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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

James M. Campbell

John W. Moore

Paul Shnitzer

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[B–178696]

Pay—Retired—Annuity Elections for Dependents—Survivor Benefit Plan—Implementation of New Plan

An initial election under the Survivor Benefit Plan, Public Law 92–425 (10 U.S.C. 1447–1455) by a member of the uniformed services who was retired prior to September 21, 1972, the date the Plan was enacted, and which was made on the basis of insufficient information or a misunderstanding, may be changed or revoked only during the 18-month period prescribed (Public Law 93–155, which amended the 1972 act), and the failure of the administrative office to provide the adequate information necessary to make an intelligent election constitutes an administrative error within the meaning of 10 U.S.C. 1454. However, where an election under the Plan was made on the basis of adequate information within the 18-month period, no further election may be allowed, nor may a conditional election be permitted in the absence of a provision in the act to this effect, and, furthermore, a statement of nonparticipation does not preclude a member from electing coverage within the 18-month period.

To the Secretary of Defense, December 3, 1973:

Further reference is made to letter dated May 14, 1973, from the Acting Assistant Secretary of Defense (Comptroller) in which a decision is requested with regard to certain questions concerning modifications or changes of elections made by members retired prior to September 21, 1972, under the provisions of the Survivor Benefit Plan, Public Law 92–425, September 21, 1972, 86 Stat. 706 (10 U.S. Code 1447–1455). Department of Defense Military Pay and Allowance Committee Action No. 473 containing a discussion of the circumstances involved was enclosed with the letter.

The questions are as follows:

1. May a member who retired prior to 21 Sep 1972, change or revoke his initial election:
   a. During the one year period allowed for the election?
   b. At any time during his lifetime after the one year period?
2. If the answer to question 1 is in the affirmative, is there a limit to the number of times such election may be changed?
3. May such retiree submit a conditional election before the end of the one year grace period and stipulate a future effective date:
   a. Before 21 Sep 1973?
   b. Any other future effective date?

In the discussion contained in the Committee Action it is pointed out that some retirees elected into the new Plan before they received detailed information about the program and then later learned through news media and information released by the military departments of various restrictions in the law and now desire to change the limit of their coverage or completely revoke their elections.

The Committee Action also refers to various provisions of the Survivor Benefit Plan which allow changes or revocations under specific circumstances. Reference is made to delayed elections or changes which

are authorized in 10 U.S.C. 1448 (election within 1 year after marriage or acquisition of a child); 10 U.S.C. 1449 (revocation after determination of competency in the case of a mentally incompetent member; and 10 U.S.C. 1450(f) (change from natural interest person to a spouse or children). However, it is pointed out that the law appears to be silent in the matter of change or revocation as applied to existing retirees on the effective date of the law.

It is noted in the Committee Action that the Plan applies to a person who is married or has dependent children when he becomes entitled to retired pay unless he elects not to participate in the Plan and such election is irrevocable if not revoked prior to entitlement to retired pay (10 U.S.C. 1448(a)). It is indicated in the Committee Action that under this provision it would appear that a member who retired on or after September 21, 1972, may change his election as many times as he desires before the day on which he becomes entitled to retired pay.

Generally, the Survivor Benefit Plan provides for automatic coverage for a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan, such election being irrevocable unless revoked before the first day for which he is eligible for that pay (10 U.S.C. 1448(a)). In other words, once a member becomes entitled to retired or retainer pay he is bound by his election made prior thereto unless he falls within the specific exceptions provided for in the act.

Section 3(b) of Public Law 92-425 (10 U.S.C. 1448 note) provides that "Any person who is entitled to retired or retainer pay on the effective date of this Act (September 21, 1972), may elect to participate in the Survivor Benefit Plan * * * before the first anniversary of that date." This section has been amended to extend the 1-year period to 18 months by Public Law 93-155, November 16, 1973 (87 Stat. 615). The purpose of the 18-months period appears to allow those members to which it applies to seriously consider their participation in the Plan prior to making a decision regarding participation.

Concerning the correction or revocation of an election under the Survivor Benefit Plan, the law, 10 U.S.C. 1454, as added by the act of September 21, 1972, vests in the Secretary concerned the authority to correct or revoke any election when he considers it necessary to correct an administrative error. This authority is identical with the authority presently contained in the Retired Servicemen's Family Protection Plan (10 U.S.C. 1445). We have construed the latter provision as being sufficiently broad to authorize the correction of an administrative error with respect to any action by a retired mem-

ber pending his election under the Retired Servicemen's Family Protection Plan. *See* B-174552, July 10, 1972.

As provided in section 3(b) of the Act of September 21, 1972, and its legislative history, Congress extended coverage of the Plan to those persons who were entitled to retired or retainer pay on September 21, 1972, provided they elect to participate in the Plan within a specified period, now 18 months of that date. We find nothing in the law or its legislative history, however, which indicates that such an initial election, which is shown to have been made on the basis of insufficient information regarding the Plan, is irrevocable. Where, as indicated in the Committee Action, the individual was not provided adequate information to make an intelligent election or there is a misunderstanding on his or her part concerning such election, it is our view that the individual may change or revoke his or her initial election provided the change or revocation is made within the 18-month period. *Cf.* 49 Comp. Gen. 837 (1970). Moreover, we believe the failure of the administrative office to provide the individual with adequate information on which to make an intelligent election constitutes an administrative error within the meaning of 10 U.S.C. 1454. Accordingly, question 1a is answered in the affirmative.

As to question 1b, since Congress granted retirees a substantial period of time (18 months) following September 21, 1972, to consider participation in the Plan, we do not believe that any change or revocation of an initial election made after the 18-month period would be proper. However, the Secretaries concerned could invoke 10 U.S.C. 1454 in certain circumstances.

With respect to question 2, where it is shown that an election was made on the basis of adequate information within the 18-month period, no reason is perceived for thereafter allowing further elections. Question 2 is answered in the affirmative.

With respect to question 3, the pertinent provision of the Survivor Benefit Plan provides only that a member who is entitled to retired or retainer pay on the effective date of that act has 18 months to elect to participate in the Plan. No reference in any part of the act or the legislative history is made to a conditional election. Accordingly, question 3 is answered in the negative.

We have been asked informally to consider the effect of a retired member's action of specifically stating within the 18-month period that he does not desire to participate in the Plan or if he fails to take any action whatever. It is clear that a retired member may elect coverage under the Plan any time up to the end of the 18-month allowable

period. This silence up to the last hour of that period could not be construed as an election not to be covered if in fact he elects to be covered before the period expires. We do not consider that a retired member who states he does not desire coverage should be given any lesser period of time to finally elect coverage than the member who fails to make any participation statement up to the last hour of the authorized period. Accordingly we do not consider an earlier statement of nonparticipation as precluding the member from electing coverage if such election is made within the 18-month period.

[B-179060]

Bidders—Responsibility *v.* Bid Responsiveness—Bid Rejection Erroneous

The failure of the low bidder to list the buses it would use in performing transportation service contracts did not render the bid nonresponsive as the omission relates to the responsibility of the bidder rather than to the responsiveness of the bid, since the procurement requirement was for the furnishing of services and not for furnishing buses, except as an incident to furnishing the services, and since the bidder is legally obligated to furnish buses having acceptable minimum characteristics. Therefore, the bid should not have been rejected without a specific determination that the company was nonresponsive.

Bids—Rejection—Erroneous Basis

Where the contracting officer improperly found that the low bid was nonresponsive and awarded contracts for shuttle bus services in Alaska to other bidders pursuant to the erroneous determination, he should, upon finding that the low bid is still for acceptance, make a current determination of the responsibility of the rejected bidder, and if found responsible, terminate existing contract(s) for those schedule(s) on which the rejected company was the low bidder and make award to the company, if its bid is otherwise acceptable for award.

To the Secretary of the Army, December 3, 1973:

We refer to report SAOAS(I&L)-MO dated August 22, 1973, from the Acting Assistant Deputy for Material Acquisition, responding to the protest of Transportation Services, Inc., under IFB DAFA03-73-B-0129, which was issued for shuttle bus service between certain points in Alaska.

The company maintains that its apparent low bid for the required transportation services should not have been considered nonresponsive for failing to contain a list of the buses that the company would use in performance of the contract. We must agree for the reasons stated below.

The required services were set forth in schedules "A," "B," and "C" of the IFB, as pertinent:

ITEM NO.	SUPPLIES/SERVICES	QUANTITY UNIT
	SCHEDULE "A"	
0001	Furnish Shuttle Bus service in accordance with Section "F". * * * 0001AA * * * from Fort Greely to Fairbanks, Alaska and return * * *	365 da [from July 1, 1973, through June 30, 1974]
	SCHEDULE "B"	
0001	Furnish Shuttle Bus service in accordance with Section "F". * * * 0001AA * * * from Fort Greely to Delta Junction and return * * *	365 da [from July 1, 1973, through June 30, 1974]
	SCHEDULE "C"	
0001	Furnish School Bus services * * * at Fort Greely in accordance with Section "F". * * * 0001AA * * * place of residence to Fort Greely school and return.	106 da [from November 1, 1973 through April 15, 1974]

Section "F" of the IFB described in detail the types of buses that would meet acceptable minimum standards for the service under each schedule. The last sentence of paragraph 5 of that section stated: "Contractor states the following buses will be used in performance of this contract."

Four bidders, Sturgeon Transportation Company, Alaska Motor Coaches, Transportation Services, and Trans Student Lines submitted bids by bid opening on June 7, 1973. Transportation Services was apparent low bidder on schedule "A" and on schedules "B" and "C," combined. The company did not, however, list the buses it would use in performing the contract. We observe from the abstract of bids that Trans Student Lines also did not furnish such a list. Because the contracting officer decided that this omission rendered Transportation Services' bid nonresponsive, he rejected its bid and made separate awards for schedule "A" and for schedules "B" and "C," combined, to the next lowest bidders on June 21, 1973.

Unless something on the face of the bid limits, reduces, or modifies the obligation of a prospective contractor to perform in accordance with the terms of the invitation, the bid must be considered responsive. 49 Comp. Gen. 553 (1970), and cases cited therein. Here, Transportation Services unqualifiedly offered to meet all requirements for the service, including minimum requirements for the buses to be used in furnishing the service. Its bid must, therefore, be considered responsive.

Further, we think the requirement for listing buses to be used in the service related to the capacity and ability of prospective contractors to supply the required buses and, thus, was a matter of responsibility. *See* 53 Comp. Gen. 36 (1973); B–168396, February 2, 1970. This relation is confirmed by the fact that the contract is one for the furnishing of services and not for the furnishing of buses, except as an incident to furnishing the services. So limited, the failure of a bidder to list buses to be used in the service does not affect the obligation to furnish the service with buses meeting the minimum prescribed requirements. Whether a bidder can furnish the buses he is otherwise obliged to furnish is a separate question to be answered in deciding the responsibility of the bidder.

This case is therefore distinguishable from the situation in B–166255, August 1, 1969, cited in the administrative report, when bidders were required, as part of their bids, to identify offered products having "Qualified Products List" status. The contract was one for furnishing "Qualified Products List" products, not services. Thus, the failure of the apparent low bidder in that case to identify in some way the qualified product it was intending to offer affected its obligation to deliver a qualified product, and its bid was properly rejected as nonresponsive.

It is therefore our conclusion that Transportation Services' bid should not have been rejected without a specific determination that the company was nonresponsible. *See* B–168396, *supra.*

Consequently, we recommend that the contracting officer immediately request Transportation Services to confirm, in writing, that it will accept award at the prices and on the terms set forth in its original bid for the services if made within 30 calendar days from the date of this decision, or within the time deemed necessary by the contracting officer to: (1) make responsibility determinations on the company both for the current period and the original award date; (2) terminate for convenience the existing service contract(s) for those schedule(s) on which the company was low bidder, upon a finding that Transportation is responsible for both points in time; and (3) make award, if otherwise proper, to the company. If this assurance is obtained and the company under appropriate procedures is found to be responsible for both points in time, the contracting officer should immediately carry out the additional steps in the sequence listed.

Our Office would appreciate being advised as to the action taken with respect to this recommendation.

[B-179642]

Contracts—Specifications—Deviations—Waiver—Protest

The fact that the unsolicited literature accompanying the protestant's bid did not include all the purchase description requirements and that the bidder failed to submit technical manuals with its bid and to execute a Buy American Certificate does not make the bid nonresponsive and the bid should be considered for award. The literature entitled "General Description Portable Heil Refuse Pulverizing System" did not conflict with the purchase description even though it did not include all the purchase description requirements, and, moreover, the descriptive data highlighted the salient features of the System rather than limiting what would be supplied; the specifications bind the bidder notwithstanding manuals were not furnished with the bid; and in view of the fact the import duty paid applies to an insignificant part of the end item and not the end item itself, the bidder is considered to have offered a domestic product.

To the Director, Defense Supply Agency, December 3, 1973:

We refer to letter DSAH-G of November 2, 1973, and prior correspondence, from the Assistant Counsel, Headquarters, Cameron Station, reporting on the protest of The Heil Co. (Heil) against the rejection of its bid under invitation for bids (IFB) No. DSA700-73-B-2735, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio.

The IFB solicited bids for five refuse shredder/pulverizer systems (CLINS 0001 through 0005) to be in accordance with an attached purchase description. CLIN 0006 of the IFB solicited a price for the first article test requirement and CLIN 0007 for the technical manuals on the equipment.

There was attached to the Heil bid an unsolicited typewritten statement entitled "General Description Portable Heil Refuse Pulverizing System." The first paragraph of the "General Description" stated:

> The eight to twelve ton per hour portable refuse pulverizer to be provided on bid #DSA700-73-B-2735 will consist of the following:

Thereafter followed a one-page description of various features of the equipment.

The Heil description was forwarded by the contracting officer to Warner Robins Air Materiel Area (WRAMA) for comparison with the requirements of the purchase description. WRAMA advised that the general description did not conflict with the purchase description, but it did not include all the requirements in the purchase description.

The contracting officer concluded that it was not clear whether Heil intended to comply with the requirements of the purchase description and that, at best, the general description attached to the bid created an ambiguity that could not be resolved after bid opening. Further, the contracting officer determined that the failure to submit an acceptable bid on CLIN 0007 also was a justifiable basis for a find-

ing of nonresponsiveness. Additionally, Hammermills, Inc., has contended that the Heil bid was nonresponsive for failure to complete the Buy American Certificate while stating that it would pay an import duty of $1,350 per unit. The unit prices bid by Heil ranged from $93,840 to $94,650.

The administrative report affirms the determination of the contracting officer on the basis that the Heil descriptive data stated that the "pulverizer * * * *will* consist of the following" (emphasis supplied in report) and what follows did not cover all the requirements. No mention was made in the general description of the control panel, operator's platform, performance requirements, safety and master controls and welding, casting, marking and lubrication requirements. However, although the Heil description does contain the quoted statement and does not cover all the requirements in the purchase description, the information furnished in the Heil description does not deviate from the purchase description requirements on the aspects covered. It is our opinion that the descriptive data was submitted to "highlight" the salient features of the proposed shredder/pulverizer system, not as a means to indicate the limit of what would be supplied. We do not believe that the descriptive data was included with the view of offering something other than what the Government sought to obtain under the specifications. Nor do we believe that Heil, if awarded the contract in question, would have any legal right to supply an item that deviates in any manner from the requirements of the specifications. In B–160474, February 27, 1967, relied on in the administrative report to support the action of the contracting officer, the bidder offered a specific model (by model number) and furnished descriptive data in support of that model. In the instant procurement, the bidder does not cite any model on the bid form so as to restrict the bid to a specific model. Therefore, the immediate case is distinguishable from the above-cited case.

As regards the question of nonresponsiveness of Heil's bid on data CLIN 0007, it was agreed by DSA at the conference held on October 24, 1973, and confirmed by letter of October 31, 1973, that the matter would not be pursued. However, Hammermills, Inc., has contended that the Heil bid was nonresponsive because it was not accompanied by any technical manuals. The requirement for technical manuals to be used with the equipment furnished under the contract is contained in AFAD–71–531–(13) included in the IFB. This specification provides for correcting any deficiencies in the manuals after the submission of bids. In this connection, we have determined that the failure of manuals submitted with a bid to conform to the manual specifications should not render a bid nonresponsive, since the successful bidder

is bound by the provisions of the specification to make any changes required by the Government to make the technical manuals submitted with the bid acceptable. *See* 53 Comp. Gen. 249 (1973). For this same reason, the failure to provide a manual with the bid should not render the bid nonresponsive.

In response to the Buy American issue raised by Hammermills, we concur in the DSA position that Heil is not offering a foreign product and, therefore, should not have its bid evaluated as a foreign product. Hammermills contends that Heil's bid is nonresponsive or should be evaluated as a foreign bid because Heil states in Clause D14 that it would pay an import duty of $1,350 per unit and did not expressly state that it was offering a domestic source end product. However, since Heil did not take any exception to the Buy American Certificate on the reverse side of Standard Form 33, and clearly indicated in Clause D14, by stating "*PARTIAL-PARTS ONLY*," that the import duty of $1,350 applies only to a rather insignificant part of the end item and not the end item itself, we concur with DSA that the only reasonable interpretation of Heil's bid is that it is offering a domestic source end product within the meaning of the Buy American Act clause incorporated by reference in Clause L01 of the solicitation and it will use one or more foreign components on which it will pay the duty referred to in Clause D14. Therefore, Heil's bid should not be rejected as nonresponsive or evaluated as a foreign bid because of the import duty referred to in Clause D14. [Italic supplied.]

In view of the foregoing, it is our opinion that the Heil bid is responsive. Therefore, it is recommended that the bid be considered for award.

[B–179871]

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc., Determinations—Union Agreement Effect

While the issuance of wage determinations pursuant to the Service Contract Act of 1965 is vested exclusively in the Department of Labor, when the legality of a wage determination is questioned the GAO will consider whether that determination was issued in accordance with applicable statutory and regulatory provisions so as to warrant its inclusion in a Government contract. Therefore, upon review of the propriety of the wage determination included in a cost-reimbursable service contract between the Air Force and Pan American World Airways, it was concluded that under the 1965 act, which requires a successor contractor to pay, as a minimum, wages and fringe benefits to which employees would have been entitled under the predecessor contract, a union is permitted to challenge its own collective bargaining agreement when predecessor and successor contractors are the same on the basis that the wages called for by agreement are substantially at variance with those prevailing in the locality.

Contracts—Labor Stipulations—Service Contract Act of 1965—Amendments—Retroactive Application

Although Congress intended, in enacting the Service Contract Act Amendments of 1972, that wage determinations issued as a result of hearings held pursuant to section 4(c) of the Service Contract Act would be applicable to contracts awarded prior to the issuance of a wage determination, appropriate implementing regulations have not been promulgated and the GAO urges the issuance of regulations as soon as practicable to provide for the required contract clauses.

To the Secretary of the Air Force, December 3, 1973:

This is in reply to the October 12, 1973, letter from the Acting Assistant Secretary of the Air Force (Installation & Logistics), requesting our opinion as to the propriety of making disbursements in accordance with Department of Labor (DOL) Wage Determination No. 73–594 (Rev. 3) under a cost-reimbursable service contract entered into by the Air Force with Pan American World Airways, Incorporated, for the operation and maintenance of the Eastern Test Range, Brevard County, Florida.

The contract in question encompassed the period from September 1, 1972, through June 30, 1973, and contained priced options for each of the next 2, fiscal years and unpriced options for each of 2 additional years. The Air Force, intending to exercise the option for fiscal year 1974, submitted to DOL on March 16, 1973, a Standard Form 98, Notice of Intention to Make a Service Contract, pursuant to Armed Services Procurement Regulation (ASPR) 12–1005.8(b) and 29 CFR 4.145, which treat the exercise of renewal options as new procurements for purposes of the Service Contract Act of 1965 (SCA) (41 U.S. Code 351 note).

On May 22, 1973, DOL issued Wage Determination No. 73–594, which reflected wage rates called for in the collective bargaining agreements entered into by Pan American and several unions. The unions, however, claimed that the wage rates were lower than those prevailing in the locality and requested DOL to conduct a formal hearing pursuant to section 4(c) of the SCA (41 U.S.C. 353(b)). On May 31, 1973, DOL determined that a hearing was warranted and issued a notice to that effect. After a hearing on June 27 and 28, 1973, in which the Air Force participated, the Administrative Law Judge issued a decision on August 7, 1973, which upheld the unions' position. As a result, Wage Determination No. 73–594 (Rev. 3), setting forth increased wages and fringe benefits, was issued on September 17, 1973, with a notation that the revised rates "have application from July 1, 1973" to the Pan American contract. In the meantime, the Air Force had exercised the option effective July 1, 1973, so that when the revised wage determination was issued there was already in being a formal

contract which called for wage payments in accordance with the wage determination issued in May.

The Service Contract Act of 1965, Public Law 89–286, 79 Stat. 1034, as amended by Public Law 92–473, 86 Stat. 789, 41 U.S.C. 351 *et seq.*, was enacted to provide wage and safety protection for employees working under Government service contracts. The act requires service contractors to pay their employees in accordance with wage determinations issued by DOL and made a part of their contracts awarded by the various Federal procurement agencies. Section 2 of the act (41 U.S.C. 351(2)) requires Federal service contracts to include a provision specifying the minimum wages and fringe benefits as determined by the Secretary of Labor "in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations." 41 U.S.C. 351. Section 4(c) of the act provides:

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality. 41 U.S.C. 353(c).

Your Department takes the position that section 4(c) of the act has no applicability to this contract and, therefore, the hearing and resulting issuance of a revised wage determination were contrary to statute. Specifically, it is claimed that section 4(c) "is addressed solely to the issue of relieving a successor contractor of the obligation to pay wage rates bargained for by his predecessor when such rates are substantially higher than those prevailing in the locality," and not to the situation where, as here, bargained-for wage rates are lower than the prevailing local wages. It is also claimed that section 4(c) is not applicable to a situation in which the predecessor contractor and successor contractor are one and the same.

In undertaking a review of the issues raised by the Air Force, we recognize that the issuance of wage determinations is vested by statute exclusively in the Department of Labor, and once issued, the correctness of the wage determination is not open to review. *United States* v. *Binghamton Construction Co., Inc.*, 347 U.S. 171 (1954), 127 Ct.

Cl. 844. However, when the legality of a wage determination is questioned, we will consider whether that determination was issued in accordance with the applicable statutory and regulatory provisions so as to warrant its inclusion in a Government contract. 49 Comp. Gen. 186 (1969); 47 *id.* 192 (1967). Accordingly, our first concern here is whether DOL acted in accordance with the SCA in issuing Wage Determination No. 73-594 (Rev. 3).

Both section 2 and section 4(c) of the SCA establish collectively bargained-for wage rates as the standard for determining what wage rates are to be paid employees working under a Government service contract. Section 2 requires the Secretary of Labor to base wage determinations on collective bargaining agreements covering service employees of the class to be employed under a Federal contract. Section 4(c) provides that no contractor may pay his employees less than that to which they would have been entitled under a predecessor contract, unless those wages vary substantially from those prevailing in the locality. Thus, in situations involving a predecessor contractor who was a party to a collective bargaining agreement, both sections 2 and 4(c) of the SCA have reference to that same agreement, so that DOL's wage determination should reflect the same wage levels that section 4(c) establishes as the minimum payable under a successor contractor. DOL recognizes that the minimum level set by section 4(c) is applicable even if a wage determination is not issued. 29 CFR 4.6(d)(2). Accordingly, it is apparent that sections 2 and 4(c) must be considered together in determining the minimum wages payable under a service contract, and that the proviso of section 4(c) relieving a successor contractor of paying wages in accordance with his predecessor's wage rates is necessarily applicable to any wage determination based on those predecessor wage rates. This construction has not only been recognized and applied by DOL, see 29 CFR 4.3(b), 4.10(a), but is also indicated by the legislative history of Public Law 92-473 (Service Contract Act Amendments of 1972), which added section 4(c) and the requirement in section 2 to recognize collective bargaining agreement wage levels to the basic act. The Senate report accompanying the bill which became Public Law 92-473 described the proviso as going to both section 4(c) and to section 2, S. Rept. 92-1131, 92d Cong. 2d sess. 3, and also stated:

> Sections (2)(a)(i), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme. It is the intention of the committee that sections 2(a)(1) and 2(a)(2) and 4(c) be so construed that the proviso in section 4(c) applies equally to all the above provisions. S. Rept. 92-1131, 92nd Cong., 2d sess. 4.

Thus, we think it is clear that section 4(c) provides a procedure for challenging the applicability of a predecessor contractor's wage rates

even when those rates were used as the basis for a wage determination issued pursuant to section 2.

We think it is also reasonably clear that the section 4(c) procedure permits consideration of claims that a predecessor contractor's wage levels were lower, as well as higher, than those prevailing in the locality. The proviso, of course, refers only to wages and benefits which are "substantially at variance" with those locally prevailing, which literally encompasses rates which are both higher and lower than the prevailing rates. The proviso was added to the proposed section 4(c) after concern was expressed in Congress that incorporation of the successor contractor doctrine in the SCA would lead predecessor contractors to increase wages to artificially high levels in order to discourage competitors who would be bound to pay those high rates if awarded a contract. *Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, on S. 3827 and H.R. 15376*, 92nd Cong., 2d sess. 23, 76–77, 97. However, the bill passed by the House of Representatives subsequent to those hearings did not contain the section 4(c) proviso, 118 Cong. Rec., August 7, 1972, H. 7257–7263. The proviso was added to the measure by the Senate, an action with which the House agreed. 118 Cong. Rec., September 27, 1972, H. 8803–04. The purpose of the proviso was explained in the Senate Committee report as follows:

> However, the committee was concerned about safeguarding against any possible abuse. There are certain unusual circumstances where predetermination of wages and fringe benefits contained in such a collective agreement might not be in the best interest of the worker or the public.
>
> Thus, service employees should be protected against instances where the parties may not negotiate at arm's length. For example, a union and an employer may enter into a contract, calling for wages and fringe benefits substantially lower than the rates presently prevailing for similar services in the locality. Likewise, a union and employer may reach an agreement providing for future increases substantially in excess of any justifiable increases in the industry. Finally, it is possible that over a long period of time, predetermined contractual rates might become substantially at variance with those actually prevailing for services of a character similar in the locality.
>
> The committee concluded that the dual objectives of protecting the service worker and safeguarding other legitimate interests of the Federal Government could be best achieved by requiring the Secretary to predetermine the wages and fringe benefits contained in the collective agreement, except in the instance where he finds, after notice to interested parties, and a hearing, that * * * such contractual wages and fringe benefits are substantially at variance with those prevailing for services of a character similar in the locality. S. Rept. 92–1131, 92nd Cong., 2d sess. 4–5.

We think this makes it clear that Congress contemplated that the section 4(c) remedy would be available for challenging predecessor wage rates whenever those rates were either substantially higher or substantially lower than those prevailing in the locality.

We also believe that section 4(c) is applicable to the situation where a contractor is both the predecessor and successor contractor. The op-

erative words of section 4(c) refer to "contract," not "contractor" ("no contractor or subcontractor under *a contract, which succeeds a contract* * * *." [Italic supplied.]). Thus, the statute is applicable by its terms to a successor *contract*, without regard to whether the successor contractor was also the predecessor contractor, and, as noted previously, the exercise of an option, as was done here, is treated as the award of a new contract under the SCA. Furthermore, the fact that a successor contractor (whether or not he was also the predecessor contractor) has its own collective bargaining agreement does not negate the clear mandate of the statute that the rates called for by the predecessor contract shall be the minimum rates payable under the new contract unless DOL decides otherwise pursuant to section 4(c). As we have stated previously:

> The fact that a particular contractor may be obligated by an independent agreement to pay higher or lower wage rates than these stipulated in a Government contract as minimum rates, pursuant to statute, does not affect either the validity of the rates established by the contract or the contractor's duty to comply therewith * * *. 48 Comp. Gen. 22, 23-24 (1968).

We do not disagree with the Air Force position that the primary purpose of section 4(c) was to require successor contractors to honor collective bargaining agreements in effect at a particular work site unless those agreements contained unreasonably high rates. However, as indicated above, the language of section 4(c) clearly permits the action taken in this case by DOL. While the Air Force argues that DOL's action is contrary to the Congressional intent of preserving, rather than providing a vehicle for challenging the wage rates established in collective bargaining agreements, we note that the wage rates involved herein were arrived at prior to enactment of the 1972 Amendments, and were lower than those previously agreed to in order to enable the incumbent contractor to offer a competitive proposal. DOL's action here rectifies that situation by raising the wage rates to the level prevailing in the Cape Kennedy locality. Now that the 1972 Amendments are in effect, it is unlikely that this situation would again arise, since the act as amended requires that successor contractors pay wages in accordance with a predecessor's collective bargaining agreement.

Accordingly, we are of the opinion that Wage Determination No. 73-594 (Rev. 3) was issued in accordance with the provisions of the SCA and the procedures contemplated therein.

There remains for consideration whether that wage determination can be made applicable to the contract in question. Wage determinations have generally been regarded as inapplicable to previously awarded contracts, 29 CFR 4.164(c); 48 Comp. Gen. 719, 721 (1969), with certain possible exceptions not directly relevant here. *See* ASPR

12–1005.3(b); 29 CFR 4.5(c). However, we think it was the clear intent of Congress that any revised wage determinations resulting from a section 4(c) proceeding were to have validity with respect to the procurement involved. To hold otherwise would completely thwart the statutory scheme. As Congress appears to have envisioned it, DOL would implement section 4(c) by "providing for expeditious hearings and decisions," and that—

> * * * contractual wages and fringe benefits shall continue to be honored * * * unless and until the Secretary finds, after hearing, that such wages and fringe benefits are substantially at variance with those prevailing in the locality for like services. S. Rept. 92–1131, 92nd Cong., 2d sess. 5.

Obviously, once it is found that the contractual wages and benefits do substantially vary from those locally prevailing, the contractor would no longer be obligated to pay those wages. We agree with DOL that the SCA then requires the issuance of a new wage determination (based on the wages and fringe benefits locally prevailing), 29 CFR 4.10(d), which is to be applied to the contract in place of any wage determination previously issued.

We are aware that neither the regulations promulgated by the Secretary of Labor and the Department of Defense nor any contract clauses provided for by such regulations specifically deals with the application of a revised wage determination resulting from a section 4(c) proceeding to an existing contract subject to the SCA. We believe that regulations explicitly providing for contract clauses authorizing such application should be issued as soon as practicable, and we are pleased to note that DOL has advised us of its intention to revise its regulations further to provide for this type of situation.

Notwithstanding the absence of current regulatory provisions directly bearing on this matter, we do not believe that application of Wage Determination 73–594 (Rev. 3) to the current cost-type contract is precluded by any provision of law. Accordingly, and in view of the purpose and intent of the SCA, we would not view as improper the inclusion of the revised wage determination in the current contract.

For your information, we are enclosing a copy of our letter of today to the Secretary of Labor.

[B–70371]

Courts—Jurors—Fees—Government Employees in Federal Courts—Prorated Fees

Federal employees in the Washington, D.C., metropolitan area who served as jurors in the United States District Court for the District of Columbia during the afternoon of January 19, 1973, when the half day holiday proclaimed by Executive Order 11696 was in effect, and who on the basis of 5 U.S.C. 5537 are not

paid a juror's fee while in a pay status may be paid a prorated fee in the proportion the number of hours served on jury duty after the commencement of the one-half day holiday bears to the total number of hours of jury duty performed on that day since to do otherwise when Federal employees serve as jurors in Federal or D.C. Courts would be more restrictive than required under controlling statutes and inconsistent with prior C.G. decisions to the effect a Federal employee is entitled to the full jury fee when the entire period of jury duty falls outside the employee's work hours on any given day. Conflicting decisions are overruled.

To the Director, Administrative Office of the United States Courts, December 6, 1973:

Further reference is made to your letter of June 7, 1973, requesting a decision as to the appropriate fee, if any, that should be paid to Federal employees in the Washington, D.C. metropolitan area who served as jurors in the United States District Court for the District of Columbia during the afternoon of January 19, 1973, when the half day holiday proclaimed by the President in Executive Order 11696, January 17, 1973 (38 Fed. Reg. 1722, January 18, 1973), was in effect.

Section 1871 of Title 28, U.S. Code, governs fees to be paid jurors serving in United States Courts and provides in part as follows:

§ *1871. Fees*

Grand and petit jurors in district courts or before United States commissioners shall receive the following fees, except as otherwise expressly provided by law:

For actual attendance at the place of trial or hearing and for the time necessarily occupied in going to and from such place at the beginning and end of such service or at any time during the same, $20 per day, * * *

However, as a general rule, Federal employees are not entitled to jury fees while on court leave for the purpose of performing jury service in a court of the United States or the District of Columbia under provisions of 5 U.S.C. 5537, quoted in part below:

§ *5537. Fees for jury and witness service*

(a) An employee as defined by section 2105 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) or an individual employed by the government of the District of Columbia may not receive fees for service—

(1) as a juror in a court of the United States or the District of Columbia * * *.

In construing this statute we have consistently held that the wording "* * * may not receive fees for service—(1) as a juror in a court of the United States * * *" prohibits payment to an employee of the United States for jury duty for those days on which he may perform jury service in the United States Courts while in a pay status in his civilian position. 20 Comp. Gen. 276 (1940).

However, we have held that fees received for jury service in State courts on a holiday falling within the employee's basic tour of duty may be retained by the employee, provided that, had he not been on jury duty, he would have been excused from his regular duties on the

holiday. 27 Comp. Gen. 293 (1947). A similar determination was made with respect to employees serving as jurors in courts of the United States or the District of Columbia in 45 Comp. Gen. 251 (1965). Accordingly, jurors serving in courts of the United States or the District of Columbia may be paid the applicable jury fee when serving on holidays when they are not excused from duty to perform such service. With respect to an employee who performs jury service in a court of the United States or of the District of Columbia after his hours of duty so that no court leave is involved, we have held that such an employee is entitled to payment of jury fees. 36 Comp. Gen. 378 (1956).

Until now, we have followed the rule that for a Federal employee to be entitled to a jury fee for Federal or District of Columbia jury service on a given day, the period of jury duty must not overlap any part of the employee's duty status period since there is no provision in the statute providing for prorating such fee. 36 Comp. Gen. 378, *supra*, and 52 *id.* 626 (1973). After fully considering the matter we now are of the opinion that our prior decisions precluding the prorating of jury fees, when employees are excused from duty for any part of the day on which they serve as jurors in Federal or District of Columbia courts, is more restrictive than required under the controlling statutes. While the prorating of jury fees may cause some administrative inconveniences we foresee no grave consequences resulting from the prorating of fees that would be inconsistent with the purpose and intent of the jury fees statutes. If, as we held in prior decisions, a Federal employee is entitled to the full jury fee when the entire period of jury duty falls outside the employee's work hours on any given day, it is just as logical and consistent with the controlling statutes to permit prorating of jury fees in appropriate circumstances. Thus, it is our present view that for each hour of jury service performed in a court of the United States or the District of Columbia outside of the hours of duty an employee otherwise worked or, but for jury service, would have been required to work on a given day, he is entitled to a proportionate part of the jury fee for that day. For instance, when an employee is excused for the full 8-hour workday while on jury duty, he would be entitled to a pro rata payment of the jury fee to the extent that his jury service lasted in excess of 8 hours computed on the base of full hours. Thus, an employee serving for 10 hours would be entitled to a pro rata jury fee based on two-tenths (or one-fifth) of the full fee, if he served 12 hours, a pro rata fee based on four-twelfths (or one-third) etc. In circumstances where the employee is not assigned to a regular 8-hour day or when he actually works part of the day, similar determinations of the pro rata jury fee will be made. Thus, employees scheduled to work 4 hours on January 19, 1973, but excused because of jury service would

be entitled to a jury fee based on the relationship of the number of hours of jury service performed in excess of 4 to the total jury service on that day. If jury service lasted 6 hours, the employee would be entitled to one-third of the jury fee, and if it lasted 8 hours, one-half of the jury fee.

Accordingly, in the instant case the jury fees for the employees involved may be prorated and paid in the proportion that the number of hours served on jury duty after the commencement of the one-half day holiday bears to the total number of hours of jury duty performed on that day.

Decisions cited above in conflict with the principle stated herein are to be regarded as no longer controlling and this decision will govern in the case of jury fees paid for January 19, 1973, to employees in the Washington, D.C. metropolitan area who were given a half holiday on that day and to all future cases involving jury service in excess of the time the employee was excused on leave.

[B–125617]

States—Fire Fighting Services—Government Reimbursement Liability

Reimbursement by the General Services Administration to the St. Louis Community Fire Protection District (CFPD) and other separate district and local fire departments for the supplemental expenses incurred due to equipment losses and payroll costs for personnel called to duty to respond to a fire at the Military Personnel Records Center is not authorized since the Center is located within the area covered by the St. Louis CFPD, which as a political subdivision under Missouri law has the statutory duty to render fire fighting services without cost, a duty that extends to the property of the United States in view of the Government's sovereign immunity from taxation. Although the Record Center lay outside the boundaries of the surrounding district and local fire departments, and GSA has the authority to contract for their services, their obligation to respond to the Center fire arose out of mutual agreements with CFPD.

To the Administrator, General Services Administration, December 6, 1973:

This is in reply to your Administration's letters of August 1 and September 10, 1973, concerning the authority of the General Services Administration (GSA) to reimburse local fire departments for certain costs incurred as a result of the fire at the Military Personnel Records Center (Center), Overland, Missouri, July 12 to 16, 1973.

The Center, under the custody and control of GSA, is located in a six-story warehouse-type structure with a gross area of over 1.5 million square feet. The circumstances of the fire and the response by the various fire departments were set forth in your letter as follows:

Within minutes after the discovery of the fire, elements of the Community Fire Protection District of St. Louis County responded to the fire. Because of the

size of the building and the rapid spread of fire, approximately forty other separate district and local fire departments were called for assistance. By the afternoon of July 13, some firemen were able to enter the sixth floor to fight the fire from the interior. By daylight on July 14 the fire was contained to a small area on the sixth floor. The fire was considered extinguished on Monday, July 16 after the entire sixth floor was destroyed.

The location of the Center is within the boundaries of the Community Fire Protection District but outside the boundaries of the other fire departments which responded to the fire. However, in order to provide assistance in emergency conditions, all of the fire departments involved in extinguishing the blaze had previously entered into a mutual aid agreement pursuant to section 70.210 to 70.320, inclusive, of the Revised Statutes of Missouri for the interchange of fire fighting services. Under the terms of the agreement, parties thereto are not entitled to receive compensation, or become obligated to pay for any services performed under the agreement. Further, the agreement provided that any party may terminate its obligations thereunder by giving 30 days notice.

Specifically you ask whether GSA may reimburse the fire departments involved for supplemental expenses incurred as a result of the fire, i.e., equipment losses and payroll costs over and above the cost of personnel who would have been on duty notwithstanding the fire.

Our decisions have uniformly held that a charge against appropriated funds for firefighting services rendered by a political subdivision in connection with fires in or on Federal property located within the territorial area of responsibility of that subdivision is precluded where there is no legal obligation upon the United States to pay for such services. These holdings are predicated upon the premise, stated generally, that where there existed a statutory duty of a municipality, fire district or county to render firefighting services to property within its limits without cost to the owners of the property, such duty extended to protecting the property of the United States located within such limits without charge therefor.

As we stated in 49 Comp. Gen. 284, 286 (1969), the duty to provide fire protection "extends to protecting the property of the United States located within such limits and, consequently, since the Government is thus legally entitled to fire protection or firefighting service, there is no authority to charge appropriated funds with the cost thereof." A charge to appropriated funds for firefighting services to which the United States is legally entitled would, in effect, be a payment in lieu of taxes which would be in contravention of the Government's sovereign immunity from taxation. 24 Comp. Gen. 599 (1945); 26 *id.* 382 (1946); 32 *id.* 91 (1952).

The above principles are summarized in 45 Comp. Gen 1 (1965), which recognizes a possible exception in the case of a "Federal enclave," which is not involved in the instant situation.

A fire protection district is a "political subdivision" under Missouri law, and hence falls within the scope of the principles enumerated above. Vernon's Annotated Missouri Statutes, sections 70.210 and 321.010. There is thus no authority for the United States to make any

payment to the Community Fire Protection District of St. Louis County for firefighting services rendered nor to contract with the District for future services. 35 Comp. Gen. 311 (1955); B–125617, April 11, 1956.

The situation regarding the surrounding district and local fire departments is somewhat different in that the Records Center lay outside their boundaries and their obligation to respond to the fire arose out of contract rather than statute. Nevertheless, we are unable to conclude that these differences, in the circumstances here present, compel a different result. We believe that the decisions cited above stand for the proposition that a fire department which is legally obligated to provide its services to a given geographical area must provide those services equally to all property within that area, including Federal property (with the possible exception of the "Federal enclave" mentioned above). The source of the obligation, whether statute or agreement, cannot alter its nature. In the instant case, the mutual aid agreements had the effect of extending the area of responsibility of each signatory department or district. To the extent that the United States is a beneficiary under these agreements, it is merely an incidental one. Nor does the fact that the agreements could be terminated upon 30 days notice alter the fact that they were in full force and effect at the time of the fire. Of course in the event that the mutual aid agreements should be terminated or renegotiated to exclude the Records Center, GSA would be authorized to contract with the surrounding fire districts and departments (but not with the St. Louis Community Fire Protection District) for appropriate fire protection for the Center in the future. *Cf.* 45 Comp. Gen. 1 (1965).

In light of the foregoing we must conclude that there is no legal basis upon which payment by the United States to any of the fire districts or departments responding to the Records Center fire may be authorized.

[B–178773]

Contracts—Labor Stipulations—Service Contract Act of 1965—Omission of Provision

Although the failure to question the propriety of the absence from a solicitation for aircraft maintenance of a Service Contract Act (SCA) clause until after the award of a contract renders the protest untimely, since a significant issue has been raised because it refers to a principle of widespread interest and since a court is interested in the views of the GAO, the merits of the protest have been considered and it is concluded that the absence from the contract of a SCA clause does not render the contract illegal if after the contract award the Department of Labor decides that the SCA was applicable to the procurement, since the contracting officer acted in good faith and in accordance with regulations implementing the SCA in determining the Walsh-Healey Public Contracts Act pertaining to supplies, and not the SCA, which affords service contract workers

protection, was applicable, and, furthermore, it is primarily for contracting agencies to decide what provisions should or should not be included in a particular contract.

To the Lockheed Aircraft Service Company, December 6, 1973:

This is in reply to your telefax message of May 30, 1973, and subsequent correspondence, protesting the award of a contract to E-Systems, Incorporated, by the Department of the Air Force under request for proposals (RFP) No. F34601–73–R–7150, issued by the Oklahoma City Air Materiel Area, Tinker Air Force Base, Oklahoma.

Your protest is grounded on the Air Force's failure to include in the solicitation and resulting contract provisions applying the Service Contract Act of 1965, 41 U.S. Code 351 note, to this procurement. You assert that the Air Force, by not including such provisions, did not comply with the requirements of that act and that the contract awarded to E-Systems is therefore illegal. The Air Force, on the other hand, denies that it violated the Service Contract Act in the handling of this procurement, a position in which it is supported by counsel for E-Systems. The Department of Labor (DOL), whose views we solicited in connection with this matter, agrees with you and urges us to uphold your protest. For the reasons set forth below, we are of the opinion that the protest must be denied.

Initially, we must consider the assertions of the Air Force and E-Systems that the protest was untimely filed. The record shows that the solicitation, calling for offers to provide aircraft modification and programmed depot maintenance work for the Special Air Mission (SAM) fleet based at Andrews Air Force Base, was issued on December 15, 1972. The RFP contained the standard Walsh-Healey Public Contracts Act (41 U.S.C. 35 note) provision, but contained no provision regarding the Service Contract Act. Proposals were submitted by Lockheed (which, according to the Air Force, had been the sole-source and only contractor for the SAM fleet maintenance requirements for more than 20 years prior to 1973), E-Systems, and other offerors, and after a period of negotiation and evaluation, a contract was awarded to E-Systems on May 11, 1973. By letter dated May 18, 1973, which you submitted to the Air Force subsequent to a debriefing conference held on May 22, 1973, you asked the contracting officer to state whether a determination had been requested from either the Secretary of Labor or the Air Force Deputy Chief of Staff, Systems and Logistics, as to the applicability of the Service Contract Act to the procurement. The Air Force informed you by letter dated June 15, 1973, that no such determination had been requested. In the interim, you filed a protest with this Office on May 31.

Our Interim Bid Protest Procedures and Standards require that protests "based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of proposals shall be filed prior to * * * the closing date * * *. In other cases, bid protests shall be filed not later than five days after the basis for protest is known or should have been known, whichever is earlier." 4 CFR 20.2. That section also states that if a protest initially is filed with the contracting agency, a subsequent protest to this Office must be filed "within five days of notification of adverse agency action." Both the Air Force and E-Systems maintain that your protest involves the absence from the RFP of Service Contract Act provisions and therefore should have been filed prior to the closing date for receipt of proposals. Air Force also contends that in any event your protest should have been filed within 5 days of your receipt of notification of the award to E-Systems. You claim, however, that the absence from the solicitation of a Service Contract Act clause did not automatically indicate a violation of law, since the omission "may have been sanctioned by the Department of Labor." You further claim that only after you began to suspect that this was not the case that you asked the Air Force if in fact DOL had been queried as to the applicability of the Service Contract Act, and that your grounds for protest became known only after you received a negative reply from the Air Force.

We think your protest must be regarded as untimely filed. Although we agree that the absence of a Service Contract Act provision from the RFP did not necessarily indicate any illegal or improper action by the Air Force, our rules contemplate that any questions you might have regarding a solicitation will be raised prior to the closing date for receipt of proposals. This includes questions regarding the absence of a particular provision from a solicitation. B–178206, April 4, 1973. Therefore, it was incumbent upon you to query the Air Force about the basis for the non-inclusion of a Service Contract Act clause in the RFP prior to the date set for receipt of proposals, rather than after award was made to another firm, and your failure to have done so renders your protest untimely.

However, 4 CFR 20.2(b) provides that we may consider any protest which is not filed timely if the protest "raises issues significant to procurement practices or procedures," which we have said refers "to the presence of a principle of widespread interest." 52 Comp. Gen. 20, 23 (1972). We think this protest raises such an issue. It calls into question the legality of a contract awarded without Service Contract Act clauses when the Department of Labor believes the contract is subject to the act. That this case does not represent an isolated instance in which this question has arisen is evidenced by the fact that at least

two other protests involving this issue recently were filed with this Office. Furthermore, although we declined to consider the merits of one of those cases when the protester also requested substantive judicial relief, B–178463, June 29, 1973, the court in that suit stated that GAO's dismissal of the protest was "a reversal of deference" in view of the desirability of having cognizant administrative agencies, including GAO, review matters prior to judicial resolution. *Curtiss-Wright Corp.* v. *McLucas*, Civil Action No. 807–73, D.N.J., September 14, 1973, n. 20. We gather from that statement that the court may be interested in our views with respect to the primary issue involved in both this case and the *Curtiss-Wright* matter. Therefore, in accordance with our policy of considering protest issues when a court has expressed interest in our views, *see* 52 Comp. Gen. 161 (1972), we think it appropriate for us to decide this case on the merits.

The Service Contract Act of 1965, as amended, 41 U.S.C. 351 *et seq.*, provides that every contract entered into by the United States in excess of $2,500, subject to certain exceptions set forth in 41 U.S.C. 356, "the principle purpose of which is to furnish services in the United States through the use of service employees," shall contain provisions specifying the minimum wages to be paid and fringe benefits to be furnished service employees "in the performance of the contract," as determined by the Secretary of Labor. The act further provides that in no event shall a contractor pay his service employees under a service contract less than the minimum wage specified by the Fair Labor Standards Act, 29 U.S.C. 206(a)(1). Implementing regulations, setting forth the specific provisions to be included in contracts and providing for contracting agencies to notify DOL of their intent to award service contracts, have been promulgated by the Secretary of Labor and adopted by the Department of Defense. 29 CFR 4.4–4.6; Armed Services Procurement Regulation (ASPR) 12.1004, 12.1005. These regulations require contracting officers to file with DOL, at least 30 days prior to the issuance of a solicitation leading to the award of a contract "which may be subject to the Act," a Standard Form 98, Notice of Intent to make a Service Contract. DOL then notifies the contracting agency "of any determination of minimum monetary wages and fringe benefits applicable to the contract." ASPR 12–1005.2. Any such determination is then included in the solicitation and resultant contract, ASPR 12–1005.3, which would also include the standard Service Contract Act clause requiring employees to be paid not less than the wages set forth in the determination. If there is no wage determination, the clause requires employees to be paid not less than the statutory Federal minimum wage specified in the Fair Labor Standards Act.

The Air Force states that the primary purpose of the contract awarded to E-Systems "is to supply the Air Force with end products: that is, a serviceable, overhauled, rebuilt and modified aircraft," and that any "services performed in the execution of the contract are secondary to its primary purpose of supplying a serviceable overhauled aircraft." The Air Force further states that it has always included the Walsh-Healey Public Contracts Act provision in this type of contract because it viewed the contract as one for the procurement of supplies, and that this "policy did not change with the enactment of the Service Contract Act in 1965." Thus it maintains that since the contract is for supplies and not principally for furnishing services, the Service Contract Act and implementing regulations are inapplicable. On the other hand, DOL, after reviewing the contract specifications, has concluded that the contract is principally for services and that it cannot agree with the Air Force's self-determined policy" that the contract is primarily for supplies.

The Air Force and E-Systems argue that DOL is not correct in its interpretation of various provisions of the Service Contract Act or of the E-Systems contract. The Air Force also argues that even if DOL's views are regarded as correct, the missing Service Contract Act clause should be read into the contract in accordance with the doctrine enunciated in *G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1, 312 F.2d 418, cert. den. 375 U.S. 954 (1963), 376 U.S. 929, 377 U.S. 1010 (1964), so that the validity of the contract could be preserved. In our view, resolution of these issues is not necessary for a proper disposition of this and similar protests. DOL, whose views we have carefully considered, recommends that we sustain the protest essentially because it has now determined, after contract award and the filing of a protest, that the contract is subject to the Service Contract Act. However, although the Service Contract Act is applicable by its terms to all contracts (in excess of $2,500) which are principally for services, the regulatory scheme envisions an initial determination by the procuring agency as to whether a proposed contract "may be subject to the act." 29 CFR 4.4; ASPR 12-1005.2. Thus, if the agency believes a contract may be subject to the act, it is required to notify DOL by submission of a Standard Form 98. If the agency does not believe a contract may be subject to the act, however, then there is no duty on its part to submit anything to DOL or to include a Service Contract Act clause in the solicitation. Accordingly, we think the only issue that must be determined is whether or not the Air Force contracting officer had a reasonable basis for believing that this procurement was not one that "may be subject to the Act."

The Air Force, relying on what it regards as (and what reasonably appears to be) a significant amount of rebuilding or replacement of aircraft components called for by the contract specifications, has traditionally treated this type of contract, both before and after enactment of the Service Contract Act, as subject to the Walsh-Healey Act. Section 7 of the former act specifically exempts from its provisions "any work required to be done in accordance with the provisions of the Walsh-Healey Public Contract Act," 41 U.S.C. 356, and as the Air Force points out, the statutory history of the Service Contract Act suggests that the act's purpose was to fill a "void" and therefore would not apply to contracts already covered by the Walsh-Healey Act. H. Rept. No. 948, 89th Cong., 1st sess. 5; S. Rept. 798, 89th Cong., 1st sess. 2. The Air Force states that it continued to subject its aircraft depot maintenance and modification contracts to the requirements of the Walsh-Healey Act after passage of the Service Contract Act because:

> (1) The end items generated were not *services* of the type apparently contemplated by the SCA [Service Contract Act], and (2) the employees performing these contracts appeared to be adequately protected by existing labor standards legislation—and thus not within the void sought to be filled by the Congress when it passed the SCA.

Several judicial and DOL decisions, which appear to treat reasonably similar type of work as subject to the Walsh-Healey Act, are cited by the Air Force to support its determination that the Walsh-Healey Act, and not the Service Contract Act, was applicable to this type of procurement. It claims that it was not until July, 1973, that DOL's position on this matter became clear, and that it was therefore not on any kind of effective notice that the Service Contract Act might be applicable to aircraft overhaul work.

We think the record reasonably supports the Air Force position. With one exception, we are not aware of any DOL regulation or ruling which called into question, prior to the awarding of this contract, the Air Force policy with respect to Service Contract Act applicability to this type of procurement. It is true that DOL, contrary to the Air Force view, indicated that both the Service Contract Act and the Walsh-Healey Act could be applicable to the same contract, provided that the principal purpose of the contract was for furnishing services. 29 CFR 4.122. However, DOL also recognized that "no hard and fast rule can be laid down as to the precise meaning of the term 'principal' " and that whether "the principal purpose of a particular contract is the furnishing of services * * * is largely a question to be determined on the basis of all the facts in each particular case." 29 CFR 4.111. In 29 CFR 4.130, DOL set forth a list "illustrative" of the types of services called for which "have been found to come within the coverage of the Act." We see nothing in that list which suggests that

aircraft modification and overhaul contracts might be considered as within the coverage intended by the Service Contract Act.

The one exception referred to above is a letter dated May 22, 1969, in which DOL advised the National Aero Space Service Association that a Navy contract for the overhaul of S–2 series aircraft was regarded as "chiefly for the furnishing of services and subject to the Service Contract Act." DOL also stated in that letter that it did "not contemplate the issuance of any wage determination that would be applicable to this or any contract of a similar nature." The Air Force concedes that under the DOL interpretation implicit in this ruling "the Service Contract Act might apply to part or all of some overhaul and modification contracts." However, since the DOL ruling contained no explanation as to why the Navy contract was viewed as one chiefly for services, the Air Force "assume[d] that the contractor's overhaul and component supply responsibilities in that case were not of the same magnitude as those here." In addition, the Air Force explains its reaction to the DOL ruling as follows:

> It seemed clear, however, that the DOL would not issue wage determinations in these cases, but rather would rely on the minimum wage established under the Fair Labor Standards Act. Since most, if not all, of our modification and overhaul contractors were in interstate commerce, and therefore were automatically subject to the Fair Labor Standards Act, it was obvious that the inclusion of the SCA would have no effect on the wages paid service employees. Accordingly, we continued our practice of including only the Walsh-Healey Act.

We agree with DOL that its failure to issue a wage determination for the Navy S–2 procurement did not relieve the Air Force of its obligation to submit a Standard Form 98 whenever it was otherwise required to do so, especially in view of the 1972 amendment to the Service Contract Act which requires DOL to issue wage determinations for all service contracts under which more than 20 service employees are to be employed during fiscal year 1974. Public Law 92–473, approved October 9, 1972, 41 U.S.C. 358. However, in view of the history of this type of procurement, both prior to and subsequent to the S–2 ruling, as well as the statutory history of the Service Contract Act and the various judicial and administrative rulings which suggested the applicability of the Walsh–Healey Act to this procurement, we do not think that the Air Force acted unreasonably in not considering the S–2 ruling as mandating the submission of a Standard Form 98 to DOL for this procurement. Furthermore, DOL has not claimed that it ever put the Air Force on notice, prior to issuance of the solicitation or award of the contract, that it regarded this type of procurement as subject to the Service Contract Act. In fact, in its letter to us, DOL refers only to the S–2 ruling and then to the reaffirmation of its position in that case in a letter to the Air Force on July 18, 1973, which of course was after this contract was awarded.

It is also important to realize that it is primarily for the contracting agencies to decide what provisions should or should not be included in a particular contract. 44 Comp. Gen. 498 (1965); 47 *id.* 192 (1967). This, as has been previously noted herein, is the thrust of the applicable regulations which require the initial decision as to possible applicability of the Service Contract Act to be made by the procuring agency. Even DOL has recognized the primacy of an agency's function in this respect. For example, our file contains a copy of a letter dated April 19, 1971, from the Administrator of DOL's Wages and Hours and Public Contracts Division to the Federal Aviation Administration. That letter, sent in response to the submission of Standard Form 98, stated that "the contract may be principally for the manufacture or furnishing of materials, supplies, articles or equipment, and thus may be subject to * * * the Walsh–Healey Public Contracts Act * * *." The letter further stated:

> If upon reconsideration *you conclude that the contract will in fact be primarily for services* performed by service employees and thus subject to the * * * Service Contract Act, please return the notice * * * to this Office with a notation to that effect. [Italic supplied.]

Therefore, on the basis of the record before us, we conclude that the contracting officer acted in good faith in regarding the Service Contract Act as not applicable to this procurement, that his failure to include a Service Contract Act clause in the solicitation and to submit a Standard Form 98 to DOL was not a deliberate, arbitrary attempt to circumvent any statutory or regulatory provision, and that the contract was not awarded illegally. In addition, the fact that DOL subsequently made it clear to the Air Force that it regards the contract awarded to E-Systems as subject to the act does not render that contract void, since it was awarded in good faith and in accordance with the regulatory provisions implementing the Service Contract Act. See, in this connection, *Kentron Hawaii, Ltd.* v. *Warner*, No. 71–2038, D.C. Cir., June 15, 1973, and our decisions at 51 Comp. Gen. 72 (1971) and 52 *id.* 161 (1972), in which it was held that the validity of a service contract was not affected by the absence therefrom of a DOL wage determination when that absence was not due "to any misfeasance or nonfeasance on the part of the contracting agency." 51 Comp. Gen. 72, 76 (1971). We do not think the record in this case shows misfeasance or nonfeasance on the part of the Air Force.

Although we cannot agree with DOL that the protest should be upheld, we share its obvious concern with respect to affording service contract workers the protection envisioned by the Service Contract Act. We note that 29 CFR 4.5(c) provides that if a contracting agency does not notify DOL of its intent to make a service contract within the time prescribed by 29 CFR 4.4, "the contracting agency shall exercise any

and all of its power that may be needed (including * * * its power to negotiate, its power to pay any necessary additional costs, and its power under any provision of the contract authorizing changes) to include in the contract any wage determinations communicated to it within 30 days of the filing of such notice or of the discovery by the Employment Standards Administration, U.S. Department of Labor, of such omission." We think a similar provision, specifically pertaining to the situation in which DOL, subsequent to contract award, disagrees with a determination by a contracting agency that the Service Contract Act and therefore the notice requirements of 29 CFR 4.4 were not applicable to the procurement, would protect the workers concerned and would provide for the orderly resolution of the type of dispute involved herein without the potential disruption of the procurement process. Accordingly, we are suggesting to the Secretary of Labor that consideration be given to the development and promulgation of such a provision. A copy of our letter to the Secretary is enclosed.

[B–178966]

Pay—Retired—Annuity Elections for Dependents—Children—Dependency Status

Children of deceased retired members who are under 18 years of age and serving on active duty in a uniformed service, or are under 22 and serving as a cadet or midshipman at a service academy, or are enrolled in an institute of higher learning under a military subsistence scholarship program are considered eligible dependents to receive a Survivor Benefit Plan annuity (10 U.S.C. 1447–1455), within the meaning of 10 U.S.C. 1447(5), even though they are provided quarters and subsistence by the Government since a showing of actual dependency for the individuals enumerated is not required as the only valid restrictions on dependent eligibility are those limitations specifically mentioned in section 1447(5).

To the Secretary of Defense, December 6, 1973:

Further reference is made to a letter dated June 18, 1973, from the Acting Assistant Secretary of Defense (Comptroller) requesting a decision concerning the eligibility of several categories of otherwise dependent children of retired members, the children themselves being service members, to receive annuities under the provisions of the Survivor Benefit Plan, 10 U.S. Code 1447–1455, as added by Public Law 92–425. A copy of the Department of Defense Military Pay and Allowance Committee Action No. 481 setting forth and discussing the question was attached.

The question posed in the Committee Action is:

Is the child of a deceased retired member, who is:
a. under age 18, and serving on active duty in a uniformed service; or
b. under age 22, and serving as a cadet or midshipman at a service academy; or

c. under age 22, and enrolled in an institute of higher learning under a military subsistence scholarship program;
a dependent eligible for payment of a Survivors Benefit Plan annuity, within the meaning of 10 U.S.C. 1447(5), as amended by P.L. 92-425.

The brief discussion of this question in the committee action points out that since persons of the categories delineated in the question are provided quarters and subsistence by the Government, doubt has been expressed as to whether Congress intended to include people in the above-mentioned categories as being considered eligible for Survivor Benefit annuities. However, the view was also expressed that if Congress had intended to preclude such persons from being considered eligible under Public Law 92-425, specific language to that effect would have been included in the statute.

Section 1447(5), Title 10, U.S. Code, provides in pertinent part that:

"Dependent child" means a person who is—
(A) unmarried;
(B) (i) under 18 years of age; (ii) at least 18, but under 22, years of age and pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution; or (iii) incapable of supporting himself because of a mental or physical incapacity existing before his eighteenth birthday or incurred on or after that birthday, but before his twenty-second birthday, while pursuing such a full-time course of study or training; and
(C) the child of a person to whom the Plan applies including (i) an adopted child, and (ii) a stepchild, foster child, or recognized natural child who lived with that person in a regular parent-child relationship.

A review of the legislative history of the Survivor Benefit Plan shows that the act was the culmination of a long recognized need for the protection of military widows and dependent children. The Department of Defense originally proposed that the Plan make no specific provision for children, but instead suggested that those parents who desired to provide benefits for children, in addition to those available under social security, could do so through the insurable interest provision (10 U.S.C. 1448(b)). However, during consideration of the matter in the House of Representatives a specific children's benefit was added. Consequently, section 1450, Title 10, U.S. Code, provides that when a member of the Plan dies a monthly annuity shall be paid to:

(1) the eligible widow or widower;
(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section; or
(3) the natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies became entitled to retired or retainer pay, if there is no eligible beneficiary under clause (1) or (2).

This is the basic context in which the Committee's question concerning dependent eligibility should be framed. In this connection, there is nothing in the statute which requires, as a general proposition, a showing of actual dependency in all cases before allowing a retiree's

child to qualify as a "dependent child" under the act. Only with regard to children who are incapable of supporting themselves because of a mental or physical incapacity existing before their 18th birthday or, in the event such children are attending school full time, before their 22nd birthday and a foster child who, in order to qualify as a "dependent child" of a person to whom the Plan applies, must at the time of death of that person reside with an receive over one-half of his support from that person and not be cared for under a social agency contract, is there any limitation as to actual dependency.

Considering the clear and unambiguous language of section 1447(5) in defining a "dependent child," it is our view that, in the absence of a clear expression of legislative intent to the contrary, the only valid restrictions on dependent eligibility are those limitations specifically mentioned in this section. We therefore must conclude that Congress did not intend to prohibit those individuals in the categories mentioned, even though they may be provided quarters and subsistence by any of the uniformed services, from qualifying as eligible beneficiaries as dependent children and your question is answered accordingly.

[B-149685]

Loans—Participatory Loans—Small Business Administration and Private Lending Institutions—Interest Rates

Private lending institutions participating with the Small Business Administration (SBA) in making loans to assist public or private organizations operated for the benefit of the handcapped or to assist handicapped individuals in establishing, acquiring, or operating a small business concern pursuant to section 7(g) of the Small Business Act are not restricted to the 3 per centum per annum interest rate prescribed by section 7(g)(2) of the act, for to apply the language of section 7(g)(2) literally would defeat the purpose of the act. Therefore the SBA may approve an interest rate which is "legal and reasonable" on the participation loans made by lending institutions under section 7(g), even though the SBA on its direct or participation loans is restricted to the prescribed 3 percent interest rate. However, at an opportune time the SBA should seek appropriate legislative revision of the language in question.

To the Administrator, Small Business Administration, December 7, 1973:

Reference is made to your letter of August 8, 1973, requesting our concurrence in your decision to permit private lending institutions to charge a rate of interest which is "legal and reasonable" on loans made under section 7(g) of the Small Business Act, as amended, 15 U.S. Code 636(h), pursuant to agreements to participate on an immediate or deferred basis with the Small Business Administration (SBA).

Section 7(g) which was enacted by section 3 of Public Law 92–595, approved October 27, 1972, authorizes SBA to make loans either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred basis to assist public or private organizations operated for the benefit of handicapped individuals or to assist handicapped individuals themselves in establishing, acquiring or operating a small business concern.

You state that while the statute permits these loans to be made either directly by SBA or in participation with lending institutions the language establishing the interest rate to be charged appears to restrict the participant's share of a loan to 3 per centum per annum, the same as may be charged by the Administration. More specifically, section 7(g)(2) of the Small Business Act, as enacted by section 3 of Public Law 92–595, provides: "Any loan made under this subsection shall bear interest at a rate of 3 per centum per annum."

Your letter continues:

> It is evident that if SBA were to apply the language of Public Law 92–595 in its strictest sense the maximum amount of interest a participant could charge would be 3 per centum per annum. It is equally evident that no participation loans would be made if a participating lending institution could not charge a more realistic rate. It seemed implausible to us that Congress would enact a law which permitted (and therefore encouraged) lending institution participation in a loan program, and at the same time established an interest rate which would in effect preclude these lending institutions from such participation.

You state that an examination of the legislative history of Public Law 92–595 sheds no light, either pro or con, which would enable you to establish the intent of Congress with respect to this problem, but you feel that the intent of Congress in enacting Public Law 92–595 was that a reasonable and appropriate interest rate could be charged on the participating institution's share of any loan made under section 7(g) of the Small Business Act, as amended.

Therefore SBA has sent to the Federal Register for publication proposed rules and regulations to establish a loan program to provide assistance to certain non-profit organizations and to small business concerns owned by handicapped individuals. You point out that section 118.31(b) and (c) therein establishes the interest rate on direct loans and the SBA share of an immediate participation loan at 3 percent per annum while, subject to the approval of SBA, the participant's share of immediate participation loans and/or guaranteed loans prior to SBA's purchase shall be at a rate which is "legal and reasonable."

We agree that if SBA were to apply the language of section 7(g)(2) in its strictest sense, the maximum amount of interest a participant could charge would be 3 per centum per annum. And as you state it is probable that no participation loans would be made by private bank-

ing institutions if such institutions could not charge a more realistic interest rate.

We also agree that it seems highly unlikely that Congress would pass legislation which permitted lending institution participation in a loan program, and at the same time establish an interest rate which would in effect preclude these lending institutions from such participation. Hence, in the instant case it would not be unreasonable to conclude that the congressional intent in enacting the interest provision of Public Law 92–595 was that a reasonable and appropriate interest rate be charged on the participating institution's share of any loan made under section 7(g).

Accordingly, in the present case we would not object to the Small Business Administration's proposed rules and regulations, which establish the interest rate on direct loans and the SBA share of an immediate participation loan—made under section 7(g)—at 3 percent per annum and the participant's share of immediate participation loans and/or guaranteed loans prior to SBA's purchase at an interest rate which is "legal and reasonable." We suggest, however, that at an opportune time SBA seek appropriate legislative revisions of the language in question.

[B–139458]

Appointments—Presidential—Confirmation—Travel Expenses

A National Credit Union Board Presidential appointee whose appointment is subject to Senate confirmation may not be reimbursed the expenses incurred to travel to Washington to appear before the Senate Banking Committee in connection with his confirmation unless the Administrator of the National Credit Union Administration determines the appointee performed official business such as conferences with officials of the Administration that were of substantial benefit to the Administration and the Administrator approves the travel performed by the nominee.

To the Administrator, National Credit Union Administration, December 18, 1973:

This refers to your letter dated August 29, 1973, referenced OA/LA:vc, requesting our decision concerning the propriety of paying expenses incurred by a person prior to his confirmation as a Federal employee.

The Federal Credit Union Act, 12 U.S. Code 1752a, provides that the President will appoint, subject to Senate confirmation, persons to serve as members of the National Credit Union Board to advise the Administrator of the National Credit Union Administration on matters pertaining to its program. When the President makes an appointment, the appointee is required to appear before the Senate Banking

Committee. Accordingly, expenses in traveling to Washington are incurred by the appointee before he is a Federal employee. Your question is whether the National Credit Union Administration may administratively determine that such expenses incurred prior to confirmation are proper and payable after confirmation by the Senate.

In our decision B–150010, November 16, 1962, regarding the propriety of paying similar travel expenses claimed by a judicial appointee, we concluded that:

> Regarding a case in which a nominee travels to Washington solely to testify before a committee of the Senate in behalf of his confirmation by the Senate and who, while in Washington, performs no official business of the judiciary, we are of the opinion that so far as the use of judicial branch appropriations is concerned such travel is personal to the nominee and that the expense thereof should be borne by him.

Accordingly, since we cannot distinguish the above situation from the facts in this case as you present them, we must advise you that the National Credit Union Administration may not pay a nominee's travel expenses incurred while going before a confirmation committee. However, it also appears from the above-cited decision that if official business, such as conferences with officials of your office, is also conducted by the nominee at the time he is in Washington, D.C., for his confirmation hearings, and such business is determined to be of "substantial benefit" to the National Credit Union Administration, then there would be no objection to otherwise proper payments if there is administrative approval of the travel.

[B–178506]

Pay—Retired—Disability—Name on Promotion List—Effect on Retired Pay

An Air Force major who was retired for disability under 10 U.S.C. 1201 and 1372 after being recommended for promotion to the grade of lieutenant colonel, although entitled under section 206(a) of the Reserve Officer Personnel Act of 1954 to be placed on the retired list in the higher grade to which promoted (10 U.S.C. 1374(a)), is not entitled to retired pay based on the higher grade (10 U.S.C. 1374(d)), but pursuant to 10 U.S.C. 1372(1) his retired pay must be computed on the grade of major, the grade he was actually serving in on the date of his retirement since the disability for which the officer was retired was not found as the result of a physical examination for promotion as required by 10 U.S.C. 1372(3). Furthermore, section 507(a)(7) of the Officer Personnel Act of 1947, which permitted computation of an officer's retired pay on the basis of his promotion to a higher grade, is not for application as it was repealed prior to the officer's placement on the disability retired list.

To N. R. Breningstall, Department of the Air Force, December 19, 1973:

Further reference is made to your letter dated March 29, 1973 (file reference RPTT), requesting an advance decision as to the propriety

of making payment on a voucher in the amount of $10,597.11 in favor of Lieutenant Colonel James P. Maloney, USAF, retired, 169 14 4004, representing the difference in retired pay between the grade of major and lieutenant colonel for the period of July 4, 1958, through March 31, 1973. Your letter was forwarded to this Office by Headquarters United States Air Force letter dated April 20, 1973 (file reference ACF), and has been assigned Air Force Request No. DO–AF–1185 by the Department of Defense Military Pay and Allowance Committee.

By General Orders Number 24, dated May 13, 1958, Major James P. Maloney was placed on an approved recommended list for officers selected for promotion to the permanent grade of "Lieutenant Colonel, Reserve of the Air Force," with an effective date for promotion of June 25, 1959.

However, you indicate that subsequent to selection for promotion, he was found unfit for duty by reason of physical disability. And, by Special Orders Number C–310 dated June 24, 1958, he was retired for disability under 10 U.S. Code 1201 and 1372 effective July 3, 1958, in the grade of major.

You indicate that the Air Force has advanced Major Maloney on the retired list to the grade of lieutenant colonel under the provisions of 10 U.S.C. 1374(a) but, pursuant to 10 U.S.C. 1374(d), the Air Force has consistently declined to compute his retired pay based on the pay of a lieutenant colonel but has continued to compute such pay on the basis of the pay of a major. You also say that from the date of his retirement Colonel Maloney has maintained that under the provisions of 10 U.S.C. 1372(3) he was entitled to be retired in the grade of lieutenant colonel with retired pay based on that grade.

In view of the decisions of the Court of Claims in *Kratz* v. *United States*, 156 Ct. Cl. 480 (1962), *Willis* v. *United States*, 156 Ct. Cl. 485 (1962), *Frederickson* v. *United States*, 133 Ct. Cl. 890 (1956), and *Lowell* v. *United States*, 141 Ct. Cl. 111 (1958), as well as our decision 42 Comp. Gen. 685 (1963), you say it appears that Colonel Maloney was entitled under the provisions of 10 U.S.C. 1372(3) to be retired in and have his retired pay based on the grade of lieutenant colonel. Further, you ask, assuming that we agree that Colonel Maloney's retired pay should be computed based on the pay of a lieutenant colonel, whether he is entitled to such pay retroactively to July 4, 1958, the day he became entitled to retired pay.

The *Kratz* and *Willis* cases and our decision 42 Comp. Gen. 685, to which you refer, involved the application of section 507(a)(7) of the Officer Personnel Act of 1947, Ch. 512, 61 Stat. 795, 893, 10 U.S.C. 559a (7) (1952 ed.). That provision was expressly repealed by section 53 of the act of August 10, 1956, Ch. 1041, 70A Stat. 641, 677. In order

for Colonel Maloney to receive the benefits of section 507(a)(7) of the 1947 act, he must have been placed in a disability retired status prior to that repeal. Since the record shows that the member was not retired until July 3, 1958, that provision of law and those cases are not applicable to him. *Cf. Kratz* v. *United States*, 156 Ct. Cl. 480, 484.

The provisions of law in effect at the time of Colonel Maloney's retirement and applicable in his case are 10 U.S.C. 1372 which was derived in pertinent part from the fifth proviso of sections 402(d) and 409, title IV of the Career Compensation Act of 1949, approved October 12, 1949, Ch. 681, 63 Stat. 818, 823; and section 206(a), title II, of the Reserve Officer Personnel Act of 1954, approved September 3, 1954, Ch. 1257, 68 Stat. 1152, 50 U.S.C. 1196(a) (Supplement V, 1952 ed.), presently codified as 10 U.S.C. 1374 (a) through (d).

Section 1372 of Title 10, U.S. Code, provides in pertinent part as follows:

> Unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability under section 1201 * * * of this title * * * is entitled to the grade equivalent to the highest of the following:
>
> (1) The grade or rank in which he is serving * * * on the date when he is retired.
>
> * * * * * * *
>
> (3) The permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is retired and *which was found to exist as a result of his physical examination for promotion.* [Italic supplied.]

The Court of Claims and this Office have consistently viewed the fifth proviso of section 402(d) of the Career Compensation Act of 1949 and clause (3) of 10 U.S.C. 1372 as requiring a definite degree of connection between the physical examination and the prospective promotion in order to meet the conditions prescribed in those statutory provisions. In other words, the physical examination given in connection with a promotion must have a direct and substantial bearing on effecting that promotion. *See* 50 Comp. Gen. 508 (1971) and cases cited therein, especially *Brandt* v. *United States*, 155 Ct. Cl. 345, 351 (1961), wherein in holding in favor of the Government the court stated in part as follows:

> * * * In effect plaintiff asks this court to hold that solely by virtue of the fact that plaintiff was retired for physical disability at a time when he was being considered for promotion, he has met the requirements of the fifth proviso of section 402(d), and should thus receive disability retirement pay based on the higher rank to which he would have been promoted had he remained in the service. This we cannot do. Had Congress intended the provision to operate in that manner we believe it would have stated so, rather than imposing the specific requirement explicit in the language of the statue. * * * Plaintiff has actually sought to have this court extend the tenor of the cases distinguished above one step further, so as to eliminate the requirement of a degree of connection between physical examination and promotion from the fifth proviso of section 402(d).

Since we have declined to do this, the establishment of facts indicating at least a degree of connection between physical examination and proposed promotion remains requisite to a cause of action under the statutory provision. * * *

The *Fredrickson* case which you cite, and which was distinguished in the *Brandt* case, involved physical examinations for retirement and promotion which were so close together as to be held to be part and parcel of the same transaction. That does not appear to be the case here. Also, the *Lowell* case which you cite does not appear applicable here since that case did not involve the question of whether the member's physical disability was found to exist as a result of his physical examination for promotion.

From your letter, it appears that the physical examination given to Colonel Maloney, which gave rise to the question of his physical ability to remain in the service, took place subsequent to the date of the orders placing him on the approved recommended list of officers selected for promotion and, according to Colonel Maloney's letter, was given at his request not in connection with his promotion. Therefore, based on the information before us and in the absence of a promotional physical examination within the purview of the court's holding in the *Brandt* case, it does not appear that Colonel Maloney's physical disability "was found to exist as a result of his physical examination for promotion" and, consequently, would not come within the provisions of 10 U.S.C. 1372(3) so as to entitle him to retired pay based on the basic pay of a lieutenant colonel.

Section 206(a) of the Reserve Officer Personnel Act of 1954 provides in pertinent part as follows:

A Reserve officer recommended for promotion to any grade under this Act * * * who, at any time prior to promotion, is found incapacitated for service by reason of physical disability shall, if transferred to the Retired Reserve, be transferred in the grade for which recommended * * * unless holding appointment in or entitled to higher grade under other provisions of law. *No increase in pay or benefits shall accrue by reason of such promotion unless otherwise provided by law.* [Italic supplied.]

Contrary to Colonel Maloney's belief, the provisions of 10 U.S.C. 1374(a) and (d) did not originate in Public Law 86–559, approved June 30, 1960, 74 Stat. 264, but are the codification of the above-quoted provisions of section 206(a) of the Reserve Officer Personnel Act of 1954 which provisions were in effect at the time of his retirement.

Based on the before-quoted provisions of the Reserve Officer Personnel Act of 1954, it appears that Colonel Maloney was entitled to be placed on the retired list in the grade of lieutenant colonel at the time of his retirement, as you indicate was later done by the Air Force. However, since the italicized provisions of that act clearly prohibit him from receiving the retired pay of a lieutenant colonel, his retired pay must be computed on the basic pay of a major, the grade in which he was serving on the date when he was retired. *See* 10 U.S.C. 1372(1).

Accordingly, since Colonel Maloney has apparently been receiving retired pay computed on the grade of major to which he is properly entitled, payment on the voucher enclosed with your letter is not authorized and it will be retained here.

[B-160579]

Fees—Membership—Appropriation Availability

Although the prohibition in 5 U.S.C. 5946 against the use of appropriated funds to pay membership fees for individual employees in professional associations applies to employees of the National Environmental Research Center of the United States Environmental Protection Agency who join professional societies concerned with environment, notwithstanding such membership would be of primary benefit to the agency rather than the employee, there is no objection to the use of the funds for the payment of membership fees in the name of the agency if the expenditure is justified as necessary to carry out the purposes of the agency's appropriation.

General Accounting Office—Decisions—Advance—Voucher Accompaniment

Even though a U.S. Environmental Protection Agency (EPA) certifying officer (C.O.) is not entitled to a decision as to the availability of appropriated funds for the payment of membership fees for employees in professional organizations because his request was not accompanied by a voucher as required by 31 U.S.C. 82d, which limits the U.S. General Accounting Office to responding to a question of law with respect to payment on a specific voucher presented to the C.O. for certification prior to payment, in view of the fact the question no doubt will recur, it is considered as having been submitted by the head of EPA who is entitled to a decision under section 8 of the act of July 31, 1894, as amended (31 U.S.C. 74), under which GAO has authority to provide decisions to heads of executive departments or other establishments on any question involving payments which may be made by their agency.

To the Administrator, Environmental Protection Agency, December 26, 1973:

We have received a letter dated October 29, 1973, from Mr. Marcus W. Pugh, Authorized Certifying Officer, Chief, Fiscal Policies and Procedures Branch, United States Environmental Protection Agency (EPA), asking whether appropriated funds of EPA are available for the payment of membership fees for employees in professional organizations when, it is alleged, "the benefits of the membership accrue not to the individual—but to the organization as a whole."

We must point out that the statutory authority under which this Office may render a decision to a certifying officer (section 3 of the act of December 29, 1941, 55 Stat. 876, 31 U.S. Code 82d) limits us to instances involving a question of law with respect to payment on a specific voucher presented to him for certification prior to payment of the voucher. The voucher must also accompany the submission to this Office. (*See* 21 Comp. Gen. 1128 (1942); 52 *id.* 83 (1972).)

In the instant case, no voucher accompanied the request for a decision and the question is presented in general terms. Normally we would not render a decision under such circumstances. However, it appears from the letter that some vouchers previously disapproved by the Financial Management Division, EPA, may have been presented again with a request for reconsideration. In any event, the question seems likely to recur again. Accordingly, we have elected to treat the request for an opinion as though it had been submitted by you, and are responding under the broad authority of section 8 of the act of July 31, 1894, 28 Stat. 207, 208 as amended, 31 U.S.C. 74, under which we may provide decisions to heads of executive departments or other establishments on any question involving payments which may be made by their agencies.

Mr. Pugh's letter states that the organization and presumably the function of the National Environmental Research Center (NERC)-Cincinnati, require that its senior management and certain other research staff members maintain professional contacts with organizations which share EPA concerns for protection or enhancement of the quality of the environment. He cites as examples of such organizations the American Waterworks Association, the American Public Health Association, the American Academy for Advancement of Science, the American Society for Testing Materials, Water Pollution Control Federation, the American Public Works Association, The American Society of Microbiology, the American Institute of Mining, Society of Technical Writers and Publishers, National Solid Waste Management Association, the New York Academy of Science, and the Air Pollution Control Association.

The letter suggests that membership in the above organizations is primarily for the benefit of the agency and not for the individual who represents it, in contrast to such professional organizations as the American Society of Chemical Engineers or the American Chemical Society in which membership primarily benefits the professional career of the individual.

It has repeatedly been held that section 8 of the Act of June 26, 1912, now codified as 5 U.S.C. 5946, prohibits use of appropriated funds for payment of membership fees or dues in organizations or societies for Government employees or officers as *individuals*, regardless of the resulting benefit to the agency. (*See*, e.g., 32 Comp. Gen. 15 (1952); 33 *id.* 126 (1953).) The legislative history of the section in question indicates that the point Mr. Pugh raises was considered during the course of hearings on the District of Columbia Appropriation Act for 1913 (37 Stat 854) and rejected. At that time, Representative Cox questioned a $10 expenditure by the District of Columbia

Auditor to pay his dues in the National Association of Comptroller and Accountants. D.C. Commissioner Rudolph replied "Of course there is no doubt about the benefit this city derives from his being associated with men who comprise an association like a national association of auditors." His fellow Commissioner, Major Judson, then stated, "I do not think that is right, however, because we might as well have all the people who belong to associations of that kind have their dues paid by the District. I think we had better call his attention to that and have it refunded." (Hearings before the Committee on Appropriations of the House of Representatives on the District of Columbia appropriation bill for 1913, December 11, 1911, at pages 65, 66.) One month later, the bill was reported by the Committee containing the prohibition in substantially the same form in which it was later enacted. Thus the fact that substantial benefit to the Government would result from an individual membership is not sufficient to overcome the prohibition.

It is well settled, however, that this prohibition does not apply when the membership is entered in the name of the Federal agency concerned rather than the individual, that such membership would be of primary benefit to the agency, and that an administrative determination has been made that agency membership in a particular professional association is necessary to carry out the activities authorized by the appropriation in question. *See* 24 Comp. Gen. 814 (1945); 31 *id.* 398 (1952); 33 *id.* 126 (1953).

In light of these decisions, we must advise that EPA appropriations may not be used to pay membership fees for individual employees in any of the professional organizations listed in your letter. We would not be required to object, however, if the EPA wishes to purchase an agency membership in any such organization and justifies the expenditure as being of direct benefit to the agency and essential to carry out the purposes of its appropriation.

[B-179684]

District of Columbia—Contracts—Labor Stipulations—Affirmative Action Programs

The failure of the low bidder under an invitation for bids issued by the Government of the District of Columbia for roof rehabilitation at the Spring Road Clinic to execute a certificate of compliance with the equal opportunity obligations provision included in the solicitation until after bid opening was a matter of form rather than substance and does not constitute a basis for rejection of the low bid as the bid form submitted obligated the bidder to comply with the affirmative action requirements which were made part of the bid documents and did not require the submission or adoption of minority utilization goals but only that the contractor take certain affirmative action steps.

Bonds—Bid—Excessive Amount—Minor Informality

Since the furnishing of a bid bond in excess of the amount required by the invitation for bids does not constitute a change that would give one bidder an advantage over another, the deviation may be waived as a minor informality.

To Roofers, Inc., December 26, 1973:

Reference is made to your letter of September 7, 1973, protesting the proposed award of a contract to the Dee Cee Roofing Company, Incorporated (Dee Cee), under invitation for bids No. C–72178/BRI–2, issued on July 18, 1973, by the Government of the District of Columbia (D.C. Government), for roof rehabilitation at the Spring Road Clinic. For the reasons stated below, your protest is denied.

Bids were opened on August 1, 1973, and four bids were received. The bid from Dee Cee Roofing Company, Incorporated, at $52,200 was the low bid and your bid at $59,890 was second low. Upon examination of the bids it was found that the bid from Dee Cee did not comply with the requirements of the invitation in two respects. Dee Cee submitted a 20 percent bid bond rather than the 5 percent bid bond required. In addition, Dee Cee failed to include an executed certificate of compliance with the equal opportunity obligations provision included in the solicitation.

The contracting officer concluded that furnishing a bid bond in excess of the amount required did not render the bid nonresponsive. The question of whether Dee Cee's bid was nonresponsive for failing to include the certificate of compliance with the equal opportunity obligations was forwarded to the D.C. Contract Review Committee, which concluded that Dee Cee's bid was responsive based on the fact that the Commissioner's Order and Administrative Instructions were a part of the specifications on which the bidder submitted his bid. On August 31, 1973, Dee Cee furnished an executed certificate of compliance with the equal opportunity obligations. Award is being withheld pending our decision on the protest.

The primary basis of the protest concerns the legal effect of Dee Cee's failure to certify as provided in the solicitation that it was fully aware of the content of and agreed to comply with the Commissioner's Order and the Commissioner's Administrative Instruction referred to on the page included with the solicitation entitled "*Compliance With Equal Opportunity Obligations*," which stated as follows:

COMMISSIONER'S ORDER 73–51 DATED FEBRUARY 28, 1973 "COMPLIANCE WITH EQUAL OPPORTUNITY OBLIGATIONS IN CONTRACTS" AND THE "COMMISSIONER'S ADMINISTRATIVE INSTRUCTION DATED FEBRUARY 28, 1973, CHAPTER 2621," ARE INCLUDED AS A PART OF THIS INVITATION TO BID AND EACH BIDDER SHALL INDICATE IN HIS

BID DOCUMENT HIS COMMITMENT, IN WRITING, TO COMPLY WITH THE COMMISSIONER'S ORDER AND ADMINISTRATIVE INSTRUCTION. FAILURE TO COMPLY WITH THE AFOREMENTIONED MAY RESULT IN REJECTION OF HIS BID.

The Commissioner's Order and the Administrative Instruction referred to in the above statement were included with the bid documents.

In general, the Commissioner's Order sets forth the policy of the D.C. Government to provide equal opportunity in employment, as well as provisions to be included in contracts, duties of the contracting agencies, and requirements for contractors. It also provides that the procedures to be followed in implementing the order shall be those set forth in the Commissioner's Administrative Instruction.

The Commissioner's Administrative Instruction sets forth employment ranges constituting acceptable minimums upon which a prospective contractor must establish its commitment to meet affirmative action obligations for utilization of minorities for designated trades for construction contracts in excess of $100,000, and requires the submission of an affirmative action plan. For contracts under $100,000, the instruction provides that the contractor shall submit a personnel utilization schedule; however, there is no statement as to what standards constitute acceptable minimums and no requirement for submission of an affirmative action plan based upon such minimums. The D.C. Government has advised that criteria for acceptable minimums for contracts under $100,000 had not been developed as of the time of the issuance of this solicitation. We have been further advised that the D.C. Government is presently working on establishing minimum acceptable standards for construction contracts under $100,000.

Although a commitment to minimum manpower utilization goals was not required by this solicitation, the Administrative Instruction did impose certain other affirmative action requirements, such as utilization of minority owned subcontractors and maintenance of a training program. However, we do not believe that completion of the certification was necessary to establish a bidder's obligation to comply with those requirements upon acceptance of its bid. It is well established that a bidder can commit itself to a solicitation's affirmative action requirements in a manner other than that specified by the solicitation. 51 Comp. Gen. 329 (1971); B–176328, November 8, 1972; B–177846, March 27, 1973. Here, the "*Compliance With Equal Opportunity Obligations*" clause stated that the Commissioner's Order and Administrative Instruction were "included as a part of this invitation to bid." The bid form signed by the bidder stated:

The undersigned agrees * * * to * * * perform all work specified in accordance with all terms and conditions of this Invitation and the General Provisions Booklet, * * * specifications, addenda, schedules, plans and conditions (incorporated herein by reference and made a part hereof,) * * *.

As indicated above, the Order and Administrative Instruction did not require the submission or adoption of minority manpower utilization goals, but did require the contractor to take certain other affirmative action steps. We think that by signing the bid form Dee Cee obligated itself to meet these requirements, and that therefore its failure to sign the certification did not render its bid nonresponsive. *See* B–174216, December 27, 1971. In this connection, we note that even though the IFB contained a certification statement that could be completed by a bidder, there was no explicit IFB requirement for execution of that or any other certification.

In view of the foregoing, we agree with the D.C. Government that the failure to furnish the prebid certificate regarding compliance with equal opportunity obligations was a matter of form rather than substance and does not constitute a basis for rejecting Dee Cee's bid.

The final point concerns the effect of furnishing a bid bond in excess of the amount required. Since this is not the type of deviation that would give Dee Cee an advantage over your concern, it may be waived as a minor informality. *See* 38 Comp. Gen. 830 (1959).

[B–178701]

Contracts—Awards—Small Business Concerns—Certifications—Failure to Request

Under an invitation for bids for food services for 1 year with two 1-year options that was restricted to small business concerns, the award of a contract without referring the nonresponsibility of four low bidders to the Small Business Administration under the certificate of competency procedures because of the urgency of the procurement was a proper determination under ASPR 1–705.4(c)(iv). However, the refusal of the administrative agency to attend the informal conference on the protest held pursuant to section 20.9 of the Interim Bid Protest Procedures and Standards is a policy that should be reconsidered. Furthermore, the U.S. General Accounting Office will not substitute its judgment in the matter for that of the contracting officer unless it is shown by convincing evidence of record that a finding of nonresponsibility was arbitrary, capricious, or not based on substantial evidence.

Contracts—Awards—Small Business Concerns—Size—Appeal

The acceptance by a contracting officer of the self-certification submitted by the successful bidder that it is a small business concern on the basis that the contrary determination by a Small Business Administration (SBA) district office was not final as it had been appealed to the SBA Size Appeals Board was improper as the district director's decision remains in full force and effect unless reversed or modified by the Board, and the fact that ASPR 1–703(b)(3)(iv) permits suspension of the full size determination cycle when the urgency of a procurement so requires does not negate a regional size determination made prior to award. Because the contracting officer was not misled by the self-certification but acted with full knowledge of the facts in reliance on his reading of the applicable ASPR provisions, and because of the urgency of the procurement, the contract awarded should be terminated for the convenience of the Government and resolicited, and this recommendation requires the actions prescribed by sections 232 and 236 of the Legislative Reorganization Act of 1970.

To the Secretary of the Air Force, December 28, 1973:

This is in reply to letter LGPM, dated September 18, 1973, from the Chief, Contract Management Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, reporting on the protests of Chemical Technology, Inc. (CTI), Quality Maintenance Company, Inc. (Quality), Jets Services, Inc. (Jets), and the Small Business Administration (SBA) against the award of a contract to Dyneteria, Inc. (Dyneteria), under invitation for bids (IFB) F05600-73-B-0387, issued by Lowry Air Force Base.

The IFB, issued on May 7, 1973, requested bids for full food services for 1 year commencing September 1 with two 1-year options. The bid opening date was extended several times because of efforts to have the procurement restricted as a small business set-aside. The opening date was finally established by amendment as July 10, 1973. The amendment also advised bidders that the solicitation would be restricted to small business concerns.

At bid opening the following bids, including option periods, were received:

CTI	$4,173,430.72
Jets	4,699,053.45
Holloway Enterprises	4,721,783.69
Quality	5,242,554.11
Dyneteria	5,310,309.58
Amcor, Inc	5,633,058.83
MC&E Service & Support Co. (MC&E)	6,485,386.83
ABC Food Service	6,831,076.39

Preaward surveys were conducted on CTI, Jets, and Quality. The surveys recommended against award to these low bidders. Holloway alleged a mistake in bid and indicated that it would not participate in any preaward survey or take steps to demonstrate technical competence to perform the contract or to obtain a certificate of competency. In view of this, Holloway was determined to be nonresponsible.

Since the four low bidders were not recommended for consideration, a preaward survey was performed on Dyneteria which resulted in a recommendation for award. On July 31, 1973, a determination of urgency was made pursuant to paragraph 1-705.4(c)(iv) of the Armed Services Procurement Regulation (ASPR) and on August 1, 1973, the contract was awarded to Dyneteria without referring the nonresponsibility of the four low bidders to SBA under the certificate of competency (COC) procedures. The determination of urgency was based on the necessity to award the contract 30 days before the start of per-

formance, September 1, 1973, to allow the contractor sufficient start-up time.

CTI, Jets, SBA, and Quality protested to our Office on August 6, 8, 10, and 14, respectively, the award of the contract to Dyneteria on the grounds that: first, CTI, Jets, and Quality were entitled to have the determinations of nonresponsibility referred to SBA; second, Dyneteria was other than small business and, therefore, ineligible for award. In accordance with section 20.9 of our Interim Bid Protest Procedures and Standards, our Office extended the opportunity to all interested parties (CTI, Jets, Quality, Dyneteria, SBA, and the Air Force) to attend an informal conference on the protest.

The purpose of the 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. Air Force representatives declined our invitation to attend the conference apparently because it is contrary to Air Force 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 Air Force or deleterious to its procurement process. We earnestly urge that this policy be reconsidered since the advantages to be gained are significant. We would like to point out that other procurement agencies participate in these conferences and have acknowledged their usefulness. We would be pleased to discuss the matter further with the hope that your department will, in the future, avail itself of this salutary procedure.

The protestors contend that they were denied recourse to the COC procedure outlined in ASPR 1-705.4. This provision requires a contracting officer to refer the nonresponsibility of a small business concern to SBA for COC consideration. Issuance of a COC is conclusive on the agency as to the bidder's capacity and credit. However, in this procurement, the contracting officer made a determination of urgency under ASPR 1-705.4(c)(iv) and did not refer the nonresponsibility matters to SBA. It appears from the record before our Office that the determinations of nonresponsibility and the nonapplicability of the COC procedures were in compliance with ASPR and we find no basis to question these determinations.

Also, the protestors have challenged the findings of nonresponsibility by the contracting officer. We have often held that we will not substitute our judgment for that of the contracting officer in this area, unless it is shown by convincing evidence of record that the finding of nonresponsibility was arbitrary, capricious, or not based on sub-

stantial evidence. 45 Comp. Gen. 4 (1965). We do not believe this test has been met by the protestors and we will interpose no objection to the determinations of nonresponsibility.

A review of the record before Our Office shows that on June 27, 1973, the Charlotte, North Carolina, District Office of SBA determined Dyneteria to be other than a small business firm for food service procurements at Fort Ord, California; Fort Belvoir, Virginia; Fort Richardson, Alaska; and Hickam Air Force Base, Hawaii. This determination was timely appealed by Dyneteria. On August 17, 1973, the SBA Size Appeals Board affirmed the District Office decision. Notwithstanding the fact that the instant procurement was under the same size standards as the four involved in the SBA District Office determination, Dyneteria self-certified in its bid that it was an eligible small business concern. By letter dated July 11, 1973, the day after bid opening, MC&E protested to the contracting officer the size status of Dyneteria. This protest was received on July 16, 1973, and was forwarded to SBA for determination on July 17, 1973. On July 29, 1973, the contracting officer received a letter from the SBA Charlotte Office informing him of the June 27 determination and the appeal to the SBA Size Appeals Board filed by Dyneteria.

On these facts, the protestors maintain that the contracting officer knew, prior to award, that Dyneteria was a large business concern and was, therefore, ineligible for award. The Air Force's position is that under the pertinent provisions of ASPR, the SBA District Office's determination was not "final" since Dyneteria had appealed. Therefore, Dyneteria was eligible for award.

ASPR 1–703(b) states, in part, as follows:

(b) *Representation by a Bidder or Offeror.* Representation by a bidder or offeror that it is a small business concern shall be effective, even though questioned in accordance with the terms of this subparagraph (b), unless the SBA, in response to such question and pursuant to the procedures in (3) below, determines that the bidder or offeror in question is not a small business concern. * * *. The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers * * *. A representation by a bidder or offeror that it is a small business concern will not be accepted by the contracting officer if it is known that (i) such concern has previously been *finally* determined by SBA to be ineligible as a small business for the item or service being procured, and (ii) such concern has not subsequently been certified by SBA as being a small business. * * *. [Italic supplied.]

Subparagraphs (2) and (3) provide as follows:

(2) *Questioning of Status by Contracting Officer.* A contracting officer may, any time after bid opening, protest the small business status of any bidder or offeror on the instant procurement by sending a written notice to the SBA district office of the district in which the bidder or offeror has his principal place of business.

Such notice shall contain a statement of the basis for the protest, together with available supporting facts. SBA will advise the bidder or offeror in question that his small business status is under review.

(3) *Determination by SBA District Director.* The SBA District Director will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of his determination, and award may be made on the basis of that determination. This determination is final unless it is appealed in accordance with (4) below, and the contracting officer is notified of the appeal prior to award. If an award was made prior to the time the contracting officer received notice of the appeal, the contract shall be presumed to be valid. * * *.

Subparagraph (4) provides for an appeal to the SBA Size Appeals Board from a size determination of the SBA District Director.

Pursuant to 15 U.S.C. 637(b)(6), SBA is empowered to determine a business concern's size status for procurement purposes. Offices of the Government having procurement powers must accept as conclusive SBA's determination as to which concerns are to be designated small business. In discharge of this responsibility, SBA has promulgated regulations which have the force and effect of law (*Otis Steel Products Corp.* v. *United States*, 161 Ct. Cl. 694 (1963)), found at part 121 of chapter I of title 13 of the Code of Federal Regulations. Section 121.3–4, entitled "Size Determinations," provides that original size determinations shall be made by the director serving the region in which the principal office of the concern whose size is being protested is located. Such determinations are final unless appealed in accordance with section 121.3–6. Section 121.3–6(a) provides that the Size Appeals Board shall review appeals from size determinations made pursuant to section 121.3–4 and shall make final decisions as to whether determinations should be affirmed, reversed, or modified. Section 121.3–6(g) provides that following any decision in a size appeals case, an interested party may petition the Size Appeals Board for reconsideration of its decision. The reconsideration of the Size Appeals Board constitutes the final administrative remedy of SBA. When viewed in conjunction with the statutes and ASPR, these size regulations clearly establish SBA as the sole adjudicator of size status matters.

It is not disputed that, as of the date of award, the contracting officer knew that Dyneteria had self-certified itself small business; that the cognizant SBA district office had determined Dyneteria large business under the same size standard for the instant procurement; that Dyneteria had appealed the district office's determination to the Size Appeals Board; and that the Size Appeals Board's decision would not be forthcoming before the required award date. Under these circumstances, the contracting officer concluded, erroneously, we believe, that

unless a decision he considered to be "final" had been rendered by SBA, he was free to ignore the only outstanding SBA size determination.

ASPR 1-703(b)(3) provides that the SBA District Director will determine the small business status of a questioned bidder and award may be made on the basis of that determination. This determination is accorded finality unless appealed. In our view, this provision, as well as the regulatory scheme as a whole, is designed to facilitate orderly conduct of Government procurement where size questions are involved. Considering that SBA alone can determine small business status, there is a need for Government agencies to be able to rely upon SBA action at each stage of the procurement process.

Clearly, the right of appeal from a District Director's determination exists as to all interested concerns. However, the existence of that right, or even the exercise of an appeal, does not negate the validity of a size determination by an SBA District Director. The appeal is simply notice that the interested concern does not agree with the size determination. Until the District Director's determination is reversed or modified as provided for in the regulations, it remains in full force and effect insofar as the size of a bidder is concerned. We do not subscribe to the Air Force's interpretation that the appeal and self-certification of Dyneteria overrode the District Director's adverse size determination. Under the SBA regulations, only the Size Appeals Board can change the District Director's determination. A contracting officer is not free to independently evaluate the District Director's decision and reject it in favor of a bidder's self-serving statement. The applicable regulations give the contracting officer no decision-making authority in size determination. *Mid-West Construction, Ltd.* v. *United States*, 387 F. 2d 957, 961 (1968).

Pursuant to ASPR 1-703(b), a contracting officer cannot accept a bidder's self-certification if it is known that the bidder has been previously finally determined ineligible as a small business concern. In our view, the use of the word "finally" in this context clearly envisions a time frame sufficient to permit full exhaustion of the size determination process. Thus, this ASPR provision gives direction in a situation where a bidder has exhausted SBA's administrative remedies. However, this does not imply, as the Air Force asserts, that in the absence of a "final" SBA determination a bidder's representation is to control over an SBA District Director's size determination.

While ASPR 1-703(b)(3)(iv) permits suspension of the full size determination cycle when the urgency of the procurement so requires,

this authority does not negate a regional size determination made prior to award. To hold otherwise would be an emasculation of the authority vested in SBA to make size determinations under its statute which are "conclusive" on procurement officers of the Government. In effect, the contracting officer, in this case, has used the urgency situation to circumvent SBA's statutory authority. In an urgent procurement which cannot tolerate the delay incident to complete prosecution of all appeal rights, the only reasonable course of action open would be reliance on the district office's size determination.

Though we conclude that Dyneteria was ineligible for award as a small business concern, we recognize that the contracting officer was not misled by Dyneteria's self-certification but acted with full knowledge of the facts in reliance on his reading of the applicable ASPR provisions, quoted above. In view of this and the need for continuous food service, we recommend that the contract awarded Dyneteria be terminated for the convenience of the Government and the requirements, including the option periods, be resolicited.

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

We would appreciate advice of the action taken on our recommendation.

[B–179101]

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Government Estimated Basis

A proposal to furnish mess attendant services which deviated more than 5 percent from the manning estimates in the request for proposals was improperly rejected since the proposal was found to be technically satisfactory on the basis of the same manning charts that contained the deviation and ASPR 3–805.2 requires inclusion in the competitive range of all offers which have a reasonable chance of being selected for award and those offers where there is doubt they are in the competitive range. Although the offer should not have been regarded as out-

side the competitive range without an opportunity for the offeror to submit documentation substantiating the manning differences, interference with the good-faith award is not warranted but it is recommended that the renewal option in the contract should not be exercised.

To Sellers, Conner & Cuneo, December 28, 1973:

This is in reply to your letter of October 3, 1973, and prior correspondence, concerning the protest of ABC Management Services, Incorporated (ABC), against rejection of its proposal and award of a contract to another company under request for proposals (RFP) N00123–73–R–1613, issued by the Naval Regional Procurement Office, Los Angeles, California.

The RFP was for mess attendant services for the Naval Construction Battalion Center, Port Hueneme, California. Thirteen offers were received in response to the solicitation, and after a technical evaluation was performed eight offers, including ABC's, were found to be not within the competitive range. Best and final offers were subsequently requested from the five offerors in the competitive range, and award was made on June 29, 1973, to Tidewater Management Services, Incorporated (Tidewater).

The RFP required all offerors to submit manning charts. Section D of the RFP set forth the Government estimates of the total manning hours required for satisfactory performance and provided that:

Submission of manning charts whose total hours fall more than 5% below these estimates may result in rejection of the offer without further negotiations *unless* the offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required services satisfactorily with fewer hours.

After initial proposals had been received, the Navy revised downward its estimate of required man-hours and requested revised proposals based on the new estimates. The revised manning charts submitted by ABC on June 1, 1973, reflected 86,702.5 man-hours per year, which was a deviation of more than 6 percent from the Government estimate of 92,291 man-hours. ABC's offer was rejected because it did not contain any justification for exceeding the 5 percent variance from the Government estimate, even though the technical evaluators otherwise found the proposal to be "satisfactory." You argue that the contracting officer failed to exercise appropriate discretion by treating the not more than 5 percent variance requirement as an "absolute prerequisite for contract award," and you state that this

action was inconsistent with the actions taken by other contracting officers in similar procurements.

The rejection of ABC's proposal is explained in the *Documentation for the Review Board*, dated June 11, 1973, which was included with the Navy's report on this protest. The document states:

> * * * ABC's offer was deficient by 974 manhours or over 6% less. ABC was not the incumbent contractor and did not offer any substantiating evidence as to the reason for the manning differences. As per Section D(a) of the RFP, and in view of the fact that adequate competition was available, ABC's offer was rejected and ABC was eliminated from * * * the proposed competitive range.

We do not believe that rejection of ABC's proposal was proper under the reported circumstances of this case. We have previously noted that 10 U.S. Code 2304(g) contemplates that procurement officials are to determine a competitive range so that meaningful discussions can be held with all firms submitting proposals within that range. 50 Comp. Gen. 679, 684 (1971). Here ABC's proposal was found to be technically satisfactory, but was rejected without discussion solely because that firm did not specifically justify a deviation of more than 6 percent from the Government estimate of required manning levels, even though the determination of "satisfactory" was based on the manning charts containing the deviation. Clearly, the permissive terms of the RFP did not require rejection of the ABC proposal. Furthermore, we think the rejection was inconsistent with ASPR 3-805.2 (DPC #110, May 30, 1973), which provides that the competitive range "shall include all proposals which have a reasonable chance of being selected for award" as well as those as to which "there is doubt" as to whether it is in the competitive range. It appears that what the contracting officer did here is analogous to determining the competitive range by use of a predetermined score, a practice which we have criticized as contrary to sound procurement policy. 50 Comp. Gen. 59 (1970).

With respect to the award to Tidewater, the record indicates that the man-hours proposed in that firm's best and final offer, as well as in the offer submitted in response to the Government's revised estimate, were within 5 percent of the Government's estimate, and that the award was otherwise in accordance with the RFP criteria.

Notwithstanding our conclusion that ABC's offer should not have been regarded as outside the competitive range without an opportunity to submit documentation substantiating the manning differences, we do not believe the circumstances warrant interference with the good-faith award to Tidewater. However, we are advising the Secretary of the Navy that the renewal option in the contract should not be exercised.

[B-179478]

Carriers—Common—State Regulated

In the evaluation of bids to furnish field desks to be shipped f.o.b. origin to several destinations, the carriers whose rates were used by the contracting agency in computing transportation costs may be regarded as "regulated common carriers" within the meaning of ASPR 2-201(a)D(vi), whether they are regulated by the Interstate Commerce Commission or the State in which the bidder's production facilities and delivery points are located since the purpose of the regulation is to insure that award is made to the bidder offering the lowest evalauted overall cost including transportation costs as required by ASPR 19-100 and ASPR 19-301. Furthermore, the United States may utilize tenders issued by State-regulated carriers for intrastate shipments.

Transportation—Rates—Section 22 Quotations—Utilization

The contention that preferential "section 22" rates tendered by carriers regulated by the Interstate Commerce Commission to the Government cannot be used in computing transportation costs for the evaluation of f.o.b. origin bids to furnish field desks, since the clause in ASPR 7-103.25 was not included in the invitation for bids, is not valid because the wording of the clause appears verbatim in the invitation. Moreover, ASPR 19-217.1(a), which the protestant views as requiring inclusion of the clause, only requires inclusion if the contractor may be required by the Government to ship the desks under prepaid commercial bills of lading.

Transportation—Rates—Section 22 Quotations—Effective Date for Bid Evaluation Purposes

For the purpose of using carriers' "section 22" tenders in the evaluation of bids under a solicitation for field desks, there is no provision in ASPR for evaluating carriers' responsibility or likelihood that the preferential "section 22" tenders offered to the Government by the carriers will still exist on date of shipment. However, since "section 22" tenders are continuing unilateral offers which may be withdrawn by a carrier in accordance with the terms of the particular tender, even though there is no assurance of the continued existence of a tender, the contracting agency need not determine in evaluating bids that these rates will exist on the date of shipment, so long as they are in effect or are to become effective prior to the date of the expected shipment and are on file or published as provided in ASPR 19-301.1(a).

Contracts—Specifications—Amendments—Late Receipt Effect

A bidder who contends that the failure to be timely notified of an amendment to an invitation for bids to furnish field desks that extended the bid opening date cost it more favorable quotes from suppliers is not considered to have been prejudiced by the extension of the bid opening date or the failure to receive the amendment prior to the originally scheduled bid opening date where the record evidences an acknowledgment of the amendment was received with a letter modifying certain option prices by the time of bid opening. Furthermore, there is no indication that the apparent late receipt of the amendment resulted from any deliberate act by the contracting agency or that the bidder raised any objection prior to the extended bid opening.

Bidders—Qualifications—Prior Unsatisfactory Service—Administrative Determination

Although defaults or unsatisfactory performance under prior contracts are for consideration in determining bidder responsibility under an invitation for bids to furnish field desks, in view of favorable preaward surveys and satisfactory performance under current contracts, the U.S. General Accounting Office will not question the contracting officer's determination that the bidders selected for contract awards are responsible. Furthermore, responsibility is a question of fact to be determined by the contracting officer and necessarily involves the exercise of a considerable range of discretion and, therefore, determinations of responsibility should be accepted where there is no convincing evidence that a determination was arbitrary, capricious or not based on substantial evidence.

To the Texas Trunk Company, Inc., December 28, 1973:

Reference is made to your telegram dated August 16, 1973, and subsequent correspondence from you and James F. Gardner Associates, Attorneys, protesting against the award of a contract to any other firm under invitation for bids (IFB) No. DSA-400-74-B-0062, issued by the Defense General Supply Center (DGSC), Defense Supply Agency, Richmond, Virginia, for the supply of field desks to four locations.

Item 0001 of the IFB called for the supply of 454 desks to Tracy, California; item 0002 for 77 desks to Columbus, Ohio; item 0003 for 339 desks to Memphis, Tennessee; and item 0004 for 581 desks to Richmond, Virginia. Bids could be made on an f.o.b. destination or an f.o.b. origin basis on items 0001, 0003, and 0004. On item 0002, bids could be made only on a f.o.b. destination basis. Bid opening was to take place on August 3, 1973; however, Amendment 0001 dated August 2, 1973, extended the opening date to August 8, 1973.

On August 8, 1973, the six bids received were opened. The bid by Miller Manufacturing Company, Inc. was withdrawn with DGSC's permission due to a mistake in its bid. The other bids received were recorded as follows:

Bidder	Tracy, California f.o.b. destination	Tracy, California f.o.b. origin	Columbus, Ohio f.o.b. destination
Remco Products, Inc. (Remco)	$110.00	$108.00	$118.00
Pluribus Products, Inc. (Pluribus)	$118.00	$108.00	$114.00
Texas Trunk Co., Inc	$111.24	N/B	$111.98
Auto Skate Co., Inc	$125.00	$110.00	$120.00
Winslow Corp	N/B	$114.00	$117.00

Bidder	Memphis, Tennessee f.o.b. destination	Memphis, Tennessee f.o.b. origin	Richmond, Virginia f.o.b. destination	Richmond, Virginia f.o.b. origin
Remco	N/B	$108.00	N/B	$108.00
Pluribus	$113.00	$108.00	$112.00	$108.00
Texas Trunk	$110.73	N/B	$110.56	N/B
Auto Skate	$120.00	$110.00	$118.00	$110.00
Winslow Coop	N/B	$114.00	N/B	$114.00

Your bid was made on an "all or none" basis.

DGSC proposed to award item 0001 to Remco and items 0002, 0003 and 0004 to Pluribus after evaluating the bids as follows:

Item 0001 Remco (f.o.b. origin)	
unit bid	$108.00
less ½% discount	.54
plus transportation	.2688
unit cost	$107.7288
Item 0002 Pluribus (f.o.b. destination)	
unit bid	$114.00
less ⅓% discount	.38
unit cost	$113.62
Item 0003 Pluribus (f.o.b. origin)	
unit bid	$108.00
less ⅓% discount	.36
plus transportation	1.1685
unit cost	$108.8085
Item 0004 Pluribus (f.o.b. origin)	
unit bid	$108.00
less ⅓% discount	.36
plus transportation	.7287
unit cost	$108.3687
Texas Trunk (f.o.b. destination)	
unit bid	$111.24
less ½% discount	.56
unit cost	$110.68
Texas Trunk (f.o.b. destination)	
unit bid	$111.98
less ½% discount	.56
unit cost	$111.42
Texas Trunk (f.o.b. destination)	
unit bid	$110.73
less ½% discount	.55
unit cost	$110.18
Texas Trunk (f.o.b. destination)	
unit bid	$110.56
less ½% discount	.55
unit cost	$110.01

Your bid was determined to be low on only item 0002. However, your was on an "all or none" basis. Accordingly, it is proposed that split awards to Remco and Pluribus be made since your total evaluated bid is $160,093.76, as compared to the $157,500.32 total evaluated cost of the proposed split award.

You contend that the evaluation of the bids was in violation of clause D-9 of the IFB, which incorporated the following clause from Armed Services Procurement Regulation (ASPR) paragraph 2-201 (a)D(vi):

EVALUATION—F.O.B. ORIGIN. Land methods of transportation by regulated common carrier are normal means of transportation used by the Government for shipment within the United States (excluding Alaska and Hawaii). Accordingly, for the purpose of evaluating bids (or proposals), only such methods will be considered in establishing the cost of transportation between bidder's (or offeror's) shipping point and destination (tentative or firm, whichever is applicable), in the United States (excluding Alaska and Hawaii). Such transportation cost will be added to the bid (or proposal) price in determining the overall cost of the supplies to the Government. When tentative destinations are indicated, they will be used only for evaluation purposes, the Government having the right to utilize any other means of transportation or any other destination at the time of shipment.

You contend that the carriers, whose rates were used by the procuring activity in evaluating the bids, are not "regulated common carriers," but agricultural cooperative "dead head" haulers not regulated by the Interstate Commerce Commission (ICC).

You further allege that "section 22" rates (i.e., special reduced rates tendered to the Federal Government by carriers pursuant to 49 U.S.C. 22) can only be utilized for purposes of evaluation in accordance with ASPR 19-217. You state that ASPR 19-217.1 expressly excludes the use of "section 22" rates in f.o.b. destination contracts and directs that if such rates are to apply to f.o.b. origin contracts, ASPR 7-103.25 must be included in the IFB. You conclude that since this clause did not appear in the IFB, it is indicated that "section 22" rates were not contemplated and, therefore, should not be used in evaluating the bids under the IFB.

You also contend that when transportation costs are a factor in the evaluation of bids, those costs must be computed on the basis of rates to be effective at the time of shipment and that the rates must actually have been filed or published at the time of bid opening. You state that inasmuch as the administrative report only indicates the existence of "section 22" tenders on the date of bid opening, but makes no comment as to their validity at the date of shipment, these rates should not be utilized in the evaluation of the bids under the present IFB.

You finally contend that the transportation rates used by the procuring activity were unrealistically low. You conclude that if these transportation rates had been computed in accordance with ASPR and the terms of the IFB, your bid would have been low.

The procuring activity determined the unit transportation costs for evaluation of the bids as follows:

Item	Low Evaluated Bidder	Weight/Freight Rates	Unit Transportation Costs
0001 To Tracy, California	Remco From Rancho Cordova, California.	30,020 pounds @ $.22 per hundred pounds, Hall's Trucking Company (Hall) Quotation No. 1; 13,110 pounds as 20,000 pounds @ $.28 per hundred pounds, Trez Transport Company (Trez) Quotation No. 1.	$. 2688
0003 To Memphis, Tennessee	Pluribus From Brooklyn, New York	32,205 pounds @ $1.23 per hundred pounds, Malone Freight Lines, Inc. (Malone) Quotation No. 148.	$1. 1685
0004 To Richmond, Virginia	Pluribus From Brooklyn, New York	35,055 pounds @ $.66 per hundred pounds, 20,140 pounds as 24,000 pounds @ $.80 per hundred pounds, George W. Brown, Inc. (Brown) Quotation No. 69.	$. 7287

Malone is regulated by the ICC under Certificate No. MC–75840. Brown is also regulated by the ICC under Certificate No. MC–65491. Hall and Trez are not regulated by the ICC. However, they are regulated by the Public Utilities Commission of California (CPUC). Hall has been issued CPUC Radial Highway Common Carrier Permit No. CAL–T–84923. Trez has been issued permit No. CAL–T–101339.

It is clear that the United States may utilize tenders issued by State-regulated carriers for intrastate shipments. See *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958); *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1965). Moreover, use of the means of transportation which is most advantageous to the Government is required by ASPR 19–100. Also ASPR 19–301.1(a) states that "the best available transportation rates in effect or to become effective prior to the expected date of the initial shipment and on file or published at the date of bid opening, *shall* be used in the evaluation." [Italic supplied.] Furthermore, the inclusion of estimated freight costs in determining the low bidder is in accord

with 10 U.S.C. 2305(c), which requires that award shall be made to that responsible bidder, whose bid "will be most advantageous to the Government, price and other factors considered."

We find that the purpose of ASPR 2-201(a)D(vi) is to comply with the above statutory directive, and the directives of ASPR 19-100 and 19-301, by insuring that award is made to the bidder offering the lowest evaluated overall cost to the Government, including transportation costs. In cases where a bidder's production facilities are in the same State as the delivery point under the IFB, we believe that ASPR 2-201(a)D(vi) contemplates that the term "regulated common carriers" includes common carriers who are regulated by the State, since the carriers offering the lowest possible rates for these intrastate shipments are likely to be intrastate carriers regulated only by the State.

In reviewing your contention that the rates of carriers whose tenders were used in evaluation were unrealistically high, we note that the transportation rates under Malone Quotation No. 148 for the shipment from Brooklyn to Memphis are slightly higher than as computed by the procuring activity. This tender offers the Government class 35 rates, truckload minimum 32,000 pounds, as published in Table No. 1 of Malone Tariff No. 2-A, MF-ICC No. 26. The procuring activity used the rates in Supplement No. 32 of this tariff (i.e., $1.23 per hundred pounds). However, these rates were superseded by Supplement No. 35 effective June 18, 1973. Therefore, as of bid opening August 8, 1973, the appropriate rate was $1.35 per hundred pounds. This would raise the unit transportation cost of shipping the desks from Brooklyn to Memphis to $1.2825 (32,205 pounds x $1.35÷339 units). Pluribus' total unit cost, if evaluated on the basis of the rates in Supplement No. 35, would have been $108.9225 ($108.00-$.36+$1.2825). This is still lower than your evaluated total unit cost of $110.18.

Also, the procuring activity used Brown Quotation No. 69 in computing transportation costs from Brooklyn to Richmond. We note that this tender was canceled on April 6, 1973. However, we also note that Brown quotation No. 73, which would cover the shipment of the desks from Brooklyn to Richmond for the same rates offered in Quotation No. 69, was issued on April 16, 1973, and was in effect at bid opening.

It appears that the procuring activity computed the transportation costs of several bidders under this IFB by use of tenders issued by agricultural cooperatives who are exempted from regulation by the ICC. *See* 49 U.S.C. 303(b)(5). However, since the carriers whose rates were used in computing the transportation costs of the bidders to whom award is proposed are regulated common carriers, it cannot be said that you were prejudiced by this apparent use of the tenders of agricultural cooperatives.

With regard to your contention that the non-inclusion of ASPR 7–103.25 in the IFB precludes the use of "section 22" rates in evaluating the bids, we note that the wording of this clause appears verbatim at the end of clause H–6 of the IFB. Moreover, even if this clause was not included in the IFB we do not feel that this would preclude the use of "section 22" rates in evaluating the bids, since ASPR 19–217.1 (a) only requires the inclusion of this clause if the contractor may be required by the Government to ship under prepaid commercial bills of lading.

The legal status of "section 22" tenders is that of continuing unilateral offers, which may be withdrawn by the carrier in accordance with the terms of the particular tender. However, we consistently have found that "section 22" rates, when they are available to the Government, should be used in the evaluation of f.o.b. origin bids so long as they are in effect or to become effective prior to the date of the expected shipment and on file or published at the date of bid opening. 46 Comp. Gen. 77 (1966); B–172011, August 3, 1971. Moreover, we have held that there is no provision in ASPR for evaluating the responsibility of carriers or the liklihood that the "section 22" rates would still exist on the date of shipment. *See* 46 Comp. Gen. 77, 83 (1966). Therefore, even though there is no assurance that such tenders will be effective as of the date of shipment, they may be considered in the evaluation so long as they are in effect or to become effective prior to the date of the expected shipment and on file or published. 46 Comp. Gen. 77, *supra;* ASPR 19–301.1(a).

You cite 39 Comp. Gen. 774 (1960) to support your position as to the necessity of the agency finding that the tenders would exist on the shipment date. That case involved a bidder asking to have his bid evaluated on the basis of reduced rates obtained by his "rate shopping" after bid opening. In that case, we stated that "while transportation costs *may* be calculated on the basis of rates to be effective at the time of shipment, such rates must have been actually filed or published at the time of evaluation." [Italic supplied.] Since the rates there involved had not been filed or published at the time of evaluation, even though they would be effective at the time of shipment, they were not for consideration.

You also contend that you received no notice of Amendment 0001 and did not know of its existence until after the scheduled opening called for on the face of the IFB. You state that this "tactic" cost you more favorable quotes from suppliers.

We note that a signed copy of the amendment, which bears your August 6, 1973 receipt stamp, was received by the agency, along with a letter modifying certain option prices, by the time of bid opening. Although you apparently did not receive the amendment prior to the originally scheduled bid opening, it appears that you received it in time to revise certain prices. Furthermore, there is no indication in the record that the apparent late receipt resulted from any deliberate act by the agency or that you raised any objection prior to the extended bid opening. Therefore, we are unable to perceive of any prejudice to your firm.

You also raise certain questions concerning three previous solicitations by DGSC for field desks and you state that this procurement history clearly reflects "the bumbling ineptness of the other prospective bidders." You further state that there has yet been no production under the contracts awarded to Remco and Pluribus pursuant to these prior solicitations. You feel that it is incongruous that these contractors be found responsible under the present IFB since they are unable to deliver under existing contracts for the same item.

The procuring activity determined that Remco's and Pluribus' capacity to perform has been satisfactorily established, based upon favorable preaward surveys and current performance under the prior contracts for field desks referred to by you. In this regard, we have been informed by the DGSC that Pluribus has made five partial shipments totaling 1256 desks and delivery is shortly anticipated on 682 additional desks. Furthermore, it is reported that Pluribus was given a 30 day extension on delivery because of difficulty in obtaining tubing. Pluribus reportedly is not delinquent for either the original quantity or the option quantity. Remco was reportedly delinquent in deliveries because of difficulty in obtaining plywood. However, an extension was granted because it was determined that the delay was beyond Remco's control. Although Remco has made no deliveries, it now has 500 desks completed and ready for inspection and packing, 300 desks 98 percent completed and the balance of the contract quantity under production.

Responsibility is a question of fact to be determined by the contracting officer and necessarily involves the exercise of a considerable range of discretion. Where, as in this case, there is no convincing evidence that the determination was arbitrary, capricious or not based upon substantial evidence, we will not substitute our judgment for that of the contracting officer. 45 Comp. Gen. 4 (1968); 51 Comp. Gen. 703, 709 (1972).

In view of the foregoing, your protest is denied.

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Although defaults or unsatisfactory performance under prior contracts are for consideration in determining bidder responsibility under IFB to furnish field desks, in view of favorable preaward surveys and satisfactory performance under current contracts, U.S. GAO will not question contracting officer's determination that bidders selected for contract awards are responsible. Furthermore, responsibility is a question of fact to be determined by contracting officer and necessarily involves exercise of considerable range of discretion and, therefore, determinations of responsibility should be accepted where there is no convincing evidence that determination was arbitrary, capricious or not based on substantial evidence---------- 443

Qualified Offerors List

Although protest against award of contract under RFP issued by National Highway Traffic Safety Admin. will not be considered as it was untimely filed pursuant to sec. 20.2 of GAO Interim Bid Protest Procedures and Standards, exception is taken to establishment and operation of Qualified Offerors List (QOL) by Admin. to curtail excessive production of solicitation packages, but which in fact is presolicitation procedure for determining prospective bidder's or offeror's responsibility, and as procedure unduly restricts competition it shoud be eliminated. Furthermore, Federal Procurement Regs., relied upon as authority to establish QOL, merely permit establishment of mailing list to assure adequate source of supply and to spell out necessary procedures for reasonable restriction on number of solicitations available---------- 209

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Nonreferral for certification justification
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Under IFB for food services for 1 year with two 1-year options that was restricted to small business concerns, award of contract without referring the nonresponsibility of four low bidders to SBA under certificate of competency procedures because of urgency of procurement was proper determination under ASPR 1-705.4(c)(iv). However, refusal of administrative agency to attend informal conference on protest held pursuant to sec. 20.9 of Interim Bid Protest Procedures and Standards is policy that should be reconsidered. Furthermore, U.S. GAO will not substitute its judgment in matter for that of contracting officer unless it is shown by convincing evidence of record that finding of nonresponsibility was arbitrary, capricious, or not based on substantial evidence-- 434

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Where IFB to design, fabricate, and erect window walls, entrances, and rolling and sliding doors did not restrict contract performance to single firm nor restrict subcontracting because of 5-year minimum experience requirement, and bidder took no exception to requirement that at least 12 percent of work would be performed by its own force, fact that subcontractor was listed, although not required, is not construed to mean all work would be subcontracted; where subcontractor's insurance experience modification factor for Workmen's Compensation permitted Govt. to take into consideration cost of Govt.-provided insurance, failure of prime contractor to submit its own insurance factor is minor informality; and where subcontractor is bound by prime contractor's commitment to Washington Plan providing minority hiring goals, bid as submitted was responsive and was properly considered for contract award 331

Responsibility *v.* responsiveness
Bid deviations

Although deletion of total set-aside for small business concerns from IFB for hamsters without verification of potential bidders' intentions will not be questioned in view of concurrence of SBA representative to deletion, it is recommended that in future procurements decisions to make or delete total set-aside be carefully considered, potential sources of small business interest be thoroughly investigated, and basis of determination be fully explained and documented. Furthermore, discarding all bids under amended invitation that deleted set-aside and negotiation of procurement under 41 U.S.C. 252(c)(10) were improper actions since deviations in three bids received affected bidder responsibility and not bid responsiveness. However, negotiations currently being conducted may be continued as needs of contracting agency have changed since opening of bids and use of negotiations will not negate maximum possible competition which advertised procurements attempt to further 221

Bid rejection erroneous

Failure of low bidder to list buses it would use in performing transportation service contracts did not render bid nonresponsive as omission relates to responsibility of bidder rather than to responsiveness of bid, since procurement requirement was for furnishing of services and not for furnishing buses, except as incident to furnishing services, and since bidder is legally obligated to furnish buses having acceptable minimum characteristics. Therefore bid should not have been rejected without specific determination that company was nonresponsive 396

BIDS
All or none
Award to one bidder advantageous

Fact that one agency seeks to meet its minimum needs for efficient garbage removal system by purchasing entire system—that is grouping bodies, refuse containers, and trucks—while another agency plans to modify on-hand items and by only certain components of system is not

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determinative of propriety of either solicitation as both methods are reasonable in order to achieve desired ends. Therefore, all or nothing bidding requirement on refuse containers, trucks, and related equipment is not considered unduly restrictive of competition, even though manufacture of single component would be excluded, since question of compatibility of components is reasonable basis for procuring agency to require bids on entire system 270

Bonds. (*See* **BONDS, Bid**)
Buy American Act
Buy American Certificate
Omission

Fact that unsolicited literature accompanying protestant's bid did not include all purchase description requirements and that bidder failed to submit technical manuals with its bid and to execute Buy American Certificate does not make bid nonresponsive and bid should be considered for award. Literature entitled "General Description Portable Heil Refuse Pulverizing System" did not conflict with purchase description even though it did not include all purchase description requirements, and, moreover, descriptive data highlighted salient features of System rather than limiting what would be supplied; specifications bind bidder notwithstanding manuals were not furnished with bid; and in view of fact import duty paid applies to an insignificant part of end item and not end item iteslf, bidder is considered to have offered domestic product... 399

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New items and trade-in allowances

Under IFB consisting of two items, furnishing of new printing press and trade-in allowance for removal of old presses, only new item is considered foreign end product to which 6-percent differential factor prescribed by Buy American Act (41 U.S.C. 10a–d) applies in evaluation of bids to determine price reasonableness of domestic articles, even though bid value of trade-in items was evaluation factor, since no articles, materials, or supplies are to be acquired for public use under trade-in provision of IFB, and fact that second low bidder offering foreign printing

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Nonresponsive
Bidder may not "fall back" on required schedule

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Discarding all bids
Negotiation in lieu of advertising

Although deletion of total set-aside for small business concerns from IFB for hamsters without verification of potential bidders' intentions will not be questioned in view of concurrence of SBA representative to deletion, it is recommended that in future procurements decisions to make or delete total set-aside be carefully considered, potential sources of small business interest be thoroughly investigated, and basis of determination be fully explained and documented. Furthermore, discarding all bids under amended invitation that deleted set-aside and negotiation of procurement under 41 U.S.C. 252(c)(10) were improper actions since deviations in three bids received affected bidder

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Evaluation
Delivery provisions
Lowest overall cost to Government

Contention that preferential "section 22" rates tendered by carriers regulated by ICC to Govt. cannot be used in computing transportation costs for evaluation of f.o.b. origin bids to furnish field desks, since clause in ASPR 7–103.25 was not included in IFB, is not valid because wording of clause appears verbatim in invitation. Moreover, ASPR 19–217.1(a), which protestant views as requiring inclusion of clause, only requires inclusion if contractor may be required by Govt. to ship desks under prepaid commercial bills of lading 443

In evaluation of bids to furnish field desks to be shipped f.o.b. origin to several destinations, carriers whose rates were used by contracting agency in computing transportation costs may be regarded as "regulated common carriers" within meaning of ASPR 2–201(a)D(vi), whether they are regulated by ICC or State in which bidder's production facilities and delivery points are located since purpose of regulation is to insure that award is made to bidder offering lowest evaluated overall cost including transportation costs as required by ASPR 19–100 and ASPR 19–301. Furthermore, U.S. may utilize tenders issued by State-regulated carriers for intrastate shipments 443

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Under IFB consisting of two items, furnishing of new printing press and trade-in allowance for removal of old presses, only new item is considered foreign end product to which 6-percent differential factor prescribed by Buy American Act (41 U.S.C. 10a–d) applies in evaluation of bids to determine price reasonableness of domestic articles, even though bid value of trade-in items was evaluation factor, since no articles, materials, or supplies are to be acquired for public use under trade-in provision of IFB, and fact that second low bidder offering foreign printing press would have been low bidder if trade-in allowance had been deducted from cost of new item furnishes no basis for sustaining protest to manner in which bids were evaluated 225

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"Clear and convincing evidence" of error

While GAO has right of review, authority to correct mistakes alleged after bid opening but prior to award vests in procuring agency, and as weight to be given evidence submitted in support of error is question of fact, determination by designated evaluator of evidence, to whom matter was referred pursuant to ASPR 2–406.3(b)(1) and (e)(3), to correct error since work sheets of low bidder established by clear and convincing evidence that alleged error occurred, showed how it occurred, and that price bid was only approximately 35 percent of price intended, will not be disturbed by GAO, for work sheets alone can constitute clear and convincing evidence of error, and fact that procuring activity determined evidence was not clear and convincing in no way bound evaluator or reflected on independent consideration of evidence. Furthermore, ASPR 2–406 procedure for evaluating bid mistakes applies whether procurement is routine or complicated 232

Late telegraphic bid correction evidence of error

Although under ordinary circumstances contracting officer is not not expected to anticipate possibility that bidder will claim mistake in bid after award, where he was on notice of possibility of bid error in alternative item to basic bid for electrical distribution system aud where bidder had attempted to modify by late telegram both basic bid, Item 1, and alternative item, Item 1A, contracting officer should have been alerted to possibility of error on both items and it would have been prudent prior to award of Item 1 to inquire if attempted price increases

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Failure of low bidder to list buses it would use in performing transportation service contracts did not render bid nonresponsive as omission relates to responsibility of bidder rather than to responsiveness of bid, since procurement requirement was for furnishing of services and not for furnishing buses, except as incident to furnishing services, and since bidder is legally obligated to furnish buses having acceptable minimum characteristics. Therefore bid should not have been rejected without specific determination that company was nonresponsive 396

Preparation
Costs
Recovery

Although bid or proposal preparation costs may be reimbursable where Govt. has breached implied obligation to fairly consider bid or proposal, claim for cost of preparing proposal to furnish weather observation and cloud seeding aircraft may not be considered on basis revaluation of price score factor displaced claimant—reevaluation necessitated by fact initial evaluation used erroneous technique—or on basis it was deemed inadvisable to cancel procurement because of erroneous public opening of proposals—determination sufficiently justified—since these facts do not support finding of breach of obligation that warrants recovery of proposal preparation costs 253

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Erroneous basis

Where contracting officer improperly found that low bid was nonresponsive and awarded contracts for shuttle bus services in Alaska to other bidders pursuant to erroneous determination, he should, upon finding that low bid is still for acceptance, make current determination of responsibility of rejected bidder, and if found responsible, terminate

BIDS—Continued
Rejection—Continued
Erroneous basis—Continued Page
existing contract(s) for those schedule(s) on which rejected company was low bidder and make award to company, if its bid is otherwise acceptable for award ---- 396

Requests for proposals. (*See* **CONTRACTS, Negotiation**)
Specifications. (*See* **CONTRACTS, Specifications**)
Submission
Time extension for submission
Amended invitation requirement
Late receipt of amendment

Bidder who contends that failure to be timely notified of amendment to IFB to furnish field desks that extended bid opening date cost it more favorable quotes from suppliers is not considered to have been prejudiced by extension of bid opening date or failure to receive amendment prior to originally scheduled bid opening date where record evidences acknowledgment of amendment was received with letter modifying certain option prices by time of bid opening. Furthermore, there is no indication that apparent late receipt of amendment resulted from any deliberate act by contracting agency or that bidder raised any objection prior to extended bid opening ---- 443

Trade-in allowances
Foreign product offered

Under IFB consisting of two items, furnishing of new printing press and trade-in allowance for removal of old presses, only new item is considered foreign end product to which 6-percent differential factor prescribed by Buy American Act (41 U.S.C. 10a-d) applies in evaluation of bids to determine price reasonableness of domestic articles, even though bid value of trade-in items was evaluation factor, since no articles, materials, or supplies are to be acquired for public use under trade-in provision of IFB, and fact that second low bidder offering foreign printing press would have been low bidder if trade-in allowance had been deducted from cost of new item furnishes no basis for sustaining protest to manner in which bids were evaluated ---- 225

Two-step procurement
Bid protest procedures applicability

Timeliness requirement in sec. 20.2 of Interim Bid Protest Procedures and Standards is for application to protests incident to two-step form of procurement since special exemption to protest procedure for this form of procurement is not warranted. Therefore, not for consideration is both allegation of specification improprieties filed after closing date for receipt of bids under step two since improprieties should have been discussed at pre-technical proposal conference or brought to attention of contracting agency prior to closing date for receipt of proposals under step one, and delayed objection to rejection of technical proposal submitted under step one as contacts to obtain explanations and clarifications do not meet requirement of protesting to contracting agency. Furthermore, exceptions in sec. 20.2(b) to protest procedures do not apply since to pursue a

BIDS—Continued
Two-step procurement—Continued
Bid protest procedures applicability—Continued Page
matter that appears futile does not constitute "good cause shown" and rejection of proposal for deficiencies does not raise issues significant to procurement practices and procedures 357

Technical proposals
Preparation costs, anticipated profits, etc.

Damage claim for anticipated profits by unsuccessful offercr is not for allowance since no contract came into existence and, therefore, there is no legal basis to support claim. Also, claim for proposal preparation costs based upon contention that technical proposal submitted under step one of two-step procurement was not fairly and honestly considered is not for allowance by U.S. GAO since standards and criteria for allowance of preparation costs have not been established by courts 357

BONDS
Bid
Excessive amount
Minor informality

Since furnishing of bid bond in excess of amount required by IFB does not constitute change that would give one bidder an advantage over another, deviation may be waived as minor informality 431

BUY AMERICAN ACT
Bids. (*See* **BIDS, Buy American Act**)

CARRIERS
Common
State regulated

In evaluation of bids to furnish field desks to be shipped f.o.b. origin to several destinations, carriers whose rates were used by contracting agency in computing transportation costs may be regarded as "regulated common carriers" within meaning of ASPR 2-201(a)D(vi), whether they are regulated by ICC or State in which bidder's production facilities and delivery points are located since purpose of regulation is to insure that award is made to bidder offering lowest evaluated overall cost including transportation costs as required by ASPR 19-100 and ASPR 19-301. Furthermore, U.S. may utilize tenders issued by State-regulated carriers for intrastate shipments 443

CLAIMS
Statutes of limitation. (*See* **STATUTES OF LIMITATION**)

COMMODITY CREDIT CORPORATION
Price-support programs
Wool

Under well established rule that substantive statutory regulations have effect of law and cannot be waived, Commodity Credit Corp. lacks authority to adopt proposed amendment to regulations promulgated under National Wool Act to extent that would permit retroactive waiver of regulatory requirement that wool price support payments be based on actual net sales proceeds. However, in view of broad administrative discretion afforded by sec. 706 of act in formulating program terms and

COMMODITY CREDIT CORPORATION—Continued
Price-support programs—Continued
Wool—Continued Page
conditions, there is no objection to prospective adoption and application of provision for varying actual net sales proceeds requirement under limited and clearly defined circumstances and subject to determination that provision is consistent with purposes of act..... 364

COMPENSATION
Assignment
Banking facilities for deposit, etc.
Commercial insurance premium payments

Allotment of civilian compensation to joint account in financial institution which is used to effect payment of commercial insurance premiums is proper under applicable law and regulations—31 U.S.C. 492, as amended by P.L. 90-365; Treasury Dept. Cir. No. 1076 (First Revision) dated Nov. 22, 1968; ch. 7000, Part III, Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies, and Dept. of Treasury Transmittal Letter No. 59 to Manual..... 310

Double
Concurrent military retired and civilian service pay
Exemptions
Reserve Officers' Training Corps programs

Establishment under 10 U.S.C. 2031 of Marine Corps Junior Reserve Officers' Training Corps unit at Indian High School funded by Federal Govt. is not precluded since establishment of corps in "public and private secondary educational institutions" is not restricted to nongovernmental institutions, and retired members of uniformed services employed as administrators and instructors are required to be paid under 10 U.S.C. 2031 (d) (1), which provides for retention of retired or retainer pay by member and payment by school to member of additional amount of not more than difference between such pay and active duty pay and allowances, half of which is reimbursable by appropriate service. However, GS appointments of officer and Fleet Reservist, with CSC approval, need not be revoked, and any resultant dual compensation payments may be waived, but future payments to members are compensable under sec. 2031(d)(1), and incident to GS appointments, school may not be reimbursed for additional amounts paid members..... 377

Jury duty
Fees. (*See* **COURTS, Jurors, Fees**)
Night work
Regularly scheduled night duty
Leaves of absence

Employee on 8 hour regular shift of duty, which included 2 a.m. on last Sunday in Apr. when standard time was advanced 1 hour to daylight saving time (15 U.S.C. 260a(a)), who was placed on annual leave for 1 hour so 1 hour of pay would not be lost may not be paid Sunday premium pay for 1 hour of annual leave since 5 U.S.C. 5546 does not authorize premium pay for leave status during any part of regularly scheduled tour of duty on Sunday. However, night differential prescribed by 5 U.S.C. 5545(a) is payable for paid leave period that is less than 8 hours, including both night and day hours, and it is sufficient to

COMPENSATION—Continued
Night work—Continued
Regularly scheduled night duty—Continued
Leaves of absence—Continued Page

only note on time and attendance report fact leave was attributable to time change. Thus an employee who works 12 midnight to 8 a.m. shift on Sunday when time is advanced will be placed on annual leave for 1 hour and receive night differential for 6 hours including hour of annual leave.. 292

Overpayments
Waiver. (*See* **DEBT COLLECTIONS, Waiver**)

Overtime
Compensatory time
Failure to use

Claim of reservoir superintendent of Bureau of Reclamation for 2 hours overtime for Sundays and holidays he was required to work during period Aug. 1, 1955, through Jan. 10, 1970, to take weather and reservoir operation records—overtime claimed on basis of not taking advantage of compensatory time arrangement before its discontinuance—is not within purview of 5 U.S.C. 5596 regarding timely appeal to unwarranted personnel action and is for consideration pursuant to 31 U.S.C. 71a, and claim having been received in U.S. GAO on May 23, 1973, only that portion of claim for period prior to May 23, 1963, is barred..... 264

Regular
Not within purview of compensatory time provisions

Sunday and holiday work performed on regular and recurring basis is not work within purview of compensatory provisions of 5 U.S.C. 5543 and 5 CFR 550.114, and employee who from Aug. 1, 1955, through Jan. 10, 1970, maintained reservoir records, as well as other employees similarly situated, is entitled as provided by 5 CFR 550.114(c) to overtime compensation prescribed by 5 U.S.C. 5542 for period not barred by 31 U.S.C. 71a. Overtime is compensable on basis of actual time worked Sundays and minimum of 2 hours for holidays, payable without interest in absence of statute so providing, and at grade limitation prescribed by 5 U.S.C. 5542(a)(1). Employees who took compensatory time may be paid difference between value of that time and overtime; claims affected by 31 U.S.C. 71a should be forwarded to GAO for recording and return; overtime is payable when compensatory time is not requested..... 264

Premium pay
Sunday work regularly scheduled
Leaves of absence

Employee on 8 hour regular shift of duty, which incuded 2 a.m. on last Sunday in Apr. when standard time was advanced 1 hour to daylight saving time (15 U.S.C. 260a(a)), who was placed on annual leave for 1 hour so 1 hour of pay would not be lost may not be paid Sunday premium pay for 1 hour of annual leave since 5 U.S.C. 5546 does not authorize premium pay for leave status during any part of regularly scheduled tour of duty on Sunday. However, night differential prescribed by 5 U.S.C. 5545(a) is payable for paid leave period that is less than 8 hours, including both night and day hours, and it is sufficient

COMPENSATION—Continued
Premium pay—Continued
Sunday work regularly scheduled—Continued
Leaves of absence—Continued Page

to only note on time and attendance report fact leave was attributable to time change. Thus an employee who works 12 midnight to 8 a.m. shift on Sunday when time is advanced will be placed on annual leave for 1 hour and receive night differential for 6 hours including hour of annual leave 292

Promotions
Retroactive
Salary increase adjustment

Claim of civilian employee for retroactive promotion and salary differential between grades GS–12 and GS–13 on basis position he was serving in overseas was reclassified on July 3, 1970, to GS–13, and that although he was legally qualified for promotion administrative office failed to act timely, is justifiable claim and employee should be retroactively promoted to GS–13 to date not earlier than July 3, 1970, nor later than beginning of fourth pay period after July 3, 1970, in accordance with 5 CFR 511.701 and 511.702, and paid salary differential to Aug. 28, 1972, date he returned from overseas. Rule is that when position is reclassified to higher grade, agency must within reasonable time after date of final position reclassification, unless employee is on detail to position, either promote incumbent, if qualified, or remove him, and time frame for "reasonable time" is prescribed in 5 CFR 511.701 and 5 CFR 511.702 216

Tropical differential. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES, Tropical differentials**)

What constitutes
Intergovernmental Personnel Act detail reimbursement

When State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may not include fringe benefits, such as retirement, life and health insurance, and costs for negotiating assignment agreement required under 5 CFR 334.105, and for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference according to legislative history to salary of State or local detailee, and there is no basis for ascribing to term a different meaning than used in Federal personnel statutes, that is that term refers to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees 355

CONFERENCES
Consider protests of bidders, etc. (*See* **CONTRACTS, Protests, Procedures, Interim Bid Protest Procedures and Standards Conferences**)

CONTRACTORS

Successors

Wages

Union agreement *v.* wage determination Page

While issuance of wage determinations pursuant to Service Contract Act of 1965 is vested exclusively in Dept. of Labor, when legality of wage determination is questioned GAO will consider whether that determination was issued in accordance with applicable statutory and regulatory provisions so as to warrant its inclusion in Govt. contract. Therefore, upon review of propriety of wage determination included in cost-reimbursable service contract between AF and Pan American World Airways, it was concluded that under 1965 act, which requires successor contractor to pay, as a minimum, wages and fringe benefits to which employees would have been entitled under predecessor contract, union is permitted to challenge its own collective bargaining agreement when predecessor and successor contractors are the same on basis that wages called for by agreement are substantially at variance with those prevailing in locality.. 401

CONTRACTS

Advertising *v.* negotiation. (*See* **ADVERTISING, Advertising *v.* negotiation**)

"Affirmative action programs." (*See* **CONTRACTS, Labor stipulations, Nondiscrimination, "Affirmative action programs"**)

Amounts

Estimates

Man-hours for mess attendant services

Under RFP for performance of mess attendant services that contained Govt. estimate of required man-hours and that stated 5 percent deviation below estimate may result in rejection of offer unless satisfactory performance could be substantiated, acceptance of proposal that was 15 percent below Govt.'s estimate would not constitute change in specifications without notice to offerors since solicitation indicated use of lesser man-hours than required which could reduce total cost would be desirable; five of eight offerors were without 5-percent range, thus evidencing equal opportunity to deviate; and feasibility of accepting 15-percent deviation is supported by fact deviation was based on study of degree to which mess facilities would be used and fact man-hours proposed exceeded man-hours utilized by incumbent contractor..... 198

Awards

Effective date

Delayed

Determination that prospective contractor failed to meet minimum financial standards required by sec. 1-1.1203 of FPR to be eligible for award of Federal Supply Service contract for film is upheld on basis SBA's denial of bidder's application for certificate of competency (COC), although approved by regional office, is final and conclusive since in procurements that exceed $250,000, determination to issue or deny COC is vested in SBA Central Office (15 U.S.C. 637(b)(7)) and is not subject to review, and on basis improvement in bidder's financial condition after

CONTRACTS—Continued
Awards—Continued
Effective date—Continued
Delayed—Continued Page

award, and fact award was made a month before it was to take effect, in order to timely distribute Federal Supply Schedule to agencies, has no effect on propriety or validity of award 344

Erroneous
Nonresponsive bidder

Upon reconsideration of 53 Comp. Gen. 32, which directed termination of contract award to low bidder under second step of two-step formally advertised procurement for fork lift trucks and line items because alternate delivery schedule offered by bidder did not provide for required delivery concurrency of first production units and of spares and repair parts, low bid is still considered nonresponsive, notwithstanding argument that low bidder can "fall back" on commitment in required delivery schedule since at best bid is ambiguous, or viewed in light most favorable to bidder, bid is subject to two reasonable interpretations—under one it would be nonresponsive, and under the other responsive. However, in absence of clear indication of prejudice to other bidders, and since contractor will comply with the Govt.'s delivery schedule, decision is modified with respect to contract termination requirement and, therefore, reporting matter to appropriate congressional committees is no longer necessary 320

Termination of contract

Where contracting officer improperly found that low bid was nonresponsive and awarded contracts for shuttle bus services in Alaska to other bidders pursuant to erroneous determination, he should, upon finding that low bid is still for acceptance, make current determination of responsibility of rejected bidder, and if found responsible, terminate existing contract(s) for those schedule(s) on which rejected company was low bidder and make award to company, if its bid is otherwise acceptable for award 396

Legality
Mechanism basis used

Contentions against propriety of award "to develop fully the automated analysis of chromosomes" do not require cancellation of award where successful offeror was selected only after on-site approval of facilities and favorable *ad hoc* technical evaluation of its proposal by panel of scientists on basis of presenting most advantageous offer, price and other factors considered, notwithstanding doubt as to validity of cost and best buy analysis and failure to clarify statistical program offered. Furthermore, contracting officer is satisfied that performance of contract meets the RFP requirements; that subcontracting of laboratory work is proper; and that no diversion of grant funds is occurring. Fact that mechanism for award was interagency agreement between HEW and NASA (42 U.S.C. 2473(b)(5) and (6)), and incorporation of project as task order under existing contract between NASA and contractor does not reflect on legality of contract 278

CONTRACTS—Continued
Awards—Continued
Propriety
Acceptance of award Page

In procurement of lighting panels to replace panel designed to support integrated electronics control equipment developed for F–4 aircraft where drawing stated panel must be in accordance with military specification that required qualified products listing (QPL), but RFQ did not evidence such requirement, although award to firm not on QPL will not be disturbed as award was not precluded by RFQ and contract is nearly completed, to require displaced initial low offeror to unnecessarily comply with QPL requirement was prejudicial, unfair and costly. Furthermore, although contracting officials erroneously failed to take action when it was recognized before award procurement should have been advertised utilizing applicable military specification, this approach will be used to procure panels in future 295

Upheld

Where IFB to design, fabricate, and erect window walls, entrances, and rolling and sliding doors did not restrict contract performance to single firm nor restrict subcontracting because of 5-year minimum experience requirement, and bidder took no exception to requirement that at least 12 percent of work would be performed by its own force, fact that subcontractor was listed, although not required, is not construed to mean all work would be subcontracted; where subcontractor's insurance experience modification factor for Workmen's Compensation permitted Govt. to take into consideration cost of Govt-provided insurance, failure of prime contractor to submit its own insurance factor is minor informality; and where subcontractor is bound by prime contractor's commitment to Washington Plan providing minority hiring goals, bid as submitted was responsive and was properly considered for contract award 331

Small business concerns
Certifications
Conclusiveness

Determination that prospective contractor failed to meet minimum financial standards required by sec. 1–1.1203 of FPR to be eligible for award of Federal Supply Service contract for film is upheld on basis SBA's denial of bidder's application for certificate of competency (COC), although approved by regional office, is final and conclusive since in procurements that exceed $250,000, determination to issue or deny COC is vested in SBA Central Office (15 U.S.C. 637(b)(7)) and is not subject to review, and on basis improvement in bidder's financial condition after award, and fact award was made a month before it was to take effect, in order to timely distribute Federal Supply Schedule to agencies, has no effect on propriety or validity of award 344

Failure to request

Under IFB for food services for 1 year with two 1-year options that was restricted to small business concerns, award of contract without referring the nonresponsibility of four low bidders to SBA under certificate of competency procedures because of urgency of procurement was

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Certifications—Continued
Failure to request—Continued Page

proper determination under ASPR 1-705.4(c)(iv). However, refusal of administrative agency to attend informal conference on protest held pursuant to sec. 20.9 of Interim Bid Protest Procedures and Standards is policy that should be reconsidered. Furthermore, U.S. GAO will not substitute its judgment in matter for that of contracting officer unless it is shown by convincing evidence of record that finding of nonresponsibility was arbitrary, capricious, or not based on substantial evidence.. 434

Set-asides
Subsequent to unrestricted solicitation

Modification of RFQ to restrict procurement to small business concerns was proper exercise of authority by contracting officer under ASPR 3-505, which provides for amendment of solicitation prior to closing date for receipt of quotations to effect necessary changes since change of procurement to small business set-aside was recommended by SBA representative and was accepted on basis sufficient number of small business concern offers could be obtained. Therefore, quotation submitted by large business concern which was prepared under original unrestricted RFQ may not be considered or even opened to compare reasonableness of prices submitted by small business concerns, and in absence of judiciary established criteria and standards, claim for preparation costs may not be settled by GAO---------- 307

Withdrawal
Procedural steps before withdrawal

Although deletion of total set-aside for small business concerns from IFB for hamsters without verification of potential bidders' intentions will not be questioned in view of concurrence of SBA representative to deletion, it is recommended that in future procurements decisions to make or delete total set-aside be carefully considered, potential sources of small business interest be thoroughly investigated, and basis of determination be fully explained and documented. Furthermore, discarding all bids under amended invitation that deleted set-aside and negotiation of procurement under 41 U.S.C. 252(c)(10) were improper actions since deviations in three bids received affected bidder responsibility and not bid responsiveness. However, negotiations currently being conducted may be continued as needs of contracting agency have changed since opening of bids and use of negotiations will not negate maximum possible competition which advertised procurements attempt to further---------- 221

Size
Appeal

Acceptance by contracting officer of self-certification submitted by successful bidder that it is a small business concern on basis that contrary determination by SBA district office was not final as it had been appealed to SBA Size Appeals Board was improper as district director's decision remains in full force and effect unless reversed or modified by Board,

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Size—Continued
Appeal—Continued Page

and fact that ASPR 1-703(b)(3)(iv) permits suspension of full size determination cycle when urgency of procurement so requires does not negate regional size determination made prior to award. Because contracting officer was not misled by self-certification but acted with full knowledge of facts in reliance on reading of applicable ASPR provisions, and because of urgency of procurement, contract awarded should be terminated for convenience of Govt. and resolicited, and this recommendation requires actions prescribed by secs. 232 and 236 of Legislative Reorganization Act of 1970 434

Bids
Generally. (*See* **BIDS**)
Bonds. (*See* **BONDS**)
Cost-plus
Evaluation factors
"Realism" of costs and technical approach

Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor 240

Since award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic with regard to proposed costs and technical approaches—judgments that are properly left to administrative discretion of contracting agency which is in best position to assess "realism" of costs and technical approaches, and must bear major criticism for any difficulties or expenses experienced by reason of defective analysis—acceptance of two proposals for award of cost-plus-a-fixed-fee contracts to develop artillery locating radar on basis these proposals were only acceptable ones submitted from both technical and cost standpoint was proper determination that is substantiated by record that evidences selection of successful offerors was not arbitrary 240

Pricing or technical uncertainty
Discussion with all offerors requirement

Administrative view that there is no requirement for competitive discussion under FPR 1-3.805-1(a)(5) when cost-reimbursement contract is contemplated means that competitive discussions would not be

CONTRACTS—Continued
Cost-plus—Continued
Pricing or technical uncertainty—Continued
Discussion with all offerors requirement—Continued Page

required even when proposed costs of most technically acceptable offeror were unreasonable and unrealistic, and belief that discussions need not be held in any circumstances when cost-type award is involved conflicts with requirement in section that discussions be held prior to award where there is any uncertainty as to pricing or technical aspects of proposal. Fact that cost-type award need not necessarily be made at lowest estimated cost does not nullify general requirement for discussion prior to award of negotiated contract as requirement for discussions with competitive offerors for cost-type awards is mandatory unless one of enumerated exceptions to requirement is involved 201

Data, rights, etc.
"Technical Data—Withholding of Payment" clause
Propriety of use

Disqualification of low offeror who took exception to "Technical Data—Withholding of Payment" clause (ASPR 7-104.9(h)), concerned with untimely delivery or deficiency of technical data, and "Reserve Pending Execution of Release" clause contained in RFP is upheld since offeror was adequately advised during negotiations of consequences of failing to accept terms of RFP, and fact that amount withheld under technical data clause may exceed price of data does not make contracting officer's determination to include clause arbitrary and capricious, and use of "Reserve Pending Execution of Release" clause is matter within discretion of contracting agency. Furthermore, since protest was untimely delivered it properly was regarded as filed after award 382

Labor stipulations
Nondiscrimination
"Affirmative action programs"
Minority manpower goals

Failure of low bidder under IFB issued by Govt. of District of Columbia for roof rehabilitation at Spring Road Clinic to execute certificate of compliance with equal opportunity obligations provision included in solicitation until after bid opening was matter of form rather than substance and does not constitute basis for rejection of low bid as bid form submitted obligated bidder to comply with affirmative action requirements which were made part of bid documents and did not require submission or adoption of minority utilization goals but only that contractor take certain affirmative action steps 431

Subcontractor's status

Where IFB to design, fabricate, and erect window walls, entrances, and rolling and sliding doors did not restrict contract performance to single firm nor restrict subcontracting because of 5-year minimum experience requirement, and bidder took no exception to requirement that at least 12 percent of work would be performed by its own force, fact that subcontractor was listed, although not required, is not construed to mean all work would be subcontracted; where subcontractor's insurance experience modification factor for Workmen's Compensation permitted Govt. to take into consideration cost of Govt-provided

CONTRACTS—Continued
Labor stipulations—Continued
Nondiscrimination—Continued
"Affirmative action programs"—Continued
Subcontractor's status—Continued Page

insurance, failure of prime contractor to submit its own insurance factor is minor informality; and where subcontractor is bound by prime contractor's commitment to Washington Plan providing minority hiring goals, bid as submitted was responsive and was properly considered for contract award 331

Service Contract Act of 1965
Amendments
Retroactive application

Although Congress intended, in enacting the Service Contract Act Amendments of 1972, that wage determination issued as result of hearings held pursuant to sec. 4(c) of Service Contract Act would be applicable to contracts awarded prior to issuance of wage determination, appropriate implementing regulations have not been promulgated and GAO urges issuance of regulations as soon as practicable to provide for required contract clauses 401

Applicability of act
Keypunch operators, etc.

Although practice of Labor Dept. in classifying as "service employees" keypunch operators and other clerical-type employees under Service Contract Act of 1965, 41 U.S.C. 351, *et seq.*, is questionable since statutory language of act and its legislative history as well as Dept. of Labor's regulations indicate "service employee" was intended to mean "blue collar" employee, practice is not specifically prohibited and, therefore, protest is denied. However, because of significant adverse impact on procurement procedures, department should present the matter to Congress and obtain clarifying legislation, and should submit statements of action taken to appropriate congressional committees as required by Legislative Reorganization Act of 1970 370

Minimum wage, etc., determinations
Locality basis for determination

Labor Dept.'s practice of issuing Service Contract Act wage determinations for keypunch services based on locality of Govt. installation being served rather than location where services are to be performed is a questionable implementation of act in view of fact the statutory language of act and its legislative history indicate "locality" refers to place where service employees are performing contract, and practice should be drawn to attention of Congress when clarifying language is sought concerning classification of keypunch operators and other clerical-type employees under act 370

Union agreement effect

While issuance of wage determinations pursuant to Service Contract Act of 1965 is vested exclusively in Dept. of Labor, when legality of wage determination is questioned GAO will consider whether that determination was issued in accordance with applicable statutory and regulatory provisions so as to warrant its inclusion in Govt. contract. Therefore,

CONTRACTS—Continued
Labor stipulations—Continued
Service Contract Act of 1965—Continued
Minimum wage, etc., determinations—Continued
Union agreement effect—Continued Page
upon review of propriety of wage determination included in cost-reimbursable service contract between AF and Pan American World Airways, it was concluded that under 1965 act, which requires successor contractor to pay, as a minimum, wages and fringe benefits to which employees would have been entitled under predecessor contract, union is permitted to challenge its own collective bargaining agreement when predecessor and successor contractors are the same on basis that wages called for by agreement are substantially at variance with those prevailing in locality 401

Omission of provision

Although failure to question propriety of absence from solicitation for aircraft maintenance of Service Contract Act (SCA) clause until after award of contract renders protest untimely, since significant issue has been raised because it refers to principle of widespread interest and since court is interested in views of GAO, merits of protest have been considered and it is concluded that absence from contract of SCA clause does not render contract illegal if after contract award Dept. of Labor decides that SCA was applicable to procurement, since contracting officer acted in good faith and in accordance with regulations implementing SCA in determining Walsh-Healey Public Contracts Act pertaining to supplies, and not SCA, which affords service contract workers protection, was applicable, and, furthermore, it is primarily for contracting agencies to decide what provisions should or should not be included in particular contract 412

Mistakes
Absence of contract
Payment. (*See* **PAYMENTS, Absence or unenforceability of contracts**)
Allegation before award. (*See* **BIDS, Mistakes**)
Contracting officer's error detection duty
Notice of error
Substantial

Although under ordinary circumstances contracting officer is not expected to anticipate possibility that bidder will claim mistake in bid after award, where he was on notice of possibility of bid error in alternative item to basic bid for electrical distribution system and where bidder had attempted to modify by late telegram both basic bid, Item 1, and alternative item, Item 1A, contracting officer should have been alerted to possibility of error on both items and it would have been prudent prior to award of Item 1 to inquire if attempted price increases reflected mistakes in both items, particularly since bidder had not acquiesced in award. Therefore, upon establishing existence of mistake, no contract having been effected at award price, and substantial portion of work having been completed, contractor may be paid on a *quantum valebat* or *quantum meruit* basis, that is, reasonable value of services and materials actually furnished 368

CONTRACTS—Continued

National emergency authority. (*See* **CONTRACTS, Negotiation, National emergency authority**)

Negotiation

Auction technique prohibition

Disclosure of prices, etc. Page

Award for aircraft to offeror who scored highest both as to price and technical factors upon reevaluation of price factor of proposals subsequent to erroneous public opening of proposals and disclosure of prices will not be disturbed because reevaluation of points accorded price was necessitated by use of erroneous technique in initial evaluation that proportionally reduced points that exceeded lowest price used as datum level and accorded 40 points; because initial technical evaluation by composite board assured independent judgment and fairness; and because notwithstanding disclosure of prices and subsequent negotiating procedures amounted to use of auction technique in violation of FPR 1-3.805-1(b), sufficient justification has been shown for not canceling procurement. However, repetition of deficiencies reviewed should be avoided in future procurements 253

Awards

Advantageous to Government

Propriety of award

Contentions against propriety of award "to develop fully the automated analysis of chromosomes" do not require cancellation of award where successful offeror was selected only after on-site approval of facilities and favorable *ad hoc* technical evaluation of its proposal by panel of scientists on basis of presenting most advantageous offer, price and other factors considered, notwithstanding doubt as to validity of cost and best buy analysis and failure to clarify statistical program offered. Furthermore, contracting officer is satisfied that performance of contract meets the RFP requirements; that subcontracting of laboratory work is proper; and that no diversion of grant funds is occurring. Fact that mechnism for award was interagency agreement between HEW and NASA (42 U.S.C. 2473(b)(5) and (6)), and incorporation of project as task order under existing contract between NASA and contractor does not reflect on legality of contract 278

Propriety

Upheld

Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Propriety—Continued
Upheld—Continued Page

offerors; and where commonality features between contracts were not made evaluation factor 240

Since award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic with regard to proposed costs and technical approaches—judgments that are properly left to administrative discretion of contracting agency which is in best position to assess "realism" of costs and technical approaches, and must bear major criticism for any difficulties or expenses experienced by reason of defective analysis—acceptance of two proposals for award of cost-plus-a-fixed-fee contracts to develop artillery locating radar on basis these proposals were only acceptable ones submitted from both technical and cost standpoint was proper determination that is substantiated by record that evidences selection of successful offerors was not arbitrary 240

Competition
Competitive range formula
Manning information

In a 100 percent small business set-aside negotiated procurement for mess attendant services where RFP provided for possible rejection of offers submitting manning charts whose total hours fell more than 5 percent below Govt.'s estimated need for hours without substantiating deficiency, contracting officer's rejection of such offer, initially considered within competitive range, is not abuse of his discretion even though rejection was subsequent to receipt of best and final offers. While offeror's elimination from competitive range may have been based in part on elements going to responsibility, it was not a determination of nonresponsibility that required Small Business Administration Certificate of Responsibility proceeding 388

Proposal to furnish mess attendant services which deviated more than 5 percent from manning estimates in the RFP was improperly rejected since proposal was found to be technically satisfactory on basis of same manning charts that contained deviation and ASPR 3-805.2 requires inclusion in competitive range of all offers which have reasonable chance of being selected for award and those offers where there is doubt they are in competitive range. Although offer should not have been regarded as outside competitive range without opportunity for offeror to submit documentation substantiating manning differences, interference with good-faith award is not warranted but it is recommended that renewal option in contract should not be exercised 440

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement
Cost-reimbursement contracts Page

Administrative view that there is no requirement for competitive discussion under FPR 1-3.805-1(a)(5) when cost-reimbursement contract is contemplated means that competitive discussions would not be required even when proposed costs of most technically acceptable offeror were unreasonable and unrealistic, and belief that discussions need not be held in any circumstances when cost-type award is involved conflicts with requirement in section that discussions be held prior to award where there is any uncertainty as to pricing or technical aspects of proposal. Fact that cost-type award need not necessarily be made at lowest estimated cost does not nullify general requirement for discussion prior to award of negotiated contract as requirement for discussions with competitive offerors for cost-type awards is mandatory unless one of enumerated exceptions to requirement is involved 201

Formal competitive bidding rules

Although deletion of total set-aside for small business concerns from IFB for hamsters without verification of potential bidders' intentions will not be questioned in view of concurrence of SBA representative to deletion, it is recommended that in future procurements decisions to make or delete total set-aside be carefully considered, potential sources of small business interest be thoroughly investigated, and basis of determination be fully explained and documented. Furthermore, discarding all bids under amended invitation that deleted set-aside and negotiation of procurement under 41 U.S.C. 252(c)(10) were improper actions since deviations in three bids received affected bidder responsibility and not bid responsiveness. However, negotiations currently being conducted may be continued as needs of contracting agency have changed since opening of bids and use of negotiations will not negate maximum possible competition which advertised procurements attempt to further 221

Impracticable to obtain
Justification for negotiation

Where procurement records for purchase of refuse collection trucks and related equipment under invitations for bids reveal past problems in securing competition both because of existence of patents and inclusion of patent indemnification clause, needs of procurement agency may be obtained under negotiating authority in 10 U.S.C. 2304(a)(10) if it appears likely that persons or firms other than patent holder who are capable of performing in accordance with Govt.'s specifications would not presently be interested in submitting bids 270

Cost, etc., data
"Realism" of cost

Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data—Continued
"Realism" of cost—Continued Page

intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor 240

Discussion requirement. (*See* **CONTRACTS, Negotiations, Competition, Discussion with all offerors requirement**)
Evaluation factors
Best buy analysis

Contentions against propriety of award "to develop fully the automated analysis of chromosomes" do not require cancellation of award where successful offeror was selected only after on-site approval of facilities and favorable *ad hoc* technical evaluation of its proposal by panel of scientists on basis of presenting most advantageous offer, price and other factors considered, notwithstanding doubt as to validity of cost and best buy analysis and failure to clarify statistical program offered. Furthermore, contracting officer is satisfied that performance of of contract meets the RFP requirements; that subcontracting of laboratory work is proper; and that no diversion of grant funds is occurring. Fact that mechanism for award was interagency agreement between HEW and NASA (42 U.S.C. 2473(b) (5) and (6)), and incorporation of project as task order under existing contract between NASA and contractor does not reflect on legality of contract 278

Criteria
Adequacy

Where RFP for mess attendant services required that offered price/hour be greater than offeror's basic labor expense, but agency failed to include realistic figure for vacation and holidays, award made is not considered improper since purpose of evaluation criteria to prevent unrealistically inflated manning charts and award at price so low that satisfactory performance would be jeopardized appears to have been met, and all offerors were evaluated on same basis, and contract awarded is being performed satisfactorily at offered price 388

Erroneous evaluation

Award for aircraft to offeror who scored highest both as to price and technical factors upon reevaluation of price factor of proposals subsequent to erroneous public opening of proposals and disclosure of prices will not be disturbed because reevaluation of points accorded price was necessitated by use of erroneous technique in initial evaluation that proportionally reduced points that exceeded lowest price used as datum level and accorded 40 points; because initial technical evaluation by composite board assured independent judgment and fairness; and because notwithstanding disclosure of prices and subsequent negotiating procedures amounted to use of auction technique in violation of FPR 1-3.805-1(b), sufficient justification has been shown for not canceling procurement. However, repetition of deficiencies reviewed should be avoided in future procurements 253

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Manning requirements
Government estimated basis

Page

Under RFP for performance of mess attendant services that contained Govt. estimate of required man-hours and that stated 5 percent deviation below estimate may result in rejection of offer unless satisfactory performance could be substantiated, acceptance of proposal that was 15 percent below Govt's. estimate would not constitute change in specifications without notice to offerors since solicitation indicated use of lesser man-hours than required which could reduce total cost would be desirable; five of eight offerors were without 5-percent range, thus evidencing equal opportunity to deviate; and feasibility of accepting 15-percent deviation is supported by fact deviation was based on study of degree to which mess facilities would be used and fact man-hours proposed exceeded man-hours utilized by incumbent contractor 198

Proposal to furnish mess attendant services which deviated more than 5 percent from manning estimates in the RFP was improperly rejected since proposal was found to be technically satisfactory on basis of same manning charts that contained deviation and ASPR 3-805.2 requires inclusion in competitive range of all offers which have reasonable chance of being selected for award and those offers where there is doubt they are in competitive range. Although offer should not have been regarded as outside competitive range without opportunity for offeror to submit documentation substantiating manning differences, interference with good-faith award is not warranted but it is recommended that renewal option in contract should not be exercised 440

Noncompliance

In a 100 percent small business set-aside negotiated procurement for mess attendant services where RFP provided for possible rejection of offers submitting manning charts whose total hours fell more than 5 percent below Govt.'s estimated need for hours without substantiating deficiency, contracting officer's rejection of such offer, initially considered within competitive range, is not abuse of his discretion even though rejection was subsequent to receipt of best and final offers. While offeror's elimination from competitive range may have been based in part on elements going to responsibility, it was not a determination of nonresponsibility that required Small Business Administration Certificate of Responsibility proceeding 388

Price/hour less than basic labor expense

Where RFP for mess attendant services required that offered price/hour be greater than offeror's basic labor expense, but agency failed to include realistic figure for vacation and holidays, award made is not considered improper since purpose of evaluation criteria to prevent unrealistically inflated manning charts and award at price so low that satisfactory performance would be jeopardized appears to have been met, and all offerors were evaluated on same basis, and contract awarded is being performed satisfactorily at offered price 388

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Point rating
Predetermined score Page

Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor 240

Reevaluation

Award for aircraft to offeror who scored highest both as to price and technical factors upon reevaluation of price factor of proposals subsequent to erroneous public opening of proposals and disclosure of prices will not be disturbed because reevaluation of points accorded price was necessitated by use of erroneous technique in initial evaluation that proportionally reduced points that exceeded lowest price used as datum level and accorded 40 points; because initial technical evaluation by composite board assured independent judgment and fairness; and because notwithstanding disclosure of prices and subsequent negotiating procedures amounted to use of auction technique in violation of FPR 1-3.805-1(b), sufficient justification has been shown for not canceling procurement. However, repetition of deficiencies reviewed should be avoided in future procurements 253

Propriety of evaluation

Contentions against propriety of award "to develop fully the automated analysis of chromosomes" do not require cancellation of award where successful offeror was selected only after on-site approval of facilities and favorable *ad hoc* technical evaluation of its proposal by panel of scientists on basis of presenting most advantageous offer, price and other factors considered, notwithstanding doubt as to validity of cost and best buy analysis and failure to clarify statistical program offered. Furthermore, contracting officer is satisfied that performance of contract meets the RFP requirements; that subcontracting of laboratory work is proper; and that no diversion of grant funds is occurring. Fact that mechanism for award was interagency agreement between HEW and NASA (42 U.S.C. 2473(b) (5) and (6)), and incorporation of project as task order under existing contract between NASA and contractor does not reflect on legality of contract 278

CONTRACTS—Continued
Negotiation—Continued
National emergency authority
Restrictions on negotiations Page

A request for proposals that was issued pursuant to 10 U.S.C. 2304 (a)(16) for maintenance of defense mobilization base established for module type booster was not improperly restricted to base producers, even though configuration of booster had been radically changed, in view of fact skills and capital equipment used by base manufacturers of old style booster are readily adaptable to new style booster, and agency authorized to maintain viable industrial mobilization base in interest of national defense may limit negotiation under 10 U.S.C. 2304(a)(16) to present base producers. Therefore, return of unopened offer to firm that is not member of defense mobilization base is within scope of contracting agency's authority 348

Requests for proposals
Mess attendant services
Man-hour estimates

Under RFP for performance of mess attendant services that contained Govt. estimate of required man-hours and that stated 5 percent deviation below estimate may result in rejection of offer unless satisfactory performance could be substantiated, acceptance of proposal that was 15 percent below Govt.'s estimate would not constitute change in specifications without notice to offerors since solicitation indicated use of lesser man-hours than required which could reduce total cost would be desirable; five of eight offerors were without 5-percent range, thus evidencing equal opportunity to deviate; and feasibility of accepting 15-percent deviation is supported by fact deviation was based on study of degree to which mess facilities would be used and fact man-hours proposed exceeded man-hours utilized by incumbent contractor 198

Preparation costs

Although bid or proposal preparation costs may be reimbursable where Govt. has breached implied obligation to fairly consider bid or proposal, claim for cost of preparing proposal to furnish weather observation and cloud seeding aircraft may not be considered on basis reevaluation of price score factor displaced claimant—reevaluation necessitated by fact initial evaluation used erroneous technique—or on basis it was deemed inadvisable to cancel procurement because of erroneous public opening of proposals—determination sufficiently justified—since these facts do not support finding of breach of obligation that warrants recovery of proposal preparation costs 253

Proposal deviations
Disqualification of offeror

Disqualification of low offeror who took exception to "Technical Data—Withholding of Payment" clause (ASPR 7-104.9(h)), concerned with untimely delivery or deficiency of technical data, and "Reserve Pending Execution of Release" clause contained in RFP is upheld since offeror was adequately advised during negotiations of consequences of failing to accept terms of RFP, and fact that amount withheld under technical data clause may exceed price of data does not make contracting

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Proposal deviations—Continued
Disqualification of offeror—Continued Page

officer's determination to include clause arbitrary and capricious, and use of "Reserve Pending Execution of Release" clause is matter within discretion of contracting agency. Furthermore, since protest was untimely delivered it properly was regarded as filed after award 382

Qualified Offerors List

Although protest against award of contract under RFP issued by National Highway Traffic Safety Admin. will not be considered as it was untimely filed pursuant to sec. 20.2 of GAO Interim Bid Protest Procedures and Standards, exception is taken to establishment and operation of Qualified Offerors List (QOL) by Admin. to curtail excessive production of solicitation packages, but which in fact is presolicitation procedure for determining prospective bidder's or offeror's responsibility, and as procedure unduly restricts competition it should be eliminated. Furthermore, Federal Procurement Regs., relied upon as authority to establish QOL, merely permit establishment of mailing list to assure adequate source of supply and to spell out necessary procedures for reasonable restriction on number of solicitations available 209

Requests for quotations
Use propriety

In procurement of lighting panels to replace panel designed to support integrated electronics control equipment developed for F–4 aircraft where drawing stated panel must be in accordance with military specification that required qualified products listing (QPL), but RFQ did not evidence such requirement, although award to firm not on QPL will not be disturbed as award was not precluded by RFQ and contract is nearly completed, to require displaced initial low offeror to unnecessarily comply with QPL requirement was prejudicial, unfair and costly. Furthermore, although contracting officials erroneously failed to take action when it was recognized before award procurement should have been advertised utilizing applicable military specification, this approach will be used to procure panels in future 295

Payments
Absence or unenforceability of contracts. (*See* **PAYMENTS ABSENCE or unenforceability of contracts**)
Preparation costs, etc.
Contract not consummated

Modification of RFQ to restrict procurement to small business concerns was proper exercise of authority by contracting officer under ASPR 3–505, which provides for amendment of solicitation prior to closing date for receipt of quotations to effect necessary changes since change of procurement to small business set-aside was recommended by SBA representative and was accepted on basis sufficient number of small business concern offers could be obtained. Therefore, quotation submitted by large business concern which was prepared under original unrestricted RFQ may not be considered or even opened to compare reasonableness of prices submitted by small business concerns, and in absence of judiciary established criteria and standards, claim for preparation costs may not be settled by GAO 307

CONTRACTS—Continued
Protests
Procedures
Interim Bid Protest Procedures and Standards
Conferences Page

Under IFB for food services for 1 year with two 1-year options that was restricted to small business concerns, award of contract without referring the nonresponsibility of four low bidders to SBA under certificate of competency procedures because of urgency of procurement was proper determination under ASPR 1-705.4(c)(iv). However, refusal of administrative agency to attend informal conference on protest held pursuant to sec. 20.9 of Interim Bid Protest Procedures and Standards is policy that should be reconsidered. Furthermore, U.S. GAO will not substitute its judgment in matter for that of contracting officer unless it is shown by convincing evidence of record that finding of nonresponsibility was arbitrary, capricious, or not based on substantial evidence.... 434

Timeliness
Filing in other than General Accounting Office

Oral protest 1 day before bid opening to specifications for trash and refuse removal and disposal services on basis they misstated scope and nature of services required was not timely filed in view of IFB provision requiring protest to be filed with procurement office in writing at least 5 days before bid opening—a reasonable requirement. Since initial protest was not timely filed, subsequent protest to GAO may not be considered under sec. 20.2 of Interim Bid Protest Procedures and Standards which provides that protest based upon alleged improprieties in solicitation that are apparent prior to bid opening must be filed with GAO prior to bid opening, and that protest initially filed with contracting agency will only be considered if timely filed with agency and subsequently filed with GAO within 5 days of notification of adverse agency action..... 212

Two-step procurements

Timeliness requirement in sec. 20.2 of Interim Bid Protest Procedures and Standards is for application to protests incident to two-step form of procurement since special exception to protest procedure for this form of procurement is not warranted. Therefore, not for consideration is both allegation of specification improprieties filed after closing date for receipt of bids under step two since improprieties should have been discussed at pre-technical proposal conference or brought to attention of contracting agency prior to closing date for receipt of proposals under step one, and delayed objection to rejection of technical proposal submitted under step one as contacts to obtain explanations and clarifications do not meet requirement of protesting to contracting agency. Furthermore, exceptions in sec. 20.2(b) to protest procedures do not apply since to pursue a matter that appears futile does not constitute "good cause shown" and rejection of proposal for deficiencies does not raise issues significant to procurement practices and procedures..... 357

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Protests—Continued
Timeliness—Continued
Untimely protest consideration basis Page

Although protest against award of contract under RFP issued by National Highway Traffic Safety Admin. will not be considered as it was untimely filed pursuant to sec. 20.2 of GAO Interim Bid Protest Procedures and Standards, exception is taken to establishment and operation of Qualified Offerors List (QOL) by Admin. to curtail excessive production of solicitation packages, but which in fact is presolicitation procedure for determining prospective bidder's or offeror's responsibility, and as procedure unduly restricts competition it should be eliminated. Furthermore, Federal Procurement Regs., relied upon as authority to establish QOL, merely permit establishment of mailing list to assure adequate source of supply and to spell out necessary procedures for reasonable restriction on number of solicitations available..... 209

Although failure to question propriety of absence from solicitation for aircraft maintenance of Service Contract Act (SCA) clause until after award of contract renders protest untimely, since significant issue has been raised because it refers to principle of widespread interest and since court is interested in views of GAO, merits of protest have been considered and it is concluded that absence from contract of SCA clause does not render contract illegal if after contract award Dept. of Labor decides that SCA was applicable to procurement, since contracting officer acted in good faith and in accordance with regulations implementing SCA in determining Walsh-Healey Public Contracts Act pertaining to supplies, and not SCA, which affords service contract workers protection, was applicable, and, furthermore, it is primarily for contracting agencies to decide what provisions should or should not be included in particular contract..... 412

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Research and development
Cost-plus contract
Evaluation

Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor..... 240

CONTRACTS—Continued

Service Contract Act of 1965. (*See* **CONTRACTS, Labor stipulations, Service Contract Act of 1965**)

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

Specifications

Amendments

Late receipt effect Page

Bidder who contends that failure to be timely notified of amendment to IFB to furnish field desks that extended bid opening date cost it more favorable quotes from suppliers is not considered to have been prejudiced by extension of bid opening date or failure to receive amendment prior to originally scheduled bid opening date where record evidences acknowledgment of amendment was received with letter modifying certain option prices by time of bid opening. Furthermore, there is no indication that apparent late receipt of amendment resulted from any deliberate act by contracting agency or that bidder raised any objection prior to extended bid opening 443

Prior to closing date of solicitation requirement

Modification of RFQ to restrict procurement to small business concerns was proper exercise of authority by contracting officer under ASPR 3-505, which provides for amendment of solicitation prior to closing date for receipt of quotations to effect necessary changes since change of procurement to small business set-aside was recommended by SBA representative and was accepted on basis sufficient number of small business concern offers could be obtained. Therefore, quotation submitted by large business concern which was prepared under original unrestricted RFQ may not be considered or even opened to compare reasonableness of prices submitted by small business concerns, and in absence of judiciary established criteria and standards, claim for preparation costs may not be settled by GAO 307

Changes, revisions, etc.

Justification

Under advertised procurement where former supplier of single pick-up point refuse trucks would have been sole source of supply, there appears to be no reason to exclude from competition manufacturers willing to bid dual point equipment conditioned on furnishing kit to modify agency's existing single point pick-up refuse containers to accept both single and double pick-ups, even though former supplier may have some competitive advantage. Furthermore, warranty as to correctness of successful bidder's recommendation relative to operation of refuse system which may in part use equipment of another manufacturer may not be implied where solicitation provides for no warranty 270

What constitutes

Under RFP for performance of mess attendant services that contained Govt. estimate of required man-hours and that stated 5 percent deviation below estimate may result in rejection of offer unless satisfactory performance could be substantiated, acceptance of proposal that was 15 percent below Govt.'s estimate would not constitute change in specifications without notice to offerors since solicitation indicated use of lesser

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Specifications—Continued
Changes, revisions, etc.—Continued
What constitutes—Continued Page

man-hours than required which could reduce total cost would be desirable; five of eight offerors were without 5-percent range, thus evidencing equal opportunity to deviate; and feasibility of accepting 15-percent deviation is supported by fact deviation was based on study of degree to which mess facilities would be used and fact man-hours proposed exceeded man-hours utilized by incumbent contractor---------- 198

Deviations
Informal *v.* substantive
Acceptability of deviation

Where IFB to design, fabricate, and erect window walls, entrances, and rolling and sliding doors did not restrict contract performance to single firm nor restrict subcontracting because of 5-year minimum experience requirement, and bidder took no exception to requirement that at least 12 percent of work would be performed by its own force, fact that subcontractor was listed, although not required, is not construed to mean all work would be subcontracted; where subcontractor's insurance experience modification factor for Workmen's Compensation permitted Govt. to take into consideration cost of Govt-provided insurance, failure of prime contractor to submit its own insurance factor is minor informality; and where subcontractor is bound by prime contractor's commitment to Washington Plan providing minority hiring goals, bid as submitted was responsive and was properly considered for contract award---------- 331

"Affirmative action programs"

Failure of low bidder under IFB issued by Govt. of District of Columbia for roof rehabilitation at Spring Road Clinic to execute certificate of compliance with equal opportunity obligations provision included in solicitation until after bid opening was matter of form rather than substance and does not constitute basis for rejection of low bid as bid form submitted obligated bidder to comply with affirmative action requirements which were made part of bid documents and did not require submission or adoption of minority utilization goals but only that contractor take certain affirmative action steps---------- 431

Bid bond requirement

Since furnishing of bid bond in excess of amount required by IFB does not constitute change that would give one bidder an advantage over another, deviation may be waived as minor informality---------- 431

Information

Failure of low bidder to list buses it would use in performing transportation service, contracts did not render bid nonresponsive as omission relates to responsibility of bidder rather than to responsiveness of bid, since procurement requirement was for furnishing of services and not for furnishing buses, except as incident to furnishing services, and since bidder is legally obligated to furnish buses having acceptable minimum characteristics. Therefore bid should not have been rejected without specific determination that company was nonresponsive---------- 396

CONTRACTS—Continued
Specifications—Continued
Deviations—Continued
Waiver
Protest Page

Fact that unsolicited literature accompanying protestant's bid did not include all purchase description requirements and that bidder failed to submit technical manuals with its bid and to execute Buy American Certificate does not make bid nonresponsive and bid should be considered for award. Literature entitled "General Description Portable Heil Refuse Pulverizing System" did not conflict with purchase description even though it did not include all purchase description requirements, and, moreover, descriptive data highlighted salient features of System rather than limiting what would be supplied; specifications bind bidder notwithstanding manuals were not furnished with bid; and in view of fact import duty paid applies to an insignificant part of end item and not end item itself, bidder is considered to have offered domestic product 399

Manuals
Sufficiency determination

IFB schedule provision to effect a bidder will be considered nonresponsive if commercial technical manuals solicited did not meet military specifications standards should be deleted for use in future solicitations as it is prejudicial to fault bidders for this failure in view of fact military specification on "Manuals, Technical: Commercial Equipment" does not contemplate bid rejection on basis of manual insufficiency but rather provides that details of manual content shall be covered by contract; in view of conflicting provision in solicitation schedule that commercial manual content that unintentionally deviates from equipment specification affords no basis for bid rejection; and in view of fact bidder is bound by its bid to comply with both equipment specifications and commercial manual requirements of military specifications 249

Minimum needs requirement
Different approaches to achieve

Fact that one agency seeks to meet its minimum needs for efficient garbage removal system by purchasing entire system—that is grouping bodies, refuse containers, and trucks—while another agency plans to modify on-hand items and by only certain components of system is not determinative of propriety of either solicitation as both methods are reasonable in order to achieve desired ends. Therefore, all or nothing bidding requirement on refuse containers, trucks, and related equipment is not considered unduly restrictive of competition, even though manufacture of single component would be excluded, since question of compatibility of components is reasonable basis for procuring agency to require bids on entire system 270

Qualified Offerors List

Although protest against award of contract under RFP issued by National Highway Traffic Safety Admin. will not be considered as it was untimely filed pursuant to sec. 20.2 of GAO Interim Bid Protest Procedures and Standards, exception is taken to establishment and operation of Qualified Offerors List (QOL) by Admin. to curtail excessive

CONTRACTS—Continued
Specifications—Continued
Qualified Offerors List—Continued Page

production of solicitation packages, but which in fact is presolicitation procedure for determining prospective bidder's or offeror's responsibility, and as procedure unduly restricts competition it should be eliminated. Furthermore, Federal Procurement Regs., relied upon as authority to establish QOL, merely permit establishment of mailing list to assure adequate source of supply and to spell out necessary procedures for reasonable restriction on number of solicitations available---------- 209

Qualified products
Listing
Misrepresentation

In procurement of lighting panels to replace panel designed to support integrated electronics control equipment developed for F–4 aircraft where drawing stated panel must be in accordance with military specification that required qualified products listing (QPL), but RFQ did not evidence such requirement, although award to firm not on QPL will not be disturbed as award was not precluded by RFQ and contract is nearly completed, to require displaced initial low offeror to unnecessarily comply with QPL requirement was prejudicial, unfair and costly. Furthermore, although contracting officials erroneously failed to take action when it was recognized before award procurement should have been advertised utilizing applicable military specification, this approach will be used to procure panels in future---------- 295

Reevaluation
Changes requiring reevaluation

Bidder who failed to have product on Qualified Products List reevaluated pursuant to Qualified End Products clause (ASPR 1–1107.2(a)) included in IFB to furnish road graders, clause which requires reevaluation of product if any change occurred in location or ownership of plant at which previously approved product is, or was, manufactured, may, nevertheless, have its bid considered for award since change in circumstances of bidding concern was one of form, not substance—transfer of title to plant facility and change in corporate name with no accompanying change in employees, products, and manufacturing processes—and, therefore, reevaluation of product would be useless exercise and overly technical application of reevaluation requirement---------- 249

Subcontracts
Propriety

Where IFB to design, fabricate, and erect window walls, entrances, and rolling and sliding doors did not restrict contract performance to single firm nor restrict subcontracting because of 5-year minimum experience requirement, and bidder took no exception to requirement that at least 12 percent of work would be performed by its own force, fact that subcontractor was listed, although not required, is not construed to mean all work would be subcontracted; where subcontractor's insurance experience modification factor for Workmen's Compensation permitted Govt. to take into consideration cost of Govt-provided insurance, failure of prime contractor to submit its own insurance factor is minor informality; and where subcontractor is bound by prime contractor's

CONTRACTS—Continued
Subcontracts—Continued
Propriety—Continued Page

commitment to Washington Plan providing minority hiring goals, bid as submitted was responsive and was properly considered for contract award 331

Termination
Cancellation of requirement

Upon reconsideration of 53 Comp. Gen. 32, which directed termination of contract award to low bidder under second step of two-step formally advertised procurement for fork lift trucks and line items because alternate delivery schedule offered by bidder did not provide for required delivery concurrency of first production units and of spares and repair parts, low bid is still considered nonresponsive, notwithstanding argument that low bidder can "fall back" on commitment in required delivery schedule since at best bid is ambiguous, or viewed in light most favorable to bidder, bid is subject to two reasonable interpretations—under one it would be nonresponsive, and under the other responsive. However, in absence of clear indication of prejudice to other bidders, and since contractor will comply with the Govt.'s delivery schedule, decision is modified with respect to contract termination requirement and, therefore, reporting matter to appropriate congressional committees is no longer necessary 320

Convenience of Government
Erroneous awards

Where contracting officer improperly found that low bid was nonresponsive and awarded contracts for shuttle bus services in Alaska to other bidders pursuant to erroneous determination, he should, upon finding that low bid is still for acceptance, make current determination of responsibility of rejected bidder, and if found responsible, terminate existing contract(s) for those schedule(s) on which rejected company was low bidder and make award to company, if its bid is otherwise acceptable for award 396

Acceptance by contracting officer of self-certification submitted by successful bidder that it is a small business concern on basis that contrary determination by SBA district office was not final as it had been appealed to SBA Size Appeals Board was improper as district director's decision remains in full force and effect unless reversed or modified by Board, and fact that ASPR 1-703(b)(3)(iv) permits suspension of full size determination cycle when urgency of procurement so requires does not negate regional size determination made prior to award. Because contracting officer was not misled by self-certification but acted with full knowledge of facts in reliance on reading of applicable ASPR provisions, and because of urgency of procurement, contract awarded should be terminated for convenience of Govt. and resolicited, and this recommendation requires actions prescribed by secs. 232 and 236 of Legislative Reorganization Act of 1970 434

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Types
Effect on legality of contract Page

Contentions against propriety of award "to develop fully the automated analysis of chromosomes" do not require cancellation of award where successful offeror was selected only after on-site approval of facilities and favorable *ad hoc* technical evaluation of its proposal by panel of scientists on basis of presenting most advantageous offer, price and other factors considered, notwithstanding doubt as to validity of cost and best buy analysis and failure to clarify statistical program offered. Furthermore, contracting officer is satisfied that performance of contract meets the RFP requirements; that subcontracting of laboratory work is proper; and that no diversion of grant funds is occurring. Fact that mechanism for award was interagency agreement between HEW and NASA (42 U.S.C. 2473(b) (5) and (6)), and incorporation of project as task order under existing contract between NASA and contractor does not reflect on legality of contract ---------- 278

Warranties
Implied
No warranty in solicitation

Under advertised procurement where former supplier of single pick-up point refuse trucks would have been sole source of supply, there appears to be no reason to exclude from competition manufacturers willing to bid dual point equipment conditioned on furnishing kit to modify agency's existing single point pick-up refuse containers to accept both single and double pick-ups, even though former supplier may have some competitive advantage. Furthermore, warranty as to correctness of successful bidder's recommendation relative to operation of refuse system which may in part use equipment of another manufacturer may not be implied where solicitation provides for no warranty ---------- 270

CORPORATIONS
Government
Claims settlement authority

Claim of Federal National Mortgage Assn. (FNMA) against Federal Housing Admin. (FHA) of Dept. of HUD for handling, as successor mortgagee, adjustments necessitated by conversion from insurance for housing for moderate income and displaced familes under sec. 221(d)(3) of National Housing Act, as amended, to insurance for rental and cooperative housing for lower income families under sec. 223 of act may not be considered by U.S. GAO for the FHA while not specifically chartered as corporation is defined in Government Corporation Control Act (31 U.S.C. 846) as "wholly owned Govt. corporation," and as Govt. corporations are authorized to settle their own claims or to have their financial transactions treated as final, GAO is without authority to determine FNMA's entitlement to handling charges claimed ---------- 338

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When Federal judge or other judicial officer, as well as judicial entity, is sued within scope of judicial duties and Dept. of Justice declines to provide legal representation, use of judiciary appropriations to pay litigation costs, including minimal fees to private attorneys where gratuitous representation is not available, is not precluded by 28 U.S.C. 516–519 and 5 U.S.C. 3106. However, Administrative Office of the U.S. Courts should advise appropriate legislative and appropriations committees of Congress of its plans and estimated cost for implementation of plans, and determination as to whether defense of judicial officer's ruling or judicial body's rule is in best interest of U.S. and necessary to carry out functions of judiciary should be made by Administrative Office of the U.S. Courts and not by defendant. Also, defense of Federal public defenders appointed under 18 U.S.C. 3006A(h) may be paid from appropriations provided for public defender service where other public defender attorneys are not available 301

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Even though U.S. Environmental Protection Agency (EPA) certifying officer (C.O.) is not entitled to decision as to availability of appropriated funds for payment of membership fees for employees in professional organizations because his request was not accompanied by voucher as required by 31 U.S.C. 82d, which limits the U.S. GAO to responding to question of law with respect to payment on specific voucher presented to C.O. for certification prior to payment, in view of fact question no doubt will recur, it is considered as having been submitted by head of EPA who is entitled to decision under sec. 8 of act of July 31, 1894, as amended (31 U.S.C. 74), under which GAO has authority to provide decisions to heads of executive departments or other establishments on any question involving payments which may by made by their agency ---------- 429

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Claim of Federal National Mortgage Assn. (FNMA) against Federal Housing Admin. (FHA) of Dept. of HUD for handling, as successor mortgagee, adjustments necessitated by conversion from insurance for

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housing for moderate income and displaced families under sec. 221(d)(3) of National Housing Act, as amended, to insurance for rental and cooperative housing for lower income families under sec. 223 of act may not be considered by U.S. GAO for the FHA while not specifically chartered as corporation is defined in Government Corporation Control Act (31 U.S.C. 846) as "wholly owned Govt. corporation," and as Govt. corporations are authorized to settle their own claims or to have their financial transactions treated as final, GAO is without authority to determine FNMA's entitlement to handling charges claimed..... 338

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profesional organizations because his request was not accompanied by voucher as required by 31 U.S.C. 82d, which limits the U.S. GAO to responding to question of law with respect to payment on specific voucher presented to C.O. for certification prior to payment, in view of fact question no doubt will recur, it is considered as having been submitted by head of EPA who is entitled to decision under sec. 8 of act of July 31, 1894, as amended (31 U.S.C. 74), under which GAO has authority to provide decisions to heads of executive departments of other establishments on any question involving payments which may be made by their agency ---------- 429

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Claim of Federal National Mortgage Assn. (FNMA) against Federal Housing Admin. (FHA) of Dept. of HUD for handling, as successor mortgagee, adjustments necessitated by conversion from insurance for housing for moderate income and displaced families under sec. 221(d)(3) of National Housing Act, as amended, to insurance for rental and cooperative housing for lower income families under sec. 223 of act may not be considered by U.S. GAO for the FHA while not specifically chartered as corporation is defined in Government Corporation Control Act (31 U.S.C. 846) as "wholly owned Govt. corporation," and as Govt. corporations are authorized to settle their own claims or to have their financial transactions treated as final, GAO is without authority to determine FNMA's entitlement to handling charges claimed ---------- 338

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Acceptance by contracting officer of self-certification submitted by successful bidder that it is a small business concern on basis that contrary determination by SBA district office was not final as it had been appealed to SBA Size Appeals Board was improper as district director's decision remains in full force and effect unless reversed or modified by Board, and fact that ASPR 1-703(b)(3)(iv) permits suspension of full size determination cycle when urgency of procurement so requires does not negate regional size determination made prior to award. Because contracting officer was not misled by self-certification but acted with full knowledge of facts in reliance on reading of applicable ASPR provisions, and because of urgency of procurement, contract awarded should be terminated for convenience of Govt. and resolicited, and this recommendation requires actions prescribed by secs. 232 and 236 of Legislative Reorganization Act of 1970 ---------- 434

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Funds appropriated or made available to Forest Service for construction and maintenance of forest roads and trails to carry out provisions of 23 U.S.C. 205 and 16 U.S.C. 501 may not be used to close such

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roads and trails or return them to natural state for pursuant to 31 U.S.C. 628 appropriations are required to be applied solely to objects for which they are made unless otherwise provided by law, and according to definitions of "construction" and "maintenance" in 23 U.S.C. 101(a), legislative purpose of both 23 U.S.C. 205(a) and 16 U.S.C. 501 pertains to development and preservation of forest roads and trails and not to their liquidation. Hence, road funds may not be used to return abandoned road sites to their natural state..... 328

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Fact that spouse of Army major who was transferred effective June 12, 1972, from Palo Alto to Fort Sill is an Army nurse does not deprive major to entitlement for dependent travel allowance since par. M7000 of JTR which prohibits reimbursement for travel of dependent who is member of uniformed services on active duty on effective date of spouse's station change, and for travel of dependents receiving any other type of travel allowance from Govt. in their own right, is not for application as major's wife traveled from Palo Alto to Fort Sill during period that she was in an excess leave status between graduating from Stanford Univ. on June 11, 1972, and reporting to Fort Sam Houston on July 12, 1972, to attend Army Nurse Officer Basic Course, period during which she was not entitled in her own right to basic pay and allowances prescribed by 37 U.S.C. 204 for active duty..... 289

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Sunday and holiday work performed on regular and recurring basis is not work within purview of compensatory provisions of 5 U.S.C. 5543 and 5 CFR 550.114, and employee who from Aug. 1, 1955, through Jan. 10, 1970, maintained reservoir records, as well as other employees similarly situated, is entitled as provided by 5 CFR 550.114(c) to overtime compensation prescribed by 5 U.S.C. 5542 for period not barred by 31 U.S.C. 71a. Overtime is compensable on basis of actual time worked Sundays and minimum of 2 hours for holidays, payable without interest in absence of statute so providing, and at grade limitation prescribed by 5 U.S.C. 5542(a)(1). Employees who took compensatory time may be paid difference between value of that time and overtime; claims affected by 31 U.S.C. 71a should be forwarded to GAO for recording and return; overtime is payable when compensatory time is not requested.. 264

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When State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may not include fringe benefits, such as retirement, life and health insurance, and costs for negotiating assignment agreement required under 5 CFR 334.105, and for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference according to legislative history to salary of State or local detailee, and there is no basis for ascribing to term a different meaning than used in Federal personnel statutes, that is that term refers to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees 355

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Sunday and holiday work performed on regular and recurring basis is not work within purview of compensatory provisions of 5 U.S.C. 5543 and 5 CFR 550.114, and employee who from Aug. 1, 1955, through Jan. 10, 1970, maintained reservoir records, as well as other employees similarly situated, is entitled as provided by 5 CFR 550.114(c) to overtime compensation prescribed by 5 U.S.C. 5542 for period not barred by 31 U.S.C. 71a. Overtime is compensable on basis of actual time worked Sundays and minimum of 2 hours for holidays, payable without interest in absence of statute so providing and at grade limitation prescribed by 5 U.S.C. 5542(a)(1). Employees who took compensatory time may be paid difference between value of that time and overtime; claims affected by 31 U.S.C. 71a should be forwarded to GAO for recording and return; overtime is payable when compensatory time is not requested 264

Sunday work
Effect on premium and night differential pay

Employee on 8 hour regular shift of duty which included 2 a.m. on last Sunday in Apr. when standard time was advanced 1 hour to daylight saving time (15 U.S.C. 260a(a)), who was placed on annual leave for 1 hour so 1 hour of pay would not be lost may not be paid Sunday premium pay for 1 hour of annual leave since 5 U.S.C. 5546 does not authorize premium pay for leave status during any part of regularly scheduled tour of duty on Sunday. However, night differential prescribed by 5 U.S.C. 5545(a) is payable for paid leave period that is less than 8 hours, including both night and day hours, and it is sufficient to only note on time and attendance report fact leave was attributable to time change. Thus an employee who works 12 midnight to 8 a.m. shift on Sunday when time is advanced will be placed on annual leave for 1 hour and receive night differential for 6 hours including hour of annual leave 292

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Private lending institutions participating with SBA in making loans to assist public or private organizations operated for benefit of handicapped or to assist handicapped individuals in establishing, acquiring, or operating small business concern pursuant to sec. 7(g) of Small Business Act are not restricted to 3 per centum per annum interest rate prescribed by sec. 7(g)(2) of act, for to apply language of sec. 7(g)(2) literally would defeat purpose of act. Therefore SBA may approve interest rate which is "legal and reasonable" on participation loans made by lending institutions under sec. 7(g), even though SBA on its direct or participation loans is restricted to prescribed 3 percent interest rate. However, at opportune time SBA should seek appropriate legislative revision of language in question 422

MEDICAL TREATMENT
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Medical services Dept. of State is authorized under Foreign Service Act of 1946, as amended, to furnish other agency overseas employees and their dependents may not be extended to overseas employees of Internal Revenue Service (IRS) in absence of specific legislation authorizing service for IRS employees and in view of unavailability of IRS "necessary expenses" appropriation for expenses of this nature. Only exceptions to general rule that medical care and treatment are personal to employee unless provided by contract of employment, statute, or valid regulation are where illness is direct result of Govt. employment or where limited medical services are for principal benefit of Govt., that is, diagnostic and precautionary services such as examinations and innoculations made necessary by particular conditions or requirements of employment 230

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Veterans Admin. funds appropriated for medical care of eligible veterans may be used to install central air-conditioning in home of disabled veteran who suffers body temperature impairment as there is no satisfactory alternative to treat him in noninstitutional setting, and installation of central air-conditioning—necessary for effective and economical treatment—is reasonably related to and essential to carry out purpose of appropriation to medically rehabilitate veteran in nonhospital setting to obviate need for hospital admission. Furthermore, general rule that appropriated funds may not be used for permanent improvements of private property in absence of specific legislative authority is not for application since improvement is for benefit of veteran and not U.S. 351

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A part-time, Schedule A, employee of U.S. Dept. of Commerce employed as Field Supervisor on WAE basis who, involved in automobile accident while operating privately owned vehicle on official business, was charged with failure to obey stop sign and given summons to appear in court is entitled to payment for her time and mileage expenses from her home in Camden, N.J., to New Castle, Del., and return, incident to court appearances since Federal Govt. under "Federal Tort Claims Act" is party potentially liable for damages sustained by defendant due to negligent operation of motor vehicle by employee within scope of her employment and, consequently, appearance of employee at judicial proceeding to which she was summoned may be regarded as performance of official duty within meaning of 5 U.S.C. 6322(b)(2)..... 214

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Candidate for admission to U.S. Air Force Academy who had in Jan. 1973 medically qualified for pilot training but when he reported to academy in July was not admitted because he was found medically disqualified for condition that had existed from birth but which had been overlooked during initial physical examination may be reimbursed cost of traveling from home to academy and return, even though par. M5000–1 of JTR prescribes reimbursement of travel expenses only to those persons accepted by military academies, since candidate's rejection was due to no fault on his part and, therefore, he should be granted reimbursement under par. M5050–2, JTR, on basis Govt. owes him same consideration that is extended to rejected applicants for enlistment in Regular services or Reserve components..... 236

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Fact that spouse of Army major who was transferred effective June 12, 1972, from Palo Alto to Fort Sill is an Army nurse does not deprive major to entitlement for dependent travel allowance since par. M7000 of JTR which prohibits reimbursement for travel of dependent who is member of uniformed services on active duty on effective date of spouse's station change, and for travel of dependents receiving any other type of travel allowance from Govt. in their own right, is not for application as major's wife traveled from Palo Alto to Fort Sill during period that she was in an excess leave status between graduating from Stanford Univ. on June 11, 1972, and reporting to Fort Sam Houston on July 12, 1972, to attend Army Nurse Officer Basic Course, period during which she was not entitled in her own right to basic pay and allowances prescribed by 37 U.S.C. 204 for active duty..... 289

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Collection of overpayments that resulted when annuity payments under Retired Serviceman's Family Protection Plan were continued to be made to legal guardian of adopted, unmarried minor child of deceased officer after child attained age 18, may be waived pursuant to 10 U.S.C. 1442 since "undue hardship test"—or other good reasons—stated in 35 Comp. Gen. 401 as basis for waiver of overpayments under Plan is satisfied where legal guardian used monies erroneously paid, plus her own and estate funds to continue beneficiary's education, as well as providing good home for her, and where it would be against equity and good conscience to attempt to recover erroneous payments from legal guardian who financially depends on social security payments for support 228

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Amount equal to educational assistance allowances paid to staff sergeant at rate prescribed for veterans while attending school from July 6, 1970, to Dec. 8, 1970, which was withheld from payment due him as result of correction of his military records to show he was not discharged on Sept. 8, 1969, but that he continued on active duty until Dec. 8, 1970, at which time he was honorably discharged, may not be reimbursed to member as amount withheld represents educational assistance allowances paid at rate prescribed in 38 U.S.C. 1682 (a)(1) only for veterans discharged from military service, and sergeant's records having been corrected to show him on active duty for period of school attendance, entitlement is limited to the lesser educational assistance allowance rate provided by 37 U.S.C. 1682 for servicemen on active duty 299

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Establishment under 10 U.S.C. 2031 of Marine Corps Junior Reserve Officers' Training Corps unit at Indian High School funded by Federal Govt. is not precluded since establishment of corps in "public and private secondary educational institutions" is not restricted to non-governmental institutions, and retired members of uniformed services employed as administrators and instructors are required to be paid under 10 U.S.C. 2031(d)(1), which provides for retention of retired or retainer pay by member and payment by school to member of additional amount of not more than difference between such pay and active duty pay and allowances, half of which is reimbursable by appropriate service. However, GS appointments of officer and Fleet Reservist, with CSC approval, need not be revoked, and any resultant dual compensation payments may be waived, but future payments to members are compensable under sec. 2031(d)(1), and incident to GS appointments, school may not be reimbursed for additional amounts paid members 377

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Prohibition in 31 U.S.C. 679 that appropriated monies shall not be expended for telephone services in private residence or apartment, except for long-distance calls on public business, reflects general policy against furnishing telephone service at Govt. expense for personal benefit of employees and is not intended to apply to Govt-owned facility that is not set aside for exclusive personal use and where sufficient official use for telephone exists, such as in Army barracks. Therefore, local-service telephones may be installed and operated at Govt. expense in Army barracks, notwithstanding availability of telephones for personal use without means of apportioning costs between official and personal calls since telephone availability will improve soldier morale, and operation and maintenance appropriation, Army, is available for welfare and recreation of military personnel 195

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Exceptions in 35 CFR 253.135 to payment of tropical differential to more than one spouse if both are employed by Federal Govt.; to payment of differential where job of spouse employed outside Federal Govt. reasonably is determinative of family's location; and to payment of differential to employee whose spouse is member of U.S. military forces, are equally applicable to male and female employees and, therefore, prohibitions are not susceptible to allegation of sex discrimination that violates legislation and governing regulations made effective Jan. 10, 1971, to eliminate sex discrimination in employment because of marital status. In case of claims submitted by Panama Canal Zone Govt. female employees, differential is payable only if positions occupied are determinative of family location, and future claims in view of varying factual circumstances should be judged individually 203

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Promotions
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Claim of civilian employee for retroactive promotion and salary differential between grades GS–12 and GS–13 on basis position he was serving in overseas was reclassified on July 3, 1970, to GS–13, and that although he was legally qualified for promotion administrative office failed to act timely, is justifiable claim and employee should be retroactively promoted to GS–13 to date not earlier than July 3, 1970, nor later than beginning of fourth pay period after July 3, 1970, in accordance with 5 CFR 511.701 and 511.702, and paid salary differential to Aug. 28, 1972, date he returned from overseas. Rule is that when position is reclassified to higher grade, agency must within reasonable time after date of final position reclassification, unless employee is on detail to position, either promote incumbent, if qualified, or remove him, and time frame for "reasonable time" is prescribed in 5 CFR 511.701 and 5 CFR 511.702 216

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Exceptions in 35 CFR 253.135 to payment of tropical differential to more than one spouse if both are employed by Federal Govt.; to payment of differential where job of spouse employed outside Federal Govt. reasonably is determinative of family's location; and to payment of differential to employee whose spouse is member of U.S. military forces, are equally applicable to male and female employees and, therefore, prohibitions are not susceptible to allegation of sex discrimination that violates legislation and governing regulations made effective Jan. 10, 1971, to eliminate sex discrimination in employment because of marital status. In case of claims submitted by Panama Canal Zone Govt. female employees, differential is payable only if positions occupied are determinative of family location, and future claims in view of varying factual circumstances should be judged individually 203

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Children of deceased retired members who are under 18 years of age and serving on active duty in uniformed service, or are under 22 and serving as cadet or midshipman at service academy, or are enrolled in institute of higher learning under military subsistence scholar-

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ship program are considered eligible dependents to receive Survivor Benefit Plan annuity (10 U.S.C. 1447–1455), within meaning of 10 U.S.C. 1447(5), even though they are provided quarters and subsistence by Govt. since showing of actual dependency for individuals enumerated is not required as only valid restrictions on dependent eligibility are those limitations specifically mentioned in sec. 1447(5)..... 420

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Collection of overpayments that resulted when annuity payments under Retired Serviceman's Family Protection Plan were continued to be made to legal guardian of adopted, unmarried minor child of deceased officer after child attained age 18, may be waived pursuant to 10 U.S.C. 1442 since "undue hardship test"—or other good reasons—stated in 35 Comp. Gen. 401 as basis for waiver of overpayments under Plan is satisfied where legal guardian used monies erroneously paid, plus her own and estate funds to continue beneficiary's education, as well as providing good home for her, and where it would be against equity and good conscience to attempt to recover erroneous payments from legal guardian who financially depends on social security payments for support..... 228

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Initial election under Survivor Benefit Plan, Pub. L. 92–425 (10 U.S.C. 1447–1455) by member of uniformed services who was retired prior to Sept. 21, 1972, date Plan was enacted, and which was made on basis of insufficient information or misunderstanding, may be changed or revoked only during 18-month period prescribed (Pub. L. 93–155, which amended 1972 act), and failure of administrative office to provide adequate information necessary to make intelligent election constitutes administrative error within meaning of 10 U.S.C. 1454. However, where election under Plan was made on basis of adequate information within the 18-month period, no further election may be allowed, nor may conditional election be permitted in absence of provision in act to this effect, and, furthermore, statement of nonparticipation does not preclude member from electing coverage within the 18-month period.... 393

Disability
Name on promotion list
Effect on retired pay

AF major who was retired for disability under 10 U.S.C. 1201 and 1372 after being recommended for promotion to grade of lieutenant colonel, although entitled under sec. 206(a) of Reserve Officer Personnel Act of 1954 to be placed on retired list in higher grade to which promoted (10 U.S.C. 1374(a)), is not entitled to retired pay based on higher grade (10 U.S.C. 1374(d)), but pursuant to 10 U.S.C. 1372(1) his retired pay must be computed on grade of major, grade he was actually serving in on date of retirement since disability for which officer was retired was not found as result of physical examination for promotion as required

PAY—Continued
Retired—Continued
Disability—Continued
Name on promotion list—Continued
Effect on retired pay—Continued Page

by 10 U.S.C. 1372(3). Furthermore, sec. 507(a)(7) of Officer Personnel Act of 1947, which permitted computation of an officer's retired pay on basis of his promotion to higher grade, is not for application as it was repealed prior to officer's placement on disability retired list---------- 425

PAYMENTS
Absence or unenforceability of contracts
Quantum meruit
Value of services and materials furnished

Although under ordinary circumstances contracting officer is not expected to anticipate possibility that bidder will claim mistake in bid after award, where he was on notice of possibility of bid error in alternative item to basic bid for electrical distribution system and where bidder had attempted to modify by late telegram both basic bid, Item 1, and alternative item, Item 1A, contracting officer should have been alerted to possibility of error on both items and it would have been prudent prior to award of Item 1 to inquire if attempted price increases reflected mistakes in both items, particularly since bidder had not acquiesced in award. Therefore, upon establishing existence of mistake, no contract having been effected at award price, and substantial portion of work having been completed, contractor may be paid on a *quantum valebat* or *quantum meruit* basis, that is, reasonable value of services and materials actually furnished---------- 368

PRESIDENT
Appointments. (*See* **APPOINTMENTS, Presidential**)
PROPERTY
Private
Federal funds for improvements, repairs, etc.
Limitation on expenditures

General rule prohibiting use of appropriated funds for permanent improvements of private property (5 Comp. Dec. 478) unless specifically authorized by law, and limited exception to that rule in sec. 322 of Economy Act (40 U.S.C. 278a) which, in effect, permits expenditures for alterations, repairs, and improvements of rented premises not in excess of 25 percent of first year's rent is for application to proposed alteration, repairs, and improvement of permanent nature to premises rented for housing flight service stations and other air navigation facilities operated by FAA in connection with air control facilities since sec. 207(b) of Federal Aviation Act concerning establishment and operation of air traffic control facilities does not constitute statutory authority for FAA to effect permanent improvements to private property without regard to limitation in 40 U.S.C. 278a---------- 317

Repairs and improvements
Disabled veteran's home

Veterans Admin. funds appropriated for medical care of eligible veterans may be used to install central air-conditioning in home of disabled veteran who suffers body temperature impairment as there is no satis-

PROPERTY—Continued
Private—Continued;
Repairs and improvements—Continued
Disabled veteran's home—Continued Page

factory alternative to treat him in noninstitutional setting, and installation of central air-conditioning—necessary for effective and economical treatment—is reasonably related to and essential to carry out purpose of appropriation to medically rehabilitate veteran in nonhospital setting to obviate need for hospital admission. Furthermore, general rule that appropriated funds may not be used for permanent improvements of private property in absence of specific legislative authority is not for application since improvement is for benefit of veteran and not U.S..... 351

Public
Fire fighting services

Reimbursement by GSA to St. Louis Community Fire Protection District (CFPD) and other separate district and local fire departments for supplemental expenses incurred due to equipment losses and payroll costs for personnel called to duty to respond to fire at Military Personnel Records Center is not authorized since Center is located within area covered by St. Louis CFPD, which as political subdivision under Missouri law has statutory duty to render fire fighting services without cost, duty that extends to property of U.S. in view of Govt.'s sovereign immunity from taxation. Although Record Center lay outside boundaries of surrounding district and local fire fighting departments, and GSA has authority to contract for their services, their obligation to respond to Center fire arose out of mutual agreements with CFPD.... 410

REGULATIONS
Recommendation by General Accounting Office
Implementing regulations

Although Congress intended, in enacting the Service Contract Act Amendments of 1972, that wage determination issued as result of hearings held pursuant to sec. 4(c) of Service Contract Act would be applicable to contracts awarded prior to issuance of wage determination, appropriate implementing regulations have not been promulgated and GAO urges issuance of regulations as soon as practicable to provide for required contract clauses..... 410

Retroactive
Administrative policy revision

Under well established rule that substantive statutory regulations have effect of law and cannot be waived, Commodity Credit Corp. lacks authority to adopt proposed amendment to regulations promulgated under National Wool Act to extent that would permit retroactive waiver of regulatory requirement that wool price support payments be based on actual net sales proceeds. However, in view of broad administrative discretion afforded by sec. 706 of act in formulating program terms and conditions, there is no objection to prospective adoption and application of provision for varying actual net sales proceeds requirement under limited and clearly defined circumstances and subject to determination that provision is consistent with purposes of act..... 364

ROADS AND TRAILS. (*See* **HIGHWAYS**)
SMALL BUSINESS ADMINISTRATION
Loans
Participation
With private lending institutions
Interest rates Page

Private lending institutions participating with SBA in making loans to assist public or private organizations operated for benefit of handicapped or to assist handicapped individuals in establishing, acquiring, or operating small business concern pursuant to sec. 7(g) of Small Business Act are not restricted to 3 per centum per annum interest rate prescribed by sec. 7(g)(2) of act, for to apply language of sec. 7(g)(2) literally would defeat purpose of act. Therefore SBA may approve interest rate which is "legal and reasonable" on participation loans made by lending institutions under sec. 7(g), even though SBA on its direct or participation loans is restricted to prescribed 3 percent interest rate. However, at opportune time SBA should seek appropriate legislative revision of language in question 422

STATES
Employees
Detail to Federal Government
"Pay" reimbursement

When State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may not include fringe benefits, such as retirement, life and health insurance, and costs for negotiating assignment agreement required under 5 CFR 334.105, and for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference according to legislative history to salary of State or local detailee, and there is no basis for ascribing to term a different meaning than used in Federal personnel statutes, that is that term refers to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees 355

Fire fighting services
Government reimbursement liability

Reimbursement by GSA to St. Louis Community Fire Protection District (CFPD) and other separate district and local fire departments for supplemental expenses incurred due to equipment losses and payroll costs for personnel called to duty to respond to fire at Military Personnel Records Center is not authorized since Center is located within area covered by St. Louis CFPD, which as political subdivision under Missouri law has statutory duty to render fire fighting services without cost, duty that extends to property of U.S. in view of Govt.'s sovereign immunity from taxation. Although Record Center lay outside boundaries of surrounding district and local fire departments, and GSA has authority to contract for their services, their obligation to respond to Center fire arose out of mutual agreements with CFPD 410

Taxes. (*See* **TAXES, State**)

STATION ALLOWANCES
Military personnel
Dependents
Page
Maintained overseas at place other than at member's station

Fact that concurrently member of uniformed services was assigned from continental U.S. duty station to remote and isolated post in Alaska and dependents were authorized to travel in military status, pursuant to par. M7001 of JTR, to another Alaskan location where dependent facilities exist, and to which location member made periodic visits, does not make member eligible to receive station allowances, and principle enunciated in 49 Comp. Gen. 548 is for application, for choice of an Alaskan location for dependents in lieu of residence in continental U.S. does not change member's "all others" tour of duty to "accompanied by dependents tour," and as dependents are not considered as residing in vicinity of member's duty station, there is no entitlement to allowance. Erroneous payments made on basis of misunderstanding will not be questioned 339

STATUTES OF LIMITATION
Claims
Compensation
Status of claim

Claim of reservoir superintendent of Bureau of Reclamation for 2 hours overtime for Sundays and holidays he was required to work during period Aug. 1, 1955, through Jan. 10, 1970, to take weather and reservoir operation records—overtime claimed on basis of not taking advantage of compensatory time arrangement before its discontinuance—is not within purview of 5 U.S.C. 5596 regarding timely appeal to unwarranted personnel action and is for consideration pursuant to 31 U.S.C. 71a, and claim having been received in U.S. GAO on May 23, 1973, only that portion of claim for period prior to May 23, 1963, is barred 264

General Accounting Office
Civil service matters
Overtime claims

Sunday and holiday work performed on regular and recurring basis is not work within purview of compensatory provisions of 5 U.S.C. 5543 and 5 CFR 550.114, and employee who from Aug. 1, 1955, through Jan. 10, 1970, maintained reservoir records, as well as other employees similarly situated, is entitled as provided by 5 CFR 550.114(c) to overtime compensation prescribed by 5 U.S.C. 5542 for period not barred by 31 U.S.C. 71a. Overtime is compensable on basis of actual time worked Sundays and minimum of 2 hours for holidays, payable without interest in absence of statute so providing, and at grade limitation prescribed by 5 U.S.C. 5542(a)(1). Employees who took compensatory time may be paid difference between value of that time and overtime; claims affected by 31 U.S.C. 71a should be forwarded to GAO for recording and return; overtime is payable when compensatory time is not requested 264

STATUTORY CONSTRUCTION

Strict construction

Defeat purpose of act

Page

Private lending institutions participating with SBA in making loans to assist public or private organizations operated for benefit of handicapped or to assist handicapped individuals in establishing, acquiring, or operating small business concern pursuant to sec. 7(g) of Small Business Act are not restricted to 3 per centum per annum interest rate prescribed by sec. 7(g)(2) of act, for to apply language of sec. 7(g)(2) literally would defeat purpose of act. Therefore SBA may approve interest rate which is "legal and reasonable" on participation loans made by lending institutions under sec. 7(g), even though SBA on its direct or participation loans is restricted to prescribed 3 percent interest rate. However, at opportune time SBA should seek appropriate legislative revision of language in question

SUBSISTENCE

Per diem

Military personnel

Training duty periods

Excess of 20 weeks

Chief warrant officer, member of R.I. National Guard, who under permanent change of station orders attended full-time training duty in Warrant Officer Auto Repair Course at Army Ordnance Center and School for period in excess of 20 weeks, although usual period of instruction is less than 20 weeks, because no instruction was provided during Christmas holiday period, and other military personnel who were students—some members of Army, National Guard and U.S. Army Reserve—similarly situated are entitled to per diem allowance, notwithstanding receipt of permanent change of station orders, as both officer and students were in fact in temporary duty status since actual course of instruction was less than 20 weeks duration and active duty status during holiday period was merely incidental to course of instruction and did not serve to extend period of instruction 218

Temporary duty

New employees prior to reporting to first duty station

Resident of Syracuse, N.Y., who at time of hire by Internal Revenue Service was assigned 30 days temporary training duty in Philadelphia, Pa., thus preventing him from establishing residence at designated official station at Newburgh, N.Y., is entitled incident to his voluntary return to Syracuse over 4 weekends to have Syracuse considered as residence for purpose of sec. 6.5c, OMB Cir. A-7, and to be reimbursed in amount that will not exceed per diem and other expenses that would have been allowed had he remained at temporary duty station, but inasmuch as employee was not in subsistence status on weekends, 8 nights involved should not be included in average lodging cost comparison 313

TAXES

State

Government immunity

Rule Page

Reimbursement by GSA to St. Louis Community Fire Protection District (CFPD) and other separate district and local fire departments for supplemental expenses incurred due to equipment losses and payroll costs for personnel called to duty to respond to fire at Military Personnel Records Center is not authorized since Center is located within area covered by St. Louis CFPD, which as political subdivision under Missouri law has statutory duty to render fire fighting services without cost, duty that extends to property of U.S. in view of Govt.'s sovereign immunity from taxation. Although Record Center lay outside boundaries of surrounding district and local fire departments, and GSA has authority to contract for their services, their obligation to respond to Center fire arose out of mutual agreements with CFPD 410

TELEPHONES

Army barracks

Public and private use

Prohibition in 31 U.S.C. 679 that appropriated monies shall not be expended for telephone services in private residence or apartment, except for long distance calls on public business, reflects general policy against furnishing telephone service at Govt. expense for personal benefit of employees and is not intended to apply to Govt-owned facility that is not set aside for exclusive personal use and where sufficient official use for telephone exists, such as in Army barracks. Therefore, local-service telephones may be installed and operated at Govt. expense in Army barracks, notwithstanding availability of telephones for personal use without means of apportioning costs between official and personal calls since telephone availability will improve soldier morale, and operation and maintenance appropriation, Army, is available for welfare and recreation of military personnel 195

TIME

Standard advanced to daylight saving

Compensation effect

Employee on 8 hour regular shift of duty, which included 2 a.m. on last Sunday in Apr. when standard time was advanced 1 hour to daylight saving time (15 U.S.C. 260a(a)), who was placed on annual leave for 1 hour so 1 hour of pay would not be lost may not be paid Sunday premium pay for 1 hour of annual leave since 5 U.S.C. 5546 does not authorize premium pay for leave status during any part of regularly scheduled tour of duty on Sunday. However, night differential prescribed by the 5 U.S.C. 5545(a) is payable for paid leave period that is less than 8 hours, including both night and day hours, and it is sufficient to only note on time and attendance report fact leave was attributable to time change. Thus an employee who works 12 midnight to 8 a.m. shift on Sunday when time is advanced will be placed on annual leave for 1 hour and receive night differential for 6 hours including hour of annual leave 292

TORTS
Claims under Federal Tort Claims Act
Private property damage, etc.
Scope of employment Page

A part-time, Schedule A, employee of U.S. Dept. of Commerce employed as Field Supervisor on WAE basis who, involved in automobile accident while operating privately owned vehicle on official business, was charged with failure to obey stop sign and given summons to appear in court is entitled to payment for her time and mileage expenses from her home in Camden, N.J., to New Castle, Del., and return, incident to to court appearances since Federal Govt. under "Federal Tort Claims Act" is party potentially liable for damages sustained by defendant due to negligent operation of motor vehicle by employee within scope of her employment and, consequently, appearance of employee at judicial proceeding to which she was summoned may be regarded as performance of official duty within meaning of 5 U.S.C. 6322(b)(2)---------- 214

TRANSPORTATION
Carriers. (*See* **CARRIERS**)
Rates
Section 22 quotations
Effective date for bid evaluation purposes

For purpose of using carriers' "section 22" tenders in evaluation of bids under solicitation for field desks, there is no provision in ASPR for evaluating carriers' responsibility or likelihood that preferential "section 22" tenders offered to Govt. by carriers will still exist on date of shipment. However, since "section 22" tenders are continuing unilateral offers which may be withdrawn by carrier in accordance with terms of particular tender, even though there is no assurance of continued existence of tender, contracting agency need not determine in evaluating bids that these rates will exist on date of shipment, so long as they are in effect or are to become effective prior to date of expected shipment and are on file or published as provided in ASPR 19-301.1(a)---------- 443

Utilization

Contention that preferential "section 22" rates tendered by carriers regulated by ICC to Govt. cannot be used in computing transportation costs for evaluation of f.o.b. origin bids to furnish field desks, since clause in ASPR 7-103.25 was not included in IFB, is not valid because wording of clause appears verbatim in invitation. Moreover, ASPR 19-217.1(a), which protestant views as requiring inclusion of clause, only requires inclusion if contractor may be required by Govt. to ship desks under prepaid commercial bills of lading---------- 443

TRAVEL ALLOWANCE
Military personnel
Husband and wife both members of the uniformed services

Fact that spouse of Army major who was transferred effective June 12, 1972, from Palo Alto to Fort Sill is an Army nurse does not deprive major to entitlement for dependent travel allowance since par. M7000 of JTR which prohibits reimbursement for travel of dependent who is member of uniformed services on active duty on effective date of spouse's station change, and for travel of dependents receiving any other type of travel allowance from Govt. in their own right, is not for application as

TRAVEL ALLOWANCES—Continued
Military personnel—Continued
Husband and wife both members of the uniformed services—Con. Page

major's wife traveled from Palo Alto to Fort Sill during period that she was in an excess leave status between graduating from Stanford Univ. on June 11, 1972, and reporting to Fort Sam Houston on July 12, 1972, to attend Army Nurse Officer Basic Course, period during which she was not entitled in her own right to basic pay and allowances prescribed by 37 U.S.C. 204 for active duty 289

TRAVEL EXPENSES
Military personnel
Candidates for military academies
Rejected for admission

Candidate for admission to U.S. Air Force Academy who had in Jan. 1973, medically qualified for pilot training but when he reported to academy in July was not admitted because he was found medically disqualified for condition that had existed from birth but which had been overlooked during initial physical examination may be reimbursed cost of traveling from home to academy and return, even though par. M5000–1 of JTR prescribes reimbursement of travel expenses only to those persons accepted by military academies, since candidate's rejection was due to no fault on his part and, therefore, he should be granted reimbursement under par. M5050–2, JTR, on basis Govt. owes him same consideration that is extended to rejected applicants for enlistment in Regular services or Reserve components 236

Official business
Compliance with court orders

A part-time, Schedule A, employee of U.S. Dept. of Commerce employed as Field Supervisor on WAE basis who, involved in automobile accident while operating privately owned vehicle on official business, was charged with failure to obey stop sign and given summons to appear in court is entitled to payment for her time and mileage expenses from her home in Camden, N.J., to New Castle, Del., and return, incident to court appearances since Federal Govt. under "Federal Tort Claims Act" is party potentially liable for damages sustained by defendant due to negligent operation of motor vehicle by employee within scope of her employment and, consequently, appearance of employee at judicial proceeding to which she was summoned may be regarded as performance of official duty within meaning of 5 U.S.C. 6322(b)(2) 214

Presidential appointees
National Credit Union Board

National Credit Union Board Presidential appointee whose appointment is subject to Senate confirmation may not be reimbursed expenses incurred to travel to Washington to appear before Senate Banking Committee in connection with his confirmation unless Administrator of National Credit Union Admin. determines appointee performed official business such as conferences with officials of Administration that were of substantial benefit to Administration and Administrator approves travel performed by nominee 424

TRAVEL EXPENSES—Continued
Temporary duty
New employee prior to reporting to first duty station Page

Notwithstanding newly appointed Internal Revenue Service employee was prevented from establishing residence at his designated official station because of temporary training assignment, employee's entitlement incident to travel to and from his temporary duty station is limited to travel from official station to temporary station and return under general rule an employee must bear expenses of travel to first permanent duty station unless appointed to manpower shortage position which entitles an employee to reimbursement under 5 U.S.C. 5723, and Internal Revenue Service employee was not appointed to manpower shortage position. 313

VEHICLES
Privately owned
Accidents while on Government business
Claims incident thereto

A part-time, Schedule A, employee of U.S. Dept. of Commerce employed as Field Supervisor on WAE basis who, involved in automobile accident while operating privately owned vehicle on official business, was charged with failure to obey stop sign and given summons to appear in court is entitled to payment for her time and mileage expenses from her home in Camden, N.J., to New Castle, Del., and return, incident to court appearances since Federal Govt. under "Federal Tort Claims Act" is party potentially liable for damages sustained by defendent due to negligent operation of motor vehicle by employee within scope of her employment and, consequently, appearance of employee at judicial proceeding to which she was summoned may be regarded as performance of official duty within meaning of 5 U.S.C. 6322(b)(2)---------- 214

VETERANS
Education
Overpayments
Educational assistance allowances to veterans

Amount equal to educational assistance allowances paid to staff sergeant at rate prescribed for veterans while attending school from July 6, 1970, to Dec. 8, 1970, which was withheld from payment due him as result of correction of his military records to show he was not discharged on Sept. 8, 1969, but that he continued on active duty until Dec. 8, 1970, at which time he was honorably discharged, may not be reimbursed to member as amount withheld represents educational assistance allowances paid at rate prescribed in 38 U.S.C. 1682(a)(1) only for veterans discharged from military service, and sergeant's records having been corrected to show him on active duty for period of school attendance, entitlement is limited to the lesser educational assistance allowance rate provided by 37 U.S.C. 1682 for servicemen on active duty---------- 299

VETERANS—Continued
Rehabilitation
Noninstitutional setting
Air-conditioning of private home Page

Veterans Admin. funds appropriated for medical care of eligible veterans may be used to install central air-conditioning in home of disabled veteran who suffers body temperature impairment as there is no satisfactory alternative to treat him in noninstitutional setting, and installation of central air-conditioning—necessary for effective and economical treatment—is reasonably related to and essential to carry out purpose of appropriation to medically rehabilate veteran in non-hospital setting to obviate need for hospital admission. Furthermore, general rule that appropriated funds may not be used for permanent improvements of private property in absence of specific legislative authority is not for application since improvement is for benefit of veteran and not U.S. 351

VOUCHERS AND INVOICES
Accompanying decision requests. (*See* **GENERAL ACCOUNTING OFFICE, Decisions, Advance, Voucher accompaniment**)

WORDS AND PHRASES
"Locality"

Labor Dept.'s practice of issuing Service Contract Act wage determinations for keypunch services based on locality of Govt. installation being served rather than location where services are to be performed is a questionable implementation of act in view of fact the statutory language of act and its legislative history indicate "locality" refers to place where service employees are performing contract, and practice should be drawn to attention of Congress when clarifying language is sought concerning classification of keypunch operators and other clerical-type employees under act 370

"Service employees"

Although practice of Labor Dept. in classifying as "service employees" keypunch operators and other clerical-type employees under Service Contract Act of 1965, 41 U.S.C. 351, *et seq.*, is questionable since statutory language of act and its legislative history as well as Dept. of Labor's regulations indicate "service employee" was intended to mean "blue collar" employee, practice is not specifically prohibited and, therefore, protest is denied. However, because of significant adverse impact on procurement procedures, department should present the matter to Congress and obtain clarifying legislation, and should submit statements of action taken to appropriate congressional committees as required by Legislative Reorganization Act of 1970 370

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