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The decision format in these pamphlets reproduces the original except for address, salutation and complimentary close. As reflected in this pamphlet, the format has been modified in decisions issued since January 1, 1974, by substituting for the addressee a "Matter of" line.

[B-178884]

Pay—Retired—Annuity Election for Dependents—Survivor Benefit Plan—Social Security Offset

Offset of amount from annuity payable under Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.* representing Social Security benefit payable to widow at age 62 and widow with one dependent child must be calculated on the basis of wages attributable to military service only, and the formula used to calculate wages attributable to the military service may not include wages from nonmilitary employment.

To the Secretary of Defense, April 1, 1974:

Further reference is made to letter from the Acting Assistant Secretary of Defense (Comptroller), received here June 13, 1973, requesting a decision concerning the proper method of computing the amount of social security benefits attributable to military service for the purpose of effecting a reduction in Survivor Benefit Plan annuities as required under the provisions of 10 U.S. Code 1451(a), as added by Public Law 92-425. A copy of Department of Defense Military Pay and Allowance Committee Action No. 478 setting forth and discussing the question was attached.

Specifically, the question presented is:

> What is the proper method for computing the amount of social security benefit "attributable to military service" for the purpose of a reduction in the Survivor Benefit Plan (SBP) annuities within the meaning of Section 1451(a), U.S.C. 10, as added by Public Law 92-425, where there are both military and nonmilitary covered earnings?

The discussion in the Committee Action states that under the provisions of 10 U.S.C. 1451(a), when a widow or widower reaches age 62, and there are no longer dependent children, the monthly annuity shall be reduced by an amount equal to the amount of survivor benefit, if any, to which the widow or widower would be entitled under subchapter II of Chapter 7 of Title 42, U.S. Code, based solely upon service by the person concerned as described in section 410(*l*)(1) of Title 42 and calculated assuming that the person concerned lived to age 65. In the Committee Action it is also stated that the law provides that when a widow has one dependent child, the monthly annuity shall be reduced by an amount equal to the mother's benefit, if any, to which the widow would be entitled under above-mentioned provisions of Title 42 and calculated assuming the person concerned lived to age 65.

In the discussion contained in the Committee Action the following excerpt from section 401(a)(1) of the implementing Department of Defense regulation for the Survivor Benefit Plan is quoted:

> * * * the social security payments based solely upon the retiree's active military service will be calculated using the same basic procedure used by the Social Security Administration but will be based on an assumed earnings pattern.

For the purpose of this calculation, the member is assumed to live to age 65 and to have worked in social security covered employment only while on active duty.

The discussion indicates that the following formula applies to the establishing of Survivor Benefit Plan annuities if the amount of reduction from SBP annuities is based on social security benefits attributable solely to military service:

a. Determine the aggregate amount of military social security covered earnings for the period 1 Jan 1957 (or after age 21 if later) through retirement date, including any free wage credits allowed for that period.
b. Determine the year in which the retiree would have attained age 65.
c. Subtract 1951 from the year in which age 65 would be attained.
d. Subtract 5 from the result in "c" above. Convert this result (years) to months.
e. Divide the result in "a" above by the number of months in "d" above. This establishes the Average Monthly Earnings (AME) attributable to military service.
f. Find the Primary Insurance Amount (PIA) for the AME, using a table (42 U.S.C. 415) that relates AME to PIA for this purpose.
g. Reduce the SBP annuity by 82½% of PIA under the "Widow's Benefit" provisions at her age 62, and by 75% of PIA under the "Mother's Benefit" provisions.

It is noted in the Committee Action that in instances where the member had Social Security covered earnings only on military service the aforementioned method for calculating the reduction seems proper. However, it is pointed out, that when both military and nonmilitary covered earnings are involved the question arises as to whether that method of computation is consistent with the intent of Public Law 92–425.

The discussion indicates that another method of calculating the reduction when both military and nonmilitary covered earnings are involved could be used and under this method military wages are considered to be additive for the specific purpose of determining the reduction of the Survivor Benefit Plan annuities. The method proposed is as follows:

a. Obtain the amount of the social security benefit PIA for the total earnings and the included coverage.
b. From the SSA table, determine the AME for total earnings. Note that this total earnings include both military and nonmilitary earnings.
c. From DOD source determine the military earnings.
d. Increase the years of coverage to age 65 in accordance with Section 1451 of U.S.C. 10, to determine the divisor. Convert years to months.
e. Divide "c" by "d" to determine the AME attributable to military service.
f. Subtract "e", the AME due to military service, from "b" the AME due to total earnings. This will be the AME due to nonmilitary earnings.
g. From the SSA tables, determine the social security benefit PIA for "f."
h. Subtract "g" from the PIA for member alone determined from the AME in "b." This is the PIA due to military earnings.
i. Reduce the SBP annuity by the applicable percentage of the military earnings PIA ("h").

The discussion in the Committee Action states that by using this latter method of calculating the reduction in the annuity, such a reduction would be less than it would be by use of the former method. Further, it is claimed that since the computation is for the purpose of

calculating a deduction from a benefit rather than a benefit itself, use of the former method would cause a higher proportionate deduction which in effect would be opposite to the intent of social security of providing higher benefits for lower wages. It is further claimed that when the first method is used in the cases where both military and nonmilitary covered wages are to be considered, it seems to create an injustice to the widow, whereas the latter method is more in line with the intent of the law providing the widow with maximum benefits for which the retiree paid.

In the Committee Action it is emphasized that social security payments to the survivors are not affected by the above and that full benefits will be paid by the Social Security Administration on total wages, both military and nonmilitary. It is also indicated that the deduction made by the military from the survivor's annuity under the Plan are simply droppage and are not provided, nor should they be provided to the Social Security Administration.

Section 1451(a) of Title 10, U.S. Code, provides in part that where a widow or widower reaches age 62, or there is no longer a dependent child, whichever occurs later, the monthly annuity shall be reduced by an amount equal to the amount of the survivor benefit, if any, to which the widow or widower would be entitled under the Social Security system based solely upon the service of the member concerned in the uniformed services and calculated assuming that persons lived to age 65.

As we understand the formulas as presented in the Committee Action, the first formula referred to calculates the Social Security offset to the Survivor Benefit Plan on the basis of military covered earnings only and the assumption that a member lives to age 65. The other formula referred to in the Committee Action calculates the Social Security offset to the Survivor Benefit Plan by using the member's total earnings covered by Social Security and reducing this figure to arrive at the military covered earnings.

We believe that congressional intent concerning the manner in which the Social Security offset is to be determined for the purposes of 10 U.S.C. 1451(a) is clearly expressed in the legislative history of the act.

In House Report No. 92-481, September 16, 1971, to accompany H.R. 10670, which eventually became Public Law 92-425, it is stated on page 14 that:

> The determination of the portion of the Social Security benefit to the widow at age 62 which is attributable to her husband's active military service assumes that the military retiree had no employment covered by Social Security subsequent to military service and that he lived to age 65. This is the most favorable way that could be devised for determining the percentage of Social Security attributable to military service. * * * Since Social Security benefits are reduced

somewhat by all the years after the initial year of coverage in which there are no earnings * * * the assumption that there is no covered employment following military retirement will lower the relative value of the Social Security attributable to military service and, in turn, result in the lowering of the offset from the widow's Social Security payments.

In the great majority of cases the military retiree works subsequent to active military service; and in the great majority of instances where the retiree continues to work the employment is covered by Social Security. * * *

However, the Committee has chosen to use the most generous formula for determining Social Security widow's benefits attributable to the spouse's military service to be assured that military annuities will not be reduced because of Social Security earned outside government service and to assure that a widow will receive at least 55 percent of the man's military retired pay.

And on page 15 of that report it states:

There is no reduction in the Social Security benefits that may have been earned as the result of the husband's employment in his post-retirement years * * *. It cannot be overemphasized that the only Social Security payments which are taken into account in this integration of benefits are the payments to the widow *based on her husband's Social Security earned while he was on active duty in military service.*

Similar statements were made on pages 30 and 31 of Senate Report No. 92–1089, September 6, 1972, to accompany S. 3905.

An additional definitive statement concerning the calculation of the Social Security offset attributable to military service is set forth on page 53 of the aforementioned Senate Report as follows:

Social security payments considered in determining the amount of the offset from the annuity are calculated using two assumptions:

(1) That the member lived until age 65.

(2) That the member's only social security covered wages were those received from a uniformed service.

The House of Representatives recognizing that other definitions could be employed, found that this definition, alone, (1) would assure that military annuities would not be reduced because of social security earned outside of government service and (2) would further assure that a widow will receive at least 55 percent of retired pay. It also avoids complicated administrative problems.

In light of the foregoing, there appears to be little doubt that there was no congressional intent to have the Social Security offset be determined by use of a formula which interjects a member's total earnings, both military and nonmilitary, into the calculation.

Accordingly, it is our view that section 1451(a) of Title 10, U.S. Code, and its legislative history require that the amount of the reduction from the Survivor Benefit Plan annuity which represents the Social Security benefit be calculated solely on the basis of a member's wages attributable to military service, without consideration of any Social Security covered wages attributable to nonmilitary service.

Furthermore, we invite your attention to the fact that the Survivor Benefit Plan is intended to be comparable to the Civil Service survivor annuity plan from the point of view of the percentage of costs attributable to the participants and to the Government. Also for consideration is the fact that the Survivor Benefit Plan by design is intended to provide 55 percent of a deceased member's retired pay to his widow

during the gap years before age 62 when the widow is not entitled to Social Security and to assure that after age 62 both the military retired pay and the Social Security benefits will at least equal 55 percent of the member's retired pay. See page 15 of House Report No. 92–481, September 16, 1971.

In view of this, we see no merit to the contention that an injustice is created by using a formula for computing the offset based solely on wages attributable to military service.

[B–179929]

Bidders—Waiver of Misdescription—Execution—Revival of Bid

Bidder's execution of a waiver of misdescription in a solicitation upon agency's request after the bid expired may be viewed as a revival of the bid. Since all other bids were rejected, Government may accept the revived bid rather than readvertise if such action is in Government's best interest.

In the matter of Surplus Tire Sales, April 2, 1974:

Bids in response to sales invitation No. 31–4003 issued by the Defense Property Disposal Service for hardware fittings and specialties were opened on August 16, 1973, and Surplus Tire Sales (Surplus Tire) was high bidder on items 169, 170, and 174. It had, however, limited the period within which its bid could be accepted to 10 calendar days. Surplus Tire contends that prior to expiration of the bid, it was contacted by phone by the contracting officer, notified of a misdescription relating to item 170 and asked to execute a waiver accepting item 170 as it was constituted. The bidder alleges that it was also requested to extend its offer until award could be effected, which it orally agreed to do. The bidder thereafter received by mail a waiver purchase form dated August 29, 1973, which it signed and dated September 5, 1973.

The contracting officer has reported that he first contacted Surplus Tire by telephone on August 28, which was after expiration of the bid, and that at the time of this contact he was not aware that the bid had expired. In this connection we note that the bidder's first letter of inquiry, dated September 22, 1973, and addressed to the sales contracting officer, indicated that the above-described telephone conversation took place "on or about August 29, 1973." In its protest to this Office the protester has stated in one instance that the telephone conversation occurred on August 21 and in another correspondence a date of August 23 is referenced. However, the record of telephone calls placed by the contracting officer for the period August 1 to September 7, 1973, shows that two telephone calls were placed to Surplus Tire on August 28, 1973. We have no record before us of any contact

between Surplus Tire and the contracting officer prior to August 28, and thus must conclude that its bid expired prior to any contact between the parties.

Surplus Tire further contends that attached to the waiver purchase form which it received on or before September 5, 1973, was the following handwritten note:

> Mr. Schwartz:
> Award will be made upon receipt of letter from you extending bid acceptance period. Removal date will be adjusted accordingly.

Surplus Tire acknowledges that it did not send such a letter to the contracting officer although it did sign and return the waiver form. It also believes that its bid was effectively extended, or reinstated, by return of the waiver form. Thereafter, upon its inquiry of September 22, 1973, to the contracting officer, it was notified that "since an extension of your bid acceptance time was never received, an award may not be made inasmuch as the bid became invalid upon expiration of your 10-day bid acceptance time."

We understand that all bids were subsequently rejected on the items in which Surplus Tire is interested and that the Defense Property Disposal Service intends to readvertise these items at a later date.

In order for acceptance and award to take place, the Government must have in its possession a responsive and viable bid. However, this is not to say that in proper circumstances the Government may not choose to accept a bid, once expired, which has subsequently been revived by the bidder. A limitation set by the bidder on the time in which its bid may be accepted serves to benefit the bidder in markets where there are frequent fluctuations in price or product demand. Expiration of the acceptance period enables the bidder, if it desires, to refuse to perform any contract awarded to it thereafter and deprives the Government of any right to create a contract by acceptance action. Nonetheless, the bidder may waive an acceptance time limitation, before or following expiration of the acceptance period, if it is still willing to accept an award on the basis of the bid as submitted. 46 Comp. Gen. 371, 373 (1966); 42 *id.* 604, 606 (1963); B-143404, November 25, 1960. However, the bidder may not by such action compel the Government to accept its bid. Since the Government would not have been able to compel the bidder to extend its acceptance period beyond the stated number of days, it does not appear entirely inequitable that the bidder cannot force the Government to do so. 48 Comp. Gen. 19, 22 (1968).

In our opinion it is apparent from Surplus Tire's execution of the waiver form that it intended to extend the life of its bid. Otherwise, the waiver would have been meaningless.

However, as we noted above, the contracting officer is not compelled to make award to Surplus Tire unless it is clearly in the best interest of the Government to do so.

This Office recognizes that the authority vested in the contracting officer to reject any or all bids and readvertise is extremely broad, and we will ordinarily not question his action. *See* 49 Comp. Gen. 244, 249 (1969). In exercising such authority, the contracting officer must not act in a manner which would compromise the integrity of the competitive bidding system. As was stated by the Court of Claims in *Massman Construction Company* v. *United States*, 60 F. Supp. 635, 643, 102 Ct. Cl. 699, *cert. denied* 325 U.S. 866 (1945):

> To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons.

Consistent with the policy set forth in the *Massman* case, subparagraph (a) of section 1–2.404–1 of the Armed Services Procurement Regulation provides that in order to preserve the integrity of the competitive bid system, after bid opening award must be made to that responsible bidder submitting the lowest responsive bid "unless there is a compelling reason to reject all bids and cancel the invitation." The principal expressed therein and in the *Massman* case equally applies to surplus sales. 49 Comp. Gen. 244, 249 (1969).

Moreover, in 46 Comp. Gen. 371, 374 (1966), we upheld the contracting officer's decision to allow the bidder to waive the expiration of its bid acceptance period, and expressed our opinion that the alternative procedure left open to the contracting officer, i.e., of canceling the IFB and readvertising the procurement, was not proper in that expiration of the bid in that case did not constitute a "compelling reason" to reject all bids and cancel the invitation, especially in light of the harm that would be caused to the bidder by exposure of its bid.

In 42 Comp. Gen. 604, *supra*, we held that the low bidder should not be permitted to revive its expired bid. In that case the next low bid was available to the Government and was reasonable as to price. In those circumstances we concluded that it would be unfair to the second low bidder, who had offered the Government a longer bid acceptance period than the low bidder, to permit the low bidder to revive its bid. In the case at hand, however, the question of relative fairness to the bidders does not arise. Here Surplus Tire submitted the only acceptable bid for the items involved and therefore other bidders who may have offered a longer acceptance period are not unfairly prejudiced by reinstatement of the only acceptable bid.

From the record before us it appears that cancellation and readvertisement of the items would not be in the Government's best interest. In this connection we note that waiver of the misdescription requested by the contracting officer and executed by the bidder was authorized only in the instance of a minor misdescription that reasonably could not have affected competition, *if the cost of cancellation of the item and*

its readvertisement would not be in the best interest of the Government. We find nothing in the subsequent facts presented to us that would constitute a cogent or compelling reason for permitting cancellation and readvertisement of items 169, 170, and 174. However, should the market value of these items have so changed that the Government feels cancellation and readvertisement would be in its best interest, then we would not object to that determination. On the basis of the record before us, however, we feel that the Government's interest would be better served by acceptance of the bids than by cancellation and readvertisement.

[B-179189]

Quarters Allowance—Temporary Duty—Between Completion of Basic Training and Permanent Duty Assignment

An enlisted member without dependents in pay grade E–4 (less than 4 years' service) or below while performing temporary duty between the date he completes basic training and the date he receives orders naming a permanent duty station to which he will report on completion of temporary duty is not in a travel status and is entitled to basic allowance for quarters when Government quarters are not available to him while serving at the place of performance of his basic duty assignment, which may be regarded as his permanent station for this purpose.

To the Secretary of Defense, April 3, 1974:

Reference is made to letter of July 11, 1973, from the Principal Deputy Assistant Secretary of Defense (Comptroller), with enclosure, requesting a decision as to whether an enlisted member without dependents, in pay grade E–4 (less than 4 years' service) or below, is entitled to basic allowance for quarters when Government quarters are not available for assignment to him while performing temporary duty between the date he completes basic training and the date he receives orders naming a specific permanent duty station to which he will report upon completion of temporary duty. The question is discussed in Committee Action No. 487, Department of Defense Military Pay and Allowance Committee, a copy of which was enclosed with the Principal Deputy Assistant Secretary's letter.

The Committee Action indicates that the Navy Area Audit Service Washington has issued audit exceptions against basic allowance for quarters payments made to enlisted members in the aforesaid category. The basis for these exceptions was that the members were in a travel status between permanent duty stations and were not entitled to basic allowance for quarters under 37 U.S. Code 403(f) and Rule 15, Table 3–2–3, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM).

Additionally, we are informed as follows:

It is the Committee view that a member in this category is not in a "travel status" at the station where he is performing temporary duty, because that station is his only designated post of duty. 39 Comp. Gen. 511. Hence, 37 U.S.C. 403(f) and Rule 15, Table 3-2-3, DODPM, have no application in the circumstances. Since the station to which he is assigned for temporary duty is the member's "permanent station" for pay and allowances purposes, he is entitled to basic allowance for quarters while at that station if Government quarters are not available for assignment to him. Compare 48 Comp. Gen. 490.

In accord with 37 U.S.C. 403, under the provisions of Rule 1, Table 3-2-3, DODPM, members without dependents, entitled to basic pay, who are assigned to a permanent station accrue basic allowance for quarters if Government quarters or housing facilities are not assigned.

Further, basic allowance for quarters does not accrue after date of departure from old station for members in pay grade E-4 (less than 4 years' service) or lower, in a travel status on permanent change of station, including leave en route and proceed time. Rule 15, Table 3-2-3, DODPM.

Paragraph M3050-1 of the Joint Travel Regulations (JTR), provides that "Members are entitled to travel and transportation allowances as authorized in accordance with existing regulations, only while actually in a 'travel status'. They shall be deemed to be in a travel status while performing travel *away from their permanent duty station*, upon public business, pursuant to competent travel orders * * *." [Italic supplied.]

Paragraph M1150-10a of the JTR defines the term "permanent station" as the post of duty or official station to which a member is assigned or attached for duty other than temporary duty or temporary additional duty. The term "permanent station" for the purpose of travel and transportation allowances has consistently been applied as having reference to the place where the member's basic duty assignment is performed (38 Comp. Gen. 853 (1959); 41 *id.* 726 (1962); 44 *id.* 670 (1965); 48 *id.* 490 (1969)).

Where a member is ordered to active duty from his home, and assigned to temporary duty upon completion of which he is to receive a further assignment, he may not be considered as being away from his designated post of duty so as to be entitled to per diem allowance, the place at which he is serving constituting his only designated post of duty and, therefore, while so serving he would not be traveling away from his permanent station. *See* 39 Comp. Gen. 511 (1960).

Consequently, a member initially assigned to a station for basic training, who after completion of such training performs duty at that location pending the receipt of orders designating a specific duty station to which he will report, is not in a travel status and, therefore, is not entitled to per diem allowance.

In such circumstances, in the absence of Government quarters available for assignment to the member during the period subsequent to basic training, basic allowance for quarters may be afforded to the member who is serving at the place of performance of his basic duty assignment, which may be regarded as his permanent station for this purpose.

Accordingly, your question is answered in the affirmative.

[B-180053]

Contracts—Specifications—"New Material" Clause—Exception—New, Unused Surplus

Under solicitation that called for furnishing new manufactured aircraft solenoid valves but contained provisions under which surplus dealers could participate, rejection of proposal offering to furnish new former Government surplus valves was proper in view of the fact that the valves needed replacement of rubber "O" rings which constitutes refurbishment and would therefore require performance retesting that neither agency nor offeror was in a position to perform.

In the matter of D. Moody & Company, Inc., April 4, 1974:

On July 17, 1973, request for proposals (RFP) No. F41608-74-R-R038 was issued by the Directorate of Procurement and Production, San Antonio Air Materiel Area, Kelly Air Force Base, Texas. The RFP requested offers for furnishing 43 aircraft solenoid valves, FSN 2915-814-4439, Padway Aircraft Products, Inc., P/N 20651 or General Dynamics Corp. P/N 8-00964-1. These valves were to be used in fuel transfer in the No. 3 fuel tank of the F-106. While the RFP called for furnishing new manufactured equipment, it contained provisions under which surplus dealers could participate. The solicitation contained the following pertinent provisions:

C-39. NOTICE TO OFFERORS: (See Provision in Section B entitled "Surplus Material.")

(a) This solicitation has been prepared to include terms and conditions which contemplate furnishing new maufactured items to the Government. In the event new, unused, surplus material is offered in response to this solicitation, the offeror must notify the Procuring Contracting Officer (PCO), in writing, separate from the contractor's offer, within a minimum of ten calendar days prior to the offer opening date so the PCO may consider amending the terms and conditions of the solicitation to include provisions for the purchase of surplus material. Offers of surplus material where the PCO was not notified at least ten calendar days prior to offer opening date may be considered nonresponsive and may not be considered for award.

* * * * * * *

B-29. SURPLUS MATERIAL: (See Provision in Section C entitled "Notice to Offerors". [sic])

Concurrent with the notification to the PCO that surplus material is being offered, the offeror will provide the following certificate (If the material being offered is former Government surplus, this certificate must be provided in addition to the information required in ASPR 1-1208, Government Surplus):

> The undersigned hereby certifies that the material to be furnished in response to solicitation (insert solicitation number) was manufactured by the origi-

nal design manufacturer (and/or) his approved source. (Indicate quantities of each manufacturer.) [sic] This material is new, unused, meets applicable specifications, and is offered without rework or refurbishment of any kind. The undersigned further certifies that no changes have been made to the materials being offered. * * *

The opening date for the proposals was August 16, 1973. Three offers were received at the following unit prices:

D. Moody & Co., Inc.	$89.80
Alamo Aircraft Supply, Inc. (Alamo)	105.00
Padway Aircraft Products, Inc. (Padway)	115.49

In its letter offer of August 10, 1973, Moody stated:

This bid submitted in response to Invitation for Bid F41608-74-R-R038, opening August 16, 1973, acknowledges and includes our acceptance of all terms and conditions stated therein.
Offer 43 ea. 2915-814-4439 Valve Solenoid, P/N 20651 at $89.80 ea. new surplus in the original pack dated 11/61, Contract No. AF01(601)38747. Obtained from AF Surplus approximately October 1969.
Terms net 30 days.
Delivery according to "Required" schedule.
Terms and conditions current BOA acceptable.

Moody's proposal was rejected because (1) it did not comply with the solicitation provisions pertaining to the 10-day written notification by the offeror where it was offering new surplus and (2) its offer was for "new surplus in the original pack dated November 1961" which required the replacement of the original rubber "0" rings because of the age of the synthetic rubber materials.

In this connection, the Air Force reports that Moody's proposed replacement of the rubber "0" ring constitutes refurbishment of the equipment which is prohibited by the provisions of paragraph B-29 of the RFP. (The record indicates that Alamo's proposal also was rejected because the equipment it offered would require replacement of similar components.)

On October 11, 1973, contract No. F41608-74-C-1051 was, therefore, awarded to Padway.

Although the record indicates that Moody did not comply with the solicitation provisions pertaining to the 10-day written notification, it appears that the primary reason for rejection of its offer was that it offered surplus valves which required replacement of the rubber "0" rings. In this regard, we have been informally advised of the steps necessary to replace the rubber component in question. Though it appears that the valve disassembly and "0" ring replacement processes are simple to accomplish, the reassembly of the valve to a .0025-inch tolerance required by the Air Force would seem to be significantly more difficult. By the very nature of the item and because of exacting performance requirements, precise tests are required of even new parts. It would appear, therefore, to be quite reasonable to require retesting of all such critical items where there exists the possibility that

the part's performance level, within an acceptable range when manufactured, may have been reduced by the replacement operation. Past reassembly problems alone would seem to warrant such present and future scrutiny.

Since the agency (1) does not have the facilities available to test the valves in question and (2) doubts that surplus dealers, such as Moody, are likewise in a position to perform such a function, we can see no objection to its rejection of Moody's offer of refurbished material.

We would, however, suggest to the Air Force that it consider amending the provisions of clause B-29 to allow for the acceptance of offers of reworked and refurbished material *if* that material has been certified (by means of adequate performance testing) to essentially equal the performance of newly manufactured material of the same exact type.

[B-173815]

Compensation—Wage Board Employees—Coordinated Federal Wage System—Compensation Adjustments

Upon conversion to the Federal Wage System under Public Law 92-392, which established a uniform rate of 7½ percent night shift differential for second shift workers, employees who had previously received 10 percent night shift differential would not suffer reduction of basic pay but would be entitled to receive the higher differential under new pay scale until reassigned to other duties not involving night work, or until entitled to higher rate of basic pay than retained rate by reason of wage schedule adjustment, higher premium pay, or any other action in the normal operation of the System.

In the matter of night pay for Defense Mapping Agency Hydrographic Center employees, April 5, 1974:

There is before our Office the question of the proper pay rate for Mr. Kenneth G. Taylor, an Engraver (Lithographic) with the Defense Mapping Agency Hydrographic Center in Suitland, Maryland, upon conversion from the Coordinated Federal Wage System to the Federal Wage System effective November 26, 1972, established by Public Law 92-392, 5 U.S. Code 5341.

The information in our file shows that Mr. Taylor is paid under the Lithographic and Printing Plant Wage Schedule for the Washington, D.C. area. This is a 34-grade schedule with three step rates at each grade. Immediately prior to November 26, 1972, Mr. Taylor was at grade 23, step 3, of that schedule. The pay applicable in that position consisted of a $6.73 per hour day rate plus a night shift differential (NSD) of 10 percent making a total hourly rate of $7.40.

The amendments made by Public Law 92-392 became effective with respect to Mr. Taylor on November 26, 1972, the same date as the

application of a new Lithographic and Printing wage schedule. The principal effect of the act insofar as Mr. Taylor was concerned was the establishment of a uniform 7½ percent NSD for second shift work.

In implementing the two changes which became effective November 26, 1972, the Defense Mapping Agency initially gave Mr. Taylor the benefit of the old 10 percent NSD rate in computing his pay under the new wage schedule. This resulted in his pay being fixed at the rate of $7.81 per hour—$7.10 basic rate plus 10 percent. Later the agency determined that it had incorrectly applied the 10 percent rate to the rates which took effect on November 26 and that the 7½ percent rate prescribed by Public Law 92–392 which became effective that day should have been applied. Accordingly, Mr. Taylor's pay rate was reduced to $7.63 per hour effective November 26, 1972.

The House of Representatives Committee on Post Office and Civil Service when considering Public Law 92–392 was aware that certain wage board employees were receiving pay differentials for second and third shift work which were in excess of the shift differentials specified in the act. On the other hand, many wage board employees were receiving shift differentials which were lower than those specified in Public Law 92–392. Prior to Public Law 92–392 such shift differentials were dependent upon the prevailing custom of each labor market area. It was the Committee's intent to establish uniform shift differentials which would apply to all prevailing rate employees regardless of their geographical areas of employment. In so doing, however, the Committee recognized that certain employees could suffer a reduction in pay. To remedy this problem, section 9(a)(2) of Public Law 92–392 (5 U.S.C. 5343 note) provides as follows:

> (2) In the case of any employee described in section 2105(c), 5102(c)(7), (8), or (14) of title 5, United States Code, who is in the service as such an employee immediately before the effective date, with respect to him, of the amendments made by this Act, such amendments shall not be construed to decrease his rate of basic pay in effect immediately before the date on which such amendments become effective with respect to him. * * *

Further subsection 9(a)(1) of Public Law 92–392 provides in pertinent part:

> Except as provided by this subsection, an employee's initial rate of pay on conversion to a wage schedule established pursuant to the amendments made by this Act shall be determined under conversion rules prescribed by the Civil Service Commission. * * *

The Civil Service Commission has determined that a prevailing rate employee who, prior to the enactment of Public Law 92–392, regularly received a shift differential that was higher than that specified in the act would be entitled to receive the higher differential under

the new pay scale until such time as he was reassigned to other duties not involving night work, or until entitled to a higher rate of basic pay than the retained rate by reason of a wage schedule adjustment, higher premium pay, or any other action in the normal operation of the Federal Wage System.

A report from the Commission advises us that under its regulations for implementing Public Law 92–392 it believes that the 10 percent NSD should have been applied to the new rate which became effective November 26, 1972, and that employees should have retained that rate under the rules prescribed. Thus, the Commission believes that the original action taken by the Defense Mapping Agency was correct and should not have been rescinded.

We recognize that Mr. Taylor would not have suffered a decrease in his aggregate rate of basic pay had the Defense Mapping Agency applied the 7½ percent NSD rate on November 26, 1972, when the wage rates were increased.

On the other hand the CSC apparently considers that the savings provision in section 9(a)(2) of the act applies not only to prevent a reduction in aggregate basic pay but also to preclude a reduction in the 10 percent night differential which under 5343(f) is a part of basic pay. In view thereof and of the broad authority of the Civil Service Commission to issue regulations for the implementation of Public Law 92–392 as contained in section 9(a)(1) of that act we need raise no objection to the view taken by the Commission with respect to the matter. Although the Commission's regulations in that regard are not entirely clear, the Commission's interpretation of its own regulations and its advice as to the intent of those regulations are entitled to great weight in the consideration of claims arising thereunder. Accordingly, we consider that employees receiving night differential under the Lithographic and Printing Plant Wage Schedule for the Washington, D.C. area should have had their pay rates adjusted on November 26, 1972, on the basis of the higher night differential rates applicable the day before the provisions of Public Law 92–392 took effect.

We have been advised that the schedule adjustment which was effected November 25, 1973, produced a new basic rate including night differential of $8.05 for Mr. Taylor ($7.49 scheduled rate at WP-23/3, plus a 7½ percent NSD). At this point, his retained rate would terminate under the Civil Service Commission regulations.

Mr. Taylor's compensation and the compensation of employees similarly situated should be computed in accordance with the foregoing and necessary adjustments made.

[B-177604]

Property—Public—Damage, Loss, etc.—Measure of Damages—Value of Item

The deduction by the Government of the full value of goods damaged in transit, and the subsequent denial of a claim for the amount deducted by the General Accounting Office is sustained where the contract of carriage is complete and unequivocal on its face as to the contracted rate, and where the contracted rate was the only one available to the Government.

In the matter of O.K. Trucking Company, April 8, 1974:

The O.K. Trucking Company (O.K.) transported on May 6, 1971, a truckload shipment described on Government bill of lading (GBL) No. F-5371835 as 2,045 pieces of "FREIGHT ALL KINDS & FOODSTUFFS FROZEN" from Chicago, Illinois, to Chillicothe, Ohio. O.K. acknowledged on the bill of lading that the shipment was received in good condition when presented at origin and the administrative office shows that it was received in damaged condition when delivered at destination. The administrative office notified O.K. of the number of cartons of drugs damaged and demand was made for their invoice cost of $1,091. Upon O.K.'s failure to refund the amount claimed, it was collected by administrative deduction.

O.K. contends that the extent of its liability is limited to $.50 per pound for the 96 pounds of the drug delivered damaged and unusable, or $48, rather than for the actual value of the drugs. By letter of April 26, 1973, from the Transportation and Claims Division, United States General Accounting Office, O.K.'s claim for the amount administratively deducted was denied.

O.K. submitted to the Government a tender or offer (I.C.C. No. 28) to transport freight all kinds and frozen foodstuffs at a rate of $1.10 per hundred pounds, with a minimum weight of 40,000 pounds per vehicle used. O.K. states that item 15 of its tender incorporates by reference the rules of National Motor Freight Classification A-11, MF-I.C.C. 13 (NMFC A-11) and that NMFC A-11 provides a released valuation of $.50 per pound for drugs or medicines.

Tenders, such as I.C.C. 28, which was applicable at the time of the transportation movement, are rate quotations made to the United States under section 22 of the Interstate Commerce Act, as amended, 49 U.S. Code 22, made applicable to motor carriers by 49 U.S.C. 317 (b), and are continuing unilateral offers to perform transportation services at named ratings or rates subject to the terms and conditions named therein. See *C. & H. Transportation Co.* v. *United States*, 436 F. 2d 480, 481; 193 Ct. Cl. 872 (1971). The offer ripens into an agreement or contract when accepted by the Government by making any shipment under its terms.

O.K. offered in I.C.C. No. 28 to transport freight all kinds and frozen foodstuffs at a specific rate and specific minimum weight. When O.K. issued the bill of lading prepared by the Government, the offer ripened into a contract of carriage which appears complete and unequivocal on its face because the rate the parties contracted for is specifically stated and it is not necessary or appropriate to go beyond the face of that contract for the applicable rate. O.K.'s tender, like most tenders involving freight all kinds, does not contain a list of excepted commodities; it therefore appears that it was O.K.'s intention to transport all commodities, without exception, at the one stated rate and to assume on those commodities its full common law liability.

Only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. *New York, N.H. & H.R.R.* v. *Nothnagle*, 346 U.S. 128, 135 (1953). The decisions in this area are based on the premise that the shipper should receive consideration in the form of a lower rate for the correspondingly greater risk of loss that he must bear. Here, the parties contracted for one specific rate, and this rate was the only one offered to the Government.

O.K. states that item 15 of its tender incorporates by reference the rules of NMFC A–11, and that it provides a released valuation of $.50 per pound for drugs or medicines. However, there is nothing in the rules of NMFC A–11 relative to released valuation. While item 60002 of NMFC A–11 makes the transportation of certain drugs or medicines subject to released valuation when properly agreed to and noted on the bill of lading, there is nothing on GBL No. F–5371835 to indicate the Government agreed to the application of released valuation on the shipment.

O.K. further states that language in the *C. & H.* case, *supra*, supports its contention that the provisions of Condition 5 on the back of the Government bill of lading operate to limit O.K.'s liability to a released valuation of $.50 per pound.

The language in *C. & H.* referred to is this:

> It should be mentioned here that if the rate under Item No. 187 of Tariff No. 2–G for the shipment involved in Case No. 373–65 had been lower than the rate prescribed in Tender No. 100–L for such shipment, then the Item 187 rate, together with the ancillary released value limitation in that item, would have been applicable to the shipment. This would have been so in view of a standard condition which was contained in the government bill of lading covering this shipment and which stated as follows:
>
> 5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.

For the purposes of explanation we quote the two paragraphs following those relied on by O.K.:

> The purpose of the quoted condition was to obtain for the Government the lowest available rate, even if the lowest rate was available only upon the basis of a released value. However condition 5 did not come into operation with respect to the shipment involved in Case No. 373–65 because the released-value rate quoted in Item No. 187 of Tariff No. 2–G ($6.91 per hundred pounds) was not lower that the rate quoted in Tender No. 100–L ($6.60 per hundred pounds) for this shipment.
>
> In this connection, it was not necessarily incongruous for the plaintiff, without imposing any requirement regarding released values, to quote to the Government in Tender No. 100–L rates that were lower than those which the plaintiff offered to the general public in Item No. 187 of Tariff No. 2–G for similar transportation services, on the basis of released values only. Pertinent sections of the Interstate Commerce Act authorized the plaintaiff and other carriers to offer the Government transportation services under arrangements that were different from, and more advantageous than, those offered to the general public.

O.K.'s support is misplaced: if the applicable rate is a *tariff* rate, Condition 5 satisfies the bill of lading notation requirements that may be required by the released valuation provision of the tariff; if the applicable rate were a tender or quotation rate, Condition 5 does not satisfy the bill of lading notation requirements that may be required by the tender or quotation. This is the reason: as stated above, rate quotations are continuing unilateral offers and it is an elementary principle of contract law that offers, to be accepted, must be accepted in the precise terms in which they are made. Any material variance in an offer constitutes a counter offer which requires acceptance by the offeror to become operative. Thus, and despite Condition 5, to take advantage of the released valuation provisions offered in rate quotations, the Government as offeree and shipper, must comply with the offer's requirements as to the notations to be placed on the bills of lading.

Here in O.K.'s case the lower tender rate was applicable to GBL No. F–5371835 and the tender incorporated by reference the rules of NMFC A–11. But as stated above those rules contained nothing relative to released valuation notations. Item 60000 (actually, item 60002) relied on by O.K., is a *rating*, not a rule. Furthermore, the tender rate was the only rate available to the Government for a shipment rated as freight all kinds and frozen foodstuffs.

O.K. states that the shipper could have declared a value on the bill of lading and still have obtained the rate tendered. But this would put an undue burden on the Government and defeat the purpose of a freight all kinds rate. One of the major advantages to shipper and carrier alike in the use of freight all kinds rates is the elimination of the necessity to describe and rate the various articles comprising mixed-truckload shipments. This advantage was referred to by the Supreme Court of the United States in *Public Utilities Commission of*

California v. *United States*, 355 U.S. 534, 544–545 (1958), and apparently was an important element affecting the decision reached there. This advantage obviously would be negated if the shipper were required to ascertain items subject to a valuation in the classification, list them, and declare a valuation.

We have also said that freight all kinds rates are applicable and will not be objected to although particular items could be shipped at lower charges under applicable tariffs, if overall the freight all kinds rates provide lower charges. Thus, a shipper cannot select certain articles in his shipment and apply on them a lower class rate, lower than the quotation rate, or vice versa.

The deduction action taken by the Government and the action taken by the Transportation and Claims Division in denying the claim is hereby sustained.

[B-180419]

Bidders—Responsibility *v.* Bid Responsiveness—Licensing-Type Requirements

Rejection of low bidder as nonresponsive because it failed to provide evidence of ICC operating authority regarded by Army as necessary for performance of packing and containerization contract was improper, since licensing-type requirements are matters of responsibility.

Bidders—Qualifications—License Requirement—ICC Certification

ICC decision in *Kingpak, Investigation of Operations*, 103 M.C.C. 318, requiring motor carriers providing transportation under contracts for packing and containerization of used household goods to have ICC operating authority, permits carriers to act as freight forwarders of used household goods exempt from requirement for having such authority, but since bidder was low only on portion of IFB calling for services relating to unaccompanied baggage, which is not regarded as used household goods, contracting officer properly rejected bid because of lack of ICC operating authority.

Bidders—Qualifications—License Requirement—Time for Compliance

There is no basis for concluding that award was improperly made because Army did not allow sufficient time for ICC to process low bidder's application for temporary authority, since award was not made until 2 months after application was filed with ICC.

In the matter of Victory Van Corporation; Columbia Van Lines, Inc., April 8, 1974:

Invitation for bids (IFB) No. DAHC30-74-B-0026, issued October 29, 1973, by the United States Army Military District of Washington, solicited bids for packing and containerization services incident to shipment or storage of personal property belonging to Department of Defense personnel. Victory Van Corporation (Victory) was the low

bidder on the portion of the schedule calling for unaccompanied baggage services. Columbia Van Lines, Incorporated (Columbia), the second low bidder, protested against any award to Victory on the grounds that Victory does not have necessary Interstate Commerce Commission (ICC) operating authority. Victory then protested againt award to any other bidder. Award was made to Columbia during the pendency of these protests when Columbia, as the prior incumbent contractor, declined to accept further extensions of its contract.

Page 4 of the IFB states that "Each bidder must submit to the Contracting Officer, *prior to award*, valid evidence of an ICC Operating Authority." Page 18 of the IFB, under the heading "RESPONSIVENESS," states that "Failure to furnish ICC Certificate before award will cause rejection of bid." Victory has ICC operating authority for most of the area of performance encompassed by the solicitation, but does not have such authority for two of the outlying counties within that area. Victory applied to the ICC for temporary authority to operate in those counties, and the Army has supported that application. Victory also proposed to furnish the necessary services in those two counties by operating as a freight forwarder and using another carrier having operating authority in those counties, which Victory views as an acceptable method of performance since page 38 of the IFB provides for subcontracting with "the prior written approval of the Contracting Officer." The Army, however, viewed Victory's bid as nonresponsive because Victory did not have the requisite operating authority in its own name, and awarded a contract to Columbia when it felt it could no longer wait for the ICC to act on Victory's application for emergency temporary operating authority.

The Army is not correct in treating Victory's bid as nonresponsive. As the IFB provides, bidders have until date of award to provide evidence of operating authority and it is well established that licensing-type requirements are matters of responsibility, not responsiveness. 47 Comp. Gen. 539 (1968); 51 *id.* 377 (1971). Therefore, the controlling issue is not whether Victory's bid was nonresponsive but rather whether the Army could properly reject Victory as a nonresponsible bidder under the circumstances reported here.

In *Kingpak, Incorporated, Investigation of Operations*, 103 M.C.C. 318 (1966), which was upheld in *Household Goods Carriers' Bureau* v. *United States*, 288 F. Supp. 641 (N.D. Cal. 1968), *aff'd per curiam* 393 U.S. 265 (1968), the ICC held that local motor carriers performing local transportation in connection with packing and containerization services for household goods which were to move in interstate commerce were required to have ICC operating authority. Subsequently, we upheld procurement agency determinations that contracts could

not be awarded to firms without such authority. 47 Comp. Gen. 539, *supra;* B–174735, June 7, 1972; B–178043, July 27, 1973. We have also held that where a solicitation requires a bidder to have the operating authority in its own name, the bidder cannot satisfy the requirement by subcontracting with another company having that authority. 50 Comp. Gen. 753 (1971). In that same case, however, we recognized that such a requirement could be unduly restrictive of competition in cases where possession of complete operating authority by the bidder was not necessary for satisfactory contract performance.

The Army's position in this case apparently is based upon informal advice provided to the Department of Defense (DOD) by an official of the ICC. On October 22, 1971, in response to that advice, the Commander of the Military Traffic Management and Terminal Service (MTMTS) sent the following message to DOD units:

> The Interstate Commerce Commission has requested that all transportation officers be advised of the necessity for contractors involved in government packing and containerization contracts to hold appropriate authority from the Interstate Commerce Commission. This authority will be either proper operating authority as a carrier or proper licensing as a broker of transportation.

On September 22, 1972, the MTMTS Commander notified DOD units as follows:

> The Interstate Commerce Commission requires all contractors involved in government packing and containerization contracts to hold in its own name either ICC operating authority as a carrier or a license as a broker to cover the transportation or the arranging of the transportation of shipments moving in interstate commerce.

As noted above, the *Kingpak* decision held that carriers performing transportation services, that is, actual motor carrier operations, must possess ICC operating authority. However, the ICC in *Kingpak* explicitly recognized that under section 402(b)(2) of the Interstate Commerce Act, 49 U.S. Code 1002(b)(2), a freight forwarder of used household goods, as opposed to the company performing motor carrier operations for the freight forwarder, need not possess ICC operating authority. It further recognized that a motor carrier having ICC operating authority could also act as a freight forwarder exempt from the requirement for having ICC authority, so long as certain practices were observed by the carrier. 103 M.C.C. 318, 333–336. Accordingly, under *Kingpak* it may be possible for a contractor to provide required services to the Government by performing both motor carrier operations and freight forwarding operations under the same contract, with ICC operating authority required of the contractor for the motor carrier operations in which it would engage, but not for the services it would provide as a freight forwarder of used household goods.

Here, however, Victory was the low bidder only on the portion of the IFB calling for unaccompanied baggage services. Although counsel

for Victory contends that the statutory exemption of freight forwarders of used household goods from ICC regulation encompasses forwarders of unaccompanied baggage, the decisions of the ICC indicate otherwise. For example, in *Routed Thru-Pac, Inc., Freight Forwarder Application*, 332 I.C.C. 352 (1968), affirmed sub nom. *American Movers Conference et al* v. *United States*, 307 F.Supp. 74 (C.D. Cal. 1969), the ICC discussed unaccompanied baggage as follows:

> It is apparent that while personal clothing, sporting equipment, and other personal belongings of a householder, constitute household goods, such baggage when moving independently and in an entirely separate movement may not be so classified and has traditionally required authority.

See also *Trans-American World Transit, Inc., Freight Forwarder Application*, 340 I.C.C. 196 (1973). Thus, it appears that Victory could not properly engage in freight forwarding operations involving individual shipments of unaccompanied baggage without the requisite ICC authority. Since Victory did not have ICC authority to operate either as a motor carrier, a non-exempt freight forwarder, or a transportation broker for a portion of the contract area of perfomance, the contracting officer properly refused to make an award to Victory. B–158634, October 6, 1966; B–178043, *supra*.

Victory also contends that award was improperly made because the Army did not give the ICC sufficient time to consider Victory's application for temporary operating authority. In this respect, Victory states that it requested, prior to December 1, 1973, that the Army support Victory's application for temporary authority, but that the Army's statement of support was not furnished until December 27. Victory asserts that since it normally takes 2 to 3 months for temporary authority, the Army should not have made an award to another firm until the ICC had a "reasonable period of time" in which to act. The record indicates that authorization to award a contract to Columbia during the pendency of the protest was requested on February 25, 1974. That request was granted on February 27, which was 2 months after Victory's application was filed with the ICC. The record further indicates that the ICC denied Victory's application on March 5, 1974. Under these circumstances, there is no basis for concluding that the award was made improperly.

[B–178538]

Military Personnel—Acceptance of Foreign Presents, Emoluments, etc.—Foreign Government Employment—Retired Officer—Retired Pay Adjustment

A retired Regular Air Force officer who is regarded as holding an "office of profit and trust" under the Federal Government as those terms are used in Article I, section 9, clause 8 of the United States Constitution which prohibits

persons holding such offices from accepting emoluments from foreign states in absence of Congressional consent, and who claims to be employed by an American-based firm and receives a civilian salary from that firm, where record shows that such firm is merely a conduit whereby he is detailed by that firm to work for an instrumentality of a foreign Government by virtue of a contract between the American-based firm and such instrumentality to supply professional personnel, the acceptance by the retired member of salary for such employment comes within the Constitution prohibition, and, while lacking penalty, such provision will be given effect by withholding from member's retired pay an amount equal to the foreign salary received in violation of the Constitution.

Foreign Governments—Employment of United States Government Retirees—Agency Rule to Determine Status

In determining the existence of an employer-employee relationship between a retired member and a foreign Government or instrumentality thereof, the common law rules of agency will be applied in order to determine whether such instrumentality has the right to control and direct employee in performance of his work and manner in which work is to be done.

To N. R. Breningstall, Department of the Air Force, April 9, 1974:

Further reference is made to your letter dated April 5, 1973 (file reference RPTT), with enclosures, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $905.96 in favor of Lieutenant Colonel Milton Stein, SSAN 130 07 2453, USAF, Retired, representing retired pay for the month of April 1973 which has been withheld because of the circumstances described in your letter. Your letter was forwarded to this Office by letter dated April 27, 1973, from the Office of the Deputy Assistant Comptroller for Accounting and Finance of the Air Force, and has been assigned Air Force Request No. DO–AF–1186 by the Department of Defense Military Pay and Allowance Committee.

You say that Colonel Stein retired as a Regular officer of the United States Air Force on April 1, 1971, and on June 29, 1971, took up residence in Israel. Further, that on December 27, 1971, he notified your activity by DD Form 1357, "Statement of Employment," that he was accepting employment with Israel Aircraft Industries, effective January 1, 1972. You say that in that form the member described his position title as "Program Coordinator in ARAVA Project Office—Engineering Division."

You also say that on June 29, 1972, Colonel Stein was advised of the constitutional provision prohibiting a retired officer from accepting employment with a foreign Government and requested that he furnish information relative to the status of Israel Aircraft Industries. On September 1, 1972, he advised that as of that date he was employed by Aerotech Technical Personnel, Los Angeles, California, submitting a revised DD Form 1357 to that effect. He explained that his new employer contracted out all types of professional as well as other types of personnel to companies throughout the world and that he was con-

tracted out to Israel Aircraft Industries, Ltd., Lod Airport, Israel, and that he is now being paid in U.S. dollars by Aerotech Technical Personnel, Ltd., Los Angeles, California.

You point out that Colonel Stein's position title and his described duties in the revised DD Form 1357 were identical to those described earlier when he was employed directly by Israel Aircraft Industries. Further, you say that he declined to submit any of the information requested relating to the status of Israel Aircraft Industries since he is "not directly employed by an Israel Company."

You say that on November 17, 1972, your activity requested information from Aerotech Technical Personnel, Ltd., concerning Colonel Stein's employment status and the contractual relationship with Israel Aircraft Industries. On December 5, 1972, they responded, advising that Colonel Stein was hired by their office in Israel for utilization as a Program Coordinator and assigned to Israel Aircraft Industries under contract between Aerotech Technical Personnel, Ltd. and Israel Aircraft Industries in which the former is required to furnish the latter engineering and technical services on an "as required" basis.

You say further that while the contractual relationship between Israel Aircraft Industries and Aerotech Technical Personnel attempts to give the appearance that Colonel Stein's employment is with the latter to provide a service with the former, you express the opinion that, in reality, the member's employer is still Israel Aircraft Industries, and Aerotech Technical Personnel, Ltd., is simply an employment agency for the employer and the funds which compensate both Aerotech Technical Personnel and Colonel Stein under their contractual relationship must come from Israel Aircraft Industries, if not largely from Israel Government sources.

Based on the above, you ask the following questions:

(1) Does Colonel Stein's employment come within the prohibition of Article I, section 9, clause 8 of the Constitution?

(2) Is it proper to stop further payment of retired pay so long as Colonel Stein continues to accept employment with Israel Aircraft Industries?

(3) Is the Air Force required to recover so much of Colonel Stein's retired pay as equals the amount received by him from his employment with Israel Aircraft Industries since January 1, 1972?

It is well established that a Regular officer of the armed services who is retired from active service is still in the military service of the United States. *United States* v. *Tyler*, 105 U.S. 244 (1881); 10 U.S. Code 3075. See also *Hooper* v. *United States*, 164 Ct. Cl. 151 (1964). Similarly, this Office has consistently held that certain members of

the armed services, including Regular officers retired for length of service, receive retired pay by virtue of their continuing status in the military service after retirement. *See* 23 Comp. Gen. 284 (1943); 37 *id.* 207 (1957); 38 *id.* 523 (1959); 41 *id.* 715 (1962).

Article I, section 9, clause 8 of the Constitution of the United States provides as follows:

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

The history of the constitutional provision under consideration indicates that the evil intended to be avoided is the exercise of undue influence by a foreign Government upon officers of the United States. *See*, in this connection, 24 Op. Atty. Gen. 116. Further, it has been the consistent and longstanding view of this Office that this clause prohibits Regular members of the armed services, including those retired for length of service, from receiving retired pay during any period while employed by a foreign Government or instrumentality thereof. *See* 41 Comp. Gen. 715 (1962); B–152844, December 12, 1963; 44 Comp. Gen. 130 (1964); B–158396, February 3, 1966.

We have been informally advised by the Office of the Economic Attache of the Embassy of Israel that the Israel Aircraft Industries is a large corporation owned by the Government of Israel. Thus, it would appear that Israel Aircraft Industries is in actuality an instrumentality of the Government of Israel and if it is determined that Colonel Stein is employed by the Industries rather than Aerotech Technical Personnel, Ltd., then such employment would come within the purview of the constitutional prohibition. See, in this connection, Executive Order 5221, November 11, 1929. *Cf.* 10 U.S.C. 1032.

Based on the above there remains for consideration the relationship that exists between Colonel Stein and Israel Aircraft Industries. In addressing this issue there is for application the common law rules of agency. Those rules have been restated as well as anywhere else in *Maloof* v. *United States*, 242 F. Supp. 175, 181 (1965). There the Court, quoting from *Keitz* v. *National Paving and Contracting Co.*, 134 A. 2d 296, 301 (1937), stated:

> "Coming now to the main question involved herein, it has been stated by this Court that there are at least five *criteria* that may be considered in determining the question whether the relationship of master and servant exists. These are: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. Standing alone, none of these *indicia*, excepting (4), seem controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether the employer has *the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done.* It will be noted from the above, it is

not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his *right* to do so that is important."

In our decisions two of these criteria have been specifically applied where the issue involved Federal employment.

In 44 Comp. Gen. 761 (1965) a similar determination had to be made in a case involving employment of individuals by the General Services Administration who were hired through a temporary employment agency since it was recognized that personal service contracts would be in violation of civil service laws if it could be determined that there existed an employer-employee relationship between the Government and the individual. In order to arrive at a satisfactory conclusion in that case, a three part test was applied in order to determine the existence of an employer-employee relationship. First, the performance of a Federal function; second, appointment or employment by a Federal officer; and third, supervision and direction by a Federal officer.

In that decision it was stated that the existence of an employer-employee relationship depends not upon the nature of the work to be done but upon the method chosen to accomplish that work. Under the facts of that case it was determined that those individuals working under the contracts in question were performing a Federal function; that although the individual workers were not appointed to their positions in the usual manner by a Federal officer, it was found that control over their continued employment was exercised by the Government since the Government had the right to require immediate replacement for any unsatisfactory individual. Further, that the nature of the work required detailed instruction and supervision by Government personnel.

It appears from the record that Colonel Stein is performing work which would normally be done by an employee of Israel Aircraft Industries. Although he was not technically appointed to the position by an official of Israel Aircraft Industries or that of the Government of Israel, it appears that his employment is controlled by that corporation to the extent that it has the right to terminate his services at any time and that his work is supervised and controlled by their employees. Additionally, it is to be noted that it would appear that Israel Aircraft Industries is the true source of Colonel Stein's compensation. Therefore, based on the record before us, it is our view that, applying the common law rules stated in the *Maloof* case, there is sufficient evidence to warrant the conclusion that an employer-employee relationship exists between the member and Israel Aircraft Industries and that his acceptance of salary incident to that employment is prohibited by the Constitution in the absence of "the Consent of Congress."

While the applicable constitutional provision does not specify the penalty to be imposed for action taken contrary to the prohibition contained therein, it is our view that substantial effect can be given such provision by withholding retired pay in an amount equal to the salary Colonel Stein receives as a result of his employment with Israel Aircraft Industries. *See* 44 Comp. Gen. 130 (1964), and B–154213, December 28, 1964.

Your questions are answered accordingly.

[B–178973]

Pay—Retired—Annuity Election for Dependents—Survivor Benefit Plan—Widower

For purposes of 10 U.S.C. 1451(a) which provides for deduction [illegible] survivor annuity under Survivor Benefit Plan of amount equal to Social Security survivor benefit computed on basis of member's military service only, widower's benefit is not subject to same reduction [illegible] widow's benefit when there is one dependent child since widower [illegible] Social Security benefit comparable to "mother's benefit" received [illegible] under Social Security laws.

In the matter of Department of Defense Military Pay and Allowance Committee Action No. 476, April 9, 1974:

This action is in response to letter dated June 20, 1973, from the Acting Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning whether the term "widower" is synonymous with "widow" for purposes of reducing survivor benefit annuities under 10 U.S. Code 1451(a) in the circumstances discussed in Department of Defense Military Pay and Allowance Committee Action No. 476.

The question presented in the Committee Action is as follows:

In the application of Section 1451(a) U.S.C. 10, as added by Pub. L. 92-425, is the term "widower" synonymous with "widow" for purposes of reducing Survivor Benefit annuities by that portion of social security benefit attributable to military service?

In the discussion set forth in the Committee Action it is indicated that there appears to be some doubt as to whether an annuity to a widower at any age with only one dependent child is subject to reduction under the provisions of 10 U.S.C. 1451(a).

It is stated in the Committee Action that the first sentence of 10 U.S.C. 1451(a) provides that if a widow or widower is under age 62 or there is a dependent child, the annuity payable to the widow, widower or dependent child under section 1450 shall be equal to 55 percent of the base amount. In commenting on the second sentence of the section it is pointed out that reference is made only to a widow with one dependent child being subject to a reduction of the annuity

equal to the "mother's benefit" to which a widow would be entitled under the Social Security Act. The third sentence of 10 U.S.C. 1451(a) provides that when a widow or widower reaches age 62, or there is no dependent child, whichever occurs later, the monthly annuity shall be reduced by an amount equal to the Social Security survivor benefit if any to which the widow or widower would be entitled.

Reference is made in the Committee Action to page 31 of Senate Report No. 92–1089, September 6, 1972, wherein language is quoted which appears to indicate that the Senate Armed Services Committee considered reductions where there is a dependent child only in the case of widow. It is also pointed out in the Committee Action that the Social Security Administration has advised that a widow, under laws applicable to the Social Security Administration, is presumed to have been supported by the husband and may receive a "mother's benefit," but that section 402 of Title 42, U.S. Code, does not provide a similar benefit to a widower with a dependent child.

The Committee Action also indicates that there is nothing in the law or legislative history which indicates that the term "widower" is to be considered as synonymous with "widow" in the application of 10 U.S.C. 1451(a).

The Survivor Benefit Plan established by Public Law 92–425, 10 U.S.C. 1447, was designed to build on the income maintenance foundation of the Social Security system in order to provide survivor coverage to military widows and dependent children in a stated amount from retirement income derived by a member from his military service. Since the Government contributes substantial amounts to the Social Security system on behalf of members of the uniformed services it was determined that there should be an offset against the Survivor Benefit Plan annuities when a survivor becomes entitled to Social Security survivorship benefits. *See* page 29, Senate Report No. 92–1089, September 6, 1972. Thus, when survivors who are receiving annuities under this Plan receive Social Security survivor benefits or become entitled to receive such benefits a reduction of the annuity under the Plan is required and is calculated on the basis of the Social Security survivorship benefit which would be attributable solely to a retired member's years of military service. In this regard, it is to be noted that the actual Social Security benefit to which a survivor is entitled is not affected by this computation.

Thus, it would logically follow that there would not be a setoff under the Survivor Benefit Plan unless there was a survivor entitlement under the Social Security Act.

While the annuity payable to either widow or widower who reaches age 62 is reduced by whatever Social Security benefit he or she is

entitled to receive, we understand when there is a dependent child, the widow is entitled to a "mother's benefit" under the Social Security Act but no benefit comparable to the "mother's benefit" is payable to a widower. Therefore, it seems clear that in enacting section 1451(a) of Title 10, U.S. Code, the Congress was aware that such benefit did not exist and for that reason chose to refer only to a "widow" with regard to that portion of the offset provision relating to a widow with one dependent child.

Accordingly, the question is answered in the negative.

[B-179416]

Trailer Allowances—Military Personnel—"Cents a Mile" Rate—Mileage Computation

Where member of uniformed services is entitled under provisions of 37 U.S.C. 409 to movement of housetrailer between a point in Alaska and a point in the contiguous States not connected by highway the distance for purpose of the "cents a mile" provision of section 709 may be computed by means other than highway mileage provided in paragraph M10007, Joint Travel Regulations. Commercial shipment of the trailer may be authorized, payment being limited to 74 cents per mile for the official distance computed without reference to highway mileage.

To the Secretary of the Army, April 9, 1974:

This refers further to letter dated July 23, 1973, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) forwarded here by letter of July 26, 1973, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 73–33) concerning the shipment of the housetrailer of a member from Anchorage, Alaska, to Bethel, Alaska, incident to a permanent change of station.

We are informed by the Assistant Secretary that the member who received permanent change-of-station orders directing him to proceed from Anchorage, Alaska, to Bethel, Alaska, is entitled under the provisions of paragraph M10004–1 of the Joint Travel Regulations (JTR) to ship his housetrailer through the use of Government procured transportation. It is stated that in accordance with paragraph M10004–3, JTR, the amount of the trailer allowance to be paid by the Government is limited to the lowest of three ceilings, and that in this connection it has been determined that a rate of $0.74 per mile is applicable for the official distance from Anchorage to Bethel.

The Assistant Secretary states that pursuant to paragraph M4155–4, JTR, the Commanding General, Finance Center, U.S. Army, Indianapolis, Indiana, was requested to provide an official distance from Anchorage to Bethel, and that the Finance Center replied that since no highway exists between these two points, the official distance would be zero (0) miles. Consequently, it is indicated that although the ship-

ment of a housetrailer is authorized in connection with the permanent change of station in this case, because an official distance cannnot be determined, no allowance can be paid.

In such circumstances, our decision is requested as to whether commercial shipping may be authorized.

Section 409 of Title 37, U.S. Code, provides in pertinent part as follows:

> Under regulations prescribed by the Secretaries concerned and in place of the transportation of baggage and household effects or payment of a dislocation allowance, a member * * * may transport a housetrailer or mobile dwelling within the continental United States, within Alaska, or between the continental United States, within Alaska, or between the continental United States and Alaska, for use as a residence by one of the following means—
>
> (1) transport the trailer or dwelling and receive a monetary allowance in place of transportation at a rate to be prescribed by the Secretaries concerned but not more than 20 cents a mile;
>
> (2) deliver the trailer or dwelling to an agent of the United States for transportation by the United States or by commercial means; or
>
> (3) transport the trailer or dwelling by commercial means and be reimbursed by the United States subject to such rates as may be prescribed by the Secretaries concerned.
>
> However, the cost of transportation under clause (2) or the reimbursement under clause (3) may not be more than the lesser of (A) the current average cost for the commercial transportation of a housetrailer or mobile dwelling; (B) 74 cents a mile; or (C) the cost of transporting the baggage and household effects of the member or his dependent plus the dislocation allowance authorized in section 407 of this title. * * *

Paragraph M10004–3, JTR, provides as follows:

> 3. CEILINGS. Under the staute authorizing trailer allowances, the amount to be paid by the Government is limited to the lowest of the following three ceilings:
>
> (1) $0.74 per mile;
>
> (2) the current average cost for the commercial transportation of a housetrailer;
>
> 3. the combined cost of transporting the maximum weight allowance of household goods over a like distance for a member of a corresponding pay grade plus the appropriate dislocation allowance, if applicable.
>
> It has been determined that item 1 currently constitutes the lowest of the three ceilings except where applicable directives, regulations, or local laws require movement of housetrailers by indirect or circuitous routes. When trailer movement is required to be made over an indirect or circuitous route, as provided in par. M10007–1, a comparison of items 1 and 3 is necessary in order to determine the lower ceiling.

Paragraph M10007, JTR, provides as follows:

> 2. BETWEEN DUTY STATIONS WITHIN THE UNITED STATES AND BETWEEN DUTY STATIONS WITHIN ALASKA. The maximum authorized distance for trailer allowances within the United States and within Alaska will be the *highway* distance between the points the member otherwise would be entitled to movement of houshold goods as prescribed in Chapter 8 or the highway distance between the points the house trailer is actually transported, whichever distance is shorter. When an indirect or circuitous route is required in the transportation of a house trailer, the authorized distance will be computed as provided in subpar. 1. [Italic supplied.]

With respect to computation of official distances paragraph 5 of the Official Table of Distances (Army Regulations 55–60, Air Force Manual 177–135, Navy Publication P–2471) provides that "The dis-

tances in miles have been computed over the shortest, usually traveled *highway routes* as shown on the latest available highway maps. * * *" [Italic supplied.]

The act of August 7, 1964, Public Law 88–406, 78 Stat. 383, amended section 409 of Title 37, U.S. Code, to authorize the movement of housetrailers or mobile dwellings of members of the uniformed services between the continental United States and Alaska and within Alaska, and also provided for shipment by the Government in addition to Government arranged commercial shipment.

The legislative history of the law refers to the intent of Congress to provide authorization for shipment of housetrailers to places in Alaska which are inaccessible by highway or by commercial carrier. *See* pages 9178 and 9179, Hearing of Subcommittee No. 2, Committee on Armed Services, House of Representatives, on H.R. 8954, 88th Congress, April 14, 1964, which became Public Law 88–406.

Clearly, under the law commercial transportation may be authorized to locations not served by highway, and in such circumstances, official distance must be computed by other than highway mileage.

Consequently, for the purpose of determining payment for housetrailer or mobile home transportation at the "cents a mile" rate provided in 37 U.S.C. 409, the distance between two locations not served by highway may be determined by means other than highway mileage, such as the common carrier mileage, and that distance may be regarded as the official distance.

In this regard, we have been advised by our Transportation and Claims Division that the distance from Anchorage to Bethel via Foss Alaska Lines (converted from nautical miles) is 1,636.45 miles.

Therefore, commercial shipping may be authorized based on the official distance between Anchorage and Bethel, Alaska, as determined in accord with the foregoing.

[B–178815]

Pay—Submarine Duty—Absence Periods—Training and Rehabilitation

While the 14-man augmentation to the crew of nuclear-powered attack submarines, which allows members of the submarine to remain in port for periods of training and rehabilitation, is not, strictly speaking, comparable to the two-crew system as used in nuclear-powered ballistic missile submarines, the legislative history of Public Law 86-635, July 12, 1960, which amended the law relating to the payment of incentive pay for periods of training and rehabilitation away from the submarine in cases of off-ship crew of two-crew nuclear-powered submarines (37 U.S.C. 301(a) (2)), is not so restrictive so as to prohibit payments of incentive pay during periods of training and rehabilitation on a continuous basis in the case of the augment crew of nuclear-powered attack submarines, so long as such training and rehabilitation periods bear a reasonable relationship to periods of duty aboard the submarine and no severe imbalance of assignments occurs among crew members.

To the Secretary of Defense, April 10, 1974:

This decision is in response to a request for an advance decision by the Acting Assistant Secretary of Defense (Comptroller) concerning whether the Department of Defense Military Pay and Allowances Entitlements Manual may be changed to provide for the payment of incentive pay for hazardous duty to crew members of nuclear submarines other than ballistic missile submarines during periods of training and rehabilitation ashore for periods in excess of 15 days. The question together with a discussion thereof is contained in the Department of Defense Military Pay and Allowance Committee Action No. 475.

The Committee Action states that Public Law 86–635, now codified as 37 U.S. Code 301(a)(2), provides for entitlement to incentive pay for hazardous duty to crew members of nuclear-powered submarines during periods of training and rehabilitation after assignment to the submarine. It is pointed out that, to date, this entitlement has been applied only in the case of the off-ship crews of two-crew polaris/poseidon nuclear-powered submarines.

The discussion in the Committee Action states that the growing complexity of the nuclear submarine force has resulted in new and unforeseen manning requirements, an example of which being a need for an increased allowance of 14 men assigned to the nuclear attack class of submarine (SSN) for the purposes of providing increased equipment maintenance and to augment the manpower resources to carry out the operational requirements of that class of submarine. It is indicated that this 14-man augmentation has proven to be extremely important to nuclear attack submarines by the fact that their availability has allowed improved maintenance of many sophisticated shipboard equipments and systems during in-port periods; has permitted commanding officers to send crew members to courses of instruction for additional technical training, an opportunity which was previously limited by the ship's operational schedule or the maintenance workload; has allowed a more flexible and reasonable in-port watch rotation in consonance with established Navy standards and has resulted in a more adequate rehabilitation and leave policy which was previously unattainable.

It is pointed out in the discussion that under the provisions of the Department of Defense implementation of 37 U.S.C. 301(a)(2), as expressed in Rule 1, Table 2–2–2 of the Department of Defense Pay and Allowances Entitlements Manual, there is a loss of entitlement to submarine pay for the period of training and rehabilitation ashore for personnel released from underway duties by the augment crew when the training and rehabilitation period exceeds 15 days, with

the exception of members attending approved submarine training courses.

The view is expressed in the Committee Action that a review of the legislative history of Public Law 86–635 indicates that the foregoing rule established under Department of Defense regulations may possibly be broadened to include personnel performing temporary additional duty for training and rehabilitation ashore under the augmentation program now being employed in the manning of nuclear-powered attack submarines. However, doubt is expressed in the discussion as to the legality of such application.

It is noted in the Committee Action that, as expressed in its legislative history, the clear intent of Public Law 86–635 was to pay incentive pay to the off-crew of two-crew nuclear-powered submarines as a means of attracting and retaining personnel in the nuclear submarine community.

The discussion of the Committee Action states that while the nuclear attack submarines do not have two complete crews, the concept of authorizing 14 additional crew members provides, in effect, one and a fraction crews for each nuclear attack submarine, with a small percentage of the crew in an off-crew training and rehabilitation status while the submarine is at sea.

It is also noted in the Committee Action that the testimony and questions of some members of Congress during hearings on H.R. 10500, which became Public Law 86–635, indicated concern over the possibility that the Navy may take advantage of the wording of the then proposed legislation as it applied to the two-crew concept. However, it is stated in the discussion that in the 13 years since enactment of Public Law 86–635, the two-crew concept for submarine pay entitlement purposes has been limited exclusively to ballistic missile submarines and this request for advance decision is the first attempt to extend the authority to another class of nuclear-powered submarine.

Section 204(a)(2) of the Career Compensation Act of 1949, now codified in 37 U.S.C. 301(a)(2), was amended by the act of July 12, 1960, Public Law 86–635, 74 Stat, 469, to authorize the continued payment of submarine pay during periods of training and rehabilitation after assignment to nuclear-powered submarines. Prior to the advent of nuclear-powered submarines and enactment of the amendment, payment of incentive pay for duty on a submarine on a continuous basis was authorized only for those members whose designated post of duty was the submarine and who were berthed and subsisted aboard the submarine except when permitted to go on leave or for temporary additional duty ashore, which in neither case may the absence from the submarine exceed 15 days.

Subsection (a)(2) of 37 U.S.C. 301, as amended by Public Law 86–635, provides in part that a member is entitled to incentive pay for hazardous duty required by orders, hazardous duty meaning duty:

(2) as determined by the Secretary concerned, on a submarine (including, in the case of nuclear-powered submarines, periods of training and rehabilitation after assignment thereto), or in the case of personnel qualified in submarines, as a member of a submarine operational command staff whose duties require serving on a submarine during underway operations—

With advent of the nuclear-powered ballistic missile submarines, which were capable of extended deployments, a determination was made by the Navy that it was necessary to man these submarines with two full crews. This was deemed necessary based on the finding that the only real limitation on the mission of the vessel was the physical and mental endurance of the crew members. In order to alleviate this condition, the two-crew concept was formulated, thus permitting one crew to be physically on-board the submarine, while the other crew was performing temporary additional duty for training and rehabilitation ashore.

Prior to the enactment of Public Law 86–635, when this period of training and rehabilitation exceeded 15 days, there was a loss of incentive pay for those members ashore.

Therefore, while the crew members of the two-crew nuclear powered submarines actually spent as much time at sea on the submarine as crew members of conventional submarines, nuclear-powered submarine crew members suffered a substantial loss of incentive pay. As a result, it became difficult to attract volunteers from the conventional submarine service to the nuclear-powered submarine service and Public Law 86–635 was enacted with a view to attracting more members to volunteer for duty in nuclear submarines.

During hearings on H.R. 10500, which became Public Law 86–635, the testimony generally indicates that if authorized, the incentive pay would only be applicable in cases where the two-crew concept or a modified version thereof would be utilized. Some concern was expressed by certain members of Congress that such authorization would be used to authorize two-crews for all submarines, conventional as well as nuclear-powered. However, assurances that this would not be the case were given by the Department of Defense spokesman at the hearings. It was indicated that incentive pay in such cases would be authorized only in the case of nuclear-powered submarines when a two-crew manning concept would be appropriate.

Various materials have been informally obtained from the Department of the Navy concerning the concept of the 14-man augmentation program.

In this connection, the Navy has determined that in order to facilitate and to make more efficient the operations of these nuclear-powered attack submarines and to provide a less demanding schedule on its crews, an augmentation of 14 additional billets would be filled periodically on a rotational basis by members of the enlisted crew of the submarine and would thereby enable 14 members of the crew to remain ashore for the purposes of training and rehabilitation. Generally, it appears that this training and rehabilitation consists of schooling, clerical, and administrative duties, in-port watch standing and provide greater opportunities for leave.

The view has been advanced that this 14-man augmentation should be considered within the two-crew concept, the only difference being the size of the off-ship crew. As previously mentioned, this augmentation actually amounts to one and a fraction crews instead of two full crews.

We agree generally with the view expressed in the Committee Action that the language of the law and the congressional intent as expressed in the hearings and the Committee reports is sufficiently broad to permit the payment of submarine incentive pay as authorized under the provisions of 37 U.S.C. 301(a)(2), to those members performing training and rehabilitation away from their duty station aboard the nuclear-powered attack type submarines. However, it is our view that the regulations governing assignment rotation for such periods of training and rehabilitation for members of nuclear-powered attack submarines should conform as nearly as is feasible to the prescribed format used in connection with the training and rehabilitation of the off-crew of two-crew nuclear-powered submarines and that adequate administrative safeguards be developed by the Navy to insure that no imbalance of assignments to periods of duty for training and rehabilitation occurs among crew members.

In this regard, it must be emphasized that entitlement to incentive pay for the periods of training and rehabilitation of off-crew members of nuclear-powered attack submarines is not to be treated in a manner similar to the entitlement to incentive pay prescribed by 37 U.S.C. 301(a)(2)(A) for members assigned to a submarine operational command staff, where minimal on-board time is required. If members assigned to nuclear-powered submarines, other than two-crew submarines, should perform periods of training and rehabilitation which do not bear a reasonable relationship to periods of duty aboard the submarine and to that performed by other crew members, payment of incentive pay under the provisions of 37 U.S.C. 301(a)(2) on a continuous basis would not be authorized.

Accordingly, based on our understanding of the circumstances which formed the basis for the submission, the question is answered in the affirmation subject to the above-mentioned limitations.

[B–178862]

Bids—Late—Mail Delivery Evidence—Agency Obtained Evidence Effect

Contracting officer acted in accordance with advice of postal officials in accepting late registered mail bid on basis that lateness was due solely to a delay in the mails for which bidder was not responsible. Award will not be disturbed because it later appears that postal officials' advice may have been erroneous.

Bids—Late—Mail Delivery Evidence—Procedure to Obtain

It was not improper for the contracting officer, rather than the low bidder, to have gathered information upon which the determination to accept the late bid was made. Contracting officer was not obligated to conduct a hearing prior to making his determination.

Bidders—Qualifications—Administrative Determinations—Acceptance

Contracting officer's determination that successful bidder was responsible was not arbitrary, capricious, or unsupported by substantial evidence.

In the matter of the Frieden Construction Company, April 11, 1974:

Frieden Construction Company (Frieden) requested reconsideration of our decision B–178862, October 10, 1973, in which we held that a contracting officer properly accepted a late, registered mail bid. For the reasons stated below, our initial decision is affirmed.

The bid in question was sent via registered air mail from Mission, Texas, to Lincoln, Nebraska, in response to an invitation for bids which set the bid opening time as 1:30 p.m., Monday, April 16, 1973. The bid was not received by the procuring activity until 10:50 a.m., April 17, 1973.

In response to an inquiry from the contracting officer, the Mission postmaster advised when the bid envelope left Mission and expressed the opinion that the bid "should have been in the Lincoln, Nebraska Post Office on Saturday Morning on April 14, 1973." Similarly, the Lincoln postmaster stated that:

> Under normal circumstances, we feel this letter should have arrived in time for delivery on April 16. However, some connections may have been missed because of severe weather or other circumstances beyond control of the Postal Service.

In view of his receipt of this information, we concluded that the contracting officer complied with Federal Procurement Regulations (FPR) 1–2.303–3 then in effect, which permitted bids sent by reg-

istered mail to be considered for award if "* * * it is determined that the lateness was due solely to a delay in the mails * * * for which the bidder was not responsible."

In its request for reconsideration, Frieden asserted that it was improper for solely the contracting officer (rather than the bidder) to have made the inquiries and assembled the information upon which the determination was made that the late bid could be accepted. Frieden urges that our decision B–158029, January 17, 1966, stands for the proposition that the contracting officer should not have made the inquiries of postal officials.

Additionally, Frieden maintains that it should have been afforded a hearing by the contracting officer prior to his determination of the acceptability of the late bid, and that had such a hearing been held, Frieden could have established the unacceptability of the late bid. In this connection, Frieden's counsel makes the general observation that he is "not certain" that we correctly concluded that the formal notice and hearing requirements of the Administrative Procedure Act (5 U.S.C. 551) did not apply to an administrative determination of the acceptability of a late bid.

In B–158029, *supra*, we stated:

> Your bid was not sent by registered or certified mail as required by the above provisions of the invitation as a pre-requisite to its consideration in the event of late receipt. Consequently, the contracting officer not only was under no duty but was unauthorized to contact the post office for a determination regarding timely mailing. * * *

We believe it is clear that the reference in B–158029 to a lack of duty or authority in the contracting officer to make inquiry of the post office resulted from the regular mail transmission of the bid in that case. Furthermore, FPR 1–2.303–3(d) in effect at the time of bid opening expressly contemplated that the "procuring activity" would obtain "information concerning the normal time for delivery" of bids sent by registered or certified mail.

In the absence of any specificially identified reason or citation of authority as to the applicability of the Administrative Procedure Act, we do not believe it has been shown that our initial decision contained a material error of law in this regard. We also observe that FPR 1–2.303, which governs the consideration of late bids, makes no provision for notice to other bidders or the conduct of hearings. We therefore remain of the opinion that the contracting officer was not obligated to conduct hearings prior to his determination of the acceptability of the late bid.

Frieden's assertion that it could have established the unacceptability of the late bid, had the contracting officer conducted a hearing, is largely derived from inquiries by Frieden of Mission and Lincoln

postal officials after receipt of our initial decision. Assuming the accuracy of counsel's recitation of statements made to him by postal officials, there is some basis for concluding that the low bidder had not mailed its bid in time for the April 16 opening. The fact remains, however, that when he accepted the low bid, the contracting officer was acting in accordance with the advice given him by postal officials. We do not regard the award as being arbitrarily made, nor are we prepared to disturb the award, because it later appears that the postal officials may have been mistaken.

This protest, however, illustrates the difficulty in obtaining substantiating information from the Postal Service, and the administrative effort, time and confusion which have been associated with the procedures for handling of late bids. These considerations led to the revision of the late bid rules subsequent to the time period relevant to this protest. In view of Postal Service statistics, which indicate that over 95 percent of all mail in the United States is received within five days of mailing, it was decided to use this time period in conjunction with the use of registered or certified mail to establish an acceptable sharing of risk of late receipt between the Government and the bidder. Federal Procurement Regulations 1–2.201(b)(31) now provides, in regard to situations such as that presented by Frieden's protest, that:

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

(1) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); * * *.

In its request for reconsideration, Frieden renewed its assertion that the low bidder was not a responsible prospective contractor, principally because it allegedly did not satisfy the solicitation requirement that bidders be "regularly established in the business."

The instant procurement was for the demolition of an elevated steel water tank. The file shows that in response to an inquiry by the contracting officer, a large midwestern designer and fabricator of steel storage tanks advised that the low bidder "has successfully dismantled old elevated and ground storage tanks as a subcontractor * * * in the past" and that the low bidder "is presently under contract to dismantle several tanks as a subcontractor * * * later this year at various locations."

It has long been the rule of our Office to accept the contracting officer's determination of responsibility, unless it is shown by convincing evidence that the finding was arbitrary, capricious or not based on substantial evidence. 45 Comp. Gen. 4 (1965); 51 *id.* 233

(1971). In view of the information available to the contracting officer, we have no reason to question the low bidder's qualifications.

[B-175434]

Appropriations—Availability—Gifts—To Officers and Employees

Expenditure for the distribution of decorative ashtrays to participants at SBA-sponsored conference of Government procurement officials with intent that SBA seal and lettering on ashtrays would generate conversation relative to conference and serve as a reminder to the participants of conference purposes, and thereby further SBA objectives, is unauthorized in that such items are in the nature of personal gifts and thus expenditures therefor do not constitute necessary and proper use of appropriated funds.

In the matter of expenditures for Federal officials participating in interagency conference, April 12, 1974:

A certifying officer of the Small Business Administration (SBA) has requested our opinion as the propriety of certifying for payment a voucher in favor of General Displays, in the sum of $412.30, covering the cost of 70 ashtrays distributed to procurement officials from various Federal agencies attending an SBA-sponsored interagency meeting.

The Small Business Act charges SBA with the responsibility of assisting small business interests and insuring that a fair proportion of the total purchases, contracts, and sales of the Government are awarded to small-business concerns. 15 U.S. Code 631. To further such purposes SBA is authorized by several sections of the Small Business Act, as amended, to consult and cooperate with the departments and agencies of the Federal Government to effectuate the purposes of the act. *See*, for example, 15 U.S.C. 637(b)(4); 637(b)(12); 638(c); and 639(f). Pursuant to that authority we are told that SBA annually has held an interagency conference and has invited the attendance of officials at the policymaking level from various Government departments and agencies. At the latest such conference SBA provided each such Government official with an ashtray bearing the SBA seal and the words "Interagency 1973 Conference." It was intended that each recipient would place the ashtray on his desk in his Government office and that it would serve as a continuing reminder to such official of the conference and the responsibilities of his department or agency to cooperate with SBA in pursuance of small business programs authorized by the Small Business Act, and thereby further the accomplishment of such programs.

It is urged that the use of these ashtrays for such purposes is analogous to the use of photographs in connection with a National SCORE conference held pursuant to section 8(b)(1A) and (1B) of

the Small Business Act, as amended, 15 U.S.C. 637(b)(1A) and (1B), which was the subject of our decision of April 11, 1972, B–175434.

In that case, the photographs in question, together with appropriate news releases, were distributed to newspapers nationally for publication as a news item. In that the photographs did not constitute personal items or gifts and were not used to publicize the future appearance of any individual or group of individuals, payment therefor was authorized on the basis that the photographs constituted a proper means of effecting agency functions. *Cf.* B–62501, January 7, 1947, and 47 Comp. Gen. 321 (1967).

We believe the situation considered in B–175434 is entirely different from that considered herein in that the ashtrays that were given to the Federal officials are in the nature of personal gifts. Furthermore, while SBA is charged by law to cooperate with other Government agencies in carrying out its function, the officials of those other Government agencies are likewise required by law to cooperate with SBA when requested to do so by the Administrator. Consequently, we see no basis on which payment for items in the nature of personal gifts may be authorized in order to secure the cooperation of such other agency officials. Similarly, we have held that appropriated funds may not be used to purchase and distribute cuff links and bracelets as promotional items under the International Travel Act of 1961, 22 U.S.C. 2121, since such items were more properly in the category of personal gifts rather than promotional material and, hence, did not constitute a necessary and proper use of funds appropriated to carry out such act. *See* B–151668, December 5, 1963.

Accordingly, the voucher may not be certified for payment and will be retained here.

[B–180434]

Contracts—Protests—Timeliness—Solicitation Improprieties

Protest based on alleged improprieties in invitation which are apparent prior to bid opening must be filed with GAO prior to bid opening or within 5 days of notification of adverse agency action on protest; however, submission of bid during this period does not amount to waiver of right to protest after bid opening, as protester is only protecting its position, not having received written final decision from procuring agency on all issues protested.

Contracts—Specifications—Delivery Provisions—Sufficiency

Preparation and establishment of delivery provisions to reflect needs of Government are matters primarily within jurisdiction of procuring agency, subject to question by GAO only when not supported by substantial evidence.

Contracts—Requirements—Indefinite Quantity *v.* Requirements—Conflict

Conflict between "Requirements" General Provision and "Indefinite Quantity" General Provision was not prejudicial to protester, as protester was aware of agency position prior to bid opening and prepared its bid in accordance with this position; therefore failure to issue amendment to clarify conflict does not affect the legality of the procurement.

In the matter of East Bay Auto Supply, Inc.; Sam's Auto Supply, April 12, 1974:

On January 15, 1974, East Bay Auto Supply, Inc (East Bay) protested any award under invitation for bids (IFB) No. F26600-74-09006. The protest was based on the allegations that (a) the IFB required unrealistic and objectively impossible delivery frames which were not the Government's minimum requirements, and (b) the IFB, with its five modifications, was confusing and misleading to prospective bidders. The IFB was issued on November 12, 1973, at Nellis Air Force Base, Nevada.

East Bay protested to the Air Force prior to bid opening on December 4, 1973, that the specifications, as stated, were unduly restrictive, unrealistic and confusing. The Air Force, although modifying the IFB by amendment number MO-5, opened the bids notwithstanding East Bay's protest. When bids were opened on January 8, 1973, and adjusted to comply with Amendment MO-5, Sam's Auto Supply had submitted the low bid of $274,932.61. East Bay's bid of $279,050.62 was the third low bid. It was at this point in time that East Bay protested to our Office. Award was made to Sam's Auto Supply on March 1, 1974.

The Interim Bid Protest Procedures and Standards of this Office, as set forth in title 4, Code of Federal Regulations (CFR), require that a protest based on alleged improprieties in an invitation which are apparent prior to bid opening shall be filed prior to bid opening. The opening of the bids by the procuring activity, without taking complete corrective action on the protested items, is deemed by our Office to be the "adverse agency action" from which time a party has 5 working days to file its protest before our Office. As bids were opened on January 8, 1974, East Bay would have had 5 working days, or until January 15, 1974, to file its protest. Since East Bay did protest on January 15, its submission would appear to have been timely filed.

However, we are faced with the problem that East Bay has submitted a bid under the IFB. There is dicta in our opinion B-175698, August 7, 1972, that there is no procedure available under which a bidder may submit a bid and then, if unsuccessful, file a protest after bid opening based on alleged improprieties in the invitation. It may have appeared that our Office was of the opinion that by submitting

a bid under an allegedly improper IFB, the party submitting the bid would be, in effect, waiving any rights it may have to later protest the specifications of the IFB. To hold otherwise might be tantamount to allowing a party "two bites at the apple" in that it could first determine whether or not it had received the award under the IFB and if not, then protest award to any firm based on the defective specifications.

However, the above decision can be distinguished from the present situation. In B–175698, *supra*, the protester had not initially filed its protest with the agency involved. Instead, a protest was filed 13 days after bid opening directly with our Office. The protest was denied as being untimely filed. In the present situation, the initial protest was lodged with the Air Force 5 weeks before bid opening. Armed Services Procurement Regulation 2–407.8(a)(1) requires that "The protester shall be notified in writing of the final decision on the written protest." A written final decision of this nature concerning all issues protested was not undertaken on East Bay's protest. Therefore, East Bay should not be penalized for protecting itself by submitting a bid when it had no way of determining the final status of all issues protested until the time when the bids were actually opened. Accordingly, it is our opinion that East Bay has not waived its right to protest this procurement by submitting a bid, and is entitled to a decision on the merits of those issues raised in a timely manner.

As indicated above, East Bay's first contention challenges the validity of the solicitation specifications with respect to delivery requirements. The procurement officials have determined that the manner of delivery specified in the solicitation is sufficient to meet the Government's minimum needs. In this regard, our Office has consistently taken the position that the preparation and establishment of specifications to reflect the needs of the Government are matters primarily within the jurisdiction of the procurement agency, to be questioned by our Office only when not supported by substantial evidence. 38 Comp. Gen. 190 (1958); 37 *id.* 757 (1958); 17 *id.* 554 (1938); B–176420, January 4, 1973. We recognize that Government procurement officials, who are familiar with the conditions under which supplies or equipment have been delivered in the past, are generally in the best position to know the Government's needs and best able to draft appropriate specifications. Thus, we have held that the Government cannot be placed in the position of allowing bidders to dictate specifications which would have the effect of requiring delivery schedules not meeting the considered needs of the procurement agency.

Based on the record before us, we find that due consideration had been given to the fact that each of the preceding invitations had re-

quired delivery within 3 work days, whereas the present invitation allows 4. There is no record of any protest from any other bidders concerning the prior delivery specifications and requesting relief from this time frame. Moreover, East Bay has been awarded four successive COPARS contracts, each at Nellis AFB, and each with terms the same as those in the solicitation in question. None of the previous delivery requirements was ever formally protested by East Bay. Therefore, we believe that the procuring agency properly exercised its discretion in drafting the specifications and we will not question this determination.

East Bay next contends that the solicitation was confusing and misleading, especially as to what quantities might be involved under this procurement. East Bay states that there was a conflict between General Provision 49 ("Requirements"), and General Provision 50 ("Indefinite Quantity"). This point was brought to the attention of the procuring activity on December 4, 1973. The record discloses that Mr. Lobenberg of East Bay telephoned TSgt Everett to clarify this point. At 0945 hours that same date, TSgt Everett returned Mr. Lobenberg's call and the "Memo for Record" states as follows:

> * * * I phoned Mr. Lobenberg, informed him that Mrs. Hillhouse was in agreement with him, that the Indefinite Quantity clause should have not been included in the General provisions and that it would be deleted by a subsequent amendment to the IFB.
>
> /s/ Herman L. Everett, TSgt

However, an amendment to this effect was not issued by the procuring activity. The Air Force recognizes that it would have been preferable to delete the "Indefinite Quantity" provision prior to bid opening, but argues that the failure to do so is not of sufficient consequence to require cancellation of the IFB and readvertisement. We are of the same opinion. East Bay was on notice as a result of the December 4, 1973 conversation as to the procuring agencies view on the conflict between the General Provisions. Given this fact, East Bay prepared its bid as if the IFB called for a requirements contract. While it may be true that East Bay would have offered the Government a better discount on parts if this were an indefinite quantity requirement, we have already stated that it is the Government and not the bidder that dictates the specifications. Therefore, since this was in fact a requirements contract and East Bay formulated its bid on this basis, we fail to find any prejudice to East Bay through the failure to issue the amendment.

As concerns the general contention that the IFB was confusing and ambiguous, we find this allegation to have been raised in an untimely manner. Any ambiguities or uncertainties in regard to the solicitation should have been raised with the procuring activity prior to bid opening, as required by 4 CFR 20.2(a). Those not so raised may not be

raised before our Office subsequent to bid opening. This general allegation was not raised in the December 4 letter to the procuring activity, nor do we find any other evidence of this point being raised prior to bid opening. As this point was not raised in a timely fashion, we decline to consider this general allegation on its merits.

In view of the foregoing, the protest is denied.

[B-180112]

Contracts—Protests—Timeliness—Solicitation Improprieties

Bid protest filed after bid opening and challenging estimates and other alleged defects in solicitation is untimely under 4 CFR 20.2(a), notwithstanding protester's assertion that defects became apparent only after incumbent contractor's bid was opened, since record indicates that alleged defects were or should have been apparent to protester prior to bid opening.

Bidders—Qualifications—Small Business Concerns—Status Determination

Determination by Small Business Administration (SBA) that bidder is small business is conclusive upon Federal agencies and any appeal from determination must be filed with SBA.

Bids—Acceptance Time Limitation—Extension—Effect Not Prejudicial to Other Bidders

Low bidder's failure to formally extend bid in writing prior to expiration date does not preclude acceptance of bid subsequently extended, notwithstanding fact that another bidder extended its bid prior to expiration date, since low bidder's participation in bid protest filed by the other bidder shows intention to keep bid open for duration of protest and there is no indication that acceptance of low bid would have detrimental effect on competitive bidding system or be prejudicial to other bidders.

In the matter of Mission Van & Storage Company, Inc. and MAPAC, Inc., a joint venture, April 15, 1974:

Invitation for bids (IFB) No. M00681-74-B-0030, issued September 25, 1973, by the Marine Corps at Camp Pendleton, California, solicited bids for providing services relating to the storage and shipment of personal property belonging to Department of Defense personnel for the calendar year 1974. The solicitation contained estimated amounts of the various types of services that would be required during the year, and included a notation that the procurement was a 100 percent small business set-aside. On November 13, 1973, bids were opened and DeWitt Transfer and Storage Company (DeWitt), bidding on an "all or none" basis, was found to be the low bidder.

By letter and telegram dated November 20, 1973, Mission Van & Storage Co., Inc. and MAPAC, Inc. (Mission—MAPAC), which had bid as a joint venture, protested any award under the IFB on the basis

that it contained several defects, including grossly inaccurate Government estimates. Award to DeWitt was also protested on the ground that the firm was not a small business. Thereafter, by letter of January 18, 1974, Mission—MAPAC further protested against award to any bidder other than itself, claiming that all bids except its own had expired on January 13, 1974.

The specific IFB defects alleged by Mission—MAPAC deal with estimates of the services that would be required annually under the contract. Mission—MAPAC asserts that some estimates are overstated, while other services that will be required are not provided for at all. Under section 20.2(a) of our Interim Bid Protest Procedures and Standards, protests based upon alleged improprieties in solicitations which are apparent prior to bid opening must be filed prior to bid opening. 4 CFR 20.2(a). Mission—MAPAC claims that the defects it alleges were not apparent prior to bid opening, but became apparent only after the bid of DeWitt, the incumbent contractor, was revealed.

However, it is clear from both Mission—MAPAC's letter of November 27, 1973, and its bid that its awareness of the alleged solicitation defects was not dependent upon DeWitt's bid. For example, it is pointed out that the total estimated services in connection with overflow goods for Type II or Air Cargo containers is 150 percent of the total estimate for the bulk (non-overflow) cargo, whereas Mission—MAPAC's "experience as a Government contracting moving and storage company has shown that in actuality overflow articles amount to approximately 5 percent to 15 percent of the Bulk Type II or Air Cargo articles." It is also alleged that the IFB did not explicitly provide for shipment of household goods requiring other than Type II, Conex, or Air Cargo containers, so that it was not clear to Mission—MAPAC whether these services, alleged to be needed by the Marines, were either overlooked or included in another item. It is further claimed that "Items 18 (Inbound Service) and 23 (Storage) both provide for estimated annual quantities of service in Areas II and III when, in fact, the IFB defines such services so that none exists for Areas II and III." These allegations obviously involve matters evident from the face of the invitation and are not related to the bid submitted by DeWitt.

Mission—MAPAC does allege two defects which could have been pointed up by the DeWitt bid. First, it asserts that the estimate of 36,000 gcwt. for item 15 (complete service, inbound household goods) was a "gross overstatement of fantastic proportions" which was demonstrated by DeWitt's bid of $.01 per gcwt., "when, in fact, normal operating costs would amount to approximately $1.00 per gcwt." The protester also asserts that DeWitt's bid of $.10 per gcwt. for an esti-

mated amount of 5,000 gcwt. on item 22 (inbound service, contractor facility—unaccompanied baggage) demonstrates an error in the estimate because the true cost would be approximately $1.25 per gcwt. However, with respect to both items, Mission—MAPAC states that its "records disclose that the estimated annual quantities provided in the instant IFB are the same quantities, almost without exception, that have been used in solicitation * * * in at least six (6) prior years" and that this "evidences the meaninglessness of the figures used." Furthermore, with respect to item 15, Mission—MAPAC states that "the warehouse facilities of the present contractor also prove that the estimated annual quantity has no relationship to annual needs" since DeWitt's facilities could not accommodate total contract requirements if this estimate were accurate, even though DeWitt "has been able to service the contract adequately in the past with its present warehouse space." This alone suggests that Mission—MAPAC knowledge of DeWitt's facilities, rather than DeWitt's bid on the current invitation, provided a basis for questioning the item 15 estimate. In addition, Mission—MAPAC's own bid indicates that its bidding pattern was similar to DeWitt's. Thus, on item 15, it bid $.05 on the Area I requirements and $.10 on Area II and Area III requirements, despite its assertion that $1.00 would be a more appropriate figure. Similarly, on item 22, Mission—MAPAC bid $.10, just as DeWitt did, even though it states that $1.25 would be the approximate true cost.

Accordingly, the record indicates that the various defects complained of were or should have been apparent to Mission—MAPAC prior to bid opening. Therefore, its protest with respect to the alleged solicitation defects must be considered untimely. 53 Comp. Gen. 533 (1974).

We are concerned, however, that some of the estimated quantities appear to bear little relationship to actual requirements of previous years. For example, services required by item 15 (estimated at 36,000 gcwt.) totaled 5650 gcwt. in 1972 and 1980 gcwt. during the first 9 months of 1973, while services required by item 22 (estimated at 5,000 gcwt.) totaled 367 gcwt. in 1972 and 660 gcwt. through October 1, 1973. While these estimates reflect requirements far in excess of needs that actually developed, other estimates (i.e., items 4b, 31, and 33) are substantially lower than the actual requirements for 1972 and 1973. The Marine Corps identifies several factors which were considered in determining estimated requirements (such as cessation of the Vietnam conflict, occupancy of quarters nearing completion, possibility of increased retirements in the Southern California Area), and states that in light of these offsetting factors, it was concluded "that the best

overall basis for establishing estimates * * * was to utilize estimates consistent with those used in prior years." While we agree with the Corps that these factors do not "afford a precise basis for predicting future household goods movements," we think that it would have been more prudent to give greater weight to actual prior year requirements in determining 1974 estimates than to adopt the previously used estimates regardless of how inaccurate they proved to be. We are so advising the Secretary of the Navy.

With respect to DeWitt's small business status, that determination can be made only by the Small Business Administration (SBA), and its decision in this respect is conclusive upon Federal procuring agencies. 15 U.S. Code 637(b)(6); 44 Comp. Gen. 271 (1964). The record indicates that SBA has determined DeWitt to be a small business for this procurement. Any appeal from that determination must go to SBA's Size Appeals Board in accordance with Armed Services Procurement Regulation (ASPR) 1.703(b)(4).

Mission--MAPAC also claims that the Marine Corps failed to solicit bid extensions while this protest was pending, that no bidder other than Mission--MAPAC took the necessary steps to extend its bid beyond the expiration date, and therefore only Mission--MAPAC now has a bid which may be accepted under the solicitation.

Both Mission--MAPAC and DeWitt initially offered a 60 day acceptance period expiring on Saturday, January 12, 1974. The Marine Corps reports that on January 11, 1974, Mission--MAPAC extended its bid, but that DeWitt's bid was not extended until January 16, 1974, in response to the contracting officer's request of that date. The Marine Corps believes that acceptance of DeWitt's bid, as extended, would be proper and it proposes to do so.

We have held, as the protester points out, that a reinstated bid should not be accepted when to do so would compromise the integrity of the competitive bidding system. 42 Comp. Gen. 604 (1963); 48 *id.* 19 (1968). However, as stated in 42 Comp. Gen. 604, *supra*, this does not mean that in the proper circumstances the Government may not accept a bid, once expired, which has subsequently been revived by the bidder. In 46 Comp. Gen. 371 (1966), the low bidder extended its bid acceptance period when requested to do so 3 days after the original 60 day period had lapsed. We held that the bid properly could be accepted because the integrity of the competitive bidding system would not be compromised thereby and because there would be no prejudice to another bidder whose 60 day acceptance period had also expired. We distinguished that situation from the one in 42 Comp. Gen. 604, *supra*, in which the low bidder offered an acceptance period of only 20 days while the second low bidder offered the more

customary 60 days. There we held that the low bid, which was not extended until more than 2 weeks after expiration of the original 20 day period, should not be accepted because the low bidder "sought and gained an advantage after bid opening in the nature of an option not sought by other bidders, of renewing its bid in short increments or allowing it to lapse as dictated by market conditions," and that "the integrity of the competitive bidding system would best be served by making an award to the second low bidder." 46 Comp. Gen. 371, 373. Mission—MAPAC argues that our conclusion in 46 Comp. Gen. 371, *supra*, is not applicable because here the Government has always had a bid (Mission—MAPAC's) it could accept while in that case all bids had expired. It further argues that acceptance of DeWitt's bid would violate the integrity of the competitive bidding system because DeWitt, by failing to extend its bid prior to expiration of the acceptance period, relieved itself "of the burden of servicing the contract at prices set on 1973 costs" and would have the option to renew or not to renew its bid as was the case in 42 Comp. Gen. 604, *supra*.

We do not think that acceptance of DeWitt's bid would compromise the competitive bidding system. Unlike the bidders in 42 Comp. Gen. 604 and 48 *id.* 19, DeWitt did not seek any advantage over other bidders. It offered the standard 60 day acceptance period rather than an unusually short one. Furthermore, it is reasonably clear that DeWitt intended and considered its bid to be viable at least during the pendency of this protest. We have taken the position that a protest to this Office during a bidder's acceptance period could be viewed as tolling the bid acceptance period pending resolution of the protest, 50 Comp. Gen. 357 (1970), although circumstances may indicate that a protester desires to terminate its offer notwithstanding its protest. 52 Comp. Gen. 863 (1973). We have also recognized that the intention of a bidder to extend the life of its bid may be indicated by the bidder's course of action in dealing with the contracting officer even after expiration of the bid. 53 C.G. 737 (1974). Here DeWitt, through counsel filed a letter of opposition to Mission—MAPAC's protest with this Office on December 27, 1973, well within the original bid acceptance period, and subsequently filed additional papers. We think this participation in the protest is sufficient to indicate DeWitt's intention to keep its bid alive and that under the circumstances it may be regarded as having that effect. Accordingly, we would not object to an award to DeWitt.

It does not appear that the contracting officer complied with ASPR 2.404–1(c) and ASPR 2–407.8(b)(1), which require contracting officers to request bid extensions from those bidders which might be in line for award when award will not be made before expiration of the

bids. 50 Comp. Gen. 357, *supra*. We are suggesting, therefore, that appropriate steps be taken to assure future compliance with these provisions.

[B-180853]

Contracts—Protests—Administrative Actions—Filing Protest—"Adverse Agency Action" Conclusion

Offeror's conference with agency above level of contracting officer against proposed adverse action is protest to agency and protest by offeror to GAO within 5 days of agency denial is timely.

Contracts—Negotiation—Lowest Offer—Award Basis

Where agency intended to treat RFP as advertised solicitation, which intention was known to protester, and proposals are publicly opened and prices disclosed, lowest responsible offeror should be considered for award without invoking negotiation procedures.

In the matter of RCA Corporation, April 16, 1974:

This protest was submitted by the RCA Corporation (RCA) against the award of a contract for 294 mobile radios by the Immigration and Naturalization Service (Immigration) to Motorola, Inc. (Motorola), under request for proposals (RFP) CO-15-74. Prior to the RFP, Immigration issued, and later canceled, invitation for bids (IFB) CO-12-74 because the three bids received were nonresponsive. Also of note is the fact that RCA submitted a "No Bid" because it would not accept the liquidated damages provision of $85.00 per unit per day of delay with no limitation as to time.

On February 15, 1974, a determinations and findings (D&F) was executed to authorize the use of negotiation pursuant to 41 U.S. Code 252(c)(2) and (c)(10), as implemented by Federal Procurement Regulations (FPR) 1-3.202(a) and 1-3.210(a)(1). The former sections permit the use of negotiation when the public exigency will not tolerate the delay incident to formal advertising because the radios were required by August 13, 1974, for installation in motor vehicles scheduled for delivery on that date for border patrol duties. The schedule contemplates delivery 150 days after receipt of written notice to proceed. While the latter section, FPR 1-3.210(a)(1), is applicable when the property can only be obtained from a sole-source of supply, we believe that Immigration intended to cite FPR 1-3.210(a)(3) which authorizes negotiation when no responsive bids are received under an IFB. Our belief is based on the fact that the RFP was in fact competitive and the findings of the D&F notes the fact that formal advertising was no longer feasible because all bids received on IFB CO-12-74 were nonresponsive.

In any event, RFP CO-15-74 was issued on February 15, 1974. Paragraph 10 of the General Conditions revised the liquidated damages provision of the IFB:

> * * * The stipulated rate for liquidated damages shall be eighty five (85) dollars per unit per calendar day, except that the total daily damages rate shall not exceed $200.00.

All three proposals received timely were publicly opened and prices announced on March 5 to representatives of the competitors. RCA submitted the low price of $372,009. The instant controversy stems from the stipulation contained in the RCA proposal that the maximum liability it would accept for delinquent delivery would be $20,000, or 100 calendar days. Motorola submitted the next low price of $397,917. The Astronautics Corp. was next low at $536,025. Another proposal was not considered because it was received untimely.

Initially, it is Immigration's position that the protest is untimely under our Interim Bid Protest Procedures and Standards (Standards), because the basis for the protest, i.e., disclosure of prices, was known to RCA on March 5, but not protested until March 18. Additionally, it is noted that the contracting officer's representative telephonically notified RCA on March 8 that its proposal was nonresponsive due to the exception taken as to the liquidated damages provision. However, upon notification, RCA requested and met with the Associate Commissioner on March 14 to impress upon Immigration that it had the authority to award to RCA in view of its lower price. It is stated that a final agency decision was not rendered until March 18. We view this meeting as a protest to the agency within the context of section 20.2(a) of our Standards (4 CFR). Therefore, since the RCA protest was filed with GAO within 5 days of notification of adverse agency action, it is timely.

It is protester's position that, since this was a negotiated procurement, Immigration should award to RCA because of its lower price notwithstanding its exception to the liquidated damages provision. In its letter of March 26, RCA stated "* * * Bidding strategy was based on an offer having a price low enough to merit judgmental consideration even if other bidders' offers were with no exceptions but at higher prices * * *." Alternatively, RCA requests that negotiations be conducted under the RFP. Immigration's response is that it considers RCA's proposal nonresponsive and intends to award to Motorola. Immigration states that the intent of the liquidated damages provision was to insure timely delivery of the radios which are critical to its law enforcement operations and mission.

While authority exists to negotiate this procurement, it seems clear that Immigration has treated the procurement as though it were formally advertised. Certainly, public opening of proposals and an-

nouncement of prices is anathema to the concept of negotiated procurement. *See* FPR 1-3.805-1. It is not disputed that RCA knew beforehand that Immigration intended to publicly open proposals. In fact, it is stated that this unique procurement method had been used previously by Immigration. In this light, RCA may be said to have acquiesed in the conduct of the procurement which gave rise to the protest. However, protester is not objecting to the method of procurement.

It is our opinion that the protest should be resolved in a manner which effects the least prejudice to responding offerors. We do not believe that award can be made to RCA under the RFP. Section 10(g) of Standard Form 33A, included in the RFP, cautions offerors that the Government may make an award based upon the initial offers received without discussions. Therefore, offers should be stated in the most favorable terms from both a price and technical standpoint.

Inasmuch as prices have been exposed, the opening of discussion at this point would constitute an auction, which is clearly prohibited by FPR 1-3.805-1(b). Therefore, since RCA was aware that proposals would be publicly opened, but misinterpreted the effect that its exception would have, we do not believe that RCA should now be heard to complain of the procedure which works to its disadvantage. *See* B-171482, March 17, 1971. Since Immigration treated the procurement as though it were formally advertised, we believe that the procurement should be treated as formally advertised and award should be made to the lowest responsible offeror without discussions with all offerors. *See*, for example, 52 Comp. Gen. 569 (1973).

Therefore, the protest is denied.

[B-143673]

Courts—Judgments, Decrees, etc.—Compromises—Permanent Indefinite Appropriations—Availability

Judgments and costs (or compromise settlements) assessed against individual Internal Revenue Service employees determined to have been acting within the scope of their employment are payable from the indefinite appropriation established by 31 U.S.C. 724a if not over $100,000 in each case, but funds must be appropriated specifically for that purpose if the amount exceeds $100,000, and in either case, the judgment must be regarded as an obligation of the United States.

In the matter of availability of funds to pay judgments against Internal Revenue Service employees, April 19, 1974:

This decision to the Secretary of the Treasury is in response to a request from the Assistant Secretary for Administration, Department of the Treasury, concerning the availability of funds to pay damages and costs which may be assessed against individual employees of the

Internal Revenue Service (IRS) in the case of *W. P. Dobbs, Bryan T. Dobbs* v. *WSB Television and Radio, et al.*, Civil No. 18151 (N.D. Ga.).

According to the information presented to us, a motion to dismiss the complaint has been denied by the District Court. Before proceeding with the trial, Department of Justice attorneys asked the Department of the Treasury whether it would be able to pay a compromise settlement or final judgment rendered against defendants.

The facts as related to us are as follows: Plaintiffs are in the business of preparing tax returns for clients. They allege that the defendant IRS agents invaded their right to privacy by subjecting them to humiliating and prejudicial media and press publicity in the course of arresting the plaintiffs for allegedly preparing false income tax returns in violation of Internal Revenue laws. The defendant agents state that their actions were in accordance with IRS policies and directives to give maximum publicity to such arrests as a deterrent to other potential offenders. The Treasury Department apparently supports that contention. It has determined administratively that "employee defendants were at all times acting in the official performance of their duties under the Internal Revenue Code." Appropriate Department of Justice officials concur in this determination.

The Assistant Secretary notes that appropriations available to IRS do not provide authority for the payments of judgments and asks our advice as to whether the permanent indefinite appropriation for the payment of judgments not otherwise provided for, established by 31 U.S. Code 724a, would be available to pay a final judgment for damages and costs that may be rendered against individul IRS employees in this case.

Inasmuch as the IRS employees have been administratively determined to have been performing their official duties when the actions giving rise to this suit are alleged to have occurred there is for consideration 26 U.S.C. 7423 which provides that—

> The Secretary or his delegate, subject to regulations prescribed by the Secretary or his delegate, is authorized to repay—
>
> * * * * * * *
>
> (2) *Damages and costs.*
> All damages and costs recovered against any officer or employee of the United States in any suit brought against him by reason of anything done in the due performance of his official duty under this title.

Concerning the above provision of law, we stated in 40 Comp. Gen. 95 (1960) that such provision clearly was intended to exempt any Government officer or employee from liability for civil damages recovered against him in the performance of official duty in relation to the general matters concerning administration of the Internal Revenue laws. We further stated that this statute for all practical purposes con-

verts judgments rendered against individual employees into judgment obligations of the United States. Accordingly, and since no appropriations of IRS were available to pay judgments against the employees there involved in the amount of $400 each, payments of those judgments were authorized to be effected from the indefinite appropriation established by 31 U.S.C. 724a.

In accordance with that decision, we see no reason why a judgment which may be rendered against an individual IRS employee in this case properly may not be paid from such appropriation provided, of course, that such judgment is within the maximum limitation of $100,000 prescribed in 31 U.S.C. 724a. If the individual judgment exceeds $100,000, it will be necessary to request a specific appropriation for payment of the judgment from the Congress.

Since pursuant to 28 U.S.C. 2414 the permanent indefinite appropriation is available for any compromise settlements that may be effected in this case by the Attorney General, what is said above with respect to the payment of judgments would be equally applicable to such compromise settlements.

[B-179644]

Claims—Transportation—Improper Packing Charges—Disallowed

Disallowance of claims presented by motor carrier for improper packing charges under Rule 687 of National Motor Freight Classification relating to shipments known to be classified materials transported under control of Armed Forces Courier Service is sustained where only evidence relating to manner of packing is inference drawn from the fact that GBL contained no description of the packing and where motor carrier is estopped from asserting that shipments were improperly packed because it had knowledge of the security packing.

In the matter of Lee Way Motor Freight, Inc., April 19, 1974:

The Transportation and Claims Division (TCD) of the United States General Accounting Office disallowed claims presented by Lee Way Motor Freight, Inc. (Lee Way) for $3,330.78 on 23 shipments of electrical instruments shipped on Government bills of lading (GBL) by the Armed Forces Courier Service (ARFCOS) from Alexandria, Virginia, to San Antonio, Texas, between December 5, 1967, and December 23, 1968. ARFCOS tendered these shipments to McLean Trucking Co., Inc. (McLean) in accordance with Army Regulation No. 66-5 (AR 66-5) dated June 20, 1966, which covered the administration and operations of that service. McLean knew that the shipments were, for security purposes, classified material.

McLean accepted the shipments at origin and Lee Way delivered them. Upon presentation of its original bills, Lee Way collected freight

charges based on the exclusive use of vehicle service provisions in McLean's Section 22 I.C.C. Tender 1427.

Lee Way presented claims for penalty charges based on Item (Rule) 687 of the governing National Motor Freight Classification (NMFC), alleging that the electrical instruments did not comply with the packing requirements of the classification. Each claim was disallowed because ARFCOS was the shipper and prepared the shipment in accordance with AR 66–5. A copy of that regulation and a copy of the contents of an explanatory administrative report received from the ARFCOS accompanied each disallowance.

In a letter dated August 31, 1973, seeking review of the disallowances, the claimant, citing *Janice, Inc.* v. *Acme Fast Freight, Inc.*, 302 I.C.C. 596, 598 (1958) contends that TCD failed to present sufficient evidence to support its determination of the inapplicability of Rule 687. It contends that:

> The mere fact the settlement certificates indicate the improper packing penalty is not applicable on these movements is not sufficient evidence to disallow our supplemental vouchers without further supporting evidence * * *.

The Interstate Commerce Commission stated in *Janice* (beginning at the bottom of page 597) that the burden is upon the complainant to show by convincing evidence that the commodity descriptions in the shipping papers were erroneous, and that the commodity was of a character embraced within the description on which the rate claimed was applicable.

We do not disagree with the rule of evidence applied in *Janice;* the rule is an incident of the general rule that the party having the affirmative of an issue has the burden of proof. In view of the facts in *Janice*, however, we do not understand how it supports Lee Way's position.

In that case, a shipper initiated a proceeding before the Commission by filing a complaint seeking, in effect, a determination that would have changed the commodity description appearing on the shipping documents. On these facts, the Commission held that a mere statement by the complaining party, without evidence, is not sufficient to prove the nature of the commodity shipped.

Lee Way was paid freight charges upon presentation of its original bills, as required by 49 U.S. Code 66. Subsequently, claims were filed for the penalty charges. Although Lee Way had the burden to show that the articles were not properly packed, our TCD apparently was expected by Lee Way to allow the claims on a mere inference drawn from the fact that the GBLs contained no reference to the packing. TCD properly determined that this was insufficient evidence to carry Lee Way's burden of proof and furnished evidence showing that

ARFCOS was the shipper and had prepared the shipments in accordance with AR 66–5. This evidence, which was peculiarly within the knowledge of the Government, served to rebut Lee Way's inference.

Perhaps for security reasons ARFCOS could not state positively how the shipments were packaged, but it can be inferred from regulations prescribing minimum packaging standards for materials entered into the ARFCOS system that if the equipment had not been packaged according to AR 66–5, it would not have been loaded by the ARFCOS.

Lee Way also contends that AR 66–5, cited on the settlement certificates, is not a "governing publication" under McLean's Section 22 I.C.C. Tender 1427. But under paragraph 7 of the tender, Lee Way, among other things, agreed to perform the transportation "* * * in accordance with all Federal, State or municipal laws and regulations * * *."

Rule 687, which imposes on the shipper a penalty of 10 percent of the applicable freight charges for the improper packing of truckload or volume shipments, reads, in pertinent part:

PACKING OR PACKAGING—NON-COMPLIANCE WITH

* * * this rule applies on articles which do not comply with the packing requirements applicable to the respective articles under the terms of this classification and ONLY when the failure to comply is discovered after the articles have been accepted for transportation.

Applicability of Rule 687 depends upon two questions of fact: whether the electrical instruments were improperly packed, as determined by the commodity description in item 61700 of the governing classification, and if so, whether that fact was discovered by the carriers or their agents after acceptance of the shipments for transportation.

There is no indication on the Government bills of lading as to the manner in which the lading was packaged. The only notation relating to the lading is to a certain number of packages or pieces of "ELECTRICAL INSTRUMENTS, NOI." Item 61700 of the governing classification applies to electrical appliances or instruments, NOI, in inner containers in cloth bags, or in barrels, boxes, or crates or in certain packages.

Rule 360, section 2(c), of the NMFC requires that the kind of package used be shown on the bill of lading. Although, technically, ARFCOS may not have complied with Rule 360, that rule seems to be concerned with the correct identification of the commodity, rather than with the packing used. We believe also that section 3 of Rule 360, giving the carrier a right of inspection, relates to the identification of the commodity, rather than to the packing used.

Ordinarily, the lading is accessible to a carrier's agent at the time a shipment is accepted for transportation; however, in view of the

classified nature of these shipments which were packed in accordance with the standards for security materials entered into the ARFCOS system prescribed in AR 66–5—and which was known to McLean, the origin carrier—the courier officer or officers sealed the trailers and prevented access by the carriers' personnel. Since Lee Way also knew of the security provisions surrounding these shipments when it accepted them from its connecting carrier, it is now estopped from asserting that they were improperly packed.

Lee Way has the burden of proof [*United States* v. *New York, New Haven & Hartford R.R.*, 355 U.S. 253 (1957)] and on the present record there is no competent evidence supporting a conclusion and Lee Way is estopped from showing that each shipment was not packed in accordance with the classification packing requirements.

The disallowance of the claims is sustained.

[B–176601]

Transportation — Dependents — Military Personnel — Dislocation Allowance—Marital Status Disruption

Where at the time of member's permanent change of station, divorce action against member's wife was pending in the court, and the child was in the legal custody of the wife under temporary court order, member is entitled to dislocation allowance pursuant to 37 U.S.C. 407, as a "member without dependents" as defined by paragraph M9001–2, Vol. 1, Joint Travel Regulations (JTR), since he would not be entitled to travel expenses of his dependents for the purpose of changing their place of residence under paragraph M7000–12, Vol. 1, JTR (now item 13), and he was not assigned Government quarters.

In the matter of a claim for dislocation allowance as a member without dependents, April 23, 1974:

This action is an advance decision regarding the entitlement of Lieutenant Colonel Gerald R. Gillie, U.S. Army, 297–28–3310, to a dislocation allowance as a member without dependents. The request for advance decision was submitted by Major C. R. Henderson, U.S. Army, Finance and Accounting Officer, Headquarters Presidio of San Francisco, Presidio of San Francisco, California, by letter of June 1, 1973, file reference AMNPR–FIN(0) and was forwarded here by endorsement dated July 31, 1973, of the Per Diem, Travel and Transportation Allowance Committee, and has been assigned PDTATAC Control No. 73–38.

Headquarters Fort Leavenworth, Fort Leavenworth, Kansas, Special Orders No. 65 dated April 5, 1971, ordered Colonel Gillie to proceed on a change of permanent station from Fort Leavenworth, Kansas, to Brigham Young University, Provo, Utah. Colonel Gillie reported to his new duty station, as specified in his orders, on July 12,

1971, and submitted a claim for dislocation allowance as a member without dependents.

It is stated that Colonel Gillie filed for a divorce and appeared in court on June 14, 1971, at which time his wife was awarded custody of their dependent child, and that under Virginia law a defendent is required to comply with a mandatory waiting period of 1 year before the final divorce decree can be granted, in this case June 14, 1971, to July 6, 1972, and that it was during this mandatory waiting period that the permanent change of station to Brigham Young University took place.

It is indicated that since Colonel Gillie had a wife and child, he was considered to be a member with dependents, as defined by Paragraph M9001–1, Volume I, Joint Travel Regulations, who did not move these dependents upon permanent change of station, and, therefore, his claim was denied. However, in view of decision B-176601, March 27, 1973, rendered subsequent to the disallowance of Colonel Gillie's claim, it is now requested that a determination regarding entitlement to dislocation allowance as a member without dependents be made, since the member's permanent change of station took place subsequent to the initial court order but prior to the time the final decree of divorce was granted.

It appears from the record that a temporary order issued by the Juvenile and Domestic Relations Court of Fairfax County, Virginia, dated July 31, 1970, granted to Leslie Gillie, the member's wife, custody of their infant child, Trina Gillie. Colonel Gillie petitioned the Circuit Court of Fairfax County, Virginia, for a decree of divorce. This cause was heard on June 14, 1971, and the final decree of divorce was entered on July 6, 1972, following the 1-year statutory waiting period. During the interim, custody of the child apparently remained with the mother and on August 6, 1971, the Circuit Court ordered Colonel Gillie to pay $200 per month support and maintenance for the child, *pendente lite*, retroactive to August 1, 1971. The record also indicates that Colonel Gillie has not been assigned Government quarters.

Pursuant to 37 U.S. Code 407, under regulations prescribed by the Secretary concerned, a member of a uniformed service without dependents who is transferred to a permanent station where he is not assigned Government quarters is entitled to a dislocation allowance equal to his quarters allowance for 1 month. For the purpose of section 407, it is provided that a member whose dependents may not make an authorized move in connection with a change of permanent station is considered a member without dependents.

The regulations authorized to be prescribed are contained in the Joint Travel Regulations, Volume 1, Paragraph M9001–2 which provides that the term "member without dependents" means a member, regardless of pay grade, who has no dependents or who is not entitled to transportation of dependents under the provisions of paragraph M7000 in connection with a change of permanent station.

Paragraph M7000 of the regulations provides that, other than for specifically enumerated exceptions, members of the uniformed services are entitled to transportation of dependents at Government expense upon a permanent change of station or between points otherwise authorized in the regulations. Among the exceptions, item 12 (now item 13) provides that members of the uniformed services are not entitled to reimbursement for any travel of dependents between points otherwise authorized in the regulations to a place at which they do not intend to establish a residence and that travel expenses of dependents for purposes other than with intent to change the dependent's residence, as authorized in the regulations, may not be considered an obligation of the Government.

In decision B–178191, June 21, 1973, in circumstances where the court order did not specifically provide, but where it was apparent that the member's wife had been awarded custody of their children and they were living separate and apart from the member under a separate maintenance decree, and therefore, the member was not entitled to transportation at Government expense for either his wife or children for the purpose of changing their place of residence, the member was considered as a member without dependents, entitled to a dislocation allowance on that basis. *See also* decision B–178229, September 14, 1973, and cases cited therein.

Since it appears that at the time of the member's permanent change of station legal custody of the child was retained by the member's wife, who was living separate and apart from the member, he was not entitled to transportation of dependents for the purpose of changing their place of residence. Therefore, Colonel Gillie is to be regarded as a member without dependents, and since he was not assigned Government quarters he is entitled to a dislocation allowance on that basis.

The travel voucher may be paid as indicated above, if otherwise correct.

[B–180109]

Compensation—Wage Board Employees—Coordinated Federal Wage System—Environmental Differential

Veterans Administration (VA) employee claimed environmental differential under FPM Supplement 532–1, S8–7 and Appendix J, for cold work. Fact that VA furnished protective clothing for work in the cold storage area does not

defeat entitlement since employee performed work which Appendix J lists as qualifying for the differential and no provision is made for alleviating discomfort. Where VA does not have past records of actual periods of exposure, which normally constitute basis for payment of cold work differential, payment may be based on most reasonable estimate after consideration of all available records.

In the matter of prevailing rate employees' environmental differential, April 24, 1974:

The Controller of the Veterans Administration (VA), by his letter dated October 9, 1973, requests reconsideration of the determination by our Transportation and Claims Division that Mr. James H. Lee, a food service worker employed by the VA, is entitled to payment of an environmental differential of 4 percent for cold work under Appendix J of Federal Personnel Manual (FPM) Supplement 532-1. In addition the Controller explains that while environmental differential pay for "cold work" is based on actual exposure, records do not reflect specific dates and times that Mr. Lee performed duty in a cold storage area. He therefore requests to be furnished general guidelines for use in determining the amount of compensation due Mr. Lee in the event that upon reconsideration our Transportation and Claims Division's determination is upheld.

In regard to his request for reconsideration of the determination that Mr. Lee is entitled to payment of an environmental differential, the Controller states that the claimant's employing station's action complied fully with the intent and objectives of paragraphs S8-7a and d of FPM Supplement 532-1 and that payment of Mr. Lee's claim would require some change or modification to the language of these paragraphs. The regulations in effect during the period of Mr. Lee's claim provided:

a. *Objective.* Each agency should have as its objective the elimination or reduction to the lowest level possible of all hazards, physical hardships, and working conditions of an unusually severe nature. When the agency action does not overcome the unusually severe nature of the hazard, physical hardship, or working condition, an environmental differential is warranted. Even though an environmental differential is authorized, there is an agency responsibility to initiate continuing positive action to eliminate danger and risk which contribute or cause the hazard, physical hardship, or working condition of an unusually severe nature. The existence of environmental differentials is not intended to condone work practices which circumvent Federal safety laws, rules, and regulations.

* * * * * * *

d. *Authorization for pay for environmental differential.* (1) Pay is authorized for exposure to an unusually severe hazard which could result in significant injury, illness, or death, such as on a high structure when the hazard is not practically eliminated by protective facilities or on an open structure when adverse conditions such as darkness, lightning, steady rain, snow, sleet, ice, or high wind velocity exists.

(2) Pay is authorized for exposure to an unusually severe physical hardship under circumstances which cause significant physical discomfort or distress not practically eliminated by protective devices.

(3) Pay is authorized for exposure to an unusually severe working condition under circumstances involving exposure to fumes, dust, or noise which cause significant distress or discomfort in the form of nausea, or skin, eye, ear, or nose irritation or conditions which cause abnormal soil of body and clothing, etc., and where the distress or discomfort is not practically eliminated.

The Controller, in previous correspondence dated December 1, 1972, explained the VA's basis for administrative denial of Mr. Lee's claim as follows:

* * * As outlined in sections S8–7a and d of FPM Supplement 532–1, the basic objective for employee safety is to eliminate, or reduce to the maximum extent possible, all hazards; when the hazard is not practically eliminated or overcome, the environmental differential is payable. With respect to cold work, protective clothing is provided VA employees upon entering cold storage rooms, and they are not usually required to be so continuously exposed to the cold as to exceed the protective limits of the clothing. Although prolonged exposure in cold storage rooms could be a basis for the 4% differential for cold work, there is nothing in the claim file to indicate such prolonged exposure. * * *

Essentially the VA's position is that the mere listing of work in cold storage areas at temperatures below freezing in Appendix J as a category of work for which a 4 percent differential is payable is not conclusive as to entitlement where the physical distress or discomfort involved is practically eliminated by protective clothing furnished by the VA.

The issue here involved is not whether the protective clothing provided by the VA in fact ameliorated the discomfort involved in working in a cold storage area—an issue as to which the VA's and claimant's positions are at odds. Rather, the issue is the purely legal one of whether, under applicable regulations in subchapter S8–7 and Appendix J of FPM Supplement 532–1, the 4 percent environmental differential for work in cold storage areas is payable notwithstanding that the discomfort is to an extent eliminated by the furnishing of protective clothing. In this regard the above-quoted paragraphs, as well as the following from subchapter S8–7, are for consideration:

e. *Establishment of environmental differentials.* (1) Appendix J is a schedule of environmental pay differentials which defines methods of payment and various degrees of hazards, physical hardships, and working conditions, each of an unusually severe nature, for which the differentials are payable. The amount of the differentials are listed in appendix J. Environmental differentials are authorized only when the exposure is under the circumstances described in the category listed in appendix J, except as provided in paragraph i. * * *

(2) Environmental differentials are stated as percentage amounts and are authorized for the categories of exposures as described in appendix J. * * *

* * * * * * *

f. *When environmental differential is paid.* (1) An agency shall pay the environmental differential in appendix J to a wage employee paid under a Federal Wage System wage schedule when the employee is performing assigned duties which expose him to an unusually severe hazard, physical hardship, or working condition listed in appendix J, on or after the effective date specified.

* * * * * * *

g. *Determining local situations when environmental differentials are payable.* (1) Appendix J defines the categories of exposure for which the hazard, physical hardships, or working conditions are of such an unusual nature as to warrant environmental differentials, and gives examples of situations which are illustrative of the nature and degree of the particular hazard, physical hardship, or working condition involved in performing the category. The examples of the situations are not all inclusive but are intended to be illustrative only.

(2) Each installation or activity must evaluate its situations against the guidelines in appendix J to determine whether the local situation is covered by one or more of the defined categories.

(a) When the local situation is determined to be covered by one or more of the defined categories (even though not covered by a specific illustrative example), the authorized environmental differential is paid for the appropriate category.

Appendix J, Part 1, at paragraph 5 provides:

5. *Cold work.* Working in cold storage or other climate-controlled areas where the employee is subjected to temperatures at or below freezing (32 degrees Fahrenheit).

Paragraphs a and d relied upon by the VA are general statements. Paragraphs e, f and g explain essentially that inclusion of a category of work, under the conditions for that category in Appendix J, amounts to a determination that such work meets the general criteria and objectives for payment of an environmental differential set forth at paragraphs a and d.

Payment of the differential for certain categories of work included at Appendix J is conditioned upon the discomfort, condition or hazard not being to some extent alleviated. We refer in this regard to the following categories of work listed at Part I of Appendix J: high work at lesser heights, dirty work, and work involving welding of preheated metals. At Part II of Appendix J, payment of a differential for the following categories of work is similarly conditioned: work with explosives and incendiary materials involving a high degree of hazard, work with poisons involving a high degree of hazard, and work with micro-organisms involving a high degree of hazard. Other categories of work, of which cold work is one, are not so conditioned. Those unconditioned categories listed at Part I of Appendix J include flying, high work at 100 feet or above, work on floating targets, hot work, cold work, and micro-soldering or wire welding and assembly. Unconditioned categories of work listed at Part II of Appendix J include duty abroad submerged vessels, work with explosives and incendiary materials involving a low degree of hazard, work with poisons involving a low degree of hazard, and work with micro-organisms involving a low degree of hazard.

To adopt the VA's construction of the regulation—that the language of paragraphs a and d regarding elimination of the hazard, hardship or severe working condition involved is a condition to payment to be

imposed in addition to such conditions as may be included in the definition of categories of work defined at Appendix J—is to render redundant the language as is used in defining the categories listed at Appendix J. There is a strong presumption against construction of a statute or regulation which renders any language thereof redundant and we are offered and find no compelling reason to adopt such a construction in this case.

Work in a cold storage area, such as Mr. Lee performed, qualifies for payment of the 4 percent differential insofar as the employee is subjected to temperatures at or below freezing. On the record, we find no dispute of fact as to whether the work Mr. Lee performed was of such nature and thus affirm the finding of our Transportation and Claims Division that Mr. Lee is entitled to payment of the differential.

The 4 percent environmental differential for cold work is payable on an actual exposure basis in accordance with subparagraph S8–7 of FPM, Supplement 532–1. In regard to the basis for payment of the differential, the Controller states:

> As you have indicated, environmental differential pay for "cold work" is based on actual exposure as opposed to hours in a pay status. During the course of a regularly scheduled eight hour tour of duty, Mr. Lee may have entered the cold storage area on several occasions including, in all likelihood, two or more times within the same one hour period of time. Through telephonic communication with the station it has been learned that records, which would document the specific dates and times Mr. Lee performed duty in a cold storage area, do not exist. This lack of information is the result of the station's determination that Mr. Lee was not eligible for environmental differential pay. Based on this lack of documentation, we regret that we are unable to furnish the requested pay computations. Accordingly, it is requested that we be furnished general guidelines which may be utilized in developing the amount of retroactive compensation payable to Mr. Lee.

We recognize that determination of the amount due poses a difficult problem because of the lack of records. However, in cases where it is known that over a period of time employees have performed duty for which they are entitled to additional pay and doubt exists only as to the particular days or hours on which the qualifying work was performed, this Office has approved payment therefor based upon the most reasonable estimate after consideration of all available records. *See* 50 Comp. Gen. 767 (1971) and B–170182, December 26, 1973. In this connection the agency was advised in July 1973 that Mr. Lee was entitled to payment of the differential. Since the date such notice was received, we assume that records have been maintained showing periods when Mr. Lee performed work qualifying for the differential. Such records may be used in preparing a reasonable estimate of qualifying work during the period in question.

[B-179334]

Gratuities—Reenlistment Bonus—Critical Military Skills—Training in Related Skill in Same Occupational Field

Marine Corps member serving in a critical skill at the time of his reenlistment is entitled to a variable reenlistment bonus under 37 U.S.C. 308(g) notwithstanding the fact that he reenlisted for the purpose of being trained and serving in a new critical skill since such new skill was within the same occupational field as the old skill and the new skill would require the use of the old skill plus additional training and, thus, the old skill would continue to be utilized and not lost to the Marine Corps.

In the matter of entitlement of variable reenlistment bonus, April 25, 1974:

This action is in response to a letter (file reference 430:RSM:cds 7200) from Mr. R. S. Muza, Disbursing Officer, United States Marine Corps Supply Activity, Philadelphia, Pennsylvania, requesting an advance decision as to whether Sergeant Robert C. Radle, USMC, 187 42 0796, is entitled to a variable reenlistment bonus incident to his reenlistment in the Marine Corps on June 22, 1973. The request was forwarded to this Office by Headquarters United States Marine Corps letter dated July 31, 1973 (file reference CD–wsd 7220/4) and has been assigned Control Number DO–MC–1200 by the Department of Defense Military Pay and Allowances Committee.

The submission states that at the time Sergeant Radle reenlisted, he held the military occupational specialty (MOS) of 2851, Aviation Radio Repairman. However, prior to and contingent on his reenlistment the Marine Corps authorized his assignment to courses of instruction leading to his establishment of and service in MOS 2861, Radio Technician. That assignment was effected 3 days after his reenlistment. At the time of Sergeant Radle's reenlistment, both MOS 2851 and MOS 2861 were designated as critical skills eligible for a variable reenlistment bonus at the "multiple 4" level.

Since Sergeant Radle was reenlisted for the purpose of being trained and serving in MOS 2861 and not MOS 2851, the critical skill he held at the time of his reenlistment and upon which his variable reenlistment bonus was to be based, the disbursing officer expresses doubt as to his entitlement to such a bonus. The Headquarters Marine Corps transmittal letter indicates that such doubt apparently stems from our decision 52 Comp. Gen. 416 (1973), in which we expressed the view that where it is known at the time of reenlistment that the member is not to be utilized in the critical skill which he possesses and upon which the variable reenlistment bonus is based, the purpose of the bonus is defeated and no entitlement to it accrues, whether or not the new skill in which the member is to be trained and serve is a critical skill.

However, enclosed with the disbursing officer's letter is a line-flow diagram from Marine Corps Order P1200.7B (MOS Manual) that reflects promotional progression and skill relationships in occupational field 28, Telecommunications Maintenance, which field includes both MOS 2851 and MOS 2861. As is stated in the transmittal letter, that diagram indicates that MOS's 2851–53 normally progress to MOS's 2861–66 upon advancement in grade and completion of additional training. Also, the description of the duties associated with MOS 2861 apparently embraces all the duties of MOS 2851 and in addition requires higher level and more extensive skills. The transmittal letter states, therefore, that in view of the relationship between MOS 2851 and 2861 it is not certain that the principle stated in 52 Comp. Gen. 416, *supra*, applies in this case. In fact it is indicated that it could be considered that Sergeant Radle will continue to perform the duties of the critical skill he possessed at the time of reenlistment and on which his variable reenlistment bonus would be based even though such duties are performed under a different MOS, and he will also be required to utilize higher level skills in the new MOS.

The variable reenlistment bonus is authorized by 37 U.S. Code 308 (g) which provides in pertinent part as follows:

> (g) Under regulations to be prescribed by the Secretary of Defense * * * a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. * * *

In 47 Comp. Gen. 414 (1968), we held that Department of Defense administrative regulations then in effect, issued pursuant to 37 U.S.C. 308(g), contemplated payment of the variable reenlistment bonus only to a member who possesses a military skill in critically short supply, as an inducement to reenlist for the purpose of retaining the use of his service in such specialty, which was precisely the intent of Congress in authorizing the variable reenlistment bonus. Accordingly, we held in 52 Comp. Gen. 416 that a Marine Corps member who at the time of his reenlistment was qualified and serving in MOS 0351, Antitank Assaultman, a critical skill, was not entitled to a variable reenlistment bonus when it was known prior to his reenlistment that upon reenlisting his MOS was to be changed and he was to be trained in a new and totally different skill (occupational field 21, Armament Repair) and was not to be utilized in the critical skill which he possessed at the time of reenlistment and upon which his bonus was to have been based.

That decision is consistent with other decisions in which we have repeatedly held, in effect, that the variable reenlistment bonus is a form of additional compensation for individuals serving in the critical military skills and, while payment of the bonus is not affected

by subsequent duty changes, the reenlistment must be for the purpose of continuing to serve in such critical skill. Thus, we have held that no entitlement to the bonus accrued to enlisted members who had been selected for college training leading to commissioning as officers who reenlisted for the purpose of meeting obligated service requirements for such training (47 Comp. Gen. 414, *supra*); to an enlisted member who was discharged and reenlisted while undergoing training in an Officer Candidate School Program (48 Comp. Gen. 624 (1969)); to an enlisted member who had been tentatively appointed a Reserve officer prior to his reenlistment (49 Comp. Gen. 206 (1969)); or to an enlisted member reenlisted while undergoing training in a program such as the Naval Academy Preparatory School designed to aid enlisted members to attend and graduate from the Naval Academy and serve as officers in the Navy (52 Comp. Gen. 572 (1973)).

However, in 51 Comp. Gen. 3 (1971), we recognized that in some instances further training of members possessing critical skills may be desirable in those skills after reenlistment. In that decision we authorized payment of the variable reenlistment bonus to a member who reenlisted to acquire necessary obligated active duty remaining to enable him to participate in the Marine Corps Associate Degree Completion Program. There, we said that where a major course of study pursued is reasonably related to the member's critical skill and where it is contemplated that upon completion of those studies he will resume his duty in the same skill in which he performed prior to his assignment to the training program, the bonus is authorized.

In the instant case, the member, while not retaining exactly the same MOS he held at reenlistment, will remain in the same occupational field (28–Telecommunications Maintenance). It is indicated that he will continue to utilize the critical skill he held at the time of his reenlistment, building upon such skill with additional training to become more highly skilled in the Telecommunications Maintenance field and advance in grade. Thus, his critical skill will not be lost to the Marine Corps but will be more fully utilized as he receives further training and advances within his occupational field. This case, therefore, differs materially from the situation in 52 Comp. Gen. 416, *supra*, wherein it was contemplated prior to reenlistment that after reenlistment the member would be trained and serve in a new skill apparently unrelated to the skill which he held at reenlistment and, thus, such old skill would be lost to the service and the training of a replacement required.

Therefore, in the circumstances of this case we see no bar to the payment of a variable reenlistment bonus. Accordingly, if otherwise correct, payment on the bonus, multiple 4, may be made to Sergeant Radle.

[B-180195]

Bids—Evaluation—On Basis Other Than on Invitation—Information Deviating From Specifications

Award for transportation services evaluated on basis of oral announcement at bid opening instead of evaluation method provided in IFB which would have resulted in different bidder being successful should be terminated for the convenience of the Government and requirement resolicited, since oral statement was not binding on bidders; moreover, bids may not be evaluated on different basis than stated in IFB. Bidders were effectively denied opportunity to consider whether bids should be modified and FPR 1-2.207(d) precludes award in such circumstance.

Bids—Evaluation—Estimates—Requirements Contract

Invitation for bids is defective where no estimated quantities of services advertised are stated as required by FPR 1-3.409(b)(1) and prior GAO decisions.

In the matter of Jacobs Transfer, Inc.; Kane Transfer Company, April 25, 1974:

On November 1, 1973, Solicitation No. 3TTM-801 was issued by the Transportation Management Division, Federal Supply Service, General Services Administration (GSA) to secure a requirements contract for pickup and/or delivery service for store-stock merchandise between the Franconia Stores Depot in Virginia and points within the Washington, D.C. Commercial Zone, Laurel and Fort George G. Meade, Maryland. The contract would be for a period of 1 year beginning December 1, 1973, and ending November 30, 1974, with an option to extend for two 1-year periods.

By Amendment No. 1, bid opening was extended to November 19, 1973. The METHOD OF AWARD clause (paragraph 21) contained in the solicitation provided:

Award will be based on the basis of rate per 100 pounds to lowest responsible bidder. Minimum charges will not be considered and no multiple awards will be made.

The RATES AND CHARGES clause (paragraph 22) stated:

(a) Rate on Stores Stock Items in any Quantity of Weight_____ $
(b) Minimum charge per shipment on Emergency Shipments of Stores Stock Items_____ $
(c) Rate on Stores Stock Items Applicable on Shipments made on Saturdays, Sundays and Federal Holidays in any Quantity of Weight _____ $
(d) Hourly charges, where authorized by Federal Supply Service (Helper Only)_____ $
Vehicle and Driver_____ $

The solicitation also required bidders to certify that they either hold or do not hold authorization from the Interstate Commerce Commission (ICC) or other cognizant regulatory body and to furnish copies of the authorization if requested.

Very shortly before bid opening, the exact moment being in dispute, it was stated to everyone present in the GSA bid room, including the protester:

> Only one price will be read, and that price will be the price entered under paragraph 22(a) of the invitation. This price will be the figure used in evaluating the bid for award purposes.

No objection or question was raised as to the proposed method of award.

On November 21, 1973, Jacobs Transfer, Inc (Jacobs), by letter to the contracting officer, asserted that based on the METHOD OF AWARD clause it, rather than Kane Transfer Company (Kane), should be the low bidder. On the same day, counsel for Jacobs, by a separate letter to the contracting officer, alleged that Kane was not a responsible or eligible bidder. Specifically, Jacobs alleged that Kane did not possess proper authority to transport certain commodities from Virginia northbound to certain areas contemplated in the solicitation. The contracting officer, after due consideration, concluded that Kane was a responsible contractor and had properly been evaluated as the low offeror and thereafter made award to Kane on November 30, 1973. On December 3, 1973, Jacobs, through counsel, filed the protest with our Office.

Jacobs contends that the METHOD OF AWARD clause, although specifically omitting minimum charges (paragraph (b)), did not specifically preclude evaluating a bid price for paragraph (c) under the RATES AND CHARGES clause. Jacobs therefore contends that had GSA evaluated the bids on the basis of both paragraphs (a) and (c), Jacobs, rather than Kane, would have been the low bidder. Jacobs further asserts that the statements made prior to bid opening as to the evaluation method for the bids were improper and not binding.

GSA has responded that Jacobs has been a Government contractor for nearly 10 years as a result of contracts awarded for the same requirement in 1964, 1967, and 1970. According to GSA, none of the contracts were awarded on the basis of an overtime rate, although at least the 1970 solicitation required bidders to indicate such a rate in the bids. In view of this background, GSA believes that it would be somewhat inconceivable that Jacobs expected that the award would be made on the basis of the combination of the paragraph (a) normal rates and (c) overtime rates of the RATES AND CHARGES clause.

In any case, GSA contends that it is totally unreasonable to interpret the clauses as suggested by the protester. Paragraph (c), relating to shipments to be made on Saturdays, Sundays and Federal holidays, would only be utilized where movement could not possibly be accomplished during the normal work week. As a practical matter, it would

therefore be impossible to estimate the amount of weekend and holiday movement with any degree of accuracy. To give as much weight to the bidding prices for movement during the normal work week under paragraph (a) as for movement on the weekends under paragraph (c) lends itself to an unbalanced bidding situation whereby a bidder could bid low on paragraph (c) where little traffic is expected and bid high under paragraph (a) where the main bulk of the movement is anticipated.

Finally, GSA relies on the statement made just prior to bid opening as fixing the method of award. GSA contends that since no party either raised an objection or questioned the proposed method of award it should stand.

Our review of the provisions of the invitation for bids (IFB) leaves no doubt that paragraphs 21 and 22 contemplated and required the evaluation of bid prices by including both subparts (a) and (c). While GSA actually may not have intended to evaluate bids on that basis, the rule is settled that bids may not be evaluated on a different basis than that set out in the IFB. B–148749, June 25, 1962. Moreover, paragraph 3 of the Solicitation Instructions and Conditions, Standard Form 33A, states, "Oral explanations or instructions given before the award of the contract will not be binding."

Kane's bid on item (a) in the amount of $0.714 per 100 pounds was evaluated by GSA as lower than Jacobs' bid in the amount of $0.758 per 100 pounds less a 5 percent prompt payment discount. As a result of this evaluation, Kane was awarded the contract. However, evaluation in accordance with the terms of the solicitation would have required consideration of the amounts quoted under paragraph (c)—Jacobs, $1.438; Kane, $1.428 resulting in net bids of—Jacobs, $2.086 (including applicable discount factor) and Kane, $2.142. Therefore, Jacobs should have been determined to be the low bidder, if relative quantities are ignored.

Federal Procurement Regulations (FPR) section 1–2.207 provides for the issuance of a written amendment when it becomes necessary before bid opening to make changes in the IFB. The change in this instance was oral and in no way complied with FPR. Further, FPR 1–2.207(d) states:

> * * * No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

Thus, the regulations contemplate that no award be made unless all prospective bidders have an opportunity to consider changes in the invitation and have an opportunity to modify their bids as a result of such information. In this case, although all bidders were in attendance

at the bid opening, they were effectively denied an opportunity to consider whether they wished to modify their bids. In that regard, the attorney for Kane has indicated that under the previous procurement for the services, GSA issued a formal amendment to provide for evaluation of bids on a non-overtime basis alone. In view of the mandate in FPR 1-2.207(d), no award should have been made under the invitation.

In addition, the invitation was defective. First, FPR 1-3.409(b)(1) provides that in a requirements contract—

> * * * An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. * * *

Second, our Office has held that bids must be evaluated on the basis of the estimated number of work units to be accomplished under the contract. 47 Comp. Gen. 272 (1967); 43 *id.* 159 (1963). Further, in B-173183, September 7, 1971, it was stated:

> * * * Although it may indeed be administratively difficult, we feel the establishment of estimated quantities by some reasonable means, recognizing the limitations on accuracy inherent in the most accurate means available in some situations, would clearly be superior to utilizing no weight factor at all. * * *

In view of the foregoing, it is recommended that the award to Kane be terminated for the convenience of the Government and the procurement be resolicited under an invitation which provides for evaluation of bids based on the estimated quanity of services for the entire range of categories involved [(a) through (d)].

In the circumstances it would be academic to discuss the ICC authority of Kane necessary for the contract. Therefore, that point will not be considered.

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.

[B-179703]

Contracts — Negotiation — Evaluation Factors — Additional Factors—Not in Request for Proposals

Consideration of additional evaluation factors not contained in request for proposals (RFP) was proper in view of fact that additional factors are sufficiently correlated to general criteria shown in RFP to satisfy requirement that prospective offerors be advised of evaluation factors which will be applied to their proposals; however, failure to disclose additional factors raises questions of impartiality of evaluation and weakens integrity of procurement system.

Contracts—Negotiations—Evaluation Factors—Criteria—Subcriteria

Although offerors under request for proposals should be informed of relative weights of main categories of evaluation factors, failure to disclose relative weights of subcriteria does not warrant question by GAO if subcriteria used are of such nature as to be "definitive" of main criteria as opposed to being essential characteristics or measurements of performance of end item being procured. 51 Comp. Gen. 272 modified.

Contracts—Negotiation—Evaluation Factors—Price Elements for Consideration—Cost Estimates

Use of adjusted Independent Government Cost Estimate (IGCE) in evaluation of proposals, and addition of 41 percent factor to all cost proposals appears proper as use of adjusted IGCE was neither arbitrary nor capricious and constituted an exercise of proposal evaluation responsibility.

Contracts—Negotiation—Awards—Propriety—Evaluation of Proposals

Normally, GAO will not substitute its judgment for that of contracting officials by making independent determination as to what areas should be considered during evaluation and thereby influence which offeror should be rated first and receive award; such determinations being questioned only upon clear showing of unreasonableness or favoritism, or upon clear showing of violation of procurement statutes and regulations.

Waivers—Gold Flow—Negotiated Procurement

Gold flow waivers, properly obtained through Army channels, are not subject to question at this time, as request for waiver is within discretion of procuring agency and even though reasonable men may differ as to soundness of rationale behind request, GAO will not substitute its own judgment when no error has been committed in obtaining waivers.

In the matter of AEL Service Corporation; Federal Electric GmbH/ Siemens Aktiengesellschaft; Philco-Ford Corporation; Page Communications Engineers, April 26, 1974:

On March 5, 1973, request for proposals (RFP) No. DAJA37-73-R-0423, was issued by the United States Army Procurement Agency, Europe (USAPAE), for the engineering and installation of various communication devices intended to provide Armed Forces television coverage to various United States military elements located throughout the Federal Republic of Germany. Forty firms received copies of the RFP. On March 30, 1973, a solicitation conference was held to clarify any questions held by prospective offerors. Eleven firms were represented at the conference. The closing date for submission of proposals in response to the solicitation was set for April 30, 1973. Offers were received from the following firms:

AEL Service Corporation (AEL)
Federal Electric/Siemens (FE/S) (a joint venture)

Page Communications Engineers
Philco-Ford
Sanders Associates

On May 2, 1973, the proposals were furnished to the Source Selection Evaluation Board (SSEB) for evaluation in accordance with the evaluation plan dated April 25, 1973.

Between June 20, 1973, and August 13, 1973, negotiations were conducted with all offerors who had submitted proposals. Audit reports were received and used during the cost negotiations. The negotiations were conducted in two phases; technical and cost. Technical negotiations with AEL were held on June 26, 1973. Prior to the negotiations, the contracting officer, in a letter dated June 12, 1973, advised AEL of certain questions that should be answered at the technical negotiations and that there was a significant problem with AEL's cost proposal. AEL reassured the contracting officer that all difficulties would be resolved. The best and final offer due date was established as August 15, 1973, in order to permit all offerors sufficient time to consider amendment 0004, issued July 10, 1973.

Upon receipt of the best and final offers from each offeror, the final evaluations were made. The SSEB recommended FE/S for award as having received the highest total composite score, and as having submitted the best overall proposal when considering all of the evaluation criteria used. The contracting officer, after consideration of the SSEB report, made his own decision in favor of FE/S and award was thereafter made to FE/S.

AEL protests this award alleging that the contracting officer grossly abused his discretion respecting source selection and, as a result, violated the applicable regulations pertaining to criteria for awards under negotiated procurements. More specifically, AEL raises the following contentions: (1) the evaluation criteria were improperly applied; (2) the RFP contained inherent deficiencies that require it to be canceled; (3) the evaluation process was tainted by bias, irrationality, and ignorance; and (4) award to FE/S would result in an adverse gold flow situation. In accordance with section 20.9 of our Interim Bid Protest Procedures and Standards, 4 CFR, AEL exercised its right to offer oral argument in support of its position. Our Office extended the opportunity to all parties expressing an interest in this matter to attend an informal conference on January 8, 1974.

The purpose of a conference is to crystallize the issues before our Office and to afford all interested parties an opportunity to present their views on the merits of the protest. Also, our Office gains further insight, not readily discernible from the record, into significant factors inherent in the particular procurement being protested. Though we invited Army representatives to attend the conference, the invitation

was declined, apparently because it is contrary to Army policy to attend protest conferences. Though we are unaware of the policy considerations involved, it is difficult for us to understand how attendance could be adverse to the interest of the Army or deleterious to its procurement process. We would like to point out that other procurement agencies participated in these conferences and have acknowledged their usefulness. We have therefore suggested to the Department of the Army that this policy be reconsidered since the advantages to be gained are significant.

I. WERE THE EVALUATION CRITERIA PROPERLY CONSTRUCTED AND APPLIED?

As stated in paragraph 3-501(a) of the Armed Services Procurement Regulation (ASPR), proper procurement procedure requires that solicitations contain the information necessary to enable a prospective offeror to prepare a proposal or quotation properly. It is AEL's contention that the Army has failed to do this.

AEL asserts that the RFP misinformed offerors as to the bases for evaluation of their "technical" and "management" proposals in that the number of criteria listed on the RFP was fewer than the number actually used (and stated) in the evaluation plan. Additionally, the RFP appeared to indicate that each evaluation criterion was of relatively equal weight, whereas the evaluation plan disclosed great disparities in value between the evaluation criteria.

The evaluation plan, as set forth in the RFP, was as follows:

D-2 *PROPOSAL EVALUATION FACTORS*

1. *Technical Adequacy* [500 points]
   a. *Proposal.* * * *
   b. *Understanding of Requirements.* * * *
   c. *Feasibility of Approach.* * * *
   d. *Completeness of Proposals.* * * *
   e. *Specifications and Standards.* * * *
   f. *Publications.* * * *
2. *Company Responsibilities* [300 points]
   a. *Company Experience.* * * *
   b. *Personnel.* * * *
   c. *Acceptance of Responsibility.* * * *
3. *Price* [200 points]

The evaluation plan actually utilized, however, was as follows:

PROPOSAL EVALUATION FACTORS

1. *Technical Adequacy* [500 points]
   a. *Proposal.*
   b. *Understanding of Requirement.*

c. *Feasibility of Approach.*
d. *Completeness of Proposal.*
e. *Specifications and Standards.*
f. *Publications*
g. *Alarm System.*
h. *Logistics.*

2. *Company Responsibilities* [300 points]
   a. *Company Experience.*
   b. *Personnel.*
   c. *Acceptance of Responsibility.*
3. *Price* [200 points]
   a. *Estimated Target Cost & Fees.*
   b. *Relationship of Share Ratio, Target Fee, Max Fee, Min Fee to Target Costs.*
   c. *Cost Accounting and Reporting System.*
   d. *Financial Position of Company & Related Cost Impact.*
   e. *Qualifications & Assignments of Personnel & Related Costs Impact.*
   f. *Technical Adequacy or Superiority of Quotations & Related Cost Impact.*

Although the additional evaluation criteria may not be easily categorized under the categories as set forth in the RFP, we believe there is sufficient correlation betwen the additional evaluation factors used and the generalized categories shown in the RFP to satisfy the requirement that prospective offerors be advised of the evaluation criteria which will be applied to their proposals. *See* 51 Comp. Gen. 397 (1972); 50 *id.* 565, 574 (1971).

We are, however, concerned with the fact that the procuring agency had the new evaluation plan prior to the date set for initial receipt of proposals but failed to disclose the additional criteria to prospective offerors. This could have been accomplished by issuing an amendment to the RFP as is detailed in ASPR 3–505 concerning corrections of defects in an RFP. In our opinion, the integrity of the competitive procurement system demands the timely disclosure of evaluation data to prospective offerors so that both the procuring activity and the responding offerors may be on a common ground as to the basis of award selection. We believe this to be an important step in the negotiated procurement process since offerors formulate their proposals on the basis of the known evaluation factors. In our opinion, withholding of relevant evaluation criteria raises the question of impartiality of the evalution process. The benefits that inure to the Government through full timely disclosure of all relevant evaluation criteria are

apparent. Moreover, withholding of relevant evaluation criteria, be it intentional or not, could adversely affect the integrity of the system.

In regard to AEL's contention concerning deception as to the relative weights of the evaluation criteria, it has been the consistent position of our Office that offerors should be placed in a position to make accurate and realistic proposals by informing them in the solicitation of the relative importance to be attached to each evaluation factor. 51 Comp. Gen. 272, 279 (1971); 50 *id.* 565, 575, *supra;* 49 *id.* 229, 230 (1969); 47 *id.* 336, 342 (1967); 44 *id.* 439, 442 (1965). Accordingly, we have held that each evaluation factor and its relative importance should be disclosed to offerors. 51 Comp. Gen. 272, *supra;* B–167867, January 20, 1970; B–167508, December 8, 1969; 48 Comp. Gen. 314, 318 (1968).

Conceding the efficacy of this principle, we believe that its effect should be limited to the principal evaluation factors which form the judgmental bases for award. That is to say, not all subcriteria of the principal factors need be treated in the same manner as the principal criteria. In the instant case, the subcriteria listed under "Technical Adequacy" may be categorized as definitively descriptive of the main criterion. In our opinion, subcriteria in the nature of "Proposal," "Understanding of Requirements," "Feasibility of Approach," "Completeness of Proposal," "Specifications and Standards," "Publications" and "Logistics" are all definitive categories of "Technical Adequacy." Being definitive subcriteria, we find no harm in the failure to disclose the relative weights of these types of subcriteria, as they are all elements which basically comprise the main criteria, but in a narrative fashion. It is our opinion that an offeror could not realistically assume that subcriteria of such a definitive nature, unless stated otherwise, would be of equal importance in relation to each other. It would be improper and unrealistic to assume that "Publications" should be weighted on a par with "Understanding of Requirements."

We do, however, want to clarify and distinguish this position from instances involving subcriteria which are essential characteristics or measurements of performance of the end item being procured. If the subcriteria involved requirements for items such as the CATV towers, transmitters, receivers, etc., then we believe that the relative importance of these subcriteria would have to have been disclosed in order to allow offerors to properly formulate their proposals.

Our holding in 51 Comp. Gen. 272, 281, *supra*, is modified to the extent that it is inconsistent with the foregoing statements.

As the subcriteria in this instance were of a definitive nature, we find no basis to question the propriety of the procurement on this issue.

AEL further contends that the Government relied to an irrational extent upon the Independent Government Cost Estimate (IGCE) in evaluating offerors' cost proposals. AEL states that instead of discarding the IGCE as being too inflated, and instead of discussing specific aspects of the IGCE with individual offerors, the evaluators added a 50 percent factor to each cost proposal to "compensate" for the inadequacy of the IGCE and/or each offeror's miscomprehension of the Government's needs. This, AEL asserts, was contra to our decision in 50 Comp. Gen. 16 (1970).

The procuring agency responded to this contention by stating that the cost adjustments were not for the purpose of compensating for any potential inadequacies of the IGCE and/or offeror's miscomprehension of the Government's needs. The original IGCE was in the amount of $9.566 million. Upon receipt of all initial proposals, the contracting officer requested Government estimators to reevaluate the IGCE. The estimators, upon reevaluation, confirmed the accuracy of the IGCE within plus or minus 27 percent, based on the total weighted factors for the components of the IGCE. Since offerors had less time to prepare cost estimates, and there was a potential for greater uncertainty for the offeror's estimated costs, an additional 50 percent of the Government's 27 percent factor was authorized. Therefore, all estimated cost proposals were increased and/or decreased by 41 percent (27 percent plus 14 percent) and compared on a range with the IGCE which was adjusted by 27 percent.

By using a method of adjustment of this nature, an offeror submitting a higher cost would receive a greater upward (and downward) adjustment than an offeror submitting a lower cost. Applying this rationale to the facts of this procurement, the following adjustments were made. Initially, FE/S' cost proposal was approximately $3 million less than the IGCE. AEL's cost proposal was approximately $4 million less than the IGCE. By adjusting each amount by 41 percent and the IGCE by 27 percent, the proposal had a cost range as follows: FE/S—$9.3 million to $3.8 million, Philco-Ford- $9.9 million to $4.1 million, Northrup Page—$3.0 million to $1.2 million, Sanders Associates—$7.8 million to $3.2 million, and AEL—$7.0 to $2.9 million. The IGCE range was $11.2 million to $6.4 million.

These cost ranges were plotted in a bar graph manner, extending from $0 to $12 million. The IGCE, when plotted, was divided into 10 equal segments, each segment representing one-tenth of the cost range between $6.4 million and $11.2 million. Scores were then determined by establishing where the high end of each adjusted cost proposal fell, in relation to the IGCE. The farther along the IGCE

bar a cost fell, the more points it received. Therefore, while the initial spread between FE/S and AEL was $1 million, the adjusted spread between FE/S and AEL was better than $2 million—and in this light it can be seen why FE/S received a greater score.

Therefore, while we wish to reserve comment on the merits of this type of evaluation plan, based on the record before us, we find no basis to question the use of this plan in the instant procurement. Its application was neither arbitrary nor capricious and under the circumstances, appears to have been a proper exercise of procurement discretion. Moreover, as concerns the instant procurement, it appears that if the price or cost evaluation scores were to be totally disregarded FE/S, Philco-Ford and AEL would still remain in the same relative positions.

As concerns our decision 50 Comp. Gen. 16, *supra*, cited by counsel for AEL, that decision stands for the proposition that a Government estimate, by itself, is not a sound basis for rejecting a proposal without further negotiations, if that proposal was within the competitive range. In the instant procurement, negotiations were conducted with all five firms submitting proposals. No firm was eliminated solely on the cost evaluation, nor was the IGCE adjustment applied to one offer in a manner different from any of the other offers. We therefore find the above decision to be inapplicable to the case at hand.

II. WERE THERE INHERENT DEFICIENCIES IN THE RFP THAT COMPEL CANCELLATION?

AEL contends that there were deficiencies in the RFP which were so severe that the chairman of the Technical Evaluation Panel recommended that the RFP be canceled. AEL states that there were several areas of uncertainty pertaining to system definition and that the awardee would have been able to increase its profits to an unlimited amount. The basis for these contentions are statements in the record made by the chairman of the evaluation board. That same chairman, however, was a party to the evaluation report which recommended award to the highest ranking offeror. By recommending award be made, it appears to us that the SSEB waived any recommendations they may have considered as concerns cancellation of the RFP.

Moreover, given all of these existing uncertainties as pointed out by AEL, we question how it was possible that AEL submitted a proposal which they declare to be responsive to the requirements of the solicitation. If AEL felt that they were responsive (which they were) to specific requirements, such requirements must have been specific enough for the Army to make an award thereunder.

AEL next contends that two ambiguities in the RFP's specifications remained throughout the entire procurement action and raise serious question as to the viability of the RFP and any contract awarded thereunder. However, AEL was aware of these ambiguities throughout the negotiation process. Section 20.2(a) of our Interim Bid Protest Procedures and Standards provides that protests based upon alleged improprieties in solicitations which are apparent prior to the closing date for receipt of proposals shall be filed prior to such closing date. Accordingly, as this point had not been raised prior to August 15, 1973, this aspect of the protest is untimely and will not be considered.

III. WAS THE EVALUATION PROCESS TAINTED BY BIAS, IRRATIONALITY AND IGNORANCE?

It is the AEL's position that the entire proposal evaluation process was tainted by bias, irrationality and ignorance. AEL contends that there was a pro-German bias in that FE/S received a higher evaluation as a result of having (a) a fully trained and experienced staff located in Germany, (b) made arrangements for all of the office space required in the Mannheim area for project implementation, and (c) a better knowledge of German electrical specifications and proposed site locations. AEL contents further that it was severely penalized because one of its proposed subcontractors (UNICOM, Incorporated) was a newly formed corporation. And finally, AEL contends that the entire evaluation process was highly questionable due to the increase in evaluation scores after best and final offers, when the new scores are viewed and are sought to be justified in light of the information submitted between the rounds of evaluation in response to questions presented by the SSEB.

The Army has rebutted these arguments by stating that all of the items in question mentioned above properly came within the purview of the evaluation criteria. Only after consideration of all of the evaluation results did the contracting officer select FE/S as representing the greatest value to the Government. This choice was concurred in by all others connected with the procurement.

We will not substitute our judgment for that of the contracting officials by making an independent determination as to what areas should be considered during evaluation and thereby influence which offeror should be rated first and receive award. Such determinations will be questioned by our Office only upon a clear showing of unreasonableness or favoritism, or upon a clear showing of a violation of the procurement statutes and regulations. *See* B-164552, February 24, 1969. The record before us shows that AEL's proposal was evaluated in accordance with the criteria set forth in the evaluation plan. All of the other

firms were evaluated on these same criteria. Under this procedure, FE/S was duly selected for award. We do not find that the award made was contrary to existing law or regulation, or that it can be considered to be arbitrary or capricious. Neither do we find that the evaluation process was tainted by bias or favoritism.

IV. WILL AWARD TO FE/S RESULT IN A NEGATIVE "GOLD FLOW" SITUATION?

The final contention raised by AEL is that an award to FE/S will result in adverse gold flow consequences. AEL contends that both the "FE" and "S" components of FE/S are German corporations. As a result, all costs and all profit (fee) will necessarily be expended by the Government in Germany rather than in the United States. This, AEL states, will result in a negative gold flow situation as compared to award to an American firm and, therefore, award to FE/S was not most advantageous within the meaning of the evaluation criteria contained in the RFP and certainly was not in the best interests of the United States Government.

FE/S rebuts the above contention by asserting that "FE," although a German company, is a wholly owned subsidiary of Federal Electric Corporation, a Delaware corporation. The sole function of the subsidiary is to serve as the parent's operating arm in Germany. Therefore, all G&A expenses and fee, if any, resulting from "FE's" performance of the contract will as a matter of course be repatriated to its American parent.

The Army has taken the position that the bulk of the contract work effort involves installation, construction, testing and commissioning of towers, buildings and microwave, MATV/CATV distribution systems in Germany. Moreover, any American personnel employed for this project would have to live in the Germany economy and thus expend American currency to support themselves in Germany. To reduce gold flow consequences, all MATV/CATV equipment was required to be of United States origin. The contracting officer was of the opinion that no matter which firm received the award, approximately $5.4 million would have to be expended in Germany. Therefore, it was decided that the only difference in gold flow would be the differences between proposals as to estimated cost and percentage fee.

It was on this basis that three separate gold flow waivers were requested for various aspects of the procurement. All waivers were forwarded through proper channels to the individuals responsible for granting such requests. All waivers were granted before award was

made under the RFP. Although reasonable men might differ as to the soundness of the rationale behind the granting of the requested waivers, our Office will not, at this time, substitute our opinion for that of the individuals responsible for the decisions. We find no procedural errors in the granting of such waivers and, therefore, the waivers must stand.

In view of the foregoing discussion, we are of the opinion that the award to FE/S is not subject to objection by GAO. Accordingly, the protest of AEL is denied.

[B-180157]

Contracts — Specifications — Samples — Workmanship Requirements

Samples of knives and spoons submitted with bid on solicitation for carbon steel flatwear were properly rejected for poor workmanship because knives contained grind marks and edge of one spoon was rough, and solicitation permitted rejection of bids accompanied by samples which did not conform to listed characteristics, including workmanship.

Contracts—Specifications—Samples—Defective—Notice to Bidder

The Comptroller General is aware of no basis for objecting to General Services Procurement Regulation 5A-2.408-71(b), which precludes General Services Administration from informing bidder, prior to award, of defects found in bid samples submitted.

In the matter of R & O Industries, Inc., April 30, 1974:

Invitation for bids No. FPNGA-HH-55115-A-8-17-73 was issued by the General Services Administration for quantities of carbon steel flatware on a requirements basis. The solicitation required submission of bid samples with the bid and provided that the samples would be evaluated to determine compliance with the subjective characteristic of workmanship for all items and for objective characteristics for certain of the items. R & O Industries, Inc. (R&O) submitted the low bid on several items, but its bid was rejected because the samples submitted by R&O for each item were found to be of poor workmanship. R&O then protested against the rejection of its bid samples and also against the GSA policy of not informing bidders, prior to award of a contract, of any defects found in their bid samples.

GSA reports that after application of the 12 percent Buy American differential and the addition of transportation costs, R&O's bid was low on 29 items of knives and spoons. For item 14-25, utility table knife, R&O's bid samples were evaluated as follows:

Fails Workmanship

Surface adjacent to cutting edge is not smooth and contains grind marks. This ground surface is also wavy and not well rounded. These defects result in the cutting edge being excessively sharp and are defects which may impair serviceability.

R&O's samples for items 26–35 and 37, serrated table knife, also failed workmanship, for the following reasons:

Surface on blade tip is not smooth and contains grind marks. This ground surface is also wavy and not well rounded. These defects result in the blade tip being excessively sharp. In addition, the serrations are not uniform and distinct. These are defects which may impair serviceability.

R&O's samples for items 61, 62, 66, 67, 68, and 70, tablespoon, were similarly rejected because the "Edge of bowl on one sample is rough and not finished smooth and round * * *."

R&O questions how its bid samples could have been rejected since it claims to have previously furnished items identical to the bid samples which were acceptable to GSA. R&O also claims that it submitted identical samples to an independent testing laboratory, which found them to be acceptable. It further claims that GSA's reasons for rejecting the samples are arbitrary and capricious and reflect "subjective decisions based on comparison of one bidder's samples to another rather than the same preestablished clearly defined criteria."

The fact that R&O has previously furnished acceptable items does not establish the acceptability of the samples submitted in response to this solicitation. B-176262(2), December 4, 1972. Furthermore, we have recognized that it is not unreasonable for different laboratories to arrive at different conclusions with respect to workmanship on different sets of samples when, as here, it is not established that the different sets of samples are identical in all material respects. B-175307, June 14, 1972. Therefore, and in accordance with paragraph 12(b) of the solicitation, which provided for rejection of bids if the bid samples failed to conform with the specified characteristics, GSA could properly determine the acceptability of R&O's bid with respect to the samples by evaluating only the actual samples with the bid. 34 Comp. Gen. 180 (1954); 37 *id.* 745 (1958); 51 *id.* 583 (1972).

In challenging this evaluation, R&O questions how a knife can be too sharp and how it can be determined that a spoon is "rough." It also asserts that the alleged defects regarding serrations go to objective specification requirements and not to the subjective characteristics of workmanship. We have previously recognized, in two cases involving R&O, that objective specification requirements and "workmanship" are not mutually exclusive. B-175699, August 9, 1972; B-

175555, August 25, 1972. Therefore, it may well be that GSA could consider non-uniform separations to be an element of workmanship. However, it is not necessary for us to decide either that question or the question of whether R&O's knives were too sharp. Paragraph 3.7 of Federal Specification RR-F-450C, applicable here, states:

> *Workmanship.* The finished flatwear shall be clean and shall not contain any burrs, rough die, tool, gouge, or grind marks or burn marks. The finished items shall not be fractured, dented, bent, punctured, or malformed.

Since R&O's samples for both the utility and serrated knives were found to contain grind marks, they were properly rejected for poor workmanship. With respect to the spoon, Table XII of the specification lists "Edges of bowl and handle not rounded or smooth" as a major defect. Obviously, a determination of whether the edge of a spoon is rough or smooth necessarily involves some subjective evaluation, which may involve a comparison with other suppliers' spoons. Although R&O asserts that the tests it ran on its spoons caused no irritation to the skin or tongue of those who conducted the tests, we have no basis for concluding that GSA's subjective evaluation of the spoon samples submitted to it was an abuse of discretion or otherwise improper. Accordingly, the record in this case does not support R&O's allegations that GSA acted arbitrarily and capriciously in rejecting its bid samples.

Section 5A-2.408-71(b) of the General Services Procurement Regulations provides that "Prior to award, no such information regarding inspection or test data shall be disclosed to any bidder or individual except Government officials or employees required to have access to such information in connection with bid evaluation and determination of award." R&O objects to this provision insofar as it precludes GSA from informing bidders, prior to award, about defects found in their bid samples, because it prevents bidders from rebutting GSA's findings until after a contract is awarded to a competitor. It appears that R&O's primary concern is that a bidder whose sample is improperly rejected has little likelihood of obtaining meaningful relief after contract award because contracts are infrequently terminated. However, as GSA points out, a contract may be terminated in appropriate circumstances if it is established that a valid bid was arbitrarily or improperly rejected. *See*, e.g., 52 Comp. Gen. 47 (1972) and *id.* 215 (1972). Furthermore, as R&O recognizes, GSPR 5A-2.408-71(b) was promulgated pursuant to statutory authority, and we are aware of no basis for objecting to it. See B-175307, *supra*.

For the foregoing reasons, the protest is denied.

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