be held in a special fund in the U.S. Treasury. Will there be any interest credited to that account while the funds are withheld pending enrollment?
Mr. BIBLE. The bill does not by its terms provide for interest on the appropriated funds once they are, in fact, appropriated although interest at the rate of 4 percent per annum beginning 6 months after the end of any fiscal year in which Congress fails to make a scheduled appropriation is provided.
As to funds withheld pending enrollment, it is the committee's intention that the Secretary of the Treasury shall use his existing statutory authority to invest and manage the Alaska Native fund pending enrollment and to credit any interest so earned to that fund. When the enrollment is completed, the total balance, including accrued interest will be paid to regional corporations in accordance with the bill. *See* 117 Cong. Rec. S. 21656.

In support of the Treasury Department's position, the Department's Assistant General Counsel argues that: (1) the fund in question is not a fund for Indian tribes and (2) the composition of the fund is specifically and categorically outlined by Congress in section 6 and—except for interest payable under 6(a) (43 U.S.C. 1605(a)) where there is a delay of more than 6 months by the Congress in appropriating moneys due under the act—no interest on the fund in question is payable.

In concluding that the fund is not a fund for Indian tribes the Treasury position does not rest on any disagreement with the position of the Interior Department that the three aboriginal ethnic groups of Alaska are recognized wards of the nation and that these aboriginal groupings have been and may be considered to be subsumed under the general definition of Indian tribes. Rather, the Treasury position rests on the fact that the Alaska Native fund is created for distribution to the regional corporations established by Public Law 92-203 and not to aboriginal groupings which might be considered "tribes." Further, the act speaks throughout of "Natives of Alaska" as the ultimate individual beneficiaries of the settlement involved and defines a native as a citizen of the United States who has one-fourth degree or more Alaska Indian, Aleut or Eskimo blood. It is thus not essential for enrollment that such a person be a present member of any

aboriginal native village or group. Finally, the Indian tribal funds presently accounted for as trust funds by the Treasury are held for particular recognized tribes of native origin or organization and the trust funds are derived from revenues earned or received by the specific groups.

With regard to the second point made by Treasury, it is stated that the fact that a single provision is made for interest demonstrates an attention by the Congress to the subject of interest and an intent to exclude any other type of interest. In this regard, it is argued that it would be unrealistic to suppose that Congress intended interest upon the interest authorized for a delayed appropriation. In addition, the Treasury argues that it has always taken a position which is well recognized by Congress that appropriated funds are not subject to investment or interest earnings unless such increment is specifically authorized. Finally, Treasury argues that the computations of royalty provided for in section 9 of the act do not include recognition of the possibility of the accrual of interest on the royalties already paid in determining a maximum payment of $500 million dollars.

During consideration of this matter Counsel for the Alaska Federation of Natives requested opportunity to present arguments supportive of the proposition that the Alaska Native Fund is an Indian Tribal fund and thus entitled to be carried on the books of the Treasury as an interest-bearing trust account.

In oral and written arguments Counsel advanced the following points:

(1) The term "Indian Tribes" as used in 25 U.S.C. 161a should not be narrowly construed as it is used in its broad generic sense to refer to all aboriginal groupings in keeping with what Counsel advances as the view that this statute expresses a broad congressional policy of guaranteeing at least 4 percent interest on all monies held in trust by the Government for the benefit of Aboriginal Americans;

(2) Administrative practice under the statute demonstrates that the Government has not limited its applications solely to "Indian Tribes" in any narrow sense;

(3) The Alaska Native fund is within the category of funds entitled to interest under 25 U.S.C. 161a;

(4) The legislative history of the Alaska Native Claims Settlement Act is consistent with the application of 25 U.S.C. 161a.

(5) Under the long-established judicial rule that ambiguities are to be construed in favor of the aboriginal people, citing *Worcester* v. *Georgia*, 6 Pet. 515, 582 (1832), the Government should give the Alaska natives the benefit of the doubt in the construction of this statute; and,

(6) The Alaska Native Claims Settlement Act was to effect a fair and just settlement of all claims of these Alaska natives and the Government's failure to allow for the payment of interest on the funds made available for this settlement would defeat the fundamental purpose of the act.

For the most part the Natives of Alaska do not fall into well-defined tribal groups. See Cohen, *Handbook of Federal Indian Law* (U.S. Department of the Interior, 1945) chap. 21, sec. 1, p. 402. See also, *In Re Sah Quah*, 31 Fed. 327, 329 (1886) for judicial recognition that the natives of Alaska by standards of habits, modes of living, and traditions, have a patriarchal rather than tribal system. In view of this, under a strict construction of the term Indian tribe as used in 25 U.S.C. 161a, 162a, most historical organizations of native Alaskans would not be covered under those statutes.

A dominant factor in our consideration of this matter is that we can find no legitimate basis for treating the natives of Alaska—the ultimate beneficiaries—any differently from the treatment that is accorded under those statutes to other aboriginal groups geographically situated in the contiguous lower forty-eight States. In this light, recognizing that the legal position of the individual Alaskan native has been generally assimilated to that of the other Indians of the United States, see Cohen, *supra*, chap. 21, sec. 6, p. 404, we do not think that the lack of formal tribal organization for the Alaskans should be determinative.

It is our view that the trust nature of the Federal holding of these sums during completion of the roles required by section 5 of Public Law 92–203 more than outweighs the fact that the regional corporations who will be the initial recipients of these funds may not historically be characterized as Indian tribes. We also believe that any doubts involved concerning the payment of interest are resolved by the only legislative history available, i.e., (1) the specific provision for the payment of interest in the bill which passed the Senate; (2) the explanation during consideration of the conference report on the floor of the Senate by the spokesman for the Senate Conferees, Senator Bible, that it was the intention of the conference committee that existing statutory authority should be used to invest and manage the Alaska Native Fund; and (3) the fact that there was no statement on the floor of the House of Representatives during consideration of the conference report or otherwise which was contrary to Senator Bible's explanation to the Senate.

Thus, it is our decision that these corporations may, for the purpose of interest payment and investments under the provisions of law found at 25 U.S.C. 161a and 162a, be treated as Indian tribes pending enrollment under Public Law 92–203.

U.S. GOVERNMENT PRINTING OFFICE : 1973 O - 496-301