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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-154522]

Station Allowances—Military Personnel—Excess Living Cost Outside United States, etc.—Additional to Quarters Allowance

Members of the uniformed services without dependents assigned to two-crew nuclear-powered submarines who are receiving basic allowance for quarters and subsistence while performing temporary additional duty for training and rehabilitation ashore at overseas home port of submarine in excess of 15 days are entitled to the housing and cost-of-living allowances authorized under 37 U.S.C. 405 and paragraph M4301 of the Joint Travel Regulations notwithstanding the fact the submarine is the permanent station of the members and housing and cost-of-living allowances are payable only at permanent station, since Congress did not intend to preclude payment of such allowances to members actually experiencing higher cost for housing and cost of living.

To the Secretary of the Navy, February 1, 1974:

Further reference is made to letter dated April 23, 1973, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) in which a decision is requested concerning entitlement to housing and cost-of-living allowances to certain members assigned to nuclear submarines who are temporarily serving ashore overseas at the home port of the vessel for a period of training and rehabilitation and are receiving basic allowance for quarters. The request has been assigned PDTATAC Control No. 73–16 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary points out that in 47 Comp. Gen. 527 (1968) it was determined that members without dependents who are attached to two-crew nuclear-powered submarines are entitled to a basic allowance for quarters while temporarily serving ashore at the home port of the submarine during periods of training and rehabilitation (TRAHAB) when Government quarters are not assigned to them because such quarters are not available or are inadequate under criteria established by the Navy. He indicates that this decision was based, in part, on the fact that the members in question were not entitled to per diem allowances under the Navy Travel Instructions, paragraph 4059, although they were in a travel status incident to temporary additional duty orders for training and rehabilitation.

It is noted by the Assistant Secretary that housing and cost-of-living allowances are authorized under the provisions of the Joint Travel Regulations (JTR), for members who are on permanent duty at a location outside the continental United States (including Hawaii or Alaska) or who are on permanent duty on a ship which has a home port outside the continental United States.

In his letter the Assistant Secretary states that paragraph M4301–3b(3) of JTR provides that housing allowances are payable to members without dependents "for any day upon which Government quarters are not assigned to him at his permanent duty station." It

is indicated that in the case of a member without dependents who is performing TRAHAB under temporary additional duty orders at the overseas home port of his submarine, doubt as to entitlement to housing allowances exists when Government quarters are not assigned to him at the home port because they are not available, or, if so, are inadequate. The view is expressed that while Government quarters are not assigned to him at his permanent station, Government quarters are assigned to the on-ship crew of the submarine, and since a member on training and rehabilitation duty is not performing duty at his permanent duty station, entitlement to housing allowance appears to be unauthorized.

The Assistant Secretary indicates, however, that the situation could be viewed from the standpoint that since entitlement exists to a basic allowance for quarters, which allowance is for the purpose of reimbursing a member for the cost of quarters when Government quarters are not available, it would seem to follow that entitlement to a housing allowance should exist since such allowance is designed to reimburse a member for excessive housing costs experienced overseas incident to the procurement of private quarters. It is therefore requested that we determine whether entitlement to the housing allowance exists. If our answer is in the negative, a determination is requested as to whether it could legally be provided by an appropriate change to the JTR.

The Assistant Secretary also points out that paragraph M4301–3b (1) provides for the payment of cost-of-living allowances for members without dependents at an overseas duty station. He lists the various circumstances set forth in the Joint Travel Regulations upon which entitlement to the cost-of-living allowance exists.

It is stated by the Assistant Secretary that an officer member is entitled to a basic allowance for subsistence at all times and that an enlisted member is entitled to the basic allowance for subsistence when a Government mess is not available to him at his permanent station. He expressed the view that since the purpose of the cost-of-living allowance is to reimburse a member for the excess cost of living (except housing) at an overseas location, it appears that an officer member without dependents on training and rehabilitation duty at the overseas home port of his submarine should be entitled to a cost-of-living allowance when Government mess is not available or utilized. Likewise, it appears that an enlisted member should be entitled to the allowance when a Government mess is not available or he is authorized to mess separately. It is stated, however, that doubt as to the entitlement exists in view of conditions specified in paragraph M4301–3b(1), items 1, 3, and 4. In view of this, a determination is requested concerning entitlement to a cost-of-living allowance and, if such entitlement does

not exist, a determination is requested as to whether the JTR may be amended to provide for such entitlement.

The Assistant Secretary concludes that some disbursing officers have been paying these allowances under the circumstances outlined in his letter. He requests, that in the event such payments are subsequently determined to be improper, the payments not be questioned in view of the complexity of the entitlements and misunderstanding concerning the interpretation of 47 Comp. Gen. 527 (1968).

The statutory authority for the payment of a cost-of-living allowance and housing allowance is 37 U.S. Code 405, which provides that the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside the United States or in Hawaii or Alaska, whether or not he is in a travel status. The cost-of-living allowance and housing allowance may be prescribed independently of each other.

Regulations issued pursuant to 37 U.S.C. 405 are contained in part G of the JTR, paragraph M4301–1 of which provides that housing and cost-of-living allowances are authorized for the purpose of defraying the average excess costs experienced by members on permanent duty at places outside the United States and are in addition to basic allowances for quarters and subsistence.

Under the provisions of paragraph M4301–3b(3), a housing allowance is payable to a member without dependents for any day upon which Government quarters are not assigned to him at his permanent duty station.

Cost-of-living allowances are payable to a member under the provisions of paragraph M4301–3b(1) items 1, 3, and 4 for any day during which a Government mess is not available to him at his permanent station; for any day an accompanied enlisted member is authorized to mess separately or for any day an unaccompanied enlisted member, for whom Government quarters are not available, is authorized to mess separately; and, for any day during which it is impracticable for an officer, who, by order of competent authority, is authorized to occupy housing on the local economy, to utilize the existing Government mess for all meals.

Basic allowance for quarters authorized under the provisions of 37 U.S.C. 403 is not payable to a member without dependents who is assigned Government quarters or is on sea duty. This Office has held and the regulations recognize that when a member is assigned to a ship, the vessel itself and not its home yard or home port is the member's permanent duty station. This concept has been applied equally to the

situation of two-crew nuclear-powered submarines since the submarine is considered to be the permanent duty station for both crews. 45 Comp. Gen. 689 (1966).

However, in our decisions 44 Comp. Gen. 105 (1964) and 47 *id.* 527 (1968), the unique problem presented by the two-crew operational procedures of certain nuclear-powered submarines relating to entitlement to basic allowance for quarters for the off-board crew while assigned to temporary duty ashore at their home ports for more than 15 days for periods of training and rehabilitation was considered. In these decisions we concluded that members without dependents, although technically having quarters assigned to them aboard the submarine, would be entitled to a basic allowance for quarters while temporarily serving ashore at the home port of the submarine for periods of training and rehabilitation for more than 15 days, if adequate Government quarters were not available or assigned to them at the home port.

This conclusion was reached due to the fact that while serving ashore for these periods in excess of 15 days, under the pertinent law and regulations, the member was not considered to be in a sea duty status and that in view of 37 U.S.C. 403 and 10 U.S.C. 7572, it appeared to be the intent of Congress that members of the uniformed services shall either be furnished quarters which they are able to occupy or be paid an allowance for quarters.

Similarly, it would appear that when Congress enacted legislation providing authority to prescribe an allowance for the purpose of defraying the average excess costs experienced by members on duty at places outside the United States, it did not intend to preclude the payment of such allowances to members who are actually experiencing higher costs for housing and cost of living.

It is our understanding that quarters are always provided on board for members assigned to a vessel, which is the member's permanent duty station. For obvious reasons, however, the on-ship crew and the off-ship crew cannot occupy assigned quarters simultaneously. Therefore, in consonance with our interpretation of the law applicable to basic allowance for quarters in such cases, the phrase "* * * assigned to him at his permanent duty station * * *" in reference to quarters in paragraph M4301 of the JTR, may be construed to denote quarters which are not only assigned but are available for his use at his permanent duty station for housing allowance purposes.

Accordingly, payment of housing and cost-of-living allowances is authorized to members without dependents assigned to two-crew nuclear submarines, while they are temporarily ashore for more than 15 days for periods of training and rehabilitation at the overseas home port, if Government quarters are not assigned or available for their

use at such home port, or a Government mess is not available under the conditions set forth in paragraph M4301, JTR.

While it is our view that the JTR need not be amended to legally authorize payment of the allowances in question, an addition to paragraph M4304 may be for consideration with regard to the rate of allowance to be applied for those allowances authorized.

Furthermore, the conclusion reached herein is not to be regarded as applying to other entitlements authorized in the JTR, but only to the housing and cost-of-living allowances in the circumstances described in the Assistant Secretary's letter.

[B-178979]

Quarters Allowance—Female Members—Entitlement to Allowance—Statute of Limitation

Under the ruling in *Frontiero* v. *United States*, 411 U.S. 677 (1973), that certain portions of 37 U.S.C. 401 and 403, the statutory provisions that govern basic allowance for quarters (BAQ) entitlement, are constitutional, the Department of Defense may not deny BAQ payments to current or former female service members who otherwise qualify for BAQ payments for periods antedating September 13, 1973, the issuance date of revised DOD instructions. However, claims which accrued more than 10 years prior to receipt in the General Accounting Office are barred from consideration by the act of October 9, 1940, 31 U.S.C. 71a.

To the Secretary of Defense, February 1, 1974:

Further reference is made to a letter dated October 11, 1973, with enclosures, from the Assistant Secretary of Defense (Comptroller), requesting an advance decision regarding the entitlement of a female member of the uniformed services to a basic allowance for quarters under the provisions of 37 U.S. Code 403 in the described circumstances. The question is set forth and discussed in Department of Defense Military Pay and Allowance Committee Action No. 496, attached to the letter.

The question presented is as follows:

Is a female member entitled to basic allowance for quarters, at the without dependent rate, under the *Frontiero* decision for periods before 13 September 1973, subject to the statute of limitations (31 U.S.C. 71a), when the following conditions existed:

a. She was married to a service member and had no dependents,
b. She and her husband were assigned to the same station or adjacent stations,
c. Family-type Government quarters were not furnished,
d. Single Government quarters were either available for assignment or actually assigned to her, and
e. She actually resided off station with her husband?

The discussion in the Committee Action, pertaining to eligibility for the basic allowance for quarters, notes that although it has always been the policy of the Department of Defense to assign a husband and wife, who are both members of the uniformed services stationed at the same or adjacent military installations and who have no other

dependents, to family-type quarters when possible, the eligibility for assignment, under 37 U.S.C. 403 and DOD Instruction 1338.1, January 30, 1964, to public quarters or to payment of basic allowance in lieu thereof rested with the male member. The female member in a pay grade below 0–4 could not claim her member husband as a "dependent" and was therefore not entitled to a basic allowance if quarters for members without dependents were available for her use.

In this connection, it is to be observed that the Department of Defense Instruction 1338.1, January 30, 1964, provided in pertinent part:

III. *POLICY*

A. It is the policy of the Department of Defense to encourage maintenance of the family unit. When both husband and wife are members of the Uniformed Services and are assigned to the same or adjacent military installations, the male member is authorized basic allowance for quarters prescribed for a member without dependents when public quarters for dependents are not available, notwithstanding the availability of single quarters.

* * * * * * *

C. When both husband and wife are members of the Uniformed Services with no other dependents and are stationed at the same or adjacent military installations, the following provisions apply:

* * * * * * *

2. *Both Officer or Both Enlisted.* Eligibility for assignment to public quarters for dependents or to the payment of basic allowance for quarters prescribed for a member without dependents in lieu thereof rests with the male member. The female member is not eligible for assignment to public quarters for dependents nor is she entitled to the basic allowance for quarters prescribed for a member without dependents unless quarters for members without dependents are not available for her occupancy. Where quarters are available for her occupancy, the female member will nevertheless be permitted to reside with her husband but will not be entitled to the payment of the basic allowance for quarters prescribed for a member without dependents, unless she is in a pay grade above 0–3 and public quarters are not assigned for their joint occupancy.

The Committee Action discussion further notes that, based on answers in our decision 53 Comp. Gen. 148 (1973)—which in part responded to certain questions posed in Committee Action No. 483, particularly question 3a of that Committee Action—that arose from the Supreme Court's ruling in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Department of Defense revised its policy relative to assignment of quarters to married service members, effective September 13, 1973, and extended eligibility for assignment to family quarters, if otherwise appropriate, to either member, as jointly decided by both of them. The revised policy also provides that basic allowance for quarters is payable to a female member when she is authorized to reside off station with her husband, notwithstanding the availability of single-type quarters for her occupancy.

The discussion goes on to say that the instructions issued by the military services in implementation of the ruling in the *Frontiero* case and our decision of August 31, 1973, authorize payments to qualified female members on and after September 13, 1973, the effective date of the re-

vised policy referred to above. The Committee Action expresses doubt, however, as to whether DOD Instruction 1338.1, dated January 30, 1964, can legally prohibit payments of basic allowance for quarters to a qualified female member for periods prior to September 13, 1973, and states that a denial of retroactive payments would appear to be in contravention of the law authorizing basic allowances for quarters, as construed by the United States Supreme Court in the *Frontiero* case.

Entitlement of members of the uniformed services to basic allowance for quarters is authorized under the provisions of 37 U.S.C. 403 which provide, in part, that where a member in a pay grade below 0–4 is assigned to quarters "adequate for himself, and his dependents, if with dependents," he shall not be entitled to receive a basic allowance for quarters. Section 401 of Title 37 formerly defined "dependent" with respect to a member of a uniformed service to include his spouse but, in the case of a female member, provided that "a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support." No comparable test was required of a male member claiming his wife as a dependent.

On May 14, 1973, in the *Frontiero* decision, *supra*, the Supreme Court struck down as unconstitutional those portions of 37 U.S.C. 401 and 403 which permitted a serviceman to claim his wife as a dependent without regard to whether she was in fact dependent upon him for any part of her support but denied a servicewoman the privilege to claim her husband as a dependent unless he was in fact dependent upon her for over one-half of his support.

On July 9, 1973, in response to the *Frontiero* decision, Congress enacted Public Law 93–64, 87 Stat. 147, which deleted the support test for dependents of female members.

Neither the Supreme Court nor the Congress had specifically considered the issue of retroactivity. However, in our decision 53 Comp. Gen. 148, *supra*, we held that the Supreme Court's construction of 37 U.S.C. 401 and 403 must be gievn retroactive application, stating therein that:

> We find no indication in the court's decision of an intention to limit that decision to a prospective application only. Since the court ruled that inequality of treatment as between male and female members with regard to entitlement and payment of quarters allowances for the sole purpose of achieving administrative convenience, is a violation of the Due Process Clause of the Fifth Amendment to the Constitution, such a ruling must be regarded as effective from the effective date of the statute.

In line with the above-quoted part of our decision of August 31, 1973, it is our view that the Department of Defense may not deny retroactive payments of basic allowance for quarters for periods which antedate September 13, 1973, to a current or former female member of the uniformed services otherwise entitled to these payments.

Retroactive entitlement to such payments is subject, however, to the 10-year limitation provided in the barring act of October 9, 1940, Ch. 788, 54 Stat. 1061, 31 U.S.C. 71a, which provides in pertinent part as follows:

(1) Every claim or demand * * * against the United States cognizable by the General Accounting Office * * * shall be forever barred unless such claim * * * shall be received in said office within ten full years after the date such claim first accrued: *Provided*, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established.

Separate claims for past payments of basic allowance for quarters, in cases such as here involved, accrue each time an otherwise qualified female member receives an insufficient payment or fails to receive any payment. Hence, to be considered for payment by this Office each such claim must be received here within 10 full years from the date it accrues. It is to be noted that such claims may be processed by the services concerned. However, we have long held that the filing of a claim in the administrative office concerned does not meet the requirements of the barring act of October 9, 1940, *supra*. *See* 32 Comp. Gen. 267 (1952), and 42 *id.* 337, 339 (1963). Therefore, claims on which the limitation period prescribed in that act is about to expire should be promptly transmitted to this Office for recording after which they will be returned for payment, denial or referral back to the General Accounting Office for adjudication. *See* Title 4 GAO 7. Also, any such claim which is doubtful as to the facts or the law should be transmitted here for settlement.

Accordingly, your question is answered in the affirmative, subject to the conditions herein stated.

[B-180303]

Personal Services—Arbitrators

The contract to conduct a study of labor management activity and processes proposed to be entered into between a retired Federal employee and the Office of Economic Opportunity (OEO) under the authority granted the Director in secton 602 of the Economic Opportunity Act of 1964 to obtain the services of experts and consultants, either through direct employment or by contract, in accordance with 5 U.S.C. 3109, when construed on the basis of the whole arrangement existing between the parties and not only from the wording of the contract evidences the former employee will represent OEO in connection with labor-management grievances and arbitration proceedings that will require a close working relationship with agency employees, a relationship that is incompatible with an independent contractor relationship and should the former employee accept employment under such an arrangement his pay would have to be reduced in accordance with 5 U.S.C. 8344(a) by the amount of his civil service annuity.

To the Director, Office of Economic Opportunity, February 1, 1974:

Your letter of December 14, 1973, forwarding a proposed contract for the services of Mr. George Loutsch, requests our opinion as to whether Mr. Loutsch's performance under the proposed contract would in any way affect his status as retired Federal employee or his right to annuity and/or payments under the contract.

The civil service retirement provisions as contained in subchapter III, Chapter 83, Title 5, U.S. Code, place certain restrictions on the pay an annuitant may receive if reemployed by the Government. Specifically 5 U.S.C. 8344(a) provides in pertinent part:.

(a) If an annuitant receiving annuity from the Fund * * * becomes employed after September 30, 1956, or on July 31, 1956 was serving, in an appointive or elective position, his service on and after the date he was or is so employed is covered by this subchapter. Deductions for the Fund may not be withheld from his pay. An amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay * * *.

We have held that payments under a contract which, as between the Government and the contractor, creates a relationship which is tantamount to the relationship between employer and employee are within the purview of the above provision requiring setoff of annuity payments against amounts received under the contract. On the other hand, where, under a contract, the retired annuitant functions on a truly independent basis, his payments are not subject to being setoff based on the amount of his annuity. 39 Comp. Gen. 681 (1960); B–154204, September 4, 1964; B–176681, October 27, 1972.

We have reviewed the proposed contract with a view to determining whether the relationship contemplated thereby or the relationship which it will elicit as between Mr. Loutsch and the Office of Economic Opportunity (OEO) is likely to have those aspects of an employee-employer relationship. If such a relationship is contemplated by the terms of the contract or if such a relationship will exist in the performance of the contract a setoff of the amount of Mr. Loutsch's annuity payments against amounts to which he would otherwise be entitled under the contract would be required. We are aware of no adverse effect on the annuitant's status under the civil service retirement which would result from his entering into a contract even if it is determined that the contract was for employment.

There is no question but that section 602 of the Economic Opportunity Act of 1964, Public Law 88–452, August 20, 1964, 78 Stat. 528, as amended 42 U.S.C. 2942, does give you, as Director, authority to obtain the services of experts and consultants, either through direct employment or by contract, in accordance with the provisions of 5 U.S.C. 3109. This authority is more fully discussed in B–174226, March 13, 1972, addressed to your office.

The criteria basic to any determination of whether an individual is a Federal employee are set forth at 5 U.S.C. 2105(a). The same criteria are used to establish whether the relationship between the Government and the contractor or contractor personnel under a given contract is tantamount to that of employer and employee thus requiring that the services in question be obtained in accordance with Federal personnel laws including the exception contained in 5 U.S.C. 3109. The same criteria are to be applied in determining the applicability of 5 U.S.C. 8344(a). The test is whether the employee is:

1. Appointed in the civil service by a Federal officer or employee,

2. Engaged in the performance of a Federal function under authority of law or an Executive act,

3. Subject to the supervision of a Federal officer or employee while engaged in the performance of the duties of his position.

In applying the above test there is, as here, generally no dispute as to whether the individual is to be engaged in a Federal function. Further, while there is no direct appointment by a Federal officer which would formally establish an employer-employee relationship, the presence of facts establishing the third criterion, that of detailed supervision, ordinarily will constitute evidence that such an appointment should have occurred. In the case of individuals whose services are secured as experts or consultants under 5 U.S.C. 3109 or similar authority, the usual restrictions on appointment in the Federal service are not applicable and an agreement between such an individual and an agency is considered as creating an employment relationship based primarily upon the existence of detailed supervision.

The continuing efficacy of the above test of an employer-employee relationship as it was discussed in the Opinion of the General Counsel, United States Civil Service Commission, on Legality of Selected Contracts, Goddard Space Flight Center (Pellerzi opinion) has been recently affirmed by the United States District Court for the District of Columbia in *Lodge 1858, American Federation of Government Employees et al.* v. *Administrator, National Aeronautics and Space Administration*, Civil Action Number 3261–67, decided November 30, 1973.

In an opinion supplemental to the Pellerzi opinion—generally referred to as the Mondello opinion—the significance of the presence of Government supervision of contractor or contractor employees is discussed as follows:

> The most significant of these criteria, in providing guidance to the agencies, is that of supervision of a contractor employee by a Federal officer or employee. Viewed in the context of support service contracts, this criterion would be met when the operations under a contract are such that an individual employee of a contractor is actually supervised by a Government employee while performing his duties.

For the purpose of satisfying the "supervision" test of the statute, it must be shown that there is such close and continuous Government control over the work performed by the individual contractor employees that the contractor does not have the independence of action, nor the initiative or decision-making authority, normally associated with performance by contract. The essence of this test is that the Government employee, on a close and continuous basis, not only controls what the individual contractor employee does, but how he does it, to such an extent that this control nullifies the independence of performance of the contractor that is essential when the Government contracts for services.

Clause I of the proposed contract, entitled "STATEMENT OF WORK," calls for Mr. Loutsch to conduct a study of labor management activity and processes in the Office of Economic Opportunity, considering data he is to collect from outstanding grievances, arbitration proceedings, appeals of arbitration awards and decisions of the Assistant Secretary of Labor, as well as records, methods, policies agreements and approaches used in the Labor Management Program. As a product the statement of work calls for two interim and one final report containing recommendations regarding processing of grievances, conduct of arbitration, handling of appeals, record keeping activities, as well as recommendations for improvement of the Labor Management Program.

Considered alone, the "STATEMENT OF WORK" does not suggest that the contractor is expected to perform under close Government supervision and the study called for is of a nature that, in our opinion, it could be conducted on an independent contractor basis. However, as pointed out in the Mondello opinion, *supra*, "Any evaluation of a support service contract must be based on a realistic view of the provisions of the entire contract as well as the manner in which it is to be performed and administered."

Clause XI of the contract, entitled "OEO PROJECT MANAGER" provides:

The technical performance of this contract shall be under the monitorship of the OEO Project Manager who shall be a representative of the Contracting Officer for the sole purpose of monitoring the technical performance of this contract. It is understood and agreed that the work to be performed under this contract is set forth in Clause I. "STATEMENT OF WORK" in general terms only and that proper performance of this contract will require close coordination between the Contractor and the OEO Project Manager. It is further understood and agreed that the OEO Project Manager's guidance in the performance of this contract shall be followed by the Contractor provided that no change in the terms and conditions of this contract shall be effected except by modification duly executed by the Contractor and the Contracting Officer. * * *.

The above language casts substantial doubt upon the extent of independence to be enjoyed by the contractor in the performance of the contract work. It calls not only for close coordination between the contractor and the project manager but requires the contractor to follow the guidance given by the project manager in the performance of the contract work. If the guidance to be given by the project manager relates only to identifying with greater specificity the work to

be performed under the contract, a conclusion that an employer-employee relationship would exist would not be required. On the other hand, if the guidance contemplates instructing the contractor in the results to be accomplished or in the details and manner of accomplishing the contract work, the legal relationship between the agency and the contractor that would be created would be that of employer-employee.

It is noted, further, that documentation annexed to the procurement request, submitted in connection with the proposed contract, includes a statement of work significantly broader than that contained in the contract. That statement is as follows:

> The purpose of the contract will be for an Industrial Relations Specialist to perform for a period of 90 days an independent investigation of grievances for which arbitrators have currently been designated.
>
> The Specialist is authorized to hold independent fact finding discussions, to deal directly with the grievant or his appointed representative to ascertain what might be an amicable resolution of the grievance. If necessary, the Specialist will work on arbitrations, or appear as a witness on behalf of OEO as a result of these grievances. The Specialist will make recommendations to the Director of Personnel with regard to grievance resolution or conduct of arbitrations, or appeals of awards or decisions. Specialists will meet and consult with the Office of the General Counsel.
>
> The Specialist will prepare a monthly status report and a final report to the Director of Personnel.

We understand through informal contacts with your office that it is contemplated that Mr. Loutsch will perform the services described in the second paragraph of the quoted statement even though those services are not expressly covered by the terms of the proposed contract and notwithstanding that those services might be found to be beyond the scope of work contained therein.

Under the circumstances the contract terms must be construed in the light of the whole arrangement existing between the parties and not only from the wording of the contract itself. From an analysis of the whole arrangement—the specific contract language, the statement of work contained in the documentation annexed to the procurement request and the representations concerning the scope of the contract work obtained informally from representatives of your office—it is clear that Mr. Loutsch's services are desired, in part at least, as a representative of OEO in connection with labor-management grievance and arbitration proceedings. The nature of the conduct of such proceedings is so complex and requires such a close working relationship among employees within the agency that we seriously doubt that Mr. Loutsch would function effectively in that capacity without acting as a Government employee. Accordingly we regard the tasks to be performed by Mr. Loutsch as management representative in labor-management proceedings as contemplated by the statement of the

scope of work to be performed as being incompatible with an independent contractor relationship.

When construing the specific contract language in the light of the entire arrangement contemplated by the parties the conclusion is required that an employer-employee relationship would, in fact, be created and should Mr. Loutsch accept employment under such arrangement his pay from such employment would have to be reduced by the amount of his civil service annuity.

[B-166506]

States—Federal Aid, Grants, etc.—Percentage Limitation

The language in section 202(a) of the Federal Water Pollution Control Act as amended by Public Law 92-500, 33 U.S.C. (1970 ed., Supp II) 1251, that a grant for treatment works "shall be 75 per centum of the cost of construction thereof" and in the conference report that the Federal grant shall be "75 per centum of the cost of construction in every case" is mandatory and the Environmental Protection Agency, despite assertions that the interests of the Federal Government, of the State in which project is to be placed, and the grantee might best be served if the Federal grant would be less than 75 percent of the project cost, has no authority to make grants in lesser amounts.

Federal Water Pollution Control Act—Grants-in-Aid—Applications

The Environmental Protection Agency's regulations that provide for the approval of grant applications combining both design and construction stages of a water treatment project are inconsistent with section 203(a) of the Federal Water Pollution Control Act, Public Law 92-500, 33 U.S.C. (1970 ed., Supp II) 1283(a), which prescribes that the Government is obligated to pay its share of project costs only upon approval of plans, specifications and estimates at each succeeding stage. Therefore, in the absence of approval of plans, specifications and estimates for the construction stage of a water treatment project, there is no grant commitment by the United States and no charge against a State's allotment.

Environmental Protection and Improvement—Grants-in-Aid—Water Pollution Control—Regulations Inconsistent With Law

The Administrator of the Environmental Protection Agency having been informed that the regulations promulgated pursuant to the Federal Water Pollution Control Act, Public Law 92-500, 33 U.S.C. (1970 ed., Supp II) 1251, are inconsistent with the statute and must be revised, is required by section 236 of the Legislative Reorganization Act of 1970 to report to the appropriate congressional committees as to action taken with respect to the corrective recommendations made by the General Accounting Office.

To the Administrator, Environmental Protection Agency, February 4, 1974:

In connection with work we are engaged in relating to the implementation of the Federal Water Pollution Control Act Amendments of 1972 (1972 FWPCA), Public Law 92-500, enacted October 18, 1972, 33 U.S.C. (1970 ed., Supp II) 1251, we requested the views of and a full report from your agency on several legal decisions it had made. This report was provided us in two letters dated September 18, 1973, from the Acting Assistant Administrator for Enforcement and General Counsel, Enviromental Protection Agency (EPA). We are

writing today about two of the areas we asked your agency to comment on and concerning which we find ourselves in disagreement.

The first issue relates to the provisions of section 202(a) of the 1972 FWPCA, 33 U.S.C. (1970 ed., Supp II) 1282(a), for 75 percent funding of projects and, specifically, to the legality of a grant award at a percentage less than 75 percent. Section 202(a) provides:

> The amount of any grant for treatment works made under this Act from funds authorized for any fiscal year beginning after June 30, 1971, *shall be* 75 per centum of the cost of construction thereof (as approved by the Administrator). Any grant (other than for reimbursement) made prior to the date of enactment of the Federal Water Pollution Control Act Amendment of 1972 from any funds authorized for any fiscal year beginning after June 30, 1971, shall, upon the request of the applicant, be increased to the applicable percentage under this section. [Italic supplied.]

In earlier proposed regulations—which were subsequently withdrawn—implementing the waste treatment grant section the EPA proposed a mechanism for reduction of the grant below 75 percent if a State would make up the difference. The difficulties with any approach to depart from the 75 percent could include:

(a) the potential to blackmail a community to accept something less than a 75 percent grant; and

(b) the potential once established, the myth of State grant assistance will disappear and again State loan procedures will be substituted, thus moving us right back where we were before the 1972 Act was enacted.

Thus, the issue is: "Does EPA have any flexibility as to grant percentages?" In his report to us the Acting Assistant Administrator states:

> Although all EPA grants awarded thus far under Title II of the 1972 FWPCA Amendments have been made at 75 percent of estimated project costs, and we believe that future grants should generally be awarded at 75 percent, we do not believe that the statute necessarily requires rigid conformance to 75 percent EPA funding under all circumstances. An important purpose of the 75 percent provision was to assure that no grantee would be required to contribute more than 25 percent of project costs. Another purpose was to guarantee adequate contemporaneous Federal appropriations for a substantial portion of project costs, and a related subsidiary purpose was to discontinue the "reimbursement" mechanism found in Section 8 of the former FWPCA which encouraged grantees to use their own or borrowed funds for construction with the expectation of eventual Federal repayment of project costs up to the applicable then-existing maximum eligible percentage. (Section 206 of the 1972 FWPCA Amendments explicitly limits reimbursement to projects on which construction has been initiated, as defined in 40 CFR 35.805-1 (37 F.R. 11660) and in 40 CFR 35.905-3 (38 F.R. 5330), prior to July 1, 1972.)
>
> One may conceive of circumstances under which a grantee would wish to execute a voluntary written waiver of its full 75 percent entitlement-- for example, in order to receive assistance from a state, another Federal agency or private third parties in an amount which, together with EPA assistance, would be equal to or greater than its 75 percent entitlement and denial of which would serve neither the purposes of the Act nor the interests of the grantee. Most supplementary Federal assistance programs are legally or effectively barred from contributing to more than a total of 80 percent Federal assistance for a project;

the fact that this supplementary assistance would be limited to no more than 5 percent in conjunction with a 75 percent EPA grant, plus the administrative costs attendant upon the application for an award of such supplementary Federal assistance, essentially vitiate the possibility of utilizing other Federal funds for a project which may require substantial Federal assistance available from other Federal programs, but could not receive all of it within the amount alloted to a state under Section 205 of the new FWPCA or under a state's priority system for project funding pursuant to 40 CFR 35.915 (38 F.R. 5331). In addition, several key states, such as Illinois, desire to utilize substantial available state funds and existing state programs to supplement Federal assistance under the FWPCA and have sought to obtain permission for utilization of state funds in conjunction with an EPA grant of less than 75 percent under circumstances where the grantee would not in fact ever have to pay more than 25 percent (or less) of total project costs.

Accordingly, it is my opinion that a less-than-75 percent federal grant would not violate either the provisions of the policies reflected in the 1972 FWPCA Amendments if the grantee would not in fact have to pay more than 25 percent of project costs (although it would have to agree to pay all non-Federal project costs, pursuant to Section 204(a)(4)), and if it were clearly established that no future Federal reimbursement could be received by any non-Federal source supplying funds in lieu of the full 75 percent EPA grant.

Having reviewed the statute and its legislative history, we cannot agree with EPA. First, the plain language of the statute clearly mandates that the grant "shall be" 75 percent of the cost of construction. Second, the Conference Report at page 110 (SCP 293) clearly states that the Federal grant "shall be 75 per centum of the cost of construction *in every case*." [Italic supplied.] Third, the requirement of 75 percent Federal funding in all cases was recognized by the President in his veto message of October 17, 1972 (SCP 137, 138), and by the former EPA Administrator in a letter dated October 11, 1972, to the Office of Management and Budget recommending enactment of the then bill (SCP 143, 152). Thus, while EPA has put forth several reasons why it believes it may be in the best interests of the Federal Goverment, of the State in which the project is to be placed and of the grantee for the Federal share of the grant to be less than 75 percent of the project cost, it is our opinion that EPA does not have the authority to make any grants in a lesser amount.

The second question concerns the construction grant funding mechanism established by EPA in interim regulations published on February 28, 1973, at 38 F.R. 5329 (40 CFR 35.900 *et seq.*). Section 201(g)(1) (33 U.S.C. 1281 (g)(1)) constitutes the basic authorization for the award of "grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatments works." Section 203, 33 U.S.C. (1970 ed, Supp. II) 1283, provides:

(a) Each applicant for a grant shall submit to the Administrator for his approval, plans, specifications, and estimates for each proposed project for the construction of treatment works for which a grant is applied for under section 201(g)(1) from funds allotted to the State under section 205 and which otherwise meets the requirements of this Act. The Administrator shall act upon such plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such plans, specifications, and

estimates shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project.

(b) The Administrator shall, from time to time as the work progresses, make payments to the recipient of a grant for costs of construction incurred on a project. These payments shall at no time exceed the Federal share of the cost of construction incurred to the date of the voucher covering such payment plus the Federal share of the value of the materials which have been stockpiled in the vicinity of such construction in conformity to plans and specifications for the project.

(c) After completion of a project and approval of the final voucher by the Administrator, he shall pay out of the appropriate sums the unpaid balance of the Federal share payable on account of such project.

Section 212 (33 U.S.C. 1292) contains expansive defiitions of "construction" and "treatment works."

The Conference Report explained the process to be followed under section 203 thusly:

Conference substitute

Section 203 is the same as the House amendment.

The conferees want to emphasize the complete change in the mechanics of the administration of the grant program that is authorized under the conference substitute. Under existing law and procedure, the Environmental Protection Agency makes the first payment upon certification that 25 percent of the actual construction is completed. The remaining Federal payments are also made in reference to the percentage of completion of the entire waste treatment facility. This results in applicants absorbing enormous interest expense and other costs while awaiting the irregular flow of Federal funds.

Under the conference substitute, which is a program modeled after the authority and procedures under the Federal-Aid Highway Act, each stage in the construction of a waste treatment facility is a separate project. Consequently, the applicant for a grant furnishes plans, specifications, and estimates (PS&E) for each stage (which is a project) in the overall waste treatment facility which is included in the term "construction" as defined in section 212. Upon approval of the PS&E for any project, the United States is obligated to pay 75 percent of the costs of that project. *Thus, for instance, the applicant may file a PS&E for a project to determine the feasibility of a treatment works, another PS&E for a project for engineering, architectural, legal, fiscal, or economic investigations, another PS&E for actual building, etc.*

In such a program, the States and communities are assured of an orderly flow of Federal payments and this should result in substantial savings and efficiency.

It cannot be emphasized too strongly that the procedure adopted in the conference substitute represents a complete and thorough change of the present practice of making payments of the Federal share of treatment works. The conferees urge the Administrator, the States, and local governments to draw from the experiences of the highway program to improve the efficiency of the waste treatment grant program.

When funding the construction of waste treatment plants, the Administrator, upon the request of a State, should encourage the use of a phased approach to the construction of treatment works, and the funding thereof, on a State's priority list. Such a phased program, which the committee notes has been developed and approved in the State of Delaware, has enabled the State to accelerate the construction of sewage treatment facilities, and thus accelerate the attainment of clean water. [Italic supplied.]

EPA's interim grant regulations provide that grants may be awarded for the following types of projects:

(1) projects for the preparation of preliminary plans and studies (the "Step 1" project grant);

(2) projects for the preparation of construction drawings and specifications (the "Step 2" project grants);

(3) projects for the actual building and erection of treatment works (the "Step 3" project grant) the scope of which the applicant, the State or the EPA Regional Administrator may "split" to an operable portion of a treatment works in order to avoid unnecessary obligation of a large portion of a State's allotment at one time for a single large treatment works the outlay needs for which may be spread over eight or more years;

(4) projects consisting of a combination of a Step 2 project and a Step 3 project (the "Step 2+3" project grant) under certain limited circumstances and with certain conditions attached; and

(5) projects to be conducted under the so-called "design/construct" method consisting therefore of a combination of a Step 2 project and a Step 3 project (the "Step 2/3" project grant), as to which EPA reports it has not yet awarded any such grants and that it is engaged in studies regarding the guidelines which should apply. We have not considered this type grant herein.

The Acting Assistant Administrator advises that the provisions in the regulations for the basic three steps flow directly from the above underscored portion of the conference committee report. He states that it would be administratively undesirable and impracticable for EPA, the States and the municipalities to provide for applications for separate grants for each of the more than twenty "steps" which may be derived from the definition of "construction" in section 212 of the 1972 FWPCA, even though he admits that the Conference Report might appear to suggest the twenty steps. He states that it was decided that three steps were ample to provide the orderly flow of Federal payments that was apparently the paramount desire of the conference committee members. The statute and its legislative history do not prescribe the exact number of "steps" which must be prescribed and thus this determination is left for the Administrator. We do not feel that the determination that three steps will assure the orderly flow of funds is so unreasonable or arbitrary that it can be objected to as being in conflict with the intent of the Congress.

The Acting Assistant Administrator further discusses the reasoning behind the use of the word "application" in the regulations rather than "plans, specifications, and estimates (PS&E)," the phrase used in the law. Since the word "application" apparently includes the meaning of the phrase "PS&E" we have no problems with the phraseology of the regulations in this regard.

The Acting Assistant Administrator then states that it is assumed that the thrust of our inquiry was directed to the fourth type of grant (the Step 2+3 project grant) and he discusses the rationale for EPA's procedures in this regard in great length. Because of the importance

of this issue, we are quoting the bulk of his letter, beginning with the discussion concerning the process for State certification of project priority:

* * * In order to make the meaning of the award of such a grant clear, the process for state certification of project priority must be mentioned.

The state construction grant project priority system is derived from sections 106(f)(1)(A), 204(a)(3), and 303(e)(3)(H) of the Act; the basic requirement for a state priority system was carried over from Section 7(f)(6) and 8(b)(5) of the former FWPCA. In order to allow maximum flexibility to the States and to encourage maximum utilization of available Federal funds, the construction grant regulations (40 CFR 35.915) normally require each project for Step 1, 2, or 3 to be certified separately as entitled to priority by the State agency. Accordingly, a prerequisite to approval of a grant for a Step 2 project is a State priority certification of that Step 2 project; and a later application for a grant for a Step 3 project in connection with the same treatment works would have to be supported by a State priority certification applicable to that Step 3 project. This project certification promotes State agency flexibility by allowing newly recognized high priority projects to take precedence over others previously certified, if the State so chooses, and precludes the unnecessary obligation of Federal funds for Step 3 projects on which construction will not be initiated within the near future.

However, the drafters of the EPA regulations recognized that there could arise cases where the requirement for two State certifications (one for Step 2 and another for Step 3) would be considered by the applicant, the State, and EPA to be burdensome or otherwise undesirable. The regulations accordingly provide that if a State certifies that the priority of a given project is such that both the normal Step 2 and Step 3 work should be included, then in certain limited circumstances (see 40 CFR 35.930–1(a)(4) (i) and (ii)) the normal Step 3 "re-certification" will not be required, and the grantee will be in a position to proceed expeditiously into Step 3. Thus, a municipality which required prior assurance of grant support both in preparing its construction drawings and specifications and in actually erecting the treatment works could be assured that it would not later be denied a grant solely because of lack of a State priority certification for Step 3.

Senator Muskie is apparently of the opinion that award of such a grant would irrevocably commit the United States, at the time of grant award, to payment of 75 percent of the cost not only of the preparation of construction drawings and specifications (Step 2), but also for the actual erection of the treatment works (Step 3), without first having approved the completed construction drawings and specifications. This is incorrect.

It is true that, once it has made a Step 2 + 3 grant, EPA would regard itself as having irrevocably committed the United States to payment of the Federal share of the cost of preparation of the drawings and specifications (assuming, of course, that the grantee complied with the grant provisions and that the grant was not terminated). However, the United States is not committed to payment of any sums attributable to Step 3 work until the construction drawings and specifications are submitted to EPA and approved by the Regional Administrator. The regulation (40 CFR 35.930–1(a)(4)), which authorizes the Step 2 + 3 grant contains the following condition subsequent (emphasis in original):

> "* * * *And further provided,* That any such grant award may be annulled unless detailed construction drawings and specifications are submitted to the Regional Administrator and approved prior to initiation of construction for the building and erection of the Project (Step 3)." * * *

The effect of annullment is to preclude payment of or cancel entitlement to any Federal monies under the grant; payment for preparation of plans and specifications is not normally made until completion of the task. Since construction grants are also subject to the EPA general grant regulations (see 40 CFR 35.900 and 40 CFR Part 30, esp. the regulations referred to in n. 3, *supra*) an alternative remedy would be termination of the grant, which would involve payment for costs incurred in good faith prior to the date of termination. Termination may be more equitable than annullment under particular circumstances, e.g., where incomplete plans and specifications for the *expansion* of an existing treatment works are rendered useless by the occurrence of a flood or other disaster which destroys the

existing treatment works, so that the preparation of entirely new and different plans and specifications for the construction of a replacement treatment works may be necessary.

However, while termination may be available as an alternative to annullment, under equitable circumstances, EPA must either terminate or annul the grant and may pay for no Step 3 project costs where the condition subsequent is not met, that is, where the grantee fails to submit the detailed construction drawings and specifications for the approval of the Regional Administrator, and obtains such approval, prior to the initiation of construction for Step 3, in the case of a Step 2 + 3 grant.

It is anticipated that relatively few of the (Step 2 + 3) grants will be awarded in the future,[5] under the applicable criteria for such awards, so that the great bulk of grants awarded under Title II will be Step 2 *or* Step 3 grants, with separate applications and separate priority certifications for each project. However, for the reasons cited in the regulation, *viz.*, compelling water quality enforcement considerations, serious public health problems, or small projects, it is believed that the flexibility inherent in the Step 2 + 3 grant award authority should be retained to assure the funding and the expeditious construction of such projects.

In his June 29 letters, Senator Muskie specifically criticizes EPA for allegedly ignoring Congress' intent that the construction grant mechanism "should be similar to the Federal-Aid Highway Program which requires a submission of plans, specifications and estimates suitable for bidding prior to grant obligation on the part of the United States." The Conferees expressed their intent that the EPA program be "modeled" upon the Federal-Aid Highway Program (see the conference report language quoted, *supra*, p. 5). Prior to the enactment of PL 92–500, during the drafting of the Title II construction grant regulations, and again in the preparation of this response, EPA personnel have studied the operation of the highway program and have met with highway program personnel to discuss that program. * * * It is our conclusion that the Title II regulations and the administration of the EPA Title II construction grant program are in fact very closely "modeled" upon the highway program. * * *

It should be apparent, however, that the EPA construction grant program can only be "modeled" upon the highway program; it is not practicable to administer them in an identical manner. This is so because there are substantial inherent differences between the two programs—for example, the extensive competition among the very numerous applicants for EPA grants, in contrast to the relatively small number of applicants for assistance under the highway program; the role of the state as grantee (principally) under the highway program versus the state's principal role under the EPA program to determine priority among municipalities competing for EPA grant funds; and the relatively more certain and assured long-term Federal funding commitment resulting from the existence of the highway trust fund and the formula funding mechanism. In addition, it must be noted that Congress expressed intentions concerning the EPA program

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[5] The Step 2 + 3 grant most closely resembles the project for which most grants were awarded under Section 8 of the prior FWPCA through December 31, 1972. A number of Step 2 + 3 grants were awarded initially under Title II after promulgation of the interim regulations on February 28, 1973, under a somewhat liberalized application of the criteria for the award of such grants, principally because some of the projects for which applications had been made by municipalities and for which priority certifications had been made by the states were structured under the prior construction grant mechanism and therefore did not have plans and specifications suitable for bidding purposes. In order not to cause an unnecessary hiatus in the construction grant program, and under the authority of Section 4(c) of the 1972 FWPCA Amendments, awards were initially made on the basis of the state priority systems which were submitted for approval under the prior statute on or about July 1, 1972, and of the project priority certifications subsequently made by states under those systems; see 40 CFR 35.915(c). Pursuant to this regulation, these former priority systems and project lists have expired and awards must now be made from priority systems approved in conformance with new requirements and from project lists specifically addressed to the Step 1, 2, 3 procedure. The EPA Regional Administrators were advised recently to construe the criteria for Step 2 + 3 grant awards strictly.

beyond the intent that it be modeled upon the highway program—for example, the intent that EPA concurrently fund preliminary project stages derived from the definition of "construction" in Sec. 212 of the FWPCA 1972 Amendments, and the intent that there should be a "complete and thorough change of the present practice of making payments of the Federal share of treatment works" (Conference Report, p. 111). Finally, it must also be noted that EPA had the difficult task of structuring substantial changes into an ongoing and long-established program (with projects in the "pipeline") in a manner which would not be so abrupt that it would unnecessarily result in an unjustified shut-down of the program.

In his June 29 letter Senator Muskie states (emphasis added) that "EPA has determined that a *complete* treatment works project can be approved before preparation of plans, specifications and estimates with each portion of the project or the *entire* project subject to approval at some later date * * *." He also alleges that "* * * the Agency will be committing funds for total projects rather than for discrete segments of projects." We trust that it is apparent from the Title II regulations and the explanation of the Title II process in this letter that EPA will not approve the funding of "complete" or "entire" treatment works, but will ordinarily approve instead only the particular Step 1, 2, or 3 "project" (as that term is defined in the Title II regulations at Sec. 35.905–10, and including the "splitting" of treatment works construction into "operable portions" under Step 3) within the scope of the project as certified for priority by the state agency and approved by the EPA Regional Administrator, with the limited exception of Step 2 + 3 grant, which is authorized only under the conditions discussed *supra*, pp. 7 and 8. We believe that this Title II construction grant mechanism affords each state more flexibility to determine priorities between competing projects and will also encourage construction of treatment works to proceed more rapidly.

In summary, it is my opinion that the Title II construction grant regulations and the Title II construction grant mechanism established pursuant to these regulations are consonant with the letter of the statutory provisions and fully implement the spirit of the new law as expressed in the Conference Report.

Based on the foregoing, it is our understanding that EPA's regulations provide that a grant may be awarded which would include funds for both the design and construction stages of a project, except that the award for construction may be "annulled" if EPA does not approve the detailed construction drawings and specifications developed in the design stage. When the Step 2 + 3 grant is awarded, it is clear that EPA considers the entire amount of the grant for the two steps is obligated (subject to the condition subsequent of approval of the results of Step 2) and that the full amount of the grant is charged by EPA against the allotment of the State involved.

We have a great deal of difficulty with EPA's approach in this matter. First, it is axiomatic that an agency may not obligate the United States in the absence of statutory authority. In the instant case section 203(a), quoted above, provides, in effect, that only upon the Administrator's approval of the PS&E of any project, does the United States become obligated to pay its share (75 percent) of the costs of that project. Thus, it seems clear to us that until it approves the PS&E of the project, EPA may neither commit nor obligate the United States to pay its share of that project nor charge the cost of such project against the State's allotment. At the time a Step 2 + 3 grant is awarded, the PS&E for Step 3 have, of course, not yet been formulated and hence obviously could not be approved by EPA. In the absence of the approval of the PS&E for Step 3, there is no grant commitment

by the United States and there is no charge against the State's allotment.

Second, the award of a Step 2 + 3 grant is contrary to the intent of the Congress that the unnecessary charge against a State's allotment at one time for a single or a few large treatment works be avoided in order that the construction of these projects may proceed on a broad front. This was a major purpose, in our opinion, of Congress' declaring that each stage in the completion of a treatment works may be considered a project eligible for Federal assistance. Thus, although, as noted above, we cannot object to the legality of EPA's determination that it can carry out the congressional intent that projects be approved in stages by requiring only three stages (the third stage of which may be split into operable parts), we seriously question the validity of the Step 2 + 3 grant which reduces the project in effect to two stages (i.e., the feasibility study or Step 1 stage and the design and construction or Step 2 + 3 stage, albeit with the possibility of annulment of the Step 3 grant). This is especially true since, as indicated in footnote 5 of the Acting Assistant Administrator's letter, the Step 2 + 3 grant is similar to grants made prior to the enactment of the 1972 FWPCA and Congress, in enacting the 1972 law, mandated a change from the old procedure. Moreover, the inclusion of a provision for annulment or termination recognizes the existence of a contractual obligation.

Accordingly, we must conclude that the combination of a Step 2 project with a Step 3 project as authorized by 40 CFR 35.930–1(a)(4) is not consistent with provisions of the 1972 FWPCA or its legislative history.

In conclusion, we cannot agree with your agency's position on either the percentage of funding for construction grant projects or the legality of the Step 2 + 3 construction grant process. We note that existing regulations do not provide for grants at a percentage less than 75 percent. However, your existing regulations do provide for approval of combination Step 2 + 3 grant awards and our preliminary findings indicate that a number of this type of grants have been awarded. Since we have concluded that the combination of a Step 2 project with a Step 3 project as authorized by 40 CFR 35.930–1(a)(4) is not consistent with the provisions of the 1972 FWPCA or its legislative history, the subject regulations should be revised accordingly.

As our decision requires corrective action to be taken, your attention is directed to section 236 of the Legislative Reorganization Act of 1970, 84 Stat. 1140, 1171, 31 U.S.C. 1176, which requires that you submit written statements to certain committees of the Congress as to the action taken with respect thereto. The statements are to be sent to the Committee on Government Operations of both Houses not later than 60

days after the date of this decision and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this decision. We would also appreciate your advising us of any actions you plan to take.

[B–178234]

Travel Expenses—Temporary Duty—Additional Duty—Return to Duty From Leave Point

An employee authorized to return from a temporary duty (TDY) assignment via a circuitous route for the purpose of taking annual leave who while on leave is notified to return to his TDY point for additional duty before returning to his official station is entitled to reimbursement for travel expenses and per diem relating to the circuitous return travel completed prior to notification of the additional duty, but the travel expenses should be reduced by the excess costs that would have been incurred incident to the proposed circuitous return. Furthermore, other costs such as mileage and parking fees related to the indirect travel for leave purposes are for disallowance.

To the Chief, Central Accounts Branch, Atomic Energy Commission, February 4, 1974:

This is in reply to your letter dated March 14, 1973, requesting a decision as to whether you may certify for payment a reclaim voucher for $68.45 in favor of Mr. Jack F. Cully, an employee of the Atomic Energy Commission, representing travel expenses incurred by him prior to and following a period of annual leave.

The record shows that Mr. Cully was authorized to travel from Washington, D.C., to Las Vegas, Nevada, and return to Washington with approval to stop in Albuquerque, New Mexico, on annual leave. The travel was to commence on June 26, 1972, with official duties ending on June 30, 1972, and annual leave being charged from July 3, 1972, to July 7, 1972. However, while on leave in Albuquerque, Mr. Cully was advised to return to Las Vegas for additional temporary duty. Accordingly, after the expiration of the period of leave Mr. Cully returned to Las Vegas from Albuquerque on July 10, 1972, and on July 13, 1972, he returned to Washington directly from Las Vegas. Mr. Cully has been reimbursed for the expenses incident to his travel from Washington to Las Vegas and from Albuquerque to Las Vegas and return to Washington. However, he contends that the Government has realized a savings as a result of his return to Las Vegas for additional temporary duty prior to completing his return to Washington. Accordingly, he has submitted a reclaim for reimbursement of various travel expenses incurred by him incident to his travel from Las Vegas to Albuquerque for leave at that place which were administratively disallowed in payment of his original voucher. In addition to air fare for travel to Albuquerque from Las Vegas he claims reimbursement

for mileage from the Albuquerque airport to his lodgings, parking at the airport in Washington during the period of his annual leave, and ¼ day per diem on June 30, 1972, incident to his travel from Las Vegas to Albuquerque.

Section 2.5b of Office of Management and Budget (OMB) Circular No. A–7, revised, in force at the time the travel was performed, provided in part:

> * * * In case a person for his own convenience travels by an indirect route or interrupts travel by direct route, the extra expense will be borne by him. Reimbursement for expenses will be based only on such charges as would have been incurred by a usually traveled route. * * *

In the present case Mr. Cully's travel from Las Vegas to Albuquerque was performed under his original travel orders authorizing him to return to Washington by a circuitous route via Albuquerque for the purpose of taking annual leave in that place. Under his original travel orders and the quoted provision of OMB Circular No. A–7, Mr. Cully would have been entitled to reimbursement for the cost of his return trip by the circuitous route to the extent that this cost did not exceed the constructive cost of travel by the direct return route. The revision of his travel itinerary while he was on leave in Albuquerque to include his return to Las Vegas for additional temporary duty prior to returning to Washington was in effect a cancellation of the original authorization to return to Washington. We have consistently held that an employee should not be penalized by reason of a revision of his travel itinerary for official purposes after he commences travel. *Cf.* 30 Comp. Gen. 56 (1950).

Under his original travel orders, Mr. Cully would not have been entitled to reimbursement for the entire cost of his circuitous return travel to Washington, but would have had to pay any extra expense resulting from the indirect travel. Accordingly, Mr. Cully would not be penalized as a result of the revision of his travel orders, if he is required to pay travel costs equal to the difference between the air fare direct from Las Vegas to Washington and the cost of travel as originally planned, i.e., Las Vegas-Albuquerque-Washington. In this regard tariffs in our Office indicate that the air fare on the dates concerned for travel from Las Vegas to Washington via Albuquerque was $22 more than travel by a direct route. Accordingly, Mr. Cully's claim of $45 for air fare between Las Vegas and Albuquerque should be reduced by $22, the excess cost of air fare for the proposed circuitous travel. Similarly, payment of the additional ¼ day per diem claimed may be allowed only if it is determined that under the original itinerary this per diem would have been paid. If the per diem claimed plus per diem incident to travel from Albuquerque to Washington would not have exceeded the per diem which would have been allowable for

direct travel from Las Vegas to Washington, payment may be allowed.

The mileage claimed by Mr. Cully for travel from the Albuquerque airport to his lodgings at that place and the fee for parking his automobile at the airport in Washington during the period he was on annual leave were properly disallowed as being excess costs occasioned by the circuitous route and interrupted travel. Disallowance of those items does not result in a penalty to Mr. Cully resulting from the change of itinerary nor were those expenses incurred as a result of Government business.

The voucher which is returned herewith may be certified for payment in the amount of $23 (excess deducted for air fare on previous voucher) plus any amount found due for per diem.

[B–155146]

General Services Administration—General Supply Fund—Aircraft Services Procurement

The procurement by the General Services Administration of chartered aircraft or blocked space on regularly scheduled aircraft prior to reimbursement by using Government agencies may be financed from the General Supply Fund established by section 109(a) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 756(a), for the purpose of "procuring * * * nonpersonal services." Although nothing in the applicable statute or its legislative history precludes the use of the Fund to procure chartered aircraft and/or blocked space on aircraft, since the proposed program will be a major departure from present practices it is recommended that the plan be initiated as an experimental one of limited scope and duration to test the feasibility and desirability of the program, and that the plan be disclosed to the interested committees of the Congress before proceeding with an extensive program of chartering aircraft.

To the Administrator, General Services Administration, February 5, 1974:

By letter dated June 26, 1973, you requested our views on the availability of the General Supply Fund (Fund), established by section 109(a) of the Federal Property and Administrative Services Act of 1949 (Act), as amended, 40 U.S. Code 756(a), for the procurement of chartered aircraft or blocked space on regularly scheduled aircraft.

You state that the General Services Administration (GSA), after unsuccessful attempts to negotiate reduced air fares, is studying the feasibility of establishing two experimental charter systems to be provided by United States-flag air carriers over selected high density Government travel routes with the goal of lowering the cost of official international air travel by employees of the Federal Government. One experimental system would consist of contracted blocked space round trip service on schedued flights between the East Coast and selected points in Europe and another of contracted full planeload round trip charter service with carriers between the United States and selected

points in Europe. GSA has held discussions with both scheduled United States-flag international air carriers and supplemental (charter) carriers. GSA has also engaged in discussions with the Department of Defense regarding the feasibility of combining that Department's travelers with civil agency travelers on such charter flights. You state that this proposal should result in substantial savings and estimate that with a seventy percent load factor, a round trip flight between Washington and Frankfurt, Germany, could save the Government $50,000.

You have determined that a revolving fund would be the best possible method of financing the procurement of chartered aircraft or blocked space prior to reimbursement by using Government agencies and that the only revolving fund available for such use is the General Supply Fund.

The provisions of 40 U.S.C. 756(a) are, in pertinent part, as follows:

> The General Supply Fund shall be available for use by or under the direction and control of the Administrator (1) for procuring personal property * * * and nonpersonal services for the use of Federal agencies in the proper discharge of their responsibilities, * * *.

It is your agency's view that the availability of the Fund for the procuring of "nonpersonal services" would seem to be authority for its use. You point out that while there is no specific provision authorizing such use of the Fund, neither have you found a restriction against such use. You state, however, that the matter is not entirely free from doubt in view of the fact that the amendment by section 2 of Public Law 83-766, September 1, 1954, 68 Stat. 1126, of section 211 of the Act, 40 U.S.C. 491, to permit the establishment of central motor pools contained a provision specifically making the Fund available for such pools. You state in this regard that:

> The legislative history of section 211 does not reveal if there was consideration as to whether this provision was in fact required to make the General Supply Fund available for financing the motor vehicle services. However, it is our view that the term "nonpersonal services" is sufficiently broad and generic to embrace chartered aircraft and blocked space.

You conclude that the Fund seems to be well suited for financing the proposed system and that you do not anticipate that the program would be of sufficient magnitude to create a problem in paying for any of the services ordinarily procured and furnished through the Fund.

We agree with your position that there is nothing in the applicable statute or legislative history which would specifically preclude the use of the Fund to procure chartered aircraft and/or blocked space on aircraft. Also, we cannot state that such procurement necessarily represents the acquisition of a capital asset that normally would be required to be requisitioned through an appropriation rather than through the revolving fund as an expense item nor can we state that

such a system would not constitute procurement of "nonpersonal services" within the meaning of 40 U.S.C. 756(a).

On the other hand, the implementation of the proposed program would represent a major departure from present practices. It would transfer major responsibilities to GSA and place it, in effect, in the position of operating a charter service for the Government. Thus, it would appear that the proposed program might raise many serious policy questions which should ultimately be considered by the Congress. In this regard we have reviewed the legislative history of the 1954 amendment of section 211 of the Act. We note that in considering that amendment the Congress was concerned about, among other things, the policy implications of creating a central motor pool; on the other hand, we note several differences between the proposed plan and the creation of a motor pool such as that the latter involved acquiring existing assets from other agencies and that significant capital assets were to be acquired.

Considering the broad language of the Fund authorizing use of the Fund to acquire "nonpersonal services" we will not be required to object if your agency initiates an experimental system of chartering aircraft and blocked space of limited scope and duration in order to test the feasibility and desirability of such a program. However, in view of the broad policy issues raised and the possible desire of the Congress to express itself on this matter, we believe that the proposed plan should be disclosed to the interested committees of the Congress before proceeding with an extensive program of chartering aircraft on other than an experimental basis.

Your letter of August 14, 1973, to which we replied on September 6, 1973, mentions two additional options you apparently have under consideration involving the use of DOD air charter contracts with U.S.-Flag International Airlines: (1) extension of Category Z (military) tariffs to all official international air travel, and (2) varying Category Z type fares to avoid peak traffic days. We understand that no decision to use these options has yet been made.

We think these options involve additional legal problems not presented to us. We express no opinion on the legality of such options but will be glad to consider them if you decide to use DOD air charter contracts.

[B-114873]

Loans—Government Insured—Limitations—Construction of Statutory Language

While language contained in the Agriculture-Environmental and Consumer Protection Appropriation Act, 1974, that "loans may be insured, or made to be sold and insured * * * as follows: * * * operating loans, $350,000,000 * * *" would,

standing alone, normally be construed as binding upon the Agriculture Department and establishing a limit upon the amount of loans, the legislative history indicates that the amount specified was not intended to be a limitation.

In the matter of farm operating loans, February 6, 1974:

The General Counsel of the Department of Agriculture requested our opinion whether farm operating loans may be made during fiscal year 1974 in excess of $350 million, providing that the total amount of such loans does not exceed monies appropriated to the Agricultural Credit Insurance Fund (hereafter "ACIF"). The General Counsel states that the Department desires to make operating loans in excess of $350 million, and maintains that its legal authority to do so is supported by the terms and legislative history of appropriation legislation discussed hereinafter.

Prior to enactment of the Rural Development Act of 1972, approved August 30, 1972, Public Law 92-419, 86 Stat. 657, 7 U.S. Code 1921 note, farm operating loans were made as direct loans, financed from a direct loan account, in amounts authorized by annual appropriation acts. Section 115(b) of the Rural Development Act *inter alia* abolished the direct loan account and transferred its assets and liabilities to the ACIF. *See* 7 U.S.C. 1929(g)(1). Accordingly, operating loans are now made essentially on an insured basis, and are financed from the ACIF. *See* 7 U.S.C. 1928-1929.

The General Counsel's question as to the amount of operating loans which may be made during the current fiscal year arises in view of the following provision with respect to the ACIF contained in the Agriculture-Environmental and Consumer Protection Appropriation Act, 1974, approved October 24, 1973, Public Law 93-135, 87 Stat. 468, 480:

Loans may be insured, or made to be sold and insured, under this Fund in accordance with and subject to the provisions of 7 U.S.C. 1928-1929, as follows: real estate loans, $370,000,000, including not less than $350,000,000 for farm-ownership loans; *operating loans, $350,000,000;* and emergency loans in amounts necessary to meet the needs resulting from natural disasters * * *. [Italic supplied.]

The General Counsel states that in establishing the ACIF the Congress clearly did not require further appropriations in order to utilize its assets, and that prior to fiscal year 1972, annual appropriation acts did not specify any amounts for lending purposes under this fund. The appropriation act for fiscal year 1972 did specify amounts for lending purposes in a form similar to the provision of the 1974 act quoted above. However, the General Counsel notes that the report of the Senate Committee on Appropriations on the 1972 bill stated with respect to the amounts specified for the ACIF, as well as amounts specified for the Rural Housing Insurance Fund:

The Farmers Home Administration has been making insured loans as authorized in basic law for a number of years. For the first time the bill as passed by the House indicates specific amounts for such loans under both the Agricultural

Credit Insurance Fund and the Rural Housing Insurance Fund. The underlying statutes for these Insurance Funds by their own provisions authorize loans to be made without action by Congress in the annual appropriation acts. *Therefore, the indication of specific amounts in the bill does not constitute a limitation on the amount of loans which may be made and insured by the Administration.* [Italic supplied.]

S. Rept. No. 92–253, 29–30. The Senate Appropriations Committee's report on the 1973 appropriation bill made the same point concerning the amounts specified in that bill. S. Rept. No. 92–983, 31.

In addition to citing the foregoing statements by the Senate Appropriations Committee, the General Counsel suggests that further evidence that the $350 million amount specified in the 1974 appropriation act does not constitute a limitation upon operating loans is found in the act's use of the word "may," which connotes administrative discretion.

As noted previously, the 1974 act states that "loans may be insured, or made to be sold and insured * * * as follows: * * * operating loans, $350,000,000 * * *." In our view, the natural and usual construction of such language, standing alone, would be at least to impose a specific $350 million limit upon operating loans, notwithstanding use of the word "may."

The statements of the Senate Appropriations Committee referred to by the General Counsel do, of course, directly support his construction that the amounts specified are not limitations for purposes of the 1972 and 1973 appropriation acts. Since these statements are not inconsistent with any other source of legislative history applicable to the 1972 and 1973 acts, we cannot disregard them. Moreover, since the language of the 1974 appropriation act quoted above is in this regard substantially similar to the language which the statements in the prior Senate reports addressed, it remains only to consider whether the legislative history of the 1974 act conflicts with such statements.

While the matter is far from clear, we believe that the statements contained in the prior Senate reports to the effect that the amounts specified for loans from the insurance funds—including operating loans from the ACIF—do not constitute limitations, apply as well under the 1974 appropriation act.

During House hearings on Department of Agriculture appropriations for 1974, congressional control over the budget, with particular emphasis upon loans by the Farmers Home Administration, was a subject of discussion. Chairman Whitten commented upon this matter as follows:

The FHA illustrates why that joint committee is needed because it can be argued that today is the last day that the Appropriations Committee will have any effective control over the significant parts of the FHA budget.

Similar arguments can be made about the REA budget and portions of the EPA budget.

This loss of control should be of serious concern to the Congress.

While the above may seem like extreme statements, it appears the facts clearly document its accuracy for the Farmers Home Administration.

Where last year FHA had $322,016,000 of direct appropriations, direct appropriations have been reduced to $279,224,000 in the 1974 FHA budget. This includes $163,724,000 for subsidized interest costs, which the committee has no alternative but to fund. It is also the beginning of sharply increased appropriations in the future for this purpose. The effect will be to increase the uncontrollable part of the agriculture budget in future years. Included is $3 million for mutual and self-help housing. This is under committee control, but it is a very small program. Budgeted is $112,500,000 for salaries and expenses, which are the only expenses remaining under effective annual committee control.

Insured and guaranteed loans total $1,133 million in the 1974 budget. This is also beyond the effective control of the committee, as is shown by the fact that the original estimate was $623 million, whereas the revised budget is plus $510 million higher. This change has taken place in less than a month.

The 1973 budget provided an insured loan level of $2,144 million. The current estimate is that 1973 insured loans will total $2,011 million. This change of minus $133 million was made without committee approval. The Department claims the right to make these changes without committee approval because it considers the amount in the Appropriation Act as only advisory and not binding on the Department.

The 1974 budget also proposes that $3 million of the FHA salaries and expenses appropriation be transferred from the loan account. This may be the beginning of an attempt to switch from direct to indirect financing of salaries and expenses. If this happens, the committee will lose its last effective hold over FHA.

As the above facts demonstrate, the FHA provides a classic example of how more and more authority is being taken away from the annual congressional review of the Appropriations Committee.

* * * * * * *

Mr. Secretary, I believe all these actions indicate that more and more is being taken away from the annual review process by the Congress and from congressional control. The provisions for effective annual congressional review are being weakened. Costly long-term commitments are being made which will reduce future control of the budget. The ultimate cost of insured loans may exceed the cost of achieving similar objectives by direct loans. Future generations are being saddled with commitments made by this generation.

I have covered a lot of ground in these comments and I hope you will address at length each and every one of the comments because I think they present crucial problems which are not receiving sufficient attention when budget decisions are being made.

Hearings before a Subcommittee of the House Committee on Appropriations, on Agriculture-Environmental and Consumer Protection Appropriations for 1974 (Part 3, Agricultural Programs), 93d Cong., 1st sess., at 97–98.

Responding to these comments, the Assistant Secretary of Agriculture for Rural Development stated in part:

Mr. ERWIN. I want to make it clear that we intend to adhere to the policy that the Department has long maintained in keeping this committee informed of any signficant changes in the method of funding or in funding levels for any programs of the Department. If we have failed to do so I apologize.

Now with regard to your suggestion that the Farmers Home Administration and Rural Electrification Administration budgets no longer are under any effective control of the appropriations committee, I do not agree. Rural credit needs are very difficult to estimate. This past year's emergency loan program is a very good example. Insured loan programs which provide private funding for public programs have less of an impact on the budget than direct Federal programs. Current legislation recognizes this and has attempted to move farm credit back into the private market. This program has expanded very rapidly, and to the extent that there is a little or no interest subsidy, we strongly support moving

rural credit back to the private money market. I may be wrong but I feel this committee has concurred in the past in not setting arbitrary limits on this type of credit. More recently, the subsidized housing program has been discontinued while a study is being made on how housing can better be managed to provide this benefit to its needy families.

If the committee feels that it is essential that firm controls be placed on these programs even though they are essentially private capital programs, placing a firm limitation in the appropriation language would serve that purpose. We cannot, however, support that type of ceiling. Changes in rural credit needs are difficult to determine with any degree of accuracy very much in advance. *Id.* at 98.

While the foregoing indicates concern over the absence of congressional control, it fails to disclose any disagreement with the positions taken by the Assistant Secretary. Moreover, although the Committee rejected the budget proposal that operating loans be made in "such sums as may be necessary," the language adopted by the Committee, and eventually enacted, was substantially the same as the language which the prior Senate reports had described as not being limitations. *See* H. Rept. No. 93–275, at 45.

It is noted that the Senate report on the 1974 bill does not contain a statement similar to that contained in its prior reports. However, the fact that such a statement was not made for the third consecutive year does not necessarily imply a change of position on the part of the Senate Committee, absent affirmative disavowal of its prior position.

In view of the foregoing, we find no clear evidence that the position of the Department of Agriculture, affirmed in prior Senate reports, was rejected in the context of the 1974 act. Accordingly, since the $350 million amount specified for operating loans was not intended to be a limitation, it is our conclusion that farm operating loans may be made in excess of $350 million. At the same time we reiterate our view that this construction, while it may be justified by the legislative history in this particular case, seems unusual in terms of the actual statutory language used. Since our conclusion is not entirely free from doubt we suggest that the matter be clarified in the context of future appropriation legislation.

[B–178212]

Contracts—Negotiation—Prices—Disclosure

Since the question of the propriety of the cancellation of a request for proposals (RFP) and the subsequent solicitation of an invitation for bids (IFB) of plastic weathershields is not contingent upon whether or not changes in specifications were substantial but upon the discovery of a price leak of the offer that was low at the close of the first round of negotiations prior to beginning the second round of negotiations, the cancellation of the RFP and the resolicitation by IFB was appropriate.

Contracts—Protests—Timeliness—Solicitation Improprieties

The determination of the Comptroller General in 53 Comp. Gen. 139 that the circumstances surrounding a price leak, the reopening of negotiations, the cancellation of the request for proposals and resolicitation by an invitation for bids

(IFB) were significant to procurement practices and the protest therefore was for consideration pursuant to section 20.2(b) of the Interim Bid Protest Procedures and Standards although not timely filed, does not preclude the present determination that the contention raised in request for reconsideration that the Navy failed to amend the IFB to include a specification change allegedly known to it is untimely pursuant to section 20.2(a) of the Procedures.

Contracts—Negotiation—Reopening—Exceptions in Offer Unnoticed

Although the procuring activity should have known of the exceptions taken in the protester's proposal prior to the close of the first round of negotiations and should have discussed such exceptions with the protester prior to its submission of a best and final offer, since discovery of the exceptions taken occurred subsequent to the submission of best and final offers, the procuring activity had no alternative but to institute a second round of negotiations, and the failure to discover and discuss the exceptions is not a sufficient basis to reverse the holding in 53 Comp. Gen. 139.

In the matter of Swedlow, Incorporated, February 7, 1974:

On September 5, 1973, counsel for Swedlow, Inc. (Swedlow) requested reconsideration of Comptroller General decision of August 31, 1973, 53 Comp. Gen. 139.

The relevant facts as set forth in the above-referenced decision are as follows: By letter dated May 17, 1973, Swedlow protested against the award of a contract to any other bidder under invitation for bids (IFB) N00197-73-B-0215, issued by the Naval Ordnance Station, Louisville, Kentucky (NOSL), on February 22, 1973. It is Swedlow's contention that a contract should have been awarded to it under request for proposals (RFP) N00197-73-R-0018, previously issued by the same agency on November 3, 1972.

The RFP covered the furnishing of 140 glass reinforced plastic weathershields on a multiyear basis. The use of negotiation was justified on the basis that public exigency would not permit the delay incident to advertising. (10 U.S. Code 2304(a)(2)). The closing date for receipt of proposals was December 16, 1972. Eight offers were submitted, the lowest of which was that of CTL-Dixie, Inc. (CTL-Dixie). Following receipt of proposals, negotiations were conducted with all offerors, each of which was notified by telegram that it could submit its best and final offer no later than 4 p.m., December 28, 1972, at which time negotiations would close. At the close of this round of negotiations, Swedlow had replaced CTL-Dixie as the low offeror, having made a reduction in its unit price for the multiyear items from $10,930 to $9,767.

As a result of these negotiations, the Government was prepared to make an award to Swedlow. However, a preaward review of the proposed contract revealed that the wrong defective pricing clauses had been specified in the RFP. Also, it was questioned as to whether Swedlow had, in fact, taken several exceptions to the terms and conditions of the RFP or if it had merely "requested" such changes. Neither

of these discrepancies had been corrected during negotiations. Therefore, NOSL determined that the solicitation should be amended to insert the correct clauses, and on January 9, 1973, negotiations were opened for a second time, best and final offers being requested no later than 4 p.m. on January 17, 1973.

Concerned about entering a second round of negotiations, a representative from Swedlow contacted counsel for NOSL. The basis for its concern was the allegation that an employee of NOSL had informed Swedlow's closest competitor, CTL-Dixie, that Swedlow was the former low offeror and that most likely Swedlow's price on the RFP had been leaked to the competition. Upon investigation by NOSL, these allegations were borne out. Furthermore, it was discovered during the course of the investigation that certain drawings and specifications had been substantially revised by the requiring activity. In light of all of these circumstances, the contracting officer made the determination to cancel the second round of negotiations and to reprocure the shields at a later date. All offerors were advised of this determination by telegram dated January 11, 1973. None of the offerors protested the decision to cancel at that time.

On February 22, 1973, the requirement for the shields was resolicited under IFB N00197-73-B-0215. The solicitation contained revised drawings and specifications. Eight bids were submitted under the IFB, the two low of which (for the multiyear items) were at identical prices and both below the bid of Swedlow.

The day after bid opening, March 16, 1973, Swedlow filed a formal protest with our Office protesting against award of a contract under the IFB and against all of the actions taken by NOSL after the close of the first round of negotiations on December 28, 1972. It is Swedlow's contention that it is entitled to an award under the initial RFP.

Pursuant to section 20.9 of the Interim Bid Protest Procedures and Standards, 4 CFR part 20, counsel for Swedlow requested a conference on the protest. On August 8, 1973, a conference concerning the timeliness of the protest was held with attorneys representing Swedlow and Brunswick Corp., and representatives of NOSL and our Office. In addition, on August 23, 1973, a conference concerning the merits of the protest was held with attorneys representing Swedlow and Brunswick and representatives of Swedlow, Altair Enterprises, Inc., the Small Business Administration (SBA), NOSL and our Office.

By decision dated August 31, 1973, our Office denied Swedlow's protest on the basis that the contracting officer was justified in not awarding a contract to Swedlow under the RFP.

Counsel has predicated his request for reconsideration upon the following: First, he contends that the above-referenced decision relied

heavily upon changes in specifications as justifying solicitation by IFB and that at the conference held at the General Accounting Office on August 23, 1973, Swedlow demonstrated that the changes were insignificant. Second, counsel contends that there was a very significant specification change that was known to the Navy before the IFB opening and yet there was no amendment to the IFB to include this specification change. He maintains that this point was raised at the conference on August 23, 1973, and that it was not contested. Third, counsel alleges as an additional basis for reconsideration that Swedlow was not notified that its first offer was nonresponsive because of alleged exceptions prior to making its second offer. As a consequence, counsel contends that Swedlow was led to believe that its second offer was responsive. Again, counsel has stated that the foregoing was noted at the conference of August 23, 1973, and not refuted.

As stated above, the first contention raised on behalf of Swedlow concerns the reliance by this Office upon changes in specifications as justification for cancellation of the RFP and solicitation by formal advertising. As evidenced by the telegram sent by NOSL dated January 11, 1973, which stated that the RFP "IS HEREBY CANCELED AS THE RESULT OF THE DRAWINGS AND SPECIFICATIONS BEING REVISED," NOSL did rely upon the change in specifications as a basis for cancellation of the RFP. Furthermore, in the decision of August 31, this Office expressed agreement with the cancellation and subsequent resolicitation by stating that "formal advertising became practicable with the changes in the specifications." However, it is presently the position of this Office that the question of the propriety of the cancellation of the RFP and solicitation of the IFB is not contingent upon whether or not the changes in the specifications were substantial. It is our view that the fundamental issue raised is whether upon learning of the price leak prior to beginning the second round of negotiations the actions of the contracting officer—the cancellation of the RFP and solicitation of the IFB—were appropriate.

We affirm the determination made by our Office in the decision of August 31 that the contracting officer could not have made an award under the RFP to Swedlow as low offeror after learning of the price leak because Swedlow's offer was unacceptable at the close of the first round of negotiations. Consequently, it appears that the contracting officer after learning of the price leak had the following options: (1) to continue the second round of negotiations, after issuing an amendment to the solicitation containing the revised drawings and specifications; (2) to cancel the RFP and subsequently issue a new RFP containing the revised drawings and specifications; or (3) to cancel

the RFP and issue an IFB containing the revised drawings and specifications. Formal advertising rather than negotiation is the preferred method of procurement. Since the basis for the original determination to negotiate the procurement of weathershields—that public exigency would not permit delay incident to formal advertising—appears no longer to be regarded by the contracting officer as justified, the cancellation of the RFP and issuance of the IFB was proper.

Consequently, it is the position of this Office that the cancellation of the RFP and the subsequent resolicitation of weathershields by the IFB, nothwithstanding the delays necessitated by formal advertising, was an appropriate remedy under the circumstances.

We find that counsel's second contention which concerns the failure of the Navy to amend the IFB to include a specification change allegedly known to the Navy prior to IFB opening is untimely. The Interim Bid Protest Procedures and Standards, 4 CFR 20.2(a), provides that:

> * * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. * * *

Since the alleged failure of the Navy to amend its solicitation was apparent to Swedlow prior to the opening of bids of March 15, 1973, this issue is untimely raised.

In our decision of August 31, we determined "that the issue raised questioning the action taken by the contracting officer under the circumstances prevailing at the close of the first round of negotiations is one of significance to procurement procedures." Consequently, this issue was considered under section 20.2(b) of the Interim Bid Protest Procedures and Standards which provides:

> The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

However, the above determination by our Office of the existence of a significant issue (the circumstances surrounding the price leak reopening of negotiations change from RFP to IFB) does not preclude the present determination that the contention concerning the failure of the Navy to include a specification change in the solicitation is untimely.

The final contention raised by counsel is that Swedlow was not notified that its first offer made at the close of receipt of proposals (December 16, 1972) was not responsive because of the alleged exceptions prior to making its second offer at the close of the first round of negotiations (December 28, 1972). As a consequence, counsel contends

that Swedlow was led to believe that its second offer was responsive.

The exception taken by Swedlow in its proposal made on December 16, 1972, which included the substitution of a 30-day after-award option provision for the option providing for exercise 90 days prior to final delivery contained in the solicitation, should have been known to NOSL prior to the close of the first round of negotiations. Armed Services Procurement Regulation 3–805.3(a) provides:

> All offerors selected to participate in discussions shall be advised of deficiencies in their proposals and shall be offered a reasonable opportunity to correct or resolve the deficiencies and to submit such price or cost, technical or other revisions to their proposals that may result from the discussions. A deficiency is defined as that part of an offeror's proposal which would not satisfy the Government's requirements.

Implicit in the above-quoted provision is the obligation on the part of the procuring activity to uncover all deficiencies contained in an offer prior to holding discussions with the offeror. However, it is apparent that these exceptions were not known to NOSL until some time subsequent to the submission of best and final offers on December 28, 1972.

We are in agreement with counsel for Swedlow that NOSL should have known of the exceptions prior to the close of the first round of negotiations and should have discussed such exceptions with Swedlow prior to Swedlow's submission of a best and final offer. While it is unfortunate that the discovery did not occur prior to December 28, 1972, the fact remains that such discovery occurred subsequent to Swedlow's submission of a best and final offer and NOSL had no alternative at that point in time other than to institute a second round of negotiations.

For the reasons set forth above, the decision of August 31, 1973, 53 Comp. Gen. 193, is affirmed.

[B–179592]

Contracts—Specifications—Failure To Furnish Something Required—Addenda Acknowledgment—Waiver—Criteria

The fact that an amendment to an invitation for bids which extended the bid opening date and made a material change in the specifications was not formally acknowledged by the low bidder did not require rejection of the low bid where the bid was dated just 2 days before the extended bid opening date evidencing the bidder was aware of the existence of the amendment, and where the bid date constituted an implied acknowledgement of the receipt of the amendment, and since the low bid should not have been rejected as nonresponsive, it is recommended that if the low bidder is a responsible firm and the contracting agency's operational capability will not be disrupted, the erroneously awarded contract should be terminated for the convenience of the Government and an award made to the low bidder at its bid price.

In the matter of Inscom Electronics Corporation, February 7, 1974:

On May 25, 1973, invitation for bids DAAHO1-73-B-0707 (IFB-0707), was issued by the Army Missile Command, Redstone Arsenal, Alabama. It was an accumulative quantity requirements solicitation for the procurement of power supplies for the Improved Continuous Wave Acquisition Radar (ICWAR) units for Hawk Missiles, which enable the missiles to detect low flying aircraft.

On June 15, 1973, Amendment 0001 to the IFB was issued extending the bid opening date to June 29, 1973. On June 25, 1973, Amendment 0002 was issued, extending the bid opening to July 18, 1973, and revising the Documentation Package by replacing Drawing 10182795, Revision K, with Drawing 10182795, Revision L. Amendment 0003 was issued July 10, 1973, furnishing page 2 of the drawing list, which had been inadvertently omitted from the original bid package.

When the bids were opened on July 18, 1973, it was determined that Inscom Electronics Corporation's (Inscom's) low bid was nonresponsive for failure to acknowledge receipt of any of the solicitation amendments. The next low bidder was Woodard Electric, Incorporated. On August 15, 1973, Inscom forwarded signed copies of all three amendments to the procuring agency, stating that they had been inadvertently omitted from the bid package due to a clerical error. On August 23, 1973, Inscom was formally advised by letter from the contracting officer that its bid had been declared nonresponsive for failure to acknowledge receipt of the amendments, and that the contract had been awarded to Woodard.

Inscom raised two basic grounds for protest. First it maintained that the failure of the procuring activity to indicate upon Amendments 0002 and 0003 whether or not those amendments had to be signed by the bidder and returned created doubt as to the necessity for acknowledgement of receipt of those amendments. IFB-0707 included Standard Form 33A (March 1969 edition) and the three amendments to the solicitation were issued upon Standard Form 30 (July 1966 edition). In our decision of January 17, 1972, reported at 51 Comp. Gen. 408, 410, we observed:

> * * * Both of those provisions [paragraph 4 of Standard Form 33A and block 9 of Standard Form 30] state that an amendment "must" be acknowledged by one of three methods, two of which do not require the bidder to sign and return the amendment. Therefore, while you were not required to sign the amendment, acknowledgment of it in another manner was necessary for your bid to be responsive.

We agree with Inscom that the procuring agency should have checked the applicable box in block 13 of Amendments 0002 and 0003 to advise bidders whether they were required to acknowledge receipt of the amendment by one of the available methods: signing and re-

turning the amendment. However, that omission did not negate the general obligation of bidders to acknowledge receipt of amendments, nor did it prevent the bidder from making acknowledgment through one of the remaining two methods: (1) notation on the reverse of Standard Form 33 or (2) by separate letter or telegram.

Inscom's second contention is that the changes made by the amendments were trivial and, therefore, its failure to acknowledge their receipt should have been waived as a minor informality or irregularity. In this connection, Inscom also contends that the only impact of the amendments which should be considered is that upon the price, which Inscom estimates to be $.50 per unit, whereas Woodard's price is approximately $425 per unit more than Inscom's. Armed Services Procurement Regulation 2–405(iv)(B) states, in pertinent part, that the contracting officer may waive the failure to acknowledge receipt of an amendment only if:

> (B) the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders * * *

The language of this section, and the decisions of this Office make it clear that price is not the only consideration in determining whether the failure to acknowledge receipt of an amendment constitutes a minor informality or irregularity. *See*, e.g., B–162612, October 11, 1967.

Inscom alleges that the only change of any significance was the deletion by Amendment 0002 of a washer, Find No. 35. It is clear from the contracting officer's report that this amendment not only eliminated the washer, but also changed the nut on the same stud to a self-locking type, which is clearly shown in the drawing, Revision L, accompanying Amendment 0002. While these changes may have had a trivial effect on the price of each unit, the effect on the quality of the units was not considered trivial by the contracting officer for the following reasons:

> * * * The reasons for issuing the amendment are further explained as follows: (1) Revision L to APN10182795 was made to assure diode CR–13 would be locked to its mounting surface. The previous revision used two washers and a plain nut to secure the diode. Revision L removed one washer and changed the nut to a self-locking type. This prevented the previous under flush condition of the CR–13 stud in the nut which was caused by stack-up. (2) Failure of the locking mechanism would result in failure of the diode, due to the loss of the heat sink. This in turn would cause the power supply to be inoperative and, in turn, the ICWAR Radar. To prevent the diode from working loose as a result of the deficient mounting described in Revision K, Revision L was issued.

Since Inscom has presented no evidence to dispute the importance of this change in the specifications regarding the quality of the item being procured, we conclude that the effect of Amendment 0002 was not trivial. Because Amendment 0002 cannot be considered trivial, Inscom's bid would be nonresponsive in the absence of an explicit or

implicit acknowledgment of receipt of that amendment. *See* 40 Comp. Gen. 458 (1961).

Inscom did not formally or explicitly acknowledge receipt of the three amendments. The failure to acknowledge Amendment 0001, which merely extended the bid opening date, properly could have been waived as a minor informality or irregularity. 51 Comp. Gen. 408, 410 (1972), *supra.* Similarly, the Army has characterized Amendment 0003, which provided an inadvertently omitted printout of drawing numbers, as "administrative" in nature. Amendment 0002, however, made a material change in the specifications and extended the bid opening date from June 29, 1973, to July 18, 1973. An examination of Inscom's bid shows that it is dated July 16, 1973, just 2 days before the extended bid opening date. A very similar fact situation was considered by our Office in our decision B–176462, October 20, 1972, in which we held:

> * * * that the reflection in Diamond's bid of one of the salient changes embodied by Amendment 0002 was sufficient to constitute constructive acknowledgment of receipt of that amendment, thereby binding Diamond to perform all of the other changes enumerated in that amendment at the price set out in Diamond's bid.

See also B–179169, December 21, 1973.

In the instant case, the date upon Inscom's bid clearly reflected that firm's knowledge of the existence of Amendment 0002 and constituted an implied acknowledgment of the receipt of that amendment. In view thereof, and since that amendment was the only one materially affecting the procurement, we conclude that Inscom's bid should not have been rejected as nonresponsive.

We therefore recommend, if it can be established that Inscom is a responsible firm and that the Army's operational capability would not be unduly disrupted, that the contract awarded to Woodard be terminated for the convenience of the Government and that a contract be awarded to Inscom at its bid price.

[B–179969]

Contracts—Protests—Authority to Consider—Reprocurement Due to Requirements Contract Default

Where the Internal Revenue Service (IRS) placed purchase orders for memory units with the protester under a mandatory requirements contract it held with the General Services Administration, the subsequent partial termination for default and the reprocurement of the item from another source is not a proper matter for protest to the General Accounting Office since the IRS actions taken to insure that its requirements would be satisfied was a matter of contract administration, the propriety of which must be resolved by the contracting parties pursuant to any applicable contract provision rather than by the General Accounting Office.

In the matter of Ampex Corporation, February 7, 1974:

BACKGROUND

On June 29 and August 30, 1973, the Internal Revenue Service (IRS) issued purchase orders for a total of seven 256 K core memory units pursuant to mandatory requirements contract, No. GS-00C-00052, held by Ampex Corporation (Ampex) with the General Services Administration (GSA). Installation and acceptance of all units was to be accomplished by January 1, 1974.

As of October 15, 1973, IRS had received confirmation on only four of the seven ordered units. IRS' planning and programming had been predicated on the installation of seven units by January 1, 1974. A change requiring delays in its programs for tax processing was considered to be unacceptable. Accordingly, IRS decided to solicit by telephone a temporary lease, through June 30, 1974, for three of the seven units from whatever source available to avoid any delay in tax processing during the 1974 peak processing period. In addition, on October 10, 1973, IRS terminated for default its order for a particular unit which had been delivered by Ampex and had failed to pass installation testing.

It is Ampex's position that IRS should be required to satisfy its requirements for this equipment from the mandatory GSA requirements contract currently in effect and that any other procurement action be halted. In addition, Ampex states that there has been no delegation of procurement authority by GSA to IRS for obtaining equipment from competitors of Ampex. Also, Ampex has protested that the default termination action by IRS was improper and should be rescinded.

DECISION

The record establishes that IRS obtained from GSA a delegation of procurement authority to obtain from any available source a temporary lease for three units originally ordered from Ampex. The record also indicates that the GSA contracting officer does not require an agency which has terminated an order for default to obtain a delegation of authority to reprocure the item. Once IRS placed its orders for the seven units with Ampex for all of its requirements, any subsequent additional procurement actions were taken to insure that its requirements would be satisfied and was a matter of contract administration. The propriety of a default termination must be resolved by the contracting parties pursuant to any applicable contract provision and is not a proper matter for protest to General Accounting Office.

[B-179790]

District of Columbia—Redevelopment Land Agency—Land Disposition—Failure of Bidder To Perform—Deposit Forfeiture

When a limited partnership, the successor in interest to a joint venture, failed to perform the obligation undertaken by the initial partnership, forfeiture of the original deposit is required as the District of Columbia Redevelopment Land Agency may not waive its right of forfeiture since no consideration passed to the Agency to permit waiver of the Government's right, and furthermore, the delay in seeking forfeiture does not constitute a waiver of the forfeiture right as the delay was requested by the successor partnership in order to find the means to perform the original obligation.

In the matter of District of Columbia Redevelopment Land Agency, February 11, 1974:

In October 1967, the District of Columbia Redevelopment Land Agency (Agency) offered Parcels 19 and 20 in the Southwest Urban Renewal Area for sale or lease for private redevelopment at a fixed price of $2,742,000. Five proposals were submitted to the Agency pursuant to the offering. In accordance with the Prospectus, the Agency Board of Directors was to tentatively select a redeveloper subject to a public hearing on the terms of the disposition document and the proposal. Additionally, the Prospectus required a $100,000 deposit with all proposals and further provided as follows:

> If the proposal is accepted, the developer will be required to execute and return within ten (10) days the Contract of Sale or Lease Agreement together with the required ten percent (10%) deposit (the $100,000 deposit submitted with the offer may be applied toward this). The $100,000 deposit shall be forfeited if the developer fails to do so.

On October 16, 1968, the Agency's Board of Directors voted to tentatively lease Parcels 19 and 20 to the Transportation Square Joint Venture (TSJV) subject to the holding of a public hearing.

At the time it submitted its proposal, TSJV was made up of two partners. The Charles H. Tompkins Company (Tompkins) had indicated a tentative intent to join with TSJV in this venture. However, Tompkins decided not to enter into the venture before TSJV's offer was accepted. Shortly thereafter, the Marietta Realty Corporation (MRC), as the controlling interest, joined forces with the two partners of TSJV, forming the Transportation Square Limited Partnership (TSLP). A condition of this new arrangement was that the $100,000 put up by TSJV would carry over as the deposit of TSLP.

The public hearing, as provided for in the Prospectus, was held on June 18, 1969, and thereafter the Agency approved the lease to TSLP, subject to Department of Housing and Urban Development (HUD) approval.

Prior to receiving HUD approval, however, MRC advised the

Agency that it had doubts about proceeding with the venture due to increased construction costs.

The noncontrolling partners disagreed with MRC and took the position that the lease should be executed. On September 8, 1969, on the basis of verbal HUD approval, the Agency transmitted the lease for execution to MRC, as controlling general partner for TSLP. By letter dated September 24, 1969, MRC refused to execute the lease claiming that it still required additions and modifications. The Agency responded to these assertions in its letters of October 29 and December 9, 1969, and pointed out that the time for execution of the lease agreement had expired, that the redeveloper was in default, and urged the redeveloper to promptly execute the lease agreement. During this period, MRC was still engaged in a review of the "economics" of the project and had not definitively stated that it would refuse to proceed. Therefore, the Agency did not act to terminate the award pursuant to the terms of the Prospectus.

On November 20, 1969, MRC advised the Agency that it had completed its analysis of the project and found it not feasible.

On December 15, 1969, the Agency was advised that the two former, remaining partners of TSJV had filed suit against Martin Marietta, Inc., and MRC to compel execution of the lease agreement for Parcels 19 and 20.

On May 12, 1971, while the lawsuit was still in pretrial stage, it was learned by the Agency that a major developer, Nassif, was interested in Parcels 19 and 20. In June 1971, negotiations between Nassif, the Agency, Riggs Building Corporation and Van Roijen (the latter two being the remaining partners of TSJV) commenced. A proposal acceptable to Nassif was developed, and new preliminary plans were prepared for the development of Parcels 19 and 20. On October 5, 1971, the lawsuit, *Walker & Dunlop et al.* v. *Martin Marietta Corporation*, et al., was dismissed with prejudice pursuant to a compromise agreement between the parties. On May 5, 1971, a reduced land price of $2,230,000 was approved by the Department of Housing and Urban Development, and on September 6, 1972, the Agency determined that it would agree to a substitution of parties with David Nassif replacing Marietta Realty, if the partnership would submit a revised proposal and agree to execute a lease agreement.

However, in December 1972, the Agency was advised that redevelopment of Parcels 19 and 20 could not proceed because the only market for office space would be the General Services Administration (GSA), and there was uncertainty that GSA would lease the space in view of the recent enactment of the Public Buildings Amendments of 1972 which restricted GSA's authority to lease substantial amounts of office space without congressional approval (Public Law 92-313, 40

U.S.C. 603 note). The representatives of the limited partnership then requested additional time to submit a proposal so they might determine whether they could find a potential sublessee.

Through informal advice obtained from the Agency, our Office has learned that the new partnership (TSLP) no longer plans to proceed, as a potential sublessee cannot be found. Therefore, the Agency is planning to terminate the award.

The only question that presently exists is whether or not the Agency may exercise discretion in determining to return any portion of the $100,000 deposit that accompanied TSJV's agreement to execute a lease if its proposal was accepted. The agreement, as quoted above, provides that the deposit will be retained in the event of default.

It is the Agency's position that a valid and binding obligation arose between itself and TSLP on September 8, 1969, when it formally accepted the proposal as submitted by TSJV, the predecessor of TSLP. The Agency asserts that its forebearance in not terminating the award so as to provide the redeveloper with a reasonable opportunity to comply with its obligations did not result in a release of those obligations, nor was there a waiver of any of the Agency's rights under the terms of its agreement. Further, the Agency believes that it has the legal right to demand execution of a lease agreement at any time and, in the event of failure to so execute, may, in its discretion, terminate the award for default.

However, the Agency does recognize that "* * * the redeveloper has, in good faith, made an expensive and time consuming effort over a long period to comply with its obligations to redevelop Parcels 19 and 20." In view of this good faith attempt, the Agency now requests guidance as to whether it may exercise discretion in determining whether or not to return the $100,000 deposit.

We concur in the Agency's position that the redeveloper has defaulted on its proposal and that the $100,000 is now subject to forfeiture. A binding agreement arose between the Agency and TSLP when HUD granted approval for the proposal of TSLP's predecessor, TSJV, on September 8, 1969. The original proposal was submitted by a joint venture, TSJV. As a general rule, joint ventures are governed by the laws of partnership. See 48 Comp. Gen. 365 (1968). The common-law rule is that dissolution of a partnership does not change the rights of third parties (here the Agency) as to past legal relationships with the partnership. *See* 35 Comp. Gen. 529 (1956). Therefore, when the Agency accepted TSJV's offer, TSLP, as successor in interest to TSJV, became bound to perform. See *Maryland Casualty Company* v. *Bedsole & Shetley, et al.*, 228 F. Supp. 521 (1964). Thet statements by MRC were not a withdrawal of the offer before such was accepted by HUD. (Nor do we find any provision in the Prospectus that would

have allowed a withdrawal of one's proposal before the Agency made a determination of acceptability without resulting in a forfeiture of the deposit.) Therefore, it seems clear that the Agency does have the legal right to retain the $100,000 originally submitted with TSLP's predecessor's proposal.

As concerns the possible return of any or all of this money, in our decision 40 Comp. Gen. 309 (1960) we stated at page 311 that:

> The rule is well established that no officer or agent of the Government has authority to give away the money or property of the United States either directly or by the release of vested contractual rights, without adequate legal consideration. *Bausch & Lomb Optical Company* v. *United States*, 78 Ct. Cl. 584, 607, certiorari denied 292 U.S. 645. This rule is grounded in sound public policy and is not to be weakened. *Pacific Hardware & Steel Company* v. *United States*, 49 Ct. Cl. 327, 335. However, an inspection of the facts in the matter will reveal that waiver of the forfeiture provisions is not in derogation of the established rule requiring consideration for the release of a vested contractual right. A "consideration" in the legal sense of the word is some right, interest, benefit, or advantage conferred on the promisor to which he is otherwise not lawfully entitled, or any detriment, prejudice, loss, or disadvantage suffered or undertaken by the promisee other than such as he is at the time of consent lawfully bound to suffer. *Cuneo Press, Inc.* v. *Clayburn Corporation*, 90 F. 2d 233. * * *.

In the case at hand, neither party to the contract involved was under any legal duty beyond the point in time at which the forfeiture and termination provisions took effect. It appears that the Agency did not immediately terminate the award and cause a forfeiture of the $100,000 only because it granted TSLP another chance to fulfill the original obligation of TSJV. At no time did the Agency consider TSLP's second offer as a basis for waiving the Agency's right of forfeiture.

Accordingly, we would be opposed to the Agency exercising any discretion in returning any portion of the $100,000 as no consideration has passed to the Agency to allow a waiver of their right to forfeiture.

[B–77963]

Leaves of Absence—Annual and Sick Leave Act—Coverage—Presidential Appointees

United States attorneys who are compensated at Executive Schedule rates are excluded from the coverage of the Annual and Sick Leave Act since 5 U.S.C. 6301(2)(x) exempts from coverage all officers appointed by the President whose basic rates of pay exceed the highest General Schedule (GS) level and although 5 U.S.C. 6301(2)(x) refers to an individual whose rate of pay "exceeds" the highest GS level, the intent of the Act can be effected only if those whose salaries are intended to exceed the highest GS level by virtue of assignment to the Executive Schedule are exempted even though GS–18 and Executive Level V officials may at times receive equal pay. Furthermore, while the discretionary exemption authority in 5 U.S.C. 6301(2)(xi) prohibits the President from excluding any U.S. attorney from coverage under the leave act, the clause does not operate to nullify the statutory exclusion required by 5 U.S.C. 6301(2)(x).

To the Attorney General, February 12, 1974:

This refers to your letter dated September 18, 1973, requesting our decision as to whether four United States attorneys compensated at rates of the Executive Schedule are excluded from the coverage of the annual and sick leave provisions of 5 U.S. Code 6301 *et seq.*

The Congress amended the leave provisions of the Annual and Sick Leave Act of 1951 in 1953—the act of July 2, 1953, Public Law 102, 83d Congress, 64 Stat. 136—to remove certain top ranking officers in the executive branch from coverage. Those amendments which are now codified at 5 U.S.C. 6301(2)(x) and 6301(2)(xi) make the following exclusions from coverage by the leave provisions:

(x) an officer * * * who is appointed by the President and whose rate of basic pay exceeds the highest rate payable under [the General Schedule] * * *;
(xi) an officer in the executive branch * * * who is designated by the President, except a postmaster, United States attorney, or United States marshal * * *.

The Acting Assistant Attorney General presents the problem which has arisen under those provisions as follows:

At the time these exceptions were passed, United States attorneys, while appointed by the President with the advice and consent of the Senate, were compensated at rates comparable to General Schedule rates and thus did not fall within the presidential appointee exception to the leave provisions. In 1964, however, the President, pursuant to 5 U.S.C. 5317, placed the United States attorneys for the District of Columbia and the Southern District of New York in Executive Level IV and the United States attorneys for the Northern District of Illinois and the Southern District of California in Level V. Since that time the compensation of U.S. attorneys who are Level IV has always exceeded the General Schedule salary maximum and the compensation of U.S. attorneys who are Level V has exceeded it periodically. * * *
* * * While Level V salaries are—as a matter of policy—intended to be higher than those of the General Schedule, the frequency of pay raises for the General Schedule and the limitation of the Executive Schedule to quadrennial raises frequently produces the situation where the rates of pay for GS-18 and for Level V are identical. * * *

Two questions are raised from the above facts. The first is whether these four United States attorneys are to be treated for leave purposes as are the rest of the United States attorneys or whether they are to be considered as Presidential appointees whose salaries exceed the General Schedule as are other officers compensated under the executive salary scale. The second question is whether 5 U.S.C. 6301(2)(x) requires Presidential appointees at Level V to be included in the leave act provisions whenever their salaries are equal to the GS–18 level and excluded whenever their salaries are raised to exceed the GS–18 level.

Regarding the first question the issue appears to be whether 5 U.S.C. 6301(2)(xi) operates to retain the four United States attorneys in question within the coverage of the annual and sick leave provisions even though such attorneys otherwise would be excluded under the wording of 5 U.S.C. 6301(2)(x) because they are appointed by the

President and receive compensation in excess of that payable under the General Schedule. Our opinion is that while clause (xi) prohibits the President, in the exercise of the discretionary exemption authority contained in such clause, from excluding any United States attorney from coverage under the leave statute, it does not operate to nullify the statutory exclusion of the four United States attorneys otherwise required by 5 U.S.C. 6301(2)(x).

With respect to the second question, it is the view of the Department that Congress could not have intended the "* * * anomalous and potentially chaotic result" which would follow if Level V attorneys were periodically included under and excluded from the leave provisions. In that connection it is stated that while 5 U.S.C. 6301(2)(x) refers to rates of compensation that "exceed" the maximum payable under the General Schedule, the only rational interpretation of this language is to assume that Congress intended it to apply to all of those whose salaries are intended to exceed the highest rate of the General Schedule even though occasional equality of salary may occur.

In enacting the 1953 amendments to the Annual and Sick Leave Act of 1951 it was Congress' purpose to completely remove certain high officials of the executive branch of the Government from the leave system which covers Federal employees. The reason for this was stated at S. Rept. 294, 83d Cong., 1st sess., p. 1 (1953) as follows:

> This action is based on the premise that such officials never completely divest themselves of their responsibility even during periods of vacation or illness. In effect, such officials are actually on duty at all times, thus, it is absurd to maintain attendance and leave records and allow them lump-sum payments for any unused vacation time remaining to their credit when they terminate their position.

A letter appearing in S. Rept. 294, 83d Cong., 1st sess., at pp. 4–5, from the Chairman of the Civil Service Commission to the Chairman of the Senate Committee on Post Office and Civil Service, further explains the reason for the amendment:

> In general, positions in grades GS–16, 17 and 18 are a part of the career service. Persons occupying these so-called supergrade positions observe standard working hours and are authorized to take leave of absence only as provided by the 1951 Leave Act. Thus, these employees work under very different conditions and should be treated differently from Presidential and other appointive officials.

The 1953 amendment to the Annual and Sick Leave Act thus clearly distinguished officials on the General Schedule level who were to keep regular work hours from those high level executives who are considered to be on duty at all times. The circumstances which have resulted in equal pay for grade GS–18 and Executive Level V officials do not change the essential reason for which the distinction in the leave act was made. We note further that although the positions which these high level executives occupy are now authorized by or under the execu-

tive pay provisions of 5 U.S.C. 5311–5317, at the time the pertinent amendments to the Annual and Sick Leave Act of 1951 were enacted there was no executive pay system as such. At that time executive positions were generally established in the organic act of the agency in question. A partial executive pay system was enacted in 1956 (Federal Executive Pay Act of 1956, July 31, 1956, ch. 804, 70 Stat. 736) and a more comprehensive system in 1964 (Federal Executive Salary Act of 1964, Public Law 88–426, title III, August 14, 1964, 78 Stat. 415). However these executive pay systems, since they were not in being at the time the exemptions were first authorized, could not have been made the basis for exempting employees from the leave system. Therefore, even though clause (x) indicates that an exception is granted for individuals otherwise qualified whose rate of pay "exceeds" the highest pay under the General Schedule we believe that it is appropriate to construe that clause as being applicable to those officials whose salaries were intended to exceed the highest General Schedule level, i.e., employees in Executive Level V and above. Under that construction Executive Level V United States attorneys may be treated in the same manner as Executive Level IV United States attorneys with respect to exemption from the Annual and Sick Leave Act even though certain salaries in the General Schedule may from time to time equal the salary of Executive Level V.

For the above reasons we hold that the two United States attorneys in Executive Schedule Level IV and the two in Level V are exempt from the coverage of the Annual and Sick Leave Act.

[B–179158]

Fees—Services to Public—Refund—Failure of Government to Perform

Since applications for discharge permits under the Refuse Act Permit Program, which were filed with the Corps of Engineers or the Environmental Protection Agency (EPA), were not processed because the authority to issue permits was given to the States pursuant to sections 402 of the Federal Water Pollution Control Act, as amended by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1342, refund may be made by EPA of the application fees charged, for although the fees were properly received, deposit of the fees into the Treasury as miscellaneous receipts was erroneous. Therefore, the amounts that are proper for refund should be transferred from the receipt account to the "suspense fund" for refund, and in the future until properly for deposit into the Treasury as miscellaneous receipts, fees should be deposited into the Treasury as trust funds in accordance with 31 U.S.C. 725r.

To the Administrator, Environmental Protection Agency, February 12, 1974:

Reference is made to previous correspondence with your office and particularly to a letter dated October 4, 1973, from your Associate General Counsel, Grants, Contracts, and General Administration Divi-

sion, concerning an inquiry we had received regarding an application fee in the amount of $100 paid by Airflite, Inc., to the Corps of Engineers (for a discharge permit) under the Refuse Act Permit Program, which application was not processed and thus a permit was never approved or denied. As stated in the letter of October 4, 1973, the problem is by no means limited to Airflite.

The Refuse Act Permit Program, as directed by the President in Executive Order No. 11574, dated December 23, 1970, was administered by the Secretary of the Army acting through the Corps of Engineers (Corps). Applicants for discharge permits were required to include with their applications a fee of $100 for a single discharge outlet and $50 for each additional discharge outlet.

Subsequently the authority to issue discharge permits was placed in the Environmental Protection Agency (EPA) by section 402 of the Federal Water Pollution Control Act as amended by the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, approved October 18, 1972, 86 Stat. 880, 33 U.S. Code 1342. Transfer to EPA of all discharge permit applications filed with the Corps was completed in December 1972. Funds not already deposited into the miscellaneous receipts of the Treasury were included with the transfer.

Section 402 also provides that the Administrator of EPA shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of the act, to issue permits for discharge into the navigable waters within the jurisdiction of such State. In California, the California Water Resources Control Board has been assigned the new permit program. Pursuant to the State program, the Board is requiring a filing fee for a discharge permit. Apparently the fee is also required in processing applications originally filed with Corps or EPA even though a fee was paid by the applicant in connection with that filing. Section 402 does not include a provision which would authorize the transfer of fees to the States along with the applications.

In its letter of October 4, 1973, EPA reports that it now possesses approximately $200,000 in a "suspense fund" awaiting deposit into the Treasury as miscellaneous receipts, including about $91,000 which was turned over to it by the Corps pursuant to section 402. The last cited letter indicates that in addition, approximately $4,000,000 has been deposited into the Treasury as miscellaneous receipts, and that no permits have been issued pursuant to these applications. It further appears from the same letter that the application fees were for the processing of the applications.

The applications involved were not processed by the Corps or EPA and no permits have been denied or issued pursuant to the applications

represented by the amounts which were collected by Corps and EPA pursuant to 31 U.S.C. 483(a) which provides in pertinent part:

> It is the sense of the Congress that any * * * permit or similar thing of value or utility * * * granted * * * by any Federal agency * * * to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), * * * shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation * * *, to prescribe therefor such fee, charge, or price if any, as he shall determine * * * to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, * * * and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts.

While the above-quoted statutory provisions require that amounts collected be paid into the Treasury as miscellaneous receipts, they also contemplate the furnishing of a service by the Federal agency for the charge made. Since the applications involved here were never processed and, hence, permits never issued or denied, we believe that the application fees charged—although properly received—were erroneously deposited into the Treasury as miscellaneous receipts. Accordingly there should be followed the procedure originally prescribed in paragraph 6(d) of General Regulations No. 116 on March 17, 1952, 31 Comp. Gen. 765 as follows:

> (d) Adjustments may be initiated by an agency for moneys properly received but erroneously *deposited* into the Treasury as Miscellaneous Receipts, even though a part or all of such amounts are for refund to the person from whom collected. After adjustment of the error by transfer from the receipt account to the appropriate deposit fund or other expenditure account such amounts as are proper for refund will be paid from the expenditure account under regular disbursement procedures.

In applying that procedure in the present situation, and since we understand that your office now has in its possession all records to show amounts collected and to whom refund would be due, such amounts as are proper for refund should be transferred from the receipt account to the "suspense fund" for refund by EPA to the applicants for permits of the amounts collected from them by either the Corps or EPA for applications which were not processed. *Cf.* 2 Comp. Gen. 599 (1923) and 3 *id.* 762 (1924).

In the future, until properly for depositing into the Treasury as miscellaneous receipts, such fees should be deposited into the Treasury as trust funds in accordance with 31 U.S.C. 725r.

[B-179626]

Leaves of Absence—Administrative Leave—Administrative Determination

The retroactive grant of 8 hours administrative leave to an employee by a local Commander of an Air Force Base for the time he spent in cleaning and arranging for the repair of the damages to his home, that resulted from an ammunition

train explosion, was a proper exercise of administrative authority since the Civil Service Commission has not issued general regulations covering the grant of administrative leave and, therefore, each agency, under the general guidance of the decisions of the Comptroller General, which are discussed in the applicable FPM Supplement, has the responsibility for determining the situations in which excusing employees from work without charge to leave is appropriate.

To O. Medlin, Department of the Air Force, February 12, 1974:

We refer to your letter of August 29, 1973, which questioned the authority of the local Commander of McClellan Air Force Base, California, to grant retroactively, under the applicable Civil Service Commission and Air Force Regulations, 8 hours of administrative leave to Mr. Drue Burkhalter, a civilian employee of the Air Force at McClellan AFB. During this period Mr. Burkhalter was engaged in cleaning and contacting agencies to repair damages to his home in Roseville, California, which became necessary as a result of the explosion of an ammunition train which damaged numerous dwellings in the community.

The Civil Service Commission has issued no general regulations on the subject of granting excused absence to employees without charge to leave (commonly called administrative leave); however, this matter is discussed in FPM Supplement 990–2, Book 630, subchapter S11. Further, regulations on this subject which apply only to daily, hourly and piecework employees, e.g. wage board employees, which were issued under the authority of 5 U.S.C. 6104 are contained in 5 CFR 610.301 *et seq.* In general, those regulations provide that an administrative order relieving or preventing a daily, hourly or piecework employee from working may be issued for one or more of the following reasons:

(a) Normal operations of an establishment are interrupted by events beyond the control of management or employees;
(b) For managerial reasons, the closing of an establishment or portions thereof is required for short periods;
(c) It is in the public interest to relieve employees from work to participate in civil activities which the Government is interested in encouraging; or
(d) The circumstances are such that an administrative order under paragraph (a), (b), or (c) of this section is not appropriate and the department or agency under its regulations excuses, or is authorized to excuse, without charge to leave or loss of pay, employees paid on an annual basis.

Under administrative practice and decisions of this Office similar standards are applied to salaried (General Schedule) employees. Among the various purposes for which the granting of administrative leave has been recognized either by law, Executive order, Executive policy, or decisions of our Office, are those mentioned in FPM Supplement 990–2, Book 630, subchapter S11. These include:

(1) Registering and voting
(2) Civil Defense activities
(3) Participation in military funerals
(4) Blood donations
(5) Tardiness and brief absences
(6) Taking examinations

(7) Attendance at conferences or conventions
(8) Representing employee organizations
(9) Office closings

Paragraph a of subchapter S11–5 of Book 630 contains the following general instruction with regard to the type of absence in question:

> With few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may by administrative regulation place any limitations or restrictions they feel are needed. Some of the more common situations in which agencies generally excuse absence without charge to leave and in addition to those specifically given above, are covered in this section.

The copies of pertinent Air Force and AFLC regulations which you cite, AFR 40–602 and AFLC Supplement 1 to that regulation, provide further instructions with respect to the specific circumstances in which administrative leave may be granted. Under those regulations the appropriate commander is authorized to approve such absences.

Since the Commission has not issued general regulations covering the grant of administrative leave each agency is responsible for determining those situations in which excusing employees from work without charge to leave is appropriate under the general guidance of the decisions of this Office as they are discussed in the applicable FPM Supplement.

Although the granting of time off without charge to leave in circumstances similar to those in this case has not been the subject of a decision of this Office and is not specifically discussed by the Civil Service Commission or covered by Air Force regulations the responsible official of the Department determined that such leave should be granted in Mr. Burkhalter's case and in the cases of other employees who were unable to report to work as a result of the ammunition train explosion. Since the scope of authority for making such determinations is not clearly defined in law and regulation and since the excused absence was related to an emergency situation similar to those covered in the Air Force regulation we do not believe that the exercise of the commander's authority to excuse employees should be questioned in this case.

Accordingly, we find that the change in the leave charged to Mr. Burkhalter for Monday, April 30, 1973, from annual to administrative was proper and would not question such action in similar cases.

[B–179101]

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

Upon reconsideration of the holding in 53 Comp. Gen. 440 (B–179101, Dec. 28, 1973) that an offer which failed to include the justification required by the

request for proposals when manhours proposed deviated by more than 5% from the Government's estimate was improperly rejected as no discussion was held with the offeror the holding is affirmed, since reliance on the numerical deviation for rejection of the proposal was inconsistent with the technically acceptable proposal which indicated the offeror could adequately perform notwithstanding the manhours deviation, and with ASPR 3-805.2, which requires the inclusion of offers in the competitive range that have a reasonable chance of being selected for award or if there is doubt as to whether the offers are in the competitive range.

In the matter of ABC Management Services, Inc., February 13, 1974:

Tidewater Management Services, Inc. (Tidewater) has requested reconsideration of our decision 53 Comp. Gen. 440 (1973) in which we advised the Secretary of the Navy that the renewal option in Tidewater's contract to perform mess attendant services at Port Hueneme, California, should not be exercised because another firm, ABC Management Services, Inc. (ABC), had been improperly excluded from the competitive range during the initial evaluation of proposals.

The request for proposals (RFP) warned offerors that proposals containing manning charts showing hours more than 5 percent below the stated Government estimates of minimum required manhours "may result in rejection of the offer without further negotiation" unless the offeror substantiated the manning difference to show that it could perform satisfactorily with the proposed fewer hours. ABC's offer was rejected because it failed to justify a deviation of more than 6 percent from the Government estimate. However, we viewed the rejection as inconsistent with Armed Services Procurement Regulation (ASPR) 3-805.2 because ABC's offer had been found to be technically satisfactory and yet was rejected solely because its manning chart deviated from the predetermined manhour level set forth in the RFP.

Tidewater asserts that the 5 percent requirement of the RFP should be regarded as controlling, and suggests that a more appropriate basis for rejection of ABC's offer would be that it was "nonresponsive" rather than "outside the competitive range."

The concept of "responsiveness" is for application in formally advertised procurements, and refers to whether or not a bid offers to provide the Government's stated needs. A bid which does not meet those needs must be rejected as nonresponsive, without any discussion with the bidder involved. However, the concept of responsiveness is not applicable to negotiated procurements in which the Government normally has a statutory duty to hold discussions with all offerors in the competitive range. 10 U.S. Code 2304(g). Contracting officers generally have been required to include proposals in the competitive range if there was a meaningful possibility that they could be improved by written or oral discussions to the point of being acceptable for

award. 47 Comp. Gen. 29 (1967); 50 *id.* 59 (1970). Furthermore, ASPR 3-805.2 now states that offers shall be included in the competitive range if they "have a reasonable chance of being selected for award" and even if "there is doubt" as to whether the offers should be in the competitive range.

We agree with Tidewater that effect should be given to the RFP provisions, and we have specifically recognized that the RFP provisions give contracting officers "discretion to eliminate unsubstantiated sub-95 percent offers from consideration at any time before award" and that they need not "accept an unsubstantiated low-hour offeror's proposal because of the offeror's mere assertions that it can perform adequately." 53 Comp. Gen. 388 (1973). However, in that case the contracting officer included within the competitive range offers proposing manning levels outside the 5 percent acceptable deviation because it was determined that meaningful negotiations could be conducted with those offerors. It was only when the offerors failed, after discussion, to upgrade their proposals or substantiate their deviations that the proposals were rejected. *See also* B-179174, January 15, 1974. On the other hand, Navy contracting officers have also exercised their discretion to reject, without discussion, offers deviating more than 5 percent from the Government estimate. *See*, e.g., 53 Comp. Gen. 440, *supra.*

In this case, we might well have no disagreement with the contracting officer's decision to reject ABC's offer but for the fact that food service personnel evaluated the offer and found it to be technically satisfactory prior to the time the contracting officer made his decision. Under these circumstances, we think the contracting officer's reliance on ABC's numerical deviation to reject its proposal was inconsistent with the technical evaluation and with the requirements of ASPR 3-805.2 and was similar to determining the competitive range by means of a predetermined score. In our view, the technical evaluation indicated that ABC could adequately perform notwithstanding its man-hours deviation, and the contracting officer therefore had a duty to conduct discussions with ABC.

Accordingly, our previous decision is affirmed.

[B-179744]

Contracts—Specifications—Restrictive—Particular Make—Design *v.* Performance Criteria

In a brand name or equal formally advertised procurement the use of a nonfunctional design rather than a performance criteria is unduly restrictive and inconsistent with the principles underlying 10 U.S.C. 2305 and paragraph 1-1206 of the Armed Services Procurement Regulation, thus preventing award for a product that admittedly meets Government requirements.

Bids—Discarding All Bids—Compelling Reasons Only

The fact that specifications are inadequate, ambiguous, or otherwise deficient is not a compelling reason, absent a showing of prejudice, to cancel an invitation and, therefore, the invitation for Radiographic Polyester Film, canceled to correct salient characteristics, should be reinstated, since the contradiction between salient characteristics and brand name product alone is not a compelling reason for cancellation.

Bids—Discarding All Bids—Reinstatement

Where the readvertising of a procurement would create an auction atmosphere, because all prior bidders would participate in the resolicitation and all bidders would most likely offer the products previously offered, but at reduced prices, there was no cogent and compelling reason to justify cancellation of the invitation and as the cancellation was prejudicial to the competitive system as an award under the initial solicitation would have served the needs of the Government, the original invitation for bids should be reinstated.

In the matter of GAF Corporation; Minnesota Mining and Manufacturing Company, February 13, 1974:

On June 22, 1973, the Defense Personnel Support Center (DPSC) issued invitation for bids (IFB) No. DSA120–73–B–3736. The IFB sollicited bids on five sizes of Radiographic Film in varying estimated quantities, for delivery on an f.o.b. destination basis. The procurement contemplated a 1-year requirements type contract with award to be made on an "all or none basis" for all five sizes of film.

The technical requirements applicable to the solicited supplies were described in Defense Medical Purchase Description No. 1, dated 14 December 1971, attached to the solicitation. Under the heading "Description" on page 1 of the Purchase Description, the Government's requirements were stated, in part, as follows:

Shall be Kodak's RP X-Omat film, Dupont's Cronex 4 film, GAF's HR 2000 film, 3M's Type R film or equal.

The salient characteristics of the required film were specified on pages 1 and 2 of the Purchase Description, and certain tests were prescribed on pages 4 and 5 for determining compliance with the stated requirements. The following portions of the Purchase Description are pertinent to the protested cancellation:

Material. The film shall consist of a transparent blue-tinted polyester base, coated with emulsion on both sides. The materials shall be suitable in all respects for the purpose intended. A clear base shall not be acceptable.

* * * * * * *

The film shall consist of a blue-tinted optically-homogeneous, transparent polyester base, uniformly coated with a radiosensitive emulsion on both sides.

* * * * * * *

Base Tint. The emulsion shall be removed [from] both sides of a sheet of fresh film using chlorine bleach. The base shall then be examined for blue tint. A clear base shall not be acceptable.

Three of the four brand name manufacturers responded to the solicitation. The low bid submitted was that of GAF Corporation (GAF) and the second lowest was that of Minnesota Mining and Manufactur-

ing Company (3M). The highest bid was that of Eastman Kodak Company. Its bid was determined to be nonresponsive due to certain exceptions taken to material solicitation clauses and to specification requirements not related to those quoted above. Dupont did not submit a bid under this IFB. Therefore, it appeared that only GAF and 3M had submitted bids responsive to the solicitation.

Having submitted the low bid, a preaward survey of GAF was initiated on July 25, 1973. The request for survey put forth DPSC's belief that GAF was offering a new film which had not previously been supplied to the Government and a special check was requested to assure that GAF was familiar with the specification requirements.

As a result of the survey, it was discovered that GAF's HR 2000 film, specifically listed as a brand name product in the Purchase Description, and offered by GAF in response to the solicitation, failed to comply with the above-quoted Purchase Description requirements relating to blue-tinted base, in that the offered film utilized a clear base which did not meet the "Base Tint" test requirement of the Purchase Description. On this basis, the survey report found GAF unsatisfactory as to technical capability, production capability and ability to meet the required schedule. Accordingly, the report recommended that no award be made to GAF. In forwarding the Pre-Award Survey Report to the Purchasing Office, the Quality Assurance Branch of DPSC also recommended that GAF not be considered an acceptable source for the solicited supplies.

On August 21, 1973, the contracting officer requested the Division of Technical Operations to determine whether the Purchase Description requirement for film consisting of a blue-tinted base (to the exclusion of a clear base) reflected the Government's minimum essential needs, or whether film of the type represented by GAF's HR 2000, consisting of a clear base but coated with a blue-tinted emulsion, satisfactorily met the Government's requirements. The purpose of this inquiry was not to determine the possibility of accepting GAF's HR 2000 film as offered, but to determine whether the award should be made to 3M or withheld entirely, with all bids to be rejected and the solicitation canceled. If it was determined that only the blue-tinted base film, as required by the Purchase Description, satisfied the Government's needs, DPSC intended to make award to 3M. Otherwise, consideration was to be given to possible cancellation of the solicitation.

After a review of the Purchase Description but before a reply was received from the Technical Services Branch, the contracting officer decided that GAF's film did not meet the requirements for film consisting of a transparent blue-tinted base, coated with a radio-sensitive emulsion on both sides, because GAF's film was constructed of a clear

base coated with a blue-tinted emulsion. The contracting officer's conclusion was reinforced by the emphasis placed upon the salient characteristics in the IFB and the blue-tint test requirement. Therefore, the contracting officer determined that from a technical and legal viewpoint GAF's offer to furnish its HR 2000 film would not conform to the specification and could not be considered for award.

However, on September 6, 1973, the Technical Services Branch notified the Purchasing Office that a determination had been made that film consisting of a clear base coated with a blue-tint emulsion would meet the needs of the Government equally as well as film with a blue-tinted base. Given this new information, the requirements as set forth in the Purchase Description were considered to be unduly restrictive. A written statement to this effect was issued on October 1, 1973, by the Defense Medical Materiel Board.

Meanwhile, on September 7, 1973, the contracting officer executed a Determination and Findings stating that the specifications applicable to the pending procurement did not adequately describe the Government's requirements, and based thereon, it was determined that the solicitation should be canceled. GAF was notified of the cancellation and was informed that, following revision of the specification, it would be resolicited. Each of the other companies submitting a bid was issued a similar letter on the same date.

Following cancellation of the solicitation, the Purchase Description was revised and redesignated Defense Medical Purchase Description No. 2, dated October 3, 1973. As revised, the Purchase Description identifies the brand name film products previously specified, including GAF's HR 2000 film. However, the salient characteristics of the film had been modified to indicate that the film shall consist of a transparent blue-tinted polyester base *or* a clear colorless polyester base with a blue-tinted surface coat, uniformly coated on both sides with a radiographic emulsion. This revised Purchase Description would be utilized in resoliciting the canceled procurement and in future procurements of the radiographic film described above.

GAF, however, puts forth the following arguments in response to the actions taken by DPSC:

(a) The Purchase Description applicable to the canceled solicitation could be interpreted so as to permit GAF to offer its HR 2000 film; (b) even if the Purchase Description was to be considered ambiguous, the ambiguity could and should have been waived because it had no effect on price, quality or quantity and placed no one at a competitive advantage; (c) if the film offered by GAF did, in fact, deviate from the stated requirements the deviation was not a material one and should have been waived; and (d) cancellation of the procurement was

improper because it was prematurely accomplished before the Government had determined whether there was any material difference between film with a blue-tint base with a clear emulsion and a clear base film coated with a blue-tinted emulsion.

GAF points out that it accomplishes the required functional results through different design approaches which do not affect either the capability or the adaptability of its film. Our review of the salient characteristics as set forth in the IFB fails to disclose any design criteria which contain any functional significance in this procurement. Therefore, after reviewing and considering the applicable regulations and authorities, we conclude that the use of design criteria which serve no functional purpose in a situation such as this in brand name or equal formally advertised procurements is inconsistent with the principles underlying 10 U.S. Code 2305 and its implementation at Armed Services Procurement Regulation (ASPR) 1–1206, prescribing the procedures to be followed in brand name or equal procurements.

It appears from the record that the specific design features of the salient characteristics were not necessary to meet the minimum needs of the Government. Additionally, GAF's HR 2000 film is now considered to be an acceptable item under the canceled IFB, and would also be acceptable as a brand name product should DPSC resolicit for the type of film. Therefore, our Office is now faced with the question of either to uphold the cancellation, as the Defense Supply Agency (DSA) argues, or to recommend reinstatement of the canceled IFB and have award made to the low responsive and responsible bidder thereunder, as urged by GAF.

DSA contends that cancellation is the only means of remedying any prejudicial effect the inclusion of GAF's part number as a brand name may have had upon GAF and the competitive bidding system. To support this position, Assistant Counsel for DSA cites our decision B–149824, October 12, 1962, which asserts the proposition that when a solicitation specifies a brand name or equal item which does not meet the salient characteristics set forth, there is an ambiguity created by the two divergent specifications which does not permit full and free competition on an equal basis.

GAF, on the other hand, contends that B–149824, *supra*, is inapplicable to the present situation. It is our opinion that the latter contention is correct. In B–149824, *supra*, the ambiguity resulted from a difference of opinion between the contracting officer and the Quartermaster General as to the use of salient characteristics and a brand name or equal stipulation to describe the article to be procured. The brand name product listed did not have the same features as the product offered by the company that received the award. Further, if

the lesser product was what was actually desired, the brand name company would have offered another of its products instead of the model listed as a brand name. Therefore, the ambiguity resulted from the difference of opinion as to what constituted an acceptable "or equal" product. Given these specific circumstances, the ambiguity was found to have been prejudicial in that the advertisement did not permit full and free competition on an equal basis. In the instant procurement, however, there does not appear to have been such a prejudicial ambiguity. The product offered by GAF met all of the essential performance characteristics and requirements. Moreover, the product offered was one of the brand name items called out in the solicitation. The only shortcoming of the HR 2000 film was that it failed to meet the blue-tinted base requirement. This requirement, however, was a design requirement which, as we previously have stated, was neither essential to meet the Government's actual needs, nor was it proper to use such a design criteria.

Therefore, in order to sanction the cancellation of the IFB and the resolicitation as recommended by DSA, it must be established that the improper salient characteristics had a prejudicial effect on the preservation of the integrity of the competitive bidding system.

The authority to cancel an invitation after bids are opened is contained in ASPR 2-404.1 as follows:

> (a) The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a *compelling reason* to reject all bids and cancel the invitation * * *.
>
> (b) When it is determined prior to award but after opening that the requirements of 1-1203 (relating to the availability and identification of specifications) have not been met, the invitation for bids shall be canceled. Invitations for bids may be canceled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that—
>
> (i) inadequate or ambiguous specifications were cited in the invitation * * *. [Italic supplied.]

In this case, ASPR 2-404.1(b)(1) was cited as authority for the cancellation action.

While we recognize that the contracting officer is afforded broad authority to reject all bids and readvertise and ordinarily we will not question such action (B-178134, May 29, 1973, and cases cited therein), we believe the cancellation of the IFB in this instance was not based on a "compelling reason." As stated in *The Massman Construction Co.* v. *United States*, 102 Ct. Cl. 699, 719 (1945):

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

The mere utilization in an IFB of inadequate, ambiguous or otherwise deficient specifications is not, absent a showing of prejudice, a

"compelling reason" to cancel an IFB and readvertise. The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have extended manpower and money in preparation of their bids without the possibility of acceptance. 52 Comp. Gen. 285 (1972). Moreover, as a general proposition, it is our view that cancellation after bids are opened is inappropriate when an award under a solicitation would serve the actual needs of the Government. 49 Comp. Gen. 211 (1969); 48 *id.* 731 (1969).

The responsiveness of GAF's bid on its HR 2000 film depends on whether the film as offered conforms to the essential requirements of the invitation. GAF's HR 2000 film was listed as one of the four brand name products specifically acceptable under the IFB. Moreover, as has been stated above, DPSC has determined that GAF's HR 2000 film does indeed conform to the essential requirements of the IFB. There is, however, a discrepancy between a brand name product listed and one of the salient characteristics. By definition, salient characteristics are descriptive of certain features of the brand named products particularly required by the Government to meet its functional needs. The record before us does not support the essentiality of the blue-tint requirement insofar as film function is concerned. Indeed, DSA admits that this requirement is nonfunctional and GAF's HR 2000 film, which has a blue-tinted emulsion, meets its needs.

There is an obvious conflict between the designation of GAF's HR 2000 film and the salient characteristic calling for a blue-tinted base. We think it was reasonable for GAF, on the basis of the name brand designation, to conclude that the procuring activity had determined that its designated product was acceptable despite the salient characteristic. Ordinarily, this type of ambiguity in the specifications would require rejection of all bids and readvertisement of the procurement. However, we do not find that kind of action to be called for in this instance.

It is our opinion that there was no reason to believe that firms other than the listed brand name manufacturers would have bid on a resolicitation or that the brand name bidders would have offered any different film if the erroneous salient characteristics were changed to include the GAF product. In this regard, we have obtained informal advice from DSA that no companies, other than the four brand name firms listed, were either solicited or expected to submit bids. Further, if the procurement were resolicited, no products other than those offered in response to the original IFB could be expected to be offered.

Thus, the net effect of a new solicitation would be to create an auction atmosphere—a situation where the new bids would constitute responses to the prior exposed bid prices rather than to any significant change in the salient characteristics. 52 Comp. Gen. 285 *supra.* We therefore feel that the inconsistency in the specifications was not, on the record, a cogent and compelling reason to cancel the solicitation.

In the circumstances, we conclude that no "cogent and compelling reason" existed to justify cancellation of the invitation. Therefore, it is our recommendation that the original IFB be reinstated, the design criteria for a blue-tinted base as opposed to a blue-tinted emulsion be waived, and award made to the resulting low responsive, responsible bidder.

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.

[B-178001]

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Proposal Revisions

The rejection of a proposal initially determined to be within a competitive range on the basis of oral statements made by the offeror during the course of discussion was improper since the offeror was not afforded an opportunity to submit a revised proposal. While the duration of a negotiation session with an offeror is not determinative of whether meaningful discussions were conducted, affording the offeror the opportunity to submit a revised proposal is an essential element of the negotiating process required by 10 U.S.C. 2304(g). However, the procurement should not be disturbed since the record shows the award was made to the offeror submitting a superior proposal and the agency had serious doubts as to protester's ability to perform contract. Modified by 53 Comp. Gen. — (B-178001, May 14, 1974).

Contracts—Negotiation—Notice to Offeror of Disqualification

Where an award was not made under the request for proposals until 20 days after the protester's proposal was determined to be unacceptable, paragraph 3-508.2 of the Armed Services Procurement Regulation required the agency to notify the protester that its proposal was rejected. However, any violation of the regulation is procedural and does not affect the award.

In the matter of Operations Research, Incorporated, February 14, 1974:

Contract No. N61339-73-C-0097 was awarded to the IBM Corporation (IBM) under request for proposals (RFP) No. N61339-73-R-0041, issued on October 17, 1972, by the Naval Training Equipment Center (NTEC) Orlando, Florida. The solicitation invited proposals on a cost-plus-a-fixed-fee basis for research and development services in connection with the "determination of the technologies potentially supportive of the design, operations, evaluations, and redesign of the

Navy training system." This objective is to be accomplished in three phases, with Phase I–analysis of the Navy's education and training systems being the subject of the procurement.

On the November 20, 1972, closing date, four proposals were received. On December 1, 1972, the Navy prepared a list of "technical clarification" questions for each of the four offerors. All the offerors' responses to these questions were evaluated by cognizant technical personnel and it was determined that only the proposals submitted by Operations Research, Incorporated (ORI) and IBM were acceptable "but require further discussion." Accordingly, only those two firms were invited to attend "technical clarification" conferences, held separately for ORI on January 8, 1973, and for IBM on January 9, 1973, and the other two offerors were advised that their proposals were unacceptable. The responses of the offerors to questions posed at these conferences were evaluated, resulting in the award of a contract on February 1, 1973, to IBM at an estimated cost of $309,828, including fee.

Counsel for ORI contends that the award to IBM was unlawful because the Navy did not conduct full and meaningful negotiations with ORI as required by statute (10 U.S.C. 2304(g)) and applicable regulations. Counsel argues that since the record indicates that the ORI proposal was not considered technically unacceptable after the "technical clarification" conference of January 8, 1973, ORI was still within the competitive range. In this regard, counsel points out that although the memorandum of the final evaluation dated January 9, 1973, shows that IBM's technical score rose to 95.7 and ORI's technical score fell to 77.7 as a result of the "technical clarifications" conferences in January, the memorandum does not state that ORI's proposal was unacceptable and includes the following statement:

> All proposals receiving an overall rating of 75%, or less, * * * are considered to be unacceptable from a technical standpoint.

Therefore, counsel concludes that ORI's proposal must have been considered acceptable. Accordingly, he contends that 10 U.S.C. 2304 (g) obliged the agency to conduct further negotiations with ORI, and that Armed Services Procurement Regulation (ASPR) 3-805.1 (b) required the agency to establish a common cut-off for negotiations with both offerors and to request them to submit best and final offers. Counsel points out that after January 8, 1973, agency personnel held no discussions with ORI, did not advise it that negotiations were terminated, did not ask ORI for a best and final offer and never discussed or evaluated ORI's lower cost estimate. In support of his position that such failures were violative of the applicable statute, counsel cites 50 Comp. Gen. 117 (1970), where we held that the agency failed to

observe the established principles of negotiated procurement when it awarded a contract to a "superior" offeror without holding cost or full technical discussions with other "weak" though acceptable offerors, and failed to establish a common cut-off for negotiations and solicit best and final offers from all acceptable offerors.

The Navy concedes that ORI was considered to be within the competitive range after the December clarification but argues, citing 52 Comp. Gen. 198 (1972), that it was not required to hold further negotiations with ORI after the January 8, 1973 conference because, as a result of ORI's responses during the conference, its proposal was no longer considered within the competitive range. The Navy states that it was concluded that meaningful discussions could not be conducted with ORI "once it was determined that the technical proposal was materially deficient."

As ORI's counsel points out, section 2304(g) of Title 10 of the U.S. Code requires that written or oral discussions be held with all offerors within a competitive range. We have held that in order to have meaningful discussions within the intent of 2304(g), offerors should be advised of the areas in which their proposals have been judged deficient so that they may have the opportunity to satisfy the Government's requirements, and thereby the Government may obtain the full benefits of competition. 47 Comp. Gen. 29 (1967); *id.* 336 (1967); 51 *id.* 431 (1972); 52 *id.* 466 (1973).

At the same time we have recognized that the pointing out of deficiencies during the course of negotiations could lead to technical transfusion and technical leveling, and that these practices are detrimental to the competitive process. Therefore, we have held that no fixed, inflexible rule can be used to construe the requirement in 2304(g) for written or oral discussions; rather the content and extent of discussions needed to meet the requirement is a matter of judgment primarily for determination by the procuring agency. 51 Comp. Gen. 621 (1972); *see* ASPR 3-805.3.

Our decision of 52 Comp. Gen. 198, *supra*, was consistent with these principles. In that case the protester was initially determined to be within the competitive range. Examination of the protester's revised proposal, however, revealed serious shortcomings in the protester's approach to the contract work. The revised proposal was found by the agency evaluators to be deficient in many areas, and it was evident that the protester could have satisfied the agency's misgivings at that point "only through completely revising its cost and technical proposals." (*ibid*, at p. 208.) Therefore, we held that the agency was not required to hold further discussions with the protester merely because its proposal initially had been determined to be within the com-

petitive range. Thus we stated (at p. 208) that, "Whether the proposal is initially determined to be within the competitive range or whether the proposal is initially rejected, the contracting agency should not be required to hold discussions with an offeror once it is determined that his proposal is outside the acceptable range."

However, we do not believe that our holding in 52 Comp. Gen. 198, *supra*, is applicable where, as here, a revised proposal has not been submitted and evaluated. We have never held that a proposal initially determined to be within the competitive range may be determined to be no longer within that range on the basis of oral discussions with the offeror without the receipt and evaluation of a revised proposal from the offeror. In fact, it is our view that while the duration of a negotiating session is by no means determinative of whether meaningful discussions have been held with an offeror, 52 Comp. Gen. 161, 163 (1972), affording the offeror the opportunity to submit a revised proposal is an essential element of the negotiating process required by 10 U.S.C. 2304(g). Therefore, once ORI's proposal was determined to be within the competitive range the Navy should have given ORI the opportunity to submit a revised proposal before making any further determination with regard to the acceptability of ORI's proposal. The statutory goal of maximum competition in the area of negotiated procurements may be achieved only if all offerors within the competitive range are afforded an equal opportunity to revise their proposals. *See* ASPR 3-805.1(b). ORI was denied this opportunity.

Although we find that the Navy's failure to request a best and final proposal by ORI was improper, we do not believe award to IBM should be disturbed. It is evident from statements in the January 9, 1973 memorandum concerning the ORI proposal such as "the bidder's proposal does not present the vision necessary to analyze the Navy Training System—" and "the offeror was unable to explain satisfactorily the translation of the lattice network to be mathematical models. This is significant * * *," that the Navy evaluators had serious doubts as to ORI's ability to perform the contract. Furthermore, it is clear that IBM was considered to have submitted the superior proposal. Under the circumstances, we do not feel any useful purpose would be served by disturbing the award to IBM and reopening the procurement at this point. However, we recommend that the Secretary of the Navy should insure that a reoccurrence of the instant situation be avoided in the future.

Finally, counsel contends that the Navy failed to notify ORI that its proposal was determined unacceptable as required by ASPR 3-508.2. In our opinion, the regulation does contemplate that notice of unacceptability will be given promptly where award is not antic-

ipated within a "few" days. Since the award to IBM was not made until some 20 days after ORI's proposal was determined unacceptable, we believe that such notice should have been provided. However, any violation of the regulation was procedural and did not affect the validity of the award.

[B-179406]

Bids—Mistakes—Corrections—Still Lowest Bid

The worksheets submitted to substantiate the allegation of error in the low lump-sum bid to perform janitorial services having established the error occurred in the bid preparation by subtracting rather than adding the profit item, the bid may be corrected. Furthermore, although the bidder made no claim of error for other items the agency contends were omitted in the bid preparation that does not preclude consideration of the bid as corrected since the corrected bid approximates the Government's estimate for the job and evidence indicates the bid would be low even if the omitted items were to be added to the bid.

Bids—Mistakes—Evidence of Error—Determination Procedure

The apparent computation of certain individual items on worksheets furnished in support of an error in bid after the total price was determined rather than before is a logical if not an optimum procedure and does not reasonably put the authenticity of the worksheets into question.

In the matter of Oneida Chemical Company, Inc.; O'Brian Cleaning Company, Inc., February 14, 1974:

On May 30, 1973, invitation for bids (IFB) No. 2PBO-MB-894 was issued by the General Services Administration (GSA) for janitorial services at the U.S. Customs and Immigration Station in Champlain, New York. At bid opening on June 20, 1973, two bids were received, one from the Oneida Chemical Company, Inc. (Oneida), in the amount of $107,602.96 and one from the O'Brian Cleaning Company, Inc. (O'Brian), in the amount of $146,000. The Government's estimate of the cost of performing the contract was $158,000.

On June 21, 1973, a representative of Oneida contacted GSA's New York Regional Office and advised of an alleged mistake in bid. The representative was advised to submit the original worksheets and any other pertinent information and documentation in support of the claimed mistake. At a meeting in GSA's New York Regional Office on June 27, 1973, the Oneida representative submitted the company's worksheets. On July 3, 1973, that same office received a letter dated June 27, 1973, from Oneida explaining how the alleged mistake occurred.

On July 11, 1973, a Board of Award meeting was held to consider Oneida's alleged mistake in bid. The Board of Award found that the evidence submitted did not support the existence of the alleged mistake nor the bid intended. It was also found that Oneida's worksheets

revealed other supposed errors of omission or underestimation that the Board determined would seriously impair the protestant's ability to perform the contract as bid. A written Findings and Determination that Oneida's bid price was so far out of line with the amount of the other bid received and the amount estimated by the Government that acceptance of the bid would be unfair to Oneida or to the other bidder and, therefore, should be rejected, was signed on July 13, 1973, and approved by the Assistant General Counsel, GSA, on July 24, 1973.

A certified letter was sent to Oneida advising that its bid had been rejected. On August 2, 1973, the Board of Award reconvened and recommended that the contract be awarded to O'Brian. By letter dated August 6, 1973, O'Brian was awarded contract No. GS-02B-17404, at its bid price of $146,000. On August 6, a telegram from Oneida protesting any award of the contract other than to itself was received in GSA's New York Regional Office after the letter of award to O'Brian had been mailed. Performance of the contract has been suspended by GSA pending resolution of the protest. O'Brian has been notified not to incur costs nor secure insurance or performance bonds until further notice.

It is Oneida's contention that since its mistaken bid of $107,602.96 and its alleged intended bid of $118,903.60 were both lower than that of O'Brian's bid, the contracting officer's only choice was to determine which of these amounts should have been the contract price and to make an award accordingly. GSA has taken the position that its actions were proper as (1) from the worksheets submitted, Oneida's intended bid price could not have been ascertained with any degree of certainty, nor was the authenticity of the worksheets clearly proven and (2) Oneida's bid was unrealistically low.

We have reviewed the worksheets that the Director, Buildings Management Division, had before him in connection with the alleged error and we do not agree that there is a lack of convincing evidence of the intended bid price under the IFB. Oneida's worksheet shows a total price of $113,253.28. The next listed entry is:

& Plus Profit (add 5% of Vol) 5650.32

However, instead of adding this amount, the protestant subtracted it to arrive at the $107,602.96 figure. Thus, since the amount to be included as a percentage of profit as figured on the total volume was clearly indicated, it was a matter of simple arithmetic to correct the final total and determine the intended total bid price which would have still been less than the next low bid.

As concerns the alleged omissions from the worksheets, we observe that the IFB only required the submission of a lump sum price for all the services to be performed and did not provide for prices on an item-

by-item basis. Furthermore, GSA has revised the original estimate of $158,000 for the job down to $113,059.97 plus profit and has furnished information which indicates that if the cost of items not specifically included in the worksheet were added to the bid it would remain the low bid. In that connection, our Office has permitted a bidder to forego a claim of error where the evidence has clearly indicated that the bid would have been the lowest absent error. *See* B–173031, September 17, 1971, and decisions cited therein.

Additionally, GSA has drawn into question the authenticity of Oneida's worksheets, contending that certain individual items which are shown to make up a total price figure appear to have been computed after the total price was determined rather than before. Oneida has submitted a detailed explanation as to how it computed its bid. It is our opinion, as a result of this explanation, that there is no reasonable basis to question the authenticity of the worksheets or to doubt that the worksheets furnished were not the actual worksheets used in the computation of Oneida's bid. Oneida added up all the known costs and then divided the total by the percentage of the total bid that amount represented. In other words, the total known cost is first computed. Indirect costs, such as overhead, profit and outside charges, are then determined as a percentage of the total amount to be bid. This percentage is then subtracted from 100 percent and the resulting percentage is divided into the figure representing the known costs. The result is the total cost figure for the bid. Applying this formula to Oneida's worksheets, we find no reason to doubt their authenticity. The only area of possible doubt in Oneida's worksheets is in the mistaken computation pointed out by Oneida. It might be argued that while Oneida's worksheets stated "& Plus Profit (add 5% of Vol) 5650.32," the mathematical function performed (subtraction) was correct and the words "Plus" and "add" were incorrect. However, it is our opinion that since the $5650.32 amount represented a profit figure, and in view of the amount bid by O'Brian and the $158,000 original estimate by GSA, Oneida intended to adjust its bid in an upward direction.

It has been contended that an award to Oneida at a price less than $125,000 would result in a loss contract. However, in view of the revision of the original $158,000 Government estimate to $113,059.97, plus profit, correction of the Oneida bid to $118,903.60 would not appear to result in a loss contract. It any event, our Office has held that an award may not be withheld merely because the low bid is a below-cost bid. B–178928, July 17, 1973.

In the circumstances. we recommend that the Oneida bid be cor-

rected to $118,903.60 and award be made to Oneida at the corrected bid price if it is determined to be a responsible bidder.

If the award is made to Oneida, the contract with O'Brian should be terminated for the convenience of the Government.

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.

[B-149372]

Vice-President—Protection After Resignation

Since the protective services provided by the Secret Service for former Vice President Agnew at the request of the President are being furnished without authority of law they should be discontinued. 18 U.S.C. 3056(a), the statute that authorizes Secret Service protection, does not provide for the protection of a former Vice President, and the President does not have "inherent executive power" to order Secret Service protection for the former Vice President as the President's power must stem either from an act of Congress or from the Constitution itself.

To the Secretary of the Treasury, February 15, 1974:

As you are aware this Office has considered the question of whether the protective services being provided by the Secret Service at your direction—pursuant to the request of the President—for former Vice President Agnew are authorized by law. We have concluded that they are not so authorized.

The statute authorizing Secret Service protection is 18 U.S. Code 3056(a). It provides in this respect as follows:

> Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice President or other officer next in the order of succession to the office of President, and the Vice President-elect; protect the person of a former President and his wife during his lifetime, the person of the widow of a former President until her death or remarriage, and minor children of a former President until they reach sixteen years of age, unless such protection is declined; protect the person of a visiting head of a foreign state or foreign government and, at the direction of the President, other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad; * * * and perform such other functions and duties as are authorized by law * * *.

(*See also* Public Law 90-331, set out as a note to 18 U.S.C. 3056, providing for protection of "major presidential or vice presidential candidates who should receive such protection.")

Section 3056(a) of Title 18 thus provides specifically for protection of an incumbent Vice President and of a Vice President-elect, and for protection of a former President during his lifetime, but not for

protection of a former Vice President. Moreover, the Congress has provided for certain services and facilities to be made available to former Vice Presidents, without including specific provision for Secret Service protection (act of March 7, 1964, Public Law 88–277, 78 Stat. 153 3 U.S.C. 102 note), and for protection of candidates for presidential or vice presidential office (Public Law 90–331). It is thus beyond qeustion that there is no statutory authorization for Secret Service protection of Mr. Agnew.

Nor can we agree with the reported contention of the Treasury Department that the President has "inherent executive power" to order Secret Service protection of Mr. Agnew. We believe that the President's power "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). In this case, as already noted, the acts of Congress provide no basis for the claim of Presidential power to order protection for Mr. Agnew.

With respect to the question of constitutional authority to order such protection, we note that section 3056(a) of Title 18 gives the President certain discretionary authority to order protection of distinguished foreign visitors to the United States (other than heads of State) or of official representatives of the United States performing special missions abroad. Also, we are aware that, in the legislative history of the act of January 5, 1971, Public Law 91–651, 84 Stat. 1940, 18 U.S.C. 713, which added that discretionary provision to section 3056 (a), there is a statement by the Treasury Department that the President has "inherent constitutional authority" to order protection of distinguished foreign visitors. S. Rept. No. 91–1463, 91st Cong., 2d sess. 2. However, the circumstances there involved were that the Department of State had traditionally provided protection foreign visitors under its general responsibilities for State visits, that this was considered to be a "foreign affairs function," and that the proposed legislation merely transferred the existing responsibility from the State Department to the Secret Service. Your Department there made no such claim of executive power as is apparently now being asserted; the letter from the Acting Secretary of the Treasury transmitting the proposed legislation stated that "it is our view that the President now has the inherent constitutional authority to direct the Secret Service to perform the functions *which would be authorized by this legislation*" (S. Rept. No. 91–1463, p. 3—i.e., the protection of foreign visitors and official American representatives abroad. Moreover, and notwithstanding the claimed executive authority, the Secretary of the Treasury requested and obtained specific statutory authority for the performance of the functions in question. [Italic supplied.]

We would agree that, under his constitutional duties to "receive Ambassadors and other public Ministers" (article II, section 3), and to make treaties subject to Senate advice and consent (article II, section 2), the President can provide for protection of distinguished foreign visitors to this country or of official representatives of the United States while they are abroad. Whether he could order the Secret Service to take over such functions from the Department of State without statutory authority it is unnecessary to decide, since the Congress saw fit to give him specific legislation to accomplish this purpose. However, in that situation, it is clear that the claim of inherent executive power finds its justification in furtherance of the President's performance of a constitutional duty, the conduct of foreign affairs. No such justification in terms of any constitutional duty of the President has, insofar as we know, been claimed in connection with the protection of Mr. Agnew, and none appears to this Office to be present. We must conclude that the reported claim of inherent executive power is without foundation. Hence, and since there is no statutory authority for furnishing Secret Service protection to Mr. Agnew, the furnishing of such protection is without authority of law.

We understand that the protection service is still being provided and the Department of the Treasury intends to continue it at least until sometime in April. We must advise, in light of the foregoing, that appropriations for the operations of the Secret Service are not available to pay the costs of furnishing Secret Service protection to former Vice President Agnew. Therefore future payments made for such purpose will be disallowed by our Office. Recognizing the administrative problems involved in discontinuing the protection being furnished, the disallowances will be made on any payments made after February 17, 1974. The concerned certifying officers should be immediately so informed.

Copies of this decision are being sent to the respective chairmen of the Committees on Appropriations of the House and the Senate, to Representative John E. Moss, and to other Members of Congress who have inquired to us concerning this matter.

[B-178563]

Transportation—Rates—Section 22 Quotations—Tender Applicable—Shipments Due to Military Activities Closing

Carrier's section 22 tender covering office furniture, files and equipment is not applicable on shipments of Bachelor Officers' Quarters furnishings and equipment, general commodities and household goods in connection with the closing of Floyd Bennett Air Field, but rather for application is the tender that covers household goods since shipments of an establishment moving from one location to another meets the ICC definition of household goods.

Transportation—Rates—Section 22 Quotations—Exclusive Vehicle Use Shipments

Where the carrier's section 22 tender for special vehicle services requires the service to be ordered by the shipper and that the shipping documents be marked to so indicate and the administrative office advises the services were not ordered, the carrier is not entitled to the special charges notwithstanding the shipping documents were properly marked. Modified by 53 Comp. Gen. —— (B-178563, May 15, 1974).

In the matter of Trans Country Van Lines, Inc., February 15, 1974:

Trans Country Van Lines, Inc., requests review of the settlement certificates which disallowed its claims for additional transportation charges on 26 shipments of Government property transported by the company in connection with the closing of Floyd Bennett Air Field, New York, and the relocation of a Federal Building in Cincinnati, Ohio.

Regarding the Floyd Bennett Field shipments, the carrier contends that household goods rates listed in Government Rate Tender I.C.C. No. 1–V should apply. Trans Country stated in a letter dated October 25, 1972, to the Transportation and Claims Division of this Office:

> This shipment was made incident to the removal of an establishment, or a portion thereof, from one location to another. Thus we have the authority to transport these commodities under our Government Rate Tender 1–V, Section 4 rates regardless of the rates published by any other carrier. As previously stated, G.R.T. 1–V, Section 4 rates apply since we have no provision in our Section 22 Quotation (ICC 150) for such a mixed commodity.

The Transportation and Claims Division of this Office initially concluded that Trans Country Van Lines Tender I.C.C. No. 150 was applicable. On review, this result was amended and the Division now believes that the carrier's Tender I.C.C. 150 is not applicable on the shipments since the commodities shipped do not appear in the list of commodities described in that tender. However, the Division also says that Tender I.C.C. No. 1–V is not applicable either since the articles described on the bills of lading are all general cargo commodities and there is nothing on the bills of lading to indicate a relocation of the establishment. Therefore, according to the Division, since Trans Country Van Lines has no published general commodity rates for its own account nor participates in the published rates of other carriers, compensation should be determined upon a *quantum meruit* basis with comparable published rates of other carriers used as a measure of just compensation.

Tender I.C.C. No. 1–V applies only in the absence of an applicable individual tender as filed by the carrier. If Tender I.C.C. No. 1–V were also found not applicable, then compensation would be based on a *quantum meruit* theory.

In order to determine which tariff or tender, if any, to apply, it is necessary to ascertain the identity of the articles shipped. Some factors to consider in making this determination are the shipping descriptions on the bill of lading, the function, and the use of the article. The bill of lading description of the shipped articles is *prima facie* evidence of the identity thereof and is entitled to great weight, as here, in determining the applicable quotation. *Southern Pacific Transportation Co.* v. *United States*, 454 F. 2d 740, 744 (1972), 197 Ct. Cl. 143 (1972).

The shipments in question involved various kinds of furnishings and equipment. For example, Government bill of lading (GBL) F-5586421 shows that "OFFICE FURNISHINGS AND EQUIPMENT (BOQ)" were shipped, GBL F-5586473 shows that "CARTS, DRISTRIBUTERS [sic] or SPREADERS SU, LOOSE ON WHEELS. NMFC 118925 SUB. 2" were shipped, and GBL F-5586471 shows that fire extinguisher charges or compounds, compressors or pumps, rubber hose, and chemicals were shipped. The remaining shipments involved in the deactivation of the Floyd Bennett Air Field were either shown on the bills of lading as being Bachelor Officers' Quarters (BOQ) furniture or furnishings or subsequent advice from the administrative agency showed the shipments to be BOQ or household goods and furnishings.

The term BOQ includes buildings and facilities for occupancy for certain members of the uniformed services, including living accommodations and furnishings. *See* 37 U.S. Code 403 and Army Regulations No. 210-16.

It is our view that articles such as the above mentioned and others which are described in the specific inventory lists (refrigerators, box springs, mattresses, etc.), are not normally considered as being covered by the commodity description in Tender I.C.C. No. 150, which reads in part, "OFFICE FURNITURE, FILES, FIXTURES AND EQUIPMENT, * * * ELECTRONIC EQUIPMENT * * * AND/OR PARTS THEREOF * * *." Therefore, the rates in Tender I.C.C. No. 150 are not applicable in ascertaining the charges for the commodities included in the subject shipments.

Item 10 of Tender I.C.C. No. 1-V provides that the description of property under the term "Household Goods," to which the tender rates apply is that class of property designated by the Interstate Commerce Commission in Ex Parte No. MC-19 (*Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, 473, 505 (1939) and reads in part as follows:

(a) *Household goods.* The term "household goods" means
(1) PERSONAL EFFECTS AND PROPERTY USED OR TO BE USED IN A DWELLING when a part of the equipment or supply of such dwelling;
(2) FURNITURE, FIXTURES, EQUIPMENT AND THE PROPERTY OF STORES, OFFICES, MUSEUMS, INSTITUTIONS, HOSPITALS, OR OTHER ESTABLISHMENTS, when a part of the stock, equipment, or supply of such stores, offices, museums, institutions, hospitals, or other establishments; and
(3) ARTICLES, INCLUDING OBJECTS OF ART, DISPLAYS AND EXHIBITS, which because of their unusual nature or value require specialized handling and equipment usually employed in moving household goods.

Trans Country contends that section (a)(2) would apply to the shipments in question. The interpretation of this subsection, contained in part (b) of Item 10 reads:

Subsection (2) shall not be construed to include the stock-in-trade of any establishment, whether consignor or consignee, other than used furniture and used fixtures, except when transported as an incident to the removal of the establishment, or a portion thereof, from one location to another.

As a result of the case of *Movers Conference of America* v. *United States*, 205 F. Supp. 82 (1962), this interpretative subsection was further clarified by the Interstate Commerce Commission in *Practices of Motor Common Carriers of Household Goods*, 95 M.C.C. 252, 256 (1964) to read:

Subsection (2) shall be construed to include the commodities mentioned therein when transported pursuant to the removal of the establishment, or a portion thereof, from one location to another, and used furniture, used fixtures, and used equipment of stores, offices, museums, institutions, hospitals, or other establishments transported (i) from location in one branch of an establishment to location in another branch of that establishment, (ii) from location in one establishment not regularly engaged in the sale, lease, or rental of such property to another establishment, and (iii) between location in an establishment and a repair or storage facility; but shall not be construed to include stock-in-trade of any establishment except when transported as an incident to the removal of the establishment, or a portion thereof, from one location to another.

The property removed from Floyd Bennett Field was not all consigned to one destination. The 13 shipments were consigned as follows: Dallas, Texas, two loads; Norfolk, Virginia, one load; New Orleans, Louisiana, five loads; Glenview, Illinois, three loads; Solomons, Maryland, two loads. It appears that these shipments would be included within sections ii and iii of the above construction. The commodities were moved "from location in one establishment not regularly engaged in the sale, lease, or rental of such property to another establishment," and "between location in an establishment and a repair or storage facility * * *."

Therefore, as for the goods shipped from Floyd Bennett Field to other locations around the country, we conclude as a result of the Commission's clarification of 17 M.C.C. 467, on which the commodity

description of Item 10 of Tender I.C.C. No. 1–V is based, found in 95 M.C.C. 252, 256, that Tender I.C.C.–IV is applicable in ascertaining the line-haul transportation charges for these shipments.

Regarding the Cincinnati to Avon move, the carrier claims that the shipments moved on commercial bills of lading (CBLs) marked for conversion to Government bills of lading (GBLs) at destination. And since the CBLs show that the special service of exclusive use of a vehicle of specific cubic capacity was ordered and that the shipment completely occupied the vehicle, the charges must be computed on the actual weight of the shipment subject to a minimum weight of seven pounds per cubic foot. This shipment involved the movement of office machines, desks, chairs, cabinets, etc., due to the closure of the Cincinnati Army Procurement Agency in Cincinnati, Ohio. The award for this movement of approximately 114,000 pounds of office furniture and equipment was made to Trans Country Van Lines on December 10, 1969. Trans Country subcontracted the move to Ferguson Van Lines, Inc., of Cincinnati. The administrative report sent to this Office indicates that (a) a specific amount of space or exclusive use of vehicle was not ordered, (b) the type of vehicles or capacity of such vehicles to be used in the move was not ordered, (c) all the vehicles used were loaded to capacity upon arrival at the depot in Avon, Kentucky, and (d) seals were not applied nor requested to be applied.

In connection with this issue of special vehicle services, the second paragraph of item #1 of Trans Country's Tender I.C.C. No. 50 provides:

> When the shipper or shippers agent *orders* a specific vehicle or vehicle service, i.e., complete occupancy of vehicle, exclusive use of vehicle, or the vehicle sealed, or space reservation for a portion of the vehicle or vehicles, and the government bill of lading, carriers bill of lading or DD 619 form is marked, stamped or annotated in any manner to indicate such specific vehicle or vehicle service, the carrier will provide the service and assess the transportation on charges computed on actual weight subject to a minimum weight based on seven pounds per cubic foot of vehicle space ordered or utilized. [Italic supplied.]

As we construe this provision, charges will be assessed for a specific vehicle or vehicle service *only* when the shipper or shippers agent *orders* such service or services. The second proviso relative to the assessment of premium charges for special vehicle services contained in item #1 requires that certain shipping documents be marked, stamped or annotated in a manner to indicate the specific vehicle or vehicle service.

While the records indicate full compliance with the second proviso relative to documentation, the record also clearly and affirmatively shows that the first condition for assessment of charges for special services was not met. To the contrary, the records show that neither

the shipper nor the shipper's agent ordered a specific vehicle or vehicle service.

Since the administrative report shows that a specific vehicle or vehicle service was not ordered, we must conclude that whoever caused the checkmarks and notations to be placed on the shipping documents to show that a specific vehicle or vehicle service was ordered was not in possession of the true facts and was not authorized to do so. Even though all the vehicles were loaded to capacity, there exists no basis for the assessment of the premium charges provided in item #1 of Tender I.C.C. No. 50 since the Government did not request the special vehicle services covered by that item. *See also* 51 Comp. Gen. 208 (1971).

Accordingly, the charges for the shipments involved in the deactivation of Floyd Bennett Air Field will be recomputed and, if otherwise correct, settlements making appropriate allowances will be issued. However, in connection with the shipments involved in the closure of a Federal building in Cincinnati, the settlement certificates disallowing the carrier's claims appear to be correct and are sustained.

[B-179971]

Sales—Bids—Deposits—Checks Lost—Government Liability

Bidder's claim for the incidental expenses that resulted from the loss of an unendorsed cashier's check, payable to the order of the General Services Administration (GSA) and submitted as a bid deposit incident to the sale of real property and which was lost in the mail when returned after all bids were rejected is denied because GSA, as pledgee, is only obligated to use ordinary care and its use of certified mail, return receipt requested, conforms with customary practice and pledgees need not insure pledged property.

Postal Service, United States—Claims—Losses in the Mails

Since under 39 U.S.C. 401(8) the Postal Service is authorized to settle and compromise claims against itself, the General Accounting Office does not have jurisdiction to consider the possible liability of the Postal Service for a lost check.

In the matter of Custer Development Corporation, February 20, 1974:

The General Services Administration (GSA) has requested our decision regarding the liability of the Government for certain expenses allegedly incurred by Custer Development Corporation (Custer) as a result of the loss of a bid deposit which GSA attempted to return to Custer by certified mail.

In January 1973, the General Services Administration, Property Management and Disposal Service, Region 5, solicited sealed bids on the sale of real property described as Housing Annex, Custer Air Force Station, Springfield, Michigan, D-Mich-4181. A deposit of 10 percent

of the amount bid was required to be submitted with the bid. GSA Form 1741, Instruction to Bidders, was included in the invitation for bids and contained the following provision regarding bid deposits:

> 5. BID DEPOSIT. Each bid must be accompanied by a bid deposit * * *. Failure to so provide such deposit shall require rejection of the bid. Upon acceptance of a bid, the appropriate bid deposit of the successful bidder shall be applied toward payment of the successful bidder's obligation to the Government. Appropriate bid deposits accompanying bids which are rejected will be returned to bidders, without interest, as promptly as possible after rejection of the bids.

Custer's bid deposit was in the form of a cashier's check, No. CR 489126, drawn by and on the Continental Illinois National Bank and Trust Company of Chicago and payable to the order of GSA in the amount of $84,100.10.

All bids, including Custer's, were subsequently rejected, and on February 12, 1973, the bidders were so notified with the return of their bid deposits by certified mail, return receipt requested. None of the bid deposits had been endorsed by GSA.

The certified mail log kept by GSA at the central mailroom of the Chicago Regional Office indicates that on February 12, seven pieces of certified mail were picked up by the Postal Service for deposit at the main Post Office, Chicago, Illinois. Among these letters were the bid deposits of the five bidders on the sale, including the unendorsed cashier's check submitted by Custer. Delivery receipts from the four other bidders reflect delivery dates of either February 14 or 15. However, Custer's bid deposit was never received at its office in Battle Creek, Michigan, the address recorded on the certified mail log.

GSA, after receiving information from Custer that it had not received the certified letter containing the bid deposit, promptly notified the bank which had issued the cashier's check to stop payment on the check, and it requested the United States Postal Service to investigate the loss. On March 29, the Postal Service informed GSA that the certified letter (No. 09992) containing Custer's bid deposit could not be located. After further investigation by the contracting officer, GSA concluded that the bid deposit had been lost in the mail and Custer was notified of this conclusion.

Custer believes that GSA was responsible for the loss of the check, particularly because it failed to utilize registered mail in returning the check. Various incidental expenses, totaling $4,490, were allegedly incurred by Custer as a result of the loss, "in an effort to recover the check and in reducing the corporation's liability on the check." Included in this amount is the cost of the indemnification bond which Custer was required to furnish the bank. To date, the missing check has not been presented at any bank for payment, deposit or collection.

GSA contends that the relationship created by the submission of a

bid deposit is a bailment for the mutual benefit of both the bailor (Custer) and the bailee (Government), and pursuant to this relationship it was obligated to return the deposit "without interest, as promptly as possible after rejection of the bids." (See above-quoted instructions to bidders.) In addition GSA has referred to its mailing regulations which provide for the use of certified mail where proof of receipt is needed and the material is of no monetary value. The regulations also provide for the use of registered mail for materials of monetary value that require the security and protection provided by the registered mail service. It is GSA's position that the check had no monetary value until lawfully endorsed by GSA and that the use of certified mail in returning it unendorsed was justified and in conformity with GSA's obligation to exercise the degree of care imposed by the contract of bailment.

A bailor-bailee relationship arises when the owner, while retaining legal title, delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the goods when the purpose of the bailment has been fulfilled, or to otherwise deal with the goods according to the bailor's instructions. *Lionberger* v. *United States*, 371 F. 2d 831, 840 (1967), 178 Ct. Cl. 151; *Maulding* v. *United States*, 257 F. 2d 56, 60 (1953). Where the bailment is motivated by the bailor's desire to promote a sale it is a bailment for mutual benefit. 72 C.J.C. § 8b.

More specifically a bid deposit is in the nature of a pledge, that is, a special type of bailment in which the property pledged is used for the purpose of securing an obligation owed by the pledgor to the pledgee. *Koch* v. *Han-Shire Investments, Inc.*, 140 N.W. 2d 55, 62 (1966); *Grace* v. *Sterling Grace & Co.*, 289 N.Y.S. 2d 632, 637 (1968); 38 Comp. Gen. 476, 477 (1959); 72 C.J.S. Pledges § 1. While legal title remains in the pledgor, the right to possession passes to the pledgee who has a special interest or property right in the pledge until the secured obligation has been satisfied. *Nelson* v. *Commissioner of Internal Revenue*, 101 F. 2d 568, 571 n. 3 (1939); 72 C.J.S. Pledges § 2. Furthermore, a pledge is like a bailment in that both bailees and pledgees are under a similar duty to exercise reasonable or ordinary prudence in caring for property delivered into their possession. See e.g., *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 110 (1941); *Marine Sales & Services, Inc.* v. *Greer Steel Co.*, 312 F. Supp. 718, 722 (1970); 72 C.J.S. Pledges § 33 b(1).

The record now before us clearly indicates that GSA delivered Custer's bid deposit to the Postal Service. The certified mail log lists Custer's bid deposit among the other pieces of certified mail which left GSA on February 12, 1973. We have been advised that the common practice at the Chicago Regional Office is to place mail that has

been recorded in the certified mail log into a locked, green nylon container. The container is then picked up by the Postal Service at the Regional Office and deposited at the Main Post Office. GSA has also provided us with copies of the delivery receipts from the other pieces of certified mail which were recorded in the mail log with Custer's bid deposit. Thus, we must conclude that GSA did in fact mail Custer's cashier's check by certified mail, return receipt requested, and that the check was lost after it had been placed into the possession of the Postal Service.

Under these circumstances, we do not believe that the manner employed by GSA to return the cashier's check violated its duty to exercise reasonable or ordinary care. GSA has stated that certified mail, return receipt requested, is the customary method utilized by Government procuring agencies to return bid deposits, and this Office has held that absent a specific contract provision, the manner of delivery of bailed property is governed by the customary practices employed in the circumstances. B-168616, February 9, 1970; 8 C.J.S. Bailments § 37(b)(1). Bailees are not normally under a duty to insure bailed goods on delivery of the property to a carrier for return to the bailor. *See* 8 C.J.S. Bailments § 23. Moreover, courts have approved bailees' use of less secure types of mail than registered mail in returning bailed property. See *R.C. Read & Co.* v. *Barnes*, 252 S.W. 224 (1923); *Lehman* v. *Fischzang*, 274 N.Y.S. 2d 971 (1966); B-168616, February 9, 1970, *supra.*

With regard to whether GSA's mailing regulations may have called for the use of registered mail, we think that GSA fullfilled its obligation to Custer by delivering the unendorsed check to the Postal Service and, upon notice from Custer of its nonreceipt, promptly notifying the bank to stop payment and requesting an investigation of the loss by the Postal Service.

Insofar as Custer contends that the Postal Service may have been at fault, this is not a matter for our determination. The law which created the United States Postal Service, effective July 1, 1971, gives it the authority to settle and compromise claims against it. 39 U.S.C. 401(8).

Accordingly, the claim is denied.

[B-164842]

Pay—Retired—Increases—Voluntary *v.* Involuntary Retirement

The holding in the case of *Edward P. Chester et al.* v. *United States* (199 Ct. Cl. 687), which authorizes the computation of retired pay based on rates effective July 1 rather than lower June 30 rates and accepted for Coast Guard officers in 53 Comp. Gen. 94, and for Air Force officers held beyond mandatory retirement date for physical evaluation, in 53 Comp. Gen. 135, is viewed as applicable to

Marine Corps officers retired mandatorily pursuant to Public Law 86–155, 73 Stat. 333, in view of the similarity between the applicable statutes and/or Marine Corps, and, therefore, an officer's retired pay may be computed on rates in effect July 1 of the year in which he retires. 48 Comp. Gen. 30 and other similar decisions are overruled.

To J. J. Burkholder, United States Marine Corps, February 21, 1974:

Further reference is made to your letter dated May 3, 1973, file reference RP–JJB–dm, forwarded to this Office by Headquarters Marine Corps letter dated May 21, 1973, file reference CD–egb 7225, requesting an advance decision as to whether the retired pay account of Colonel Stanley D. Low, 002011989, USMC, Retired, may be adjusted to reflect increased retired pay based on the basic pay rates in effect on July 1, 1968, rather than the lower rates in effect on June 30, 1968. The request has been assigned control number DO–MC–1191 by the Department of Defense Military Pay and Allowance Committee.

You say that in a previous decision of this Office, 48 Comp. Gen. 30 (1968), it was held that Colonel Low's retired pay should be computed based on the basic pay rates in effect on June 30, 1968, since the language of section 1(i) of the act of August 11, 1959, Public Law 86–155, 73 Stat. 333, 10 U.S. Code 5701 note, which subjected him to mandatory retirement, precluded him from voluntarily retiring effective July 1, 1968. However, you indicate that the Court of Claims in the case of *Edward P. Chester, et al.* v. *United States*, No. 169–70, decided October 13, 1972, 199 Ct. Cl. 687, held that certain Coast Guard officers subject to mandatory retirement on June 30, 1968, and 1969, pursuant to provisions of law similar to section 1(i) of Public Law 86–155, were entitled to have their retired pay computed on the higher rates of basic pay effective on July 1, 1968, or 1969, as the case might be. Therefore, in view of the court's decision in the *Chester* case, you now ask whether you may adjust the retired pay accounts of Colonel Low and other officers similarly situated to reflect the higher rates of basic pay in effect on July 1 of the year in which they retired.

In 48 Comp. Gen. 30, *supra*, the records showed that by orders dated May 3, 1968, Colonel Low was notified that in accordance with 10 U.S.C. 6323 and Public Law 86–155, he was transferred to the Retired List effective July 1, 1968. By letter dated May 10, 1968, to the Secretary of the Navy, Colonel Low requested voluntary retirement effective July 1, 1968, under the provisions of 10 U.S.C. 6323.

Apparently pursuant to Colonel Low's request, the orders of May 3, 1968, were canceled by orders dated June 10, 1968, which provided that his request for retirement after completion of more than 20 years' active service was approved and that he was transferred to the Retired List effective July 1, 1968, pursuant to 10 U.S.C. 6323 and Public Law 86–155. As we indicated in 48 Comp. Gen. 30, the impor-

tance to Colonel Low of being placed on the Retired List effective July 1, 1968, under authority of 10 U.S.C. 6323 is that his retired pay status then would be governed by the rule in our decision 44 Comp. Gen. 584 (1965). Under that rule Colonel Low would be entitled to have his retired pay computed on the rates of active duty pay in effect on July 1, 1968, rather than lower rates in effect June 30, 1968, upon which his retired pay would be computed if he were actually retired under Public Law 86–155.

In 48 Comp. Gen. 30 we noted that apparently the 1968 fiscal year continuation board, convened under the authority of section 1(a) of Public Law 86–155, considered Colonel Low but did not recommend him for continuation on the active list. He thereupon became subject to the involuntary retirement provisions of section 1(i) of that law which provides in part that officers subject to it "shall, notwithstanding any other provision of law," with certain exceptions not applicable in Colonel Low's case, "be retired on June 30 of the fiscal year in which the report of the board is approved or in which he completes 20 years of total commissioned service * * * whichever is later." It was our view, therefore, that the language of section 1(i) would preclude an officer subject to its provisions from retiring under any other provision of law unless other language contained in Public Law 86–155 evidences a contrary intent.

Regarding such a contrary intent, we noted that section 2(d) of Public Law 86–155 provides that an officer within its scope who is retired under Public Law 86–155 "* * * shall be paid, in addition to his retired pay, a lump-sum payment of $2,000, effective on the date of his retirement." And, section 2(e) provides:

> (e) An officer who has the qualifications specified in subsection (d) and who has been considered but not recommended for continuation on the active list pursuant to section 1 of this Act shall be considered for the purpose of subsection (d) as being retired under this Act *if the officer retires voluntarily prior to the date specified for his retirement under this Act.* [Italic supplied.]

Therefore, it was our view, as expressed in 48 Comp. Gen. 30, that while sections 2(d) and 2(e) of Public Law 86–155 apparently sanction voluntary retirements under the circumstances there prescribed, the phrase "notwithstanding any other provision of law" employed in section 1(i) precluded voluntary retirement under any other provision of law unless the voluntary retirement became effective before June 30 of the fiscal year prescribed in that section. Since under the provisions of the voluntary retirement statute (10 U.S.C. 6323) and the retirement orders of June 10, 1968, Colonel Low's name would be placed on the Retired List effective July 1, 1968, we held that he was mandatorily retired pursuant to Public Law 86–155 on June 30, 1968, and the orders of June 10, 1968, were without effect to accomplish his retirement effective July 1, 1968.

In the *Chester* case, *supra*, to which you refer, the plaintiffs were Regular Coast Guard captains who in June 1968 or 1969 became subject to the mandatory retirement provisions of 14 U.S.C. 288(a) and who were also eligible for voluntary retirement under other provisions of law. Section 288(a) of Title 14, U.S. Code, provides that a Coast Guard captain subject to its provisions "shall, if not earlier retired," be retired on June 30 of the fiscal year in which he, or any captain junior to him completes 30 years of active commissioned service in the Coast Guard. Under the provisions of that statute and the Uniform Retirement Date Act, 5 U.S.C. 8301, we held that members in their circumstances were entitled to compute their retired pay based on the active duty pay rates in effect on June 30 of 1968 or 1969, as the case might be, and not on the higher rates in effect on July 1 of those years. And, it was our view that although they were also eligible for voluntary retirement under other statutes which would have authorized them to compute their retired pay at the rates effective July 1, because of the mandatory nature of 14 U.S.C. 288 and the language of the statute which provided "if not earlier" retired, they could not be retired voluntarily on the same day they were to be mandatorily retired. *See* B–165038, January 6, 1969 (in which B–164842, July 23, 1968, 48 Comp. Gen. 30, is cited with approval) and B–165038(1) and (2), June 2, 1969.

In the *Chester* case the court declined to follow our construction of 14 U.S.C. 288 and held that the plaintiffs therein were not precluded from voluntarily retiring on June 30, the mandatory retirement date to which they were subject under 14 U.S.C. 288(a), and thus were entitled to compute their retired pay on the higher pay rates effective July 1.

In our decision of August 16, 1973, 53 Comp. Gen. 94 we said that we will now follow the court's ruling in the *Chester* case in the computation of the retired pay of other Coast Guard officers similarly retired under the provisions of 14 U.S.C. 288(a), both retroactively and prospectively. However, we limited retroactive application of that decision to the period (generally 10 years) provided by the barring act of October 9, 1940, 54 Stat. 1061, 31 U.S.C. 71a, with doubtful cases to be submitted here for determination. Also, in our decision of August 31, 1973, 53 Comp. Gen. 135, we said that while the mandatory retirement statutes applicable to the other services are not identical to those of the Coast Guard, in view of the general Congressional policy in recent years to treat the services uniformly in pay and allowances matters, when practicable, we will follow the rules enunciated in the *Chester* case to the extent feasible in computing the disability retired pay of members of the other services.

Therefore, in view of the similarity between the applicable statutes in the *Chester* case and in Colonel Low's case, we will now apply the court's decision in the *Chester* case in the computation of Colonel Low's retired pay and the retired pay of other officers similarly situated. Accordingly, Colonel Low's retired pay may be computed based on the rates of active duty basic pay in effect on July 1, 1968, retroactively to the date of retirement and subsequent cost-of-living increases as applicable. Our decision 48 Comp. Gen. 30 and other similar decisions will no longer be followed.

[B-179423]

Contracts—Negotiation—Requests for Proposals—Amendment—Required for Changes in RFP

Upon determination by a contracting agency that a salient characteristic not listed in the request for proposals (RFP) was essential, the agency should have issued an amendment to the RFP specifying the requirement and providing an opportunity for further proposals since paragraph 3-805.4(a) of the Armed Services Procurement Regulation provides for the modification of an RFP when a decision is made to relax, increase or otherwise modify the scope of work or the statement of requirements. Furthermore, the use of the terms "rapidly" and "conveniently" in the specifications without an explanation of the terms was ambiguous and provision should likewise have been made to indicate in the RFP the requirement of the Government in more precise terms.

In the matter of Apollo Lasers, Inc.; Solid State Radiations, Inc., February 21, 1974:

Request for proposals (RFP) DAAD05-73-R-0142, issued by the Aberdeen Proving Ground, Aberdeen, Maryland, solicited proposals for a Hologram Reconstruction Device on a brand name or equal basis for use by the Ballistics Research Laboratories (BRL). The brand name item was a TRW 1200M manufactured by TRW Instruments, which company was purchased by Solid State Radiations, Inc. (Solid State). Two proposals were received by Aberdeen in response to the RFP, one from Solid State offering the TRW 1200M and another from Apollo Lasers, Inc. (Apollo), offering that company's own holocamera system. The proposal prices received were as follows:

Solid State	$61,630.00
Apollo:	
Alternate Proposal No. 1	48,664.55
Alternate Proposal No. 2	55,524.55

The proposals were sent to BRL for evaluation and it was determined that only the proposal of Solid State was acceptable. Award was made to Solid State on July 31, 1973, and a notice of award was sent to Apollo on the same date which stated that the Apollo proposal was rejected for the following reason:

It is required that transition from transmission to reflection be made conveniently and rapidly, whereas on equipment you offered it is necessary to detach some of the components from the table and move them to different positions.

On August 7, 1973, Apollo protested the award to our Office on the grounds that the RFP failed to relate the requirements of the Government; that the use of the "brand name or equal" specification was used to direct, in effect, a sole-source award to Solid State; and that Apollo's equipment was comparable to that of Solid State and lower in price.

In response to the protest, the contracting officer stated another reason for rejecting the Apollo proposal:

* * * This particular failure to meet the essential requirements of the Government's intended use of the equipment being procured was selected because it was interpreted to be the one most obviously in conflict with the requirements of the solicitation and the one to which specific reference in the RFP could be made. It is definitely not the only failure to meet the requirements of the solicitation. Any "table top" configuration, as opposed to the "overhead suspension" configuration, dictated by the brand name or equal requirement of the solicitation, is not considered by the Government to be technically acceptable.

We have reviewed the RFP purchase description for the holocamera system. It does not state any requirement for an overhead configuration. While this configuration is the manner in which the TRW 1200M is constructed, it is not listed as a salient characteristic. Section 1–1206.2(b) of the Armed Services Procurement Regulation (ASPR) provides, in part, as follows:

"Brand name or equal" purchase descriptions should set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the needs of the Government * * *.

Moreover, certain engineering data, including structural arrangement and interrelation of items are conveyed to offerors by naming the brand. However, the agency may not reject an item for failing to meet one of the unlisted features of the named item. 50 Comp. Gen. 193 (1970).

In the circumstances, we conclude that it would have been improper to reject the Apollo proposal because the equipment offered was a table top configuration. However, ASPR 3–805.4(a) provides in part:

(a) When, either before or after receipt of proposals, changes occur in the Government's requirements or a decision is made to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the solicitation * * *.

Therefore, since the agency had a need for an overhead configuration and that was not listed as a salient characteristic, the agency should have issued an amendment to the RFP specifying the requirement and providing an opportunity for further proposals. In that connection, we observe that Apollo has stated in an October 17, 1973, letter to our Office that it could have produced an overhead system and would have offered one if the RFP required it.

Further, with respect to the requirement in the RFP that "There shall be provisions for making the transition from transmission to reflection holograms conveniently and rapidly," there is nothing in the RFP that defines "conveniently and rapidly." Apollo states that its system can be changed in ten to fifteen minutes by an experienced operator. Our Office has ascertained informally from Solid State that it takes three to four minutes to convert the TRW 1200M from transmission to reflection holograms. Both systems require an unbolting, moving and bolting of certain elements to change from transmission to reflection. While one change may be more rapid and convenient than the other, there is no indication in the solicitation as to the degree of rapidity or convenience required and offerors are left without specific guidelines in that regard. Such determination is left to the subjective judgment of the procurement personnel after the receipt of offers. Thus, because of lack of definition, procurement personnel could consider either the Solid State equipment or the equipment of both offerors as meeting the rapidity and convenience requirement. In view of the ambiguous nature of the terms "conveniently and rapidly," we likewise believe that provision should have been made to indicate in the RFP the requirement of the Government in more precise terms.

As the holocamera system was delivered to BRL on October 18, 1973, no corrective action on the procurement is possible at this time. However, we recommend that the contracting agency take appropriate action to preclude a recurrence of this situation in the future.

[B-178659]

Military Personnel—Retired—Contracting With Government—Sales Activities—Retired Pay Withholding

A retired regular Air Force officer engaged in the sale of electrical equipment whose business activities included making calls on Department of Defense (DOD) agencies, as well as an installation of the National Oceanic and Atmospheric Administration, for the purpose of rendering technical assistance, updating catalogue materials, providing information on the companies he represented and their products, determining future markets, and contracting Government purchasing agents, is considered as actively participating in the procurement process for the purpose of obtaining business for his employer and such participation constitutes sales activities in violation of 37 U.S.C. 801(c) and DOD Directive 5500.7, August 8, 1967, notwithstanding the member's contention that a majority of the calls were made in response to inquiries for technical information and, therefore, the payment of retired pay to the member during the period of participation in the procurement process is precluded.

To N. R. Breningstall, Department of the Air Force, February 22, 1974:

Further reference is made to your letter dated April 20, 1973 (file reference RPTT), with enclosures, requesting an advance decision as to whether the business activities engaged in by Lieutenant Colonel

Ben C. Hill, Jr., USAF, Retired, SSAN 526 38 7504, during the period March 22, 1972, through September 8, 1972, constitute "selling" within the meaning of 37 U.S. Code 801(c) so as to preclude payment of retired pay for that period. Your letter was forwarded to this Office by letter from the Office of the Deputy Assistant Comptroller for Accounting and Finance of the Air Force dated May 11, 1973 (file reference ACF), and has been assigned Air Force Request No. DO-AF-1189 by the Department of Defense Military Pay and Allowance Committee.

You say that Colonel Hill retired from the United States Air Force as a Regular officer, effective July 31, 1971, and is receiving retired pay in the amount of $749.13 monthly. Further, that on July 5, 1972, he submitted a DD Form 1357, Statement of Employment, which indicated that he was employed as a salesman by the Roy E. Coulson Company, a firm which represents companies in the sale of industrial electrical equipment. However, he gave assurances that his position did not entail selling to the Government as prohibited by 37 U.S.C. 801(c).

You say that upon review of his Statement of Employment, it appeared that the member was involved in selling to certain Department of Defense agencies. Therefore, on August 31, 1972, a letter was sent to him requesting more specific information on which to evaluate his situation.

In his reply, Colonel Hill submitted a list of the Government agencies on which he had made calls in his capacity as salesman for the Roy E. Coulson Company, and called attention to the fact that a majority of the calls were made in response to factory inquiries or to requests by the agencies concerned. Specifically he stated that they were made: (1) to ascertain whether installed equipment was operating properly; (2) to be of assistance if troubles were encountered with installed equipment; (3) to update existing catalogue materials; and (4) to provide requested information on the companies the Roy E. Coulson Company represented and their products. However, he also stated that some calls were made to ascertain the existence of potential markets and to introduce himself to Government purchasing agents.

You indicate that the submitted list included five Department of Defense agencies as well as the Albuquerque Seismological Center, which you say is an installation of the National Oceanic and Atmospheric Administration (NOAA) which, in turn, is the former Environmental Science Services Administration (ESSA), to which the retired pay payment prohibition of 37 U.S.C. 801(c) is applicable.

Further, that by letter dated October 30, 1972, the member advised you that he had terminated all calls on United States Government

agencies of any sort and by letters dated November 20 and 24, 1972, the president of the Roy E. Coulson Company advised that all Government contacts were removed from the duties of the member as of September 8, 1972.

Section 801(c) of Title 37, U.S. Code, provides in pertinent part that:

> Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the * * * Regular Air Force * * * who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service.

Paragraph I.C.2 of Inclosure 3–C, Department of Defense Directive Number 5500.7, dated August 8, 1967, defines "selling" for the purposes of that section, as:

> a. Signing a bid, proposal, or contract;
> b. Negotiating a contract;
> c. Contacting an officer or employee of any of the foregoing departments or agencies for the purpose of:
> (1) Obtaining or negotiating contracts,
> (2) Negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract, or
> (3) Settling disputes concerning performance of a contract, or
> d. Any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person.

Paragraph I.C.2 of Inclosure 3–C, also states that it is not the intent of the directive to preclude a retired Regular officer from accepting employment with private industry solely because his employer is a contractor with the Government.

We have held generally that the employment of retired Regular officers in nonsales, executive or administrative positions, including contacts by a retired officer in his capacity as a noncontracting technical specialist which involves no sales activities, is outside the purview of the statute and the DOD directive. *See* 41 Comp. Gen. 784 (1962); 41 *id.* 799 (1962); 42 *id.* 87 (1962); 42 *id.* 236 (1962); and 52 *id.* 3 (1972). However, this Office has taken the position that where a retired officer actually participates in some phase of the procurement process, it has been held that such activities bring him within the purview of the definition of "selling" as defined in the DOD directive. *See* for example, 42 Comp. Gen. 32 (1962); 42 *id.* 236, *supra*; and 43 *id.* 408 (1963).

In the instant case, the purpose of several of Colonel Hill's calls was to introduce himself to purchasing agents and to ascertain the existence of a future product application. In 40 Comp. Gen. 511 (1961), after citing the decision of the Court of Claims in *Seastrom* v. *United States*, 147 Ct. Cl. 453 (1959), which held that a demonstration of

drugs to various naval facilities by a retired naval officer was sales activities of the type proscribed by statute, we expressed the view that:

> We do not perceive much difference essentially between demonstrations of products for sale and contacts made for the purpose of determining the requirements of the Navy for products which an employer may desire to manufacture for the Navy. Discussions held in such contacts may form the very foundation upon which the final contract is based, particularly when negotiated contracts constitute a high percentage of Navy procurement volume. The statute is directed not only at favoritism, but at conduct that tempts favoritism. A not unlikely result of such contacts by a high ranking retired officer is the award of Navy contracts, even though the retired officer does not participate in the contract negotiations. Where a contact ultimately ripens into a contract, it cannot be realistically said that the contact and subsequent events were not interrelated and interconnected.

Further, in 49 Comp. Gen. 85 (1969), we found the proposed self-employment of a retired Air Force officer as a small business representative to constitute "selling" to the Government within the meaning of item (d) of paragraph I.C.2 of Inclosure 3–C, Department of Defense Directive Number 5500.7. There, the officer's proposed duties were to include: visiting Government agencies to gather information regarding their needs for industrial and aerospace products; determining which of his clients was capable of manufacturing the required products; and relating this information back to Government purchasing agents. We stated therein that:

> * * * since the only purpose of any contacts made by [the member] with Department of Defense personnel for the purpose of ascertaining whether the needs of the Department can be supplied by his manufacturers is to obtain business for them, there would appear to be a substantial basis for regarding such contacts as liaison activities with a view towards the ultimate consummation of a sale * * *.

Based on Colonel Hill's description of his employment duties and the extent of the contacts made with the agencies, it seems reasonable to conclude that his contacts with Defense Department purchasing agents were for the purpose of obtaining business for his clients. In this respect, we do not believe that Colonel Hill's statement that the majority of his calls were made in response to inquiries for technical information is relevant. We have stated that where contacts with DOD personnel are found to constitute sales activity within the meaning of the DOD directive and 37 U.S.C. 801(c), the statutory proscriptions apply regardless of whether contacts have been frequent or infrequent. *Cf.* 41 Comp. Gen. 642 (1962).

Accordingly, it is our view that Colonel Hill's contacts with the listed agencies during the period from March 22, 1972, through September 8, 1972, constitute "selling" in violation of 37 U.S.C. 801(c) and preclude the payment of retired pay for that period.

[B-178307]

Contracts—Cancellation—I.C.C. Carrier Authority Lacking—Partial Contract Performance

The amount claimed for the movement of a tub and barge under a canceled contract because the contractor did not have the required ICC authority is not reimbursable as an agent of the Government may not waive the requirement that a water carrier in interstate commerce is subject to regulation under the Interstate Commerce Act, and since no benefit accrued to the Government payment on a *quantum meruit* basis may not be made.

In the matter of Harry L. Lowe & Associates, February 25, 1974:

The Military Traffic Management and Terminal Service (MTMTS) received a request for the transportation of a steel hull by barge from Pascagoula, Mississippi, to Portsmouth, New Hampshire, to be performed on May 26, 1972. Solicitation of tenders of rates and charges were made to three concerns; two barge lines: S. C. Loveland Co., and James Hughes, Inc., and a marine broker, Harry L. Lowe & Associates (Lowe), whose agent, Marine Exploration Co., Inc. (Marine), would perform the actual transportation. Lowe was advised that it had been selected to handle the movement. MTMTS then determined that neither Lowe nor Marine had the proper Interstate Commerce Commission (ICC) operating authority for the intercoastal shipment. Based on this lack of authority, MTMTS canceled the contract on May 24, 1972.

It is Lowe's contention (1) that ICC operating authority was not a requirement of the contract; (2) that the transportation was an open sea tow between two navy facilities and as such should have been handled by the Military Sealift Command (MSC), and would not have required ICC authority; and (3) that Marine's ship was dispatched in good faith to make the pickup. Lowe claims $3,200 in damages for the dispatch and return of the tug and barge. By letter of October 24, 1972, from the Departmnt of the Army, Lowe's claim was denied.

Part III of the Interstate Commerce Act, 49 U.S.C. 901, *et seq.*, pertains to common and contract carriers by water and to all towage in interstate transportation, except to the extent that specific exemptions are provided. *Cornell Steamboat Co.* v. *United States*, 321 U.S. 634 (1944). Interstate transportation as it relates to part III is defined in 49 U.S. Code 902(i) to mean transportation of persons or property wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States. Thus, the fact that the shipment would have been transported from Mississippi to New Hampshire, by definition, and regardless of the route taken, would be considered interstate transportation and as such subject to the economic control of the ICC.

Lowe correctly states in the record that MTMTS would have authority for intercoastal tows as it is the single manager operating agency for military traffic within the continental United States. See Defense Supply Agency Regulation 4500.3, paragraph 101002. As this transportation did take place within the continental United States, MTMTS could have handled it unless policy reasons dictated otherwise. We were informed by MSC that procurement of transportation by tug and barge like that involved here was formerly handled by MTMTS. Approximately a year to 18 months ago, MSC and MTMTS agreed that procurement of such transportation was properly within the province of MSC; however, this was a matter of policy, and based on MTMTS authority and governing regulations, we do not consider that the procurement by MTMTS was at any time illegal.

The record contains a letter from the Chief of the ICC's Section of Water Carriers and Freight Forwarders indicating that operating authority definitely was required, and the fact that Lowe attempted to obtain temporary authority from the ICC tends to establish that Lowe agreed that it was necessary. In any event, MSC would be required by law to make this a requirement for any similar type of bid.

There is no discretion or authority in officers or agents of the United States to waive any provision of a statute. The courts have consistently followed the well-established rule that the Government acts only through its agents with power delegated and defined by statute or regulation, and the Government can be bound only by agents acting within the scope of authority delegated to them. *Federal Crop Insurance Corporation* v. *Merrill*, 332 U.S. 380, 384 (1947); *United States* v. *Zenith-Godley Company, Inc.*, 180 F. Supp. 611, affirmed 295 F. 2d 634 (1961).

We have held in cases involving bids for motor carrier service that the existence of valid operating rights is an essential condition to a valid award of a transportation-services contract in foreign or interstate commerce because of the statutory requirements in 49 U.S.C. 301, which prohibit such activities without proper authorization from the ICC. 34 Comp. Gen. 175 (1954); 47 *id.* 539 (1968). The same principle would apply to water carriers subject to Part III of the Act, 49 U.S.C. 901, *supra*. We note also that Lowe in item 17 of its "Uniform Tender of Rates and/or Charges For Transportation Services," under the heading "Lawful Performance: Operating Authorities," held itself out as having operating authority, although not the requisite ICC operating authority.

The record further indicates that the tender presented by Lowe, and calling for a performance date of May 31, 1972, was received by MTMTS on May 24, 1972. MTMTS was made aware, on that date, that Lowe did not have the proper ICC operating authority, and that

it would not be forthcoming by the desired pickup date. MTMTS also was aware that temporary authority might be granted by the Commission where there is an immediate and urgent need for service to a point or points or in the absence of carrier service capable of meeting such need. *Alabama Great Southern R. Co.* v. *United States*, 103 F. Supp. 223 (1952); 49 U.S.C. 911. But in this case two other carriers were available to perform the service.

The contract was canceled on May 24, 1972, and based on the principles and cases enumerated herein and the record before us we cannot say that the contracting officer failed to act in a reasonable manner.

Nor does it appear that recovery may be had by Lowe on a *quantum meruit* basis, for such remedy is appropriate only where one party to a transaction has received and retained tangible benefits, and no benefits are shown to have passed to the United States from Lowe for the tug and barge movement. *Crocker* v. *United States*, 240 U.S. 74 (1916); *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 566, footnote 22 (1961).

Therefore, and based on the foregoing, Lowe's claim must be and is disallowed.

[B-179836]

Contracts—Specifications—Descriptive Data—Ambiguity of Specification—Construed as Affecting Bid Responsiveness

An invitation for bids which only stated in general terms the nature and extent of the descriptive literature desired was defective because it failed to comply with section 1-2.202-5 of the Federal Procurement Regulations (FPR) that a descriptive data clause detail those components of the data and type of data desired. As the industrial exhauster solicited is still required, and cannot be procured without submission of descriptive data, the canceled invitation should be readvertised in consonance with FPR descriptive literature requirements.

In the matter of Air Plastics, Incorporated, February 25, 1974:

Invitation for bids (IFB) No. BEP-74-14 was issued on August 8, 1973, by the Bureau of Engraving and Printing, Department of the Treasury, Washington, D.C., and was intended to procure an industrial exhauster with an accompanying motor. The bid schedule provided that descriptive literature was to be furnished with each bid, and that delivery of the product was to be made within 45 calendar days after the receipt of the purchase order. On the date specified, August 28, 1973, the three bids timely received were opened. An abstract of the bids reveals the following:

Bidder	Price	Time for delivery
Buffalo Forge Company	$2,377	60 Days.
Ceilcote Company, Inc	2,560	45 Days.
Air Plastics, Inc	2,727	30-45 Days.

Subsequent to an evaluation of the bids, the Bureau of Engraving and Printing awarded this contract to Buffalo Forge. However, as a result of Air Plastics' letter of October 1, 1973, to the Bureau pointing out that Buffalo Forge's delivery time exceeded the schedule delivery parameters, the Bureau canceled the award. As the Bureau was of the opinion that Ceilcote and Air Plastics had not furnished sufficient descriptive data to establish whether the products offered would or would not comply with the specifications, those bids were rejected as nonresponsive, and the Bureau therefore decided to readvertise the procurement. As a result of the rejection of its bid, Air Plastics protested to this Office by letter dated October 1, 1973.

The solicitation contained the following requirement for descriptive literature:

(a) Descriptive literature must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purposes of bid evaluation and award, details of the product the bidder proposes to furnish as to design, materials, components, performance characteristics, construction and operation. See paragraph A.10, A–10.01 and A–10.02 of the General Conditions.

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

In its report to this Office dated October 19, 1973, the Bureau stated the following as the rationale for rejection of the Air Plastics' bid:

Bidder No. 3, Air Plastics, Inc.

This bid offered an item identified as Air Plastics, CR–24, and submitted accompanying data in the form of Air Plastics Bulletin No. 7305, Industrial Fiberglass Centrifugal Fans; however under the chart showing the characteristics of CR–24, contained therein, there was no listing for the 7100 CFM (Cubic Feet per minute) as required by the invitation. Since the descriptive literature failed to show that the product offered conformed to the specification's requirements, rejection of the bid was required.

Also, and related to the above, the counter-clockwise arrangement and No. 9 Channel base were not delineated nor was there evidence of specifically furnishing the C.F.M. @8" static pressure capacity or an open drip-proof, 1750 R.P.M., 480 Volt, 3 phase A.C. Motor and magnetic across line starter.

In response to this report, Air Plastics submitted to our Office a letter dated October 26, 1973, in which Air Plastics contended that the information submitted in its bid was adequate for the evaluation intended. In reference to its alleged failure to indicate the CR–24's characteristics at 7100 C.F.M., Air Plastics points out that the chart submitted with its bid did list the air-flow requirements of the Air Plastics CR–24 model at both 7000 and 8000 C.F.M., and the protester maintains that it is a "simple matter and standard practice in the industry to interpolate for intermediate air-flow volumes as it is im-

practical to list all possible air flow requirements." Air Plastics contends that interpolation of this chart for 7100 C.F.M. should be considered a reasonable part of the evaluation process, and it concludes that failure of the technical evaluators to conduct accepted evaluation techniques should not result in the rejection of its bid. In relation to its alleged failure to supply descriptive literature concerning the various components of its system, Air Plastics argues that there was no need for duplication of the component information because it was already stated in detail by the Bureau in describing the exhauster desired. The protester states that its bid did not in any way alter, delete or take exception to this description, and that it indicated its compliance with the description by listing its bid price immediately next to it. Air Plastics submits that its bid should have been evaluated in its entirety, and that such an evaluation should have concluded that its bid stated the necessary compliance with the specifications.

An agency has the primary responsibility to draft specifications reflecting its minimum needs as well as determining that products offered meet those specifications. Thus, an IFB may require that descriptive data accompany each bid for the purpose of bid evaluation, if such data is needed to aid the agency in determining whether the product offered meets the specifications and in concluding what the Government would be binding itself to purchase by the making of an award. 40 Comp. Gen. 132 (1960); 36 *id.* 415, 416–17 (1956). If the need for descriptive literature can be justified, the invitation must clearly establish the nature and extent of the descriptive material asked for, the purpose intended to be served by such data, and whether all details of such data will be considered an integral part of the awarded contract. 38 Comp. Gen. 59, 64 (1958). If a bid fails to comply with a proper descriptive literature requirement, the bid ordinarily will be rejected as nonresponsive. B–174892, March 6, 1972.

We note at the outset that the record furnished our Office by the Bureau of Engraving and Printing does not contain any justification for the inclusion of the descriptive literature clause as required by Federal Procurement Regulations (FPR) 1–2.202–5(c). The Bureau's statement on the protest indicates that the agency required descriptive literature to enable it to determine if the product offered conformed to the specifications. While this alone does not justify the requirement for descriptive data, 49 Comp. Gen. 398, 400 (1969), a possible justification for this requirement might have been that the purchase description in question is so brief and lacking in detail that the individual bidders could propose different designs, comprised of varying materials and components, so that descriptive data was needed to aid in the evaluation of these bids. We need not resort to such speculation, however, because even if an acceptable product could not have been pro-

cured without descriptive literature, the invitation is defective because it fails to identify those items, specification features or components as to which descriptive literature was required.

This Office has held that an IFB must state definitely the components concerning which descriptive data is required. B–146211, October 6, 1961. Even if the data requirement is justified and descriptive literature is required to determine bid responsiveness, an invitation is defective if it does not clearly establish in the greatest detail practical the nature and extent of descriptive data needed. 46 Comp. Gen. 1, 5 (1966); B–173519, September 27, 1971.

The "Requirement for Descriptive Literature" clause prescribed by FPR 1–2.202–5(d)(1) provides in part:

> * * * The descriptive literature is required to establish, for the purposes of bid evaulation and award, details of the products the bidder proposes to furnish as to [*].
> * Contracting officer shall insert significant elements such as design, materials, components, or performance characteristics, or methods of manufacture, construction, assembly, or operation, as appropriate.

The adaptation of this clause which appeared in the instant IFB stated:

> * * * The descriptive literature is required to establish, for the purposes of bid evaluation and award, details of the product the bidder proposes to furnish as to design, materials, components, performance characteristics, construction and operation.* * *.

In reference to a very similar descriptive literature clause which also merely repeated these elements, we have stated that the mere recital in that clause of those categories of general subjects which might require description, without more, is not sufficient to establish a common basis for evaluation of bids. 46 Comp. Gen. 1, 5 (1966). In that opinion, we therefore held that the invitation was defective because, *inter alia*, the extent of detail required was not properly set out. *id.* While that decision concerned Armed Services Procurement Regulation 2–202.5, the clause in issue in that decision is virtually identical to the descriptive data clause in this solicitation.

While this IFB also refers a bidder to paragraphs A–10, A–10.01 and A–10.02 of the General Conditions (for Mechanical and Electrical Equipment) for further guidance, a perusal of these paragraphs reveals that the additional advice offered is general and in fact is only a restatement of FPR 1–2.202–5. For example, paragraph A–10 admonishes bidders that each bidder shall furnish descriptive literature of the exact equipment upon which his bid is based, that this literature shall be in the form of catalog cuts, drawings, pictures, or other graphical material and shall include appropriate descriptive text, and that descriptive literature shall be complete and ample to an extent that it will enable the Bureau to determine without any doubt that the offered equipment meets all specified requirements. While these statements

are acceptable as far as they go, nowhere in the General Conditions or in the invitation is the bidder instructed as to the components for which the descriptive data is required or as to what type of data is required for each component. In view of the above, we believe that this invitation is defective for failing to set out in a manner as detailed as practical the nature and extent of the descriptive literature requirement. 49 Comp. Gen. 398, 401 (1969); 46 *id.* 1, 5 (1966).

In any event, Air Plastics argues that the descriptive data it furnished was adequate and that it accurately reflected its proposed system. It contends that the Bureau of Printing and Engraving should have awarded the contract in question to it as the low responsive, responsible bidder.

We note that attached to Air Plastics' bid was its Bulletin 7305, which included charts of air-flow volumes and dimensional data for several industrial fiberglass centrifugal fans. Air Plastics maintains that through interpolation of values appearing in its bulletin, it can be determined that its CR-24 fan, equipped with the specified 20-horsepower motor, will deliver the required volume of 7100 cubic feet per minute at an 8-inch static pressure capacity.

Even if it is conceded that Air Plastics' descriptive literature established that its fan would produce the required air-flow when equipped with the proper-sized motor, the literature does not specifically discuss the specification requirements for certain characteristics of the motor, starter, fan base, and direction of rotation. The Bureau has stated that an acceptable exhauster cannot be procured without requiring the bidder to submit descriptive data so that the Bureau can ascertain precisely what the bidder proposes to furnish. Under these circumstances, we do not believe Air Plastics has satisfied the Bureau's need for descriptive literature.

As we cannot hold that the Bureau's judgment that descriptive literature is required is incorrect, and as the product requirement still exists, the defective invitation must be canceled and the need should be resolicited under an invitation which complies fully with FPR 1-2.202-5. 48 Comp. Gen. 659, 662-63 (1969). We have been advised that this need will be readvertised, and we have informed the Bureau of Printing and Engraving of our views concerning an invitation's requirement for descriptive literature.

Accordingly, the protest must be denied.

[B-180099]

Officers and Employees—Transfers—Relocation Expenses—Houseboat as Residence—Marine Survey

An employee transferred from Las Vegas, Nevada, to Bethesda, Maryland, who purchased and occupied a houseboat as his new residence may be reimbursed

the cost of a marine survey—a necessary condition for financing the purchase of the houseboat—since 5 U.S.C. 5724a(4) and Federal Property Management Regulations 101–7 do not limit an employee to reimbursement for expenses incurred incident to the purchase of a dwelling on land at his new duty station in view of the fact that there is ample judicial recognition that a houseboat or a boat used as living quarters is a dwelling, habitation, or residence.

To the Chief, Atomic Energy Commission, February 25, 1974:

By letter dated November 16, 1973, you requested our decision whether expenses incident to the purchase of a houseboat are reimbursable real estate expenses. With your request you enclosed a travel voucher submitted by Mr. R. L. Gotchy, an employee of your agency who purchased a houseboat for use as his residence in connection with his transfer from Las Vegas, Nevada, to Bethesda, Maryland.

Paragraph 2–6.1b of the Federal Property Management Regulations (FPMR) 101–7 states in pertinent part: "To the extent allowable under this provision, the Government shall reimburse an employee for expenses required to be paid by him in connection with the sale of one residence at his old official station, for purchase (including construction) of one dwelling at his new official station * * * Provided, That: * * * The residence or dwelling is the residence as described in 2–1.4i, which may be a mobile home and/or the lot on which such mobile home is located or will be located." In the latter paragraph "residence" is defined as quarters from which the employee regularly commutes to and from work.

The record indicates that Mr. Gotchy uses the houseboat as the residence from which he commutes to and from work. The expense claimed in connection with the purchase of this houseboat is $129 for a marine survey which was a necessary condition for financing the purchase.

An examination of 5 U.S. Code 5724a(4) and the implementing regulations indicate that the expenses incurred in the purchase of a residence at the new station may be reimbursed. Ordinarily a residence would be a dwelling erected on land or a mobile home located on land. However, we find nothing in the statute or regulations limiting the residence to a dwelling on land. Moreover, there is ample judicial recognition that a houseboat or a boat used as living quarters is a dwelling, habitation, residence or—in one case—a mobile home. See generally the definitions in *Fulton* v. *Insurance Company of North America*, 127 Fed. 413 (1904), reversed on an unrelated point at 136 Fed. 182 (1905); the application of a fire insurance policy which covered a dwelling house to a "quarter boat" in *Inter-Ocean Casualty Company* v. *Warfield*, 292 S. W. 129 (1927); the application of an Internal Revenue regulation governing the sale of residential property to a houseboat in *Rumsey* v. *Commissioner of Internal Revenue*,

82 Fed. 2d 158 (1936); and the application of a State exemption statute governing mobile homes to a houseboat in, *In the Matter of Edmond R. Bell, Bankrupt*, 181 F. Supp. 387 (1960). Therefore, we are of the opinion that expenses which would be reimbursed in connection with the purchase of a residence on land may be reimbursed in connection with the purchase of a houseboat which is occupied as a residence upon transfer of station.

In view of the above the voucher returned herewith may be certified for payment if otherwise proper.

[B-178259]

Transportation—Rates—Section 22 Quotations—Exclusive Vehicle Use Shipments

When a shipper orders the special service provided in carrier's section 22 tender, issued pursuant to 49 U.S.C. 22 and 317(b), which covers electronic equipment and instruments, and the annotations on the shipping document are in compliance with the provisions of the tender and are not disputed by the administrative report, the constructive weight of the space of each vehicle ordered or used is the proper basis for computing the carrier's charges. Furthermore, under the tender should each vehicle be loaded to the full visible capacity of the vehicle, even if the shipper failed to annotate the Government Bill of Lading or did not intend to request special service, the carrier would be entitled to charges based on constructive weight.

In the matter of Trans Country Van Lines, Inc., February 27, 1974:

Trans Country Van Lines, Inc., requests a decision on the settlement of its bills for the freight charges on shipments of electronic equipment and instruments transported under Government bills of lading F-0811135 (claim TK-965215) and F-5180240 (claim TK-946095). Thus we are required to furnish a legal interpretation of the constructive weight provisions contained in so-called electronics carriers' section 22 tenders issued pursuant to 49 U.S. Code 22 and 317(b), when a shipment occupies the full visible capacity of the transporting vehicle furnished by the carrier.

Based on our decision to Trans-World Movers, Inc., 51 Comp. Gen. 208 (1971), our Transportation and Claims Division deducted $391.80 and $135.88 from monies otherwise due Trans Country Van Lines, Inc., in connection with the transportation of two shipments of electronics equipment, during February and July, 1970, respectively. Trans Country disputes the validity and applicability of the principles established in 51 Comp. Gen. 208 regarding constructive weight as a basis for charges in settlement actions taken in connection with these shipments.

The basic structure of Trans-World's (Cowboy Van Lines, Inc.) I.C.C. Tender 69-4 and Trans Country's I.C.C. Tender 50 and 150 is similar. Each consists of several columns of rates which are tied to

varying mileage blocks. These columns constitute a sliding scale of volume minimum weights. However, carriers often assess charges on the basis of seven pounds per cubic foot of van space ordered or utilized (constructive weight), or actual weight if greater, on the theory that special service is involved.

We recognize that the audit of bills relating to numerous electronics shipments often involves complicated and conflicting records in regard to the demand and performance of special services, and that the carriers' tenders contain variously drafted constructive weight provisions. Under these circumstances it is impossible to formulate a single legal principle that can be expected to serve as an "umbrella" over all such cases; distinctions must be made as material differences in the wording of these tenders are disclosed.

Concerning the decision published in 51 Comp. Gen. 208, the pertinent part of Cowboy's Tender 69–4, the section 22 quotation involved therein, reads as follows:

NOTE: When special service is requested, charges will be based on actual weight of seven pounds per cubic foot of the van used, whichever is greater.

Special service is requested for shipment [sic] which consist of or include simulators, electronic instruments and all equipment requiring specialized handling movable under the household goods commodity descriptions.

When seals are applied to the van by the shipper or shippers agent, charges will be based on actual weight subject to a minimum weight based on seven pounds per foot of total vehicle space.

If the shipper or shippers [sic] agents fails to annotate the government bill of lading as to size of vehicle requested, cubic footage capacity, charges will be based on seven pounds per cubic foot of van furnished for each shipment.

MINIMUM CHARGE: Subject to AVAILABILITY of equipment [sic] *for* exclusive use of a vehicle when requested will be on actual weight subject to a minimum charge of 12,000 pounds if the capacity of the vehicle ordered is less than 1700 cubic feet.

In that case, the Government bill of lading (GBL) showed that a 40-foot vehicle was ordered and furnished, and that the vehicle was fully loaded. It was disclosed, however, that these notations, indicating a request for a specific vehicle, were inserted by the carrier without the shipper's authority. The record indicated that seals were not applied, and an administrative report confirmed that exclusive use of vehicle service was not requested by the shipper. Based on these facts and the constructive weight provisions of Cowboy's tenders, we held that where a tender fails to specify which, if any, special services is offered, a mere request for a specific size of vehicle for loading is not a request for exclusive use of vehicle authorizing use of constructive weight, whether or not the shipment fully loads the vehicle. In view of the ambiguities of that tender we expressed the opinion, as *dictum*, that full use of a trailer, thus authorizing the constructive weight basis, could be established where seals were applied or exclusive use of vehicle was actually requested and furnished.

In the records before us now, GBL F-0811135 shows that a 40-foot vehicle was ordered and furnished to transport a shipment weighing 14,740 pounds from Keesler AFB, Mississippi, to McClellan AFB, California. The GBL shows that the shipment fully loaded the vehicle.

Other notations, appearing in the Description of Articles Column of the GBL, are of relevance to the question of special service: "1 T/L" [i.e., one truckload], and "CUBIC CAPACITY OF VEHICLE 3100" [i.e., 3,100 cubic feet of space of vehicle; later changed to 3,000 cubic feet by carrier].

Government bill of lading F-5180240 shows that a 40-foot vehicle, with a marked capacity of 3,000 cubic feet of space was ordered and furnished, and that the shipment, which had a net weight distributed over four fully loaded vehicles of 16,580, 22,210, 15,950, and 11,850 pounds, was transported from Key West, Florida, to Quonset Point, Rhode Island. Also on the GBL were the notations "4 TRUCKLOADS BASED ON 20,000 LBS MINIMUM EACH TRUCKLOAD." and "EACH 40 FT VAN LOADED TO FULL VISIBLE CAPACITY." It should also be noted that on each GBL the block indicating that the shipment fully loaded each vehicle was appropriately marked.

Item 1 of Tender 50, applicable to the first shipment, and Tender 150, applicable to the second shipment, reads as follows:

ITEM #1—*COMMODITY OR SERVICE*

OFFICE FURNITURE, FILES, FIXTURES, AND EQUIPMENT, LINK TRAINERS, FLIGHT SIMULATORS, RADAR SETS, ELECTRONIC EQUIPMENT, COMPUTERS, MISSILES, SPACECRAFT AND/OR PARTS THEREOF, AND/OR COMPONENTS, SCIENTIFIC INSTRUMENTS AND ARTICLES OF SECRET NATURE WHEN SO CLASSIFIED BY THE MILITARY AND SPECIFIED ON THE GOVERNMENT BILL OF LADING OR DD 619 FORM. EXCEPT ARTICLES, EQUIPMENT AND INSTRUMENTS WHICH REQUIRE THE USE OF TEMPERATURE AND/OR HUMIDITY CONTROLLED EQUIPMENT.

WHEN THE SHIPPER OR SHIPPERS AGENT ORDERS A SPECIFIC VEHICLE OR VEHICLE SERVICE, I.E., COMPLETE OCCUPANCY OF VEHICLE, EXCLUSIVE USE OF VEHICLE, OR THE VEHICLE SEALED, OR SPACE RESERVATION FOR A PORTION OF THE VEHICLE OR VEHICLES, AND THE GOVERNMENT BILL OF LADING, CARRIERS BILL OF LADING OR DD 619 FORM IS MARKED, STAMPED OR ANNOTATED IN ANY MANNER TO INDICATE SUCH SPECIFIC VEHICLE OR VEHICLE SERVICE, THE CARRIER WILL PROVIDE THE SERVICE AND ASSESS THE TRANSPORTATION CHARGES COMPUTED ON ACTUAL WEIGHT SUBJECT TO A MINIMUM WEIGHT BASED ON SEVEN POUNDS PER CUBIC FOOT OF VEHICLE SPACE ORDERED OR UTILIZED.

WHEN THE MILITARY TRAFFIC MANAGEMENT AND TERMINAL SERVICE, OR THE MILITARY DEPARTMENTS, EITHER DIRECTLY OR THROUGH A CONSIGNOR REPRESENTATIVES [SIC] THEREOF, FAILS TO ANNOTATE THE GOVERNMENT BILL OF LADING OR DD 619 FORM, AND CUBIC FOOTAGE OF THE SHIPMENT OCCUPIES THE FULL VISIBLE CAPACITY OF THE VEHICLE OR VEHICLES FURNISHED, THE TRANSPORTATION CHARGES WILL BE COMPUTED ON THE ACTUAL WEIGHT OF THE SHIPMENT SUBJECT TO A MINIMUM WEIGHT BASED ON SEVEN POUNDS PER CUBIC FOOT OF THE TOTAL VEHICLES [SIC] SPACE FURNISHED.

Of importance is the fact that in the second paragraph, specific special services are enumerated, including complete occupancy of vehicle—a material fact distinguishing these tenders from Cowboy's tender 69–4. In our opinion the notations on both GBLs sufficiently indicate that complete occupancy of 40-foot trailers, each having a displacement of 3,000 cubic feet, was requested, and in the absence of a negative administrative report in the record disclosing that the carrier made unauthorized notations manifesting a request for special service, there is no evidence to rebut the *prima facie* showing that such a request was made in each instance. *Cf.* B–178563, February 15, 1974, 53 Comp. Gen. 603, and 51 *id.* 208, at 212 (1971).

We hold that where the constructive weight provisions of the electronics tender specify the special service being offered and the shipper complies with the imperatives for performance of that service, such as here, where the shipper orders complete occupancy of a 3,000-cubic foot vehicle, 40 feet in length and the GBL or related document is annotated manifesting a request for such service, in the absence of a negative administrative report, the carrier is entitled to payment of charges based on constructive weight of the space of each vehicle ordered or utilized. With reference to the multi-vehicle shipment, we see nothing in these tenders that would warrant applying constructive weight to the shipment as a whole. We feel it should be applied to each vehicle that is loaded to full visible capacity.

It appears to us, based on the third paragraph of item 1 of the tenders quoted above, and the fact that each vehicle was loaded to full visible capacity that if the shipper had failed to annotate the GBL, or even if the shipper had not intended to request special service, the carrier would be entitled to charges based on constructive weight. Whatever consequences might flow from such an interpretation would not appear to be a matter of audit responsibility as much as one of traffic management.

We could not interpret Cowboy's Tender 69–4 in this manner because the pertinent provisions there did not require a vehicle to be fully loaded and the provisions implied that a request for special service was intended but the annotation was inadvertently omitted from the GBL. Nevertheless, the proposition in 51 Comp. Gen. 208, relating to full use of a trailer, where we said that the 7 pounds per cubic foot basis should be upheld in any instance where the bill of lading record, or subsequent administrative advice indicates that full use of a trailer was desired by the shipper, would have general application.

Certificates of Settlement will be issued authorizing payment of such amounts as may be found due Trans Country consistent with the opinion that charges are properly assessed on the constructive weight, or actual weight, if greater, of each vehicle used.

[B-178907]

Bids—Two-Step Procurement—Evaluation—Costs—"Life Cycle" *v.* "Cost of Ownership"

The deletion of a "life cycle" costing evaluation factor and the addition of a "cost of ownership to the Government" factor in a reinstated solicitation after the submission of oscilloscopes for qualification under step one of a two-step negotiated procurement without giving offerors an opportunity to modify their step one proposals in light of the new introduced factors into the procurement is sustained since there is no evidence of real prejudice to the position of the protester.

Contracts—Specifications—Evaluation Factors—"Life Cycle" *v.* "Cost of Ownership"

In deciding whether oscilloscopes should be purchased under an open-end contract or a new solicitation, it was not improper to add the same Government cost of ownership rate to the price offered on each manufacturer's equipment, since data was not available from which individual ownership rates could be fixed and rate used was based on the average cost to the Government for introducing similar equipment into Government inventory.

Contracts—Specifications—Minimum Needs Requirement—Basis for Determination

The contention that, in deciding whether to purchase Class III 15 MHz oscilloscopes by solicitation or under open-end contract, protester's Class III 50 MHz oscilloscope under open-end contract should have been used as the basis of cost comparison instead of competitor's open-end contract Class II 15 MHz equipment is without merit, since the determination of the Government's needs is vested in the procuring activity which decided on the 15 MHz equipment.

Contracts—Protests—Timeliness—Solicitation Improprieties

The allegation after award that the request for proposals (RFP) established an "auction technique" that is prohibited by paragraph 3-805.1(b) of the Armed Services Procurement Regulation is dismissed as an untimely protest under section 20.2(a) of the Interim Bid Protest Procedures and Standards since improprieties in an RFP are required to be filed prior to the closing date for receipt of proposals.

Contracts—Protests—Procedures—Interim Bid Protest Procedures and Standards—Compliance Requirement

The failure of the procuring agency to comply with section 20.4 of the Interim Bid Protest Procedures and Standards did not constitute a violation of paragraph 1-403 of the Armed Services Procurement Regulation respecifying factors which will not permit a delay in making an award until the issuance of a Comptroller General decision, and the failure is not significant since 20.4 is not binding on contracting agencies.

In the matter of Tektronix, Inc., February 27, 1974:

Request for proposals (RFP) No. F41608-73-B-H602 was issued by the Department of the Air Force, Kelly Air Force Base, San Antonio, Texas, on November 24, 1971, as the first step of a two-step negotiated procurement for Class III 15 MHz oscilloscopes. The first step required submission of a bid sample to be evaluated and tested for minimum specification requirements. The provisions of the RFP included a combined multi-year 50-percent labor surplus area set-aside and a life cycle costing method of procurement.

The second step of the solicitation was issued on April 12, 1973, to Ballantine Laboratories, Inc. (Ballantine), Hewlett-Packard Company (Hewlett-Packard) and Tektronix, Inc. (Tektronix), the three firms whose oscilloscopes were qualified in the first step. On May 8, 1973, the contracting officer canceled the solicitation with the following explanation: "There is no longer a requirement for the supplies covered by this solicitation."

It is reported that the Air Force intended to fulfill its operational needs by placing orders under an existing open-end contract with Hewlett-Packard for Class II 15 MHz oscilloscopes. At that time, the Air Force believed that the purchase of Class II 15 MHz oscilloscopes would be less costly for the Government, since the basic item procured would be standardized and maintenance costs would be lessened thereby. Upon further reflection, the Air Force recognized that it did not have recent and reliable data concerning the price of Class III oscilloscopes.

Accordingly, on June 6, 1973, the Air Force reinstated the subject solicitation in order to obtain a basic price upon which an evaluation could be performed. When the solicitation was reinstated, two basic changes were made in the second step.

The provisions of the original solicitation, as amended, pertaining to "EVALUATION FOR AWARD ON ONE-YEAR OR MULTI-YEAR BASIS" and "FIFTY PERCENT (50%) LABOR SURPLUS/TOTAL LIFE CYCLE TARGET COST" were deleted and a new clause "EVALUATION OF OFFERS/COST OF OWNERSHIP TO THE GOVERNMENT" was added. This added provision was subsequently amended on June 13, 1973, to provide as follows:

> The Government reserves the right to either award under this Request for Proposal or abandon the RFP and purchase their requirements for Oscilloscopes, 15 MHz, under Contract F41608-71-D-7322. This determination will be made based on the cost of ownership to the Government. The cost of ownership of the Class 3 Oscilloscopes being solicited under this request for proposal will be determined by taking the total price offered for Item 0001 less any prompt payment discount applicable (see paragraph C-9) and adding to that price the following:
>
> (1) $128,186.00 (599×$214.00) which represents the additional costs associated with the cost of introducing new items into Government inventories including ten-year management costs;
> (2) Cost of Item 0002 Spare Parts;
> (3) Cost of data under Item 0003, less any prompt payment discount applicable (see paragraph C-9);
> (4) Transportation costs.
>
> The total evaluated cost of ownership of the Class 3 Oscilloscopes will be compared with the total cost of Class 2 Oscilloscopes purchased under Contract F41608-71-D-7322. This total cost of ownership of the Class 2 Oscilloscope is $741,484.13. including transportation ($1,237.87×599 ea).
>
> If the cost of Class 3 Oscilloscopes as provided herein exceeds the total cost for Class 2 Oscilloscopes, as shown above, no award will be made under this RFP * * *.

It is reported that the life cycle cost provisions were deleted because time did not permit the accumulation of the data necessary for a meaningful computation, since a life cycle cost evalaution would take months, and the funds for the oscilloscopes were due to expire at the end of June 1973. The cost of ownership factor was applied solely to aid the Air Force in determining whether it was cost effective to purchase Class III, rather than Class II oscilloscopes.

Offers were received from the three sources by the closing date of June 18, 1973, with final and best prices furnished by June 21, 1973. The final and best offers were evaluated as follows for the procurement:

Ballantine Laboratories, Inc	$578,588.15
Tektronix, Inc	606,348.60
Hewlett-Packard Co	749,926.68

After applying the cost factors in the "EVALUATION OF OFFERS/COST OF OWNERSHIP TO THE GOVERNMENT" clause to ascertain whether the cost of the Class III oscilloscopes would be less than the $741,484.13 total cost of ownership estimated for Class II, the evaluated offers were as follows:

Ballantine Lab. Inc	$706,774.15
Tektronix, Inc	734,534.60
Hewlett-Packard Co	878,112.69

Prior to the closing date of the subject solicitation, by letter dated June 15, 1973, counsel entered a protest against the procurement on behalf of Tektronix. By memorandum dated June 23, 1973, the contracting officer recommended that award be made notwithstanding the protest. The recommendation was approved by higher authority and award was made to Ballantine, the low offeror on June 27, 1973.

By letter dated July 20, 1973, and prior correspondence, counsel for Tektronix protested the award of a contract to Ballantine to this Office. For the reasons set forth below, the Tektronix protest is denied. The protest is based on the following contentions: (1) the agency has improperly changed the basis for evaluation from life cycle costing to cost of ownership to the Government; (2) the use of an Air Force determined flat rate sum does not reflect the variance of the actual ownership costs; (3) the procurement restricts competition; (4) the solicitation, as reinstated, is contrary to the regulations prohibiting the use of "auction technique" and; (5) the agency failed to comply with section 20.4 of the Interim Bid Protest Procedures and Standards.

The Tektronix primary contention is that the solicitation, as reinstated, is prejudicial to it. Tektronix contends that its bid sample,

which was submitted under step 1, had been specially modified for evaluation on a life cycle costing basis. Since the second step permits offers only on oscilloscopes qualified under step 1, Tektronix had to propose on a sample approved under different evaluation criteria. It contends that rather than proposing a high acquisition, low operation cost item, it would have proposed a low acquisition, high operation cost oscilloscope had it known that the evaluation factor of cost of ownership to the Government would be utilized rather than life cycle costing.

In negotiation as in formal advertising, effective competition promoting both the right of offerors to an equal opportunity to compete and the Government's interest in obtaining supplies and services at fair prices, requires that all prospective contractors have the opportunity to prepare their offers on the basis of the evaluation factors to be used in making the award. We think there is merit, at least theoretically, in the position put forth on behalf of Tektronix that, based on the initial ground rules, its technical proposal was aimed at achieving a low life cycle cost at possible expense to the initial purchase price and, therefore, that it was prejudiced by the elimination of the life cycle evaluation factor without the opportunity to modify its technical proposal. Further, we do not believe that the deficiency in the process may be excused simply on the basis that all offerors stood on the same footing. Following that kind of logic could result in favoring the offer submitted casually to the detriment of the offer carefully prepared in response to the announced evaluation factors. However, an award should not be put aside because of a theoretical adverse impact on competition. The Air Force concludes that none of the technical proposals would have been materially different even if offerors could have made changes in their technical proposals following elimination of the life cycle cost evaluation provision and notes in this connection that Tektronix has offered no tangible proof of any material change it would have proposed had the opportunity been made available. In response to the Air Force position, it is asserted that Tektronix "might well have given very careful consideration" to the submission for qualification of one of its lower priced models. There is no indication, however, that the lower priced model could have met the technical solicitation requirements.

In addition, Tektronix maintains that the use of the Air Force determined flat rate sum applied in the cost of ownership to the Government to all proposals does not reflect the fact that ownership costs to the Air Force will vary substantially among the step 1 qualified instruments. Section D–5, which was added to the solicitation on June 6, and subsequently amended on June 13, provided the criteria that the

Air Force would use in determining cost of ownership of Class III oscilloscopes as follows:

> * * * Figures representing the cost of ownership of these Class 3 Oscilloscopes and comparative acquisition cost of Class 2 Oscilloscopes are being developed by the Government and will be provided to the offerors on or before 73 June 13. The aforesaid, will include, (1) the costs associated with the introduction of new items into Government inventories, (2) Ten Year Management costs * * *

The June 13 amendment of this section stated that $214 per oscilloscope "* * * represents the additional costs associated with the cost of introducing new items into Government inventories including ten-year management costs." The Air Force has indicated that data was not available from which it could fix an ownership cost for each of the oscilloscopes qualified in the first step. The $214 is the average cost to the Government based on a life cycle method of evaluation of three Class III 15 MHz oscilloscopes presently in the Air Force inventory: Monsanto (Standard) 6270A, Tektronix 422 and Hewlett-Packard 1700A. The Air Force believes that the $214 is a reasonable estimate of the cost to the Government of introducing any one of the oscilloscopes qualified in the first step into Government inventory, and we find no legal basis to object in the circumstances.

In addition, it must be noted that the use of the $214 evaluation factor was solely for the purpose of determining whether the Class III oscilloscopes would be purchased under the present solicitation. Since the cost of each of the three Class III oscilloscopes offered, which included the $214 figure and other evaluation factors, did not exceed the cost of the Class II oscilloscope, a determination was made to make an award under the present solicitation. This award was made on the basis of the offered prices. The flat rate evaluation factor did not enter into determining the successful offeror under the solicitation. Ballantine received the award because it was the low offeror.

Tektronix contends that the failure of the Air Force to consider the Tektronix Class III 50 MHz oscilloscope available to the Air Force under an existing open-end contract with a cost of ownership of $1,087, in lieu of the Class II 15 MHz Hewlett-Packard oscilloscope with a cost of ownership of $1,239, as the oscilloscope with which the items offered under the present solicitation should be compared is an undue restriction on competition.

On May 18, 1973, Tektronix formally requested the San Antonio Air Material Area (SAAMA) to consider the Tektronix instrument as comparable to the Hewlett-Packard instrument which at that time was apparently being considered by SAAMA in place of the requirement described in solicitation F41608-73-R-H602. Subsequent to reinstatement of the subject solicitation, the Deputy Chief, Commodities Procurement Division, Directorate, Procurement and Production, by

letter dated June 11, 1973, addressed to the Air Force Account Manager, Tektronix, advised that the evaluation contemplated by the RFP was limited to a comparison of cost between Class II and Class III 15 MHz oscilloscopes, not a comparison of Class II 15 MHz with Class III 50 MHz. The Deputy Chief stated that the Air Force need is for Class III 15 MHz, not Class III 50 MHz oscilloscopes and, further, that the Air Force was reviewing their requirements to determine whether or not it would be in the Government's interest to standardize on one oscilloscope to cover the entire range from 0 to 50. This review will include an analysis of not only the MHz range but also the use of Class II in comparison with Class III. The Deputy Chief concluded by explaining that although the review was in process, a final determination with any change in inventory procedure would not be forthcoming until the next buy/budget computation.

The determination of the Government's needs and the drafting of specifications to meet those needs are responsibilities vested in the procurement activity and not our Office. Consequently, we will not question the actions of the procurement activity in these areas unless it is clearly shown that the administrative discretion was abused. *See* B-175153, April 20, 1972. No such showing has been presented here and, thus, we cannot conclude that the specifications complained of do not represent the legitimate needs of the Government.

In addition, in its letter of July 20, Tektronix contends that the identification and use of the flat rate cost of ownership factor in the reinstated solicitation solely for determining whether it was cost effective to purchase any Class III rather than Class II oscilloscopes constituted an "auction technique" prohibited by paragraph 3-805.1(b) of the Armed Services Procurement Regulation (ASPR) (amended and renumbered 3-805.3(c) by Defense Procurement Circular #110, May 30, 1973), because its use clearly directs the offerors to beat the Class II price of $1,239 if they wished to be considered.

Our Interim Bid Protest Procedures and Standards require protests alleging improprieties in solicitations which are apparent prior to the closing date for receipt of proposals to be filed prior to the closing date. 4 CFR 20.2(a). Although Tektronix initially protested on June 15, which was prior to the closing date, this contention was not raised until July 20, which was more than a month after the closing date. Accordingly, we regard this issue as untimely raised.

Lastly, Tektronix maintains that the Air Force failed to comply with section 20.4 of the Interim Bid Protest Procedures and Standards and that such failure to comply constitutes a patent violation of paragraph 1-403 of ASPR. Since GAO has no authority to regulate the withholding of award, the provisions of 20.4 are not binding on the contracting agency. However, ASPR 2-407.8(b)(2) does require that notice be given to the Comptroller General of intent to make an award prior to the final disposition of a protest by this Office. In that regard,

on June 27, 1973, the procurement agency advised our Office orally that award would be made by June 29, 1973. Consequently, the Air Force complied with the provisions of the above-cited regulation. When counsel subsequently inquired as to the date on which the award was made, we were unable to inform him. An inquiry was made concerning the matter and counsel was furnished the information that was received on July 2, 1973.

[B-139703]

Witnesses—Testimony Perpetuation—Appropriation Chargeable

Since 39 Comp. Gen. 133 holds that the expense of perpetuating and authenticating the testimony given at a deposition is payable from the same funds as fees for witnesses, whereas 50 *id.* 128 holds that the Criminal Justice Act of 1964, as amended, 13 U.S.C. 3006A, provides the sole source of funds for eligible defendants to obtain the expert services necessary for adequate defense, the stenographic and notarial expenses incurred to perpetuate and authenticate the testimony of expert witnesses for such defendants should henceforth be paid by the Administrative Office of the U.S. Courts from funds available to it, and not by the Department of Justice. 39 Comp. Gen. 133 modified.

Attorneys—Fees—Overhead Expenses Part of Fee

As normally an attorney appointed under the Criminal Justice Act of 1964, 18 U.S.C. 3006A, is expected to use his office resources, including secretarial help, to take dictated statements, and these overhead expenses are reflected in the attorney's statutory fee, he may not be separately reimbursed for the expenses except in unusual situations where extraordinary overhead-type expenses are incurred in order to prepare and conduct an adequate defense, in which case such services, if otherwise eligible, may be considered "other services necessary for an adequate defense" under 18 U.S.C. 3006A(e) and be paid accordingly.

Courts—Criminal Justice Act of 1964—Civil Rights Actions *v.* Habeas Corpus Proceedings

While not disputing the position of the Department of Justice that there are similarities in some cases between prisoner civil rights actions brought under 42 U.S.C. 1983 and habeas corpus proceedings, the major similarity is that in both cases the petitioners are in custody, and, therefore, for the purposes of paying expenses under the Criminal Justice Act of 1964, 18 U.S.C. 3006A, the civil rights petitioner may not be brought within the rationale of 39 Comp. Gen. 133, concerning the payment of expenses for certain habeas corpus petitioners, in the absence of authorizing legislation.

In the matter of *forma pauperis* proceedings, February 28, 1974:

The Acting Assistant Attorney General for Administration has requested our views on two questions concerning the responsibility for payment of certain expenses in *forma pauperis* proceedings. The second question, relating specifically to the applicability of the Criminal Justice Act of 1964, 18 U.S. Code 3006A, to civil rights proceedings under 42 U.S.C. 1983 brought by certain persons in custody, was also raised in an earlier letter to us from the Chief Judge, United States District Court for the Eastern District of Pennsylvania. A copy of this decision is being sent to him.

The views of the Department of Justice (Department) and the Administrative Office of the United States Courts (AO), the two agencies most concerned with these matters, were presented to us in

three letters each from the Acting Assistant Attorney General for Administration for the Department and the General Counsel of the AO.

The initial question raised is:

> First, where a criminal defendant in the U.S. District Court is allowed to proceed in *forma pauperis*, is the Administrative Office of the U.S. Courts or the U.S. Department of Justice responsible for the payment of stenographic and notarial expenses incident to the taking and transcribing of interviews of fact witnesses incurred on behalf of the pauper? Would the responsibility for payment be the same if the witnesses were expert witnesses? If depositions had been taken instead of merely interviews, would the responsibility for payment still be the same?

In part, this question concerns the effect of the Criminal Justice Act of 1964 (CJA), as amended, 18 U.S.C. 3006A upon our decision reported in 39 Comp. Gen. 133 (1959). We held therein that travel and subsistence expenses incurred by an indigent defendant's attorney attending a deposition may be regarded as expenses incident to the responsibility of the court to assure defendants an adequate forum and, therefore, that such expenses are for payment by the AO under Rule 15(c) of the Federal Rules of Criminal Procedure. Also, after review of the language of Rule 17(b) of the Federal Rules of Criminal Procedure and the "Department of Justice Appropriation Act, 1959" under the heading "Fees and Expenses of Witnesses" we stated at pp. 136–137:

> With regard to compensation and expenses of witnesses—whether fact witnesses or experts—subpoenaed on behalf of an indigent defendant the conclusion appears required, on the basis of the language quoted, that such items are payable out of such appropriations to the Department of Justice. Nor do we find any basis upon which it might be held that such compensation and expenses of witnesses subpoenaed on behalf of an indigent ought to be paid by the Administrative Office of the United States Courts. Moreover, this conclusion would apply to deponents' fees as well as fees for witnesses appearing in court, since Rule 17(b) makes no distinction between the two; and, as shown, it is that rule which is controlling. The function of producing witnesses and evidence is not incident to maintaining a court but, rather, is typically a function of the Department under its paramount obligation to present the case to the court in seeking that justice be done.

We noted further that "Rule 17(b) refers to the subpoenaing of witnesses and provides only for payment of the costs incurred by the process and the fees of the witnesses subpoenaed" and that there is no specific provision for the payment of stenographic or notarial expenses incurred in connection with the taking of depositions. We concluded that:

> * * * since the testimony of a witness subpoenaed under Rule 17(b) would be useless if it were not transcribed and notarized, and these costs are part and parcel of the purpose for which the deponent is subpoenaed in the first instance, it must be concluded that, in view of the provision to pay the witness fees involved, the expense of perpetuating and authenticating his testimony is embraced as part of "the costs incurred by the process." And since these expenses are borne by appropriations of the Department of Justice where witnesses are subpoenaed on behalf of the Government, it follows, under the direction contained in Rule 17(b), that where the deponent is subpoenaed on behalf of an indigent defendant expenses of stenographic and notarial services must also be paid by the Department in a like manner, *id.*, p. 137.

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The CJA provides for furnishing representation for persons charged with felonies or misdemeanors (other than petty offenses) who are financially unable to obtain adequate representation, including the appointment and payment of private attorneys and payment of certain expenses incurred. Subsection (d) of the CJA establishes the maximum hourly rates to be paid to an appointed attorney and authorizes reimbursement to him for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the courts. Subsection (e) authorizes expenditures—including reimbursement for expenses reasonably incurred—for "investigative, expert, or other services necessary for an adequate defense" for persons who are financially unable to obtain such services.

The Department contends that the effect of these provisions of the CJA is to modify our decision in 39 Comp. Gen. 133, *supra*, with respect to payment of stenographic and notarial expenses while the AO states that the CJA does not change the manner in which these expenses should be handled.

In 50 Comp. Gen 128 (1970) we held that a fee of an expert (there, a psychiatrist) called to testify on behalf of an accused entitled to expert services under subsection (e) of the CJA is for payment pursuant to that act. We stated that the legislative history of the act is so persuasive as to warrant the conclusion that it preempts the payment of expert witness fees to the exclusion of the general provisions of Rule 17(b), notwithstanding the $300 fee limitation in subsection (e) of the act, and that where those fees exceed the maximum allowable under the CJA, the Department is not obligated under Rule 17(b) to pay all or part of those expenses. (See, however, *United States* v. *Bryant*, 311 F. Supp. 726 (D.D.C. 1970) cited in 6 A.L.R. Fed. 1007 at sections 3 and 7 for the view that the authority in Rule 17(b) should be used to supplement the maximum allowable under the CJA.)

Thus, we held in our 1970 decision that fees incurred by eligible defendants for expert services were to be paid by the AO out of funds appropriated to carry out the CJA and in our 1959 decision that stenographic and notarial services are necessary to the taking of a deposition and that the expenses incurred in perpetuating and authenticating testimony should be considered part of the "costs incurred by the process." Accordingly, we feel that stenographic and notarial fees and expenses incurred in taking the depositions of expert witnesses on behalf of defendants entitled to such services under the CJA should be paid by the AO. Payment of the fees of fact (nonexpert) witnesses, and the attendant stenographic and notarial fees, is not affected by the CJA and should continue to be from funds appropriated to the Department for that purpose. Our decision in 39 Comp. Gen. 133 is modified accordingly.

The ability to interview potential witnesses—as distinguished from taking their depositions—may frequently be crucial to the preparation

of a defense. In *United States* v. *Germany*, 32 F.R.D. 421 (M.D. Ala. 1963), the court dismissed the case and discharged the defendant from custody since neither the Department nor the AO would authorize payment to the defense attorney of what the court termed the necessary and essential expenses of interviewing material witnesses. See also *Lee* v. *Habib*, 424 F. 2d 891 (D.C. Cir. 1970), referring, in footnote 28, to subsection (d) of the CJA in connection with the statement that the State must provide funds to pay for defense counsel's trips to investigate the case and interview key witnesses. Both the Department and the AO recognize the importance of these preliminary interviews. They also agree that the transcribing of interviews is generally handled by counsel's own secretarial associates and that the cost thereof is not separately compensable under the CJA. In this regard we have been informally advised by staff members of both agencies that normally a word-for-word transcription of an interview is not required and that a statement dictated by the attorney summarizing the interview and, perhaps, signed by the interviewee and notarized will generally suffice.

The issue presented is whether stenographic expenses incurred while interviewing witnesses in cases involving unusual circumstances may be reimbursed and, if so, from what source. The Department suggests that the case of *United States* v. *Schenkel*, D.C. Ind. (1972), No. TH-72-CR-15, presents such an unusual situation. In that case the court approved the motion of defendant's counsel for authority to employ a reporter to take and transcribe the statements of fifteen potential defense witnesses and approximately ninety potential Government witnesses which the defense counsel proposed to interview. After completion of his work, the reporter submitted a claim in the amount of $848 for services and expenses, which claim was denied by the Chief Auditor of the AO.

The Department takes the position that the attorney should not be required to pay such an extraordinary expense from his hourly rate and that if reimbursement is not allowed, there is the possibility that defendant's counsel would forego conducting interviews rather than incur such expense, with an obvious effect on the presentation of an adequate defense. The Department states that it does not attempt to distinguish between expenses of transcribing interviews which are for authorization under subsections (d) or (e) of the CJA and the non-reimbursable expenses of secretarial help, stating that such distinctions can be made by the court in each case.

The AO does not discuss the *Schenkel* case or similar situations directly. Rather, it notes that "except in unusual cases" the CJA attorney utilizes his regular office staff and that expenses incurred thereby represent overhead and as such are reflected in the hourly statutory fee the attorney is entitled to be paid. However, one unusual

situation alluded to by the AO involves the need of an attorney to use stenographic services while traveling overseas on behalf of the defendant.

We are in agreement with both agencies that normally an attorney representing a defendant under the CJA will be expected to use his usual secretarial resources to take down dictated statements and to perform other routine tasks. Expenses so incurred are part of the attorney's overhead and the legislative history of the CJA makes it clear that overhead expenses are reflected in the statutory fee and are not subject to separate reimbursement from CJA funds.

It is also clear, however, that there may be exceptional situations where the attorney may need to incur extraordinary expenses for stenographic (or other secretarial-type) services in order to prepare and conduct an adequate defense. When the attorney can demonstrate to the court that such extraordinary expenses are necessary, we believe that payment of the expenses so incurred, where reasonable in amount, should be made from funds appropriated to carry out the CJA.

Subsection (e) describes "services other than counsel" as "investigative, expert or other services necessary for an adequate defense." The Conference Report describes those services as including "fingerprints, psychiatric, ballistic, investigative, etc." services. 1964 U.S. Code Cong. and Adm. News 3000, 3002. See also *United States* v. *Largan*, 330 F. Supp. 296, 299 (S.D.N.Y. 1971). Professor Oaks in "Obtaining Compensation and Defense Services Under the Federal Criminal Justice Act," in Cipes (Ed) Criminal Defense Techniques (1969) Sec. 7.16[4], quoted in 8 Moore's Federal Practice -Cipes, Criminal Rules, (2d ed.) p. 15–13 (1973 supp.) states that the cost of stenographic services is payable under subsection (e). *Cf.* "Annotation: Construction and Application of Provision in Subsection (e) of Criminal Justice Act of 1964 (18 U.S.C. 3006A(e)) Concerning Right of Indigent Defendant to Aid in Obtaining Services of Investigator or Expert." 6 ALR Fed. 1007. Considering the above, and although the matter is not free from doubt, it is our view--subject to what is set forth herein--that stenographic services and any similar services may be considered one of the "other services necessary for an adequate defense" for purposes of payment under subsection (e). As to such expenses, however, we believe that the AO should either issue guidelines setting forth criteria for the use of the Federal Courts -such as whether the expense involved is normally charged to paying clients as a separate expense item or is absorbed as overhead in an hourly rate—against which requests for approval of these extraordinary expenses may be considered, or seek legislation specifying the criteria to be used.

The first question is answered accordingly.

The second question raised by the Acting Assistant Attorney General for Administration is:

> Where a prisoner in a civil rights action under 42 U.S.C. 1983 in the U.S. District Court is allowed to proceed in *forma pauperis*, is the Administrative Office of the U.S. Courts or the U.S. Department of Justice responsible for the payment of any expenses involving fact witnesses and expert witnesses incurred on behalf of the pauper?

The issue of the payment of witness fees and marshal's costs by the United States in indigent prisoners' civil rights cases was earlier raised with this Office by the Chief Judge, United States District Court, Eastern District of Pennsylvania. As a result of the Chief Judge's request for our opinion, we have, in addition to the views of the Acting Assistant Attorney General for Administration of the Department and the General Counsel of the AO, the views of the Legal Counsel, United States Marshal Service and of the Assistant Attorney General, Office of Legal Counsel of the Department. As noted above, the instant decision will also serve as a response to the Chief Judge's inquiry.

As both the Department and the AO indicate, there is presently no clear statutory (or administrative) authority for the Government to pay such expenses. However, the Department takes the position that prisoner civil rights proceedings are analogous to habeas corpus proceedings. With respect to the payment of witness fees on behalf of indigent defendants in habeas corpus proceedings, we stated in 39 Comp. Gen. 133, 139, *supra*, that

> * * * habeas corpus proceedings are civil actions is well settled. *Ex parte Tom Tong*, 108 U.S. 556, 27 L. Ed. 826. While we know of no basis upon which the United States may be charged witness costs in civil proceedings, the writ of habeas corpus is so related to the protection of constitutional rights afforded indigent defendants by Rule 17(b), that to ignore that rule in a habeas corpus proceeding under the pauper's statute may well raise grave questions of constitutionality.

That view was given statutory status by the enactment of Public Law 89–162, 79 Stat. 618, approved September 2, 1965, which amended 28 U.S.C. 1825 and specifically provided for the payment of such expenses.

The Department, citing *Wilwording* v. *Swenson*, 404 U.S. 249, 30 L. Ed. 2d 418 (1971), states that the Supreme Court has noticed the "essential habeas corpus nature" of civil rights actions and contends that indigent prisoners should be afforded the ability to secure the attendance of witnesses in civil rights suits initiated by them.

The AO, however, contends that the result suggested by the Department is a matter of policy, appropriate for the legislative process alone to resolve. It does not agree that suits brought by prisoners concerning their living conditions, food, institutional discipline, etc., are like habeas corpus proceedings other than that in both cases the petitioners are in custody. The AO cites the case of *Preiser* v. *Rodriquez*, 411 U.S. 475, 93 L. Ed. 1827 (1973), distinguishing, to some extent, between habeas corpus and civil rights proceedings; the pendency of

certain bills (such as 93d Cong., S. 2610 and H.R. 8848) which would accomplish the results urged by the Department; and the proposed new "Rules Governing Habeas Corpus Proceedings" which would leave actions brought under 42 U.S.C. 1983 to be governed by the Federal Rules of Civil Procedure, as support for its position.

The 1973 Annual Report of the Director of the Administrative Office of the United States Courts discloses the magnitude of the problem here presented. Seventeen and one-half percent of all civil cases filed in fiscal year 1973 in United States District Courts were prisoner petitions. Prisoner petitions on civil rights grounds increased, for Federal prisoners, from 15 in 1966 to 414 in 1973 and petitions filed by State prisoners increased from 218 to 4,174 over the same period. In addition, many petitions filed for other types of relief (such as habeas corpus petitions) are, both in effect and in their treatment by the courts, civil rights actions. In the Annual Report, the AO states that alternative methods for handling prisoner grievances should be explored. See also *Rodriguez* v. *McGinnis*, 456 F. 2d 79 (1972).

While we do not dispute the fact that in many cases there may be substantial similarities between prisoner civil rights actions and habeas corpus proceedings, we are in basic agreement with the views presented by the AO's General Counsel in his letter to us of January 31, 1973, in which he stated with reference to our decision reported in 39 Comp. Gen. 133, *supra*,:

> The Comptroller General relied upon *United States* v. *Cavell*, 171 F. Supp. 417 (D.C. Penn., 1959) to justify this language. The court in the *Cavell* case expressly limited itself to criminal matters by stating that it was "protecting a pauper from violation of his constitutional rights in a state prosecution". *U.S.* v. *Cavell supra* at 424.
>
> Neither the Comptroller General's nor the *Cavell* court's language can be used to justify the payment of witness fees and costs in civil rights cases. When an individual files a civil rights action, even if he is a prisoner, he does not do so as an indigent defendant, but as a plaintiff in a civil suit. He is not challenging either the legality of his incarceration or the regularity of his prosecution. These actions are in no way related to the criminal process and cannot justify usage of the Federal Rules of Criminal Procedure. The fact that they are filed by prisoners does not determine the nature of the action. Any citizen or person within the jurisdiction of the United States can file the type of action prisoners ground on. 42 U.S.C. § 1983; *Cruz* v. *Beto*, 405 U.S. 319, 321-322 (1972). Prisoners use § 1983 to protect rights such as access to the mails, *Lee* v. *Tahash*, 352 F. 2d 970 (C.A. 8, 1965); compensation, *Sigler* v. *Lowrie*, 404 F. 2d 659 (C.A. 8, 1968); employment, *Granville* v. *Hunt*, 411 F. 2d 9 (C.A. 5, 1969); good time allowances, *Douglas* v. *Sigler*, 386 F. 2d 684 (C.A. 8, 1967); medical treatment, *Coppinger* v. *Townsend*, 398 F. 2d 392 (C.A. 10, 1968); physical accommodations, *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (D.C. Cal., 1966); and religious practices, *Cooper* v. *Pate*, 378 U.S. 546 (1964). These actions entitle petitioners to damages, injunctions or other proper redress. See 42 U.S.C. 1983. If the section is erroneously used in place of a habeas corpus action, the court will treat it as such and payment of witness fees and costs would then be proper.
>
> That specific Congressional authorization for payment of costs and fees in actions under 42 U.S.C. Ch. 21 is needed can be seen in the court's opinion in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). There, the court pointed out that unless Congress enacted a provision for the counsel fees, successful plaintiffs would routinely have been forced to bear their own attorney's fees and few parties would have been in a position to protect the public interest. An examination of those sections dealing with fees, process, or procedure fails to

indicate any Congressional intent to pay indigent parties fees or costs for witnesses under these statutes. See 42 U.S.C. §§ 1987, 1988, 1990, 1991.

In other words, while persons who allege that their civil rights have been violated need not be prisoners in order to be eligible to bring an action pursuant to 42 U.S.C. 1983, habeas corpus proceedings are available only to those persons who are in governmental custody. 28 U.S.C. 2241(c). Further, while Congress has established a system which will enable indigent prisoners to obtain necessary financing to prosecute their writs of habeas corpus, it has not specifically provided for the payment of counsel fees or certain other expenses for indigent petitioners, whether or not they are prisoners, who allege that other civil rights have been violated.

In this regard we disagree with the opinion of the court in *McClain* v. *Manson*, 343 F. Supp. 382 (D.C. Conn. 1972), that pursuant to subsection (g) of the CJA, civil rights and habeas corpus actions should be equated in that:

> [T]here seems to be no reason to ignore the essential habeas corpus nature of these [civil rights] petitions for purposes of the Criminal Justice Act. If statutes are to be construed broadly to protect the right of prisoners, a similar construction is appropriate to provide at least minimal compensation for those attorneys who endeavor to have those rights protected. At least this should be done in construing a statute like 18 U.S.C. 3006A(g), which makes the appointment of counsel in habeas corpus cases discretionary with the district court when it determines that the "interests of justice so require."

Rather, it is our interpretation of subsection (g) that only persons specifically mentioned therein—i.e., those subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, 2255, of Title 28 or section 4245 of Title 18, United States Code—may be furnished, at the courts' discretion, with represenation. Had Congress wished to extend the coverage of this provision to civil rights petitioners, it could have done so.

In reaching this conclusion we have, of course, considered the connection between civil rights and habeas corpus actions as discussed, among other places, in the *McClain* and *Wilwording* cases, *supra* and in "Annotation: Habeas corpus on ground of unlawful treatment of prisoner lawfully in custody," 155 ALR 145.

Accordingly, and for the reasons discussed above, we are aware of no legal basis which would authorize either the Department or the AO to pay expenses incurred in obtaining counsel or fact or expert witnesses on behalf of an indigent prisoner who is bringing a civil rights action under 42 U.S.C. 1983. Moreover, in view of the broad policy and financial implications of authorizing such payments, we believe that proposals to accomplish the goals of such a program should be considered and authorized, if desired, by the Congress. We might suggest in this regard that the Department, which is in favor of such payments, might wish to propose authorizing legislation to the Congress.

The second question is answered accordingly.

[B-179250]

Contracts—Labor Stipulations—Service Contract Act of 1965—"Successor Employer Doctrine"

Since the congressional purpose underlying section 4(c) of the 1972 Service Contract Act amendments appears to be that the "successorship" principle—the obligation that the successor service contractor pay employees no less than the rates in the predecessor's collective bargaining agreement—was intended to apply with respect to successor contracts to be performed in the same geographical area, Labor Department's application of 4(c) to procurements of services regardless of place of performance is subject to question. However, because the practice is not prohibited by the act, the protest is denied, but the matter should be presented to the Congress by the Secretary of Labor to obtain clarifying legislation.

General Accounting Office—Recommendations—Implementation

When a General Accounting Office decision contains a recommendation to an agency for corrective action, copies of the decision are transmitted to the congressional committees named in section 232 of Legislative Reorganization Act of 1970, 31 U.S.C. 1172, and the agency's attention is directed to section 236 of act, 31 U.S.C. 1176, which requires an agency to submit written statements of the action to be taken on a recommendation to the House and Senate Committees on Government Operations, not later than 60 days after the date of the decision, and to Committees on Appropriations in connection with the first request for appropriations made by the agency more than 60 days after the date of decision.

In the matter of A–V Corporation, February 28, 1974:

Invitation for bids (IFB) No. DABE34–73–B–0059 was issued May 9, 1973, by the Procurement Division, Fort Sam Houston, Texas, calling for film processing services during the period from July 1, 1973, through January 31, 1974. The services were to be performed at the location of the successful contractor or contractors.

AV's protest raises certain objections, described in detail *infra*, concerning the manner in which the Service Contract Act of 1965 has been applied to the procurement. The background facts regarding the application of the act have been outlined in the Department of the Army's administrative report to our Office. The predecessor contracts for this work, which covered the period from July 1, 1972, through June 30, 1973, were performed by Acme Film Laboratories, Inc. (Acme), Los Angeles, California, and Precision Film Laboratories, Inc. (Precision), New York, New York. No Service Contract Act wage determinations were issued for the predecessor contracts. The contracting officer states that as a result of the 1972 amendments to the Service Contract Act (Public Law 92–473, October 9, 1972, 86 Stat. 789, 41 U.S. Code 351 note), it was required that, in connection with the next procurement of the services, copies of any collective bargaining agreements between the contractors and their service employees be submitted to the Department of Labor with Standard Form 98, "Notice of Intention to Make a Service Contract * * *." The submission was made by the contracting officer. Subsequently, the Labor Department

issued Wage Determinations Nos. 73-627 (Rev.-1) and 73-628 (Rev.-1), both dated June 8, 1973, specifying minimum wages and fringe benefits for various classes of service employees. Both determinations contained the following "NOTE";

> In accordance with Section 4(c) of the Service Contract Act, as amended, the wage rates and fringe benefits set forth in this wage determination are based on a collective bargaining agreement(s) under which the incumbent contractor is operating. The wage determination sets forth the wage rates and fringe benefits provided by the collective bargaining agreement and applicable to performance on the service contract. However, failure to include any job classification, wage rate or fringe benefit encompassed in the collective bargaining agreement does not relieve the successor contractor of the statutory requirement to comply as a minimum with the terms of the collective bargaining agreement insofar as wages and fringe benefits are concerned.

The determinations were incorporated in the solicitation by amendment No. 2, June 11, 1973, which stated:

> Wage Determination Numbers 73-627 (Rev.-1) * * * and 73-628 (Rev.-1) * * * are applicable to this solicitation. * * *
>
> NOTE: Offeror must realize that the wage rates stated in the Wage Determinations provided by the U.S. Department of Labor are the absolute minimum wage rates allowable, and no wages may be paid to those employees listed which are lower than the stated "Minimum hourly wage" * * *.

Bids were received on June 26, 1973, from Acme, Precision and Hollywood Film Enterprises, Inc. (Hollywood), Hollywood, California. Contracts DAKF49-74-D-0002 and -0003 were awarded to Acme and Hollywood, respectively, on July 2, 1973.

By its letter of July 3, 1973, forwarded by a congressional source, A-V protested to our Office. The protestor points out that the wage determinations attached to the IFB are based upon the predecessor contractors' collective bargaining agreements in California and New York and contends that the act should have been applied so that the wage determinations were based on wages prevailing in the area where the service is performed. A-V, which is located in Houston, Texas, points out that its employees are covered by a collective bargaining agreement which it believes to be appropriate for economic conditions in its area, but that it cannot "live with" the Service Contract Act requirements as they have been applied to this procurement. A-V states that, under the circumstances, it was precluded from submitting a bid.

The Service Contract Act of 1965, 41 U.S.C. 351-358, was enacted to provide wage and safety protection for employees performing certain Government service contracts. As originally enacted in Public Law 89-286, October 22, 1965, 79 Stat. 1034, sections 2(a)(1) (41 U.S.C. 351(a)(1) and 2(a)(2) provided that contract specifications contain Department of Labor determinations of minimum monetary wages and fringe benefits to be paid service employees in the performance of the contract based upon the prevailing wages and fringe benefits for such employees in the locality. Public Law 92-473 amended

these provisions to add that determinations be based upon rates in collective bargaining agreements where service employees are covered by such agreements. As amended, section 2(a)(1) states:

> (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, as defined herein, shall contain the following:
>
> (1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, 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(a)).

The provisions concerning determinations of fringe benefits, as amended, are set forth in section 2(a)(2) (41 U.S.C. 351(a)(2)) in substantially similar language.

In addition, Public Law 92-473 added section 4(c) to the act (41 U.S.C. 353(c)). Section 4(c) states:

> 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.

In a typical service contract procurement--for example, a solicitation for janitorial services--if the predecessor contractor has a collective bargaining agreement, in the performance of the contract the successor contractor would be bound both by the contract terms and by section 4(c) of the act to pay wages and furnish fringe benefits in accordance with the predecessor's collective bargaining agreement.

However, the Department of Labor has applied the statutory provisions in the same manner to procurements of services which are performed at the location of the successful bidder, which may not be the same as the location of the Government installation. *See* 29 CFR 4.1c. Thus, in the present case, A-V and any other prospective bidder, whatever their locations, were obligated to bid on the basis of determinations which reflect collective bargaining agreements of the predecessor contractors in New York and California.

We agree with the contracting officer's view that the application of section 4(c) in this manner to the present procurement and similar procurements can result in the Government being "locked into" con-

tracts with firms paying high wages because of their geographic location and the collective bargaining agreements in effect at their plants. In future procurements of these services, presumably the applicable wage and fringe benefit determinations will again be based on the terms of collective bargaining agreements in effect in California and New York. In that regard, in a legal memorandum submitted with the Department of the Army administrative report it is stated:

> * * * Department of Labor's interpretation of Section 4(c) will have the effect of restricting competition as is made clear from protestant's fact situation. Contractors who perform services for private companies as well as the Government are discouraged from bidding on contracts which require that they pay higher rates imported from another location to employees performing on Government contracts. Since the private sector of the economy in their area has presumably established the effective price for the type of service, such contractors are in no position to pay all employees such rates. By establishing two different rates for employees based upon whether an employee was working on a Government contract, the contractor would only be buying labor difficulties.

In addition, it is apparent that the costs to the Government of procuring such services will be increased.

The views of the Department of Labor on A–V's protest were furnished to our Office in a letter dated December 7, 1973, from the Acting Administrator, Employment Standards Administration. The letter offers the following explanation of the rationale behind the manner in which sections 2(a)(1), 2(a)(2) and 4(c) of the act were applied to the present procurement:

> We have taken this position, based on our reading and interpretation of the language of the Act in the light of its entire legislative history, that section 4(c) was intended to apply to all successor contracts for furnishing the same services, entered into pursuant to procurement action by the same Federal facility, and not only in those cases where the government contract work is performed at the same government installation.
>
> In our interpretation and application of section 4(c) this Department has been guided by the legislative intent as expressed in the Report of the Senate Committee (S. Rept. 92–1131). According to this Report, section 4(c) and the related amendments to paragraphs (1) and (2) of section 2(a) are intended to apply in situations where a contract to furnish services to meet the Government's needs at a particular location succeeds a prior contract under which substantially the same services were *furnished to* the Government [although not necessarily performed] at the same location through the use of service employees whose wage and fringe benefits were governed by a collective bargaining agreement. The obligations of the successor contractor in such a situation, as stated in section 4(c), are to pay the service employees he employs under his contract not less than "the wage and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits . . ., to which such service employees *would have been entitled if* they were employed under the predecessor contract," *unless* "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." (Emphasis added.)
>
> Wage determinations made under section 2(a) of the Act must give effect to section 4(c). The Report stresses that "Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme" and that it is intended that these sections "be so construed that the proviso in section 4(c) applies equally to all the above provisions." A purpose of these amendments is stated to be "to explicate the degree of recognition to be accorded collective bargaining agreements covering service employees in the predetermination of prevailing wages and fringe benefits for future such contracts for *services* at the *same* location."

(Emphasis in the original.) Significantly, neither the statutory language nor the committee reports purport to limit the applicability of section 4(c) to successor contracts for services to be *performed* at the same location as under the predecessor contract, in cases where the place of performance cannot be ascertained when bid specifications are supplied to potential contractors. The services, wherever performed, are of course *furnished* to meet the service needs of the procuring facility inviting the bids and charged with administration of the contract, and such services must be considered to be furnished at the location of such facility.

We do not agree with the Labor Department's views. Initially, examination of the legislative history of the 1972 Service Contract Act amendments reveals a strong congressional concern over a specific type of problem which had arisen in connection with the administration of the act. In certain service contract procurements at particular Government installations where wage and fringe benefit determinations were not furnished by the Department of Labor, and where the incumbent contractor was underbid, the result was that the incumbent's employees lost their jobs and were forced to seek employment at lower wages with the successor contractor, and the employees also lost the benefits furnished them under their collective bargaining agreement with their former employer. These concerns were summarized at page 3 of H. Rept. No. 92-1251 on H.R. 15376, July 27, 1972, as follows:

A great deal of labor-management instability has arisen because of a failure to take the existence of collective bargaining agreements into account in the wage and fringe benefit determination process; * * *
* * * The practice of rebidding contracts yearly either without wage and fringe determinations or with unrealistically low determinations is creating chaos for reputable contracts and great hardships for employees.

It is noteworthy that the examples of specific situations of this type cited in the legislative history appear to involve procurement of services which are performed on the Government installation involved. See, for example, the comments of Senator Gurney regarding procurements of services for Cape Kennedy and Patrick Air Force Base, reported at pages 12-14 of the Hearings on S. 3827 and H.R. 15376, Subcommittee on Labor, Senate Committee on Labor and Public Welfare, August 16 and September 6, 1972; see, also, pages 23-24 and 32-34. Also to be noted are the comments of Congressman O'Hara concerning wage undercutting on a janitorial services procurement for the Eastern Test Range, reported at page 32 of the Hearing on H.R. 11884 before the Special Subcommittee on Labor, House Committee on Education and Labor, June 1, 1972. Congressman O'Hara pointed out that "It is that sort of problem which prompted us to include in the bill that in no event shall the new contractor be permitted to pay less than what the existing rate was under the old contract."

In short, there are substantial indications in the legislative history of the 1972 amendments that the intention behind the amendment of section 2(a) of the act and the inclusion of section 4(c) was merely

to assure that a successor contractor could not decrease the wages and benefits of employees hired from the predecessor contractor in the performance of services at a particular Government installation. See the statement of Senator Gurney, who sponsored S. 3827, a bill identical to H.R. 15376, the bill enacted as Public Law 92–473, reported at page 15343 of the Congressional Record, Senate, September 19, 1972:

> This bill is a simple one. It merely requires that a successful bidder on a service contract cannot pay employees less than they were receiving from their former employer unless his wages are out of line. * * *.

To the same effect is a statement by Congressman Ashbrook, a proponent of H.R. 15376, reported at page 7258, Congressional Record, House, August 7, 1972.

In view of the foregoing, we believe that the "successorship" concept of section 4(c) of the act was intended by Congress to be applied to successor contracts under which substantially the same services are being performed ("furnished") at a particular Government installation. It is not apparent from the legislative history that Congress specifically intended section 4(c) to apply to procurements of services which can be performed anywhere. We are therefore of the view that the Department's application of section 4(c) to the present procurement is subject to question.

We recognize, however, that sections 2(a)(1), 2(a)(2) and 4(c) of the amended act must be read in harmony. Sections 2(a)(1) and 2(a)(2) clearly provide that where a collective bargaining agreement covers "any such service employees," the Labor Department's wage and fringe benefit determinations must be "in accordance with" such wage rates and fringe benefits. It would appear that this statutory mandate applies to collective bargaining agreements covering service employees performing service contracts at the location of the contractor as well as agreements covering employees performing service contracts at or in the immediate vicinity of the Government installation.

After careful consideration of this matter, we cannot conclude that the Labor Department's interpretation of the act as requiring a determination based only upon the collective bargaining agreements covering service employees of the predecessor contractors is specifically prohibited by the act. Accordingly, the protest is denied.

The issue considered in the present protest is analogous to the one considered in 53 Comp. Gen. 370 (1973). That decision also involved a procurement of services to be performed at the location of the successful bidder. Our decision criticized the Labor Department's practice of interpreting the "locality" basis of wage determinations as referring only to the location of the Government installation being served, since the language and legislative history of the Service Contract Act indicate that "locality" refers to the place where services are performed.

In view of the serious impact on the Government's procurement of services, we recommended that the Department present the matter to Congress with a view towards obtaining clarifying legislation.

In the present case, we likewise believe that the Labor Department's implementation has a serious adverse impact on the Government's procurement practices in terms of reduced competition and increased costs. In addition, we believe the administrative confusion inherent in the Department's practices will adversely affect future procurements of this kind. The extent to which the Department's interpretation of sections 2(a)(1), 2(a)(2) and 4(c) of the act has resulted in a departure from the basic concept of wage and safety protection for employees performing a service contract in a particular location is well illustrated in the following hypothetical example cited by the Department of the Army:

> The [Labor Department] procedure * * * can produce absurd results. For example, a facility in Washington, D.C. has a need for a continuing service which can be performed anywhere. The predecessor contractor performed in New York City and had a collective bargaining agreement. The successor contractor performs in Dubuque, Iowa. The Dubuque contractor must pay the rates contained in the New York City contractor's collective bargaining agreement unless those rates are substantially at variance with prevailing rates for Washington, D.C. If there is a substantial variance, the Dubuque contractor then must pay Washington, D.C. prevailing rates to his employees performing in Dubuque.

Applying this example to the present procurement, if a Dubuque concern had been successful in bidding for the Fort Sam Houston, Texas, contracts, it would nevertheless be obligated to pay wages and furnish fringe benefits based on collective bargaining agreements in New York City and Los Angeles, unless the Secretary found the rates to be substantially at variance with those in the "locality" (Fort Sam Houston), in which case the prevailing rates in the Fort Sam Houston area would apply.

In view of the foregoing, we are recommending to the Secretary of Labor by letter of today that the issues considered in this decision be presented to Congress with a view towards obtaining clarifying legislation. As this decision contains a recommendation for corrective action, it is being transmitted by letter of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, 31 U.S.C. 1172. The Secretary will be required pursuant to 31 U.S.C. 1176 to submit written statements with respect to the action to be taken on the recommendation to the House and Senate Committees on Government Operations not later than 60 days after the date of the decision, and to the Committees on Appropriations in connection with the first request for appropriations made by the agency more than 60 days after the date of the decision.

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