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[B-177637]

Contracts—Negotiation—Evaluation Factors—Price Consideration Not Mandatory

The low proposal to fabricate a Satellite Communications Earth Station that was technically totally deficient, and which omitted required detailed information that was not corrected by the accompanying blanket offer of compliance as the statement was an inadequate substitution for the omitted information, was an unacceptable proposal that was not susceptible of being made acceptable without major revision. The fact that the proposal was the lowest offer submitted does not require the negotiations prescribed by 10 U.S.C. 2304(g) with all responsible offerors who submit proposals within a competitive range, even though "competitive range" encompasses both price and technical considerations and either factor can be determinative of whether an offeror is in a competitive range, since price alone need not be considered when a proposal is totally unacceptable.

To the Communications Satellite Corporation, July 5, 1973:

Reference is made to your letter of March 5, 1973, and prior correspondence, protesting against the award of a contract to Harris-Intertype Corporation, Radiation Division, under request for proposals (RFP) No. DAAB07-73-R-0001, issued by the United States Army Electronics Command, Fort Monmouth, New Jersey.

The RFP solicited proposals on a fixed-price-incentive basis for the fabrication of one Satellite Communications Earth Station in accordance with United States Army Satellite Communications Agency (SATCOM) technical requirement SCA-2140 dated June 1, 1972, repair parts, tools and test equipment, 36 months of onsite operation and maintenance, and contract data items.

Section "D" of the RFP, as revised by amendment No. 1, sets forth an evaluation and award criteria that based the contract award on the best overall proposal with appropriate consideration given to (1) Technical Proposal, (2) Past Performance, (3) Management, and (4) Cost and Cost Realism, in that order of importance. Offerors were advised that of these four factors, the Technical Proposal was the most important and bore a greater weight than all the other factors combined.

Section D.4, part II, of the RFP, as amended, warned the proposer that he is responsible for including sufficient details (without reference to cost) to permit a complete and accurate evaluation of the proposal strictly from a technical standpoint. Additional notifications as to the requirement for the proposals to contain detailed and complete information were presented in sections D.5a, D.5b, D.5b(1), D.5c and D.5d of the RFP, as amended. Also, section D.3a of the RFP, as amended, cautioned the proposer that "parroting" of the RFP words, with a statement of intent to perform, does not reveal the bidder's understanding of the problem or his capability to solve it.

Three proposals were received by August 21, 1972, the closing date for receipt of proposals, and evaluated by SATCOM. The evaluation disclosed that of the three proposals received, only your proposal was considered technically unacceptable and not susceptible of being made acceptable without major revision. On October 19, 1972, the contract was awarded to Harris-Intertype Corporation, Radiation Division, and by letter of the same date you were advised of the award.

You contend that SATCOM's failure to conduct negotiations with Comsat is a clear violation of the requirements of 10 U.S. Code 2304(g), as implemented by paragraphs 3–804 and 3–805 of the Armed Services Procurement Regulation (ASPR) that discussions be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. You maintain that SATCOM acted arbitrarily and capriciously in rejecting your proposal since it was an unqualified commitment to do the work at a price substantially below that quoted by the next lowest offeror. You allege that Comsat submitted enough technical data to be in the competitive range, so as to require SATCOM to conduct negotiations with Comsat and that SATCOM failed to take price into consideration in determining if the proposal was in the competitive range. In your view the reasons given by SATCOM for rejection of your proposal are trivial and are based on an inaccurate reading of your proposal.

You urge in this connection that a few instances of insufficient detail should not have been considered an adequate reason for rejecting a proposal without discussions, citing 47 Comp. Gen. 29 (1967); 45 *id.* 417, 427 (1966); and B–159796, November 30, 1966. On the record before us, we must conclude that no basis exists for our Office to interpose a legal objection to the rejection of Comsat's proposal.

With respect to the evaluation of your technical proposal, the Project Manager, SATCOM, made the following comments in his technical evaluation memorandum of September 21, 1972:

> In accordance with the referenced Evaluation Plan, this bidder's proposal is judged to be technically unqualified, and nonresponsive to the procurement solicitation. This proposal, in the main, is devoid of technical content beyond a very superficial level. The discussion of system and subsystem requirements and design approaches are, for the most part, a direct playback of the Government's specification requirements. The treatment of the critical design tradeoffs which involve the budgeting of subsystem performance, including the antenna system, is lacking in detail and backup data and is, therefore, unacceptable. This bidder made no definite indication of vendor selection which again cast doubt on his method of approach in such important equipment areas as the antenna and parametric receiver amplifiers. This bidder implies that the detailed technical specifications covering system and subsystem performance interface, etc. will be prepared after he receives the contract, and that these documents would then be used to procure the subsystems. The line of reasoning this bidder appears to take is that their reputation for past successes can be used as a sub-

stitute for the kind of proposal that the RFP calls for. This approach is, of course, totally unacceptable. The deficiencies of this bidder's proposal are so numerous and so serious that there is no way to seek "clarification" while avoiding a major revision of their proposal. * * *

Further elaboration of the inadequacies in the Comsat technical proposal is provided in a memorandum dated January 5, 1973, from the Executive Officer, SATCOM. A copy of this memorandum was made available to you for comment. In response to your reply letter of March 5, 1973, we requested and received a supplemental report from the contracting officer. In light of this supplemental report (a copy of which was furnished to you) and the other material of record bearing on the evaluation of Comsat's proposal, we cannot say that SATCOM's technical assessment of the proposal was an arbitrary abuse of administrative discretion. *See*, e.g., 48 Comp. Gen. 314, 317–318 (1968).

We recognize that a consideration of the severity of the informational deficiencies in Comsat's proposal cannot be completely divorced from the disputed technical questions involved. However, we disagree with your suggestion that a blanket offer of compliance by Comsat is an adequate substitute for the detailed technical information required by the solicitation. In this context, we think our decision 52 Comp. Gen. 382 (1972) is controlling and requires rejection of your contentions that discussions must be held with an offeror who submits a proposal which is technically unacceptable by reason of the omission of material technical information and that, in any event, price must be considered before the proposal is rejected.

We have held that a proposal must be considered to be within the competitive range so as to require negotiations unless it is so technically inferior that meaningful negotiations are precluded. 48 Comp. Gen. 314, *supra*. However, in that same case, we also recognized that the determination of competitive range, particularly with respect to technical considerations, is a matter of administrative discretion which will not be disturbed absent a clear showing that the determination was arbitrary or capricious.

In the present situation, Teledyne's proposal was found to be technically unacceptable for a number of reasons, some of which involved the omission of certain information from the proposal. In FAA's view, these omissions were related to basic requirements of the system to be procured and warranted rejection of Teledyne's proposal. Under these circumstances, your reliance on B–173716, *supra*, is misplaced, since in that case we found that the rejected proposal was merely "informationally deficient" and not technically unacceptable. *See* B–169908, July 31, 1970.

Furthermore, we do not believe that a duty should be imposed on the procuring activity to request information or clarifications regarding material omitted from a proposal when that omission is related to a basic requirement. B–174056, June 1, 1972.

We believe the cases you cite are easily distinguishable from the instant situation. In 45 Comp. Gen. 417 (1966), the agency elected to conduct negotiations only with one offeror, who was determined to be technically superior to the other offeror. We concluded that it was improper to exclude the other offeror from negotiations based on a determination that the offeror's proposal was merely *technically inferior and not technically unacceptable*. In 47 Comp. Gen. 29 (1967) the protestant (Honeywell) was excluded from negotiations because it failed a "benchmark" or live test demonstration. Since there was a substantial price savings between the Honeywell proposal and the only proposal found to be in the competitive range and it appeared that Honeywell was capable of passing the benchmark test within a relatively short time we held that its proposal should not be deemed technically unacceptable merely because of failing the benchmark test. Here, of course, there was an administrative determination that the Teledyne proposal was technically unacceptable as compared to the three proposals found to be acceptable. While you contend that the Teledyne proposal offers a substantial price savings to the government, we are unable to conclude that the Teledyne proposal was readily capable of being made technically acceptable.

* * * * * * *

The words "including price" were added to 10 U.S.C. 2304(g) in response to an Army procurement of M–16 rifles in which awards were made to 2 offerors on the basis of the technical superiority of their proposals, without regard to price. The history of that procurement reveals that the Army originally evaluated four proposals as technically acceptable, but subsequently determined that it would be best assured of having its needs satisfied by accepting the two highest rated technical proposals, regardless of price. The Army then awarded letter contracts to those offerors without looking at the price proposals of the other 2 offerors. Because the contract prices were significantly higher than the price proposals of the unsuccessful offerors, concern was expressed in Congress that public funds were unnecessarily expended, and legislation was introduced "for the express purpose of prohibiting in the future the waste of public funds which occurred * * * in the M–16 Contract awards." 114 Cong. Rec. 20736. This was more fully explained as follows:

The purpose of this section is to close the loophole which allowed the Army to make the recent awards for the procurement of M–16 rifles without considering price proposals from all qualified bidders. It would insure that on future negotiated procurements of this type mentioned the military departments will have to consider at least ceiling prices proposed by all qualified bidders. H. Rept. No. 1869, 90th Congress, 2d sess. 10.

Although we respect the views of Congressman Ichord and recognize that there is some support for the position you take, we do not believe that 10 U.S.C. 2304(g) requires that price must be considered in all instances in determining what proposals are in a competitive range. To accord such an interpretation to the law would place procurement officials in the unreasonable position of having to consider the price proposals of all offerors, no matter how deficient or unacceptable the accompanying technical proposals might be. We do not believe that Congress intended such a result. Rather, it seems to us that Congress wanted to insure that the prices proposed by qualified offerors who submit acceptable proposals would be considered prior to the making of awards to higher priced offerors on the basis of technical considerations alone.

We think this view is supported by our previous decisions, including those you cite in your letters. We have stated, both before and after enactment of the 1968 law, that competitive range encompasses both price and technical considerations, 45 Comp. Gen. 417 (1966); 47 *id.* 29 (1967); 50 *id.* 1 (1970), and that the negotiation of a contract without price competition on the basis that a particular offeror would furnish services of a higher quality than any other offeror was contrary to 10 U.S.C. 2304(g). 50 Comp. Gen. 110 (1970). Our concern in these cases stemmed from the absence of either meaningful or actual price competition as required by statute, and we objected to the elimination from competition of all but 1 offeror without appropriate consideration of price.

These decisions do not indicate, however, that price must be considered in all instances in determining competitive range. Our statements that both price and technical considerations are encompassed in "competitive range" mean that in appropriate cases either factor can be determinative of whether an offeror is in a competitive range, and we have frequently recognized that price need not be considered when a totally unacceptable technical proposal is submitted. B–168190, February 24, 1970; B–169908, July 31, 1970; B–160671, August 31, 1970; B–170317, February 2, 1971; *see, also*, 49 Comp. Gen. 309 (1969) and 50 *id.* 565 (1971). * * *

In view of the foregoing, the protest is denied.

[B-177847]

Advertising—Advertising *v.* Negotiation—Specifications Availability

The contention after contract award that it was not impossible to draft specifications for the procurement of airport surveillance radar equipment and that the procurement should have been formally advertised rather than negotiated under 41 U.S.C. 252(c)(10) is an allegation of an impropriety in the solicitation that was apparent prior to the date for receipt of proposals, and the protest not having been filed under the United States General Accounting Office Interim Bid Protest Procedures and Standards prior to the closing date for receipt of proposals to permit remedial action was untimely filed, particularly in view of the fact the protestant was uniquely qualified to call the procuring agency's attention to the reasons why it believed it was not impossible to draft adequate specifications.

Contracts—Negotiation—Awards—Initial Proposal Basis—Competition Sufficiency

The determination to make an award for airport surveillance radar equipment on the basis of initial proposals—an exception to the requirement for discussions with all offerors within a competitive range—is discretionary in nature, and lacking adequate price competition, since only one of the two offers submitted was fully acceptable, the procuring agency properly considered the exceptions to discussion had not been satisfied and conducted negotiations with the offeror whose initial proposal, although technically unacceptable overall was susceptible of being upgraded to an acceptable level—a determination that was not influenced by the fact a reduction in the initial price made the offer the lowest submitted. Therefore, an award to the low offeror was not arbitrary, notwithstanding the technical superiority of the competing offer since the request for proposals did not make technical considerations paramount.

To Akin, Gump, Strauss, Hauer & Feld, July 10, 1973:

Reference is made to your letter of May 11, 1973, and prior correspondence, protesting on behalf of Texas Instruments Incorporated (TI) the award of contract No. DOT-FA73WA-3228 to General Dynamics, Electronics Division (GD), by the Department of Transportation (DOT), Federal Aviation Administration (FAA).

You object to the award on the grounds that the procurement should have been advertised rather than negotiated; that award should have been made to TI on the basis of its initial proposal; that the agency improperly considered a late price reduction by GD; that the Office of the Secretary of Transportation (OST) unlawfully intervened in certain procurement decisions made by FAA; and that award to GD may violate the provisions of the Buy American Act. You request that the award to GD be set aside, and that award be made to TI on the terms specified in its previous proposal.

For the reasons which follow, the protest is denied.

Request for proposals (RFP) WA4M-2-7630 was issued on March 17, 1972, for the design, development, fabrication and installation of certain airport surveillance radar equipment, specifically, 31 units of the system described as the ASR-8. Separate cost and technical proposals were solicited. Amendment No. 2 to the RFP dated

May 11, 1972, changed the type of contract to be awarded from cost-plus-fixed-fee to fixed-price-incentive, with five items, involving data and certain support services, on a fixed-price basis. The amendment also eliminated the requirement that offerors submit cost or pricing data.

Timely proposals were received from TI and GD on May 23, 1972, with target prices as follows:

TI	$17,495,027
GD	20,362,025

The technical proposals were referred to a technical evaluation team, which furnished its report to the contracting officer by letter dated June 7, 1972.

FAA conducted an analysis of TI's proposed price, which included examination of data at TI's plant on July 10, 1972. In the meantime, GD, by telegram of June 29, 1972, had modified its proposal by reducing its target price to $16,568,000.

After analysis of the TI price, FAA desired to make an award to TI on the basis of the initial proposals. However, by letter of July 24, 1972, to the Administrator, the Acting Assistant Secretary for Administration of DOT expressed the view that the proposed award to TI could not be supported on the basis of adequate price competition or price analysis and recommended that FAA abide by the requirements of the Federal Procurement Regulations (FPR) by securing the submission of detailed cost or pricing data, conducting audits, and negotiating with the offerors.

Both offerors submitted cost or pricing data and technical revisions to their proposals. The cost proposals were audited and negotiations were conducted separately from November 15–20, 1972. At the conclusion of the discussions, best and final offers were obtained, as follows:

GD	$17,656,625
TI	21,825,536

FAA recommended award to TI. However, as a result of a decision by the Under Secretary of Transportation, award was made to GD on January 12, 1973, as the lowest technically acceptable offeror.

Your initial contention is that the procurement should have been formally advertised rather than negotiated. The contract was negotiated pursuant to 41 U.S. Code 252(c)(10), which provides that contracts may be negotiated for property or services for which it is impracticable to secure competition. FPR 1–3.210(a)(13) lists the impossibility of drafting adequate specifications, the basis relied upon in the agency's determination and findings, dated March 17, 1972, as one of the instances where the cited statutory authority may be used.

Our Interim Bid Protest Procedures and Standards (4 CFR 20.1, *et seq.*) provide that protests based upon alleged improprieties in solicitations which are apparent prior to the closing data for receipt of proposals shall be filed prior to the closing date for receipt of proposals. TI did not question the use of negotiation procedures until after the award of the contract in January 1973. As one of the leading suppliers of ASR equipment to FAA in the past, and as the supplier of the previous system, the ASR-7, it would appear that TI was uniquely qualified to call the procuring agency's attention to the reasons why it believed it was not impossible to draft adequate specifications for the "next generation" of ASR equipment, the ASR-8 system. In any event, when the agency decided to procure the ASR-8 by negotiation, the appropriate time to protest this method would have been before the closing date for receipt of proposals when remedial action might have been possible. In the circumstances, this portion of your protest must be regarded as untimely and will not be considered. Your other contentions are considered below.

Your contention that award should have been made on the basis of the initial proposals is based upon amendment No. 2 to the RFP, May 11, 1972, which stated in part:

> Your proposal should be submitted on the most favorable basis as to price, technical approach, delivery or time for completion, and other factors, since the Government proposes to make an AWARD WITHOUT further discussions or negotiations. Therefore, cost and price analysis information is no longer required.

This, you argue, induced TI and others to compete with the expectation that award would be made without discussions and submission of cost or pricing data. Thus, an award on a basis of other than initial proposal was improper. You believe that the Government should have determined that adequate price competition, as defined in FPR 1-3.-807-1(b), existed since there were two responsive proposals. In this regard, you characterize the technical evaluation report as indicating that GD's proposal was technically acceptable and inferior to TI's.

The letter dated June 7, 1972, from the evaluation team chairman to the contracting officer states that the TI proposal was found to be complete, adequate and responsive in all substantive areas. With regard to the GD proposal, the letter states:

> The General Dynamics proposal, while it could probably be upgraded, cannot be considered complete, adequate, and responsive as it now stands.
>
> * * * * * * *
>
> * * * It is not unreasonable to assume that, given the opportunity and more time, the General Dynamics proposal could be upgraded. It is the opinion of the team, however, that contract award to General Dynamics based on the proposal as submitted would result in unacceptably high risk to the Government.

These findings were iterated in a second letter dated June 30, 1972, from the team chairman:

> From analysis of the General Dynamics ASR-8 technical proposal, the evaluation team concluded that, as submitted, the proposal was not technically complete, adequate and responsive.
>
> It was the opinion of the team, however, that the proposal could be made complete, adequate and responsive through technical negotiations.
>
> Such negotiations, and the resultant design changes would cost time and money; a realistic assessment of the time or money involved would not be possible without some initial contact with the offeror.

For the following reasons, we agree with the Government's position that adequate price competition did not exist in the circumstances. The clear import of the technical evaluation report is that GD's initial proposal was technically unacceptable overall, though susceptible of being upgraded to an acceptable level through technical discussions. Since only one offeror, TI, submitted a fully acceptable offer, the criteria of adequate price competition set forth in FPR 1-3.807-1(b)(1)—at least two responsible offerors who can meet the Government's requirements—were not met. In addition, we do not believe the second exception in FPR 1-3.805-1(a)(5) to the requirement that discussions be conducted with all responsible offerors within a competitive range—namely, where accurate prior cost experience with the product clearly demonstrates that the price is fair and reasonable—could properly have been invoked here. Although FAA did conduct analysis of the TI price, comparing it with a Government estimate based upon the cost history of the previous airport surveillance radar system, the ASR-7, with the added complexity of the ASR-8 system factored in, this is not equivalent to accurate prior cost experience with the ASR-8 system. Even if the ASR-8 is regarded as substantially the same as the ASR-7, the accuracy of such price analysis would appear to be questionable in view of the fact that the ASR-7 has been procured on a sole-source basis from TI since fiscal year 1969.

In any event, award could not have been made prior to the submission of cost or pricing data as required by FPR 1-3.807-3(a). *See* 46 Comp. Gen. 631 (1967), wherein we held that a finding of adequate price competition could not serve as a basis to dispense with the requirement for cost or pricing data where award of a fixed-price-incentive contract was contemplated. The record does not show that the exceptional case waiver authority provided in FPR 1-3.807-3(b) was exercised here.

From the foregoing, it appears that award on the basis of the initial proposals was not possible. Even if it were conceded, for the purposes of argument, that a proper finding of adequate price competition could have been made, and that such a finding could properly serve to dispense with the requirement for cost or pricing data, it is not apparent why the agency's decision to enter into discussions and obtain cost or pricing data could be regarded as arbitrary.

A decision to take exception to the requirement for discussions with all offerors within a competitive range and to make an award on the basis of initial proposals is discretionary in nature. 52 Comp. Gen. 425 (1973). Also, we have stated that where negotiation is employed, its flexibility should be used to insure that competition is enhanced rather than limited, 51 Comp. Gen. 637, 640 (1972), and that the primary consideration in negotiated procurement is discussion with all offerors within a competitive range to determine whether deficient proposals—initial proposals which are not fully responsive to specifications—are reasonably subject to being made acceptable. 51 Comp. Gen. 431 (1972); 50 *id.* 59 (1970). In the circumstances, it is our view that the agency's departure, after receipt of initial proposals, from its stated intent to make an award on the basis of those proposals, cannot be regarded as giving rise to an inference of arbitrariness. *See*, in this regard, 47 Comp. Gen. 279 (1967).

Your contention concerning GD's late modification of its proposal is that the Government improperly accepted and considered it. GD's modification to its initial offer was stated in a telegram of June 29, 1972, as follows:

GENERAL DYNAMICS HAS REVIEWED THE WORK PLAN ESTABLISHED FOR THE ASR-8 PROGRAM AND HAS DEVELOPED AN IMPROVED APPROACH UTILIZING ADDITIONAL CORPORATE FACILITIES WHICH WILL RESULT IN A SIGNIFICANT REDUCTION IN CONTRACT PRICE. IN THE NEW PLAN THE PROGRAM WILL CONTINUE TO BE MANAGED BY OUR ELECTRONICS OPERATION IN SAN DIEGO, CALIFORNIA TOGETHER WITH THE ENGINEERING AND PROCUREMENT MANAGEMENT. HOWEVER, AN APPROPRIATE AMOUNT OF THE PRODUCTION ACTIVITY WILL BE ACCOMPLISHED IN OUR ELECTRONICS FACILITY AT ORLANDO, FLORIDA, RESULTING IN REDUCED COSTS. THIS PLAN IS CONSISTENT WITH OTHER RADAR PROGRAMS NOW UNDER CONTRACT WITH THE GOVERNMENT AND MAKES OPTIMUM USE OF THE ADVANTAGES OF EACH OF THE GENERAL DYNAMICS CORPORATE FACILITIES.

GENERAL DYNAMICS IS PLEASED TO OFFER THE FOLLOWING REDUCED PRICE FOR THE ASR-8 PROGRAM. SOLICITATION WA4M-2-7630

FIXED PRICE INCENTIVE ITEMS 1, 2, 3, 4, 5, 6, 7, 8, 10 (A. B. C. E. H.) 14

TARGET COST	$15,062,000
TARGET PROFIT (AT 10 PERCENT)	1,506,000
TARGET PRICE	16,568,000
CEILING PRICE (AT 120 PERCENT)	18,074,000
FIRM FIXED PRICE ITEMS 9, 11, 12, 13	$550,000

ALL OTHER TERMS AND CONDITIONS OF OUR OFFER REMAIN UNCHANGED.

This reduced GD's target price from $20,362,025 to $16,568,000, making it lower than TI's initial target price. You believe that the price reduction significantly influenced the decision not to make an award on the basis of the initial proposals. In addition, you have made repeated allegations that TI's price had been leaked to unauthorized persons and suggest that this, in conjunction with the circumstances surrounding GD's price reduction, shows that TI's interests were prejudiced.

With regard to your contention that TI's price was leaked, the agency has stated:

> The price proposals from Texas Instruments and General Dynamics were handled in accordance with standard Federal, Departmental, and FAA Procurement Procedures to insure the integrity of the competitive system and the proposals received. If Texas Instruments has information concerning any unauthorized disclosure of pricing information to General Dynamics, or if Texas Instruments was itself the recipient of such information concerning the General Dynamics' proposal, we urge that they come forward with specifics which would permit us to investigate the matter.

You have been unable to provide any evidence to substantiate your allegations and, under the circumstances, no basis exists to conclude that TI's interests were prejudiced.

It does not appear that the agency ever decided if it was proper to consider GD's proposal as modified by the late price reduction as the basis for a contract award, nor do we find it necessary to decide this issue. It appears that some consideration was given to GD's modified proposal as a basis for deciding to enter into discussions with both offerors. The agency's action in this regard was proper, since GD's late price reduction fairly indicated that negotiations would prove highly advantageous to the Government. 47 Comp. Gen., *supra;* B-176407, September 27, 1972. Regardless of the propriety of considering the late price reduction for this purpose, however, the agency was legally required to enter into discussions and secure the submission of cost or pricing data for the reasons indicated previously.

We have considered and rejected your contention that the action by OST in disregarding FAA's recommendation to award the contract to TI, whose final offer was found to be technically superior, after the close of negotiations, was "unlawful." Enclosure C to the RFP, as amended, provided that proposals were to be evaluated in accordance with the technical evaluation criteria set forth in Enclosure A, as amended (consisting of 18 factors, each of equal weight), as well as on the basis of price. Since the RFP did not make technical considerations paramount, we believe that both price and technical considerations were to be accorded substantially equal weight. 52 Comp. Gen. 686 (1973). Thus, the contracting officer's action in consummating a contract with a responsible offeror, low in price by more than $4 million dollars, which had submitted a technically acceptable final offer, was a proper exercise of procurement judgment.

In addition, the agency has submitted, in response to your protest that OST intervened in this procurement in an unlawful manner by overriding FAA determinations to award the contract to TI, a memorandum of law entitled "Power and Authority of the Secretary of Transportation" dated October 17, 1968. A copy of the memorandum is enclosed. We believe that the information contained therein adequately disposes of your views on the authority of the Secretary of Transportation to become involved in FAA procurement actions.

Finally, you have contended that the award to GD may violate the provisions of the Buy American Act, 41 U.S.C. 10a–d. You state that one of GD's subcontractors is a French concern, Thompson CSF, and that you believe that the agency may not have taken proper steps to assure Buy American Act compliance.

In this regard, the agency states in its March 27, 1973, report that:

> The award to General Dynamics does not violate the provisions of the Buy American Act. Thompson, as a subcontractor, is not delivering an end product or any components as specified in the Government's contract with General Dynamics, but is instead furnishing certain design efforts to be utilized by General Dynamics in producing the end product. Further, the dollar amount of the Thompson subcontract is $1.6 million which is substantially below 50 percent of the value of the total end product cost cited by the Act.

In view of the foregoing, the protest is denied.

[B–178673]

Travel Expenses—Actual Expenses—Reimbursement Basis—Criteria

The administrative determination that the criteria established by section 7 of the Standardized Government Travel Regulations and paragraph C8151–8154 of the Joint Travel Regulations providing for the payment of the actual expenses prescribed by 5 U.S.C. 5702 had not been satisfied and, therefore, employees on temporary duty in support of disaster recovery operations in areas damaged by Hurricane Agnes in 1972 were not entitled to reimbursement on the basis of actual expenses is a determination that may not be set aside in the absence of evidence it was not made in accordance with the governing law and regulations, or that it was arbitrary or capricious. An authorization for the payment of actual expenses does not create entitlement to the expenses since the approval was outside the scope of the official's authority and those dealing with Government personnel are deemed to have notice of limitations on authority.

To L. H. Cave, Department of the Army, July 12, 1973:

This is in reference to your letter of March 16, 1973, reference SAMCM, requesting an advance decision concerning the propriety of Mr. Jacob D. Elliott's claim for reimbursement of actual expenses he incurred while on temporary duty with the Susquehanna District in support of disaster recovery operations in areas damaged by Hurricane Agnes during the summer of 1972 (Operation Noah II). Your letter was assigned PDTATAC Control No. 73–27 by the Per Diem, Travel and Transportation Allowance Committee and forwarded here on May 14, 1973.

Headquarters, Mobile District, Corps of Engineers, issued Travel

Order, No. 135 CE on July 14, 1972, authorizing Mr. Elliott to travel to Harrisburg, Pennsylvania, for approximately 30 days temporary duty. These orders authorized per diem in accordance with Department of Defense Civilian Personnel Joint Travel Regulations (JTR). Mr. Elliott performed the travel and temporary duty authorized in the travel orders and returned to his official station on August 18, 1972. He submitted a travel voucher on an actual expense basis in the amount of $1,103.91. The amount of $855.35 was allowed consisting of per diem for 33 days at $25, plus other reimbursable expenses of $30.35. He accepted this reduced amount under protest and requested that his claim for the remaining $248.56 be forwarded to this Office for a decision.

Mr. Elliott contends the $855.35 allowed does not cover the expenses he incurred while staying in the disaster ravaged area where scarcity of accommodations had inflated prices to unrealistic levels. As to cost of accommodations, the record shows that the motel room was $15 per day plus 90 cents tax. Moreover, he claims he was informed by superiors that the trip would be on an actual expense basis and authority for this would be obtained after-the-fact, upon completion of the temporary duty. Mr. Elliott maintains he justifiably relied on the aforementioned representations and he should now be reimbursed the added expenses caused thereby.

Actual travel and subsistence expenses are governed by 5 U.S. Code 5702 which provides in pertinent part:

§ 5702. *Per diem; employees traveling on official business*

(a) An employee, while traveling on official business away from his designated post of duty, is entitled to a per diem allowance prescribed by the agency concerned. For travel inside the continental United States, the per diem allowance may not exceed the rate of $25.

* * * * * * *

(c) Under regulations prescribed under section 5707 of this title, the head of the agency concerned may prescribe conditions under which an employee may be reimbursed for the actual and necessary expenses of the trip, not to exceed an amount named in the travel authorization, when the maximum per diem allowance would be much less than these expenses due to the unusual circumstances of the travel assignment. The amount named in the travel authorization may not exceed—

(1) $40 for each day in a travel status inside the continental United States; or

(2) the maximum per diem allowance plus $18 for each day in a travel status outside the continental United States.

This statute in regard to actual subsistence expenses has been implemented by section 7, Standardized Government Travel Regulations (SGTR), Circular No. A–7, as revised, which provides:

7.1 *Authorization or approval.* a. *Must relate to specific travel assignment.* Authorization or approval will be limited to specific travel assignments where due to the unusual circumstances of the assignment the maximum per diem allowance would be much less than the amount required to meet the necesary subsistence expenses of a traveler.

b. *Duty of heads of agencies and departments.* Heads of agencies, as defined in 5 U.S.C. 5701, will, in accordance with the provisions of this section, prescribe conditions under which reimbursement may be authorized or approved for the actual and necessary subsistence expenses of a traveler. Such conditions shall restrict travel on an actual subsistence expense basis to those travel assignments where necessary subsistence costs are unusually high. They should not permit the use of the actual subsistence expense basis where necessary subsistence expenses may exceed the statutory maximum per diem allowance by a small amount. Because hotel accommodations constitute the major part of necessary subsistence expenses, travel on an actual subsistence expense basis might appropriately be authorized or approved for travel assignments which otherwise meet conditions prescribed by the head of the agency where the traveler has no alternative but to incur hotel costs which would absorb all or practically all of the statutory maximum per diem allowance.

c. *Delegation of authority.* Heads of agencies may delegate, with provision for limited redelegation, authority to authorize or approve travel on an actual subsistence expense basis. Such delegation or redelegation should be held to as high an administrative level as practicable in order to insure adequate consideration and review of the circumstances surrounding the need for travel on the actual subsistence expense basis.

* * * * * * *

e. *Conditions warranting approval.* If travel is performed (a) without prior authorization or is authorized on a per diem basis, and (b) otherwise conforms to this section, the necessary subsistence expenses incurred may be approved, within the statutory maximum allowable.

* * * * * * *

7.3 *Agency reviews and administrative control.* Heads of agencies will establish necessary administrative arrangements for an appropriate review of (a) the justification for travel on the actual expense basis, and (b) the subsistence expenses claimed by a traveler in order to determine that they are proper subsistence expenses and were necessarily incurred in connection with the specific travel assignment. Agencies are cautioned to see that travel on an actual subsistence expense basis is administered in accordance with the spirit and intent of the law and to take such steps as are necessary to prevent abuses.

This statutory regulation has been further implemented within the Department of Defense by the Joint Travel Regulations, Volume 2, which provide in pertinent part:

C8151 REQUESTS FOR ACTUAL EXPENSE ALLOWANCES

When situations arise which appear to warrant the authorization of actual expenses for a specific travel assignment, letter or wire request furnishing details of the conditions warranting the actual expense allowance will be submitted in accordance with this paragraph with a recommendation as to the amount to which the reimbursement should be limited. When such conditions are not known in advance, similar action may be taken and approval may be granted after the travel is performed. Every effort will be made to insure uniformity of allowances between members of the Uniformed Services and civilian employees, when traveling together or to the same place, when warranted by similarity of the incidents of travel and temporary duty. Request for such allowances will be accompanied by a full statement of the facts in the case, the Department of Defense components (par. C1100) involved, the number of employees involved, and the reasons why it is believed that normal per diem allowances will not suffice. Requests shall be submitted in accordance with par. C8155.

C8152 WHO MAY AUTHORIZE OR APPROVE

1. GENERAL. Except for the officials referred to in subpar. 2, [not here pertinent], actual expense allowances, when appropriate, will be authorized or approved by an Actual Expense Authorization issued by the Per Diem, Travel and Transportation Allowance Committee. Actual Expense Authorizations may be issued by the Advisory Panel over the signature of the Executive.

* * * * * * *

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C8154 CRITERIA FOR AUTHORIZING OR APPROVING ACTUAL EXPENSE ALLOWANCES

Actual expense allowances are intended for use in unusual cases where it is anticipated that the traveler will incur actual and necessary expenses in amounts which will not be covered by the normal per diem allowances prescribed in Part C or Appendix C, Part I, whichever are applicable. Unusual cases include but are not limited to instance where:

* * * * * * *

5. extenuating circumstances other than those in items 1 through 4 are such that the authority directing the travel determines the nature of the temporary duty is unusual and the use of hotels and restaurants at prices well in excess of normal per diem allowances is necessary and in the interest of the Government.

Items 1 to 4 mentioned above are not pertinent to duty such as here involved.

In accordance with these regulations the Office of the Chief of Engineers (OCE), Headquarters, Department of the Army, submitted memoranda in November 1972 requesting approval for actual expense allowances for approximately 542 civilian employees and 30 military personnel who performed temporary duty at various locations incident to Hurricane Agnes relief operations. The Per Diem, Travel and Transportation Allowance Committee disapproved the OCE request on the rationale quoted below:

2. In order to be entitled to consideration for actual expense allowances, the maximum per diem allowance must be much less than the amount required to meet the actual and necessary expenses of the trip *due to the unusual nature of a travel assignment* (5 U.S.C. A. 5702(c) and 37 U.S.C. 404(d)). A close examination of the data submitted with references (a) and (b) fails to show that other than the normal charges ordinarily encountered in those areas for the accommodations used.

3. The Comptroller General of the United States has held that the actual expense authority contained in the statutes listed above may not be used to overcome a general deficiency in the statutory per diem allowance. It is well known that the normal per diem allowance fails to cover normal costs in many places in the United States among which are many of the cities to which the travelers listed in references (a) and (b) traveled. * * *

It has long been held that the determination of an agency, acting within the field of its designated powers and authority, should not be set aside on review unless such action is not in accordance with law or regulations, is unsupported by competent material and substantial evidence, or is arbitrary or capricious. *Brown* v. *United States*, 396 F. 2d 989, 184 Ct. Cl. 501 (1968).

Under the JTR, the Per Diem, Travel and Transportation Allowance Committee has been charged with the responsibility of determining when a given factual situation satisfies the criteria set forth in the JTR for authorizing actual expense allowances for Department of Defense personnel. Upon review of expense data from the area where Mr. Elliott was on temporary duty, that Committee found that the criteria was not satisfied and declined to grant approval for actual expense allowances in that situation. On the basis of the present record we find no cause to disturb the findings and conclusions of the Committee.

In addition we find no merit in the claimant's contention that actual expenses were officially authorized by his superiors, causing him to make expenditures in reliance thereon. It is a well established principle that where a Government agent acts outside the scope of the authority actually held by him, the United States is not estopped to deny his unauthorized or misleading representations, commitments, or acts, because those who deal with a Government agent, officer, or employee are deemed to have notice of limitations on his authority.

In view of the foregoing, payment of the voucher is not authorized and accordingly it is being retained in our file.

[B–177745]

Bidders—Qualifications—Capacity, etc.—What Constitutes

Although the determination that a small business concern submitting the low offer under a request for proposals to perform refrigerated warehouse services, involving the receipt, storage, assembly, and distribution of food, including export transportation, was nonresponsible in the areas of health, safety, and sanitation should have been promptly referred, pursuant to paragraph 1–705.4(c)(iv) of the Armed Services Procurement Regulation, to the Small Business Administration for certificate of competency consideration since the deficiences relate to "capacity" defined as the "overall ability * * * to meet quality, quantity, and time requirements," the issuance of a certificate of urgency in lieu was justified and reasonable as the delay was not administratively created, and the continuation of services was essential. Furthermore, the rule is that a responsibility determination unless arbitrary, capricious, or not based on substantial evidence is acceptable.

To International Container Service, Inc., July 13, 1973:

Reference is made to your letter of March 21, 1973, and prior correspondence, protesting against the award of a contract to SDC Cold Storage, a division of Farwest Capital Co., Inc. (hereinafter SDC), under request for proposals (RFP) DSA 137–73–R–0196, issued by the Defense Personnel Support Center (DPSC), Alameda, California.

Your protest essentially concerns the question of whether you were a responsible prospective contractor and the manner in which it was determined that you were not. You generally deny deficiencies which were cited in an unfavorable preaward survey and upon which the contracting officer based his determination of nonresponsibility. Further, you state that the question of your responsibility should have been referred to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC). In this regard, you dispute the contracting officer's view that deficiencies concerning "safety" and "sanitation" are not included in the definition of "capacity." You further contend that the execution of a certificate of urgency on December 27, 1972, was without any basis, since the current contract did not expire until January 31, 1973, and it could have been extended to allow sufficient time for referral to SBA and for correction of any deficiencies. You also point out that whatever urgency existed was due to the Government's unilateral action in extending the closing date for receipt of proposals from October 25, 1972, to November 29, 1972.

The RFP was issued September 15, 1972, for 1 year's refrigerated warehouse services involving the receipt, storage, assembly, and distribution of perishable and nonperishable food in and from the Seattle, Washington, area, including export transportation. Three proposals were received and after evaluation it was determined that the ICS proposal was lowest in price, and the SDC proposal was second lowest. On December 4, 1972, the contracting officer requested DCASR-Seattle to conduct a preaward survey of ICS. The results of the survey, dated December 22, 1972, were unfavorable. The contracting officer has summarized the findings as follows:

> * * * In brief, the preaward findings established that the offeror was determined to be unsatisfactory as to "Production Capability" because it could not perform any proposed contract without extensive use of overtime charges, which the firm intended to pass on to the Government. Under the heading of "Plant Facility and Equipment" the offeror was determined unsatisfactory by reason of six listed deficiencies; principal among them being a finding that the temperature in all freezers is not maintained at 0° F. or below, as required, a finding that the premises were in violation of fire regulations of the City of Seattle, and a finding that the ceiling in the chill room was supported by portable jacks, which if hit by a forklift might allow the ceiling to collapse. Under the headings of "Transportation" and "Ability to Meet Required Schedules" the offeror was found to be unsatisfactory for four reasons, significant among the reasons being that the proposed facilities were equipped to handle only 7 trucks, as opposed to a requirement of the solicitation that the contractor be in a position to simultaneously load or unload not less than 12 trucks (D–6a, page 12), a capability to handle only 1 rail car, as opposed to a provision in the solicitation requiring the capability to simultaneously load or unload not less than 4 rail cars (D–6b, page 12) and, even if it was economically feasible to construct more extensive truck loading and unloading platforms, the effect of such would be to allow no maneuverability of trucks within the premises and that trucks would be required to block city streets and sidewalks. Moreover, the facility was found to contain only one door leading into the warehouse, wherein all of this high volume of traffic would be required to move both in and out, simultaneously. Under the heading of "Sanitation" there was found to be not less than nine specified unsatisfactory conditions significant among them being a finding that insulation was peeling off the walls in the chill room, an inadequate chill inspection room requiring extensive modification, poor lighting, debris on dock areas and interior floors, broken windows, lack of covered dock areas, and no opportunity at this location for Veterinary Inspectors to transport samples from receiving rooms to inspection rooms without interfering with operations or transporting foodstuffs outside and thus exposing them to the elements.

Based upon the results of the preaward survey, the contracting officer determined on December 27, 1972, that ICS was not a responsible prospective contractor. Since ICS represented in its proposal that it was a small business concern, the contracting officer also considered the question of whether the determination should be referred to SBA for the possible issuance of a COC. In this regard, Armed Services Procurement Regulation (ASPR) 1–705.4(c) provides that if the proposal of a small business concern is to be rejected solely because the contracting officer has determined the concern to be nonresponsible as to capacity or credit, the matter shall be referred to the SBA. In the instant case, the contracting officer has stated that his determination of nonresponsibility was predicated primarily upon health, safety, and sanitation factors. The contracting officer doubted that the standards of ASPR 1–903.2(b), which provides that procurement of foods is required to be made only from those sources which meet certain sanitation requirements, fell within the meaning of "capacity." He reasoned that since neither the word "safety" nor "sanitation" appears within the definition of "capacity" in ASPR 1–705.4, the determination of nonresponsibility was not based solely on lack of capacity or credit, and thus referral to SBA was not required. In any event, he found that award had to be made without further delay, and prepared a certificate of urgency, dated December 27, 1972, which was duly approved by the Commander, Subsistence Regional Headquarters, Oakland, and forwarded to SBA. Award was made to SDC on January 2, 1973.

ASPR 1–705.4(a) defines "capacity" as "the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know-how,' technical equipment, and facilities or the ability to obtain them. * * *" In addition, the regulation cross-references "capacity" with ASPR 1–903.2, which deals with additional standards, including standards for the procurement of food (ASPR 1–903.2(b)). Upon review of the preaward survey and the determination of nonresponsibility, it appears that all of the deficiencies cited, including those regarding health, safety, and sanitation, relate to ICS' "overall ability * * * to meet quality, quantity, and time requirements." B–171168, May 4, 1971. It therefore appears that the nonresponsibility of ICS related to its deficiencies in the areas of capacity or credit. Such being the case, the contracting officer was required under ASPR 1–705.4(c)(iv) to promptly refer the matter of ICS' responsibility to SBA for COC consideration unless a certificate of urgency indicating the specific reasons why an award must be made without the delay incident to referral was promptly filed with SBA.

Concerning the matter of urgency, the contracting officer states that, under the terms of the prior contract for warehouse services with SDC, the Government reserved the right, in the event award was made to another concern, to place freezer and cooler items at the new location beginning January 16, 1973, so that stock could be built up at that location and inventory depleted at the incumbent contractor's warehouse. He further states that it is considered essential to make an award at least 45 days prior to the date the Government must exercise this option and, for that reason, receipt of proposals was scheduled for October 25, 1972, with a projected award date of November 25, 1972. The 45 day lead time is necessary so that all contracting officers within DPSC can be informed of the Seattle storage location in ample time to assure that all supply contracts on FOB destination terms reflect the proper consignee point. If the correct information is not furnished in a timely manner, the contracting officer states that a chaotic situation could result; hundreds of change orders to existing contracts would be required and many rail and truck deliveries might be misrouted to an incorrect consignee point.

The closing date for receipt of proposals was extended from October 25, 1972, to November 29, 1972, because of a significant amendment to the Service Contract Act. This amendment required the contracting officer to obtain a new wage determination from the Department of Labor, which was received on November 20, 1972. Although this delay doubtless contributed to the circumstances which later gave rise to a determination of urgency, it was due to factors beyond the control of the contracting officer or the procuring agency. Furthermore, it does not appear that the preaward survey or the contracting officer's consideration of its results were accomplished in a dilatory manner. In short, the contracting officer was faced on December 27, 1972, with the decision whether to refer the matter of ICS' responsibility to SBA or to execute a certificate of urgency. At that time, only 20 days remained before January 16, 1973, the date for the Government to exercise its option to place storage items at a new location. As you point out, if award were eventually made to SDC, there would be no chaotic situation, since all deliveries would continue to be routed to the incumbent contractor. However, the contracting officer had to consider the possibility that referral to SBA might result in the issuance of a COC and an award to ICS, in which event it appears that the administrative difficulties referred to above could easily have occurred. With respect to your contention that the current contract should have been extended to allow sufficient time for referral to SBA, the contracting officer has indicated that, as the RFP provided for a contract term commencing February 1, 1973, and ending January 31, 1974, with estimated requirements for the 12 month period, it was considered that any contract awarded after the contract commencement date would be of questionable legal validity. Based upon the foregoing, the contracting officer decided to issue a certificate of urgency and to proceed with award to SDC. As a general rule, our Office will not question administrative determinations of urgency of procurement. B–167686, October 14, 1969. Our review of the record as a whole affords no basis for concluding that the contracting officer's decision to make an award without incurring the delay incident to an SBA referral was unjustified or unreasonable. B–162095, October 30, 1967.

With regard to the question of your responsibility, it has long been the rule of our Office to accept the contracting officer's determination of responsibility, unless it is shown by convincing evidence that the finding was arbitrary, capricious, or not based on substantial evidence. 51 Comp. Gen. 233 (1971); 43 *id.* 298 (1963). On the present record, we find no basis to question the determination of nonresponsibility.

Accordingly, the protest is denied.

[B–177925]

Checks—Forgeries—Endorsement—Rubber-Stamp

Reclamation action for the proceeds of the original check endorsed by the unauthorized use of a rubber-stamp imprint of the payee's name should be continued against the cashing bank, a Georgia institution, since the check issued to an out-of-State payee was negotiated on an endorsement made by an "unauthorized signature" within the meaning of that term as prescribed by the Uniform Commercial Code adopted by Georgia, and the improper negotiation was due to no fault of the payee who had been issued and cashed a substitute check and, therefore, passage of valid title to the bank was precluded. The fraudulent negotiation was made possible by the bank's failure to identify the negotiator of the check rather than by the unauthorized endorsement. The use of a rubber stamp—a rarity for individuals—and the fact that the check was drawn to an out-of-State payee required a greater degree of care to identify the endorser than was exercised by the endorsing bank.

To the Treasurer of the United States, July 13, 1973:

By letter dated August 17, 1972, file reference CC–VKP 4, Mrs. Rebecca H. Volkman, Special Assistant Treasurer, forwarded to us Army (Finance) check No. 11,008,439, drawn August 31, 1970, for $634.69, over symbol 5073, to the order of Jimmy Rogers, and the related file, with a request for advice as to whether there is a legal basis for continuing reclamation action against the bank or whether the payee should be held liable for refund of the amount involved.

The file shows that after your office ascertained that the original check as well as the substitute check, which had been issued to the payee under current procedures, were both negotiated by the payee and paid, the Finance Office at Fort McPherson, Georgia, was requested on November 17, 1970, to effect collection of the amount of $634.69 from the payee. Subsequently, in a letter dated November 23, 1970, the payee informed you that he did not receive the original check and that it does not bear his endorsement. He stated, however, that he received and cashed the substitute check. In his letter of November 24, 1970, he stated that he had in his office a rubber stamp bearing a facsimile of his signature and that the endorsement on the original check resembled the rubber-stamp imprint.

On March 4, 1971, the payee executed the prescribed form for making claim against the United States on account of the nonreceipt and nonnegotiation of the original check, but deleted the claim clause thereon inasmuch as he had negotiated the substitute check and received the proceeds thereof. He indicated on the form that he usually cashed his checks at the Farmers National Bank or First National Bank, Opelika, Alabama, whereas the subject check was cashed at the National Bank of Fort Benning, Fort Benning, Georgia.

The investigation by the United States Secret Service revealed that the check was negotiated on an endorsement made by the rubber-stamp imprint of the payee's name by a person whose identity could not be established after it apparently had been removed from a post office box used by the payee and another military member in connection with activities for the U.S. Army Recruiting Service. It was also revealed that the rubber stamp was kept on the top of the payee's desk at all times and that it was not stolen. An opinion rendered by the Examiner of Questioned Documents is to the effect that the stamped impressions of the payee's signature contained in one of his letters for comparison purposes compared favorably with the rubber-stamped impression of the payee's name on the original check.

Reclamation proceedings were undertaken by your office and in response to the request for refund the second endorser, the National Bank of Fort Benning, declined refund on the contention that it is a holder in due course because it took the check for value and in good faith and without notice of any infirmity in the instrument or defect in the title. The bank also denied liability on an assertion that "the law concerning checks currently states that when one of two innocent persons must suffer by the act of a third person, he who puts it in the power of the third person to inflict the injury shall bear the loss." The bank further contends that the payee had an obligation to protect the rubber stamp of his signature from unauthorized use and that if he had performed this obligation the incident would not have taken place.

The Special Assistant Treasurer has furnished a resume of the facts and circumstances surrounding the negotiation of the check and advises of the position taken by the second endorser. In view of the related circumstances, she has requested advice as to whether her office has any legal basis for continuing reclamation action against the bank or whether the payee should be held liable for refund of the amount involved.

By Act No. 713, Laws of 1962, page 156, the Uniform Commercial Code was adopted by the State of Georgia, effective January 1, 1964. Section 109A–1–201 lists general definitions with subsection (43) reading as follows: "Unauthorized signature or indorsement means one made without actual, implied or apparent authority and includes a forgery." Section 109 A–3–404, also applicable in this case, reads, in pertinent part, as follows:

Unauthorized signatures.—(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.

There is nothing in the record to show that prior to the negotiation of the check the payee had authorized anyone to use the rubber-stamp impression of his signature to endorse and negotiate the check. While such endorsement on the check may not be considered a forgery it was without question an "unauthorized signature" within the meaning of the above quoted laws so as to preclude the passage of valid title to the second endorser, the National Bank of Fort Benning.

The subject check does not bear a handwritten first endorsement but a rubber-stamped endorsement which by itself should have placed the endorsing bank on notice that the presenter may not have had valid title to the check. Generally, it is common knowledge that while organizations, business firms, etc., utilize rubber stamps to endorse checks, only in rare instances does a person not acting in a business capacity use a rubber stamp to endorse a check. Inasmuch as the check was drawn to a payee whose address is shown on the face of the check as Opelika, Alabama—an out-of-State address insofar as the endorsing bank was concerned—and since the check did not bear a handwritten endorsement and was for a comparatively substantial amount, it is our view that the endorsing bank failed to exercise that degree of care which normally would be required under such circumstances for identification of the presenter of the check as the payee. Note in this connection that the check as all other Government checks bears the printed words on the left side of the face thereof "KNOW YOUR ENDORSER . . . REQUIRE IDENTIFICATION."

In other words, had the bank carefully and prudently made an effort to identify the presenter of the check it would have then ascertained that the presenter was not in fact the payee and, hence, avoided an unauthorized and unlawful negotiation of a Government check.

We see no merit in the endorsing bank's contention that the payee had an obligation to protect the rubber stamp of his signature from unauthorized use. An unauthorized negotiation of one of his pay

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checks by means of that rubber stamp could not be anticipated under normal circumstances as he could not foresee the theft of such check from a post office box used jointly by the payee and another military member. Moreover, the fraudulent negotiation of the check was made possible by the endorsing bank's failure to properly identify the negotiator of the check rather than by an unauthorized endorsement being placed on the check. In this connection, we invite your attention to the decision of the Court of Appeals of Georgia in the case of *Berger* v. *Georgia Power Company*, 49 S.E. 2d 668 (1948), which involved a forged check which was cashed by a retail establishment for a presenter who produced an identification card in the payee's name and who was wearing a Georgia Power Company uniform with a cap which had a number corresponding with the number shown on the check. In affirming the lower court's judgment, the court said, in pertinent part, that—

When a signature is forged *or made without the authority of the person whose signature it purports to be*, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any part thereto, can be acquired through or under such signature unless the party against whom it is sought to enforce such right is precluded from setting up the forgery *or want of authority*. Code, § 14–223. There are no allegations in the petition of the plaintiff, and no evidence offered by the plaintiff, showing any reason why the defendant is precluded from setting up the alleged forgery of the indorsement on the check. Therefore, if such indorsement was a forgery, it was wholly inoperative, and no right to enforce payment of the check was acquired by the plaintiff. * * *

No issue on the question of forgery was made by the testimony in the case. The plaintiff merely showed that he made a reasonable effort to identify the person for whom he cashed the check, and that such effort apparently failed. The plaintiff did not testify that W. F. Dial, the payee of the check who was in the court, was the man for whom he cashed the check. On the other hand, Dial testified that he did not receive the check, and did not cash it, and did not know who got the check or how he got it. and that he was not in town on the day the check was cashed; and that the signature on the back of the check was not his, *and that he did not give any one permission to get his check*. [Italic supplied.]

The rights and liabilities under the laws of Georgia of endorsers on irregularly negotiated checks are also discussed in *Roswell Bank* v. *Citizens and Southern De Kalb Bank*, 104 Ga. App. 291, 121 S.E. 2nd 706 (1961), and *Yatesville Banking Company* v. *Fourth National Bank*, 10 Ga. App. 1, 72 S.E. 528 (1911).

We have found no Georgia cases involving a factual situation in which a rubber stamp endorsement was made on a check in the same manner and under similar circumstances as in this case. However, for guidance there are other State cases which are relevant to the issue herein. In the case of *Gresham State Bank* v. *O and K Construction Company*, 370 P. 2nd 726 (1962) which involved the unauthorized use of a rubber stamp impression for negotiation of a check the Court said, in pertinent part that—

It is argued that in supplying McKenna with a rubber stamp bearing the name and address of the construction company, he was provided with the means of endorsing paper and thus representing that he had authority to do so. This does not constitute the creation of an appearance of authority. Whatever appearance of authority arose from the use of the rubber stamp was not created by the O and K Construction Company; it was created by McKenna himself. *Certainly the mere furnishing of a name and address stamp by the company for use in its office did not create an ostensible authority to endorse checks and receive payment for them.* Stamps of this character are used in most offices; the supplying of them signals nothing with respect to the authority of those employed to use them. Where there are other facts from which third persons might reasonably infer that authority was granted the principal may be held liable. [Italic supplied.]

There is also for consideration herein the case of *Passaic-Bergen Lumber Company* v. *United States Trust Company*, 164 A. 580 (1933). The Court said, among other things, that—

Obviously, it cannot be held, in the absence of ratification or estoppel, that the plaintiff is bound by its manager's unauthorized act in surreptitiously taking customers' checks, affixing rubber stamp indorsements with no signatures appearing thereunder, and negotiating them over to the credit of his own corporation, in which the plaintiff had no stock, no control, or even knowledge of its existence. The very character of the rubber stamp impression of the plaintiff's name was sufficient evidence to put the defendant on notice and on guard when these checks were presented for payment. * * *.

In effect there was forgery of an indorsement. It was made by a rubber stamp by one who had no right to affix the same and by means of which Schick succeeded in obtaining from the appellant moneys which it had collected for the plaintiff.

It seems to us there can be no substantial difference between an actual forging of a name to a check as an indorsement by a person not authorized to make the signature and the affixing of a name to a check as an indorsement by the use of a rubber stamp by a person not authorized to use it.

The appellant does not deny collecting the money on the indorsement. It was the appellant's duty to inquire as to the genuineness of the plaintiff's indorsement and the authority of Schick to divert to his own company, on a rubber stamp indorsement of plaintiff's name, funds belonging to plaintiff. The failure on the part of defendant to make such inquiry was a breach of duty that it owed plaintiff, and made it liable to the plaintiff for the amount of the checks for money received by the defendant to the use of the plaintiff.

Additionally, see *Buena Vista Oil Company* v. *Park Bank of Los Angeles*, 180 P. 12 (1919), which also involved an unauthorized use of a rubber stamp for the negotiation of a check. The Court said, among other things, that—

* * * Because of the unauthorized indorsement of the check by Kemper, plaintiff's title to the proceeds of said check did not pass to defendant when the latter collected the amount thereof from the drawer's bank; but, instead, it became liable to plaintiff for that much money had and received to and for the use of plaintiff. * * * As we view the evidence, and construe the law applicable to this case, there was not the slightest excuse for the act of the defendant bank in so accepting said check. As we have seen, there were no previous dealings because of which it might be misled. Kemper said nothing; no inquiry was made of him. Without any fault upon the part of plaintiff its property was taken and attempted to be disposed of by one having no authority so to do. *Had the defendant bank performed its plain duty here, it would have been saved from its present predicament, and Kemper would have been thwarted in his unlawful scheme.* * * * [Italic supplied.]

On the basis of the above and since there is nothing of record to support a conclusion that the payee was at fault in the improper negotiation of the original check, it is our view that the National Bank of Fort Benning is legally liable under the Uniform Commercial Code as adopted by Georgia for the amount it had collected on that check. Accordingly, reclamation action against the bank on the original check should be continued.

The original check and photocopy of the substitute check together with the file are returned for your further action in the matter.

[B-178140]

Contracts—Specifications—Descriptive Data—Disclosure Requirement

A bid to furnish services, labor and material for the installation of an automated fuel handling system accompanied by the descriptive literature required by the invitation but containing a proprietary data restriction was not submitted in accordance with paragraph 2-404.4 of the Armed Services Procurement Regulation (ASPR), which provides that bids prohibiting the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered on those elements of the bid which relate to quantity, price, and delivery terms are nonresponsive bids, and the regulation implementing 10 U.S.C. 2305 providing for public disclosure of bids has the force and effect of law. In addition to the nonresponsiveness of the bid under the standards of ASPR 2-404.4, the bid was unacceptable on the basis the phrase "or equal" in the specification soliciting cable had been misinterpreted.

To the Cadre Corporation, July 16, 1973:

Reference is made to your letter of June 15, 1973, and prior correspondence, protesting against the rejection of your bid as nonresponsive and against the subsequent award of a contract to Vertex Systems, Incorporated, under invitation for bids (IFB) No. N00612-73-B-0046, issued December 29, 1972, by the Naval Supply Center, Charleston, South Carolina.

The invitation requested bids for services, labor and material for installation of an automated fuel handling system at the Center. The IFB, in paragraph C8, required the inclusion of descriptive literature to establish, for the purposes of bid evaluation and award, details of the system the bidder proposed to furnish. Failure to furnish such descriptive literature was stated to be a basis for rejection of one's bid.

By February 13, 1973, the date set for bid opening, five bids had been received. After bid opening, all bids and descriptive literature were publicly displayed for approximately 20 minutes before the existence of the proprietary notice contained in your bid was discovered. Thereafter, the proprietary data contained in your bid was removed from public display and kept confidential. On February 20, 1973, the descriptive literature from your bid, excluding the proprietary data, was given to the Fuel Division, Naval Supply Center, Charleston, for evaluation in conjunction with the Naval Fuel Supply Office, Washington, D.C. The technical personnel stated in a memorandum dated February 21, 1973, that there was insufficient information to evaluate your bid. On February 21, 1973, a review of your bid was made on the basis of the proprietary data and the nonproprietary information previously evaluated. Upon this second review, it was determined that the cable offered in your bid was not in accordance with the required specifications as contained in NAVSUP 40 Specification No. 4200B, paragraph 3.3.8. Based upon the results of both of these reviews, the contracting officer determined your bid to be nonresponsive due to (1) a failure to submit unrestricted descriptive literature, and (2) the offering of a cable which did not meet the specifications.

You base your protest upon the following two theories: (1) that Armed Services Procurement Regulation (ASPR) 2–404.4 should not apply to this procurement; but, even if it does, Cadre's bid was responsive to such provision, and (2) the cable offered by Cadre was responsive, as NAVSUP 40 Specification No. 4200B, paragraph 3.3.8, requested bids for the cable as stated or an "equal" cable.

Examining your first theory, it is our opinion that ASPR 2–404.4 would be applicable to this instant procurement. Federal law, as codified in 10 U.S. Code 2305, includes the following with respect to all advertised procurements:

(c) Bids shall be opened publicly at the time and place stated in the advertisement. * * *

A public opening has been interpreted to mean that the bid must publicly disclose to all competing bidders the essential nature and type of the products offered and those elements of the bid which relate to quantity, price and delivery terms. ASPR 2–404.4 has incorporated this concept and specifically states as follows:

2–404.4 *Restrictions on Disclosure of Descriptive Literature.*

(a) When a bid is accompanied by descriptive literature (as defined in 2–202.5 (a)), and the bidder imposes a restriction that such literature may not be publicly disclosed, such restriction renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered on those elements of the bid which relate to quantity, price and delivery terms. * * *.

Since the regulation was promulgated in implementation of a statute and was published in the Federal Register, it has the force and effect of law and bidders are charged with constructive notice of its provisions. Therefore, the contracting officer was correct in requiring the standards of ASPR 2–404.4 to be applied to your bid.

In interpreting and applying the comparable provision applicable to civilian agencies of the Government, we stated in 41 Comp. Gen. 510 (1962), at page 513 that:

By the terms of section 1–2.404–4 of the Federal Procurement Regulations not all restrictions imposed by a bidder on the public disclosure of descriptive data submitted with a bid renders such bid nonresponsive. Only those restrictions which relate to quantity, price and delivery terms or which prohibit the disclosure of sufficient information to permit competing bidders to know the *essential nature* and *type* of the products offered will have that effect. * * *.

Also, see B–159259, November 3, 1966, where we discussed the comparable regulation applicable to the National Aeronautics and Space Administration (NASA). In both of these cases, the items being procured were either of a "commercially available" nature or "off-the-shelf equipment" suitably modified to meet the requirements of the purchase description. It was in these circumstances that we stated in 41 Comp. Gen., *supra*, at page 514 that:

We are in agreement with the contracting officer's determination that * * * [the bidder's] restriction on public disclosure of its descriptive data did not prevent competing bidders from knowing the essential nature and type of product offered. All bidders had copies of the Purchase Description and knew the requirements specified therein. The competing bidders knew that * * * [the successful bidder] offered its Model * * *, *a standard off-the-shelf item* which was *apparently well known* in the industry. Furthermore, the minor modifications needed to make the * * * conform to the Purchase Description requirements were not hidden but obvious and easily ascertained. [Italic supplied.]

See, to the same effect, our holding in B–159259, *supra.*

In the instant procurement, while it appears that public disclosure was made as to the bid price, quantity and delivery terms, of your bid, the system you bid on was neither a "commercially available" nor "standard off-the-shelf" item and the descriptive literature was necessary to disclose the essential nature and type of the system you offered. Therefore, restriction of the descriptive literature submitted with your bid was a proper basis for a finding of nonresponsiveness under ASPR 2–404.4(a).

Although you have contended that the portion of the unrestricted descriptive literature submitted with your bid was sufficient for the purpose of determining the essential nature and type of your system, we note that the agency technical personnel concluded otherwise. In these circumstances, we do not believe our Office would be justified in substituting our judgment for that of the Navy technical personnel.

In any event, your bid was also determined nonresponsive with respect to meeting the Navy's need for a cable in accordance with paragraph 3.3.8 of the applicable specification, which states:

* * * A cable consisting of solid annealed copper conductors, cabled in pairs, with pairs cabled, with high molecular weight polyethylene inner jacket, longitudinally applied corrugated shield of copper and covered with a jacket of high molecular weight polyethylene or equal, shall be acceptable as a minimum requirement. * * *.

You interpreted the "or equal" phrase in the specification as modifying the entire cable, and you offered a cable with other than the specified copper sheath.

It is the Navy's position that the "or equal" applies only to the outer jacket and that such intended meaning is clear from the structure and punctuation of the sentence. We perceive of no basis for disagreeing with this interpretation. Since the Navy considers a copper sheath essential to meet its needs, your bid is not acceptable for this reason.

Accordingly, your protest is denied.

[B-178423]

Contracts—Subcontractors—Listing—Bidder Responsibility *v.* Bid Responsiveness

A bid that failed to list subcontractors which was submitted under a solicitation for the retreading of pneumatic tires that limited subcontracting to not more than 50 percent of the work and that called for the listing of subcontractors for the purpose of establishing bidder responsibility may be considered. It is only when a subcontractor listing relates to a material requirement of a solicitation that a bid submitted without a listing is nonresponsive, and the fact that the invitation imposed a 50 percent limitation on subcontracting does not convert the subcontracting listing requirement to a matter of bid responsiveness since the purpose of the listing is to determine bidder capability to perform, information that may be submitted subsequent to bid opening. Furthermore, the "Firm Bid Rule" was not violated since the bidder may not withdraw its bid and bid acceptance will result in a binding contract.

To Earl O. Dolven, July 16, 1973:

This is in reply to your letter of April 11, 1973, and subsequent correspondence, protesting on behalf of Transport Tire Company, Incorporated, against the award of contracts to two other firms under invitation for bids (IFB) No. GS-09-DP-(P)-308 issued by the General Services Administration (GSA), San Francisco, California.

The solicitation, for an indefinite requirements type 1-year term contract for retreading pneumatic tires, requested prices for various categories of work in several geographical service areas and provided for multiple awards. Special Provision #10 of the IFB required each successful bidder to limit subcontracting to not more than 50 percent of the work called for by the contract. That provision also called for the listing of subcontractors in the bid. You claim that the failure of two bidders to comply with the listing requirement renders their bids nonresponsive. Award has not been made pending resolution of your protest.

The procurement file shows that the bid submitted by McCoy's Super Tread Tire Company does not contain any subcontractor listing and that the name of one subcontractor is included in the bid of Bay Area Tire Company. You claim that Bay Area's listed subcontractor recaps only passenger tires and that Bay Area does not have the in-house capability of performing the remainder of the work bid upon. You further claim that both bidders do not have the capacity to perform 50 percent of the work bid upon or upon which they may be the low bidders. You assert that the "50% 'in-house' rule contained in the second paragraph of Special Provision 10(a) notifies offerors that a per se objective test of responsibility will be adopted" and that this "converts what appears to be at first glance a question of responsibility into a question of responsiveness." You say that this interpretation is supported by the statement in the GSA report that a contractor could be terminated for default if it did not adhere to the 50 percent subcontracting limitation. You claim that this statement indicates that Special Provision 10 would be an essential provision of any resulting contract and that all bids must therefore strictly adhere to the terms of that provision. In addition, you state that the "Firm Bid Rule" requires that full and correct information be submitted as required by Special Provision #10 and that bidders must be bound by that information.

We have held that a subcontractor listing may be related to a material requirement of a solicitation, so that a bid submitted without such a listing should be viewed as nonresponsive. 43 Comp. Gen. 206 (1963); 45 *id.* 177 (1965); 47 *id.* 644 (1968). However, we have also recognized that where subcontractor listings are required "for the purpose of determining the bidder's qualifications and responsibility" a bid may not be regarded as nonresponsive merely because such a listing is not included. 51 Comp. Gen. 329, 334 (1971). Here we think the solicitation made it eminently clear that the subcontractor listing was related to bidder responsibility. Special Provision #10 was captioned "Determining Responsibility of Offerors," and provided in subparagraph (a) for preaward inspection of bidders and "contemplated subcontractors." It further provided that:

> No offeror will be regarded as responsible where pre-award inspection discloses that the offeror proposes to furnish the services required under the contract through subletting over fifty percent (50%) of the entire contract. (See 10(b) (10) below).

Subparagraph (b) stated:

> (b) *Offeror Information Required.* To assist the contracting officer in determining the responsibility of the offeror, each offeror is requested to furnish the following information and may furnish any additional data believed pertinent:
>
> * * * * * * *
>
> (10) * * * Also, if offeror sublets any portion of his contract, which cannot exceed fifty percent (50%) of the entire contract, the sub-contractor(s) assigned DOT Code Number, Name, and address must be furnished.

There followed spaces for the insertion of this subcontractor information.

We do not agree that the 50 percent limitation on subcontracting had the effect of converting the subcontractor listing requirement to a matter of bid responsiveness. The listing was clearly required so that GSA could determine bidder capability to perform the contract, and such information may be provided subsequent to bid opening. 51 Comp. Gen. 329, *supra;* 39 *id.* 655 (1960). Furthermore, even if GSA is correct in believing that a default termination could result if a contractor subcontracted more than 50 percent of its contract work, we do not see how a bid without a listing of proposed subcontractors under this solicitation can be regarded as nonresponsive. We see nothing in the bids submitted by McCoy's Super Tread and Bay Area Tire Company to indicate any intent not to be bound by all the requirements of the invitation. Accordingly, we do not believe there is any basis to view either bid as nonresponsive.

You further argue that treating the requirements of Special Provision #10 as a matter of responsibility rather than bid responsiveness violates the "Firm Bid Rule" in that a low bidder could effectively withdraw its bid by stating at the time of preaward inspection that it intended to subcontract more than 50 percent of the work. Such an argument, of course, can be made with respect to any factor bearing on responsibility, and we do not find it persuasive. Rather, we agree with GSA that responsibility requirements are for the protection of the Government and may be waived by the Government if it seems it to be in its best interests to do so. 45 Comp. Gen. 4 (1965); 52 Comp. Gen. 647 (1973). Accordingly, we do not believe that a bidder which submits a responsive bid and is otherwise responsible could necessarily escape a contract award by an attempt to make itself appear nonresponsible. The cases you cite as authority for the "Firm Bid Rule" and its application to this case, *Scott* v. *United States*, 44 Ct. Cl. 524 (1909); *Refining Associates, Incorporated* v. *United States*, 114 Ct. Cl. 145 (1953), merely stand for the proposition that a bidder is not free to withdraw its bid on a Government contract once bids have been opened, and that acceptance of a bid, notwithstanding an attempted revocation, results in a binding contract.

GSA has reported that preaward surveys of McCoy's Super Tread and Bay Area Tire Company indicate they can perform in excess of 50 percent of the services bid upon. Accordingly, we need not consider whether the subcontracting limitation of Special Provision #10 applies to all services bid upon, as you contend, or whether GSA is correct in believing it applies only to the services covered by the contract as awarded to any individual bidder. With respect to your contention that these two bidders do not have the capacity to perform 50 percent of the work under any contracts that would be awarded to them, we have always held that a prospective contractor's ability to perform a contract is a matter primarily to be determined by the contracting agency, and absent a showing of bad faith or lack of reasonable basis therefor, we will not question that determination. 43 Comp. Gen. 228 (1963). There has been no such showing here.

For the foregoing reasons, your protest is denied.

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[B-178059]

Contracts—Mistakes—Price Variances—Two Bids Received

A bidder who mistakenly used a page from the previous year's Federal Supply Schedule as an initial worksheet in preparing its bid to supply liquid oxygen and, therefore, failed to include in its bid price the cost of storing the oxygen due to the fact the Government had previously furnished storage facilities, submitted an erroneous bid, which because it was 70 percent higher than the only other bid received should have been verified since the contracting officer had "constructive notice" of the error—the legal substitute for actual knowledge—and acceptance of the bid failed to consummate a valid and binding contract. The unfilled portion of the contract may be rescinded and payment made for deliveries on a *quantum valebat* basis, limited to the amount of the next lowest bid. The holding that no fair comparison can be made where only two widely variant bids are received will no longer be followed. 20 Comp. Gen. 286 and other similar cases overruled.

To the Acting Administrator, General Services Administration, July 17, 1973:

We refer to a letter dated February 16, 1973, from your General Counsel, concerning the request by Union Carbide Corporation, Linde Division of Birmingham, Alabama, for either rescission or reformation of contract GS-04S-19881 (item A0030) due to a mistake in bid alleged after award.

Union Carbide offered to supply an estimated 1,275,875 cubic feet of liquid oxygen to Fort Bragg Hospital in Fayetteville, North Carolina, at a price of $0.00382 per cubic foot and, as low bidder, was awarded the contract. After award, Union Carbide asserted that it mistakenly used a page from the previous year's Federal Supply Schedule as an initial worksheet in preparing its bid. That worksheet indicated that storage facilities for the oxygen would be supplied by the Government, whereas the solicitation for bids for contract GS-04S-19881 required the contractor to furnish the storage facilites. In view thereof, Union Carbide asserts that its bid price should have been $0.0072 per cubic foot. The only other bid received for item A0030 was $0.0065 per cubic foot.

The contracting officer has advised us that the 70-percent disparity between the two bids received should have charged her with notice of the probability of a mistake in bid. Your General Counsel and the contracting officer both assert that since the contracting officer did not seek verification of the low bid, no valid and binding contract was consummated upon its acceptance.

This position is at variance with the rule enunciated in 20 Comp. Gen. 286, 288 (1940), where we stated that:

> * * * ordinarily no fair comparison with other bids can be made where only two widely variant bids are received, there being no more reason for considering the low bid too low than for considering that a mistake was made by the high bidder in quoting a price too high.

In that case, we found that the contracting officer was not on notice of the probability of a mistake in bid, notwithstanding the fact that the only two bids received were in the amounts of $4.25 per unit and $12.50 per unit. We concluded that there was no basis for relieving the low bidder from the obligations imposed upon it by acceptance of its bid. If we apply that rule here we would be compelled to conclude that a valid and binding contract resulted from the Government's acceptance of the bid and the relief requested by Union Carbide would have to be denied.

However, we have reconsidered the rationale of our decision quoted above, and we believe that the decision is inconsistent with the concept of "constructive notice," which exists when the contracting officer, considering all the facts and circumstances of a case, should have known of the possibility of an error in the bid. 40 Comp. Gen. 326 (1960). It is the legal substitute for actual knowledge and results when the exercise of reasonable diligence would have produced actual knowledge.

Had Union Carbide submitted the only bid, no basis for comparison would have existed to put the contracting officer on notice of the possibility of an error. But here, a basis for comparison did exist because the contracting officer had two widely variant bids before her. Any reasonable person, acting in the position of a contracting officer, upon comparing the bids, should have been alerted immediately to the possibility of a mistake in one of the bids. We believe, therefore, that the contracting officer did not exercise reasonable diligence when she failed to request verification of the low bid. Had she done so, it is reasonable to conclude that she would have had actual knowledge of Union Carbide's mistake in bid. *See* B–167816, September 19, 1969.

We are of the opinion that the 70-percent difference in price between Union Carbide's bid and the only other bid received, standing alone, was sufficient to charge the contracting officer with constructive notice of a mistake in Union Carbide's bid. Since the contracting officer did not seek verification of the low bid, no valid and binding contract was consummated by its acceptance. B–167816, *supra*.

In view of the above, 20 Comp. Gen. 286 (1940) no longer will be followed by our Office in the consideration of cases similar to the present one.

Accordingly, contract GS–04S–19881 for item A0030 may be rescinded as to the balance of oxygen covered thereby and payment may be made to Union Carbide for the 97,941 cubic feet of oxygen already delivered on a *quantum valebant* basis limited to the amount of the next low bid. 37 Comp. Gen. 685, 686 (1958); B–177410, January 3, 1973.

[B-178625]

Bids—Delivery Provisions—Alternate Schedule—Nonresponsive—Erroneous Award

The award for separate contract line items of fork lift trucks on the basis of a permitted alternate delivery schedule that offered delivery 90 days earlier than prescribed by the invitation for bids and, therefore, was nonresponsive to the mandatory requirement that the first production units be delivered no earlier than a minimum of 365 days after approval of the first article test report—a requirement intended to assure delivery of spares, repair parts, and publication concurrently with the first production units—should be terminated, the procurement resolicited with delivery provisions informing bidders as to permissible deviations and the consequences of nonconformity in accordance with the competitive bidding system, and the appropriate congressional committees informed, pursuant to section 236 of the Legislative Reorganization Act, of the action taken on this recommendation. Furthermore, the solicitation makes no provision that in the event an alternate delivery schedule is unacceptable, the required schedule will govern. Modified by 53 Comp. Gen. ---- (B-178625, November 8, 1973).

To the Director, Defense Supply Agency, July 19, 1973:

We refer to letter DSAH-G dated June 21, 1973, from the Assistant Counsel, Headquarters, and prior correspondence, reporting on the protests of Drexel Industries, Inc. and Pettibone Corporation. The protests involve the award of a contract to J. I. Case Company, the low bidder, under invitation for bids (IFB) No. DSA700-73-B-2031, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio, for 13 separate contract line items (CLIN) of fork lift trucks, 1 CLIN for first article testing and 10 data CLIN's. In the event we hold adverse to the award to Case, Drexel, the third low bidder, has protested any award to Multi-Pallet Fork Lifts, Inc., the second low bidder.

For the reasons which follow, we recommend that the contract awarded to Case be terminated for the convenience of the Government and the procurement resolicited since the award was made to other than the low responsive bidder under a defective IFB. *See* 51 Comp. Gen. 792 (1972), and *id.* 635 (1972). Termination for convenience is being recommended because there is no indication in the record before us that either the contractor or the procurement activity contracted other than in good faith or with intent to deprive other bidders of an equal opportunity to compete. *See* 52 Comp. Gen. 215 (1972); and 51 *id.* 481 (1972). We would appreciate advice of the action taken on our recommendation.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S.C. 1172. In view thereof, your attention is directed to section 236 of the act, 31 U.S.C. 1174, which requires that you submit written statements as to the action taken with respect to the recommendation. The statements are to be sent to the

House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

The basis for the Drexel and Pettibone protests concerns the allegation that the Case bid was nonresponsive to the mandatory IFB requirement that the first production units be delivered no earlier than 365 days after approval by the Government of the first article test report.

The IFB as issued provided for submission of the first article test report by the contractor within 270 days after date of award (ADA), approval or disapproval of the test report by the Government within 30 days thereafter, and delivery of the first production units 665 days ADA. Thus, delivery of the first production units was required 365 days after submission and approval of first article test report. The time of delivery provision of the IFB warned bidders that failure to meet the required delivery schedule would result in a determination of nonresponsiveness. The DCSC Master Solicitation made part of the IFB reads, in pertinent part, as follows:

a. Delivery is *Required* to be made in accordance with the schedule set forth below, except that where delivery for an item is phased, bids may be on any basis provided delivery proposed is within the period required for the entire quantity. *Bids failing to meet the required delivery schedule will be rejected as nonresponsive.*

CLIN(S)	QUANTITY	TIME (Days after date of award)

Page 15 of the IFB set out the required delivery schedule of all CLIN's. Furthermore, the IFB as issued contained two notes to bidders concerning the delivery schedule which dealt with the time for the submission of the first article test report, as follows:

NOTE 2: CONCURRENT DELIVERY WITH THE END ITEMS IS REQUIRED FOR STOCK REPAIR PARTS AND PUBLICATIONS. ACCELERATION IN THE DELIVERY OF END ITEM WILL NOT BE ACCEPTABLE TO THE GOVERNMENT UNLESS ALL OTHER SCHEDULED DELIVERIES RELATING TO CONTRACT ITEMS SUCH AS PROVISIONING, TECHNICAL DOCUMENTATION, DRAWINGS, PUBLICATIONS, OVERPACK MANUALS, ETC. AND SPECIFICALLY FIRST ARTICLE TESTING, ARE ACCELERATED BY AN EQUAL PERIOD OF TIME AND PRIOR APPROVAL OF THE PROCURING CONTRACTING OFFICER IS OBTAINED.

NOTE 3: PROVISION C27a—SUBPARAGRAPH (b) [right of offerors to extend time for first article test report submission] HAS BEEN DELETED. OFFERORS *MAY NOT EXTEND* THE TIME FOR SUBMISSION OF FIRST ARTICLE TEST REPORT AS REQUIRED HEREIN.

Amendment 0001 to the IFB provided, in pertinent part, as follows:

The delivery times and acceleration conditions stated in the solicitation are *firm*. The 12 month lead time between first article approval and first production delivery is necessary to allow for concurrent delivery of repair parts.

Amendment 0002 changed the delivery schedule by requiring delivery of the first production units 755 days ADA and all CLIN's by 905 days ADA as opposed to the original IFB requirement of 665 days ADA and 815 days ADA, respectively—a 90-day extension. In addition, the first article test report date was extended from the original 270 days ADA to 330 days ADA. Then, Note 3, above, was deleted and the following new Note 3 was substituted (quoted as completed by Case):

TIME FOR SUBMISSION OF FIRST ARTICLE TEST REPORT AND DELIVERY SCHEDULE FOR PRODUCTION UNITS MAY BE ACCELERATED OR EXTENDED UNDER THE FOLLOWING CONDITIONS, BUT IN NO CASE MAY FIRST ARTICLE TEST REPORT EXCEED 360 DAYS ADA:

1. TIME BETWEEN SCHEDULED GOVERNMENT APPROVAL OF 1ST ARTICLE TEST REPORT (THE NUMBER OF DAYS SCHEDULED FOR SUBMISSION OF REPORT PLUS 30 DAYS) AND 1ST DELIVERY OF PRODUCTION TRUCKS IS A MINIMUM 365 DAYS.
2. FINAL DELIVERY OF ALL ITEMS DOES NOT EXCEED 905 DAYS.
3. OFFEROR, WHEN ACCELERATING OR EXTENDING THE TIME FOR SUBMISSION OF THE 1ST ARTICLE TEST REPORT IS REQUESTED TO INDICATE BELOW HIS ALTERNATE DELIVERY SCHEDULE ENCOMPASSING ALL CLINS 0001 THROUGH 0014 CONSISTENT WITH THE CONDITIONS CITED ABOVE OR NAMED ELSEWHERE IN THE SOLICITATION.

CLIN	QTY	TIME—NO. DAYS AFTER DATE OF AWARD—MAX TIME 905 DAYS
0001, 2 & 3	100	665
0004 & 5	65	695
0006	65	725
0007	65	755
0008, 9 & 10	65	785
0011, 12 & 13	66	815
0014	--------	360

[First Article requirement.]

We believe that the alternate delivery schedule proposed by Case was nonresponsive to the delivery provisions of the IFB. Case extended the number of days for submission of its first article test report from 330 days ADA to 360 days ADA. However, Case accelerated the delivery time for the first production units from 755 days ADA to 665 days ADA. This alternate schedule provided a period of 275 days between approval of the test report and delivery of the first production units—90 days less than the minimum 365 days required by the IFB, as amended. The Assistant Counsel and contracting officer advise that the purpose of the 365-day interval is to assure delivery of spares, repair parts, and publications concurrently with the first production units. Under this procurement, the contractor has no control over the source or timing of delivery of spares and repair parts. No evidence has been presented which detracts from the materiality of the 365-day interval requirement set forth in the IFB, as amended. Therefore, since the alternate delivery schedule offered by Case permits it to deliver 90 days earlier than required, that schedule is nonresponsive. Case and the contracting officer argue that various provisions of the IFB, as amended, such as Note 2 quoted above, call for concurrent delivery of the end item and spares and repair parts by Case. However, this position ignores the express provision inserted by Case in its bid dealing with delivery time which allows a time interval between submission and approval of the first article report and first production unit delivery contrary to a material delivery requirement of the IFB, as amended. *See* 46 Comp. Gen. 307, 310 (1966).

In any event, Note 2, quoted above, clearly requires that acceleration in the delivery of end items will not be acceptable unless all other scheduled deliveries relating to contract items, specifically first article testing, are accelerated by an equal period of time. Amendment 0001 reinforces this requirement. The Case alternate delivery schedule accelerated the delivery of the first production units from 755 days ADA to 665 days ADA; however, it extended, rather than accelerated, the date for submission of the first article test report. Thus, the alternate delivery schedule was nonresponsive to the Note 2 and amendment 0001 requirements of the IFB.

The Assistant Counsel and Case argue that, despite a defect fatal to the responsiveness of the alternate delivery schedule, Case may fall back on the required delivery schedule as revised in amendment 0002. The Assistant Counsel views the language of amendment 0002 which inserts a new Note 3 and Note 2 as encouraging bidders to submit alternate delivery schedules for delivery of end items where possible and to permit flexibility in the delivery of the first article test report. Furthermore, the Assistant Counsel contends that there was no intention to bind bidders to any proposed acceleration or extension.

We do not agree. Our review of the Case bid discloses that the submission of the alternate schedule should be construed as a definite offer in lieu of the required delivery schedule. There is nothing in the Case bid which evidences a firm obligation to comply with the required delivery schedule. In our view, Case has a choice of delivery schedules—one of those choices being the nonresponsive alternate schedule. The new Note 3 in amendment 0002 provides not only for acceleration or extension of the first article test report, but also the delivery schedule subject to various conditions. This, plus Note 2's acceleration provisions, reasonably leads to the conclusion that bidders could propose an alternate delivery schedule so long as it complied with the delivery requirements. We believe that Case's alternate or substitute delivery schedule was the only viable, albeit, nonresponsive, schedule remaining in its bid. There was no operative clause in the IFB to permit a construction that if Case's alternate delivery schedule was unacceptable, the required delivery schedule would govern. *See* 50 Comp. Gen. 379 (1970); and 46 *id.* 307, *supra.*

Therefore, the award made to Case should be terminated for the convenience of the Government.

However, no corrective action should be taken on our recommendation which would be based on the IFB, as amended. Note 2 to the IFB, quoted above, permitted acceleration in end item delivery if (1) equal acceleration for the data CLIN's and the first article testing CLIN, and (2) "* * * PRIOR APPROVAL OF THE PROCURING CONTRACTING OFFICER IS OBTAINED." Thus, bidders were invited to deviate from the required delivery schedule at the risk of having that deviation rejected by the procuring contracting officer. The IFB failed to stipulate any standards or criteria regarding the approval or disapproval of an accelerated delivery schedule submitted by a bidder. Bidders were at a loss to determine with any degree of certainty whether a tendered delivery schedule would be acceptable. The decision would be dependent upon the subjective determination of the procuring contracting officer after bid opening. The competitive bidding system requires that all bids be measured against the same objectively determinable standards so that all bids may be evaluated on an equal basis so as to establish the acceptability of the low bid.

We recommend that the procurement should be resolicited with delivery provisions which adequately inform bidders as to what deviations therefrom are permitted from the required delivery schedule and the consequences of the submission of an unacceptable, deviating, or substituted delivery schedule. *See* sections 1–305, *et seq.*, and 2–401.1 (b) (i) of the Armed Services Procurement Regulation; 51 Comp. Gen. 518 (1972); *id.* 635, *supra;* 49 *id.* 713 (1970); 46 *id.* 745 (1967); and 43 *id.* 544 (1964).

In view of our conclusion that the procurement should be resolicited, it is not necessary to consider the protest of Drexel against an award to Multi-Pallet Fork Lifts, Inc.

[B–178969]

Bidders—Qualifications—State, etc., Licensing Requirements

A license requirement in a Government solicitation is a matter of bidder responsibility since the bidder has the duty to ascertain its legal authority to perform a Government contract within a State, and the requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, a low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be a responsive bidder. A State may enforce its license requirements provided the State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with the execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform the service contract is a matter of bidder responsibility, not bid responsiveness, as is the fact that the bidder was in the ambulance business and not taxi business at the time bids were opened.

To S. P. LaCerva, July 19, 1973:

Reference is made to your letter of June 19, 1973, with enclosures, concerning the protest of Anthony J. Altieri, Inc., dba Double "A" Transport, Commack, New York (AJA), against award of a contract to the apparent low bidder, B&D Ambulance and Oxygen Service Corp., Huntington Station, New York (B&D), under invitation for bids (IFB) No. 632–9–74.

The IFB was issued for the procurement of taxi and emergency pick-up service to the Veterans Administration and its beneficiaries. The solicitation contained clauses concerning licensing and registration requirements and certain business information requirements as follows:

2. *QUALIFICATIONS:* a. Proposal will be considerd only from bidders who are regularly established in the business called for and who are financially responsible and have the necessary equipment and personnel to furnish service in the volume required for all the items under this contract. Successful bidder shall meet all requirements of Federal, State or City codes regarding operations of this type of service.

b. Each bidder must submit with his bid a letter in duplicate fully describing the make of vehicles, model and year which he agrees to furnish under this proposal including the location and telephone numbers of his establishment where calls are received on a 24-hour a day basis and vehicles are immediately available for dispatch. The Contracting Officer will be notified in writing of any equipment added for (sic) deleted after award of contract.

It is AJA's position that B&D failed to comply with the above qualifications. AJA states that B&D does not hold a valid license to engage in the taxi business as required by paragraph 2a. AJA further states that B&D did not furnish the letter required by paragraph 2b. Upon these two contentions, AJA believes the bid of B&D to be nonresponsive to the solicitation.

It is well established by the decisions of our Office that failure to submit permits or licenses by the time of award or at the very latest by the time contract performance is to be commenced, plus any lead time which may be necessary in the particular case, shall affect the responsibility of a prospective contractor in cases where the permit or license is a requirement of the Federal Government. *See* 51 Comp. Gen. 377 (1971).

With respect to the effect of a State law requiring a license or permit as a prerequisite to performing the type of services required by a Federal contract, in our decision B–125577, October 11, 1955, we considered an IFB for a Federal construction contract to be performed in Tennessee, under which the contractor was to obtain all licenses and permits required for the prosecution of the work. We held therein that:

State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be.

* * * * * * *

No Government contracting officer is competent to pass upon the question whether a particular local license or permit is legally required for the prosecution of Federal work, and for this very reason the matter is made the responsibility of the contractor. No statute has been brought to our attention which would authorize the inclusion of a condition in Federal contracts or bid invitations that local permits or licenses must be obtained, regardless of their necessity as applied to the work to be done. Accordingly, we are of the opinion that the obtaining of a general contractor's license for performing Government work in Tennessee is a matter which must be settled between the local authorities and the contractors, either by agreement or by judicial determination.

If a State determines that under its laws a bidder on a Federal contract must have a license or a permit as a prerequisite to its being legally capable of performing the required services for the Federal Government within the State's boundaries, the State may enforce its requirements against the bidder, provided the application of the State's law is not opposed to or in conflict with Federal policies or laws, or does not in any way interfere with the execution of Federal powers. See *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956); *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963); *Charles Paul* v. *United States*, 371 U.S. 245 (1963). In those instances where the requirements of a State law do not violate this proviso, the State may proceed to enforce its requirements against a contractor who failed to comply. However, if as a result of enforcement by the State, the contractor chooses not to perform the contract or is prohibited from doing so by an injunction won by the State, the contractor may be found in default and the contract terminated to its prejudice.

Furthermore, our Office has consistently held that a license requirement in an invitation is a requirement concerning the responsibility of prospective contractors—that is, to determine a bidder's legal authorization to perform the contract, which is a matter of responsibility and is not related to an evaluation of the bid. 47 Comp. Gen. 539 (1968), 46 *id.* 326 (1966). In the latter cited case, we stated that the critical time for actual compliance with a requirement concerning responsibility could be as late as the time for performance plus any lead time which may be necessary in the particular case. Therefore, we find no reason to question the award to B&D for failure to hold licenses and permits at the time of bid opening.

With regard to AJA's contention that failure to furnish all of the requested data with the bid should render it nonresponsive, it is the contracting officer's position that omission of this data had no effect on the contractor's obligation to perform in compliance with the specification requirements. The omission of data can be waived as a minor informality where the data does not go to the substance of the bid, and waiver therefore would not work an injustice on the other bidders. A request for the submission of data with a bid may generally be considered of substance only if it affects price, quantity, quality, or delivery. Since such was not the case here, we must conclude that the failure of B&D to submit the data in question with its bid did not require rejection of its bid as nonresponsive. *See* B-174204, February 18, 1972.

Furthermore, we think there is no question but that the equipment listing requirements of paragraph 2b are for the purpose of determining whether a prospective bidder will have the capacity and ability to perform the work described. The contract is one for the furnishing of *services* and not for the furnishing of equipment, except as an incident to performing the services. The equipment list submission requirement was clearly designed to enable the contracting officer to determine in advance of award whether the firm awarded the contract would be able to perform responsibly.

We have consistently held that where the requirement for submission of data is for the purpose of determining the capability (responsibility) of the bidder rather than the responsiveness of the bid, the failure of the bidder to submit such data is not fatal to consideration of the nonconforming bid and the data may be provided subsequent to bid opening, as was done by B&D in this instant procurement. 39 Comp. Gen. 247 (1959). The result is the same even in cases where bidders are warned that failure to conform to data submission requirements may result in rejection of their bids. 39 Comp. Gen. 655 (1960). In this connection, we note that the present invitation did not contain any notice as to the consequences of a bidder's failure to submit an equipment list, or of the submission of an incomplete list. As there was no requirement that bidders actually own the necessary equipment at the time of bid submission, this appears to indicate that the objective to be served by submission of the equipment list could just as appropriately be accomplished by submission of the list after bid opening as before such opening. 42 Comp. Gen. 728 (1963).

AJA has contended that paragraph 2a required bidders to be in the taxi business and not in the ambulance business as was the case of B&D at the time of bid opening. The experience requirement is a matter relating to responsibility rather than responsiveness. 45 Comp. Gen. 4 (1965). In this regard, our Office has held that an offer need not be rejected for failure to meet literal responsibility requirements of a solicitation where, as here, the contracting officials are satisfied that the offeror is in fact responsible. 49 Comp. Gen. 9 (1969).

In view of the foregoing, the AJA protest should be denied.

[B-175703]

Contracts—Negotiation—Evaluation Factors—Out-of-Pocket Costs—COCO *v.* GOCO Plants

The cancellation of a request for proposals for cartridges on the basis the out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with the out-of-pocket costs incurred in Government-owned contractor-operated (GOCO) plants, and an award to a GOCO facility was in accord with the terms of the solicitation that conformed with paragraph 1-300.91(a) of the Army Ammunition Command Procurement Instruction, which in turn is consistent with 10 U.S.C. 4532(a), the "Arsenal Statute." Furthermore, where GOCO plants are operated under cost reimbursement type contracts and fixed-price competition with COCO sources is precluded, cost comparisons are necessarily utilized; the internal records of a GOCO plant are not within the disclosure provisions of 5 U.S.C. 552; and as a GOCO activity is not a Government commercial or industrial activity for purposes of Bureau of the Budget Circular A-76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates.

To the Olin Corporation, July 23, 1973:

Further reference is made to your letter of April 21, 1972, and subsequent correspondence, protesting against the cancellation of RFP DAAA25-72-R-0178 (RFP-0178), issued at Frankford Arsenal, Philadelphia, Pennsylvania, and the subsequent allocation to Lake City Army Ammunition Plant (LCAAP) of the requirement represented by that solicitation.

The above-referenced solicitation, as amended, requested proposals from contractor-owned and -operated (COCO) plants for load-assemble-pack of 15,000,000 cartridges, 20mm, TP, M55A2 and 5 million cartridges, 20mm, HEI, M56A3. As we observed in our decision B-175703(1), July 25, 1972, in regard to the same procurement:

> The contracting officer informed prospective offerors of the forthcoming RFP by message of October 18, 1971, which stated in part:
>
> > Award will be made to private industry or GOCO [Government-owned contractor-operated] facility on the basis of lowest out-of-pocket cost.
>
> The RFP was issued under cover of a sheet entitled "Information to Offerors," which specifically advised offerors to "See note under Section D-7 regarding evaluation." The note provided:
>
> > This is to inform all offerors that the procurement against which this solicitation has been issued will be awarded on the basis of the lowest out of pocket cost to the Government.
> >
> > This determination will be made by comparing the lowest prices received under this solicitation with the lowest out of pocket cost available at GOCO facilities.
>
> Amendment 0001 to the solicitation deleted the above-quoted provision and replaced it with the following statement:

> Prices submitted will be compared for reasonableness with GOCO out-of-pocket costs. Evaluation factors will include first article, discounts, transportation (GFM inbound and end item destination), abnormal maintenance at GOCO plant, support services, and annual maintenance of facilities laid away or to be laid away as a result of this procurement.

Such a comparison was made, and on the basis thereof the instant RFP was canceled and the requirement was allocated to LCAAP, [a GOCO facility].

You have identified no specific statutory or regulatory provision which was violated by the cancellation of the instant RFP and the allocation of the requirement to LCAAP. Your principal argument is that the Army Ammunition Procurement Policy provides an inequitable basis for determining whether to make award to a COCO plant which has submitted a firm-fixed price offer rather than to a GOCO plant which is operated under a cost-reimbursement type contract. You contend that the inequities contained in the Army Ammunition Procurement Procedure, together with certain procurement practices under RFP -0178, prejudiced the evaluation of your offer.

The Army furnished us an internal memorandum, with attached procedures, as the expression of its ammunition procurement policy. This material is substantially reproduced in Part 3, "General Policies," of the Army Munitions Command Procurement Instruction, June 1972 edition (MUCOMPI). Therefore, we shall refer to the appropriate MUCOMPI paragraph in discussing the Army Ammunition Procurement Policy.

The Army's policy is stated in MUCOMPI 1-300.91(a) as follows:

> Ammunition items susceptible to procurement both from GOCO and COCO plants will be procured on the basis of the lowest out-of-pocket cost to the Government, consistent with protected base and mobilization base requirements and minimizing sudden shifts in procurement approaches.

Where, as in the instant case, the GOCO plant is operated under a cost reimbursement type contract, the MUCOM GOCO Contracting Branch obtains validated estimated costs and fees for the GOCO plant. The validation of the GOCO cost estimate is then coordinated with the MUCOM Price Analysis Branch, which utilizes "DCAA services, validated historical data, and other information as available and required, prior to forwarding cost estimate data to the contracting officer." MUCOMPI 1-300.92(f)(iii)(B)(III).

A solicitation is then issued to COCO contractors, and evaluated offers received thereunder are economically compared with GOCO cost estimates on an out-of-pocket basis. If private industry is low, an award is made under the solicitation. However, if the GOCO contractor is low, the solicitation is canceled and a negotiated award to the GOCO contractor is processed. MUCOMPI 1-300.92(g).

In B-143232, December 15, 1960, to the Chairman, Subcommittee for Special Investigations, House Committee on Armed Services and to the Secretary of Defense, we examined the "Arsenal Statute," 10 U.S. Code 4532(a), which now provides:

The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.

We advised the House Committee on Armed Services:

First, it is our opinion that the word "shall" was intended to make it mandatory upon the War Department to use Government arsenals and Government-owned factories to manufacture or produce all of its needs which could be so manufactured or produced on an economical basis.

Second, in the absence of a contrary expression of intention in the legislative history, it is our opinion that the words "Government-owned factories" must be interpreted to include both Government-owned Government-operated, and Government-owned contractor-operated, industrial facilities.

Third, the basic concept of the statute would appear to be a requirement that Government-owned industrial facilities should not be permitted to lie idle if it would be possible to use such facilities to produce the needs of the War Department at a cost to the Government no greater than the cost of procuring such needs from private industry. * * *.

Fourth, it is our opinion that the words "economical basis" were intended to require a comparison of all costs incurred by the Government as a result of producing an article in Government-owned facilities, with the price at which the article could be purchased from a private manufacturer.

Consequently, it is our further opinion that, in determining under this statute whether an article could have been produced in a Government-owned facility on an "economical basis," it would have been improper to include in the evaluation of such cost any amount which did not represent an actual expenditure by, or loss of savings to, the Government which was directly attributable to such production.

Similarly, we stated to the Secretary of Defense:

* * * The words economical basis, as used in 10 U.S.C. 4532(a), are to be construed to mean a cost to the Government which is equal to or less than the cost of such supplies to the Government if produced in privately owned facilities, and it is our opinion that this statute requires the cost of production in Government plant to be computed on the basis of actual out-of-pocket cost to the Government.

Thus, the general policy expressed in MUCOMPI 1–300.91(a), of procuring from GOCO or COCO plants on the basis of lowest out-of-pocket cost to the Government, is consistent in our view with 10 U.S.C. 4532(a).

The initial issue raised by your protest is whether the determination of lowest out-of-pocket costs is properly accomplished through a comparison of COCO fixed-price offers with GOCO cost estimates. You state that:

* * * the Government cannot be certain of "out-of-pocket" costs until GOCO production of similar quantities has been completed, whereas the Olin prices are firm and independent of our future cost experience.

With respect to this contention, we agree with the contracting officer's observation that:

The essential point is that a comparison must be made and a judgment exercised as to the placement of an award in a Government-owned plant or a privately-owned plant, a decision which must be predicated upon the exercise of a sound discretion.

Army policy is to obtain direct fixed-price competition among GOCO and COCO sources which are operated on that basis. However, where GOCO plants are operated under cost reimbursement type contracts, precluding such competition, cost comparisons are, in our view, necessarily utilized.

You next maintain that certain evaluation factors applied to COCO prices and GOCO cost estimates were inappropriate, or were erroneously omitted from or not adequately set forth in RFP–0178. The first of these factors was "transportation (GFM inbound * * *)," which represents the cost to the Government of transporting Government-furnished materials (GFM) to the load-assemble-pack contractor. You state that the omission of Government-furnished cartridge cases from this data in the RFP was improper. In this regard, it is administratively reported that the "GFM cartridge cases were currently being solicited and it was not known to whom the award would be made or the general geographical area of the awardee." Under these circumstances, we consider the speculative nature of the cost attributable to this item to have properly led to its exclusion from the solicitation.

You further contend that a "redistribution of overhead" evaluation factor was improperly included; that data relating to the "transportation (* * * end item destination)" factor was omitted even though it was made available a week after the award to LCAAP; and that the solicitation failed to inform offerors that "packaging costs" were an evaluation factor. The application of these factors was unfavorable to Olin. However, the record shows that even in the absence of these factors, Olin's price still would not be low out-of-pocket when compared to the GOCO cost estimate. Thus, as the contracting officer stated, "* * * there would have been no substantial difference in the economic analysis upon which the decision to allocate the requirement to LCAAP was based." In view thereof, we consider this portion of your protest as moot.

Olin also requested of the contracting officer historical cost data for LCAAP concerning the items being procured under RFP –0178. This request was denied by the head of the procuring activity (HPA) on the basis that the requested data were the internal records of a private company (the GOCO operating contractor) and therefore exempt from the disclosure requirements of 5 U.S.C. 552. You protest the denial of this information. It is the position of our Office however that we have no authority under 5 U.S.C. 552 to determine what information must be disclosed by other Government agencies. B–165617, March 6, 1969.

In your initial protest to our Office, you also stated with respect to RFP –0178:

It is significant to point out that this list of evaluation factors applied to GOCO costs does not include all the real costs which are incurred by GOCO and, therefore, places industry at an unfair competitive disadvantage. To our knowledge many of the factors which are included in the Bureau of the Budget Circular A-76, 3 March 1966 have not been applied to the GOCO out-of-pocket costs, nor have they necessarily been considered in the [Army] "Procedures to Implement Current Ammunition Procurement Policies."

Such additional industry cost factors as depreciation of existing facilities, interest, insurance, and local, state and federal taxes are totally devoid of cost consideration at a GOCO facility whereas industry must bear these costs.

Circular A-76, as revised August 30, 1967, provides for the recognition of these factors in calculating the cost of obtaining products or services from Government commercial or industrial activities. However, paragraph 3.b of the Circular states that the term "Government commercial or industrial activity" does "not include a Government-owned contractor-operated activity." Additionally, the summary of changes which accompanied the 1967 revision of Circular A-76 explains:

3.b. The definition of a Government commercial or industrial activity has been clarified. The earlier Circular, by definition, excluded a Government-owned-contractor-operated activity but the wording was not entirely clear. The change made clarifies the fact that a Government-owned-contractor-operated activity is not to be regarded as a Government commercial or industrial activity for purposes of the Circular.

Since Circular A-76 is expressly made inapplicable to GOCO plants, we do not believe that we may legally object to the procuring activity's failure to apply the criteria contained therein to the GOCO cost estimates.

We are of the same opinion with respect to the Army's failure to apply to the GOCO cost estimates evaluation factors for Federal taxes, depreciation, insurance and interest, as prescribed by Department of Defense Instruction 4100.33, July 16, 1971 (DODI 4100.33). As you recognize, DODI 4100.33 implements the policies established by Circular A-76 and therefore expressly excludes from its provisions GOCO manufacturing and production plants.

In view of the foregoing, your protest is denied.

[B-177085]

Military Personnel—Separation—Status of Permanent Change of Station Orders

A military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved his dependents to the new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and a dislocation allowance for his dependents since the Fort at no time was the officer's permanent duty station, notwithstanding his transfer was deemed a permanent change of station and he was reassigned to serve as executive officer, and the member on temporary duty while at the Fort is entitled only to per diem for the 90 days he was at the Fort. Whether a duty assignment is permanent or temporary is determined by considering orders, and the character, purpose, and duration of an assignment, and the officer's orders evidencing detachment from overseas duty for separation, the permanent change of station orders and interim assignment as executive officer did not change the character of the separation transfer.

To H. C. McDaniel, Department of the Army, July 23, 1973:

Further reference is made to your letter dated August 13, 1972, with enclosures (file reference FINCS–A), requesting a decision as to the propriety of making payment to Captain Victor E. Noe, USAR, 312–46–5069, for travel and transportation allowances claimed in connection with his ordered transfer from an overseas duty station to Fort Benjamin Harrison, Indiana, in the circumstances described therein. Your letter was forwarded to this Office by the Per Diem, Travel and Transportation Allowance Committee by endorsement dated September 21, 1972, and has been assigned PDTATAC Control No. 72–45.

The record shows that by Special Orders No. 81, dated March 21, 1972, issued by Headquarters, 3D Infantry Division, APO New York 09036, the member was transferred on a change of permanent station from Schweinfurt, Germany, to the U.S. Army Garrison Transfer Point, Fort Benjamin Harrison, Indiana, to report on April 2, 1972, for the purpose of separation processing on June 16, 1972. Pursuant to the authority of those orders, the member moved his dependents from his last permanent duty station to Fort Benjamin Harrison and resided in rented off-base housing until his discharge.

By Special Orders No. 69, dated April 7, 1972, issued by the U.S. Army Administrative School Center and Fort Benjamin Harrison, the member was reassigned (diverted) from the U.S. Army Garrison Transfer Point to Headquarters Company, Headquarters Command, Fort Benjamin Harrison, and he was relieved from his assignment (not joined) with the U.S. Army Garrison Transfer Point. On April 21, 1972, Special Orders No. 79 were issued, amending the April 7, 1972, orders, designating him as executive officer of Company C, Headquarters Command, Fort Benjamin Harrison. It is indicated that the member performed those duties until he was separated from the service on June 16, 1972.

You say that the purpose for which the member was transferred to Fort Benjamin Harrison was his ultimate separation from the service and that his assignment to duty with Company C, Headquarters Command, did not change this fact. However, since you indicate that the member was not scheduled for immediate separation under the order transferring him to Fort Benjamin Harrison, you ask the following questions:

(1) May Fort Benjamin Harrison be considered the member's permanent station to entitle him to payment for travel performed here by his dependents and to a dislocation allowance?

(2) In the event this duty is considered as temporary in nature, is the member entitled to be paid per diem for the period that he remained at the station?

(3) Would our answer in this case be different if the member had remained assigned to the U.S. Army Garrison Transfer Point until his separation and had not been assigned to perform duty as executive officer of Company C until separation? You indicate that other members have been transferred to Fort Benjamin Harrison under similar circumstances except that they have remained assigned to the transfer point until separation.

Section 404 of Title 37, U.S. Code, provides in pertinent part that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed under orders upon a change of permanent station, or otherwise, or when away from his designated post of duty and, also, upon separation from the service or release from active duty for travel from his last duty station to his home or the place from which he was called or ordered to active duty.

Paragraph M3050–1 of the Joint Travel Regulations (JTR), promulgated pursuant to the above authority, provides that members of the uniformed services are entitled to travel and transportation allowances only while actually in a travel status, and that a member is deemed to be in a travel status while performing travel away from his permanent duty station, upon public business, pursuant to competent travel orders, including periods of temporary duty. Paragraph M1150–10a of the regulations defines the term "permanent station" as the post of duty or official station to which a member is assigned or attached for duty other than temporary duty or temporary additional duty. Subparagraph M3003–2a defines "temporary duty" as duty at one or more locations, other than at the permanent station, at which a member performs duty under orders which provide for further assignment, or pending further assignment, either to a new permanent station or for return to the old permanent station upon completion of the temporary duty.

Whether a particular duty assignment is permanent or temporary in nature is determined by considering the orders under which the assignment is made and the character of the assignment itself, with the purpose and duration of the assignment being vital elements in that determination. By definition, the word "temporary" is a term of limitation which indicates a period of relatively short duration and of a transitory nature with respect to the purpose of the assignment. It has been so used with reference to temporary duty assignments. *See* 24 Comp. Gen. 667 (1945). While an administrative evaluation of the character of the assignment, as reflected in the orders directing its performance, ordinarily is given considerable weight in such determination, it is not conclusive in the matter when other available evidence is considered sufficient to indicate the existence of a contrary factual situation. *See* B–139112, May 27, 1959, copy enclosed.

In the present case, the member's orders show that he was completely detached from his overseas assignment and that his transfer to Fort Benjamin Harrison was deemed a permanent change of station assignment. However, it seems reasonably clear from the fact that the orders state that the member was assigned to that location for the purpose of separation processing and the fact that the total period that he was to be at that location did not exceed 90 days, that the character of the duty to be performed and the limited duration of the member's assignment delineated a duty status which was temporary rather than permanent.

While at a separation station in a temporary duty status, a member authorized to travel from his last permanent duty station to a separation station of his own choice for his own convenience, is entitled to per diem allowances except where the appropriate separation station authorized by service regulations is at the member's last permanent duty station (subpar. M4157–1c, JTR).

Captain Noe has indicated that while on duty overseas he received notification from the Department of the Army on March 18, 1972, that he was to be released from the Army on the 90th day after notification. Additionally, he was informed that he could request any place of assignment within the United States provided it had a transfer point. Consequently, Captain Noe requested assignment to Fort Benjamin Harrison. In such circumstances, the officer is entitled to per diem allowances while on temporary duty at that station.

With regard to the member having been disjoined and tranferred from the U.S. Army Garrison Transfer Point and assigned to perform duty elsewhere at Fort Benjamin Harrison, it would appear that such assignment was made for the purpose of utilizing the member's services pending separation from active duty. Since the record indicates that the member was separated from the service on or about the date that he was originally scheduled for separation, it is our view that such an interim assignment did not represent a change in the character of his assignment at Fort Benjamin Harrision.

Accordingly, your first and third questions are answered in the negative and your second question is answered in the affirmative.

[B–178192]

Bids—Two-Step Procurement—Technical Proposals—Criteria Sufficiency

Where the specifications for the two-step procurement of high take-off angle antennas and ancillary items did not call for a separate ladder and the low bidder under Step II proposed to furnish a ladder that would be an integral part of the antennae structure and the only other bidder offered a separate ladder on the basis of prior experience, the bidders were not competing on an equal basis and the contracting agency's acceptance of the low bid without issuing an amendment to the specifications to establish criteria requires cancellation of Step II of the invitation for bids and the reopening of the Step I phase of the procurement on the basis of amended specifications to assure an equal bidding basis. The fact that the two-step procedure combines the benefits of competitive advertising with the feasibility of negotiation does not obviate the necessity for adherence to stated evaluation criteria and basic or essential specification requirements.

To the Secretary of the Navy, July 27, 1973:

This is in reply to the April 3 and May 11, 1973, letters from the Director of Contracts, Naval Electronics Systems Command (NESC) regarding the protest of Technology for Communications International (TCI) against award of a contract under invitation for bids (IFB) N00039-73-B-0254, Step II, issued by NESC.

Request for proposals (RFP) N00039-73-R-0254(Q) Step I, calling for unpriced technical proposals for high take-off angle antennas and ancillary items, was issued on December 1, 1972. Proposals were received from TCI and from Granger Associates. After holding discussions with both offerors, the Navy determined that the proposals submitted by both firms as supplemented were acceptable. On February 23, 1973, the second step IFB was issued, calling for prices on the proposals deemed acceptable. TCI bid $173,297.90, while Granger bid $156,899.85, and after evaluating transportation costs the Navy determined that Granger's bid was the lowest. Award of a contract to Granger has been delayed pending resolution of the protest.

TCI argues that the Granger proposal deviates from the specification requirements and therefore its second step bid is nonresponsive. Alternatively, it is argued that the Step I specifications should have been revised by an amendment to the RFP so as to give TCI an opportunity to submit a propsal on an equal basis. TCI also claims that the Granger bid was nonresponsive because it did not contain required shipping information. TCI has abandoned its previously expressed assertions that the Granger bid should be rejected because it did not indicate the quantity of silver to be used in performance of the contract and because the bid was signed by someone without authority to execute bids for Granger, and therefore we will not consider those claims.

Section F of both the Step I and Step II solicitations contained the following provision:

3.4.5—*Tower climbing equipment.* A ladder with safety climbing device shall be provided for climbing the full length of the tower.

* * * * * * *

3.4.5.2—Ladder. The ladder shall be made of either steel or aluminum conforming to either the specification listed under the material section of the latest issue of the American Institute of Steel Construction (AISC) specification for the Design, Fabrication and Erection of Structural Steel for Buildings or the specification listed under the material section of the American Society of Civil Engineers (ASCE) Structural Division Proceedings Paper No. 3041 and 3342.

"Suggested Specifications for Structures of Aluminum Alloy 6061–T6, 6062–T6, 6063–T5, and 6063–6T."

Inside dimensions between stringers shall be 18 inches unless otherwise specified. Center to center spacing of rungs shall be 12 inches. Ladders shall be shop assembled in approximately 30-foot sections. Angle brackets for bolting ladders to the tower shall be punched for bolts and provided for connection to the tower bracing members of the towers.

The rungs shall be ¾ inch in diameter minimum. Vertical stringers shall be 2½ x ⅜ inch thick minimum. Angle brackets shall be ⅜ inch thick minimum spaced not more than 10 feet apart.

Steel ladders shall be galvanized after fabrication. Splice plates for bolted connections shall be provided at all ends for connecting individual sections.

TCI proposed to furnish a separate ladder, while Granger proposed a ladder that would be an integral part of the antenna structure.

TCI asserts that acceptance of the Granger proposal would be "in complete derogation" of the specifications, which it insists required a separate, shop-assembled ladder rather than just the addition of rungs to the tower structure. On the other hand, the Navy points out that the Granger proposal was evaluated by Navy engineers and found to be acceptable, and that since a "separate" ladder was not called for by the specifications, the flexibility inherent in two-step procurement allows acceptance of Granger's approach "without relaxation or changing the specifications to favor Granger." This position is also vigorously supported by counsel for Granger.

The two-step formal advertising procedure has been recognized as combining the benefits of competitive advertising with the flexibility of negotiation. 50 Comp. Gen. 346 (1970). "While the second step of this procedure is conducted under the principles of formal advertising (ASPR 2–503.2), the first step, in furtherance of the goal of maximized competition, contemplates the qualification of as many technical proposals as possible under negotiation procedures." 50 Comp. Gen. 346, 354. This procedure requires that technical proposals comply with the basic or essential requirements of the specifications but does not require compliance with all details of the specifications. 46 Comp. Gen. 34 (1966); 50 Comp. Gen. 337 (1970); 51 Comp. Gen. 85 (1971); ASPR 2–503.1(e).

Thus, we have recognized that the responsiveness of a first-step proposal would not be affected by its failure to meet all specification details "if the procuring agency is satisfied * * * that the essential requirements of the specification will be met." 50 Comp. Gen. 337, 339, *supra*. Here the Navy believes that the Granger proposal satisfies its requirements and therefore rejection of the proposal would not be appropriate. 51 Comp. Gen. 592 (1972). However, if the Granger proposal represents a basic change to the specification requirements, then before it can be accepted the Navy is obligated to inform TCI of the change and provide it with an opportunity to submit a proposal in accordance with the revised specifications. 51 Comp. Gen. 85, *supra*.

The Navy letter accompanying the RFP "authorized and encouraged" offerors "to submit multiple technical proposals presenting different basic approaches." The General Instructions section of the RFP advised offerors to provide sufficient detail in their proposals to enable the Government to determine that "the proposed equipment will have a *reasonable likelihood* of meeting the requirements of the Government as set forth in the specifications." While these provisions adequately advised prospective offerors that a variety of engineering approaches to satisfy these requirements would be acceptable, all such approaches must stay within the confines of the basic specification provisions. [Italic supplied.]

With regard to the dimensions involving the rungs and stringers, the contracting officer reports that Granger originally proposed rungs that were 20″ apart, but was required to provide rungs with closer spacing to permit easier ascent and descent. The Granger proposal that was accepted calls for rungs 10″ apart and 1½″ thick, thus exceeding specification requirements. The contracting officer further reports that:

> The dimension for stringers is critical as an inside dimension since the safety climbing device, which runs down the center of the ladder, would make it difficult for a workman to straddle the device and climb the ladder if the ladder were narrower than 18 inches. The portion of the Granger antenna tower which also serves as ladder stringers is approximately 40 inches. Prior to the acceptance of the Granger proposal, this dimension and the ladder configuration were reviewed by engineers of the Navy Facilities Engineering Command who determined that the requirements of the OSHA and the ladder specification were met.

We think this explanation clearly indicates that the rung and stringer dimensions of the Granger tower climbing equipment do not deviate from the minimum essential requirements of the specifications and do not represent a substantial change to the specifications.

With regard to the ladder itself, however, we think the record clearly indicates that at the time the first-step RFP was issued the Navy was contemplating an antenna with a separate ladder. Both the language in the specifications (providing for "bolting ladders to the tower" and for splice plates "for bolted connections") and the Navy's administrative position that Granger's approach was "novel and innovative" suggest that the possibility of a ladder that would be an integral part of the antenna structure was not considered when the specifications were drafted. ASPR 2–503.1 requires first-step RFPs to include criteria (such as design and performance characteristics) for evaluating technical proposals, and we have previously urged the inclusion in RFPs of the specific criteria "for evaluation of those proposals which may present new or basically different systems" from that described in the solicitations. 46 Comp. Gen. 34, 41, *supra*. Thus, while the Navy is technically correct when it points out that the RFP provisions do not state with specificity that a "separate" ladder is required, we think the specification sections dealing with the ladder reasonably appear to indicate just such a requirement against which proposals were to be evaluated. In our opinion, it would be unfair to TCI, which apparently has furnished antenna towers with integral climbing devices in the past, to allow Granger to propose a non-separate ladder when it is clear that TCI may not have offered a similar (and, according to TCI, a substantially less expensive) proposal solely because of its reasonable interpretation of the specifications.

Our decisions have consistently recognized that the flexibility of two-step advertising does not obviate the necessity for adherence to stated evaluation criteria and basic specification requirements. In B–157827, February 7, 1966, we agreed with the procuring agency that a change in specified friction tolerances for an altimeter was a major specification change and that issuance of an amendment to the RFP to reflect this change after evaluation of proposals received under Step I was proper. In B–155433, June 17, 1965, we indicated that proposals for furnishing air conditioned vans with piston compressors could not be accepted without a waiver of the specifications which required a rotary compressor. We noted that the agency "had determined that a rotary, helicon compressor was essential to the Government's needs" since the agency's prior experience indicated that a van lacking a high speed rotary compressor would not satisfy its requirements. In 45 Comp. Gen. 487 (1966), we held that rejection of a bid was required because it was based on furnishing an oscilloscope as part of a package of technical air navigation equipment that did not meet specification requirements in several respects. Finally, in 51 Comp. Gen. 592, *supra*, a requirement that there be adequate tailgate clearance on firefighting trucks to permit ready access to equipment on the truck was regarded as an essential element of the specifications.

In view of the above and in light of the Navy's determination that the Granger proposal will satisfy its requirements, we think the Step I specifications should have been amended to clearly reflect the acceptability of a tower climbing device which is an integral part of the tower. Accordingly, the Step II IFB should be canceled and the Step I phase of the procurement should be reopened to give offerors an opportunity to submit proposals on an equal basis.

In view of our conclusion it is not necessary to discuss TCI's other contention concerning the shipping information.

[B–174634, B–174811, B–174822, B–175014, B–175203]

Bidders—Qualifications—License Requirement—Administrative Determination

The requirement in several invitations for bids that the bidder have a license to conduct guard service business in the State of New York or that the contractor be licensed as a qualified guard service company in Virginia, County of Fairfax, and Maryland, Montgomery County, is not restrictive of competition but a proper exercise of procurement responsibility, for when a contracting officer is aware of local licensing requirements, he may take the reasonable step of incorporating them into a solicitation to assure that a bidder is legally able to perform a contract by requiring the bidder to comply with specific known State or local license requirements in order to establish bidder responsibility. While it may be possible for an unlicensed company to provide adequate guard service, it is not unreasonable for a contracting officer to believe that appropriate performance of guard service could be obtained only from licensed agencies.

To United Security Services, Inc., July 30, 1973:

We have considered your protests against the guard service license requirement included in advertised solicitations issued by the General Services Administration (GS–03B–17607, –17696, –17700, 2PBO-RC-784, –785, and –MB–797).

The solicitations required that the bidder have a license to conduct a guard service business in the State of New York or that the contractor be licensed as a qualified guard service company in Virginia, County of Fairfax, and Maryland, Montgomery County. It is your position that these licensing requirements restricted competition and that the requirements should have been deleted or ignored in making awards. On the other hand, you are aware of the position maintained by GSA that the requirements are a proper exercise of procurement responsibility.

We regret the delay in disposing of your protests. But since the protests raised issues significant to advertised procurement procedures, we found it was necessary to reevaluate prior similar matters in the light of the policy and legal considerations implicit in your protests. On the bases discussed below, we have denied your protests.

In 51 Comp. Gen. 377 (1971), we discussed our earlier decisions respecting various licensing requirements; also, we distinguished Federal requirements from State and local requirements. At pages 378–379, we noted that a failure to comply with a Federal license requirement would affect the responsibility of the bidder. With respect to State and local requirements, we quoted from a prior decision (B–125577, October 11, 1955) at page 379:

State and municipal tax, permit, and license requirements vary almost infinitely in their details and legal effect. The validity of a particular state tax or license as applied to the activities of a Federal contractor often cannot be determined except by the courts, and it would be impossible for the contracting agencies of the Government to make such determinations with any assurance that they were correct. It is precisely because of this, in our opinion, that the standard Government contract forms impose upon the contractor the duty of ascertaining both the existence and the applicability of local laws with regard to permits and licenses. In our opinion, this is as it should be.

* * * * * * *

* * * No Government contracting officer is competent to pass upon the question whether a particular local license or permit is legally required for the prosecution of Federal work, and for this very reason the matter is made the responsibility of the contractor. No statute has been brought to our attention which would authorize the inclusion of a condition in Federal contracts or bid invitations that local permits or licenses must be obtained, regardless of their necessity as applied to the work to be done. Accordingly, we are of the opinion

that the obtaining of a general contractor's license for performing Government work in Tennessee is a matter which must be settled between the local authorities and the contractors, either by agreement or by judicial determination.

We further said that "if as a result of enforcement by the State the contractor chooses not to perform the contract or is prohibited from doing so by an injunction won by the State, the contractor may be found in default and the contract terminated to its prejudice."

Both B–125577, *supra*, and 51 Comp. Gen. 377 *supra*, as well as B–165274, May 8, 1969, also cited in the latter case, involve solicitations with only a general requirement that contractors have necessary State licenses. For example, in 51 Comp. Gen. *supra*, involving a solicitation for security guard services, the invitation for bids (IFB) stated that "the contractor and each of his employees provided under this contract shall meet state and local requirements for the type services required by this contract." We think it is clear, in that type of situation, that a contracting officer should not have to determine what those State and local requirements may be, and the responsibility for making that determination is correctly placed with the prospective contractor.

All of the cases cited involved situations in which the contracting officers, by use of general language in the solicitation, attempted to insure compliance with State licensing requirements that may or may not have been applicable to or enforced against the prospective contractors. However, we think there is a significant distinction between those situations and cases in which the contracting officer validly requires bidders to hold a specified State license. Where the contracting officer is aware of and familiar with the local requirements and incorporates those requirements into a solicitation, it may well be decided that possession by the bidder of the particular license is a prerequisite for an affirmative determination of responsibility. In such situations the requirement may properly be included in the solicitation without concern—expressed in some of the earlier cases—that the IFB may require a local license even though not necessary to accomplishment of the work.

To view the matter otherwise would be tantamount to requiring a contracting officer to award a contract that he knows may well be significantly delayed or even unperformed because of noncompliance with a known State licensing requirement. We are aware that State licensing requirements may not be enforceable against Federal Government contractors. *Leslie Miller Inc.* v. *Arkansas*, 352 U.S. 187 (1956). However, we think it is reasonable for a contracting officer to be more concerned with whether the contract will be carried out properly and without interference than whether he will ultimately prevail in litigation.

In this connection, FPR 1–1.1202, setting forth the Government's policy on contractor responsibility, states that award of a contract to a bidder who is not responsible "* * * is a disservice to the Government if subsequently the contractor defaults * * * with the result that the Government incurs additional procurement or administrative costs, and acceptable supplies or services may not be furnished within the time required. * * *."

In view of the above and the large degree of discretion vested in contracting agencies in determining bidder qualifications to perform a contract, 36 Comp. Gen. 649 (1957), we think a contracting officer may properly take reasonable steps to assure that a bidder is legally able to perform a contract by requiring the bidder to comply with a specific known State or local license requirement in order to establish responsibility.

With respect to the instant solicitations, the inclusion in the solicitations of requirements for compliance with State or local licensing laws indicates that the contracting officer had reason to believe that the licensing requirements were applicable to the procurements. This is evidenced by the reports of the GSA General Counsel to our Office wherein it is stated, in effect, that State or local law (other than Virginia and the County of Fairfax) required compliance with its licensing laws. In this context, these solicitations are similar to the one we considered in B-174348 of December 29, 1971. There the solicitation required a Pennsylvania license to conduct the business of watch-guard or patrol agency. We regard this license requirement as proper, approved the agency's decision that the license requirement affected responsibility notwithstanding language of "responsiveness" in the solicitation, and upheld the award made to a bidder who obtained the State license subsequent to bid opening.

In appropriate circumstances, we believe that the procuring agency may properly require bidders to have a designated State or local license or permit, regardless of the applicability of that State or local licensing requirement to the specific procurement involved. Such circumstances would exist when it could be shown that the minimum needs of the Government could not be met by a contractor without a local license or that the nature of the procurement is such that it is reasonable to believe that only a licensed contractor could safely or effectively perform the contract.

While in some circumstances it may be possible for an unlicensed company to provide adequate guard services, we think it would not be unreasonable, in light of the guard services to be rendered, for the contracting officer to believe that appropriate performance could be obtained only from licensed agencies. In this respect, the solicitations contemplated the exercise of police authority as an incident to contract performance. We, therefore, cannot conclude that the contracting officer's determinations to require State and local licenses were unreasonable or improperly were restrictive of competition.

Accordingly, your protests are denied.

[B-175681]

Transportation—Dependents—Military Personnel—Advance Travel of Dependents—Amendment or Revocation of Orders

An officer of the uniformed services whose dependents traveled to a selected retirement home prior to the issuance of retirement orders that were canceled at his request prior to effective date, and then traveled to the officer's new permanent duty station located in the corporate limits of his old station is entitled to a monetary allowance for both moves. When orders that direct a permanent change of station, including orders directing release from active duty or retirement, are canceled or modified before their effective date for the convenience of the Government and/or in circumstances over which a member has no control, the benefits prescribed by 37 U.S.C. 406a accrue, and the fact the officer withdrew his retirement request is immaterial since the Government was under no obligation to accept the request and apparently did so primarily for the convenience of the Government.

To J. G. Smith, Department of the Navy, July 31, 1973:

By third endorsement dated April 7, 1972, the Per Diem, Travel and Transportation Allowance Committee transmitted your letter of February 1, 1972, with enclosures, requesting a decision as to the entitlement of Lieutenant Commander Richard G. Chappell to a monetary allowance in lieu of transportation for dependents' travel in the circumstances presented. The request has been assigned PDTATAC Control No. 72–16 by the Committee.

In a letter dated March 1, 1971, the Chief of Naval Personnel advised Commander Chappell that orders would be issued effecting his retirement from the naval service on or about January 1, 1972. The letter, which was delivered to the officer on March 15, 1971, authorized the movement of his household goods prior to receipt of release from active duty orders and advised him that if travel of dependents was performed prior to issuance of retirement orders, a certified copy of that letter should be included when filing a claim.

By BUPERS Order 153477, dated September 10, 1971, Commander Chappell was advised by the Chief of Naval Personnel that his request to be transferred to the retired list was approved by the Secretary of the Navy, effective January 1, 1972. The officer was to be detached from duty on December 31, 1971, and was authorized to proceed to his home of selection. On January 1, 1972, he was to be transferred to the retired list with the grade and retired pay of lieutenant commander, under the provisions of 10 U.S. Code 6323.

The record shows, however, that before the orders directing Commander Chappell's retirement became effective they were canceled by the Chief of Naval Personnel on December 15, 1971, and that new orders (BUPERS Order No. 166949) directing the officer to report to the Commander in Chief, U.S. Atlantic Fleet, for duty at Norfolk, Virginia, were issued on December 10, 1971.

Pursuant to an informal request, the Office of the Chief of Naval Personnel forwarded to our Office additional information in the matter. This consists of a message dated December 6, 1971, from the

Commander, Naval Air Force, U.S. Atlantic Fleet, requesting cancellation of the orders of September 10, 1971, for the reason that the officer desired to remain on active duty indefinitely and a letter from the Chief of Naval Personnel to the Secretary of the Navy, dated December 8, 1971, requesting the retirement approval be canceled in view of the officer's request and because the officer's service could be effectively-utilized. This was approved December 14, 1971, by the Assistant Secretary of the Navy.

An order dated December 13, 1971, issued by the Commander, Naval Air Force, U.S. Atlantic Fleet, Naval Air Station, Norfolk, Virginia, quoting Chief of Naval Personnel message dated December 10, 1971, provided that Commander Chappell was to be detached from duty on staff in December 1971 and was to proceed and report to the Commander-in-Chief, U.S. Atlantic Fleet, Norfolk, Virginia, for duty on the staff with 30 days delay in reporting, and for additional duties as specified in the order.

On January 20, 1972, Commander Chappell presented two vouchers claiming reimbursement for dependent travel. One covered travel of his dependents from Virginia Beach, Virginia, to Boaz, Alabama, home of selection, performed on August 10, 1971, incident to certificate dated March 1, 1971, and BUPERS Order 153477 September 10, 1971, as amended (canceled) by BUPERS Order 153477(1) dated December 15, 1971. The other pertained to the return travel of his dependents from Boaz, Alabama, to Virginia Beach, Virginia, performed January 5 and 6, 1972, incident to orders of December 10, 1971.

In your letter of February 1, 1972, you cite paragraph M7010 of the Joint Travel Regulations (JTR) which provides that a member is entitled to transportation of dependents from last station to home of selection upon retirement. Also, you cite paragraph M7051, JTR, which provides that when orders are modified, canceled or revoked after commencement of dependents' travel, a member is entitled to reimbursement for such travel from place dependents commenced travel to the place where they receive notification of change of orders and thence to the new duty station.

You say that the officer's retirement orders were canceled prior to January 1, 1972, and he was ordered to duty with Commander-in-Chief, Atlantic Fleet, and you indicate that the old and new permanent duty stations were both within the corporate limits of Norfolk, Virginia, the place where he relocated his household on January 6, 1972. You say further that paragraph M7051, JTR, covers only those members on permanent change-of-station orders who will continue on active duty and therefore believe that there is no authority for payment of the claim.

By letter dated March 2, 1972, the Chief of Naval Personnel reported Commander Chappell's retirement orders were canceled at his own request. Thereafter, by first endorsement dated March 10, 1972, to your letter of February 1, 1972, the Director, Navy Military Pay System expressed doubt as to entitlement because travel (by dependents) was performed based on an advance selection of a home upon retirement and because the retirement orders were canceled at the member's request. However, in a second endorsement dated March 28, 1972, the Chief of Naval Personnel contended that the officer was officially notified on March 1, 1971, that he would be issued orders effecting his retirement and also that the fact the amending orders which in effect canceled the officer's retirement orders were issued at the officer's request did not alter their directive nature.

Section 406a of Title 37, U.S. Code, provides as follows:

> Under uniform regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowance under section 404 of this title, and to transportation of his dependents, baggage, and household effects under sections 406 and 409 of this title, if otherwise qualified, for travel performed before the effective date of orders that direct him to make a change of station and that are later—
>
> (1) canceled, revoked, or modified to direct him to return to the station from which he was being transferred; or
>
> (2) modified to direct him to make a different change of station.

Paragraph M7051, JTR, implementing these provisions provides in pertinent part that when orders directing a permanent change of station (which includes from last duty station to home of selection upon retirement) are modified after the date travel of dependents under the orders is commenced, and a new permanent station is designated, or the permanent change-of-station orders are canceled or revoked, transportation of dependents at Government expense is authorized for the travel performed for the distance from the place dependents commenced travel, to the place at which they receive notification of the modification, cancellation or revocation of orders, and thence to the new station or return to the old station, not to exceed the distance from the old station to the first-named station and thence to the last-named station or return to the old station.

Under the provisions of section 406 of Title 37, U.S. Code, the right of a member to payment for his dependents' travel to his new station is based upon, and is no greater than, the right secured to him under such orders incident to his travel, unless applicable provisions of law provide otherwise. 46 Comp. Gen. 852, 854 (1967). Section 406a of that title provides that, if otherwise qualified, the payment of dependents' transportation is authorized when a change-of-station order is canceled, revoked or modified prior to its effective date.

The legislative history of 37 U.S.C. 406a (Public Law 88–238, 77 Stat. 475) reasonably supports the view that its benefits are to accrue when orders that direct a permanent change of station (including orders directing release from active duty or retirement) are canceled or modified before their effective date for the convenience of the Government and/or in circumstances over which the member has no control. 44 Comp. Gen. 655 (1965). While in this case apparently the member requested the cancellation of his retirement orders, the Secretary of the Navy was under no obligation to comply with that request but apparently did so primarily for the convenience of the Government, i.e., because his services could be "effectively utilized" on active duty. See *Winfree* v. *United States*, 125 Ct. Cl. 853 (1953).

Accordingly, in the circumstances here involved, Commander Chappell is entitled to monetary allowance in lieu of transportation for his dependents' travel from Virginia to Boaz, Alabama (home of selection), and from Boaz to Virginia Beach, Virginia. The voucher and supporting documents received with your letter are returned herewith.

[B-178121]

Contracts—Awards—Small Business Concerns—Set-Asides—Disputes

When the appeal by the Administrator of the Small Business Administration (SBA) to the Secretary of the Navy, pursuant to 15 U.S.C. 644, of a naval installation's disregard of the recommendation to restrict the solicitation for mess attendant services to small business concerns was upheld, the amendment—after due notice to offerors—of the unrestricted solicitation to restrict the procurement to small business was proper since the reversal of the initial determination that there was no reasonable expectation that an award could be made to a small business concern at a reasonable price (ASPR 1-706.5(a)(1)), as well as awarding a fair proportion of Government purchases to a small business concern (ASPR 1-702(a)) gave effect to 15 U.S.C. 644. Immaterial to the SBA authority to appeal was the lack of controversy between the contracting officer and the small business specialist, and the fact that the unrestricted solicitation had been released to the public.

To Truitt & Fabrikant, July 31, 1973:

By letter dated March 14, 1973, and prior correspondence, you protested on behalf of Manpower, Incorporated, the award of a contract under solicitation No. N00128-73-R-0110.

The request for proposals was issued by the Supply Department, Naval Administration Command, Naval Training Center (NTC), Great Lakes, Illinois, on January 16, 1973. The solicitation invited proposals for supplying necessary labor and material to perform certain mess attendant services in two subsistence buildings located at the Naval Training Center (NTC), Great Lakes, Illinois. Your protest relates to restriction of the procurement to small business concerns after the solicitation was initially issued on an unrestricted basis.

The following events as reported by Navy are relevant to consideration of your protest:

> On 27 Dec 1972, a total Small Business Set Aside, * * * was initiated by a representative of SBA, Chicago region. On 2 Jan 1973, the NTC small business specialist and the contracting officer made a joint formal determination not to set-aside the total procurement for small business, believing there was no reasonable expectation within the meaning of ASPR 1-706.5(a)(1), that an award could be made to a small business firm at a reasonable price. * * * After reaffirming

this position on 15 Jan 1973, NTC formally endorsed the request for total small business set aside, * * * and returned it to the SBA, Chicago. By letter of 15 Jan 1973, * * * Mr. E. A. Goodbout, Acting Chief, Procurement Management Assistance Division, Chicago Region of the Small Business Administration, appealed the rejection of the small business set aside to the Director of the Supply Department at NTC. However, on 16 Jan 1973, prior to receipt of the above noted appeal, NTC issued an unrestricted solicitation for these mess attendant services (the RFP presently under protest) thereby inadvertently failing to comply with ASPR 1–706.3(d), which requires that SBA be given the opportunity to appeal a rejection of a small business set-aside to the Head of the Procuring Activity and further to the Secretary of the Navy before the solicitation is issued. By letter of 22 Jan 1973, enclosure (8), the Director of the Supply Department, NTC, rejected the SBA appeal for essentially the same reasons previously cited by the contracting officer when he determined not to set-aside the procurement initially.

On 23 Jan 1973, it was determined after discussions with Mr. Morris Questal, Office of Assistant Secretary of the Navy (Installation and Logistics), that NTC had in fact misinterpreted and thereby failed to comply, as noted above, with ASPR 1–706.3(d). In order to correct the inadvertent curtailment of the right of SBA to appeal the set-aside rejection to the Secretary of the Navy, the RFP was amended on 24 Jan 1973 to indicate to all prospective offerors that a total small business set-aside was now being considered. * * * On the same date the Director of the Supply Department, NTC, notified SBA of the corrective action taken. * * * In accordance with ASPR 1–706.3(d), on 29 Jan 1973, the Chicago Regional Office of SBA requested the Director of the Supply Department, NTC, to suspend procurement action pending an appeal by the Administrator of SBA to the Secretary of the Navy. * * * On 2 Feb 1973, SBA, Washington, advised the contracting officer that SBA was, in fact, taking appeal action with the Secretary of the Navy, * * * and such appeal was taken on 6 Feb 1973. * * * Such appeal cited the fact that 18 small business firms had indicated their intention to submit offers in response to the mess attendant solicitation, including some firms which were already providing the same service at other military bases in a satisfactory manner. On 14 Feb 1973, the Assistant Secretary of the Navy (Installation and Logistics) directed NTC to initiate a total small business set-aside for the mess attendant procurement and provided the rationale for the decision. * * *

Thereafter, as previously noted above, on 15 Feb 1973, NTC amended the solicitation to provide for a total small business set-aside.

You contend that the decision by the Assistant Secretary of the Navy to affirm the total small business set-aside of the mess attendant procurement was arbitrary, capricious and illegal.

Our review of the facts, however, leads us to agree with the Navy that such allegation is without merit. The Navy report documents the several meetings and discussions between Manpower's representatives, Navy procurement officials, and the Assistant Secretary's staff, and the procedures followed by the Navy leading to its decision to set aside the procurement. Furthermore, it is clear from the record the Navy's decision to set aside the procurement was based upon the determination that there was a reasonable expectation that award could be made to a small business concern at a reasonable price (Armed Services Procurement Regulation (ASPR) 1–706.5(a)(1)), and to comply with the Department of Defense policy to place a fair proportion of its total purchases with small business concerns (ASPR 1–702(a)). In this connection, the determination that proposals would be obtained from a sufficient number of small business concerns to insure reasonable prices was based upon information from SBA that 18 small business firms experienced in the services called for in the subject procurement had expressed interest. The validity of this determination was confirmed by the receipt of 19 proposals. In these circumstances, we see no basis for concluding that the Navy's actions were arbitrary, capricious, or illegal.

You also contend that various cited provisions of ASPR 1–706.3 permit the Small Business Administration (SBA) to appeal a contracting officer's disagreement with the set-aside recommendation of the SBA representatives *only* when there is an existing controversy as to such set-aside between the contracting officer and the small business specialist (Navy representative). You maintain that since the contracting officer and the Navy's small business specialist were in complete agreement that the procurement should not be a total small business set-aside, the SBA had no authority to appeal that decision.

In implementing the policy of the Small Business Act that a fair proportion of the Government's purchases be placed with small business concerns, 15 U.S. Code 644 provides:

> To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns: but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards of contracts. *Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.* [Italic supplied.]

As indicated by the above-quoted provision of the act, it is intended that SBA shall have the right to appeal disagreements with agency contracting officials to the Secretary of the department concerned. It is clear that the cited provisions of ASPR are intended, and should so be interpreted, to give effect to this statutory mandate. It is our view that your interpretation of the regulation would have the effect of vitiating its intended purpose. We believe the Navy has properly construed the regulation and applied the procedures prescribed therein and, therefore, we have no basis for objecting to the granting of SBA's appeal.

Finally, you contend that no appeal is proper once the solicitation has been released to the public. Nowhere in the Small Business Act or in the ASPR is there any prohibition to this effect. Additionally, we note that on January 24, 1973, prior to the original closing date, the solicitation was amended to indicate that a small business set-aside was being considered. Thus, all bidders were on notice that such action might be taken. Furthermore, the amendment restricting the procurement was issued prior to the closing date for receipt of proposals.

Based on the foregoing, your protest is denied.

[B–178161]

Property—Private—Damage, Loss, etc.—Carrier's Liability—Articles of High *v.* Extraordinary Value

A claim acquired by assignment pursuant to the Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. 240, against a carrier for the loss of antique Imari and Kutani Japanese porcelains in the transit of an Air Force officer's household goods properly was recovered by setoff against the carrier who has denied liability because the porcelains were not declared to have extraordinary value; the loss was not listed at the time of delivery; and the shipment being the only one in the van it could not have been misdelivered. However, although of high value, antique porcelains are not articles of extraordinary value and since the valuation placed on the shipment was intended to include the porcelains, a separate bill of lading listing was not required; the clear delivery receipt may be rebutted by parol evidence: and the carrier's receipt of more goods at origin than delivered establishes a *prima facie* case of loss in transit.

To Allied Van Lines, Inc., July 31, 1973:

In your letter of September 27, 1972, to our Transportation and Claims Division, you claim refund of $10,000 set off by the Department of the Army to recover the value of certain property lost in transit from a shipment of household goods owned and shipped by Captain Ruth C. Shew, United States Air Force (Ret.).

On July 15, 1970, the shipment of household goods, weighing 9,900 pounds, was tendered to your agents, Greater Southwest Warehouses—Victory Van & Storage, for transportation from Willingboro, New Jersey, to Sarasota, Florida, under Government bill of lading No. F–0773689, subject to the terms of Military Rate Tender (MRT) 1–E. A valuation of $35,000 was declared and noted on the face of the bill of lading and other documents. The shipment moved to Lakeland, Florida, and on July 21, 1970, was placed in temporary storage at Yarnall Warehouse and Transfer Co., your agent.

The shipment was delivered to Captain Shew at Sarasota, Florida, on September 15, 1970. On unloading, Captain Shew questioned the absence of two packages, but on being assured by the unloaders that the two packages had been unloaded, Captain Shew executed a clean receipt, except for some damages.

On December 9, 1970, a claim for $12,699 was submitted to Yarnall Warehouse & Transfer, Inc., for the damaged and missing articles. The carrier repaired the damaged furniture and other repairable items, and offered $97.50 in settlement of missing items, excluding the two packages, which contained antique Imari and Kutani Japanese porcelains valued in the aggregate at $11,000 or at $50 for each of 100 pieces of Imari and at $60 for each of the 100 pieces of Kutani porcelain.

Captain Shew refused the settlement; she then filed a claim against the Government under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S. Code 240. This claim was settled for $10,000 and the settlement operated as an assignment to the Government of Captain Shew's claim against the carrier. On the denial by the carrier of the Government's claim for $10,000, the amount was recovered by setoff. This claim followed.

You deny liability for the two packages of porcelain for these reasons: (1) the porcelains are alleged to constitute articles of extraordinary value, but were not declared as such on the covering bill of lading as required by the tariff and the commercial bill of lading; (2) the loss was not listed at the time of delivery; and (3) your investigation allegedly establishes that no loss occurred since tracing at origin, while in transit, and while stored was negative, and you allege that misdelivery is eliminated since no other shipments were on the van.

The shipment moved under the provisions of MRT 1–E. Section I, under "GOVERNING REGULATIONS," provides:

> Except as otherwise provided for herein, rules and regulations governing application of this tariff will be as provided in carrier's published tariff on file with the Interstate Commerce Commission. * * *.

In item 1 of MRT 1–E the limitation of the carrier liability is set forth. Subparagraph (f) of that item provides:

> The carrier shall be liable, only to the extent of his stated liability, for small items of extraordinary value such as expensive cameras, watches, jewelry and furs.

The carrier's stated liability for articles of extraordinary value is not further set forth in MRT 1–E, but is set forth in Allied Van Lines Tariff 139–C, MF–I.C.C. 143, the published tariff referred to in Section 1 of MRT 1–E Rule 12 of that tariff is titled "PERISHABLE ARTICLES OR ARTICLES OF EXTRAORDINARY VALUE," and paragraph (a) reads:

> (a) The carrier will not assume any liability whatsoever for: documents, currency, money, credit cards, jewelry, watches, precious stones, or articles of extraordinary value including accounts, bills, deeds, evidence of debt, securities, notes, postage stamps, stamp collections, % trading stamps, revenue stamps, letters or packets of letters, articles of peculiarly inherent value, precious metals or articles manufactured therefrom which are not specifically listed on the bill of lading.

Valuable antique porcelains are not among the items of extraordinary value specifically listed, nor is the phrase "articles of extraordinary value" further defined in either MRT 1–E or Allied's Tariff 139–C.

Historically, common carriers of general freight were not equipped for and did not choose to carry articles of unusual or extraordinary value. Such freight was handled by contract armored vehicle carriers, or by the express and household goods carriers. When the common carriers in interstate commerce came under Federal regulation these practices were recognized and articles of unusual value were expressly excluded from the certificates of common carriers of general freight, but were included in the operating authority of household goods carriers. In this connection, articles of extraordinary value were excluded in the National Motor Freight Classification (NMFC). Rule 3 of NMFC 15, MF-I.C.C. 2, provided:

PROPERTY OF EXTRAORDINARY VALUE NOT ACCEPTED—Sec. 1. Unless otherwise provided, the following property will not be accepted for shipment nor as premiums accompanying other articles:

Bank bills, or Currency other than Coin * * *; Deeds, Drafts, Notes or Valuable Papers of any kind; Jewelry; Postage Stamps: letters with or without postage stamps affixed, * * *; Precious Metals or articles manufactured therefrom; Precious Stones; or Revenue Stamps * * *.

Again antique porcelains are not included in this descriptive definition of articles of extraordinary value.

Technological developments in recent years resulted in general freight having per pound values greater than articles previously listed as being of extraordinary value. The Interstate Commerce Commission was, therefore, called upon to interpret the exclusion provision in the operating authority certificates of common carriers of general freight.

In *Navajo Freight Lines, Inc., Extension-Silver*, 95 M.C.C. 551 (1964), the Interstate Commerce Commission, considering the carriage of silver bullion by a common carrier of general commodities, held that because of high value, coupled with negotiability and exchangeability in channels of commerce, silver bullion was an article of unusual value within the restriction in the operating authority of motor common carriers of general commodities. Following that decision, in *Garrett Freightlines, Inc.—Modifications*, 106 M.C.C. 390 (1968), the Commission said, at page 395, "* * * for purposes of transportation classification the term 'unusual value' clearly was never intended to be synonymous with the term 'high value,' " and held, at page 398:

* * * that the limitation "articles of unusual value" embraces the concept of both service and value * * *. The value involved is an "intrinsic value" based upon rarity, high monetary value (both in permanence and marketability), and legal usage or negotiability in channels of commerce * * *.

Although of high value, it does not appear and has not been shown that antique porcelains have ever been listed in the category of articles of extraordinary value or possess the negotiability and exchangeability in the channels of commerce within the definition of the Interstate Commerce Commission. Therefore, the antique Imari and Kutani porcelains have not been shown to be articles of extraordinary value. And the provision requiring separate listing on the bill of lading does not apply. Apparently, your agent at origin was also of the opinion that the antique Japanese porcelains did not constitute articles of extraordinary value, since Captain Shew has stated that on inquiry your agent advised her that the declared valuation of $35,000 on the shipment was sufficient and that nothing more was necessary.

Furthermore, in *Railway Express Agency, Inc.* v. *Hueber*, 191 S.W. 2d 710 (1945), a provision in a uniform express receipt, similar to Rule 12 of Allied's tariff which excluded carrier liability for articles of extraordinary value unless enumerated, was held invalid under the Carmack Amendment, 49 U.S.C. 20(11).

Although Captain Shew gave a clear receipt on delivery at destination, a receipt, like other evidence, may be explained by parol evidence. *Mears* v. *Railroad Co.*, 52 A. 610 (1902). The record shows that the shortage of two packages was in fact noted by Captain Shew on delivery, but that the clear receipt was executed on the representation by your agents unloading the goods that the two packages had been delivered. Captain Shew subsequently found, however, that the two packages had not in fact been delivered.

The record shows that the carrier received more goods at origin than were delivered at destination, thereby establishing a *prima facie* case of carrier liability for loss in transit. *Galveston, H. & S. A. Ry.* v. *Wallace*, 223 U.S. 481, 492 (1911); *Gulf, C. & S. F. Ry.* v. *Galbraith*, 39 S.W. 2d 91, 93 (1931). Although you allege that your investigation failed to show the occurrence of a loss at any stage of the shipment, no evidence has been presented in rebuttal of the *prima facie* case made, or to show that any loss was the result of an excepted cause.

Accordingly, your claim is disallowed.

[B-178640]

Contracts—Specifications—Failure to Furnish Something Required—Addenda Acknowledgment—Evidence

The failure to acknowledge an amendment to an invitation for the construction of a Naval and Marine Corps Reserve Center which is not considered to be a minor informality or irregularity in bid to permit correction under paragraph 2–405(iv)(B) of the Armed Services Procurement Regulation may not be waived on the basis the bidder's working papers establishes the amendment was considered in bid computation since the acknowledgment was required to be received before bid opening, nor does the use of "may" in stating that failure to acknowledge the amendment would constitute grounds for bid rejection mean the contracting officer has waiver discretion, and furthermore, to permit a bidder to determine the value of an invitation amendment would be inappropriate as it would give him the option to become eligible for award by citing costs that would bring him within the *de minimis* doctrine, or to avoid award by placing a larger cost value on the effects of the amendment.

To Tarricone, Bilgore, Weltman & Silver, July 31, 1973:

Reference is made to your letter of June 14, 1973, and prior correspondence, protesting on behalf of the John Luther and Sons Company against the failure of that firm to receive award under invitation for bids No. N62472–72–B–0163 issued by the Naval Facilities Engineering Command, Philadelphia. Award was made by the Command prior to our resolution of the protest after proper notification to our Office.

The invitation, issued March 16, 1973, solicited bids for the construction of a Naval and Marine Corps Reserve Center at Rochester, New York. On April 3, amendment No. 0001 was issued to the invitation making changes in the earthwork and planting sections of the specifications. These changes were estimated by the Command to increase the Government estimate for the work by $5,500.

At the April 19 bid opening, the two low bids were:

John Luther and Sons Company	$1,242,828
Raymond Le Chase, Inc.	1,269,118

The John Luther and Sons Company failed to submit Standard Form 19B and to acknowledge amendment No. 0001. In view of the Government estimate for the amendment, the Command determined that the amendment would have more than a "trivial or negligible" effect on the price of the work and that the failure to acknowledge the amendment could not be considered a minor informality or irregularity in bid for correction under paragraph 2–405(iv)(B) of the Armed Services Procurement Regulation (ASPR).

You believe that the John Luther and Sons Company, as low bidder, should have received award under the invitation. The bidder did receive the amendment and did, you contend, take it into consideration in computing its bid. That the amendment was considered in bid computation may be averred, you note, by examining the bid working papers wherein the cost of changing the responsibility for the quality control organization from the Government to the contractor was recorded, thereby increasing the total construction cost by $750.

Further, although the Government estimate for the additional work occasioned by the amendment was $5,500, you believe that the proper sum for consideration in determining whether the amendment had a "trivial or negligible" effect on price should be the $750 increase in the low bidder's bid. The original John Luther and Sons Company estimated cost, aside from the $750 sum, could be adjusted, without additional cost, to the increased effort called for by the amendment. Also the increased cost for lime was felt to be offset by the decrease in cost for seed caused by the amendment. Inasmuch as the $750 constitutes, you state, only .06 percent of the total bid price of $1,200,000 and approximately only 2 percent of the difference between the John Luther and Sons Company bid and that of the next low bidder, the failure to acknowledge the amendment may be waived, you contend, under the *de minimis* doctrine.

Lastly, you note that the amendment stated that a failure to acknowledge the amendment "may"—not shall—constitute grounds for rejection of the bid. The failure to so acknowledge here should consequently, you believe, be waived as a minor informality under the appropriate ASPR provisions.

We do not believe that a bidder's working papers may be used to show that an amendment to an invitation was received and considered and thereby act as a retroactive acknowledgment of that amendment. The bidder was directed by that amendment to make acknowledgment prior to bid opening either by acknowledging receipt on each copy of his offer submitted under the invitation or by separate letter or telegram which was to include a reference to the solicitation and amendment numbers. This was not done. Further, that the amendment stated that failure to make proper acknowledgment "may" constitute grounds for rejection of the bid does not mean that the contracting officer may ignore a failure to make proper acknowledgment solely at his own discretion. He may waive the failure only when legally permissible.

The general rule as to the effect of a bidder's failure to acknowledge an amendment to an invitation for bids is that when the amendment affects in other than a "trivial or negligible" manner the price, quantity, or quality of the procurement, the bidder's failure to acknowledge the amendment in compliance with the terms of the invitation or amendment cannot be waived. *See* ASPR 2–405. The basis for this rule is the principle that the acceptance of a bid which disregards a material provision of an invitation, as amended, would be prejudicial to other bidders. Clarification of the bid after opening may not be permitted because the bidder in such circumstances would have the option to decide to become eligible by furnishing extraneous evidence that the amendment had been considered, or to avoid award by remaining silent. 41 Comp. Gen. 550 (1962) and cases cited therein.

In a recent decision, 52 Comp. Gen. 544 (1973), we upheld as reasonable a contracting officer's waiver of a bidder's failure to acknowledge an amendment which the Government estimated to have increased the value of the work to be performed by $966. In that instance, the value of the amendment was .1376 percent of the low bid. It was only 4.92 percent of the $19,000 difference between the low and second low bids.

In the case before us the $5,500 value of the amendment, as determined prior to bid opening by the procurement activity, was .434 percent of the low bid of $1,242,828. It was, however, 20.9 percent of the $26,290 difference between the low and second low bids. While you contest the validity of the $5,500 estimate, we believe that in determining whether the value of an invitation amendment is such as to allow waiver of the failure to acknowledge receipt thereof it would be inappropriate to accept the valuation placed upon it by the bidder seeking the waiver. To allow that would be to revert to the situation wherein a bidder after publication of bid prices would have the option to decide to become eligible for award by citing costs which would bring him within the *de minimis* doctrine, or to avoid award by placing a larger cost value on the effects of the amendment. Consequently, we must accept the determination made here prior to bid opening by the procurement activity that the amendment increased the cost of the procurement by $5,500.

In the circumstances, we do not believe that the decision to reject the low bid submitted by the John Luther and Sons Company was unreasonable. Accordingly, the protest is denied.

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